

**FOI Release**  
***Information released under the Freedom of Information Act***

**Title:** Impact Assessment titled Codes of Conduct dated 21 May 2012

**Date of release:** 5 April 2013

**Information request**

In the IPO Impact Assessment titled Codes of Conduct and dated 21 May 2012, the IPO stated that it was relying upon a Government commissioned report from BOP Consulting, which was said to be due for publication shortly after that date. However, the BOP Consulting report was in fact not published until December 2012. I presume that in the delay between May and December, the report went through the peer review process envisaged by the IPO's "Good Evidence for Policy" guidelines.

I would like to better understand how and when the peer review process was initiated, how it went, what the feedback was and how it was acted upon. To that extent, please supply:

1. the draft of the report that was reviewed by BOP Consulting's peers;
2. any and all communications and/or documentation exchanged between the IPO, BOP Consulting and BOP Consulting's peers, as the case may be, regarding (a) the peer review process for the report, and (b) the report itself;
3. any and all communications and/or documentation showing any amendments made by either BOP Consulting or the IPO to the report as a result of the peer review process.

**Information released**

We have now completed searching for the information you requested and the information is attached. You should note that some parts of the attached e-mails have been redacted to remove any information that is not covered by the scope of your request. Also the some of the names and contact details of junior officials have been redacted from the released information. Section 40 (2) of the FOI Act provides for personal information to be withheld where the release of such information would breach the first data protection principle. The release of this information with respect to junior officials would be neither fair nor would it meet condition 6 (1) of schedule 2 of the Data Protection Act 1998.

- Email discussion
- Peer review
- 120311 IPO Collecting Societies Draft Report BOP v2 6
- 120124 IPO Collecting Societies Progress Report BOP v1 4
- 120529 IPO Hargreaves Review Collecting Societies BOP Final Report v1 1
- 120409 IPO Collecting Societies Final Report April 2012
- 120913 IPO Hargreaves Review Collecting Societies BOP Final Report

- 120730 IPO Hargreaves Review Collecting Societies BOP Final Report v1 3
- BOP Response to Peer Review Comments
- Comments on BOP CollSoc ReportV1 21-3-12
- Exec Summary AL v231012 (4 1)
- 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

[REDACTED]

---

From: [REDACTED] @bop.co.uk]  
Sent: 23 October 2012 15:35  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Exec Summary  
Attachments: Exec Summary AL v231012 (4.1).docx

[REDACTED]

Sorry it's taken me a while to get back to you, it's the usual hectic stuff here at the moment I'm afraid.

Anyway, please see attached for the Exec Summary with a few changes, mostly typos and minor clarifications - hope this is ok.

[REDACTED]

-----

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 16 October 2012 10:36  
To: [REDACTED]@bop.co.uk'  
Cc: [REDACTED]  
Subject: Exec Summary AL v041012 (4)

Hi [REDACTED]

Hope you are well.

I just wanted to run the draft Executive Summary past you to make sure you are happy with it. We are hoping to publish this finally next month.

Best wishes

[REDACTED]

-----Original Message-----

From: [redacted] [mailto:[redacted]@ipo.gov.uk]

Sent: 07 August 2012 16:07

To: [redacted]@bop.co.uk

Cc: [redacted]

Subject: RE: Collecting Societies wrap-up

Hi [redacted]

[redacted]

We are changing some of our processes to help smooth the passage from draft publication through to final and publishable report. Our Design and Print Services team have produced guidelines, which are attached, for how the IPO wants to receive manuscripts.

Would really help smooth the process for publishing the final report if one of the BOP team could use the guidelines and resubmit the report?

[redacted]

[redacted]  
Stakeholder and Events Manager  
Economics Research and Evidence  
Intellectual Property Office

4 Abbey Orchard Street,  
London, SW1P 2HT

tel: [REDACTED]  
mobile: [REDACTED]  
fax: [REDACTED]

email: [REDACTED]@ipo.gov.uk  
web: <http://www.ipo.gov.uk/pro-ipresearch.htm>

-----Original Message-----

From: [REDACTED]  
Sent: 07 August 2012 10:10  
To: [REDACTED]@bop.co.uk  
Cc: [REDACTED]  
Subject: RE: Collecting Societies wrap-up

Hi [REDACTED]

Many thanks for sending in the final version. We will now send this off to be proof read and I will let you know as soon as we have a publication date.

[REDACTED]

Many thanks

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 03 August 2012 19:02  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Collecting Societies wrap-up

Hi [REDACTED]

See attached for the finalised report and a list of our responses to the comments. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

-----

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [redacted] [mailto:[redacted]@ipo.gov.uk]  
Sent: 27 June 2012 18:41  
To: [redacted]@bop.co.uk'  
Cc: [redacted]  
Subject: RE: Collecting Societies wrap-up

Hi [redacted]

We haven't received any comments from anyone since the Copyright Expert Advisory group yet, but we have asked for all comments by the 4th July. I'm presuming that we will receive [redacted] comments then.

I would imagine, if it suits you, that end of July would be a suitable deadline for dealing with the comments [redacted]. Would this work for you?

Best wishes

[redacted]  
[redacted] | Economic Advisor | Economics, Research & Evidence | Intellectual Property  
Office |  
T: [redacted] | M: [redacted] | [redacted]@ipo.gov.uk | 4, Abbey Orchard Street,  
London SW1P 2HT |

-----Original Message-----

From: [redacted] [mailto:[redacted]@bop.co.uk]  
Sent: 25 June 2012 17:46  
To: [redacted]  
Cc: [redacted]  
Subject: Collecting Societies wrap-up

Hi [redacted]

Just wanted to check in on a couple of things. First, after our last email exchange I mailed [redacted] to say that he should feed through comments to you through the existing mechanism and not through a bi-lateral meeting with us - he didn't reply, so I've taken that as he agrees and is/will be in touch with you(!).

Second, at the end of the meeting we discussed the possible timeframe for publishing in that this now wasn't going to be until Sept now. [redacted]  
[redacted], we're just wondering when you expect us to be through with dealing with the comments that come back through the peer review process?

Best,

[redacted]

-----  
[redacted]

[REDACTED]

---

Sent: 10 July 2012 15:16  
To: [REDACTED]@bop.co.uk  
Cc: [REDACTED]  
Subject: RE: Collecting Societies wrap-up  
Attachments: RE: Comments - 5th Meeting of the Copyright Research Expert Advisory Group

[REDACTED]

[REDACTED]

I chased [REDACTED] again this morning about her comments - response attached. It's up to you if you want to wait for her comments.

[REDACTED] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: [REDACTED] | M: [REDACTED] | [REDACTED]@ipo.gov.uk | 4, Abbey Orchard Street, London SW1P 2HT |

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 10 July 2012 11:43  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Collecting Societies wrap-up

[REDACTED]

[REDACTED] I will await the [REDACTED] comments with interest!

Best,

[REDACTED]

-----

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

www.bop.co.uk

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 10 July 2012 11:34  
To: [REDACTED]@bop.co.uk  
Cc: [REDACTED]  
Subject: RE: Collecting Societies wrap-up

Morning [REDACTED]

We have been chasing the final few comments (and as always it is a bit like pulling teeth). I've attached the ones we have received and [redacted] have promised comments by Friday.

[redacted]

As soon as we get the final comments from [redacted] I will forward them on.

Best wishes

[redacted]  
[redacted] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [redacted] | M: +44 [redacted] [redacted]@ipo.gov.uk | 4, Abbey Orchard Street, London SW1P 2HT |

-----Original Message-----

From: [redacted] [mailto:[redacted]@bop.co.uk]  
Sent: 10 July 2012 11:26  
To: [redacted]  
Cc: [redacted]  
Subject: RE: Collecting Societies wrap-up

Hi [redacted]

Hope you're well. As it's now way past the 4th, could you please send through any comments as we are keen to finish this [redacted]

Best wishes,

[redacted]

-----

BOP Consulting

DL: [redacted]

M: [redacted]

www.bop.co.uk

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [redacted] [mailto:[redacted]@ipo.gov.uk]  
Sent: 27 June 2012 18:41  
To: [redacted]@bop.co.uk'  
Cc: [redacted]  
Subject: RE: Collecting Societies wrap-up

Hi [redacted]

We haven't received any comments from anyone since the Copyright Expert Advisory group yet, but we have asked for all comments by the 4th July. I'm presuming that we will receive [REDACTED] comments then.

I would imagine, if it suits you, that end of July would be a suitable deadline for dealing with the comments [REDACTED] Would this work for you?

Best wishes

[REDACTED]  
[REDACTED] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [REDACTED] | M: +44 [REDACTED] [REDACTED]@ipo.gov.uk | 4, Abbey Orchard Street, London SW1P 2HT |

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 25 June 2012 17:46  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: Collecting Societies wrap-up

Hi [REDACTED]

Just wanted to check in on a couple of things. First, after our last email exchange I mailed [REDACTED] to say that he should feed through comments to you through the existing mechanism and not through a bi-lateral meeting with us - he didn't reply, so I've taken that as he agrees and is/will be in touch with you(!).

Second, at the end of the meeting we discussed the possible timeframe for publishing in that this now wasn't going to be until Sept now. [REDACTED]  
[REDACTED] we're just wondering when you expect us to be through with dealing with the comments that come back through the peer review process?

Best,

[REDACTED]  
-----  
[REDACTED]  
Director, Research

BOP Consulting

3-5 St John Street

London EC1M 4AA

[REDACTED]

---

From: [REDACTED]@bop.co.uk]  
Sent: 14 June 2012 15:56  
To: [REDACTED]  
Subject: Revisions to report

[REDACTED]

Just to let you know that [REDACTED] has asked if I can go round to PRS to discuss the report. Unless you suggest otherwise, I will go and see what he has to say - with a proviso that PRS' comments will have to be considered in the round together with other suggestions. Are you happy with this?

[REDACTED]

---

[REDACTED]

Director, Research  
BOP Consulting  
3-5 St John Street  
London EC1M 4AA

T: 020 [REDACTED]

M: 07 [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk) <blocked::http://www.bop.co.uk/>

We have moved offices! Please note the new address and landline number.

Visit the BOP Blog: click here <<http://www.bopconsulting.typepad.com/>>

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

This email and any attachments to it may be confidential and are intended solely for the use of the individual to whom it is addressed. Any views or opinions expressed are solely those of the author and do not necessarily represent those of BOP Consulting. If you are

[REDACTED]

---

From: [REDACTED]  
Sent: 12 June 2012 13:42  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2  
Attachments: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2.doc

Dear [REDACTED] and [REDACTED]

I think I may have mentioned that the IPO had commissioned some research on codes of conduct as part of our evidence gathering for the copyright consultation. The work is near finalisation and will go to peer review in the next few days. I thought I might share it with you informally and would be happy to take any thoughts or comments you may have on it.

Kind regards,

[REDACTED]

[REDACTED]

---

From: [REDACTED]  
Sent: 19 June 2012 16:00  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: FW: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

FI

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@oft.gsi.gov.uk]  
Sent: 19 June 2012 15:46  
To: [REDACTED]  
Subject: FW: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

-----Original Message-----

From: [REDACTED]  
Sent: 19 June 2012 15:45  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: FW: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

[REDACTED]

I have now read the IPO report on collecting societies. I think it is a good document, which carefully balances the costs and benefits of a voluntary code of conduct in the UK.

My only comment is on the 'Abuse of dominance section' - I am unclear on the meaning of the following sentence: 'The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights)' - It would be helpful to clarify what is meant by 'the UK'. Also there is not necessary a tension between considering societies to be monopolies and promoting more competition, so you might want to clarify.

Good luck with the report.

[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gsi.gov.uk]  
Sent: 14 June 2012 16:31  
To: [REDACTED]  
Subject: RE: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

Many thanks, [REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@oft.gsi.gov.uk]  
Sent: 14 June 2012 10:11  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

[REDACTED]

Many thanks for sharing this document us. I will read before the end of the week and let you if I have any thoughts or comments.

Best

-----Original Message-----

From: [redacted] [mailto:[redacted]@ipo.gsi.gov.uk]

Sent: 12 June 2012 13:42

To: [redacted]

Cc: [redacted]

Subject: 120531 IPO Hargreaves ReviewCollecting Societies BOP Final Report v1 2

Dear [redacted]

I think I may have mentioned that the IPO had commissioned some research on codes of conduct as part of our evidence gathering for the copyright consultation. The work is near finalisation and will go to peer review in the next few days. I thought I might share it with you informally and would be happy to take any thoughts or comments you may have on it.

Kind regards,

[redacted]

\*\*\*\*\*

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The Office of Fair Trading  
Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX Switchboard [redacted] Web  
Site: <http://www.oft.gov.uk>

This footnote also confirms that this email message has been swept for the presence of computer viruses.

\*\*\*\*\*

[REDACTED]

---

From: [REDACTED]@bop.co.uk  
Sent: 29 May 2012 16:26  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Final edit  
Attachments: 120529 IPO Hargreaves Review Collecting Societies BOP Final Report v1.1.doc

[REDACTED]

Thanks for the final edits and comments.

Overall points:

1. When we refer to users we always mean licensees only. We thought that this had been made clear by our early distinction on p.4 (making reference to Martin Kretschmer's work), but we have made a couple of small alterations to reflect this better.

2. Formatting: there is something going on between the IPO's Word version and ours as every time we get a version back from you, you have track changed the formatting for the references to Figures and section numbers that are made in the body of the text (changing it from bold to normal). Everytime we respond to your track changes we accept these and send them back to you - but then they come back to us as track changes again in the next version! (i.e. as with all previous versions of the report, I have accepted these changes but I'm worried that they are going to show up in bold again as soon as you open the document. If so, please sort out on your side as there's some gremlins in the transmission of the files. Converting it to pdf would prevent this type of problem from happening of course when you have it clean and need to lock it down.

Detail

We have accepted your suggestions, so please see:

- our new wording of the 2nd para on Australian dispute resolution (p.23)
- wording for the state of negotiations re a code of conduct for the UK (p.33)
- your suggestion has been added for Medium Users (p.40)
- the issue of member complaints to PRS has hopefully been made clearer (p.45); as hopefully has
- the issue of more collections for members vis-à-vis whether a code is voluntary or not (p.45).

Do let me know if there is anything else you require.

Best,

[REDACTED]

---

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

www.bop.co.uk

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 29 May 2012 14:13  
To: [REDACTED]@bop.co.uk'  
Cc: [REDACTED]  
Subject: FW:

[REDACTED] told me you were working to some other deadlines today so please find attached what I hope are final comments to the codes piece - there's some comments in track as well as responses in the email chain below to your previous comments to [REDACTED]

Would be happy to arrange a time to discuss as soon as possible - I know you're keen to get this off to peer review as well. Thanks on behalf of our team for your work to date to address our comments + questions.

Best

-----Original Message-----

From: [REDACTED]  
Sent: 25 May 2012 12:56  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE:

Please pass our thanks to BOP for their work in addressing most of the earlier comments. A few outstanding comments/questions attached, have tried to keep to a minimum and explain my proposed changes in comment boxes. A couple of points would benefit from clarification from BOP; I'm happy to speak to [REDACTED] at his earliest convenience so we can resolve and get this to peer-review asap. Responses to [REDACTED] points are below in caps.

Thanks

P33

Known in government that joint ombudsman and code reviewer have been agreed. Check on BCC website whether this info has been made public. Alternativley, get in touch with BCC to see if you can say this.

Left unchanged - we strongly suggest that the IPO is best placed for assessing what can and cannot be disclosed on behalf of govt (particularly as this may change over the period of time that elapses during the peer review through to publication) so do please vet accordingly.

CAN SAY THAT IN-PRINCIPLE AGREEMENT OF BCC WORKING GROUP WAS INDICATED AT THE MINISTERIAL ROUNDTABLE ON CODES OF CONDUCT ON MARCH 7 - MINUTES ARE AVAILABLE TO PUBLIC AT <http://www.ipo.gov.uk/hargreaves-cce-20120307.pdf>

P33

Reference the MLR agreement here? Seems that the political pressure was quite direct.

I am not sure mentioning MLR would be that pertinent. The agreement was really quite pro PPL who only implemented a code after much foot dragging and pressure.

Agree with AS40, given sensitivities around MLR.

Given the internal discussion that was going on in the Comments, we have sided with the majority verdict and not made any reference to MLR

CONTENT

P39

Is it correct to describe it as a joint licence?

Joint licensing scheme? 2 licences 1 collection

Yes, as it is a joint licence - for confirmation please see <http://www.prsformusic.com/Pages/ppljointlicence.aspx>

CONTENT

P40

Don't think adjustments to this para have gone far enough to reflect earlier comments re: negotiations with trade assoc

Afraid we disagree - we think they have.

PLEASE SEE COMMENTS AND PROPOSED TEXT. NOT ALL TARIFFS ARE SET BY THE COPYRIGHT TRIBUNAL AND WE KNOW OF A LOT OF EXAMPLES WHERE NEGOTIATIONS BETWEEN MEDIUM USERS (USUALLY THROUGH TRADE ASSOCIATIONS) HAVE AND CONTINUE TO NEGOTIATE WITH COLLECTING SOCIETIES. SEE FOR EXAMPLE PPL'S PROPOSED REVISIONS TO THE SPECIALLY FEATURED ENTERTAINMENT TARIFF WHICH WAS ORIGINALLY DUE TO BE INTRODUCED EARLY 2012 - THIS HAS BEEN SUSPENDED FOLLOWING A CONSULTATION WITH LICENSEES AND FURTHER NEGOTIATIONS ARE ONGOING THIS YEAR. NOTE THIS TARIFF HAS NOT BEEN SET BY THE COPYRIGHT TRIBUNAL.

P45

Possible contradiction with p.42. If a benefit of ta code is that it leads to improved education and awareness, is a possible outcome an increased take-up of licensing?

We don't see that there is a contradiction as the section on the former p42 referred to in the Comment is careful to not state that better information would lead to more transactions. What we say is that it would improve communications and transparency - we have not established any evidence to suggest that this alone would have the secondary effect of increasing transactions.

GENERALLY CONTENT BUT SEE PROPOSAL/COMMENT IN TEXT

-----Original Message-----

From: [REDACTED]  
Sent: 22 May 2012 11:48  
To: [REDACTED]

Subject: FW:

As I mentioned earlier, sorry it's taken me so long to actually forward it.

[REDACTED] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [REDACTED] | M: +44 [REDACTED] [REDACTED]@ipo.gov.uk | 2.09, 21 Bloomsbury Street, London, WC1B 3HF |

(Please note that as from the 21st of May IPO will be in new offices at 4, Abbey Orchard Street, London SW1P 2BS. All other contact details will remain the same.)

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 09 May 2012 21:41  
To: [REDACTED]  
Subject: [REDACTED]

Please see attached for Final Report. We have accepted the suggested revisions in the main, with the principal exceptions being as follows:

P33

Known in government that joint ombudsman and code reviewer have been agreed. Check on BCC website whether this info has been made public. Alternativley, get in touch with BCC to see if you can say this.

Left unchanged - we strongly suggest that the IPO is best placed for assessing what can and cannot be disclosed on behalf of govt (particularly as this may change over the period of time that elapses during the peer review through to publication) so do please vet accordingly.

P33

Reference the MLR agreement here? Seems that the political pressure was quite direct.

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P39

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Joint licensing scheme? 2 licences 1 collection

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<http://www.prsformusic.com/Pages/ppljointlicence.aspx>

P40

Don't think adjustments to this para have gone far enough to reflect earlier comments re:  
negotiations with trade assoc

Afraid we disagree - we think they have.

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Possible contradiction with p.42. If a benefit of ta code is that it leads to improved  
education and awareness, is a possible outcome an increased take-up of licensing?

We don't see that there is a contradiction as the section on the former p42 referred to in  
the Comment is careful to not state that better information would lead to more  
transactions. What we say is that it would improve communications and transparency - we  
have not established any evidence to suggest that this alone would have the secondary  
effect of increasing transactions.

Hope this is all now good-to-go to peer review and I look forward to the next round of  
comments! Btw [REDACTED], when can we send you the final invoice?

[REDACTED]

[REDACTED]

Director, Research

BOP Consulting

3-5 St John Street

London EC1M 4AA

T: [REDACTED]

[REDACTED]

---

From: [REDACTED]@bop.co.uk  
Sent: 07 May 2012 22:15  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: BOP Report Codes- Comments

[REDACTED]

It has just occurred to me that when I said I would get the report back to you on Tuesday, that I was unaware that today was a Bank Holiday. [REDACTED], it will now be pretty difficult to get it to you by the end of tomorrow - hope Wednesday is ok instead?

Best,

[REDACTED]

---

[REDACTED]  
Director, Research  
BOP Consulting  
3-5 St John Street  
London EC1M 4AA

DL: [REDACTED]  
M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk) <blocked::http://www.bop.co.uk/>

Visit the BOP Blog : click here <<http://www.bopconsulting.tvbepad.com/>>

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

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---

-----Original Message-----

From: [REDACTED]@ipo.gov.uk  
To: "[REDACTED]@bop.co.uk" <[REDACTED]@bop.co.uk>  
Cc: [REDACTED]@ipo.gov.uk  
Date: Thu, 3 May 2012 12:00:30 +0100  
Subject: RE: BOP Report Codes- Comments

Close of play next Tuesday?

[REDACTED]

Stakeholder and Events Manager  
Economics Research and Evidence  
Intellectual Property Office  
21 Bloomsbury Street  
WC1B 3HF

tel: [REDACTED]  
mobile: [REDACTED]  
fax: [REDACTED]

email: [REDACTED]@ipo.gov.uk

web: <http://www.ipo.gov.uk/pro-ipresearch.htm> <<http://www.ipo.gov.uk/pro-ipresearch.htm>>

(Please note that as from the 21st of May IPO will be in new offices at 4, Abbey Orchard Street, London SW1P 2BS. All other contact details will remain the same.)

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 03 May 2012 11:51  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: BOP Report Codes- Comments

Thanks [REDACTED] Do you have a date in mind when you'd like this back by?

R.

-----  
BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 03 May 2012 11:41  
To: [REDACTED]@bop.co.uk'  
Cc: [REDACTED]  
Subject: FW: BOP Report Codes- Comments

Hi [REDACTED]

Thanks again for your patience on this. We have some more comments on the report. Grateful if you could work through them and send back a revised version,

We then plan to send this for peer review to the Copyright Research Expert Advisory Group. This will be under strict embargo.

[REDACTED]

[REDACTED]

---

From: [REDACTED]  
Sent: 12 April 2012 13:05  
To: [REDACTED]@bop.co.uk  
Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Hi [REDACTED]

I think that's fine if it's an acceptable protocol for attribution. I'm out of the office today, but will have a look at the final draft tomorrow.

Kind regards;

[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 11 April 2012 17:43  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

[REDACTED]

Thanks for the reply. I was aware of your comments/corrections re the table but I guess we were a little unsure how to incorporate them if we keep the original basics of the IFPI classification. My suggestion is then to make the changes that you suggest and that we then credit the table as 'Source: IFRRO adapted by IPO'?

As for the complaints issue, as complaints to govt are out of scope of the current research, we would only be interested in complaints to PRS. Your response about what PRS would attribute the reduction in complaints to is very much what we say earlier in the document, so I will make sure that we flag this in the Conclusions too.

Best wishes,

[REDACTED]

-----

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 10 April 2012 17:39  
To: [REDACTED]@bop.co.uk'

Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Hi [REDACTED]

It may be easier to discuss this over the phone if you have some time.

On the framework, I don't have an alternative, but there are real problems with using some of IFPI's classifications as some of them are simply incorrect. I have outlined these problems in the detailed comments I gave to [REDACTED] (attached). One way around this could be to create a new table of licensing models which corrects the inaccuracies?

On your second point, I am copying in [REDACTED] who deals with collecting society complaints. He should be able to provide you with a statement from the government that records a dramatic decrease in the number of complaints about PRS for Music following the adoption of a code of practice. PRS should be able to confirm that they have seen a decrease in customer complaints following the adoption of a code, though they are always keen to emphasise that the code in itself was not a panacea, but part of a package of measures, including cultural and organisational changes.

Hope this helps, and please do give me a call if you would like to talk through this.

Kind regards,

[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 10 April 2012 15:54  
To: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

[REDACTED]

I don't know if you are aware, but [REDACTED] left BOP at the end of March, so I am picking up on the comments that you had on the IPO Collecting Societies report.

When I talked to [REDACTED] about handover, she mentioned that there were really two outstanding points that you wanted to get back to us about.

The first (and most important) point was the table that classifies the different legal systems for the collective management of rights. We used the classification established by the International Federation of Reproduction Rights Organisations (IFRRO) - this is section 1.2 in the report. You were not totally satisfied with this classification and were going to get back to us with an alternative?

Second, in our initial Conclusions (under potential impacts for 'Members'), we stated that a CoC was unlikely to have an impact on the number of complaints from members as, based on the Australian case, members do not seem to complain very much. You added that, on the contrary, PRS had actually logged a fall off in the number of complaints from members and were going to get back to us with some more detail on this?

Do let me know your thoughts on this.

Best wishes,

[REDACTED]

[REDACTED]

---

From: [REDACTED]@bop.co.uk  
Sent: 10 April 2012 14:26  
To: [REDACTED]  
Subject: RE: Collecting Society Codes Research

Hi [REDACTED]

We are awaiting a couple more bits from [REDACTED] - apologies, I thought [REDACTED] had agreed this with you? I will drop Nadia a quick note to see how she's getting on.

Hope that's ok?

[REDACTED]

---

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 10 April 2012 14:19  
To: [REDACTED]@bop.co.uk  
Subject: Collecting Society Codes Research

Hi [REDACTED]

[REDACTED]

I hadn't heard anything back from you about the final report so just wanted to check everything was ok and you weren't waiting on anything from us.

Many thanks

[REDACTED]

[REDACTED] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [REDACTED] | M: +44 [REDACTED] | [REDACTED]@ipo.gov.uk | 2.09, 21 Bloomsbury Street, London, WC1B 3HF |

[REDACTED]

---

From: [REDACTED]@bop.co.uk]  
Sent: 11 April 2012 20:23  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Final Report  
Attachments: 120409 IPO Collecting Societies Final Report.doc

[REDACTED]

Please see attached for the Final Report. We have attempted to address all the points that were made during our last meeting and through follow-up email communication.

Main things to draw your attention to:

Section 1.2 - the classification of collective rights management models; see previous emails about this so [REDACTED] are you happy with how we have worked in your corrections?

section 2.3 - more detail on CAL tariff rises and comparison with ARPRA revenue increases

section 4 - we have just moved the section describing recent moves towards a CoC in the UK to the front of the section (we think it works better here)

section 5 (Summary and Conclusions) - has been re-shaped and expanded

It would be good if you could coordinate any further comments/revisions from your side

[REDACTED]

Best wishes,

[REDACTED]

---

BOP Consulting

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk)

Burns Owens Partnership Ltd, VAT Registration No. 639 0992 04, Registered in England No. 4665658

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 10 April 2012 17:40  
To: [REDACTED]@bop.co.uk'  
Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

This time with the document incorporating comments to [REDACTED]

-----Original Message-----

From: [REDACTED]  
Sent: 10 April 2012 17:39

To: [REDACTED]@bop.co.uk'

Cc: [REDACTED]

Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Hi [REDACTED]

It may be easier to discuss this over the phone if you have some time.

On the framework, I don't have an alternative, but there are real problems with using some of IFPI's classifications as some of them are simply incorrect. I have outlined these problems in the detailed comments I gave to [REDACTED] (attached). One way around this could be to create a new table of licensing models which corrects the inaccuracies?

On your second point, I am copying in [REDACTED] who deals with collecting society complaints. He should be able to provide you with a statement from the government that records a dramatic decrease in the number of complaints about PRS for Music following the adoption of a code of practice. PRS should be able to confirm that they have seen a decrease in customer complaints following the adoption of a code, though they are always keen to emphasise that the code in itself was not a panacea, but part of a package of measures, including cultural and organisational changes.

Hope this helps, and please do give me a call if you would like to talk through this.

Kind regards,

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]

Sent: 10 April 2012 15:54

To: [REDACTED]

Subject: RE: Detailed comments on Draft Report on Codes of Conduct

I don't know if you are aware, but [REDACTED] left BOP at the end of March, so I am picking up on the comments that you had on the IPO Collecting Societies report.

When I talked to [REDACTED] about handover, she mentioned that there were really two outstanding points that you wanted to get back to us about.

The first (and most important) point was the table that classifies the different legal systems for the collective management of rights. We used the classification established by the International Federation of Reproduction Rights Organisations (IFRRO) - this is section 1.2 in the report. You were not totally satisfied with this classification and were going to get back to us with an alternative?

Second, in our initial Conclusions (under potential impacts for 'Members'), we stated that a CoC was unlikely to have an impact on the number of complaints from members as, based on the Australian case, members do not seem to complain very much. You added that, on the contrary, PRS had actually logged a fall off in the number of complaints from members and were going to get back to us with some more detail on this?

Do let me know your thoughts on this.

Best wishes,

[REDACTED]

---

From: [REDACTED]  
Sent: 02 April 2012 15:36  
To: [REDACTED]@bop.co.uk  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 23 March 2012 15:18  
To: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Hi [REDACTED]  
This is the document that I have on the government response to the consultation. It does mention the Code but it does not name the principles, elements, standards that a Code should include. Is there another document that contains this information?

Many thanks,  
[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 22 March 2012 16:35  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

What time would you like to speak? I am free from about 11.30.

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 22 March 2012 16:02  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Dear [REDACTED]  
Thanks for your comments. I'll call you tomorrow to have an initial discussion.

Best,  
[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 22 March 2012 16:00  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: Detailed comments on Draft Report on Codes of Conduct

Dear All,

Thank you for a helpful meeting yesterday. As promised, here are some detailed comments from my team which we would be happy to discuss over the phone/ in person. I am out all

next week, so if it would be helpful, we can have an initial discussion over the phone tomorrow. Alternatively, if you want to make progress with this while I am away, then please speak with [REDACTED] and [REDACTED] who are copied here.

Kind regards,

[REDACTED]  
[REDACTED] Head of Collecting Societies | Copyright and Enforcement Directorate  
[REDACTED] Intellectual Property Office | Department for Business, Innovation and Skills | Tel: [REDACTED]  
[REDACTED] | Mobile: [REDACTED] [www.ipd.gov.uk](http://www.ipd.gov.uk)

[REDACTED]

---

From: [REDACTED]@bop.co.uk]  
Sent: 29 March 2012 15:57  
To: [REDACTED]  
Subject: RE: Best wishes for the future

Thanks [REDACTED]  
Yes, [REDACTED] comments have been very useful and I think the text has gain more precision after incorporating their feedback.

Hope we see each other soon,

Best,  
[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 29 March 2012 14:29  
To: [REDACTED]@bop.co.uk'  
Subject: RE: Best wishes for the future

[REDACTED]

Just wanted to say a huge thank you for all your work on the Collecting Society Codes research, and hope the technical discussions you have had with [REDACTED] have been useful.

[REDACTED]

Best wishes  
[REDACTED]

[REDACTED] | Economic Advisor | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [REDACTED] | M: [REDACTED]@ipo.gov.uk | 2.09, 21 Bloomsbury Street, London, WC1B 3HF |

-----[REDACTED] message-----

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] wishes,

[REDACTED]

---

From: [REDACTED]@bop.co.uk  
Sent: 28 March 2012 14:58  
To: [REDACTED]  
Cc: [REDACTED]@bop.co.uk  
Subject: re: update

Hi [REDACTED]

Just a quick note to let you note that I've been coordinating with [REDACTED] and we have managed to address most of their comments already. The main pending issue is the table that classifies the different systems for collective management. Even though this is a classification used by IFRRO and WIPO, [REDACTED] feel that it's not a completely accurate way to explain the differences across the different models. We have agreed to give this a second thought and that [REDACTED] will send further feedback after she's back in the office.

So, this means that we will be sending the final version of the report towards the end of next week. Is that ok with you?

Best,

[REDACTED]

-----

[REDACTED]

Consultant

BOP Consulting

2nd Floor

3-5 St John Street

London EC1M 4AA

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk) <blocked::http://www.bop.co.uk/>

[REDACTED]

From: [REDACTED]  
Sent: 23 March 2012 15:33  
To: [REDACTED]@bop.co.uk; [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

[REDACTED] that document is a response to an earlier consultation process. The proposals for codes of conduct are contained in Chapter 6 of the Consultation on Copyright which closed this week - which was accompanied by the impact assessment from which you've quoted elsewhere.

The condoc is available at <http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright.htm>

Thanks, speak soon

[REDACTED]

[REDACTED] | Senior Policy Advisor, Collective Rights Management | Copyright and Enforcement Directorate | Intellectual Property Office | Department for Business, Innovation and Skills | Tel: [REDACTED] | Mobile: [REDACTED]  
[REDACTED]@gsi.gov.uk

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@bop.co.uk]  
Sent: 23 March 2012 15:18  
To: [REDACTED]  
Subject: RE: Detailed comments on Draft Report on Codes of Conduct

Hi [REDACTED]  
This is the document that I have on the government response to the consultation. It does mention the Code but it does not name the principles, elements, standards that a Code should include. Is there another document that contains this information?

Many thanks,  
[REDACTED]

---

From: [REDACTED]  
Sent: 22 March 2012 16:00  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: Detailed comments on Draft Report on Codes of Conduct  
Attachments: Comments on BOP CollSoc Report V1 21-3-12.doc

Dear All,

Thank you for a helpful meeting yesterday. As promised, here are some detailed comments from my team which we would be happy to discuss over the phone/ in person. I am out all next week, so if it would be helpful, we can have an initial discussion over the phone tomorrow. Alternatively, if you want to make progress with this while I am away, then please speak with [REDACTED] who are copied here.

Kind regards,

[REDACTED]

[REDACTED] | Head of Collecting Societies | Copyright and Enforcement Directorate  
| Intellectual Property Office | Department for Business, Innovation and Skills | Tel: [REDACTED]  
[REDACTED] | Mobile: [REDACTED] [www.ipso.gov.uk](http://www.ipso.gov.uk)

[REDACTED]

---

From: [REDACTED]@bop.co.uk]  
Sent: 13 March 2012 12:45  
To: [REDACTED]  
Subject: RE: Collecting Societies Draft report  
Attachments: 120311 IPO Collecting Societies Draft Report BOP v2.6.doc

Follow Up Flag: Follow up  
Flag Status: Completed

Hi [REDACTED]

Please find attached the Draft Final Report on Collecting Societies Code of Conduct. I'll give you a ring after lunch to talk you through it and explaining why is lacking the economic model.

Best,

[REDACTED]

---

[REDACTED]

Consultant  
BOP Consulting  
2nd Floor  
3-5 St John Street  
London EC1M 4AA

DL: [REDACTED]

M: [REDACTED]

[www.bop.co.uk](http://www.bop.co.uk) <blocked::http://www.bop.co.uk/>

Visit the BOP Blog: click here <<http://www.bopconsulting.typepad.com/>>

[REDACTED]

---

From: [REDACTED]@bop.co.uk  
Sent: 03 February 2012 13:54  
To: [REDACTED]  
Subject: RE: invoice

Hi [REDACTED]

Yes, I agree with you, I think that a chat rather than a formal meeting will do at this stage of the research.  
I'll give you a ring on Monday morning to discuss this.

Have a nice weekend!  
[REDACTED]

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@ipo.gov.uk]  
Sent: 03 February 2012 13:28  
To: [REDACTED]@bop.co.uk  
Subject: RE: invoice

Hi [REDACTED]

Many thanks for the progress report. I am more than happy for you to issue the invoice.

I have a couple of questions on the report, maybe we could have a quick chat on Monday. I know we had suggested that we might put in a more formal meeting at this stage, but I don't think that is necessary at this moment and it would be more useful to meet when we have a better idea about where the evidence is heading. Is this ok?

Best wishes  
[REDACTED]

[REDACTED] | Economist | Economics, Research & Evidence | Intellectual Property Office |  
T: +44 [REDACTED] | M: [REDACTED]@gov.uk | 2.09, 21 Bloomsbury  
Street, London, WC1B 3HF |

-----Original Message-----

From: [REDACTED]@bop.co.uk  
Sent: 02 February 2012 12:59  
To: [REDACTED]  
Subject: invoice

Hi [REDACTED]

I would like to know whether you are satisfied with the content of our Progress Report and, consequently, if we could issue our first invoice for this Project.

Many thanks!  
[REDACTED]

[REDACTED]

---

From: [REDACTED]@bop.co.uk]  
Sent: 30 January 2012 16:35  
To: [REDACTED]  
Subject: Progress Report  
Attachments: 120124 IPO Collecting Societies Progress Report BOP v1.4.doc

Hi [REDACTED]

Please find attached our progress report on 'Collecting Societies Code of Conduct'.

This report shows our initial findings regarding the context in which the Code has been applied in Australia as well as the main benefits and criticism that it has generated and received so far. The report also includes some notes on EU developments regarding Collecting Societies..

We have incorporated an opening section that explains the economic rationale under which CSs operate. At the moment this sits as a standalone section but in following iterations of the text we'll interweave it with the analysis of Australia CoC and EU regulatory initiatives.

Best,

[REDACTED]

-----

[REDACTED]

Consultant

BOP Consulting

2nd Floor

3-5 St John Street

London EC1M 4AA

DL: 020 7780 7299

M: 07973 412 047

[www.bop.co.uk](http://www.bop.co.uk) <blocked::http://www.bop.co.uk/>

[REDACTED]

---

From: [REDACTED]  
Sent: 03 April 2013 10:18  
To: [REDACTED]  
Subject: FW: Comments - 5th Meeting of the Copyright Research Expert Advisory Group  
Attachments: 2012\_07\_05\_DACS comments on reports.pdf

[REDACTED]

Economics Research and Evidence  
Intellectual Property Office  
4 Abbey Orchard Street,  
London, SW1P 2HT

tel: 0207 034 2831  
mobile: [REDACTED]  
fax: 0207 034 2826

email: [REDACTED]  
web: <http://www.ipo.gov.uk/pro-ipresearch.htm>

-----Original Message-----

From: [REDACTED] [mailto:[REDACTED]@dacs.org.uk]  
Sent: 06 July 2012 14:17

[REDACTED]

Subject: RE: Comments - 5th Meeting of the Copyright Research Expert Advisory Group

Dear [REDACTED] & colleagues,

I attach a summary of our reflections on the two reports, which we hope will be a useful contribution to the debate.

With best wishes.

[REDACTED]

[REDACTED]

Director of Legal & International  
Design and Artists Copyright Society

T: +44 (0)20 [REDACTED]  
F: +44 (0)20 [REDACTED]  
[www.dacs.org.uk](http://www.dacs.org.uk)

\*\*\*\*\*

## **2 Comments on the report about conduct for collecting societies**

Although the report contains interesting information, in particular about the Australian situation, we do not believe that the Australian experience translates one to one into other jurisdictions. We would also express some concern that the report seems to suggest that a statutory code will achieve the generally envisaged regulation objectives better than a voluntary code, although there is no evidence available to substantiate this claim. The report does not take into account that any voluntary solution may actually encourage collecting societies to strive for compliance with such codes, whilst an imposed statutory obligation may have a chilling effect on the sector.

We do not believe that the report makes a case for the introduction of a statutory code in any convincing way. As highlighted in the meeting on the 14<sup>th</sup> we would like to re-emphasise to exercise the necessary caution of what any code of conduct can achieve and therefore should regulate. We do have our doubts that any solution will automatically raise awareness and understanding for user about how and which licences they have to use, nor will they overcome reluctance from users to purchase licences.

DACS

July 2012

# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
13<sup>th</sup> March 2012

**THIS IS A DRAFT. PLEASE DO NOT QUOTE**

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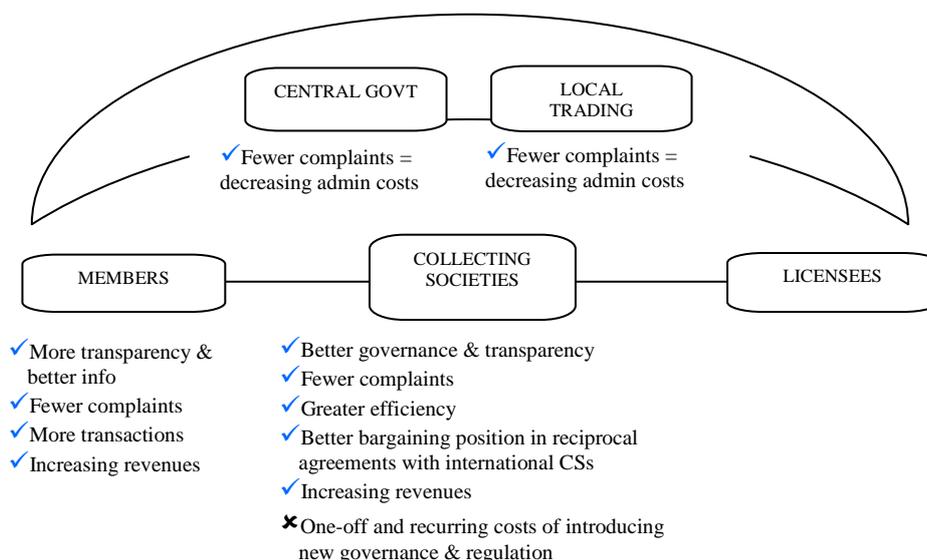
# 1. Introduction

This is the (Draft) Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of Collecting Societies Codes of Conduct.

The aim of this work package is to look at whether the introduction of a Code of Conduct, whether voluntary or with a backstop in legislation, could help to reduce any deadweight and inefficiency losses generated by the current state of the Collecting Societies in the UK (which are subject to EU and UK competition policy but operate without any other specific government regulation).

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a Code of Conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a Code of Conduct in the UK. These are grouped together and summarised below in Figure 1.

**Figure 1: Potential benefits and costs to each stakeholder of the proposed introduction of a Code of Conduct for UK Collecting Societies**



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new Codes of Conduct is that it will improve the governance and transparency of Collecting Societies and deliver better information to both members and users/licensees. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.<sup>2</sup>

<sup>1</sup> Both Atkinson and Fitzgerald are experts on Australian Intellectual Property policy.

<sup>2</sup> It should be noted that any change to the costs to government related to the processing of complaints was deemed to be out of scope of the present research.

But the Impact Assessment also proceeds to hypothesise that charges to licensees would fall as Collecting Societies (due to greater transparency and scrutiny); and that revenues would also ultimately increase for members and the CSs under the new Codes of Conduct as members and licensees would (effectively) find it easier to do business with the Collecting Societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing the Code of Conduct will fall on the Collecting Societies themselves.

The report interrogates the plausibility and extent of these hypothetical assumptions through comparative analysis. In particular, the case of Australia is examined, where a Code of Conduct was adopted by Collecting Societies in 2002, which allows for an assessment of whether the Code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of Collecting Societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK Collecting Societies has been gathered, to assess in more detail what current problems the Code of Conduct might address.

The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of Collecting Societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of Collecting Societies.

### **Definitions: Types of rights**

Copyright, as established in the Berne Convention back in 1886, gives exclusive rights to owners of literary and artistic works. WIPO<sup>4</sup> provides explanation for the rights entailed by that exclusivity. They can be classified in 4 domains:

- 1. Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of her works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. This includes the mechanical reproduction rights in musical works.
- 2. Rights of public performance, broadcasting and communication to the public** –
  - Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present. Public performance also includes performance by means of recordings. Hence, musical works are considered "publicly performed" when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls.
  - The right of "broadcasting" covers the transmission by wireless means for public

<sup>3</sup> The views of some Collecting Societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific Collecting Society, as their representative body.

<sup>4</sup> WIPO. 'Basic Notions of Copyright and Related Rights'

reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.

- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organization was established, also in France, to manage rights in the field of music. It is estimated that similar organizations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting Societies (CSs) - also known as Collective Management Organisations, CMOs, and as Reproduction Rights Organizations, RROs, in the case of reproduction rights - are private firms in charge of administering statutory copyright law via Collective Right Management (CRM) (Towse and Handke, 2007). CSs licence, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage, their tariffs and distribution structures are not self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They function under different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimize transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price

- monitoring and enforcement of rights ownership.

Collecting Societies also make international agreements with 'sister' CCS in other countries to guarantee access to a worldwide repertoire.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>5</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licenses. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Townse, 2007)

It is worth point out that CSs are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. public performance). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up clearing the rights of a piece of work with many different Collecting Societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between CSs and users, even more so if CSs do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one agency in charge to collect and redistribute the royalties generated in a particular domain of rights. "This monopolistic structure leaves copyright Collecting Societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 author's societies around the world and published by the International Association of Collecting Societies of Authors and Composers (CISAC), in 2010, 73% of the total collection comes from public performance rights (€5.5 billion). Additionally, Music is, by far, the largest licensor to Author's Collecting Societies. The music sector represents 87% of the total amount collected in 2010.

**Figure 2: Collection through Authors' Collecting Societies (2010)**

Sector	Amount (€million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

Source: CISAC, 2012

<sup>5</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

## 1.2 Models of collective management

There exist different legal systems of collective management of those rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the three main models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between CSs and its member and users.

**Figure 3: Different legal systems for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licenses to copy protected material on behalf of their members. A CS can only collect fees for those right holders who have given it the mandate to so on their behalf. Right holders can opt out the system and make claims outside a CMO. User can only use copyright material if they have clearer the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Voluntary collective licensing with back-up in legislation		
a. Extended collective license	An extended collective license extends the effects of a copyright license to also cover non-represented rights holders.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
b. Compulsory collective management	Even though the management of rights is voluntary, rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>
3. Legal license		
a. Non-voluntary system with a legal licence ("statutory	A licence to copy is provided by law (hence no agreement with the rights	Netherlands, Switzerland, <b>Australia</b> (educational statutory license)

license")	owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	
b. Private copying remuneration with a levy system	The license to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO. [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

The UK operates under a model of voluntary collective licensing with no regulation. In turn Australia has a mixed model. A statutory license exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between CS and users in Australia arise from the statutory license.

### 1.3 Collective Societies incentives and governance

In addition to (and as a consequence of) the different legal systems, Collecting Societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private memberships associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, Collecting Societies' main mission is to look after the interest of their members (provided that they have been given the mandate to collect on their behalf). Consequently, in most cases their incentives are aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic Collecting Society. However strong internal governance seems to ameliorate this negative effect. CSs are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance is subject to close scrutiny by right holders. Furthermore, the possibility for the existent of so called managerial rents (rents appropriated by the 'agent' who withholds more information that the 'principal') can be analysed by looking at CSs financial results (e.g. total amount collected from content users over administration costs).

Rochelandet (2003) follows this approach and explores the financial efficiency of Collecting Societies in different regulation settings. He looks at the music CSs in the UK, France and German. He concludes that no general positive correlation could be made between the intensity of legal supervision

and the financial results of the analysed Collecting Societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a CS with large members with market power who play a major role in defining copyright -such as music publishers or record companies- (e.g. the UK Performing Rights Society ,PRS) could minimise agency problems.

The author also indicates that if the internal governance mechanism fails then there is room to strengthen government legal supervision. An extreme case of poor management under no legislation can be found in Spain where a CS has been accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

Major frictions can be identified in the relationship between Collecting Societies and users who, by definition, lack the mechanisms available to members to monitor CSs performance. However there is very limited literature on the efficiency of the relationship between Collecting Societies and users. Section 2 explains the problems that have arisen in Australia between users and the CS in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between those two agents.

## 2. Code of Conduct in Australia

There exist ten Collecting Societies in Australia (see Figure 3). As explained above they operate under two different legal systems. Collecting licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

Figure 4: Collecting Societies in Australia

Collecting Society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

### 2.1 Regulatory background

This section explains the legal context and regulatory developments taken place in Australia before the Code of Conduct. It describes two specific mechanisms within the regulatory system (i.e. Copyright Tribunal, Statutory Licence), as well as the government attitude and policies towards intervening or regulating CSs.

### **APRA – the first collecting society**

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest Collecting Societies, the *Australasian Performing Right Society*,<sup>6,7</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for copying of literary works.

Tensions between Australian Collecting Societies and licensees have been documented since 1926. Licensees have criticised CSs for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>8</sup>

### **Copyright Tribunal**

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>9</sup> The 1968 Act also established the statutory license model for the educational sector, and declared CAL as the Collecting Society for the administration of the educational statutory license and the government copying provisions. For other sectors, such as businesses, the system remained voluntary (WIPO, 2005).

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third Collecting Society, the Phonographic Performance Company of Australia Limited<sup>10</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>11</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>12</sup> CAL has focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

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<sup>6</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>7</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>8</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to discovery of any detail of the company's trading.

<sup>9</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended establishment of a copyright tribunal.

<sup>10</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>11</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>12</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. Determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the instance of Collecting Societies. The annual revenues of APRA and CAL, in particular, increase substantially and progressively after Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively Collecting Societies.
3. Tribunal determinations played a critical role in the progressive increase of Collecting Society revenues – APRA and PPCA relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates; Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising Collecting Societies and excluding from debate the consideration of collective rights administration consideration of competition policy principles<sup>13</sup>.

By, in effect, endorsing the purpose and practices of Australian Collecting Societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the Societies. However, in the period of growth that began in the 1980s, Collecting Societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward, shaped attitudes to Collecting Societies.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though not substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some Collecting Societies, has caused considerable resentment. Copyrights, such as the public performing right, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them.

They alleged oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by Collecting Societies. However, the double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continue to characterise Tribunal proceedings.

### **Statutory licence**

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that -by law- schools and universities libraries have the right to copy, as long as the 'rights

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<sup>13</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the CS in charge of collecting the statutory licence.

The school sector is major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to Collecting Societies in Australia, only surpassed by the Retail, sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the Hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If that is the case, parties can request the Copyright Tribunal to determine rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for this organisations (see Section 2.4 for further details).

### **Government attitudes to collective administration**

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay). In principle, and by analogy, it followed that the government must disapprove of the Copyright Tribunal.

As explained above, Collecting Societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>14</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to Collecting Societies by the competition law.<sup>15</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>16</sup>

### **Don't Stop the Music report – genesis of the Collecting Societies' Code of Conduct**

In 1996, a Liberal coalition government assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>17</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

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<sup>14</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>15</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>16</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

<sup>17</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

In 1997, the Government asked a joint Committee of Parliament to investigate Collecting Societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>18</sup> for the creation of the office of Copyright Ombudsman, and most supported establishment of an alternate dispute resolution process for settling disputes between Collecting Societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>19</sup> advised support of 'light touch self-regulation' by Collecting Societies. The IDC recommended a voluntary code of conduct for Collecting Societies.

The parliamentary committee reported in 1998<sup>20</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by Collecting Societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for Collecting Societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

### **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC
- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and Collecting Societies (and received 20 submissions, as discussed below). However, five years on the ACCC is yet to release a final version of the 2006 draft guide.

## **2.2 Characteristics of the Code**

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<sup>18</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>19</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>20</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian Collecting Societies adopted a Code of Conduct for Copyright Collecting Societies.<sup>21</sup> The Code established minimum standards for disclosure and reporting by Collecting Societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide members on request with information about payment entitlements
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The Code requires Collecting Societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, Collecting Societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, Collecting Societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the Code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about Collecting Societies' compliance with the Code. The Code provides for the monitoring and review of compliance, and the necessity for amendments.

In 2003, the Collecting Societies appointed The Hon James Burchett QC<sup>22</sup> to undertake the first review of the societies' compliance with the Code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the Collecting Societies. Mr Burchett found that Collecting Societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the Code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the Code reviewer - advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a Collecting Society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and

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<sup>21</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGACS), Australian Screen Directors Authorship Collecting Society Limited (ASDACS).

<sup>22</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

summarising all complaints/disputes, and assessing how societies have handled them. Consistently, reports have stated general compliance with the Code.

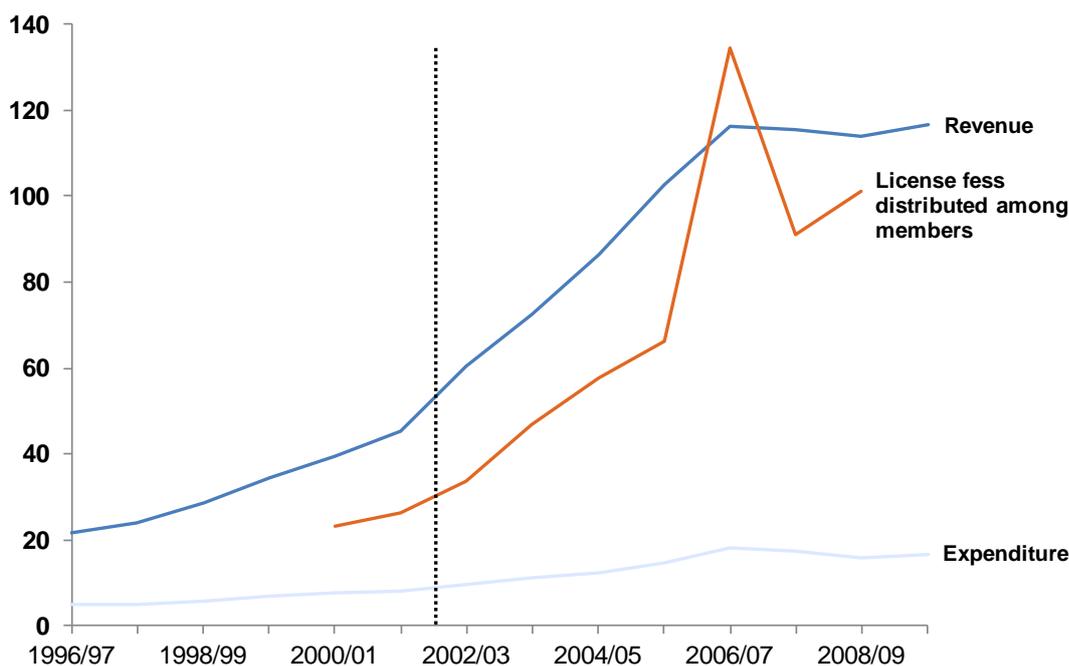
## 2.3 Collecting Society performance before and after the code

In compliance with the Code of Conduct the Copyright Authors Licensing (CAL) publishes every year an Annual Report with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 4, there has been a steady increase in CAL’s revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>23</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charge to users (e.g. schools), which could somewhat explain the tensions between the school sector (it’s biggest contributor) and CAL. According to Delia Brown, in the last 10 years, the fees charge to the school sector has increased by 500%. This is one of the main reasons why her unit (the National Copyright Unit within the Standing Council on School Education and Early Childhood Development) has been created in the first place.

Figure 4 also shows the total amount of money distributed among member and non members (‘license fees distributed’) by CAL. There is a spike in 2007 due to a one-off ‘accelerated distribution payment’ programme implemented that year. According to CAL, this was ‘intended to reduce the overall Trust Fund balance’.

Figure 5: CAL: Revenue, expenditure and license fees 1996-2010 (AUD millions)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

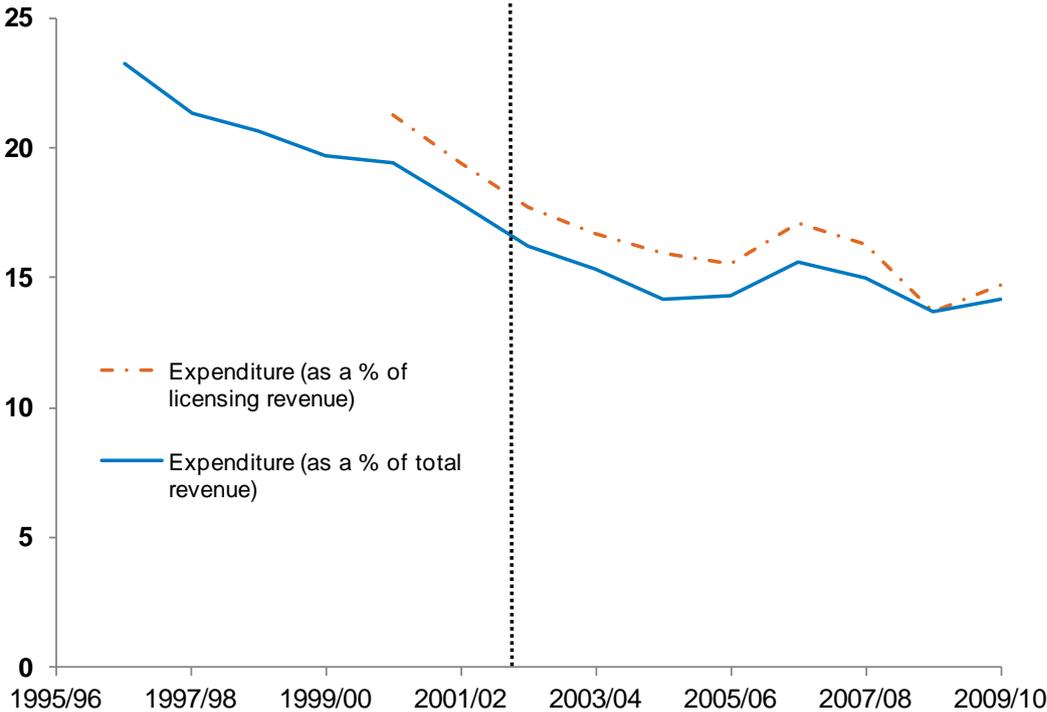
<sup>23</sup> The figures are shown in Australian dollars (AUD), and have not been deflated yet.

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 5). This downward trend is observed since before the Code of Conduct was implemented. At first glance, this trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (500% in 10 years), a sector which payments represent around 48% of the total revenue. In this sense, the trend also reflects the effect of increases in tariffs, which does not seem to be explained by any change in the nature of the business.

However, after 2005 the ratio has shown a less clear path. Another measure of productivity is given by Net Income (defined as Revenue minus expenditure) per employee. Figure 6 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards, however no more information is available in the Annual Reports for more recent years.

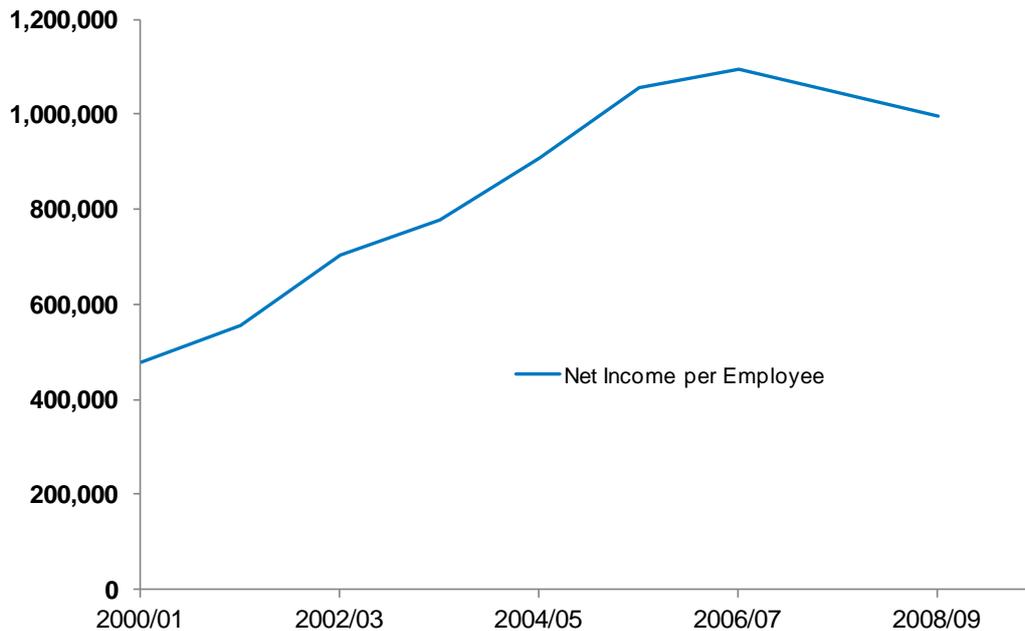
More informative measures of efficiency in this economy would be the collected and distributable sums per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 6: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Figure 7: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

## 2.4 Benefits and criticism

### 2.4.1 Benefits

The primary benefit of the Code's introduction appears to be that it has caused Collecting Societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.
- In addition, societies have established or improved complaints and dispute resolution procedures.

Criticism of the Code primarily can be divided into four categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores the mild effect of the Code in terms of behavioural change. The final one explains external factors that may have the effect of rendering the effect of the Code nugatory.

### 2.4.2 Criticism

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and Collecting Societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the Code.<sup>24</sup>

The department's submission stated four specific shortcomings. The Code:

- is voluntary
- does not prescribe minimum standards of conduct
- permits Collecting Societies to appoint the Code reviewer
- does not facilitate independent criticism – licensees who supply comments to the Code reviewer are usually 'in relationships' with Collecting Societies.

The submission also stated dissatisfaction with the way in which, during the Code review process, the Code reviewer dealt with concerns raised about the conduct of certain Collecting Societies. During negotiation of licence fees, one particular society, CAL, proved uncooperative in supplying financial and historical data necessary for judging equitable remuneration and a number of Collecting Societies were unwilling to engage in alternate dispute resolution – even though the Code provides for ADR. Collecting Societies, according to the submission, would engage in mediation with individuals, not a collective such as ministerial copyright taskforce.<sup>25</sup>

Independently of the submission, a number of criticisms can be added. The Code does not require Collecting Societies to publish or make available on request summary and detailed information about distributions and patterns of distributions. It is therefore nearly impossible to ascertain whether, and the extent to which, Collecting Societies benefit those they claim to benefit.

Additionally, the efficacy of the Code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as noted, focus on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL mediated 15 matters, and APRA-AMCOS 9 – but equally noticeable, most concern complaints made by members not licensees.

It is unlikely that the dissatisfaction with various Collecting Societies, particularly the largest societies APRA-AMCOS and CAL, expressed over 30 years, has vanished. Hence, the lack of complaints from licensees seems to be reflecting the fact that the Code has encouraged licensees to resolve issues with Collecting Societies.

## 2. Dispute-resolution

Most Code-related dispute resolution is initiated by complaints from members of Collecting Societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.

Ideally, the Code would have set an independent Copyright Ombudsman, as it was previously recommended in 1995, to deal with complaints from users and members. The Copyright Tribunal proceedings are extremely time consuming and expensive and these factors act as very real disincentives to licensees initiating legal actions.

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<sup>24</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

<sup>25</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

As mentioned above the Copyright Tribunal exists to arbitrate in disputes between Collecting Societies and users of copyright material. However, the procedure is perceived as lengthy and costly, which prevents users from initiating a case in the Tribunal. And in some cases, it ends up being the Collecting Society who takes an organisation to court, when an agreement is not reached in terms of tariffs or the conditions of the license.

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it costed them 2 AUD millions. She claims that “costs and delays of the Tribunal effectively bar most licensees, and limit its utility as a forum. Licensees have no other option but to reach agreement with the Collecting Society and pay a higher price for licence fees than what the Copyright Tribunal may have determined”.

### **3. Behavioural effect**

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information on a number of activities of Collecting Societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of minimum behavioural effect of the Code can be found again when looking at the statutory license. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting statutory licence to monetise the use of freely available digital content in schools. According to her, it's estimated that schools pay between 8 - 10 AUD millions per year (£5 - £7 millions) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### **4. External factors**

As discussed, forming a background to the consideration of 'in principle' merits of the Code, and the extent to which it is implemented, is the nexus of legislation and Tribunal, and the constraint this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the Code.

Even licensees willing to interrogate assertively the practices of Collecting Societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of Collecting Societies agreeing to mediation of disputes.

Viewed from this perspective, the Code helps to regularise the reporting and information practices of Societies, but has done nothing to reduce the distrust between Societies and licensees, nor to lessen their disparity in bargaining power.

## 3. EU developments regarding Collecting Societies

### 3.1 Overview

European Collecting Societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in

- legal status and organisation, ranging from private non-profit organisations (as in the uk) to bodies subject to direct government control (france, germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European CSs in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest licensor to CSs in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervision framework under which Collecting Societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of CSs in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a Code of Conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the

EU's competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004 the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM(2004) 261). It was not specifically concerned about the legal status of CSs which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific CS operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on Collecting Societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the CS of their choice which in turn implies they can make judgements about each CS's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment*, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services' (SEC (2005) 1254. This laid out three options:

1. do nothing
2. allow wider reciprocal agreements and
3. allow rights-holders to appoint an EU-wide CS (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist CSs in formulating 'Codes of Conduct' (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given CSs' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a Code of Conduct, setting out each CS's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collection societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on CSs' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. The document recommended extending collective

licensing, a multi-territory licensing process and extending the scope of the Satellite and Cable Directive to online delivery.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many CSs gave their views on the need for reform and Codes of Conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works* in the European Union: Opportunities and Challenges towards a Digital Single Market. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The Parliament was also less enthusiastic, emphasising the CSs contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music.

### **Main themes included in the different Directorates publications**

As the prior section shows, there is not a single body of rules and regulations under which Collecting Societies operate in the EU. It is, however, possible to identify recurrent themes across the different documents that deal with collective management:

- Governance and administration
  - External oversight
  - Transparency, especially of CSs' revenues and costs, notably deductions to third parties not right holders, and net distributions
  - Exclusivity
  - Dispute settlement
- Members
  - Flexibility of contracts (mandates) between right holders and CSs
  - Service level agreements
  - Member representation
  - Treatment of national and global repertoire
  - Distribution of royalties to right holders in other countries
  - Ability of a right-holder to negotiate their own tariffs
- Users
  - Access to information on licences

- Fairness and equivalence
- Education

## 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and others where the situation is more problematic. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium, the UK and the Nordic countries seem to score well.

### France

The Intellectual Property Code states that CSs must be established as civil law societies ('société civile') of which right holders are members ('associés').

CSs do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the Tribunal de Grande Instance in the event of substantial concerns. The Ministry's approval is necessary if a CS collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, all CSs have been subject to the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) which operates under the Cour des Comptes (Court of Auditors). Each year the CPC publishes a detailed report on all 24 CSs. It also investigates special issues.

CSs' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a CS was fulfilling a legal mandate, such as the private copying levy or the right of remuneration to cable re-transmission, but should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of CSs now see the CPC as a useful way of legitimising their activities to members and users as well as to the public. SACD has described the CPC review as a useful 'free' audit.

SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. According to SACD this even more true now that the Internet has increased people's reluctance to pay for music. However, others continue to be opposed to the CPC's intervention in what they see as their own private company (e.g. SACEM has been critical of such when the CPC published its management salaries).

### Germany

Germany passed the world's first law specifically on Collecting Societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says the government regulates CSs to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a CS is said to be collective management for the benefit of right holders. The Patent and Trademark Office (PTO) has the power to refuse any application to operate a CS if the statutes of the Collecting Society do not comply with the provisions of the UrhWahrnG, if there is a reason to believe that a person entitled by law or the statutes to represent the Collecting Society does not possess the trustworthiness needed for the exercise of his activity, or if it is unlikely, in view of the CSs' business structure, that the rights and claims entrusted to it will be effectively administered.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a CS has to grant licenses to all users according the same published tariff and cannot refuse a licence. CSs must notify the PTO of any change to its statutes, management, tariffs, contracts or agreements with foreign CSs, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees.

PTO operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (ie, Germany and the UK). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais, 'The Collective Management of Copyright and Neighbouring Rights' (2010), 'Germany has the most comprehensive legal framework on Collecting Societies in the world. However it is difficult to find realistic evaluations of whether the system has achieved its stated aims. The fact that the German Collecting Society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972, some six years after the LACNR was established, in relation to abusing its dominant position by imposing unreasonable membership terms, suggests that the system does not necessarily prevent Collecting Societies from abusing their monopoly.'

### **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to rights-holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing, and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million undistributed. The case is unresolved but there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as oppressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of their income to social causes such as pensions, sometimes up to 20%.

The Spanish Competition Commission has ruled against Spanish CSs' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two CS governance issues in recent years. The first is an example of a lack of professional management in a small CS. In 1994, when the government introduced a neighbouring right, an authors' union set up a new CS, URADEX, which faced problems with managing its database

and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second is the challenges faced by SABAM, which is by far the country's largest CS. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being February 2012, but the case continues.

Belgium's CSs have also faced complaints from users such as bars and other small businesses for public performance. Its CSs work closely with trade association to meet public concern and, where possible, collaborate together, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate CSs. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. CSs pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical Code of Conduct.

## 4. A Code of Conduct for the UK

### 4.1 Main concerns regarding the collective management system in the UK

There seems to be five main concerns among members and users (but mostly users) on the service provided by CS, in this section we will focus on the music CS (which are by far the major licensors across the world) and the text CSs that operate in the educational sector.

Some of these issues can be tackled through a Code of Conduct. Others lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a Code seems to be a necessary but not sufficient condition to improve the relationship between CSs and agents.

#### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, CSs are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different CSs can have the mandate to collect from the same licensee for the use of the same content.

This precise problem is one faced by businesses in the UK who have to pay licences to two different Collecting Societies for the public performance of the same copyrighted material. This is the case for the businesses in the hospitality, leisure and retails sectors (hairdressers, pubs and restaurants, warehouses, etc.) who –in theory- have to pay *PRS for Music* and *PPL* (Public Performing Licensing) in advance, for playing music in their establishments.

Additionally, PRS and PPL seem to have different business strategies. PRS conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on regular basis. PPL, on other hand, seems to focus its effort on a more limited pool of users.

It was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of PRS and of its duties but much less aware of PPL, since they will seldom have been approached by them.

When PPL approach a business that has been playing music in its establishment and find that they do not have a 'PPL license' (and may or may not have a 'PRS license'), they apply a 50% surcharge on their fee for the first year. PRS will do the same thing.

Trade associations do accept the fact that their members have to pay both CSs. However, they feel that CSs have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds - from the British Beer and Pub Association - has expressed that her association's concern "is that Collecting Societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the Collecting Societies themselves need to do more" (Managing Intellectual Property, January 2012).

Even more convenient for members would be a system similar to the one that exists in France, whereby only one Collecting Society –either PRS or PPL- collect on behalf of both organisations so that users don't have to deal with two different organisations. Reducing duplication has already been partially achieved. PRS and MCPS (Mechanical-Copyright Protection Society) who have recently merged into one company.

Additionally, the 'text' CSs here in the UK operates under a similar system. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and Collecting Society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and perform collective licensing on their behalf.

With regards to liabilities and awareness, then, a Code of Conduct could help to:

- improve CSs efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge when and if PPL decides to start collecting from the full base of music users.

## 2. Tariffs and scope for negotiation

There are clear differences in the scope of negotiation with CSs among users, according to the scale of the operations:

- a. Big users (e.g. broadcasters): The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is 5-year tariff deal with yearly adjustments by inflation and audience size. They pay royalties to four different CSs (PRS, PPL and MCPS for musical works, and to Directors UK and BECS for directors and authors rights). Their most efficient dealings are with PRS and PPL that act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- b. Medium users (e.g. hospitality sector): They do not get to negotiate fees. Tariffs have been set by the Copyright Tribunal in 1991 and are adjusted every year by inflation. Medium users do have some level of coordination with CSs (mostly with PRS) through their trade associations (e.g. BHA, BBPA). The BHA maintains 'good' relations with PRS, which have improved in the last five years due to changes in PRS's management culture.
- c. Small users (e.g. offices and warehouses): Unrepresented small users don't have any degree of negotiation with CSs. As explained above, they are generally aware of PRS' existence mostly because of PRS business strategy which is based on a comprehensive identification of all businesses likely to be music users.

With regards to tariffs and scope for negotiation, then, a Code of Conduct could help to:

- possibly improve the ability of users to negotiate fees by improving their access to the information about how the fees are set and by guarantying that CSs will make an effort to negotiate/coordinate with trade associations to set fees, timetables, etc.

However, ability to negotiate is limited when the tariff are 'fixed', as it is the case for the hospitality sector.

## 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by CSs. PRS has by far the most accessible website, making it possible to access to information on the different type of licensees and tariff structure.

As it has been expressed by a representative of the National Federation of Hairdressers (NFH) is not just a matter of making information available but also a matter of making a bigger effort on simplifying the complexity of, for instance, the tariff structure so user feel less alienated from this economy and, hence more willing to abide it.

With regards to transparency, then, a Code of Conduct could help to:

- standardised information and made it publically available for users and members, but also for policy makers.
- increase CSs' efforts to transmit the complexity of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the Code is voluntary and (ii) the language use in the Code is rather vague. These are two lessons that can be drawn from the Australian case.

#### 4. Repertoire and mandate

Other concerns in the UK comes from the ability of the actual collective management system to adapt to technological change than open new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>26</sup>.

According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material'. They estimate that 43% of potential in copyright work in the Library are orphan works<sup>27</sup>.

This issue lies outside the scope of a Code of Conduct, and is likely to be tackled by change in the legal systems under which CS currently operate in the UK (e.g. changes towards extended collective rights management).

#### 5. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged (Colston and Galloway, 2010). "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses CSs under competition law and tests for the abuse of dominant position. However, CSs' idiosyncratic legal status and the cultural role make competition analysis more complex.

<sup>26</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>)

<sup>27</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

The UK seems to be more inclined to treat CSs as a regulated or supervised monopoly rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights).

## 4.2 Codes of Conduct

In the last years, there has been an increasing consensus among CSs in the UK that a Code of Conduct is needed for this industry. This has been confirmed by many CSs in the Roundtable on the Codes of Conduct organised by the IPO in January 2012<sup>28</sup>. In this meeting, representatives of ten CSs have expressed that:

- they are willing to support a voluntary Code of Conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, PRS published a Code of Practice. The Code seems to have been a reflection of the change in cultural and organisational characteristics within the organisation over the previous years. In January 2012, PPL also published a Code of Conduct, while the British Copyright Council has published a set of principles that are intended to serve as baseline for other CSs when designing their own Codes in the future.

Figure 7 shows these three different initiatives and compares them with the Australian Code of Conduct.

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<sup>28</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

**Figure 8: Codes of Conduct in the UK**

Organisation	UK			Australia
	PRS	PPL	British Copyright Council	
General Description	Code of Practice, first published in 2009	Code of Conduct Available since 1 January 2012	Good Practice Principles Published made available in 2011, it provides CS with a baseline that could be used to write their own Code of Conducts. The suggested themes are: <ul style="list-style-type: none"> <li>• Transparency</li> <li>• Accountability and consultation</li> <li>• Service levels and operational issues</li> <li>• Data protection</li> <li>• Queries, complaints and dispute resolution</li> </ul>	Code of Conduct, launched in 2002. Objectives: <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in CS</li> <li>• set out the standards of service</li> <li>• ensure that Members and Licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes.</li> </ul>
Accountability and transparency	It states that PRS processes are clear and transparent.	Sets up standards of service: e.g. <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide you with accurate information</li> </ul> Promises to act promptly, fairly and consistently.	Transparency  Accountability and consultation	States that CS will maintain, and make available to Members on request, a Distribution Policy that sets out from time to time.  Also states that CS will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the Collecting Society of expenses and other amounts. CSs are supposed to take 'reasonable steps' to ensure that its employees and agents are aware of and comply with the
Education, training and awareness				

				Code. Additionally, they are supposed to engage in appropriate activities to promote awareness among Members, Licensees and the general public.
Tariffs	States that wherever possible, PRS tariffs are set in consultation with trade bodies and representative associations.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that Code of Conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	None
Complaints and dispute resolution	Complaints should be addressed to PRS Customer Relations Manager. If member/licensees is not satisfied with decision she can resubmit complain, but this time addressing the Managing Director Member and licensees can refer to the Ombudsman for PRS Music if they feel that they are not satisfied with the outcome of the complaints procedure	Not part of the Code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	Suggests that each stage of complaint procedure should be clearly explained	Each Collecting Society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>dealing with complaints from Members and Licensees; and</li> <li>resolving disputes.</li> </ul> These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.
Compliance	None	None	None	Even though the Code is voluntary it has established some compliance mechanism. Code Reviewer. However, the independence of the Code Reviewer has been put into question.
Review	None	None	None	It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the Code.

Source: BOP Consulting (2012)

## 5. Conclusions

### Code of Conduct in Australia

- The primary benefit of the Code's introduction appears to be that it has caused Collecting Societies:
  - to try conscientiously to respond to requests from members and licensees
  - to better explain distribution policy
  - to explain and publicise their functions.
  - In addition, societies have established or improved complaints and dispute resolution procedures.
- Criticism of the Code primarily can be divided into four categories:
  - *Omissions and weaknesses*: (1) it is voluntary, (2) does not prescribe minimum standards of conduct, (3) permits Collecting Societies to appoint the Code reviewer and (4) does not facilitate independent criticism
  - *Dispute-resolution*: most Code-related dispute resolution is initiated by complaints from members of Collecting Societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
  - *Behavioural effect*: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
  - *External factors*: the Code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### European developments

The analysis of European developments leads to the following conclusions:

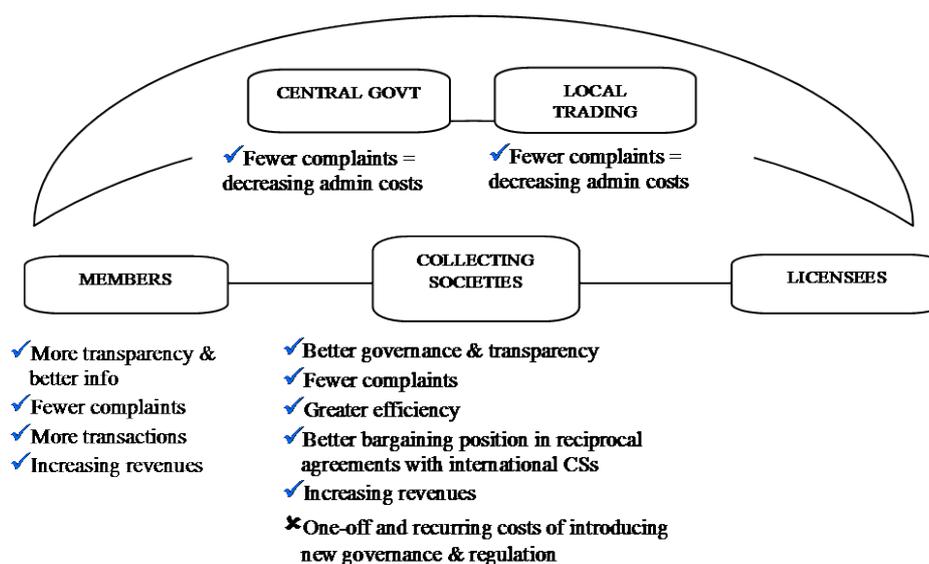
- There is wide disparity between national attitudes and behaviour towards CMOs.
- CMOs differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management
- Many European countries have one CMO which is significantly larger than the rest and which has assumed national social and cultural powers.
- Some countries, notably Germany, France and Belgium, have robust regulations.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Codes of Conduct are seen as having marginal benefits except in reassuring users.
- The priority is to rebalance the needs of right holders and users to maximise the potential of online, multi-territory distribution.

- For this to happen, Europe has to ensure right holders and users can choose CMOs on the basis of transparent, comparable information.

## A Code of Conduct for the UK

The Australian case shows that a Code of Conduct is of limited use. It's generally written in an ambiguous tone and lack effectiveness in terms of holding CSs accountable if the Code is voluntary and if the mechanisms set to review compliance with the Code is not independent from Collecting Societies.

Figure 1 in Section 1 summarises the potential benefit of a Code of Conduct. In general lines, an increase in transparency will benefit members and users. However, in the light of the Australian case it seems that other potential benefits are minor.



### Members

- Complaints do not decrease as members do not tend to complain in the first place
- There is no evidence that there is any associated increase in transactions – increases in transactions seem to be driven by (i) technological change (digital tech creating more rights to be handled by CSs) and (ii) more zealous patrolling of who are the potential users.

### Collecting Societies

- Complaints do not decrease as members tend not to complain in the first place and users do not complain in volume to the CSs' either. They may complain to government and to industry trade bodies, but both are outside scope. Users tend not to complain since they perceive the process as a) costly and b) see that it is futile as their bargaining position is so weak compared to the CSs
- Greater efficiency – There is little evidence that Code of Conduct has an effect on this. The increases in efficiency show in the Australian case seem to be explained by the effect of economies of scale, but also by the constant increment to fees charge to users.

- Better bargaining position with other CSs – This has not been examined in this research. However, it is difficult to imagine that a Code of Conduct would have this effect. In the Impact Assessment of a Code of Conduct prepared by BIS, the assumption is that by adopting a Code of Conduct, UK Societies would somehow be able to play a 'leading' role internationally, but as other CSs overseas all have Code of Conducts and more regulation than the UK, it's hard to see how this leadership role would be fulfilled.
- Increasing revenues – Again, revenues may increase but much more likely to be driven by increases in volume of rights traded and by ability to set new tariffs for the new rights.

### Users

- Code of Conduct on its own would not necessarily provide greater redress. In order to do so it would require dispute resolution to a) be less expensive and b) more independent
- Fewer complaints- As above, relatively few complaints addressed to the CSs by users as a) its costly and b) see that it's futile as their bargaining position is so weak compared to the CSs
- Lower charges - There is zero evidence that this is a likely outcome from adopting a Code of Conduct as the ability to set and enforce tariffs remains largely untouched within Code of Conducts (least any that we have looked at)

Therefore a Code of Conduct could increase transparency and, in turn, strengthen confidence in the system. However, but there seems to be no real net economic gain or loss associated with this. This is because the underlying structural characteristics (tariff bargaining power of each agent, efficacy and cost of dispute/arbitrary procedures, the simple confusion for users produced by the profusion of CSs and the profusion of rights) remain untouched – and these are the factors that would actually drive changes in costs and benefits.

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# IPO

# Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
30<sup>th</sup> January 2012

## Introduction

This report presents some initial findings regarding the analysis of Collecting Societies Codes of Conduct. This progress reports looks at:

- the economics of Collecting Societies
- Code of Conduct in Australia
- Collecting Societies: EU developments.

## The economics of Collecting Societies

Collecting Societies (CSs) (also know as Collective Management Organisations, CMOs) are private firms in charge of administering statutory copyright law via Collective Right Management (CRM) (Towse and Handke, 2007). CSs licence, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage, their tariffs and distribution structures are not self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They function under different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, voluntary collective licensing with back-up in legislation).

Reproduction licensing (e.g. performing rights, mechanical rights) is traded in the UK under a combination of open market and monopoly structure. This 'voluntary collective licensing' allows organisations (businesses or Higher Education Institutions) to license for reproduction rights either with an individual owner (e.g. an author or visual artist) or a CS (e.g. UK Publishing Licensing Society).

This licensing model also operates in other countries with a common law tradition such as Canada, US and Australia. However, in the Australian case the 'voluntary collective licensing' model only applies to

businesses, since higher education institutions operate under a non-voluntary system with statutory licence fees established by law (IFFRO, 2009)<sup>1</sup>.

From an economic point of view CRM can minimize transaction costs for members (i.e. right holders) and users. They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright this transaction costs includes (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price
- monitoring and enforcement of rights ownership.

A study conducted by PwC, and commissioned by the Copyright Licensing Agency, estimates that the costs associated with the collective licensing method are £6.7 million for HE institutions, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions. This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her)<sup>2</sup>.

In addition to lower transaction costs copyright CRM also has economies of scale which creates grounds for the existence of 'natural monopolies'. Economies of scale arise when the cost of producing an additional unit of output (i.e., the *marginal cost*) of a good or service decreases as the scale of production increases.

In the case of CRM the fixed costs of setting up the management of a bundle of rights (e.g. performing rights or mechanical rights) are high. CSs have to build a database encompassing a comprehensive number of works and associate them to individual right holders or their agents. They have negotiated and established a price to be paid for the use of those rights. Additionally, CSs have to establish the mechanisms through which they will monitor the licence payments and redistribute the corresponding royalties. However, the additional cost of administering the copyrights of a work is relatively low. In that sense, the more rights a CS administer under a single license (i.e. more authors and even more forms of reproduction) the higher the benefit for users.

Handke and Towse (2008)<sup>3</sup> state that the benefits of CMOs are greater the (i) more numerous and costlier individual transactions would be in the absence of them and (ii) the quicker the average transaction cost falls when the number of copyrights is administered by the same organisation. The first instance is reflected in the figures calculated by PwC mentioned above.

## Regulating Collecting Societies

- Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged (Colston and Gallows, 2010). "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood". (Consumer Focus, 2011).
- The EU analyses CSs under competition law and tests for the abuse of dominant position. However, their idiosyncratic legal status and cultural role make competition analysis more complex. In the EU, CSs operate under a model of voluntary collective licensing with back-up in legislation.

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<sup>1</sup> IFFRO (2009) 'Overview of models of operation of RROs under national exceptions and limitations regarding educational activities'

<sup>2</sup> PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

<sup>3</sup> Handke, C. and Towse, R. (2008) 'Economics of copyright collecting societies'.

- UK seems to be more inclined to treat CSs as a regulated or supervised monopoly rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). A similar approach is followed in Australia which, similarly to the UK, operates under a model of voluntary licensing.

## Code of Conduct in Australia

### Background

- The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies, the *Australasian Performing Right Society*,<sup>4</sup> founded in 1926 to collect licence fees for the public performance of copyrighted music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works. In 2010, APRA<sup>5</sup> and CAL collected total income respectively of AUD 221.1 and 116.8 millions.
- In 1994, the Labour Government released the policy paper *Creative Nation: Commonwealth Cultural Policy*. The policy 'elaborated [the Government's] vision of a culture-led economic future in a globalised society'.<sup>6</sup> Insofar as it applied to copyright policy, the vision identified rights protection as critical to the 'culture-led economic future'.
- Possible conflict between government agencies advocating competition policy, and those committed to intellectual property rights protection began to emerge.
- The Government, however, focused on strengthening cultural industries. It recognised Collecting Societies as important to ensure remuneration to copyright owners, and commissioned a report by Shane Simpson<sup>7</sup> on the operations of the Societies in Australia.
- The Simpson Report, published in 1995, strongly endorsed in principle the function and purpose of the Societies, and dismissed anti-competition arguments on the grounds that, applying the test in the legislation, Societies did not take advantage of power in a market for the purposes of:
  - eliminating or damaging a competitor
  - preventing market entry
  - deterring or preventing competitive conduct in the market.
- Most significantly, in terms of governance, the report recommended the creation of the office of an Ombudsman for Collecting Societies, emphasising that the office that must be independent and not 'a creature' of the societies.
- In 1996, a Liberal coalition assumed the government of Australia, and the focus of copyright policy again changed. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.
- In 1997, the Government asked a joint committee of Parliament to investigate Collecting Societies' collection of royalties for the public performance of music by small businesses.

<sup>4</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia, and the United Kingdom music publishers Chappell & Co.

<sup>5</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>6</sup> Professor Jennifer Craik, *Revisioning Arts and Cultural Policy: Current Impasses and Future Directions*, monograph 2007, University of Canberra.

<sup>7</sup> Founder and Special Counsel of Simpsons Solicitors, member of the Executive Board of CAL 1999-2004.

- A representative of the interdepartmental committee (IDC)<sup>8</sup> established to review the recommendations of the Simpson Report advised that the IDC supported 'light touch self-regulation' by Collecting Societies. The IDC recommended a voluntary code of conduct for collecting societies.
- The parliamentary committee reported in 1998 ('Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business') making six recommendations, half of which concerned dispute resolution and governance.
- The report (without elaborating reasons) did not adopt the Simpson Report's recommendation that the Commonwealth government create the office of Copyright Ombudsman. Instead, it proposed that the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints.

### **Characteristics of the Code**

- In 2002, further to the recommendation of the Don't Stop the Music report, eight Australian collecting societies adopted a Code of Conduct for Copyright Collecting Societies<sup>9</sup>. The Code established minimum standards for disclosure and reporting by Collecting Societies to members and licensees.
- The Code requires Collecting Societies to ensure that they maintain distribution policies which state how entitlements are calculated and distributions determined, the method of payment to members, times of payment, and deductions.
- In dealing with members and licensees, Collecting Societies are required:
- Separately, Collecting Societies are to foster awareness among members, licensees and the public of their activities.
- Copies of the Code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about Collecting Societies' compliance with the Code. The Code provides for monitoring and review of compliance, and the necessity for amendments.
- In 2003, the Collecting Societies appointed The Hon James Burchett QC<sup>10</sup> to undertake the first review of the societies' compliance with the Code.
- Mr Burchett found that Collecting Societies observed the obligation to 'treat members fairly, honestly, impartially and courteously' and their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the Code.
- The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett, who remains Code reviewer, advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, and then publishes his report.
- Consistently, reports have stated general compliance with the Code.

### **Benefits and criticism**

- The primary benefit of the Code's introduction appears to be that it has caused collecting societies:
  - to try conscientiously to respond to requests from members and licensees
  - to better explain distribution policy

<sup>8</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>9</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGACS), Australian Screen Directors Authorship Collecting Society Limited (ASDACS).

<sup>10</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

- to explain and publicise their functions.
- In addition, societies have established or improved complaints and dispute resolution procedures.
- Criticism of the Code primarily can be divided into four categories:
  - *Omissions and weaknesses*: (1) it is voluntary, (2) does not prescribe minimum standards of conduct, (3) permits Collecting Societies to appoint the Code reviewer and (4) does not facilitate independent criticism<sup>11</sup>.
  - *Dispute-resolution*: most Code-related dispute resolution is initiated by complaints from members of Collecting Societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
  - *Behavioural effect*: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
  - *External factors*: the Code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

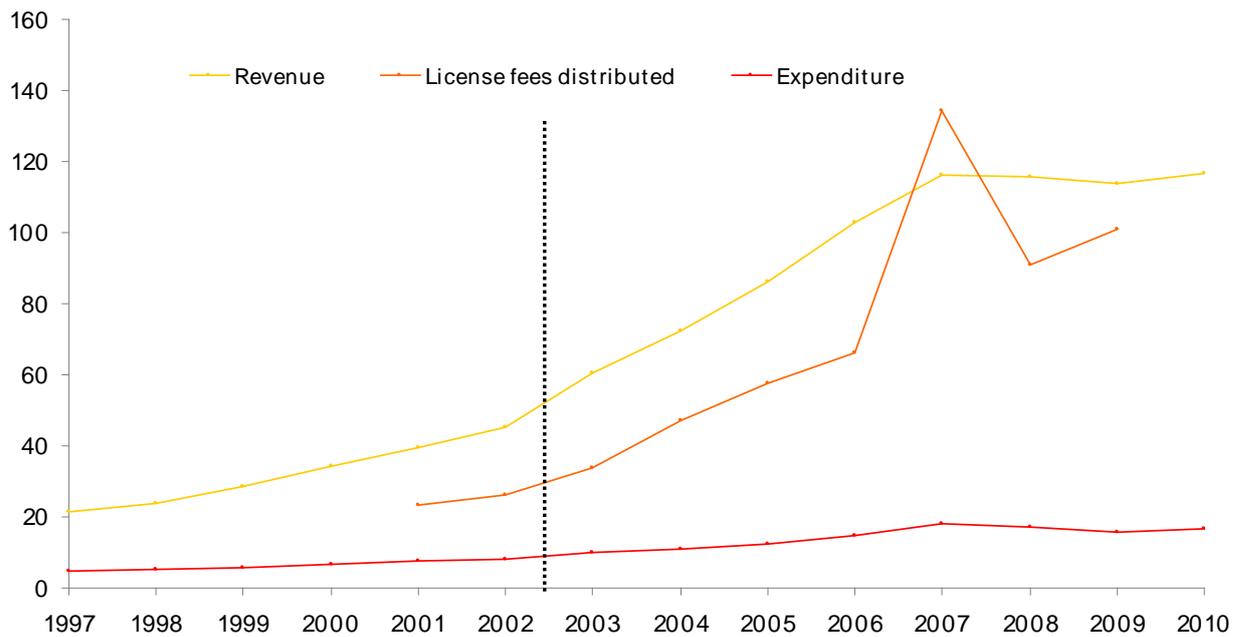
#### **Collecting Societies' performance since the introduction of the Code**

- There has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>12</sup>
- Expenditure has remained more or less stable (it will probably look even more stable once we account for inflation).
- The orange line shows the total amount of money distributed among member and non members ('license fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. This was 'intended to reduce the overall Trust Fund balance'.

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<sup>11</sup> This 'omissions and weaknesses' have been also identified by the NSW Department of Education and Training which in the document *Guide to Copyright Licensing and Collecting Societies (2007)* provides perhaps the most cogent summary of the deficiencies of the Code.  
<sup>12</sup> The figures are shown in Australian dollars (AUD), and have not been deflated yet.

Figure 1 CAL: Revenue, expenditure and license fees (in AUD millions)



## Collecting Societies: EU developments

As mentioned above, CSs exist to maximise revenues to licensors, to minimise the costs to licensees, and to reduce transaction costs. However, their idiosyncratic legal status, their cultural role, their monopolistic position in their own territory, and the complexity of their licensing processes, continue to raise questions at EU level about governance, fairness, and fair competition.

The EU treats intellectual property as an Internal Market matter but the Competition and Information Society directorates are increasingly involved. The Commission sees CSs' role in online licensing as a factor in the 'information society'.

Today, four EC directorates are involved in policy-making on CSs:

1. Internal market (DG Market)
2. Industry, innovation and creative industries (DG Information Society and Media)
3. Culture (DG Education and Culture)
4. Competition (DG Competition)

In the absence of an EU mandate for legislative action, documents tend to mention the topics that a Code of Conduct might include rather than work out the details. The main elements are mentioned in those documents are:

1. The legal form
2. Government or regulatory approval to operate
3. Governance, management and remuneration
4. Accountability (to whom, what, how often) and enforcement

5. Non-discrimination (the 'most favoured nation' principle)
6. Transparency
7. Membership qualifications
8. Membership contracts (tariffs, fees)
9. Unspent monies
10. Dispute resolution
11. Donations to Industry or cultural organisations

Germany passed the world's first law specifically on collecting societies and has the world's most comprehensive regulations. CSs are state-sanctioned monopolies and subject to prior federal authorisation. According to Gervais (2010) 'Germany has the most comprehensive legal framework on collecting societies in the world'.

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## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
May, 2012

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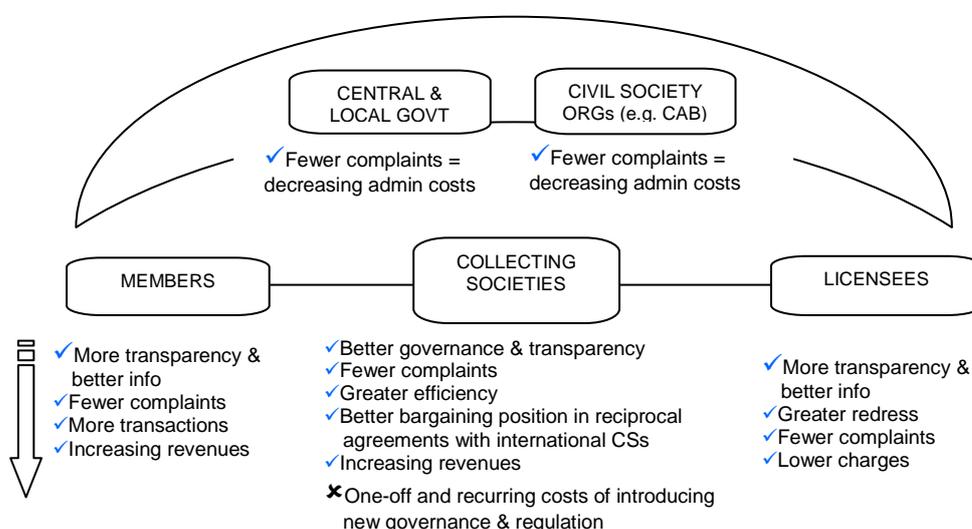
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# 1. Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in Figure 1.

Figure 1 Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

But the Impact Assessment also proceeds to hypothesise that charges to licensees could fall as collecting societies (due to greater transparency and scrutiny) provide licensees with better information for negotiating and contracting; and that revenues could also ultimately increase for members and the collecting societies under the new codes of conduct as members and licensees would (effectively) find it easier to do business with the collecting societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing codes of conduct will fall on the collecting societies themselves.

<sup>1</sup> Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

The report interrogates the plausibility and extent of these hypothetical assumptions<sup>2</sup> through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has suggested be adopted by collecting societies. The report analyses whether the Australian code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of collecting societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of collecting societies.

### Definitions: Types of rights

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO<sup>4</sup> provides an explanation of the rights entailed by that exclusivity. They can be classified as follows:

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of their works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. It also includes the mechanical reproduction rights in musical works.
2. **Rights of public performance, broadcasting and communication to the public** –
  - Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present."<sup>5</sup> Public performance also includes performance by means of recordings. Musical works can be said to have been "publicly performed" when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.
  - The right of "broadcasting" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite.

<sup>2</sup> The exception here is that area of complaints to central and local government and civil society organisations was deemed out of scope of the present research at inception.

<sup>3</sup> The views of some collecting societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific collecting society, as their representative body.

<sup>4</sup> WIPO (undated) 'Basic Notions of Copyright and Related Rights', available at: [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf)

<sup>5</sup> WIPO (undated) 'Understanding Copyright and Related Rights', available at: [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html)

When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.

- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

**3. Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

**4. Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. In the UK, though, moral rights can be waived but cannot be transferred.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organisation was established, also in France, to manage rights in the field of music. It is estimated that similar organisations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting societies - also known as collective management organisations (CMOs), or as Reproduction Rights Organisations, RROs, in the case of reproduction rights - are private firms in charge of administering statutory copyright law via collective rights management (CRM) (Towse and Handke, 2007). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They tend to operate different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimise transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price

- monitoring and enforcement of rights ownership.

Collecting societies also enter into international agreements with 'sister' collecting societies in other countries to enable access to an international repertoire not included among its international membership. These are known as reciprocal agreements.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>6</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licences. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Towse, 2007)

It is worth point out that collecting societies are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. CLA for reprographics rights). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up having to clear the rights in a piece of work with many different collecting societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between collecting societies and users, even more so if collecting societies do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one CMO that administers their particular category of rights. "This monopolistic structure leaves copyright collecting societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 authors' societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection came from public performance rights (€5.5 billion). Additionally, music is, by far, the sector that generates the highest amount of royalties for the authors' collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Figure 2).

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<sup>6</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

**Figure 2: Collection through Authors' collecting societies (2010)**

Sector	Amount (€million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

Source: CISAC, 2012

## 1.2 Models of collective management

There are different systems for the collective management of rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the four models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging – given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between collecting societies and their members and users.

**Figure 3: Different models for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to do so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>

3. Extended collective licence	An extended collective licence extends the effects of a copyright licence to also cover non-represented rights holders who have to opt out rather than opt in.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
4. Legal licence		
a. Non-voluntary system with a legal licence ("statutory licence")	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, <b>Australia</b> (educational statutory licence)
b. Private copying exemption with a levy system for fair compensation for use	The licence to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO<sup>7</sup> adapted by the UK Intellectual Property Office

Collecting societies in the UK operate voluntary collective licensing with no regulation of collecting society functions; price is effectively regulated by the Copyright Tribunal. In turn, Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between collecting societies and users in Australia arise from the statutory licence.

### 1.3 Collecting societies' incentives and governance

In addition to (and as a consequence of) the different legal systems, collecting societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non-profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private membership associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, the main goal of collecting societies is to look after the interest of their members. Consequently, in most cases their incentives are understandably aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic collecting society. However, strong internal governance could help ameliorate this potential negative effect. Collecting societies are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance tends to be subject to close

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<sup>7</sup> WIPO / International Federation of Reproduction Rights Organisations (IFRRO) classification available at: [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

scrutiny by right holders. Furthermore, the possibility for the existence of so-called managerial rents (rents appropriated by the ‘agent’ who withholds more information than the ‘principal’) can be analysed by looking at collecting societies’ financial results (e.g. the total amount collected from content users over administration costs).

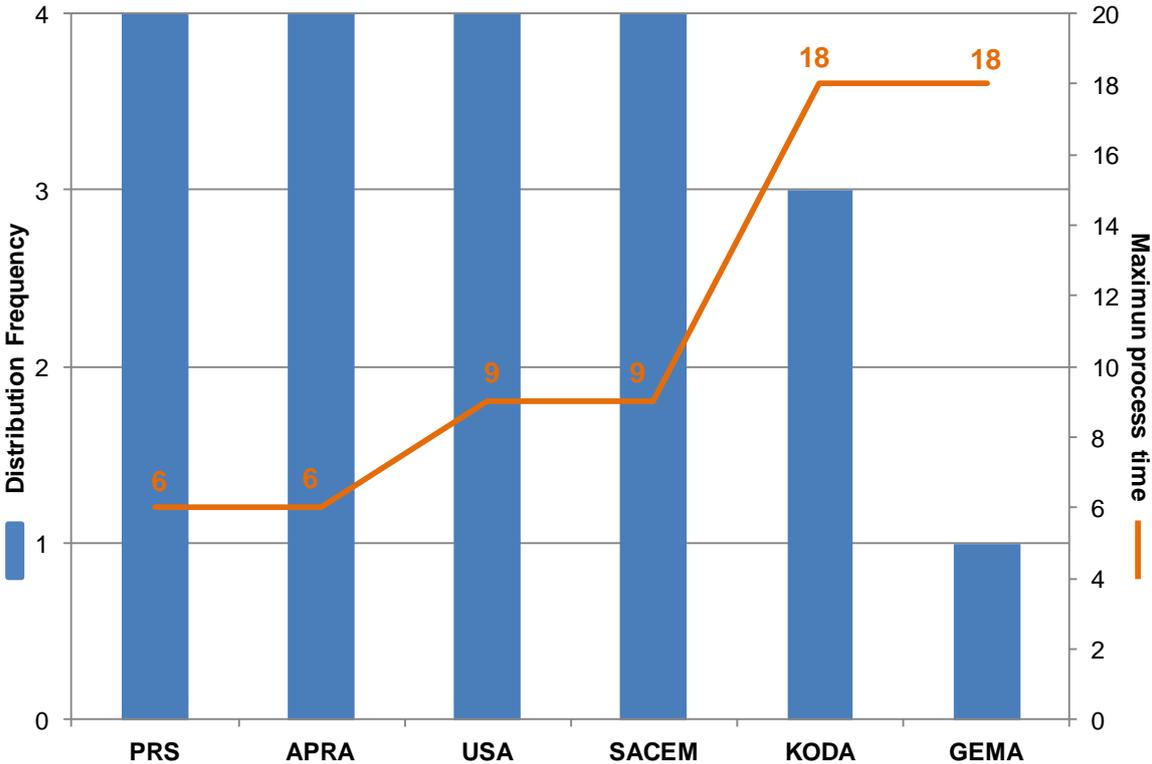
Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed collecting societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a collecting society with a large number of members that holds a lot of market power and which plays a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Right Society, *PRS for Music*) – could minimise agency problems.

These findings seem to be reflected in other indicators of efficiency. Figure 4 below shows the (i) frequency of royalties’ distribution and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence for the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

However, as Rochelandet indicates, if the internal governance mechanism fails then there is room to strengthen government legal supervision. If this weakness exists, one of the most common complaints among members is the speed and transparency with which collecting societies redistribute to right holders their corresponding royalties.

An extreme case of poor management in the absence of legislation can be found in Spain where a collecting society was accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

**Figure 4: International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies**



Source: CISAC, PRS for Music (2012)

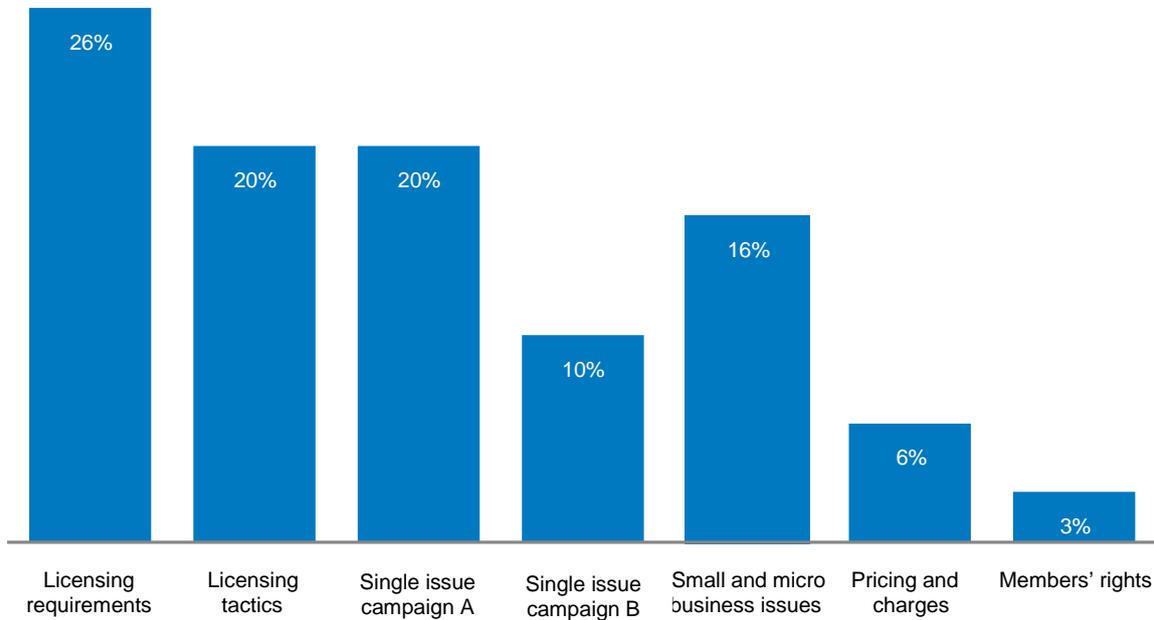
On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor a collecting society’s performance. In most cases, licensees do not have recourse to an independent appeal mechanism, such as an ombudsman, if they feel that their complaint has not been satisfactorily resolved via the internal complaints procedure of a collecting society.

In the UK the frictions between collecting societies and users is reflected in the complaints received in the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints about collecting societies, covering 118 issues in total.<sup>8</sup> Figure 5 shows the breakdown of those issues, compiled and published by the IPO. The most common issue (aggregated under the heading ‘licensing requirements’) encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the ‘heavy handed and aggressive licensing tactics’ used by collecting societies (BIS, Impact Assessment, 2011). The ‘Small and micro businesses’ issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

<sup>8</sup> Of course, this is only one means by which complaints are made about collecting societies – others could include complaints made to trade associations, to local government bodies such as Trading Standards, or to the collecting societies themselves

Complaints from members only account for 3% of the total issues covered in the complaints Minister for Intellectual Property, which could reflect two factors (i) that members tend not to complain or (ii) that their complaints are satisfactorily dealt with within the existing system (e.g. collecting societies' in-house complaint resolution process).

**Figure 5: Breakdown of complaints received by Ministers via MPs.**



Source: IPO (2012)

Even though there is evidence on the usually strained relationship between collecting societies and users, there is very limited literature on the efficiency of the relationship between them. Section 2 explains the problems that have arisen in Australia between users and the collecting society in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between the two agents involved in the transaction.

## 2. Code of conduct in Australia

There are ten collecting societies in Australia (see Figure 6). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Figure 6: Collecting societies in Australia**

Collecting society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

Source: BOP Consulting (2012)

## 2.1 Regulatory background

This section explains the legal context and regulatory developments that have taken place in Australia before the introduction of a voluntary code of conduct. It describes two specific mechanisms within the regulatory system (i.e. the Copyright Tribunal and the Statutory Licence), as well as the government attitude and policies towards intervening with or regulating collecting societies.

### APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies: the *Australasian Performing Right Society*,<sup>9,10</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>11</sup>

### Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>12</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as business, the system remained voluntary.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third collecting society, the Phonographic Performance Company of Australia Limited<sup>13</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>14</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>15</sup> CAL has

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<sup>9</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>10</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>11</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to the discovery of any detail of the company's trading.

<sup>12</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended the establishment of a copyright tribunal.

<sup>13</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>14</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>15</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase of collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles<sup>16</sup>.

By, in effect, endorsing the purpose and practices of Australian collecting societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the societies. However, in the period of growth that began in the 1980s, collecting societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward have shaped attitudes to collecting societies in Australia.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though this has not led to any substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some collecting societies, has also caused considerable resentment. Copyrights, such as the public performing right and reproduction rights, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them. This is, for example, the experience of the main educational organisations in Australia (see below).

They allege oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by collecting societies. The double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continues to characterise Tribunal proceedings.

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<sup>16</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

## Statutory licence

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that – by law – schools and university libraries have the right to copy, as long as the 'rights holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the collecting society in charge of collecting the statutory licence.

The school sector is a major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to collecting societies in Australia, only surpassed by the retail sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If this is the case, either party can request the Copyright Tribunal to determine the rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for these organisations (see Section 2.4.2 below, point 2).

It is worth pointing out that the UK Copyright Tribunal also arbitrates on the terms and conditions of a licence when the two sides cannot reach agreement themselves. However – and in stark contrast with Australia – only users and not collecting societies can take matters to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

## Government attitudes to collective administration

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay).

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>17</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to collecting societies by the competition law.<sup>18</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>19</sup>

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<sup>17</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>18</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>19</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

## **Don't Stop the Music report – genesis of the collecting societies' code of conduct**

In 1996 a Liberal coalition administration assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>20</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

In 1997, the Government asked a joint Committee of Parliament to investigate collecting societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>21</sup> for the creation of the office of Copyright Ombudsman, and most supported the establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>22</sup> advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998<sup>23</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by collecting societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for collecting societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

## **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC

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<sup>20</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

<sup>21</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>22</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>23</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and collecting societies (and received 20 submissions, as discussed below). However, six years on the ACCC is yet to release a final version of the 2006 draft guide.

## 2.2 Characteristics of the code

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.<sup>24</sup> The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide information about payment entitlements to members on request
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The code requires collecting societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, collecting societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, collecting societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about collecting societies' compliance with the code. The code provides for the monitoring and review of compliance, and for amendments.

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<sup>24</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PCCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAcollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

## Enforcement and review of the code

In 2003, the collecting societies appointed The Hon James Burchett QC<sup>25</sup> to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the code Reviewer – advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and summarising all complaints/disputes, and assessing how societies have handled them. The reports have consistently found general compliance with the code.

## 2.3 Collecting society performance before and after the code

In compliance with the code of Conduct the Copyright Agency Limited (CAL) publishes an Annual Report every year with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 7, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>26</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could go towards explaining the tensions between the school sector (its biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEED), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEED) was created in the first place.

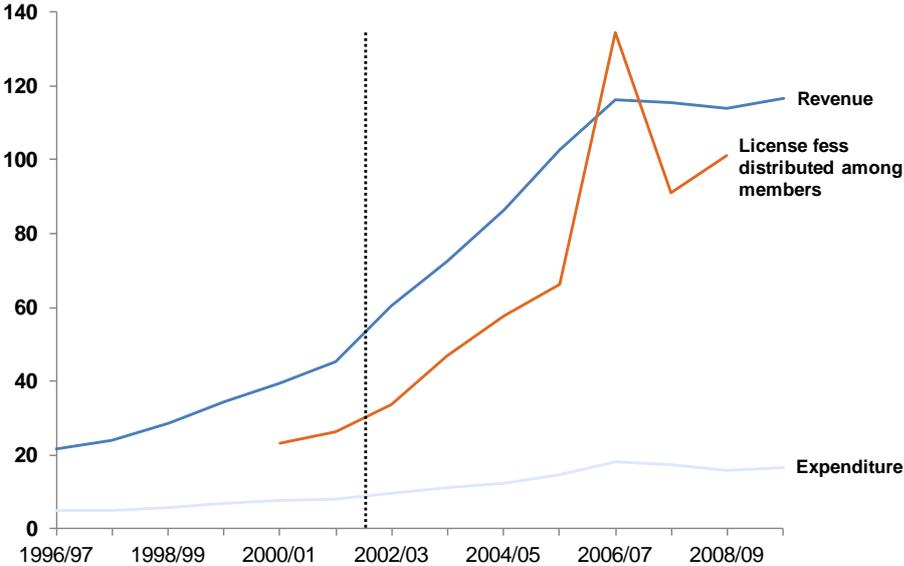
Figure 7 also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

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<sup>25</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

<sup>26</sup> The figures are shown in Australian dollars (AUD), and have not been deflated.

**Figure 7: CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions)**

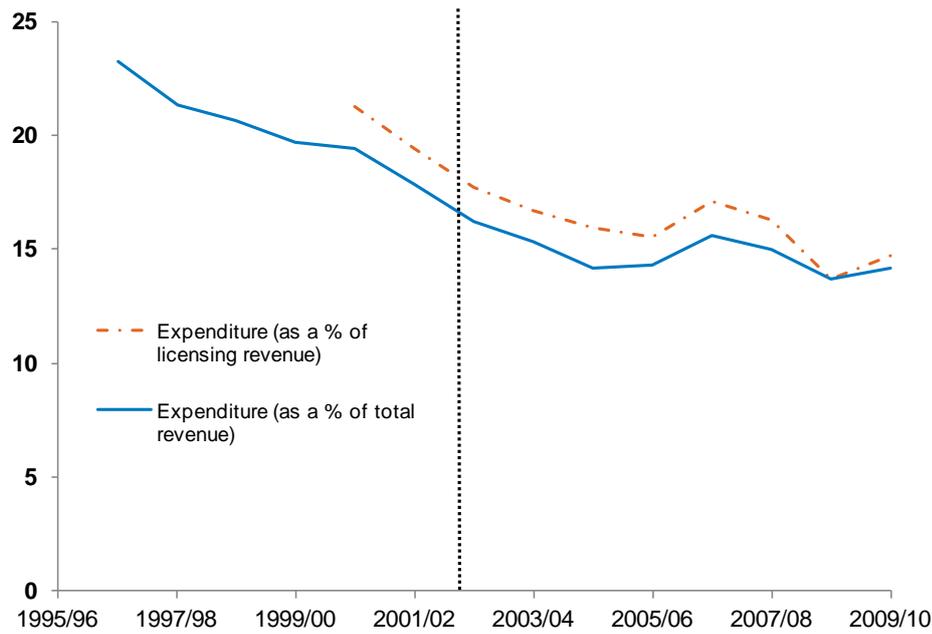


Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 8). This downward trend can be observed before the implementation of the code of conduct.

After 2005, the ratio of expenditure over revenue has shown a less clear path. Another measure of productivity is given by net income (defined as revenue minus expenditure) per employee. Figure 9 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

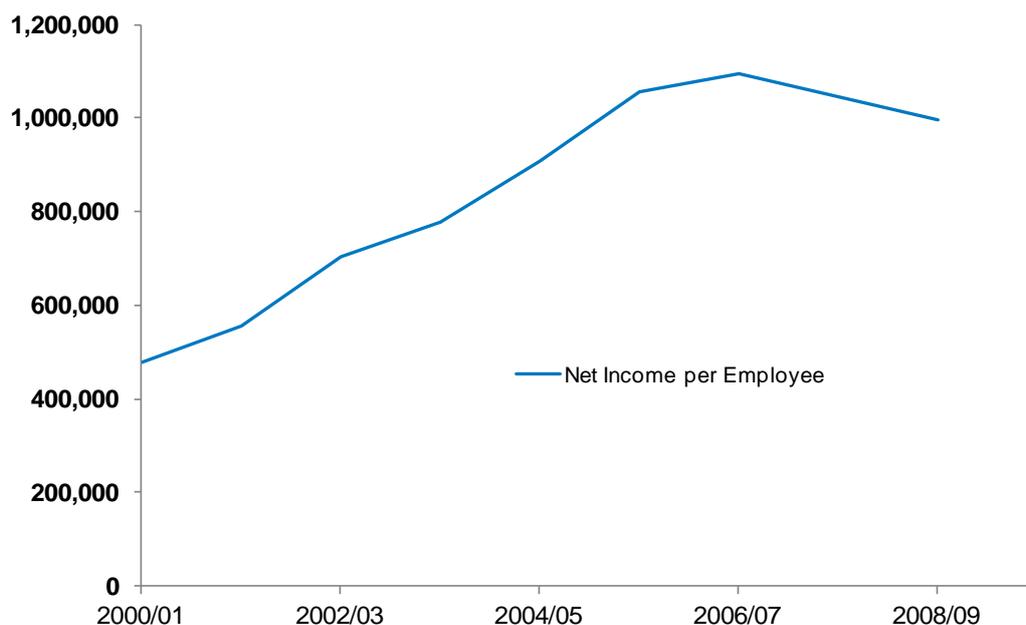
**Figure 8: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)**



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

More informative measures of efficiency would be the collected and distributable sums analysed per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 9: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

At first glance, the generally rising trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (a rise of 500% in 10 years), in a sector that accounts for around 48% of CAL's total revenue.

In particular, the large increase in CAL revenue from the schools sector stems from a decision made by the Copyright Tribunal in 2002 (plus related back payments to 1999). The 2002 Tribunal decision determined that differential rates were payable for copying of general works, artistic works, plays, short stories, poems, overhead transparencies, slides and permanent display copies, as follows:

- 4 cents for general works
- 6 cents for short stories and plays
- 8 cents for artistic works and poems
- 40 cents for overhead transparencies/slides.

The new differential rates led to a very large increase in Part VB licence fees paid by Schools and the rate has increased each year with CPI. Previously Schools had paid CAL a flat rate of \$2.442 per primary student and \$3.342 per secondary student.

The second major change made by CAL relates to digital copying. In 2002, the Tribunal declined to fix a rate for digital copying as there was insufficient evidence for it to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to appropriate digital copying rate, the schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment of electronic payment in schools. The schools also said that they would voluntarily pay CAL 85 cents per FTE student for 2005 and 85 cents per FTE student plus CPI in

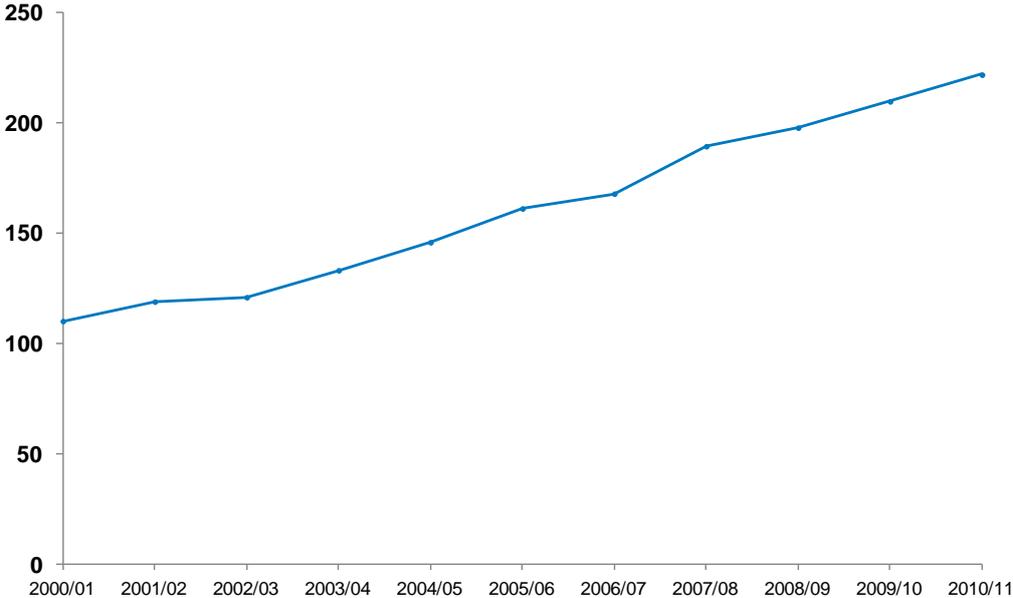
subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by Schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

In 2005, CAL duly commenced proceedings in the Copyright Tribunal for a higher electronic use rate and other matters in relation to an Electronic Use Scheme survey in Schools, but the proceedings in relation to rates go to a hearing. In 2009, a single rate for both hard and digital copying was agreed by negotiation between the schools and CAL for 2010-2012 of 16 dollars per FTE student plus CPI in the subsequent years; this settled the Copyright Tribunal litigation instigated by CAL in 2005 in relation to a rate for electronic use. The agreement is due to expire 30 December 2012 and negotiations are about to re-commence.

**APRA**

There is less information available about APRA, the Australian music collecting society. Therefore, it is only possible to build a time series for their revenue (total amount of licence fees collected from their users) (see Figure 10). Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA’s revenue increased by 90%. In contrast, CAL’s revenue increased by 195% over the same period. This provides further evidence that the CAL’s financial results are largely due to the constant increases in tariffs over the period.

**Figure 10: APRA: Revenue 2000-2010 (AUD millions)**



Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)

**2.4 Benefits and criticisms**

Ten years into the code, it is possible to identify some benefits but mostly criticisms of the Australian code of conduct. As it has already been established in the preceding section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition, this trend

has co-existed with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

This section looks into other benefits and criticisms of the code in terms of the service provided to both members and users.

### 2.4.1 Benefits

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

### 2.4.2 Criticisms

Criticism of the code can be divided into four main categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores any effect that the code has had on behavioural change of the collecting societies. The final one explains a number of structural factors that are external to the code and that may have the effect of rendering the code nugatory.

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and collecting societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.<sup>27</sup>

The department's submission stated four specific shortcomings. The code:

- is voluntary
- prescribes but does not enforce minimum standards of conduct
- permits collecting societies to appoint the code reviewer
- does not facilitate independent criticism: licensees who supply comments to the code reviewer are usually 'in relationships' with collecting societies.

The submission also stated dissatisfaction with the way in which, during the code review process, the code reviewer dealt with concerns raised about the conduct of certain collecting societies. During negotiation of licence fees, one particular society, CAL, proved unco-operative in supplying financial and historical data necessary for judging equitable remuneration and a number of collecting societies were unwilling to engage in Alternate Dispute Resolution (ADR) – even though the code

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<sup>27</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

provides for ADR. Collecting societies – according to the NSW submission – would only engage instead in mediation with individuals and not a collective, such as a ministerial copyright taskforce.<sup>28</sup>

Independently of the submission, a number of criticisms can be added. The code does not establish a standard stating that collecting societies should publish (or make available on request) summary and detailed information about distributions and patterns of distributions. The lack of information in this regard makes it difficult to ascertain the extent to which collecting societies benefit those they claim to benefit.

Additionally, the efficacy of the code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as mentioned above, focuses on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL itself mediated 15 matters – but equally noticeably, most concerned complaints made by members not licensees.

It is unlikely that the dissatisfaction with various collecting societies, particularly the largest societies such as APRA-AMCOS and CAL, expressed over the course of 30 years, has vanished. Hence, as the following issues related to Dispute Resolution below illustrate, it is not possible to assert that the lack of complaints from licensees actually reflects the fact that the code has encouraged licensees to resolve issues with collecting societies.

## 2. Dispute resolution

Most code-related dispute resolution is initiated by complaints from members of collecting societies, not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding groups of organisations (e.g. schools) or representative bodies/trade associations.

Ideally, the code would have set a requirement for an independent copyright ombudsman, as was previously recommended in 1995, to act as a fallback in the dispute resolution process. In lieu of an ombudsman, the Copyright Tribunal exists to arbitrate in disputes between collecting societies and users of copyright material. However, the Tribunal has major limitations. Firstly, the Tribunal only adjudicates on issues related to tariffs. Secondly, the procedure is perceived as lengthy and costly, which largely prevents users from initiating a case in the Tribunal. In some cases, the collecting society takes a case to the tribunal, when an agreement is not reached regarding the terms of a tariff or the conditions of the licence (see the example above in section 2.3 related to digital copying).

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it cost them AUD 2million. She claims that the “costs and delays of the Tribunal effectively bar most licensees, and this limits its utility as a forum. Licensees have no other option but to reach agreement with the collecting society and pay a higher price for licence fees than what the Copyright Tribunal may have determined”. This suggests that it is very questionable as to whether the code has ensured that collecting societies have set ‘fair and reasonable’ licence fees (which is one of the requirements of the code).

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<sup>28</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

### **3. Behavioural effect**

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information about a number of activities of collecting societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of the minimal behavioural effect of the code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely available digital content in schools. According to her, it is estimated that schools pay between AUD 8 - 10 million per year (£5 - £7 million) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### **4. External structural factors**

As discussed, the background to the consideration of the 'in principle' merits of the code – and the extent to which it is implemented – is the nexus of legislation and Tribunal, and the constraint that this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the code.

Even licensees willing to interrogate assertively the practices of collecting societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of collecting societies agreeing to mediation of disputes.

Viewed from this perspective, the code helps to regularise the reporting and information practices of collecting societies, but has done nothing to reduce the distrust between them and licensees, nor to lessen the disparity in bargaining power.

## 3. EU developments regarding collecting societies

### 3.1 Overview

European collecting societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in:

- legal status and organisation, ranging from private non-profit organisations (as in the UK) to bodies subject to direct government control (France, Germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European collecting societies in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervisory framework under which collecting societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of collecting societies in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a code of conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU's

competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004, the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM(2004) 261). It was not specifically concerned with the legal status of collecting societies which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific collecting society operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on collecting societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the collecting society of their choice – which in turn implies they can make judgements about each collecting society's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services'* (SEC (2005) 1254. This laid out three options:

1. do nothing
2. allow wider reciprocal agreements; and
3. allow rights-holders to appoint an EU-wide collecting society (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given collecting societies' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a code of conduct, setting out each collecting society's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collecting societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on collecting societies' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. Based on a public consultation that took place in 2008, the document identifies some possible actions in order to reach a 'competitive Digital Market'. In terms of the protection of rightholders, the document includes as possible options (i) extended collective licensing, (ii) creating financial incentives for online multi-territory offers and (iii) extending the scope of the Satellite and Cable Directive to online delivery as possible options.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many collecting societies gave their views on the need for reform and codes of conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The European Parliament was also less enthusiastic, emphasising collecting societies' contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music. The framework, expected in June 2012, is expected to introduce harmonised standards of governance and transparency for collecting societies.

### **Main themes included in different Directorates' publications**

As the prior section shows, there is not a single body of rules and regulations under which collecting societies operate in the EU. It is, however, possible to identify recurring themes across the different documents that deal with collective management. These are:

#### *Governance and administration*

- Extent of external oversight by statute or bodies such as regulatory bodies
- Transparency, especially of collecting societies' revenues and costs, notably deductions to third parties (not right holders), and net distributions
- Exclusivity. Historically, collecting societies have had the exclusive right to license national and international repertoire to users located in their territory. However, the Commission is challenging this territorial exclusivity insofar as it prevents the creation of a single market (e.g. a pan-European one-stop licensing operation).
- Dispute settlement

#### *Members*

- Flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.

- Service level agreements
- Member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
- Treatment of national and global repertoire. Traditionally, collecting societies use reciprocal agreements to get access to foreign repertoire. However, attempts by collecting societies to protect their own national repertoire could lead to the avoidance of reciprocal agreements that might threaten that protection – seeing these as effectively a competitive threat. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.
- Distribution of royalties to right holders in other countries
- Ability of a right-holder to negotiate their own tariffs

#### *Users*

- Access to information about licences
- Fairness and equal treatment of users by collecting societies
- Education. This includes educating trade users about the need for collective licensing and the role of collecting societies under this system.

## 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and other countries where regulation has been looser. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium and the Nordic countries seem to score well.

### **France**

The Intellectual Property Code states that collecting societies must be established as civil law societies ('société civile') of which right holders are members ('associés'). Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the 'Tribunal de Grande Instance' in the event of substantial concerns. The Ministry's approval is necessary if a collecting society collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) has acted as a permanent committee in charge of supervising the collecting societies. This committee is composed of senior civil servants and operates under the Cour des Comptes (Court of Auditors). Once every two years the CPC publishes a detailed report on all 24 collecting societies that assesses their financial results, activity and redistribution strategies.

Collecting societies' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a collecting society was fulfilling a legal mandate, such as the private copying levy or the right of remuneration for cable re-transmission, but that they should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of collecting societies now see the CPC as a useful way of legitimising their activities to members and users as well as to the public.

For instance, SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. They have described the CPC review as a useful 'free' audit. However, others continue to be opposed to the CPC's intervention in what they see as the affairs of a private company (e.g. SACEM criticised the publication of the salaries of its management by the CPC).

## Germany

Germany passed the world's first law specifically on collecting societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says that the government regulates collecting societies to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a collecting society is said to be collective management for the benefit of rights holders. The German Patent and Trademark Office (DPMA) has the power to refuse any application to operate a collecting society if: (i) the statutes of the collecting society do not comply with the provisions of the UrhWahrnG; (ii) there is a reason to believe that a person entitled by law or the statutes to represent the collecting society does not possess the trustworthiness needed for the exercise of his activity, or (iii) it is unlikely, in view of the collecting societies' business structure, that the rights and claims entrusted to it will be effectively administered. DPMA also has the power to revoke the authorisation granted to a collecting society for the performing of its operations.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a collecting society has to grant licences to all users according to the same published tariff and cannot refuse a licence. Collecting societies must notify the DPMA of any change to its statutes, management, tariffs, contracts or agreements with foreign collecting societies, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees. Finally, the UrhWahrn also states that collecting societies should provide welfare institutions for their members, such as pension funds (KEA, 2006)

DPMA operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (i.e. Germany and the UK, though the remit of the Tribunal in the UK is strictly limited to disputes related to the price/terms and conditions of the licence). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais (2010) 'Germany has the most comprehensive legal framework of collecting societies in the world'. Despite this, it is difficult to find useful evaluations of whether the system has achieved its stated aims. For instance, Figure 4 in Section 1.3 above shows that GEMA makes the fewest distributions a year and also takes the longest maximum time to process royalties in comparison with music collecting societies in the UK and Australia.

Similarly, the fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972 (some six years after the LACNR was established) – related to abusing its dominant position by imposing unreasonable membership terms – suggests that the system does not necessarily prevent collecting societies from abusing their monopoly position.

### **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to right holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million of undistributed revenues. The case is pending and there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as aggressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of its income to social causes such as pensions. In Spain, collecting societies are obliged to provide 20% of the remuneration for private copying for welfare activities and services for the benefit of their members – they must do this either themselves or through non-profit-making entities (KEA, 2006)

The Spanish Competition Commission has ruled against Spanish collecting societies' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two collecting society governance issues in recent years. The first is an example of a lack of professional management in a small collecting society. In 1994, when the government introduced a neighbouring right, an authors' union set up a new collecting society, URADEX, which faced problems with managing its database and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second issue are the challenges faced by SABAM, by far the country's largest collecting society. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being in February 2012, but the case continues.

Belgium's collecting societies have also faced complaints from users such as bars and other small businesses in which public performance takes place. Its collecting societies work closely with trade associations to address public concern and, where possible, collaborate, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate collecting societies. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. Collecting societies pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical voluntary code of conduct.

Figure 9 summarises the regulatory initiatives in the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

**Figure 9: Collecting societies Legal Framework in the EU**

Country	Legal status	Establishment and supervision	Operations and accountability	Dispute resolution	Social and Cultural function
France	Collecting societies must be established as civil law societies of which right holders are members. The law is not specific about the monopoly status	Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture. Authorisation is needed just for compulsory rights (i.e. reprography and cable retransmission). The Minister of Culture and the CPC supervises collecting societies' operations and has the power to revoke their licence to operate.	The CPC produces a bi-annual report assessing collecting societies' financial results, activity and re-distribution strategies. Royalty redistribution schemes are established by law in the case of private copying, and music public performance and broadcasting.	Mediation procedures for cable re-transmission rights. CPS mediates remuneration for broadcasting and public performance in case of disagreement.	50% of undistributed sums and 25% of the sums collected from private copy must be used for cultural purposes.
Germany	The law is not specific about the legal or monopoly status of collecting society.	Collecting societies need an administrative authorisation for starting their operations. Supervision is by the DPMA, which has the power to revoke a collecting society's authorisation to operate.	Collecting societies have to be open to all right holders and must license to all users without discrimination. Re-distribution rules have to be established in their statutes.	DPMA operates an arbitration board in case of disputes	Collecting societies should provide welfare contributions for their members, such as pension funds
Spain	Collecting societies must be non-profit organisations. Competition between collecting societies that manage the same rights is possible	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Culture, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (ad hoc body)	20% of the remuneration for private copying has to be allocated to welfare activities and services for members.
Belgium	Collecting societies can be commercial organisations or any other type of legal entities.	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Economy, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (neutral mediator)	30% of the private copying royalties may be allocated to promote new works

Source: KEA (2006), BOP Consulting (2012)

## 4. A code of conduct for the UK

### 4.1 Moves towards a code

In recent years, there has been increasing support from collecting societies and their members and users in the UK that a code of conduct is needed. For instance, this was confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012<sup>29</sup>. At this meeting, representatives of ten collecting societies expressed that:

- they are willing to support a voluntary code of conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, *PRS for Music* published a Code of Practice, the characteristics of which made it closer to a service level agreement – insofar as it delineated the level of service that should be expected from *PRS for Music*. This set of standards seems to have been part of the change in cultural and organisational characteristics that has taken place within the organisation over previous years, but it has arguably also resulted from political pressure and media attention resulting from the level of complaints before its adoption. Similarly, in January 2012, PPL also chose to publish a first code of conduct similar to the guidelines published by *PRS for Music*.

In 2011 the British Copyright Council (BCC) published a set of principles for its collecting society members which includes 10 out of the approximately 15 collecting societies that operate in the UK. These include *PRS for Music*, PPL, CLA, PLS, ALCS, Directors UK and BECS, among others.

The set of principles contain minimum standards that can be used by BCC members to develop their individual codes of conduct. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed principles; in-principle agreement was established at the Codes of Conduct Ministerial Roundtable held in March 2012.<sup>30</sup>

The intention is that these minimum standards would be adopted and implemented by all of the BCC's members by November 2012. At this point, the BCC will conduct an internal review to assess the success of the implementation and any need for change.

Finally, in December 2011 the UK government started a consultation process on proposals to change the UK's copyright system (closed at the end of March 2012), based on recommendations contained in the Hargreaves Review of Intellectual Property and Growth. As part of the consultation, the UK government is discussing proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. The government has consulted on a proposal for codes which contain minimum standards of fairness, transparency and good governance that have been set by the government. The content of the code has been mainly informed by the Australian code of conduct.

The consultation requested views on these proposed minimum standards, the scope of the code, implementation timescale, as well as initial views on potential penalties for non compliance in the case that back-stop legislation is introduced to enable the imposition of statutory codes if required. With this initiative, the UK government is attempting to lead the debate on the standards that should be expected from collecting societies. A UK code could then serve as a model to be used in the EU, for instance.

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<sup>29</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

<sup>30</sup> Minutes available at: <http://www.ipo.gov.uk/hargreaves-cce-20120307.pdf>

Figure 10 shows the three different initiatives implemented by *PRS for Music*, PPL and the BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

**Figure 10: Codes of conduct in the UK**

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
General Description	Voluntary Code of Practice, first published in 2009	Voluntary code of conduct Available since 1 January 2012	<ul style="list-style-type: none"> <li>- Good Practice Principles, published in 2011.</li> <li>- Provides collecting societies with a baseline to be used to write their own voluntary code of conducts.</li> <li>- Suggested themes:                             <ul style="list-style-type: none"> <li>• transparency</li> <li>• accountability and consultation</li> <li>• service levels and operational issues</li> <li>• data protection</li> <li>• queries, complaints and dispute resolution</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies to adopt codes based on minimum standards that cover:                             <ul style="list-style-type: none"> <li>• obligations to right holders</li> <li>• obligations to licensees</li> <li>• control of the conduct of employees and agents</li> <li>• information and transparency</li> <li>• complaint handling</li> <li>• ombudsman</li> <li>• review of code</li> </ul> </li> <li>- Based on the Australian code and subject to public consultation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>- Code of conduct, launched in 2002.</li> <li>- Objectives:                             <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in collecting society</li> <li>• set out the standards of service</li> <li>• ensure that members and licensees have access to efficient, fair and low cost procedures for handling of complaints and dispute resolution.</li> </ul> </li> </ul>
Accountability and transparency	It states that <i>PRS for Music</i> processes are clear and transparent, but does not specify how that will achieve this.	<ul style="list-style-type: none"> <li>- Sets up standards of service: e.g.                             <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide members and licensees with accurate information</li> </ul> </li> <li>- Promises to act promptly, fairly and consistently.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency</li> <li>- Accountability and consultation</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should deal with members and licensees transparently.</li> <li>- Inform member, licensees, and potential licensees of scope of repertoire and reciprocal representation.</li> <li>- Make available clear distribution policy</li> <li>- It also set standards for reporting (including members, distribution policy, revenue, cost, allocation and distribution, and report regarding compliance with its code).</li> </ul>	<ul style="list-style-type: none"> <li>- States that collecting societies will maintain, and make available to members on request, a distribution Policy that sets out from time to time.</li> <li>- Also states that collecting society will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the collecting society of expenses and other amounts.</li> <li>- It also set standards for reporting.</li> </ul>
Education, training and awareness				<ul style="list-style-type: none"> <li>Collecting societies should give an undertaking that:                             <ul style="list-style-type: none"> <li>- Staff will receive training so</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Collecting societies are expected to take 'reasonable steps' to ensure that its</li> </ul>

UK

Area	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	Australia
				employees, agents and representatives refrain from using 'high pressure selling techniques'. - Employees and agents are aware of procedures handling complaints and resolving disputes.	employees and agents are aware of and comply with the code. Additionally, they are supposed to engage in appropriate activities to promote awareness among members, licensees and the general public.
Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> <li>- Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager.</li> <li>- If member/licensees is not satisfied with decision she can resubmit complaint, but this time addressing the Managing Director</li> <li>- Members and licensees can refer to the <u>Ombudsman</u> for <i>PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure</li> </ul>	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> <li>- Suggests that each stage of complaint procedure should be clearly explained.</li> <li>- Recently, it has been discussed that an <u>ombudsman</u> could also be included.</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> <li>• define categories for complaints</li> <li>• ensure relevant information is available and understandable</li> <li>• define who is responsible of handling the complaint and the timeframe</li> </ul> </li> <li>- Government also proposes to appoint a <u>ombudsman</u> to be a final arbiter on complaints between the collecting society and its members and licensees</li> </ul>	<ul style="list-style-type: none"> <li>- Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>• dealing with complaints from members and licensees; and</li> <li>• resolving disputes.</li> </ul> </li> <li>- These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.</li> </ul>
Compliance	None	None	Recently, it has been discussed that	- The role of ombudsman	Even though the code is

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
			an independent review process could also be included.	could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code. - Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties)	voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.
Code review	No systematic process	No systematic process			It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

Source: BOP Consulting (2012)

## 4.2 Main concerns regarding the collective management system in the UK

In assessing the costs and benefits of any such code of conduct, it is worth summarising the main concerns among members and users (but mostly users) about the current service provided by collecting societies in the UK. In this section we will focus on the music collecting societies (which are by far the major licensors across the world) and the reprographic collecting society that operates in the educational sector.

Some of these issues can be tackled through a code of conduct, in particular, the issues related to transparency, accountability, governance, and dispute resolution. However, and as the Australian case demonstrates, a voluntary code is unlikely to be strong enough to attain these results, since under a voluntary system collecting societies do not have any obligation to comply with the minimum standards stipulated in the code.

It is important to note that other issues (e.g. tariffs) lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary code seems to be a necessary but not sufficient condition to improve the relationship between collecting societies and agents.

### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, collecting societies are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different collecting societies can have a mandate to collect from the same licensee for the use of the same content.

This problem is one faced by businesses in the UK who in certain circumstances have to obtain licences from two different collecting societies for the public performance of the same copyrighted material. One example of this problem concerns businesses in the hospitality, leisure and retail sectors (hairdressers, pubs and restaurants, warehouses, etc.) that play recorded music in their establishments. Those businesses legally require a licence from (1) *PRS for Music* (which collects on behalf of songwriters, composers and music publishers) for the public performance and mechanical reproduction of their works and from (2) PPL (Phonographic Performance Limited, which collects on behalf of performers and record companies) for the public performance of their works.

This legal requirement can be burdensome for businesses given that *PRS for Music* and PPL seem to have different business strategies. *PRS for Music* conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on a regular basis. PPL, on the other hand, seems to focus its efforts on a more limited pool of users. This seems to reinforce the lack of awareness of licensing requirements among some businesses. For instance, it was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of *PRS for Music* (and of its duties), but much less aware of PPL (since they will seldom have been approached by them).

Furthermore, when PPL approaches a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)<sup>31</sup>. Additionally, it also states that, 'in

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<sup>31</sup> PPL FAQ: <http://www.ppluk.com/en/I-Play-Music/Businesses/Why-do-I-need-a-licence>

certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is one day late on paying the renewal fee.

*PRS for Music* also applies surcharges but is less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence<sup>32</sup>.

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed her association's concern "is that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."<sup>33</sup>

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society – either *PRS for Music* or PPL – collect on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a *PRS for Music* licence (before that date just a *PRS for Music* licence was needed). For these organisations, *PRS for Music* has been administering a joint music licence since January 2012, which incorporates charges from both organisations. *PRS for Music* remains the single point of contact for the joint licence.

Reprographic ('text') collecting societies in the UK have established a different organisational solution but with the same end in mind. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and performs collective licensing on their behalf.

With regards to issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge if and when all collecting societies decide to make a thorough assessment of the potential universe of licensees.

However, a code on its own would not effect the joint collection of music licences that would simplify the market for users.

<sup>32</sup> PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

<sup>33</sup> Quoted in the online article, 'How should Collecting Societies be Reformed?', *Managing Intellectual Property*, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

## 2. Tariffs and scope for negotiation

There are clear differences in the scope for negotiation with collecting societies among users, according to the scale of the operations:

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is a 5-year tariff deal with yearly adjustments for inflation and audience size. They pay royalties to four different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors' and authors' rights). Their most efficient dealings are with PRS for Music and PPL which act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- **Medium users (e.g. hospitality sector):** Medium users do have some level of co-ordination with collecting societies, usually through their trade associations. These associations have on occasion referred a tariff to the Copyright Tribunal for adjudication, where they have been unable to reach agreement through discussions with the relevant collecting society (for example, the background music tariffs for the hospitality sector were set in this way – for PRS in 1991, and for PPL in 2009 – and have subsequently been adjusted annually based on inflation and usage indicators). However users, including trade associations, report that the Copyright Tribunal is expensive to access; this means that in practice such users are often dependent on the willingness of the collecting society to negotiate.
- **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of *PRS for Music*' existence mostly because of *PRS for Music*'s business strategy, which is based on a comprehensive identification of all businesses likely to be music users.

With regards to issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, ability to negotiate is limited. Though the licensee can refer to the Copyright Tribunal to adjudicate on the price, terms and conditions of a tariff but this does not happen frequently (e.g. the *PRS for Music* tariff for the hospitality sector was established in 1991).

## 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, though there recently overhauled website shows a marked improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a

bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

With regards to transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the code is voluntary and (ii) the language used in the code is vague. These are two lessons that can be drawn from the Australian case.

#### 4. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged: "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies' idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). This is because the UK recognises the benefits of monopoly providers and has sought to address potential concerns through the minimum standards proposed.

With regards to issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

#### 5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change which opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>34</sup>. According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights

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<sup>34</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=1197>)

for pre-digital material'. They estimate that 43% of potential 'in copyright' work in the Library are orphan works<sup>35</sup>.

With regards to issues of repertoire and mandate, a code of conduct for the UK would have:

- no direct effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to successfully apply to operate an Extended Collective Licensing scheme.

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<sup>35</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

## 5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

### **Code of conduct in Australia**

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism.
- Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
- Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
- External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### **Regulation of collecting societies in the European Union**

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.

- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

### Overall conclusions from the comparative analysis

In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:

- there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
- there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
- wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and which will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for instance, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. But the efficiency and size of the distributions made to members are not the only indicators with which to assess the performance of collecting societies, though they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for 'principal-agent' problems and for collecting societies to extract 'managerial rents' from members now seems relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain ubiquitous, though are often not pursued through collecting societies' own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing users' concerns rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

## A code of conduct for the UK

Looking against the potential benefits of a code of conduct that were outlined in the BIS Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a *voluntary* code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model, as summarised below.

### Members

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already (i.e. they do not tend to complain)<sup>36</sup>. This is in contrast with the case of collecting societies in Spain and Belgium which shows that mismanagement of and malpractices with rights holders' revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. The experience of PRS, where member complaints have fallen after the introduction of a code of conduct, is likely to be the result of only one of a package of measures that contributed to the improvement. This is certainly the view from the other side, where licensees consulted for this study expressly reported that the PRS code of conduct was a less important factor than the cultural and organisational changes that preceded the introduction of the code.
- More collections for members – we have found no evidence that a code of conduct would directly result in any increase in transactions. Any distinction that might be made here between the potentially different affects that a voluntary or mandatory code might have seem unlikely as increases in collections seem to be instead driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of who are the potential users of the rights that they manage – neither of which are directly influenced by whether any code of conduct is voluntary or mandatory.

### Collecting Societies

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.
- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for the new rights than by an expansion in transactions driven simply by a better informed marketplace.

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<sup>36</sup> This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

## Users

- Fewer complaints – users direct the bulk of their complaints not through collecting societies but through government, civil society organisations and industry trade bodies. Consultation with industry trade bodies for this study suggests that this is because users feel that their bargaining position is very weak. As complaints to government and civil society organisations have been outside the scope of this research, it is not possible here to state what effect a code of conduct may or may not have on the level of these complaints.
- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The international comparative evidence documented in this report indicates, then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a *statutory* code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be little other net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

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# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
April, 2012

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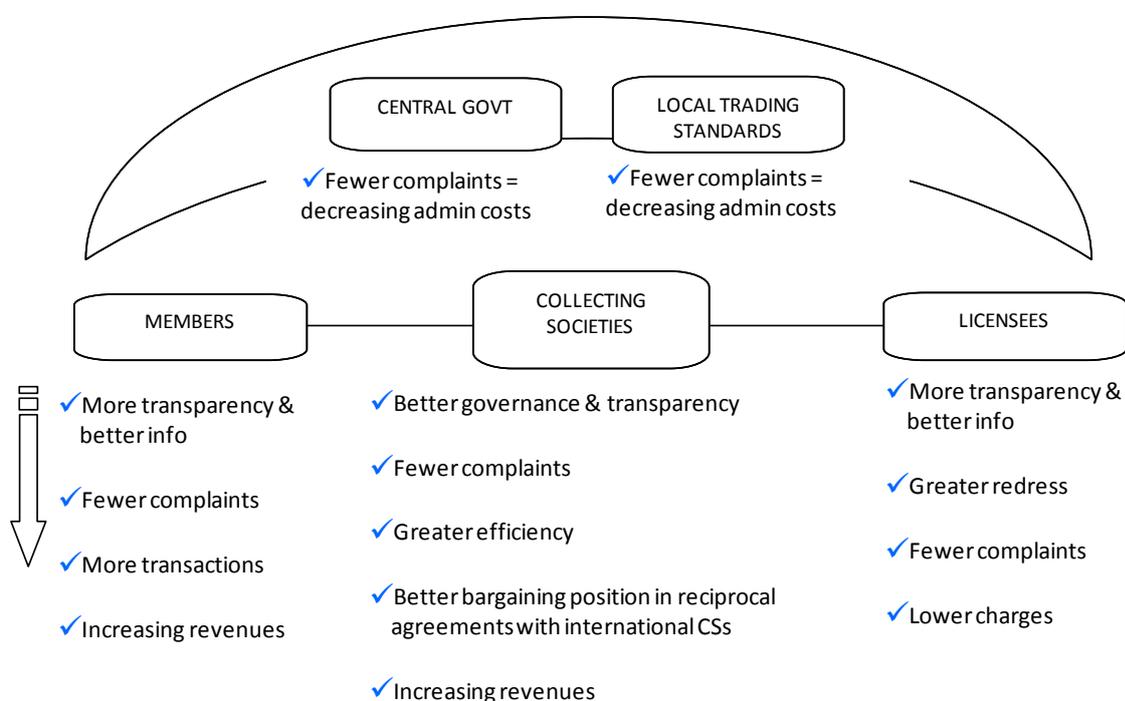
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# 1. Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in Figure 1.

**Figure 1: Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies**



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

But the Impact Assessment also proceeds to hypothesise that charges to licensees could fall as collecting societies (due to greater transparency and scrutiny) provide licensees with better information

<sup>1</sup> Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

for negotiating and contracting; and that revenues could also ultimately increase for members and the collecting societies under the new codes of conduct as members and licensees would (effectively) find it easier to do business with the collecting societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing codes of conduct will fall on the collecting societies themselves.

The report interrogates the plausibility and extent of these hypothetical assumptions<sup>2</sup> through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as basis for the code proposed by the UK Government which contains the minimum standards expected to be adopted by collecting societies. The report analyses whether the Australian code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of collecting societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of collecting societies.

### Definitions: Types of rights

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO<sup>4</sup> provides explanation for the rights entailed by that exclusivity. They can be classified in four domains:

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of her works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. This includes the mechanical reproduction rights in musical works.
2. **Rights of public performance, broadcasting and communication to the public** –
  - Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present. Public performance also includes performance by means of recordings. Musical works can be said to have been "publicly performed" when they are played over amplification equipment in such places as

<sup>2</sup> The exception here is that area of complaints to government and local trading standards that was deemed out of scope of the present research at inception.

<sup>3</sup> The views of some collecting societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific collecting society, as their representative body.

<sup>4</sup> WIPO (undated) 'Basic Notions of Copyright and Related Rights', available at: [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf)

discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.

- The right of “broadcasting” covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.
- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. In the UK, though, moral rights can be waived but cannot be transferred.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organisation was established, also in France, to manage rights in the field of music. It is estimated that similar organisations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting societies - also known as collective management organisations (CMOs), or as Reproduction Rights Organisations, RROs, in the case of reproduction rights - are private firms in charge of administering statutory copyright law via collective rights management (CRM) (Towse and Handke, 2007). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage, their tariffs and distribution structures are not self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They function under different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimise transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise

could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price
- monitoring and enforcement of rights ownership.

Collecting societies also make international agreements with 'sister' collecting societies in other countries to enable access to an international repertoire not included among its international membership.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>5</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licences. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Townse, 2007)

It is worth point out that collecting societies are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. CLA for reprographics rights). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up clearing the rights of a piece of work with many different collecting societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between collecting societies and users, even more so if collecting societies do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one agency in charge to collect and redistribute the royalties generated in a particular domain of rights. "This monopolistic structure leaves copyright collecting societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 author's societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection comes from public performance rights (€5.5 billion). Additionally, Music is, by far, the sector that generates the highest amount of royalties to the Author's collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Figure 2).

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<sup>5</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

**Figure 2: Collection through Authors' collecting societies (2010)**

Sector	Amount (€million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

Source: CISAC, 2012

## 1.2 Models of collective management

There exist different legal systems for the collective management of rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the three main models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging – given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between collecting societies and their members and users.

**Figure 3: Different legal systems for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>

3. Extended collective licence	An extended collective license extends the effects of a copyright license to also cover non-represented rights holders.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
<hr/>		
4. Legal licence		
<hr/>		
a. Non-voluntary licence ("statutory license")	A licence to copy is provided by law (hence no system with a legal agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, <b>Australia</b> (educational statutory license)
<hr/>		
b. Private copying exemption with a levy system for fair compensation for use	The license to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO<sup>6</sup> adapted by the UK Intellectual Property Office

The UK operates under a model of voluntary collective licensing with no regulation. In turn Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between collecting society and users in Australia arise from the statutory licence.

### 1.3 Collecting societies' incentives and governance

In addition to (and as a consequence of) the different legal systems, collecting societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non-profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private memberships associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, collecting societies' main mission is to look after the interest of their members (e.g. voluntary collecting management systems). Consequently, in most cases their incentives are aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic collecting society. However, strong internal governance could help ameliorate this

<sup>6</sup> WIPO / International Federation of Reproduction Rights Organisations (IFRRO) classification available at: [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

potential negative effect. Collecting societies are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance is subject to close scrutiny by right holders. Furthermore, the possibility for the existent of so-called managerial rents (rents appropriated by the 'agent' who withholds more information than the 'principal') can be analysed by looking at collecting societies financial results (e.g. the total amount collected from content users over administration costs).

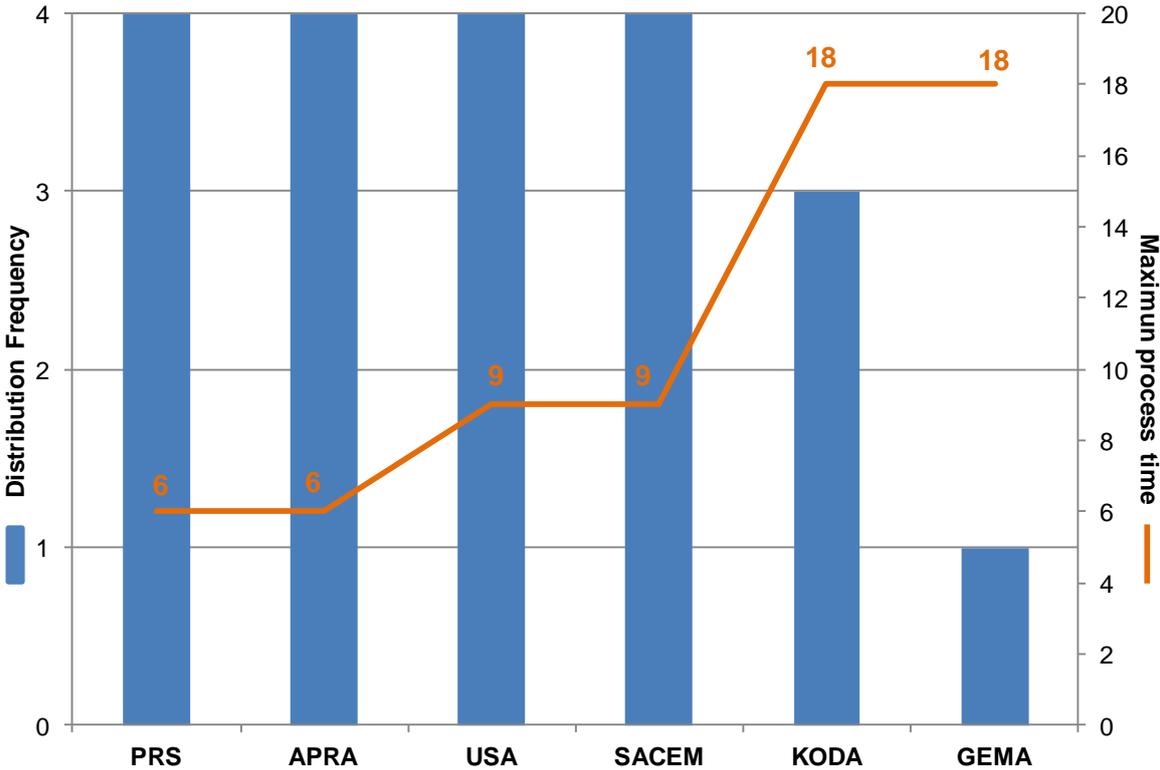
Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed collecting societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a collecting society with large members that hold a lot of market power and who play a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Rights Society, *PRS for Music*) – could minimise agency problems.

These findings seem to be reflected in other indicators of efficiency. Figure 4 below shows the (i) frequency of royalties' distribution and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence to the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

However, as Rochelandet indicates, if the internal governance mechanism fails then there is room to strengthen government legal supervision. If this weakness exists, one of the most common complaints among members is the speed and transparency with which collecting societies redistribute to right holders their corresponding royalties.

An extreme case of poor management in the absence of legislation can be found in Spain where a collecting society has been accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

**Figure 4: International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies**



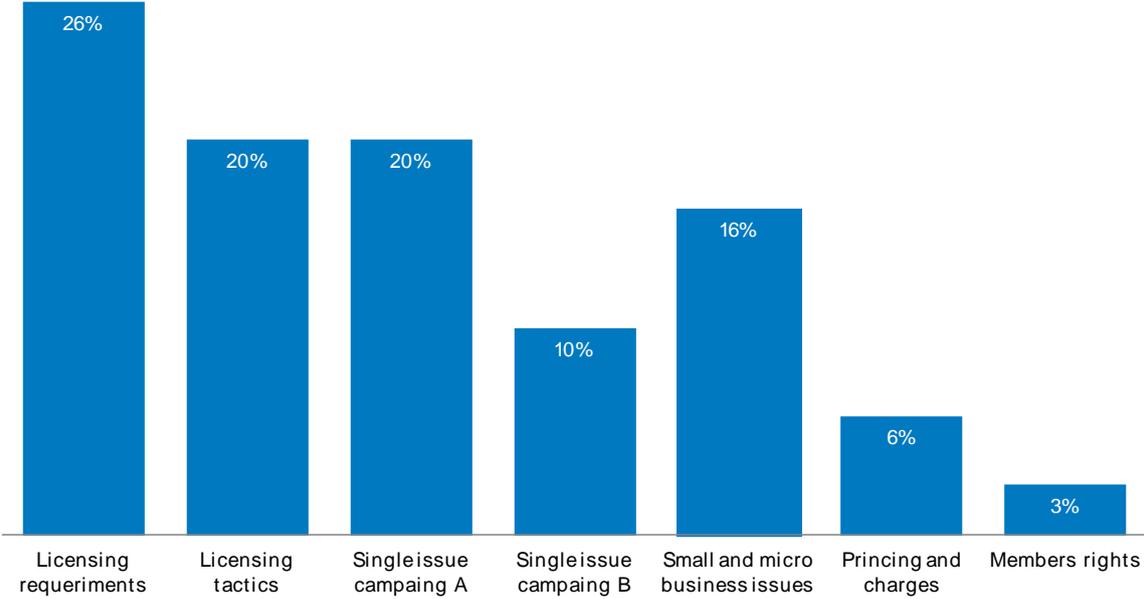
Source: CISAC, PRS for Music (2012)

On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor collecting societies’ performance. In most of the cases, licensees do not have recourse to an independent ombudsman if they feel that their complaint has not been satisfactorily resolved within the mechanism offered by collecting societies.

In the UK the frictions between collecting societies and users is reflected in the complaints received in the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints on collecting societies, covering 118 issues in total. Figure 5 shows the breakdown of those issues, complied and published by the IPO. The most common issue (aggregated under the heading ‘licensing requirements’) encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the ‘heavy handed and aggressive licensing tactics’ used by collecting societies (BIS, Impact Assessment, 2011). The ‘Small and micro businesses’ issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

Complaints from members only account for 3% of the total issues covered in the complaints Minister for Intellectual Property, which could reflect two factors (i) that members tend not to complain or (ii) that their complaints are satisfactorily dealt with within the existing system (e.g. collecting societies’ in-house complaint resolution process).

Figure 5: Breakdown of complaints received by Ministers via MPs.



Source: IPO (2012)

Even though there is evidence on the usually strained relationship between collecting societies and users, there is very limited literature on the efficiency of the relationship between them. Section 2 explains the problems that have arisen in Australia between users and the collecting society in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between the two agents involved in the transaction.

## 2. Code of conduct in Australia

There are ten collecting societies in Australia (see Figure 6). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Figure 6: Collecting societies in Australia**

Collecting society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

Source: BOP Consulting (2012)

## 2.1 Regulatory background

This section explains the legal context and regulatory developments that have taken place in Australia before the introduction of a voluntary code of conduct. It describes two specific mechanisms within the regulatory system (i.e. the Copyright Tribunal and the Statutory Licence), as well as the government attitude and policies towards intervening or regulating collecting societies.

### APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies, the *Australasian Performing Right Society*,<sup>7,8</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>9</sup>

### Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>10</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as businesses, the system remained voluntary.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third collecting society, the Phonographic Performance Company of Australia Limited<sup>11</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>12</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>13</sup> CAL has

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<sup>7</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>8</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>9</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to the discovery of any detail of the company's trading.

<sup>10</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended the establishment of a copyright tribunal.

<sup>11</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>12</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>13</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase of collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles<sup>14</sup>.

By, in effect, endorsing the purpose and practices of Australian collecting societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the Societies. However, in the period of growth that began in the 1980s, collecting societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward have shaped attitudes to collecting societies in Australia.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though this has not led to any substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some collecting societies, has also caused considerable resentment. Copyrights, such as the public performing right and reproduction rights, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them. This is, for example, the experience of the main educational organisations in Australia (see below).

They allege oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by collecting societies. The double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continue to characterise Tribunal proceedings.

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<sup>14</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

## Statutory licence

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that – by law – schools and university libraries have the right to copy, as long as the 'rights holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the collecting society in charge of collecting the statutory licence.

The school sector is major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to collecting societies in Australia, only surpassed by the Retail, sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the Hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If that is the case, parties can request the Copyright Tribunal to determine the rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for these organisations (see Section 2.4.2 below, point 2).

It is worth pointing out that the UK Copyright Tribunal also arbitrates on disputes between collecting societies and users when both parties do not reach an agreement in licences' terms and conditions. However – and in stark contrast with Australia – only users and not collecting societies can take matters to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

## Government attitudes to collective administration

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay).

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>15</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to collecting societies by the competition law.<sup>16</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>17</sup>

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<sup>15</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>16</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>17</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

## **Don't Stop the Music report – genesis of the collecting societies' code of conduct**

In 1996 a Liberal coalition administration assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>18</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

In 1997, the Government asked a joint Committee of Parliament to investigate collecting societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>19</sup> for the creation of the office of Copyright Ombudsman, and most supported establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>20</sup> advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998<sup>21</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by collecting societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for collecting societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

## **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC

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<sup>18</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

<sup>19</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>20</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>21</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and collecting societies (and received 20 submissions, as discussed below). However, six years on the ACCC is yet to release a final version of the 2006 draft guide.

## 2.2 Characteristics of the code

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.<sup>22</sup> The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide information about payment entitlements to members on request
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The code requires collecting societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, collecting societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, collecting societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about collecting societies' compliance with the code. The code provides for the monitoring and review of compliance, and the necessity for amendments.

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<sup>22</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAcollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

## Enforcement and review of the code

In 2003, the collecting societies appointed The Hon James Burchett QC<sup>23</sup> to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the code Reviewer - advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and summarising all complaints/disputes, and assessing how societies have handled them. Consistently, reports have stated general compliance with the code.

## 2.3 Collecting society performance before and after the code

In compliance with the code of Conduct the Copyright Authors Licensing (CAL) publishes every year an Annual Report with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 7, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>24</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could somewhat explain the tensions between the school sector (it's biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEED), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEED) was created in the first place.

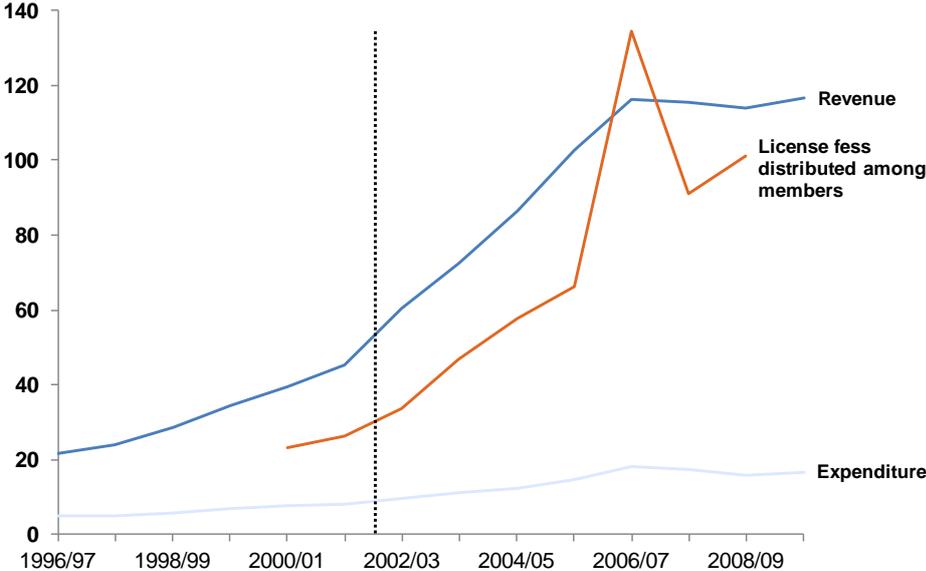
Figure 7 also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

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<sup>23</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

<sup>24</sup> The figures are shown in Australian dollars (AUD), and have not been deflated.

**Figure 7: CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions)**

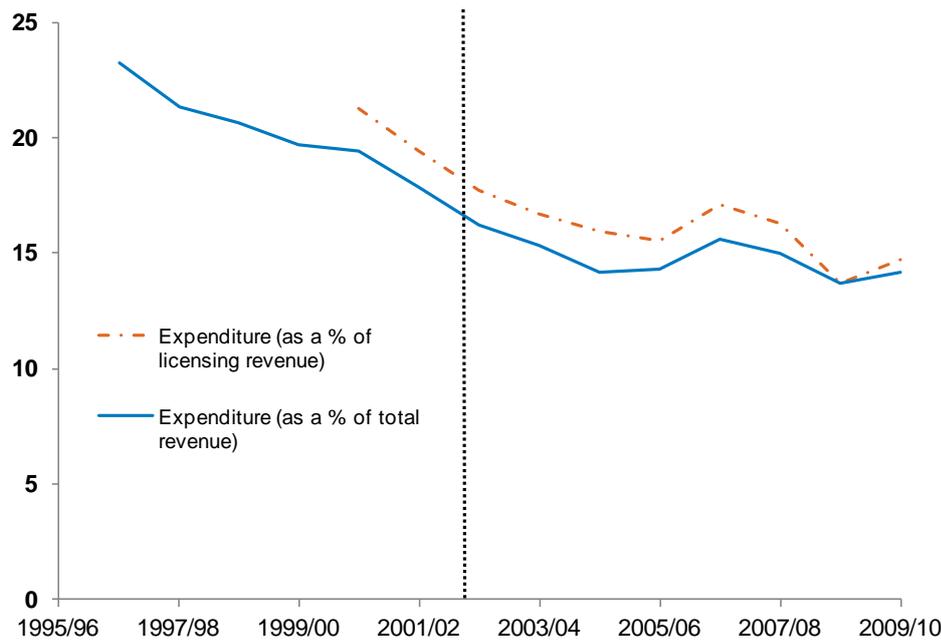


Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 8). This downward trend can be observed before the code of Conduct was implemented.

After 2005, the ratio of expenditure over revenue has shown a less clear path. Another measure of productivity is given by Net Income (defined as Revenue minus expenditure) per employee. Figure 9 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

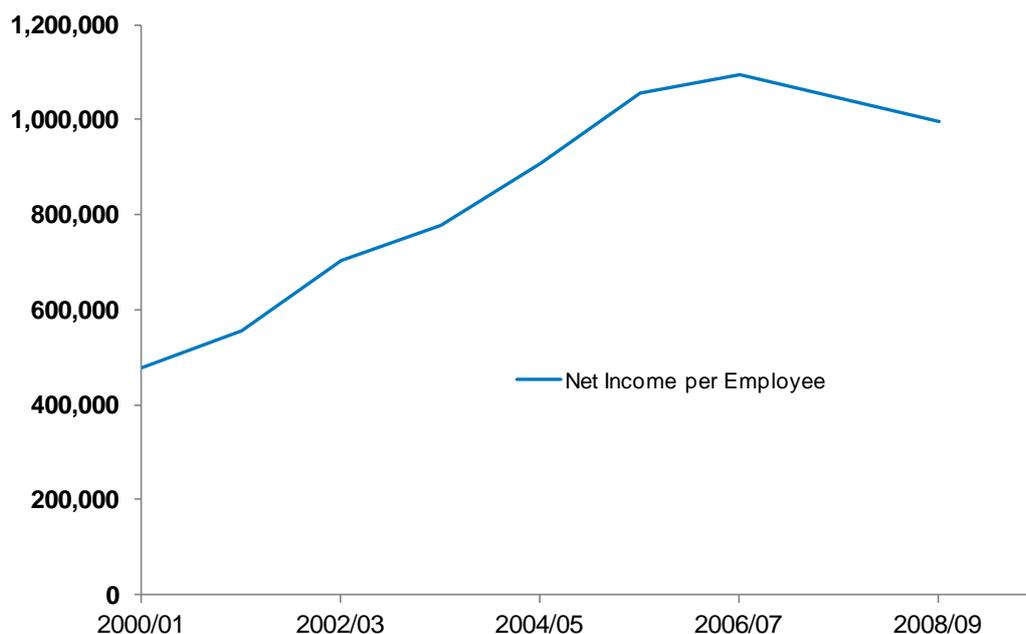
**Figure 8: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)**



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

More informative measures of efficiency in this economy would be the collected and distributable sums per number of users and per number of members. Unfortunately, CAL’s Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 9: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

At first glance, the generally rising trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (a rise of 500% in 10 years), in a sector that accounts for around 48% of CAL's total revenue.

In particular, the large increase in CAL revenue from the Schools sector stems from a decision made by the Copyright Tribunal in 2002 (plus related back payments to 1999). The 2002 Tribunal decision determined that differential rates were payable for copying of general works, artistic works, plays, short stories, poems, overhead transparencies, slides and permanent display copies, as follows:

- 4 cents for general works
- 6 cents for short stories and plays
- 8 cents for artistic works and poems
- 40 cents for overhead transparencies/slides.

The new differential rates led to a very large increase in Part VB licence fees paid by Schools and the rate has increased each year with CPI. Previously Schools had paid CAL a flat rate of \$2.442 per primary student and \$3.342 per secondary student.

The second major change made by CAL relates to digital copying. The Tribunal in 2002 declined to fix a rate for digital copying as there was insufficient evidence for the Tribunal to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to appropriate digital copying rate, Schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment of electronic payment in schools. Schools also said that they would pay CAL voluntarily 85 cents per FTE student for 2005 and 85 cents per FTE student plus

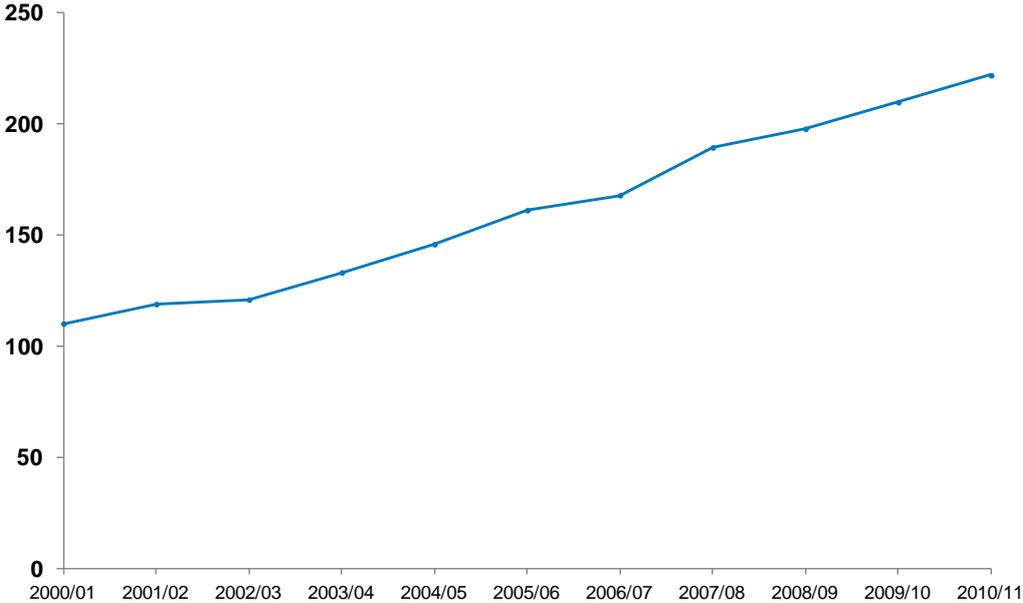
CPI in subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by Schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

In 2005, CAL duly commenced proceedings in the Copyright Tribunal for a higher electronic use rate and other matters in relation to an Electronic Use Scheme survey in Schools, but the proceedings in relation to rates did not arrive at a hearing. In 2009, a single rate for both hard and digital copying was agreed by negotiation between Schools and CAL for 2010-2012 of 16 dollars per FTE student plus CPI in the subsequent years, which settled the Copyright Tribunal litigation instigated by CAL in 2005 in relation to a rate for Electronic Use. The agreement is due to expire 30 December 2012 and negotiations are about to re-commence.

**ARPRA**

Less available information exists for APRA, the Australian music collecting society. In this case, it is only possible to build time series for their revenue (total amount of licence fees collected from users) (see Figure 10). Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA’s revenue increased by 90%. In contrast, CAL’s revenue increased by 195% over the same period. This provides further evidence that the CAL financial results are heavily explained by the constant increases in tariffs over the period.

**Figure 10: APRA: Revenue 2000-2010 (AUD millions)**



Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)

**2.4 Benefits and criticisms**

Ten years into the code, it is possible to identify some benefits but also – and mostly – criticisms of the Australian code of Conduct. As it has already been established in the prior section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition,

this trend has coexisted with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

This section looks into other benefits and criticisms of the code in terms of the service provided to both members and users.

### 2.4.1 Benefits

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticism of the code can be divided into four main categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores any effect that the code has had on behavioural change of the collecting societies. The final one explains a number of structural factors that are external to the code and that may have the effect of rendering the code nugatory.

### 2.4.2 Criticisms

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and collecting societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.<sup>25</sup>

The department's submission stated four specific shortcomings. The code:

- is voluntary
- prescribes but not enforces minimum standards of conduct
- permits collecting societies to appoint the Code Reviewer
- does not facilitate independent criticism – licensees who supply comments to the Code Reviewer are usually 'in relationships' with collecting societies.

The submission also stated dissatisfaction with the way in which, during the code review process, the Code Reviewer dealt with concerns raised about the conduct of certain collecting societies. During negotiation of licence fees, one particular society, CAL, proved uncooperative in supplying financial and historical data necessary for judging equitable remuneration and a number of collecting societies were unwilling to engage in Alternate Dispute Resolution (ADR) – even though the code

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<sup>25</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

provides for ADR. Collecting societies – according to the NSW submission – would only engage instead in mediation with individuals and not a collective, such as a ministerial copyright taskforce.<sup>26</sup>

Independently of the submission, a number of criticisms can be added. The code does not establish a standard that collecting societies should publish (or make available on request) summary and detailed information about distributions and patterns of distributions. The lack of information in this regard makes it difficult to ascertain the extent to which collecting societies benefit those they claim to benefit.

Additionally, the efficacy of the code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as mentioned above, focuses on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL mediated 15 matters – but equally noticeable, most concern complaints made by members not licensees.

It is unlikely that the dissatisfaction with various collecting societies, particularly the largest societies such as APRA-AMCOS and CAL, expressed over the course of 30 years, has vanished. Hence, it is not possible to assert that the lack of complaints from licensees actually reflects the fact that the code has encouraged licensees to resolve issues with collecting societies.

## 2. Dispute resolution

Most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.

Ideally, the code would have set an independent Copyright Ombudsman, as was previously recommended in 1995, to deal with complaints from users and members. The Copyright Tribunal proceedings are extremely time consuming and expensive and these factors act as very real disincentives to licensees to initiate legal actions.

As mentioned above, the Copyright Tribunal exists to arbitrate in disputes between collecting societies and users of copyright material. However, the procedure is perceived as lengthy and costly, which prevents users from initiating a case in the Tribunal. And in some cases, it ends up being the collecting society which takes an organisation to court, when an agreement is not reached in terms of tariffs or the conditions of the license.

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it cost them AUD 2million. She claims that the “costs and delays of the Tribunal effectively bar most licensees, and this limits its utility as a forum. Licensees have no other option but to reach agreement with the collecting society and pay a higher price for licence fees than what the Copyright Tribunal may have determined”. This means that it is very questionable as to whether the code has ensured that collecting societies have set ‘fair and reasonable’ licence fees (which is one of the requirements of the code).

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<sup>26</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

### 3. Behavioural effect

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information on a number of activities of collecting societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of the minimal behavioural effect of the code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely available digital content in schools. According to her, it is estimated that schools pay between AUD 8 - 10 million per year (£5 - £7 million) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### 4. External structural factors

As discussed, the background to the consideration of the 'in principle' merits of the code – and the extent to which it is implemented – is the nexus of legislation and Tribunal, and the constraint that this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the code.

Even licensees willing to interrogate assertively the practices of collecting societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of collecting societies agreeing to mediation of disputes.

Viewed from this perspective, the code helps to regularise the reporting and information practices of collecting societies, but has done nothing to reduce the distrust between them and licensees, nor to lessen the disparity in bargaining power.

## 3. EU developments regarding collecting societies

### 3.1 Overview

European collecting societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in:

- legal status and organisation, ranging from private non-profit organisations (as in the UK) to bodies subject to direct government control (France, Germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European collecting societies in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervision framework under which collecting societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of collecting societies in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a code of conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU's

competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004, the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market' (COM(2004) 261)*. It was not specifically concerned with the legal status of collecting societies which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific collecting society operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on collecting societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the collecting society of their choice – which in turn implies they can make judgements about each collecting society's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services'* (SEC (2005) 1254). This laid out three options:

1. do nothing
2. allow wider reciprocal agreements; and
3. allow rights-holders to appoint an EU-wide collecting society (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given collecting societies' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a code of conduct, setting out each collecting society's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collecting societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on collecting societies' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. Based on a public consultation taken place in 2008, the document identifies some possible actions in order to reach a 'competitive Digital Market'. In terms of protection of withholders the document includes as possible options (i) extended collective licensing, (ii) creating financial incentives for on-line multi-territory offers and (iii) extending the scope of the Satellite and Cable Directive to online delivery as possible options.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many collecting societies gave their views on the need for reform and codes of conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The European Parliament was also less enthusiastic, emphasising collecting societies' contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music. The framework, due in June 2012, would also introduce harmonised standards of governance and transparency for collecting societies.

### **Main themes included in different Directorates' publications**

As the prior section shows, there is not a single body of rules and regulations under which collecting societies operate in the EU. It is, however, possible to identify recurrent themes across the different documents that deal with collective management. These are:

#### *Governance and administration*

- Extent of external oversight by statute or bodies such as regulatory bodies
- Transparency, especially of collecting societies' revenues and costs, notably deductions to third parties (not right holders), and net distributions
- Exclusivity. Historically, collecting societies have had the exclusive right to license national and international repertoire to users located in their territory. However, the Commission is challenging this territorial exclusivity insofar as it prevents the creation of a single market (e.g. a pan-European one-stop licensing operation).
- Dispute settlement

#### *Members*

- Flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.

- Service level agreements
- Member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
- Treatment of national and global repertoire. Traditionally, collecting societies sustain reciprocal agreements to get access to foreign repertoire. However, attempts to protect their own national repertoire could lead to the avoidance of reciprocal agreements that might threaten that protection. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.
- Distribution of royalties to right holders in other countries
- Ability of a right-holder to negotiate their own tariffs

#### *Users*

- Access to information on licences
- Fairness and equivalence in treatment of users by collecting societies
- Education. This includes educating trade users about the need for collective licensing and the role of collecting societies under this system.

## 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and others where the situation is more problematic. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium and the Nordic countries seem to score well.

### **France**

The Intellectual Property Code states that collecting societies must be established as civil law societies ('société civile') of which right holders are members ('associés'). Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the 'Tribunal de Grande Instance' in the event of substantial concerns. The Ministry's approval is necessary if a collecting society collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) act as permanent committee in charge of controlling the collecting societies. This committee is composed of high level civil servant and operates under the Cour des Comptes (Court of Auditors). Once every two years the CPC publishes a detailed report on all 24 collecting societies that assesses their financial results, activity and redistribution strategies.

Collecting societies' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a collecting society was fulfilling a legal mandate, such as the private copying levy or the right of remuneration to cable re-transmission, but that they should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of collecting societies now see the CPC as a useful way of legitimising their activities to members and users as well as to the public.

For instance, SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. They have described the CPC review as a useful 'free' audit. According to SACD. However, others continue to be opposed to the CPC's intervention in what they see as their own private company (e.g. SACEM has been critical of such when the CPC published SACEM's management salaries).

## Germany

Germany passed the world's first law specifically on collecting societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says the government regulates collecting societies to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a collecting society is said to be collective management for the benefit of right holders. The German Patent and Trademark Office (DPMA) has the power to refuse any application to operate a collecting society if (i) the statutes of the collecting society do not comply with the provisions of the UrhWahrnG (ii) there is a reason to believe that a person entitled by law or the statutes to represent the collecting society does not possess the trustworthiness needed for the exercise of his activity, or (iii) it is unlikely, in view of the collecting societies' business structure, that the rights and claims entrusted to it will be effectively administered. DPMA also has the power to revoke the authorisation granted to a collecting society for the performing of its operations.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a collecting society has to grant licences to all users according the same published tariff and cannot refuse a licence. Collecting societies must notify the DPMA of any change to its statutes, management, tariffs, contracts or agreements with foreign collecting societies, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees. Finally, the UrhWahrn also states that collecting societies should provide welfare institutions for their members, such as pension funds (KEA, 2006)

DPMA operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (i.e. Germany and the UK). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais (2010) 'Germany has the most comprehensive legal framework on collecting societies in the world'. Despite this, it is difficult to find realistic evaluations of whether the system has achieved its stated aims. For instance, Figure 4 in Section 1.3 above shows that GEMA makes the fewest distributions a year and also takes the longest maximum time to process royalties in comparison with music collecting societies in the UK and Australia.

Similarly, the fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972 (some six years after the LACNR was established) – related to abusing its dominant position by imposing unreasonable membership terms – suggests that the system does not necessarily prevent collecting societies from abusing their monopoly position.

### **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to right holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million of undistributed revenues. The case is unresolved but there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as oppressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of their income to social causes such as pensions. In Spain, collecting societies are obliged to provide 20% of the remuneration for private copying for welfare activities and services for the benefit of their members – they must do this either themselves or through non-profit-making entities (KEA, 2006)

The Spanish Competition Commission has ruled against Spanish collecting societies' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two collecting society governance issues in recent years. The first is an example of a lack of professional management in a small collecting society. In 1994, when the government introduced a neighbouring right, an authors' union set up a new collecting society, URADEX, which faced problems with managing its database and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second issue are the challenges faced by SABAM, by far the country's largest collecting society. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being February 2012, but the case continues.

Belgium's collecting societies have also faced complaints from users such as bars and other small businesses for public performance. Its collecting societies work closely with trade associations to meet public concern and, where possible, collaborate together, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate collecting societies. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. Collecting societies pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical voluntary code of conduct.

Figure 9 summarises the regulatory initiatives by the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

**Figure 9: Collecting societies Legal Framework in the EU**

Country	Legal status	Establishment and supervision	Operations and accountability	Dispute resolution	Social and Cultural function
France	Collecting societies must be established as civil law societies of which right holders are members. The law is not specific about the monopoly status	Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture. Authorisation is needed just for compulsory rights (i.e. reprography and cable retransmission). The Minister of Culture and the CPC supervises collecting societies' operations and has the power to revoke their licence to operate.	The CPC produces bi-annual report assessing their financial results, activity and re-distribution strategies. Royalties' redistribution schemes are established by law in the case of private copying, and music public performance and broadcasting.	Mediation procedures for cable re-transmission rights. CPS mediates remuneration for broadcasting and public performance in case of disagreement.	50% of non-distributable sums and 25% of the sums collected from private copy must be used for cultural purposes.
Germany	The law is not specific about the legal or monopoly status of collecting society.	Collecting societies need an administrative authorisation for starting their operations. Supervision is by the DPMA, which has the power to revoke collecting society authorisation to operate.	Collecting societies have to accept all right holders and license to all users without discrimination. Re-distribution rules have to be established in their statutes.	DPMA operates an arbitration board in case of disputes	Collecting societies should provide welfare contributions for their members, such as pension funds
Spain	Collecting societies must be non-profit organisations. Competition between collecting societies that manage the same rights is possible	Prior authorization to operate is needed. Supervision of management is made by the Minister of Culture, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (ad hoc body)	20% of the remuneration for private copying has to be allocated to welfare activities and services for members.
Belgium	Collecting societies can be commercial organisations or any other type of legal entities.	Prior authorization to operate is needed. Supervision of management is made by the Minister of Economy, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (neutral mediator)	30% of the private copying royalties may be allocated to promote new works

Source: KEA (2006), BOP Consulting (2012)

## 4. A code of conduct for the UK

### 4.1 Moves towards a code

In recent years, there has been an increasing consensus among collecting societies in the UK that a code of conduct is needed. This has been confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012<sup>27</sup>. At this meeting, representatives of ten collecting societies expressed that:

- they are willing to support a voluntary code of conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, *PRS for Music* published a Code of Practice, the characteristics of which made it closer to a service level agreement – insofar as it delineated the level of service that should be expected from *PRS for Music*. This set of standards seems to have been a reflection of the change in cultural and organisational characteristics that has taken place within the organisation over previous years, but it has arguably also resulted from political pressure and media attention. Similarly, in January 2012, PPL also chose to publish a first code of conduct similar to the guidelines published by *PRS for Music*.

In 2011 the British Copyright Council (BCC) published a set of principles for collecting societies in coordination with its members, which includes 10 out of the 15 collecting societies that operate in the UK. These include *PRS for Music*, PPL, CLA, PLS, ALCS, DPRS, and BECS, among others.

The set of principles contain minimum standards in terms of transparency, accountability and consultation. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed Principles.

The intention is that these minimum standards would be adopted and implemented by all BCC's members by November 2012. At this point, BCC will conduct an internal review to assess the success of the implementation and any need for change.

Finally, in December 2011 the UK government started a consultation process on proposals to change the UK's copyright system (closed at the end of March 2012). As part of the consultation, the UK government is discussing proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. It is anticipated that a code should contain minimum standards of fairness, transparency and good governance, and that those principles are laid out in a consultation document. The content of the code has been based on the Australian code of conduct.

The consultation has requested views on these proposed minimum standards, the scope of the code, implementation timescale, as well as initial views on potential penalties for non-compliance in the case that back-stop legislation is introduced to the code. With this initiative, the UK government is attempting to lead the debate on the standards that should be expected from collecting societies. A UK code could then serve as a model to be used in the EU, for instance.

Figure 10 shows the three different initiatives implemented by *PRS for Music*, PPL and BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

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<sup>27</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

**Figure 10: Codes of conduct in the UK**

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government Minimum Standards	
General Description	Voluntary Code of Practice, first published in 2009	Voluntary code of conduct Available since 1 January 2012	<ul style="list-style-type: none"> <li>- Good Practice Principles, published in 2011.</li> <li>- Provides collecting societies with a baseline to be used to write their own voluntary code of conducts.</li> <li>- Suggested themes:                             <ul style="list-style-type: none"> <li>• transparency</li> <li>• accountability and consultation</li> <li>• service levels and operational issues</li> <li>• data protection</li> <li>• queries, complaints and dispute resolution</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Minimum standards that covers:                             <ul style="list-style-type: none"> <li>• obligations to right holders</li> <li>• obligations to licensees</li> <li>• control of the conduct of employees and agents</li> <li>• information and transparency</li> <li>• complaint handling</li> <li>• ombudsman</li> <li>• review of code</li> </ul> </li> <li>- Based on the Australian code and subject to public consultation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>- Code of conduct, launched in 2002.</li> <li>- Objectives:                             <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in collecting society</li> <li>• set out the standards of service</li> <li>• ensure that members and licensees have access to efficient, fair and low cost procedures for handling of complaints and dispute resolution.</li> </ul> </li> </ul>
Accountability and transparency	It states that <i>PRS for Music</i> processes are clear and transparent, but does not specify how that will achieve this.	<ul style="list-style-type: none"> <li>- Sets up standards of service: e.g.                             <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide members and licensees with accurate information</li> </ul> </li> <li>- Promises to act promptly, fairly and consistently.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency</li> <li>- Accountability and consultation</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should deal with members and licensees transparently.</li> <li>- Inform member, licensees, and potential licensees of scope of repertoire and reciprocal representation.</li> <li>- Make available clear distribution policy</li> <li>- It also set standards for reporting (including members, distribution policy, revenue, cost, allocation and distribution, and report regarding compliance with its code).</li> </ul>	<ul style="list-style-type: none"> <li>- States that collecting societies will maintain, and make available to members on request, a distribution Policy that sets out from time to time.</li> <li>- Also states that collecting society will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the collecting society of expenses and other amounts.</li> <li>- It also set standards for reporting.</li> </ul>
Education, training and awareness				<ul style="list-style-type: none"> <li>Collecting societies should give an undertaking that:                             <ul style="list-style-type: none"> <li>- Staff will receive training so</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Collecting societies are expected to take 'reasonable steps' to ensure that its</li> </ul>

UK

Area	<i>PRS for Music</i>	PPL	British Copyright Council	Government Minimum Standards	Australia
				employees, agents and representatives refrain from using 'high pressure selling techniques'. - Employees and agents are aware of procedures handlings complaints and resolving disputes.	employees and agents are aware of and comply with the code. Additionally, they are supposed to engage in appropriate activities to promote awareness among members, licensees and the general public.
Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> <li>- Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager.</li> <li>- If member/licensees is not satisfied with decision she can resubmit complain, but this time addressing the Managing Director</li> <li>- Member and licensees can refer to the <u>Ombudsman</u> for <i>PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure</li> </ul>	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> <li>- Suggests that each stage of complaint procedure should be clearly explained.</li> <li>- Recently, it has been discussed that an <u>ombudsman</u> could also be included.</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> <li>• define categories for complaints</li> <li>• ensure relevant information is available and understandable</li> <li>• define who is responsible of handling the complaint and the timeframe</li> </ul> </li> <li>- Government also proposes to appoint a <u>ombudsman</u> to be a final arbiter on complaints between the collecting society and its members and licensees</li> </ul>	<ul style="list-style-type: none"> <li>- Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>• dealing with complaints from members and licensees; and</li> <li>• resolving disputes.</li> </ul> </li> <li>- These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.</li> </ul>
Compliance	None	None	Recently, it has been discussed that	- The role of ombudsman	Even though the code is

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government Minimum Standards	
			an independent review process could also be included.	could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code. - Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties)	voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.
Code review	None	None			It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

Source: BOP Consulting (2012)

## 4.2 Main concerns regarding the collective management system in the UK

In assessing the costs and benefits of any such code of conduct, it is worth summarising what are the main concerns among members and users (but mostly users) about the current service provided by collecting societies in the UK. In this section we will focus on the music collecting societies (which are by far the major licensors across the world) and the reprographic collecting society that operates in the educational sector.

Some of these issues can be tackled through a code of conduct. In particular, the issues related to transparency, accountability, governance, and dispute resolution. However, and as the Australian case demonstrates, a voluntary code is unlikely to be strong enough to attain these results, since under a voluntary system collecting societies do not have any obligation to comply with the minimum standards stipulated in the code.

It is important to note that others issues lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary code seems to be a necessary but not sufficient condition to improve the relationship between collecting societies and agents.

### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, collecting societies are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different collecting societies can have the mandate to collect from the same licensee for the use of the same content.

This precise problem is one faced by businesses in the UK who have to pay licences to two different collecting societies for the public performance of the same copyrighted material. This is the case for the businesses in the hospitality, leisure and retails sectors (hairdressers, pubs and restaurants, warehouses, etc.) that play recorded music in their establishments. Those businesses legally require a licence from (1) *PRS for Music* (that collects on behalf of performers and record companies) and from (2) PPL (Public Performing Licensing, that collects on behalf of songwriters, composers and publishers).

This legal requirement can be cumbersome for business given that *PRS for Music* and PPL seem to have different business strategies. *PRS for Music* conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on a regular basis. PPL, on other hand, seems to focus its effort on a more limited pool of users. This seems to enforce the lack of awareness of licensing requirements among some businesses. For instance, it was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of *PRS for Music* (and of its duties), but much less aware of PPL (since they will seldom have been approached by them).

Furthermore, when PPL approach a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)<sup>28</sup>. Additionally, it also states that, 'in certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play

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<sup>28</sup> PPL FAQ: <http://www.ppluk.com/en/I-Play-Music/Businesses/Why-do-I-need-a-licence>

recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is one day late on paying the renewal fee.

*PRS for Music* also applies surcharges but is less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence<sup>29</sup>.

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations do accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed that her association's concern "is that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."<sup>30</sup>

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society –either *PRS for Music* or PPL- collect on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a *PRS for Music* licence (before that date just a *PRS for Music* licence was needed). For these organisations, *PRS for Music* has been administering a joint music licence since January 2012, which incorporates charges from both organisations. *PRS for Music* remains the single point of contact for the joint licence.

Reprographic ('text') collecting societies in the UK also operate under a similar system. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (AL collecting society) and the Publishers' Licensing Society Ltd. (PLS) and perform collective licensing on their behalf.

With regards to issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge if and when all collecting societies decide to make a thorough assessment of the potential universe of licensees.

However, a code on its own would not effect the joint collection of music licenses that would simply the market for users.

## 2. Tariffs and scope for negotiation

There are clear differences in the scope for negotiation with collecting societies among users, according to the scale of the operations:

<sup>29</sup> PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

<sup>30</sup> Quoted in the online article, 'How should Collecting Societies be Reformed?', *Managing Intellectual Property*, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is 5-year tariff deal with yearly adjustments by inflation and audience size. They pay royalties to four different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors and authors rights). Their most efficient dealings are with PRS for Music and PPL that act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- **Medium users (e.g. hospitality sector):** They have limited and very prescribed room for negotiation, revolving around the conditions and adjustments to tariffs paid in the past. Tariffs are somewhat fixed given they have been established by the Copyright Tribunal (in 1991 in the case of PRs and in 2009 in the case of PPL) and are adjusted every year by inflation and indicators of usage. Medium users do have some level of coordination with collecting societies (mostly with PRS for Music) through their trade associations (e.g. BHA, BBPA). The BHA maintains 'good' relations with PRS for Music, which have improved in the last five years due to changes in PRS for Music's management culture. The Code of Practice recently issued by PRS for Music seems to be a reflection of these positive changes.
- **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of *PRS for Music*' existence mostly because of *PRS for Music*'s business strategy, which is based on a comprehensive identification of all businesses likely to be music users.

With regards to issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, ability to negotiate is limited when tariffs are set externally. The parties can always refer to the Copyright Tribunal to discuss the tariff but this does not happen frequently (e.g. the *PRS for Music* tariff for the hospitality sector was established in 1991).

### 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, though there recently overhauled website shows a market improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

With regards to transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the code is voluntary and (ii) the language used in the code is vague. These are two lessons that can be drawn from the Australian case.

#### 4. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged: "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies' idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights).

With regards to issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

#### 5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change that opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>31</sup>. According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material'. They estimate that 43% of potential 'in copyright' work in the Library are orphan works<sup>32</sup>.

<sup>31</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>)

<sup>32</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

With regards to issues of repertoire and mandate, a code of conduct for the UK would have:

- no effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to apply to operate an Extended Collective Licensing scheme or to clear orphan works.

## 5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

### Code of conduct in Australia

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism.
- Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
- Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
- External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### Regulation of collecting societies in the European Union

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.

- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

### Overall conclusions from the comparative analysis

In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:

- there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
- there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
- wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and these confounding factors will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for instance, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. But the efficiency and size of the distributions made to members are not the only indicators with which to assess the performance of collecting societies, though they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for 'principal-agent' problems and for collecting societies to extract 'managerial rents' from members now seem relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain ubiquitous, though are often not pursued through collecting societies' own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing users' concerns rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

## A code of conduct for the UK

Looking against the potential benefits of a code of conduct that were outlined in the BIS Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a *voluntary* code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or none existent, as summarised below.

### Members

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already (i.e. they do not tend to complain)<sup>33</sup>. This is contrasted by the case of collecting societies in Spain and Belgium that show that mismanagement and malpractice of right holders revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. The experience of PRS, where member complaints have fallen after the introduction of a code of conduct, shows that this was actually only one of a package of measures that contributed to the improvement, and a less important factor than cultural and organisational changes that preceded the introduction of the code.
- More transactions for members – there is no evidence that a code of conduct, voluntary or mandatory, would result in any increase in transactions. Increases in transactions seem to be driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of who are the potential users of the rights that they manage.

### Collecting Societies

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.
- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for the new rights than by an expansion in transactions driven simply by a better informed marketplace.

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<sup>33</sup> This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

## Users

- Fewer complaints – relatively few direct complaints to the collecting societies are currently pursued by users as a) it is costly and b) they see that it is futile as their bargaining position is so weak compared to the collecting societies. They may complain to government and to industry trade bodies, but both have been outside the scope of this research and so it is not possible here to state what effect a code of conduct may or may not have on these complaints.
- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The evidence documented in this report indicates, then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a *statutory* code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be little other net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitrary procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

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# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
May, 2012

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# 1. Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in [Figure 1.1 .jpeg Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies, Source: BOP Consulting (2012)]

[Figure 1.1 .jpeg]

As can be seen in Figure 1.1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

But the Impact Assessment also proceeds to hypothesise that charges to licensees could fall as collecting societies (due to greater transparency and scrutiny) provide licensees with better information for negotiating and contracting; and that revenues could also ultimately increase for members and the collecting societies under the new codes of conduct as members and licensees would (effectively) find it easier to do business with the collecting societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing codes of conduct will fall on the collecting societies themselves.

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<sup>1</sup> Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

The report interrogates the plausibility and extent of these hypothetical assumptions<sup>2</sup> through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has suggested be adopted by collecting societies. The report analyses whether the Australian code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of collecting societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of collecting societies.

#### **Definitions: Types of rights**

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO<sup>4</sup> provides an explanation of the rights entailed by that exclusivity. They can be classified as follows:

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of their works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. It also includes the mechanical reproduction rights in musical works.
2. **Rights of public performance, broadcasting and communication to the public** –

<sup>2</sup> The exception here is that area of complaints to central and local government and civil society organisations was deemed out of scope of the present research at inception.

<sup>3</sup> The views of some collecting societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific collecting society, as their representative body.

<sup>4</sup> WIPO (undated) 'Basic Notions of Copyright and Related Rights', available at: [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf)

- Numerous national laws consider a ‘public performance’ as any performance of “a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present.”<sup>5</sup> Public performance also includes performance by means of recordings. Musical works can be said to have been “publicly performed” when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.
- The right of “broadcasting” covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.
- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. In the UK, though, moral rights can be waived but cannot be transferred.

## 1.1. Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organisation was established, also in France, to manage rights in the field of music. It is estimated that similar organisations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting societies - also known as collective management organisations (CMOs), or as Reproduction Rights Organisations, RROs, in the case of reproduction rights - are private firms in

<sup>5</sup> WIPO (undated) ‘Understanding Copyright and Related Rights’, available at: [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html)

charge of administering statutory copyright law via collective rights management (CRM) (Towse and Handke, 2007). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They tend to operate different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimise transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price
- monitoring and enforcement of rights ownership.

Collecting societies also enter into international agreements with 'sister' collecting societies in other countries to enable access to an international repertoire not included among its international membership. These are known as reciprocal agreements.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>6</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licences. "Where there are high transaction costs and economies of scale,

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<sup>6</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use” (Handke and Towse, 2007)

It is worth pointing out that collecting societies are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. CLA for reprographics rights). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up having to clear the rights in a piece of work with many different collecting societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between collecting societies and users, even more so if collecting societies do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one CMO that administers their particular category of rights. “This monopolistic structure leaves copyright collecting societies in control of the term of access and royalty distribution in their particular rights domain” (Kretschmer, 2007).

According to information corresponding to 200 authors’ societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection came from public performance rights (€5.5 billion). Additionally, music is, by far, the sector that generates the highest amount of royalties for the authors’ collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Table 1.1).

**Table 1.1 Collection through Authors’ collecting societies (2010)**

<b>Sector</b>	<b>Amount (€million)</b>	<b>Percentage</b>
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

## 1.2. Models of collective management

There are different systems for the collective management of rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the four models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging – given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between collecting societies and their members and users.

**Table 1.2 Different models for Reproduction Rights Collection**

<b>Reproduction rights models</b>	<b>Description</b>	<b>Countries</b>
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to do so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>
3. Extended collective licence	An extended collective licence extends the effects of a copyright licence to also cover non-represented rights holders who have to opt out rather than opt in.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
4. Legal licence		
a. Non-voluntary system with a legal licence ("statutory	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to	Netherlands, Switzerland, <b>Australia (educational statutory licence)</b>

license")	receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	
b. Private copying exemption with a levy system for fair compensation for use	The licence to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO<sup>7</sup> adapted by the UK Intellectual Property Office

Collecting societies in the UK operate voluntary collective licensing with no regulation of collecting society functions; price is effectively regulated by the Copyright Tribunal. In turn, Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between collecting societies and users in Australia arise from the statutory licence.

### 1.3. Collecting societies' incentives and governance

In addition to (and as a consequence of) the different legal systems, collecting societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non-profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private membership associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, the main goal of collecting societies is to look after the interest of their members. Consequently, in most cases their incentives are understandably aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic collecting society. However, strong internal governance could help ameliorate this

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<sup>7</sup> WIPO / International Federation of Reproduction Rights Organisations (IFRRO) classification available at: [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

potential negative effect. Collecting societies are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance tends to be subject to close scrutiny by right holders. Furthermore, the possibility for the existence of so-called managerial rents (rents appropriated by the 'agent' who withholds more information than the 'principal') can be analysed by looking at collecting societies' financial results (e.g. the total amount collected from content users over administration costs).

Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed collecting societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a collecting society with a large number of members that holds a lot of market power and which plays a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Right Society, *PRS for Music*) – could minimise agency problems.

These findings seem to be reflected in other indicators of efficiency. Figure 2.1 [Figure 1.2 .jpeg International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies Source: CISAC, PRS for Music (2012)] below shows the (i) frequency of royalties' distribution and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence for the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

However, as Rochelandet indicates, if the internal governance mechanism fails then there is room to strengthen government legal supervision. If this weakness exists, one of the most common

complaints among members is the speed and transparency with which collecting societies redistribute to right holders their corresponding royalties.

An extreme case of poor management in the absence of legislation can be found in Spain where a collecting society was accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

[Figure 1.2. International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies Source: CISAC, PRS for Music (2012)]

On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor a collecting society's performance. In most cases, licensees do not have recourse to an independent appeal mechanism, such as an ombudsman, if they feel that their complaint has not been satisfactorily resolved via the internal complaints procedure of a collecting society.

In the UK the frictions between collecting societies and users is reflected in the complaints received in the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints about collecting societies, covering 118 issues in total.<sup>8</sup> Figure 1.3 [Figure 1.3 .jpeg Breakdown of complaints received by Ministers via MPs. Source: IPO 2012] shows the breakdown of those issues, compiled and published by the IPO. The most common issue (aggregated under the heading 'licensing requirements') encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the 'heavy handed and aggressive licensing tactics' used by collecting societies (BIS, Impact Assessment, 2011). The 'Small and micro businesses' issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

Complaints from members only account for 3% of the total issues covered in the complaints Minister for Intellectual Property, which could reflect two factors (i) that members tend not to complain or

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<sup>8</sup> Of course, this is only one means by which complaints are made about collecting societies – others could include complaints made to trade associations, to local government bodies such as Trading Standards, or to the collecting societies themselves

(ii) that their complaints are satisfactorily dealt with within the existing system (e.g. collecting societies' in-house complaint resolution process).

[Figure 1.3: Breakdown of complaints received by Ministers via MPs. Source: IPO (2012)]

Even though there is evidence on the usually strained relationship between collecting societies and users, there is very limited literature on the efficiency of the relationship between them. Section 2 explains the problems that have arisen in Australia between users and the collecting society in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between the two agents involved in the transaction.

## 2. Code of conduct in Australia

There are ten collecting societies in Australia (Table 2.1). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Table 2.1 Collecting societies in Australia**

Collecting society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)	Publishers of church music	
LicenSing (a division of MediaCo19m Inc)		
Word of Life Pty Ltd		

Source: BOP Consulting (2012)

## 2.1. Regulatory background

This section explains the legal context and regulatory developments that have taken place in Australia before the introduction of a voluntary code of conduct. It describes two specific mechanisms within the regulatory system (i.e. the Copyright Tribunal and the Statutory Licence), as well as the government attitude and policies towards intervening with or regulating collecting societies.

### **APRA – the first collecting society**

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies: the *Australasian Performing Right Society*,<sup>9,10</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>11</sup>

### **Copyright Tribunal**

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>12</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as business, the system remained voluntary.

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<sup>9</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>10</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>11</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to the discovery of any detail of the company's trading.

<sup>12</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended the establishment of a copyright tribunal.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third collecting society, the Phonographic Performance Company of Australia Limited<sup>13</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>14</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>15</sup> CAL has focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase of collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.

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<sup>13</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>14</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>15</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles<sup>16</sup>.

By, in effect, endorsing the purpose and practices of Australian collecting societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the societies. However, in the period of growth that began in the 1980s, collecting societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward have shaped attitudes to collecting societies in Australia.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though this has not led to any substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some collecting societies, has also caused considerable resentment. Copyrights, such as the public performing right and reproduction rights, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them. This is, for example, the experience of the main educational organisations in Australia (see below).

They allege oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by collecting societies. The double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration have meant that inequality of bargaining power continues to characterise Tribunal proceedings.

### **Statutory licence**

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that – by law – schools and university libraries have the right to copy, as long as the 'rights holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the

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<sup>16</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the collecting society in charge of collecting the statutory licence.

The school sector is a major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to collecting societies in Australia, only surpassed by the retail sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If this is the case, either party can request the Copyright Tribunal to determine the rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for these organisations (see Section 2.4.2 below, point 2).

It is worth pointing out that the UK Copyright Tribunal also arbitrates on the terms and conditions of a licence when the two sides cannot reach agreement themselves. However – and in stark contrast with Australia – only users and not collecting societies can take matters to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

### **Government attitudes to collective administration**

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay).

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>17</sup> were cautious about the market failure argument, and wary too of the partial exemption from

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<sup>17</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

anti-monopoly provisions granted to collecting societies by the competition law.<sup>18</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>19</sup>

### **Don't Stop the Music report – genesis of the collecting societies' code of conduct**

In 1996 a Liberal coalition administration assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>20</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

In 1997, the Government asked a joint Committee of Parliament to investigate collecting societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>21</sup> for the creation of the office of Copyright Ombudsman, and most supported the establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the

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<sup>18</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>19</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

<sup>20</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

<sup>21</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

Interdepartmental Committee (IDC)<sup>22</sup> advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998<sup>23</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by collecting societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for collecting societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

### **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC
- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and collecting societies (and received 20 submissions, as discussed below). However, six years on the ACCC is yet to release a final version of the 2006 draft guide.

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<sup>22</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>23</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

## 2.2. Characteristics of the code

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.<sup>24</sup> The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide information about payment entitlements to members on request
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The code requires collecting societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, collecting societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, collecting societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review,

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<sup>24</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAccollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about collecting societies' compliance with the code. The code provides for the monitoring and review of compliance, and for amendments.

### **Enforcement and review of the code**

In 2003, the collecting societies appointed The Hon James Burchett QC<sup>25</sup> to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the code Reviewer – advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and summarising all complaints/disputes, and assessing how societies have handled them. The reports have consistently found general compliance with the code.

## **2.3. Collecting society performance before and after the code**

In compliance with the code of Conduct the Copyright Agency Limited (CAL) publishes an Annual Report every year with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

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<sup>25</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

As is shown in Figure 2.1, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>26</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could go towards explaining the tensions between the school sector (its biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEECD), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEECD) was created in the first place.

Figure 2.1 [Figure 2.1 .jpeg CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions). Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)] also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

[Figure 2.1 CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions) Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)]

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 2.2) [Figure 2.2 .jpeg CAL: Expenditure as a proportion of revenues, 1996-2009 (%) Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)]. This downward trend can be observed before the implementation of the code of conduct.

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<sup>26</sup> The figures are shown in Australian dollars (AUD), and have not been deflated.

After 2005, the ratio of expenditure over revenue has shown a less clear path. Another measure of productivity is given by net income (defined as revenue minus expenditure) per employee. Figure 2.3 [Figure 2.3 .jpeg CAL: Net Income per Employee, 1996-2009 (%).Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)] shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

[Figure 2.2 CAL: Expenditure as a proportion of revenues, 1996-2009 (%)Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)]

More informative measures of efficiency would be the collected and distributable sums analysed per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

[Figure 2.3 CAL: Net Income per Employee, 1996-2009 (%) Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)]

At first glance, the generally rising trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (a rise of 500% in 10 years), in a sector that accounts for around 48% of CAL's total revenue.

In particular, the large increase in CAL revenue from the schools sector stems from a decision made by the Copyright Tribunal in 2002 (plus related back payments to 1999). The 2002 Tribunal decision determined that differential rates were payable for copying of general works, artistic works, plays, short stories, poems, overhead transparencies, slides and permanent display copies, as follows:

- 4 cents for general works
- 6 cents for short stories and plays
- 8 cents for artistic works and poems
- 40 cents for overhead transparencies/slides.

The new differential rates led to a very large increase in Part VB licence fees paid by Schools and the rate has increased each year with CPI. Previously Schools had paid CAL a flat rate of \$2.442 per primary student and \$3.342 per secondary student.

The second major change made by CAL relates to digital copying. In 2002, the Tribunal declined to fix a rate for digital copying as there was insufficient evidence for it to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to appropriate digital copying rate, the schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment of electronic payment in schools. The schools also said that they would voluntarily pay CAL 85 cents per FTE student for 2005 and 85 cents per FTE student plus CPI in subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by Schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

In 2005, CAL duly commenced proceedings in the Copyright Tribunal for a higher electronic use rate and other matters in relation to an Electronic Use Scheme survey in Schools, but the proceedings in relation to rates go to a hearing. In 2009, a single rate for both hard and digital copying was agreed by negotiation between the schools and CAL for 2010-2012 of 16 dollars per FTE student plus CPI in the subsequent years; this settled the Copyright Tribunal litigation instigated by CAL in 2005 in relation to a rate for electronic use. The agreement is due to expire 30 December 2012 and negotiations are about to re-commence.

## **APRA**

There is less information available about APRA, the Australian music collecting society. Therefore, it is only possible to build a time series for their revenue (total amount of licence fees collected from their users) (see Figure 2.4 [Figure 2.4 .jpeg APRA: Revenue 2000-2010 (AUD millions). Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)]. Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA's revenue increased by 90%. In contrast, CAL's revenue

increased by 195% over the same period. This provides further evidence that the CAL's financial results are largely due to the constant increases in tariffs over the period.

[Figure 2.4 APRA: Revenue 2000-2010 (AUD millions) Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)]

## 2.4. Benefits and criticisms

Ten years into the code, it is possible to identify some benefits but mostly criticisms of the Australian code of conduct. As it has already been established in the preceding section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition, this trend has co-existed with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

This section looks into other benefits and criticisms of the code in terms of the service provided to both members and users.

### 2.4.1. Benefits

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

### 2.4.2. Criticisms

Criticism of the code can be divided into four main categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores any effect that

the code has had on behavioural change of the collecting societies. The final one explains a number of structural factors that are external to the code and that may have the effect of rendering the code nugatory.

## 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and collecting societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.<sup>27</sup>

The department's submission stated four specific shortcomings. The code:

- is voluntary
- prescribes but does not enforce minimum standards of conduct
- permits collecting societies to appoint the code reviewer
- does not facilitate independent criticism: licensees who supply comments to the code reviewer are usually 'in relationships' with collecting societies.

The submission also stated dissatisfaction with the way in which, during the code review process, the code reviewer dealt with concerns raised about the conduct of certain collecting societies. During negotiation of licence fees, one particular society, CAL, proved unco-operative in supplying financial and historical data necessary for judging equitable remuneration and a number of collecting societies were unwilling to engage in Alternate Dispute Resolution (ADR) – even though the code provides for ADR. Collecting societies – according to the NSW submission – would only engage instead in mediation with individuals and not a collective, such as a ministerial copyright taskforce.<sup>28</sup>

Independently of the submission, a number of criticisms can be added. The code does not establish a standard stating that collecting societies should publish (or make available on request) summary and detailed information about distributions and patterns of distributions. The lack of

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<sup>27</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

<sup>28</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

information in this regard makes it difficult to ascertain the extent to which collecting societies benefit those they claim to benefit.

Additionally, the efficacy of the code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as mentioned above, focus on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL itself mediated 15 matters – but equally noticeably, most concerned complaints made by members not licensees.

It is unlikely that the dissatisfaction with various collecting societies, particularly the largest societies such as APRA-AMCOS and CAL, expressed over the course of 30 years, has vanished. Hence, as the following issues related to Dispute Resolution below illustrate, it is not possible to assert that the lack of complaints from licensees actually reflects the fact that the code has encouraged licensees to resolve issues with collecting societies.

## **2. Dispute resolution**

Most code-related dispute resolution is initiated by complaints from members of collecting societies, not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding groups of organisations (e.g. schools) or representative bodies/trade associations.

Ideally, the code would have set a requirement for an independent copyright ombudsman, as was previously recommended in 1995, to act as a fallback in the dispute resolution process. In lieu of an ombudsman, the Copyright Tribunal exists to arbitrate in disputes between collecting societies and users of copyright material. However, the Tribunal has major limitations. Firstly, the Tribunal only adjudicates on issues related to tariffs. Secondly, the procedure is perceived as lengthy and costly, which largely prevents users from initiating a case in the Tribunal. In some cases, the collecting society takes a case to the tribunal, when an agreement is not reached regarding the terms of a tariff or the conditions of the licence (see the example above in section 2.3 related to digital copying).

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it cost them AUD 2million. She claims that the “costs and delays of the Tribunal effectively bar most licensees,

and this limits its utility as a forum. Licensees have no other option but to reach agreement with the collecting society and pay a higher price for licence fees than what the Copyright Tribunal may have determined". This suggests that it is very questionable as to whether the code has ensured that collecting societies have set 'fair and reasonable' licence fees (which is one of the requirements of the code).

### **3. Behavioural effect**

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information about a number of activities of collecting societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of the minimal behavioural effect of the code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely available digital content in schools. According to her, it is estimated that schools pay between AUD 8 - 10 million per year (£5 - £7 million) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### **4. External structural factors**

As discussed, the background to the consideration of the 'in principle' merits of the code – and the extent to which it is implemented – is the nexus of legislation and Tribunal, and the constraint that this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the code.

Even licensees willing to interrogate assertively the practices of collecting societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of collecting societies agreeing to mediation of disputes.

Viewed from this perspective, the code helps to regularise the reporting and information practices of collecting societies, but has done nothing to reduce the distrust between them and licensees, nor to lessen the disparity in bargaining power.

## 3. EU developments regarding collecting societies

### 3.1. Overview

European collecting societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in:

- legal status and organisation, ranging from private non-profit organisations (as in the UK) to bodies subject to direct government control (France, Germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European collecting societies in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.

#### **Regulation and Supervision**

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervisory framework under which collecting societies operate in the EU. These directorates are:

- Internal market (DG Market)

- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of collecting societies in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a code of conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

### **Background**

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU's competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004, the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM (2004) 261). It was not specifically concerned with the legal status of collecting societies which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM (2004)). It was more concerned with whether any specific collecting society operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on collecting societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the collecting society of their choice – which in turn implies they can make judgements about each collecting society's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment*, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services' (SEC (2005) 1254). This laid out three options:

1. do nothing
2. allow wider reciprocal agreements; and
3. allow rights-holders to appoint an EU-wide collecting society (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given collecting societies' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a code of conduct, setting out each collecting society's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music

collecting societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on collecting societies' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. Based on a public consultation that took place in 2008, the document identifies some possible actions in order to reach a 'competitive Digital Market'. In terms of the protection of rightholders, the document includes as possible options (i) extended collective licensing, (ii) creating financial incentives for online multi-territory offers and (iii) extending the scope of the Satellite and Cable Directive to online delivery as possible options.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many collecting societies gave their views on the need for reform and codes of conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The European Parliament was also less enthusiastic, emphasising collecting societies' contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music. The framework, expected in June 2012, is expected to introduce harmonised standards of governance and transparency for collecting societies.

### **Main themes included in different Directorates' publications**

As the prior section shows, there is not a single body of rules and regulations under which collecting societies operate in the EU. It is, however, possible to identify recurring themes across the different documents that deal with collective management. These are:

#### *Governance and administration*

- Extent of external oversight by statute or bodies such as regulatory bodies
- Transparency, especially of collecting societies' revenues and costs, notably deductions to third parties (not right holders), and net distributions
- Exclusivity. Historically, collecting societies have had the exclusive right to license national and international repertoire to users located in their territory. However, the Commission is challenging this territorial exclusivity insofar as it prevents the creation of a single market (e.g. a pan-European one-stop licensing operation).
- Dispute settlement

#### *Members*

- Flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.
- Service level agreements
- Member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
- Treatment of national and global repertoire. Traditionally, collecting societies use reciprocal agreements to get access to foreign repertoire. However, attempts by collecting societies to protect

their own national repertoire could lead to the avoidance of reciprocal agreements that might threaten that protection – seeing these as effectively a competitive threat. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.

- Distribution of royalties to right holders in other countries
- Ability of a right-holder to negotiate their own tariffs

#### *Users*

- Access to information about licences
- Fairness and equal treatment of users by collecting societies
- Education. This includes educating trade users about the need for collective licensing and the role of collecting societies under this system.

## 3.2. Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and other countries where regulation has been looser. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium and the Nordic countries seem to score well.

### **France**

The Intellectual Property Code states that collecting societies must be established as civil law societies ('société civile') of which right holders are members ('associés'). Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the 'Tribunal de Grande Instance' in the event of substantial concerns. The Ministry's

approval is necessary if a collecting society collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) has acted as a permanent committee in charge of supervising the collecting societies. This committee is composed of senior civil servants and operates under the Cour des Comptes (Court of Auditors). Once every two years the CPC publishes a detailed report on all 24 collecting societies that assesses their financial results, activity and redistribution strategies.

Collecting societies' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a collecting society was fulfilling a legal mandate, such as the private copying levy or the right of remuneration for cable re-transmission, but that they should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of collecting societies now see the CPC as a useful way of legitimising their activities to members and users as well as to the public.

For instance, SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. They have described the CPC review as a useful 'free' audit. However, others continue to be opposed to the CPC's intervention in what they see as the affairs of a private company (e.g. SACEM criticised the publication of the salaries of its management by the CPC).

## **Germany**

Germany passed the world's first law specifically on collecting societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says that the government regulates collecting societies to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a collecting society is said to be collective management for the benefit of rights holders. The German Patent and Trademark Office (DPMA) has the power to refuse any application to operate a collecting society if: (i) the statutes of the collecting society do not comply with the provisions

of the UrhWahrnG; (ii) there is a reason to believe that a person entitled by law or the statutes to represent the collecting society does not possess the trustworthiness needed for the exercise of his activity, or (iii) it is unlikely, in view of the collecting societies' business structure, that the rights and claims entrusted to it will be effectively administered. DPMA also has the power to revoke the authorisation granted to a collecting society for the performing of its operations.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a collecting society has to grant licences to all users according to the same published tariff and cannot refuse a licence. Collecting societies must notify the DPMA of any change to its statutes, management, tariffs, contracts or agreements with foreign collecting societies, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees. Finally, the UrhWahrn also states that collecting societies should provide welfare institutions for their members, such as pension funds (KEA, 2006)

DPMA operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (i.e. Germany and the UK, though the remit of the Tribunal in the UK is strictly limited to disputes related to the price/terms and conditions of the licence). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais (2010) 'Germany has the most comprehensive legal framework of collecting societies in the world'. Despite this, it is difficult to find useful evaluations of whether the system has achieved its stated aims. For instance, Figure 4 in Section 1.3 above shows that GEMA makes the fewest distributions a year and also takes the longest maximum time to process royalties in comparison with music collecting societies in the UK and Australia.

Similarly, the fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972 (some six years after the LACNR was established) – related to abusing its dominant position by imposing unreasonable membership terms – suggests that the system does not necessarily prevent collecting societies from abusing their monopoly position.

## **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to right holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million of undistributed revenues. The case is pending and there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as aggressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of its income to social causes such as pensions. In Spain, collecting societies are obliged to provide 20% of the remuneration for private copying for welfare activities and services for the benefit of their members – they must do this either themselves or through non-profit-making entities (KEA, 2006)

The Spanish Competition Commission has ruled against Spanish collecting societies' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two collecting society governance issues in recent years. The first is an example of a lack of professional management in a small collecting society. In 1994, when the government introduced a neighbouring right, an authors' union set up a new collecting society, URADEX, which faced problems with managing its database and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second issue are the challenges faced by SABAM, by far the country's largest collecting society. In 2004 a composer brought a criminal case against SABAM relating to alleged

mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being in February 2012, but the case continues.

Belgium's collecting societies have also faced complaints from users such as bars and other small businesses in which public performance takes place. Its collecting societies work closely with trade associations to address public concern and, where possible, collaborate, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate collecting societies. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. Collecting societies pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical voluntary code of conduct.

Table 3.1 summarises the regulatory initiatives in the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

**Table 3.1 Collecting societies Legal Framework in the EU**

<b>Country</b>	<b>Legal status</b>	<b>Establishment and supervision</b>	<b>Operations and accountability</b>	<b>Dispute resolution</b>	<b>Social and Cultural function</b>
France	Collecting societies must be established as civil law societies of which right holders are members. The law is not specific about the monopoly status	Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture. Authorisation is needed just for compulsory rights (i.e. reprography and cable retransmission). The Minister of Culture and the CPC supervises collecting societies' operations and has the power to revoke their licence to operate.	The CPC produces a bi-annual report assessing collecting societies' financial results, activity and re-distribution strategies. Royalty redistribution schemes are established by law in the case of private copying, and music public performance and broadcasting.	Mediation procedures for cable re-transmission rights. CPS mediates remuneration for broadcasting and public performance in case of disagreement.	50% of undistributed sums and 25% of the sums collected from private copy must be used for cultural purposes.
Germany	The law is not specific about the legal or monopoly status of collecting society.	Collecting societies need an administrative authorisation for starting their operations. Supervision is by the DPMA, which has the power to revoke a collecting society's authorisation to operate.	Collecting societies have to be open to all right holders and must license to all users without discrimination. Re-distribution rules have to be established in their statuses.	DPMA operates an arbitration board in case of disputes	Collecting societies should provide welfare contributions for their members, such as pension funds
Spain	Collecting societies must be non-profit organisations. Competition between collecting societies that manage the same rights is possible	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Culture, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (ad hoc body)	20% of the remuneration for private copying has to be allocated to welfare activities and services for members.
Belgium	Collecting societies can be commercial organisations or any other type of legal entities.	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Economy, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (neutral mediator)	30% of the private copying royalties may be allocated to promote new works

Source: KEA (2006), BOP Consulting (2012)

## 4. A code of conduct for the UK

### 4.1. Moves towards a code

In recent years, there has been increasing support from collecting societies and their members and users in the UK that a code of conduct is needed. For instance, this was confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012<sup>29</sup>. At this meeting, representatives of ten collecting societies expressed that:

- they are willing to support a voluntary code of conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, *PRS for Music* published a Code of Practice, the characteristics of which made it closer to a service level agreement – insofar as it delineated the level of service that should be expected from *PRS for Music*. This set of standards seems to have been part of the change in cultural and organisational characteristics that has taken place within the organisation over previous years, but it has arguably also resulted from political pressure and media attention resulting from the level of complaints before its adoption. Similarly, in January 2012, PPL also chose to publish a first code of conduct similar to the guidelines published by *PRS for Music*.

In 2011 the British Copyright Council (BCC) published a set of principles for its collecting society members which includes 10 out of the approximately 15 collecting societies that operate in the UK. These include *PRS for Music*, PPL, CLA, PLS, ALCS, Directors UK and BECS, among others.

The set of principles contain minimum standards that can be used by BCC members to develop their individual codes of conduct. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed principles; in-principle agreement was established at the Codes of Conduct Ministerial Roundtable held in March 2012.<sup>30</sup>

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<sup>29</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

<sup>30</sup> Minutes available at: <http://www.ipo.gov.uk/hargreaves-cce-20120307.pdf>

The intention is that these minimum standards would be adopted and implemented by all of the BCC's members by November 2012. At this point, the BCC will conduct an internal review to assess the success of the implementation and any need for change.

Finally, in December 2011 the UK government started a consultation process on proposals to change the UK's copyright system (closed at the end of March 2012), based on recommendations contained in the Hargreaves Review of Intellectual Property and Growth. As part of the consultation, the UK government is discussing proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. The government has consulted on a proposal for codes which contain minimum standards of fairness, transparency and good governance that have been set by the government. The content of the code has been mainly informed by the Australian code of conduct.

The consultation requested views on these proposed minimum standards, the scope of the code, implementation timescale, as well as initial views on potential penalties for non compliance in the case that back-stop legislation is introduced to enable the imposition of statutory codes if required. With this initiative, the UK government is attempting to lead the debate on the standards that should be expected from collecting societies. A UK code could then serve as a model to be used in the EU, for instance.

Table 4.1 shows the three different initiatives implemented by *PRS for Music*, PPL and the BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

**Table 4.1 Codes of conduct in the UK**

UK					
Area	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	Australia
General Description	Voluntary Code of Practice, first published in 2009	Voluntary code of conduct Available since 1 January 2012	<ul style="list-style-type: none"> <li>- Good Practice Principles, published in 2011.</li> <li>- Provides collecting societies with a baseline to be used to write their own voluntary code of conducts.</li> <li>- Suggested themes:                             <ul style="list-style-type: none"> <li>• transparency</li> <li>• accountability and consultation</li> <li>• service levels and operational issues</li> <li>• data protection</li> <li>• queries, complaints and dispute resolution</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies to adopt codes based on minimum standards that cover:                             <ul style="list-style-type: none"> <li>• obligations to right holders</li> <li>• obligations to licensees</li> <li>• control of the conduct of employees and agents</li> <li>• information and transparency</li> <li>• complaint handling</li> <li>• ombudsman</li> <li>• review of code</li> </ul> </li> <li>- Based on the Australian code and subject to public consultation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>- Code of conduct, launched in 2002.</li> <li>- Objectives:                             <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in collecting society</li> <li>• set out the standards of service</li> <li>• ensure that members and licensees have access to efficient, fair and low cost procedures for handling of complaints and dispute resolution.</li> </ul> </li> </ul>
Accountability and transparency	It states that <i>PRS for Music</i> processes are clear and transparent, but does not specify how that will achieve this.	<ul style="list-style-type: none"> <li>- Sets up standards of service: e.g.                             <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide members and licensees with accurate information</li> </ul> </li> <li>- Promises to act promptly, fairly and consistently.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency</li> <li>- Accountability and consultation</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should deal with members and licensees transparently.</li> <li>- Inform member, licensees, and potential licensees of scope of repertoire and reciprocal representation.</li> <li>- Make available clear distribution policy</li> <li>- It also set standards for reporting (including members, distribution policy, revenue, cost, allocation and distribution, and report regarding compliance with its code).</li> </ul>	<ul style="list-style-type: none"> <li>- States that collecting societies will maintain, and make available to members on request, a distribution Policy that sets out from time to time.</li> <li>- Also states that collecting society will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the collecting society of expenses and other amounts.</li> <li>- It also set standards for reporting.</li> </ul>
Education, training and awareness				<ul style="list-style-type: none"> <li>Collecting societies should give an undertaking that:                             <ul style="list-style-type: none"> <li>- Staff will receive training so</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Collecting societies are expected to take 'reasonable steps' to ensure that its</li> </ul>

				employees, agents and representatives refrain from using 'high pressure selling techniques'. - Employees and agents are aware of procedures handling complaints and resolving disputes.	employees and agents are aware of and comply with the code. Additionally, they are supposed to engage in appropriate activities to promote awareness among members, licensees and the general public.
Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> <li>- Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager.</li> <li>- If member/licensees is not satisfied with decision she can resubmit complaint, but this time addressing the Managing Director</li> <li>- Members and licensees can refer to the <u>Ombudsman</u> for <i>PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure</li> </ul>	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> <li>- Suggests that each stage of complaint procedure should be clearly explained.</li> <li>- Recently, it has been discussed that an <u>ombudsman</u> could also be included.</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> <li>• define categories for complaints</li> <li>• ensure relevant information is available and understandable</li> <li>• define who is responsible of handling the complaint and the timeframe</li> </ul> </li> <li>- Government also proposes to appoint a <u>ombudsman</u> to be a final arbiter on complaints between the collecting society and its members and licensees</li> </ul>	<ul style="list-style-type: none"> <li>- Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>• dealing with complaints from members and licensees; and</li> <li>• resolving disputes.</li> </ul> </li> <li>- These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.</li> </ul>
Compliance	None	None	Recently, it has been discussed that an independent review process could also be included.	- The role of ombudsman could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code.	Even though the code is voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.

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- Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties)

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Code review      No systematic process      No systematic process

It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

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Source: BOP Consulting (2012)

## 4.2. Main concerns regarding the collective management system in the UK

In assessing the costs and benefits of any such code of conduct, it is worth summarising the main concerns among members and users (but mostly users) about the current service provided by collecting societies in the UK. In this section we will focus on the music collecting societies (which are by far the major licensors across the world) and the reprographic collecting society that operates in the educational sector.

Some of these issues can be tackled through a code of conduct, in particular, the issues related to transparency, accountability, governance, and dispute resolution. However, and as the Australian case demonstrates, a voluntary code is unlikely to be strong enough to attain these results, since under a voluntary system collecting societies do not have any obligation to comply with the minimum standards stipulated in the code.

It is important to note that other issues (e.g. tariffs) lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary code seems to be a necessary but not sufficient condition to improve the relationship between collecting societies and agents.

### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, collecting societies are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different collecting societies can have a mandate to collect from the same licensee for the use of the same content.

This problem is one faced by businesses in the UK who in certain circumstances have to obtain licences from two different collecting societies for the public performance of the same copyrighted material. One example of this problem concerns businesses in the hospitality, leisure and retail sectors (hairdressers, pubs and restaurants, warehouses, etc.) that play recorded music in their establishments. Those businesses legally require a licence from (1) *PRS for Music* (which collects on behalf of

songwriters, composers and music publishers) for the public performance and mechanical reproduction of their works and from (2) PPL (Phonographic Performance Limited, which collects on behalf of performers and record companies) for the public performance of their works.

This legal requirement can be burdensome for businesses given that *PRS for Music* and PPL seem to have different business strategies. *PRS for Music* conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on a regular basis. PPL, on the other hand, seems to focus its efforts on a more limited pool of users. This seems to reinforce the lack of awareness of licensing requirements among some businesses. For instance, it was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of *PRS for Music* (and of its duties), but much less aware of PPL (since they will seldom have been approached by them).

Furthermore, when PPL approaches a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)<sup>31</sup>. Additionally, it also states that, 'in certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is one day late on paying the renewal fee.

*PRS for Music* also applies surcharges but is less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence<sup>32</sup>.

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<sup>31</sup> PPL FAQ: <http://www.ppluk.com/en/I-Play-Music/Businesses/Why-do-I-need-a-licence>

<sup>32</sup> PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed her association's concern "that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."<sup>33</sup>

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society – either *PRS for Music* or PPL – collect on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a *PRS for Music* licence (before that date just a *PRS for Music* licence was needed). For these organisations, *PRS for Music* has been administering a joint music licence since January 2012, which incorporates charges from both organisations. *PRS for Music* remains the single point of contact for the joint licence.

Reprographic ('text') collecting societies in the UK have established a different organisational solution but with the same end in mind. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and performs collective licensing on their behalf.

With regards to issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge if and when all

<sup>33</sup> Quoted in the online article, 'How should Collecting Societies be Reformed?', *Managing Intellectual Property*, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

collecting societies decide to make a thorough assessment of the potential universe of licensees. However, a code on its own would not effect the joint collection of music licences that would simplify the market for users.

## 2. Tariffs and scope for negotiation

There are clear differences in the scope for negotiation with collecting societies among users, according to the scale of the operations:

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is a 5-year tariff deal with yearly adjustments for inflation and audience size. They pay royalties to four different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors' and authors' rights). Their most efficient dealings are with PRS for Music and PPL which act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- **Medium users (e.g. hospitality sector):** Medium users do have some level of co-ordination with collecting societies, usually through their trade associations. These associations have on occasion referred a tariff to the Copyright Tribunal for adjudication, where they have been unable to reach agreement through discussions with the relevant collecting society (for example, the background music tariffs for the hospitality sector were set in this way – for PRS in 1991, and for PPL in 2009 – and have subsequently been adjusted annually based on inflation and usage indicators). However users, including trade associations, report that the Copyright Tribunal is expensive to access; this means that in practice such users are often dependent on the willingness of the collecting society to negotiate.
- **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of *PRS for Music*' existence mostly because of *PRS for Music*'s business strategy, which is based on a comprehensive identification of all businesses likely to be music users.

With regards to issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, ability to negotiate is limited. Though the licensee can refer to the Copyright Tribunal to adjudicate on the price, terms and conditions of a tariff, this does not happen frequently (e.g. the *PRS for Music* tariff for the hospitality sector was established in 1991).

### 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, though their recently overhauled website shows a marked improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

With regards to transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the code is voluntary and (ii) the language used in the code is vague. These are two lessons that can be drawn from the Australian case.

#### 4. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged: “Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood” (Consumer Focus, 2011).

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies’ idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). This is because the UK recognises the benefits of monopoly providers and has sought to address potential concerns through the minimum standards proposed.

With regards to issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

#### 5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change which opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>34</sup>. According to the British Library ‘the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material’. They estimate that 43% of potential ‘in copyright’ work in the Library are orphan works<sup>35</sup>.

<sup>34</sup> B. Stratton (2012). ‘Seeking New Landscapes’ A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>)

<sup>35</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

With regards to issues of repertoire and mandate, a code of conduct for the UK would have:

- no direct effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to successfully apply to operate an Extended Collective Licensing scheme.

## 5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

### **Code of conduct in Australia**

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism.
- Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
- Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
- External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### **Regulation of collecting societies in the European Union**

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.
- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

### **Overall conclusions from the comparative analysis**

In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:

- there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
- there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
- wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are

important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and which will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for instance, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. But the efficiency and size of the distributions made to members are not the only indicators with which to assess the performance of collecting societies, though they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for 'principal-agent' problems and for collecting societies to extract 'managerial rents' from members now seems relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain relatively ubiquitous, though are often not pursued through collecting societies' own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing users' concerns rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

## **A code of conduct for the UK**

Looking against the potential benefits of a code of conduct that were outlined in the BIS Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a *voluntary* code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model, as summarised below.

### **Members**

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already (i.e. they do not tend to complain)<sup>36</sup>. This is in contrast with the case of collecting societies in Spain and Belgium which shows that mismanagement of and malpractices with rights holders' revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. We should stress that all indicators point to UK collecting societies having strong governance mechanisms, good member relations, and no recent history of malpractice.
- More collections for members – we have found no evidence that a code of conduct would directly result in any increase in transactions. Any distinction that might be made here between the potentially different affects that a voluntary or mandatory code might have seem unlikely as increases in collections seem to be instead driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of who are the potential users of the rights that they manage – neither of which are directly influenced by whether any code of conduct is voluntary or mandatory.

### **Collecting Societies**

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in

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<sup>36</sup> This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.

- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for the new rights than by an expansion in transactions driven simply by a better informed marketplace.

## **Users**

- Fewer complaints – evidence suggests that users direct more complaints through government, civil society organisations and industry trade bodies than through collecting societies. Consultation with industry trade bodies for this study suggests that this is because users feel that their bargaining position is very weak. As complaints to government and civil society organisations have been outside the scope of this research, it is not possible here to state what effect a code of conduct may or may not have on the level of these complaints. There is some evidence in the UK as regards to user complaints to collecting societies. After the launch of their code of practice in 2009, PRS reported an 8% reduction in the number of complaints from licensees in the first year after its introduction, albeit only representing a fall of 17 complaints in total. Equally, at the same time as establishing their code of practice, PRS also instigated a new complaints procedure with a three stage tracking system. As this suggests, the PRS code of practice was one factor among others in improving PRS' relations with users, and licensees consulted for this study reported that these factors together were an expression of a more fundamental and progressive cultural and organisational change within the collecting society. The PRS example suggests that a code of conduct in isolation is unlikely to make a difference to user complaints, but it may make some contribution as part of package of measures aimed at improving the service that collecting societies provide to users.

- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The international comparative evidence documented in this report indicates, then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a *statutory* code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be little other net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights<sup>37</sup>) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

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<sup>37</sup> As an indication of the current complexity and confusion surrounding rights, one year after introducing their code of practice, PRS surveyed their licensees and the majority (60%) still did not 'fully understand the role of PRS and MCPS' – let alone how the rights

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managed by PRS/MCPS interact with those managed by PPL (Harris Interactive survey of 1,200 businesses, cited in PRS' submission to the Hargreaves Review, at: <http://www.prsformusic.com/aboutus/press/latestpressreleases/Documents/PRS%20for%20Music%20Response%20to%20Hargreaves%20IP%20and%20Growth%20Review%20Final.pdf>)

# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
May, 2012

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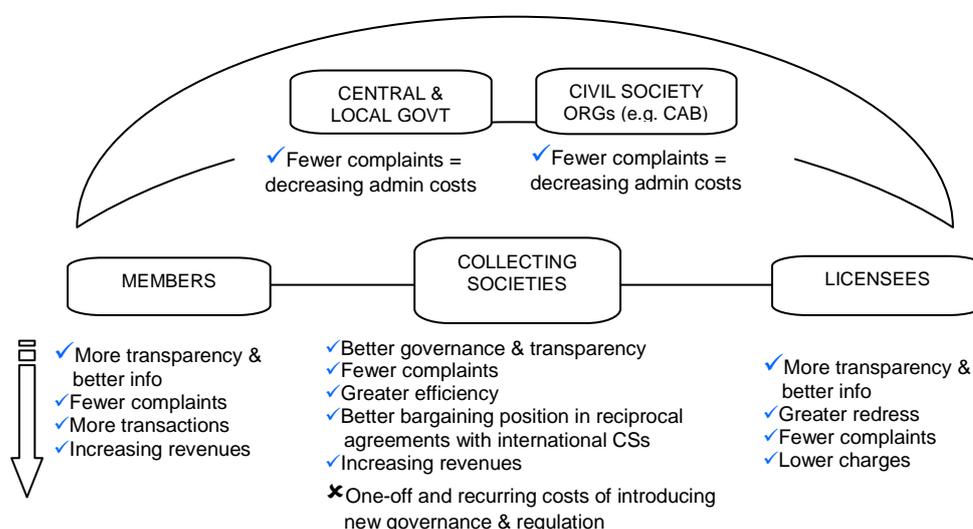
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# 1. Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in Figure 1.

Figure 1 Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

But the Impact Assessment also proceeds to hypothesise that charges to licensees could fall as collecting societies (due to greater transparency and scrutiny) provide licensees with better information for negotiating and contracting; and that revenues could also ultimately increase for members and the collecting societies under the new codes of conduct as members and licensees would (effectively) find it easier to do business with the collecting societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing codes of conduct will fall on the collecting societies themselves.

<sup>1</sup> Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

The report interrogates the plausibility and extent of these hypothetical assumptions<sup>2</sup> through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has suggested be adopted by collecting societies. The report analyses whether the Australian code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of collecting societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of collecting societies.

### Definitions: Types of rights

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO<sup>4</sup> provides an explanation of the rights entailed by that exclusivity. They can be classified as follows:

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of their works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. It also includes the mechanical reproduction rights in musical works.
2. **Rights of public performance, broadcasting and communication to the public** –
  - Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present."<sup>5</sup> Public performance also includes performance by means of recordings. Musical works can be said to have been "publicly performed" when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.
  - The right of "broadcasting" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite.

<sup>2</sup> The exception here is that area of complaints to central and local government and civil society organisations was deemed out of scope of the present research at inception.

<sup>3</sup> The views of some collecting societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific collecting society, as their representative body.

<sup>4</sup> WIPO (undated) 'Basic Notions of Copyright and Related Rights', available at: [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf)

<sup>5</sup> WIPO (undated) 'Understanding Copyright and Related Rights', available at: [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html)

When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.

- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. In the UK, though, moral rights can be waived but cannot be transferred.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organisation was established, also in France, to manage rights in the field of music. It is estimated that similar organisations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting societies - also known as collective management organisations (CMOs), or as Reproduction Rights Organisations, RROs, in the case of reproduction rights - are organisations (both private and public) in charge of administering statutory copyright law via collective rights management (CRM) (Towse and Handke, 2007). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They tend to operate different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimise transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price

- monitoring and enforcement of rights ownership.

Collecting societies also enter into international agreements with 'sister' collecting societies in other countries to enable access to an international repertoire not included among its international membership. These are known as reciprocal agreements.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>6</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licences. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Towse, 2007)

It is worth pointing out that collecting societies are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. CLA for reprographics rights). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up having to clear the rights in a piece of work with many different collecting societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between collecting societies and users, even more so if collecting societies do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one CMO that administers their particular category of rights. "This monopolistic structure leaves copyright collecting societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 authors' societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection came from public performance rights (€5.5 billion). Additionally, music is, by far, the sector that generates the highest amount of royalties for the authors' collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Figure 2).

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<sup>6</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

**Figure 2: Collection through Authors' collecting societies (2010)**

Sector	Amount (€million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

Source: CISAC, 2012

## 1.2 Models of collective management

There are different systems for the collective management of rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the four models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging – given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between collecting societies and their members and users.

**Figure 3: Different models for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to do so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>
3. Extended collective	An extended collective licence extends the effects	Nordic countries

licence	of a copyright licence to also cover non-represented rights holders who have to opt out rather than opt in.	(Norway, Denmark, Finland, Iceland, Sweden, for reprographics)
4. Legal licence		
a. Non-voluntary system with a legal licence ("statutory license")	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, <b>Australia</b> (educational statutory licence)
b. Private copying exemption with a levy system for fair compensation for use	The licence to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO<sup>7</sup> adapted by the UK Intellectual Property Office

Collecting societies in the UK operate voluntary collective licensing with no regulation of collecting society functions; price is effectively regulated by the Copyright Tribunal. In turn, Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between collecting societies and users in Australia arise from the statutory licence.

### 1.3 Collecting societies' incentives and governance

In addition to (and as a consequence of) the different legal systems, collecting societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non-profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private membership associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, the main goal of collecting societies is to look after the interest of their members. Consequently, in most cases their incentives are understandably aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic collecting society. However, strong internal governance could help ameliorate this potential negative effect. Collecting societies are in most cases member owned. Boards of Directors are

<sup>7</sup> WIPO / International Federation of Reproduction Rights Organisations (IFRRO) classification available at: [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

elected by members on a regular basis and, hence, their performance tends to be subject to close scrutiny by right holders. Furthermore, the possibility for the existence of so-called managerial rents (rents appropriated by the 'agent' who withholds more information than the 'principal') can be analysed by looking at collecting societies' financial results (e.g. the total amount collected from content users over administration costs).

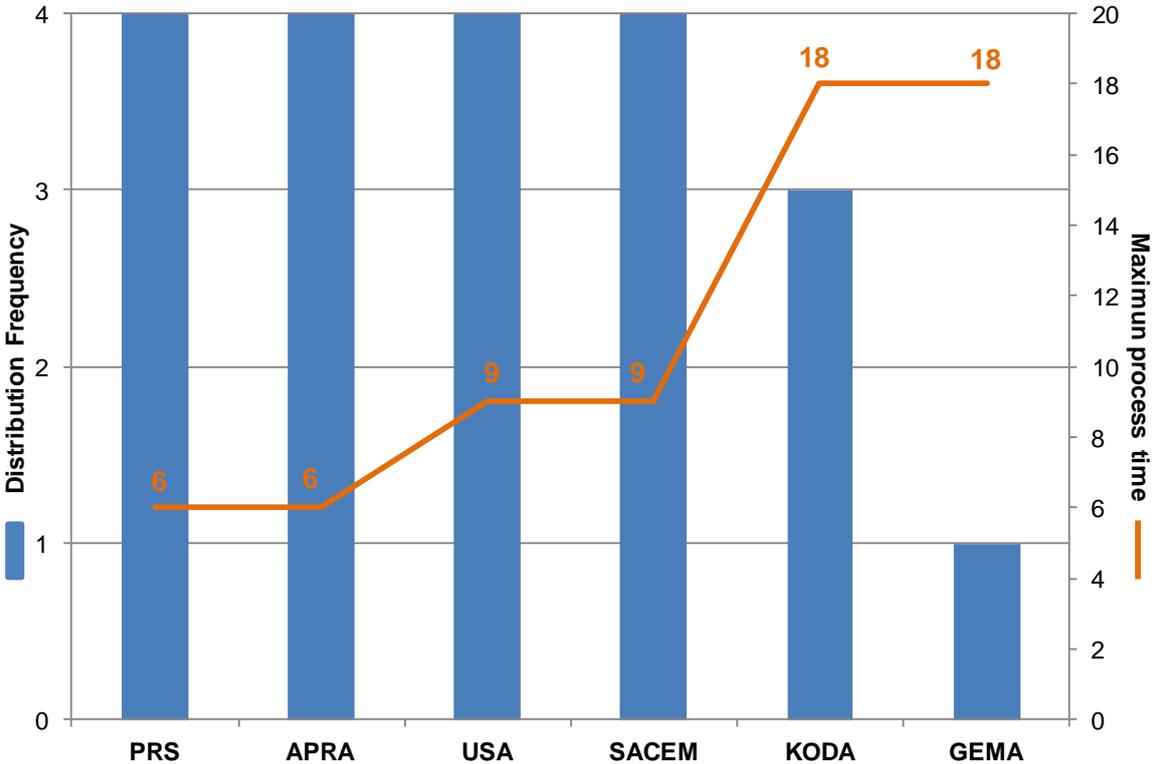
Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed collecting societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent in the institutional characteristics of these monopolistic organisations. For instance, a collecting society with members that hold a lot of market power and which play a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Right Society, *PRS for Music*) – could minimise agency problems (although at the same time there is a possibility that this same market power could be used to advantage larger members at the expense of a majority of very small rights owners).

These findings seem to be reflected in other indicators of efficiency. Figure 4 below shows the (i) frequency of royalties' distribution and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence for the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

However, as Rochelandet indicates, if the internal governance mechanism fails then there is room to strengthen government legal supervision. If this weakness exists, one of the most common complaints among members is the speed and transparency with which collecting societies redistribute to right holders their corresponding royalties.

An extreme case of poor management in the absence of legislation can be found in Spain where a collecting society was accused of fraud for diverting royalties that should have been redistributed among its members (see Section 3 for further explanation).

**Figure 4: International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies**



Source: CISAC, PRS for Music (2012)

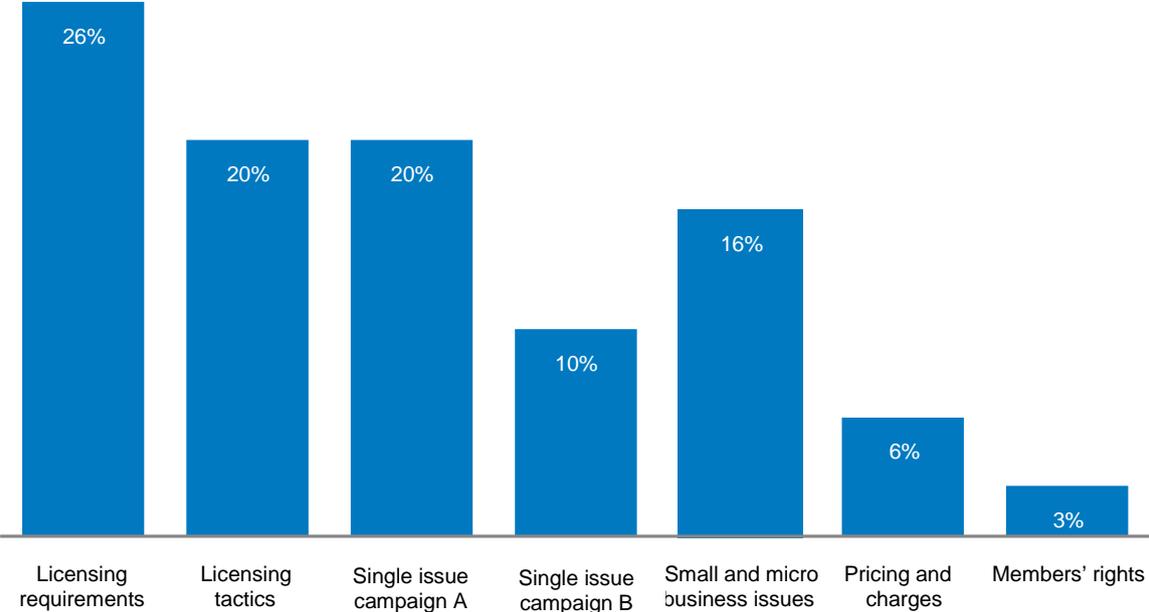
On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor a collecting society’s performance. In most cases, licensees do not have recourse to an independent appeal mechanism, such as an ombudsman, if they feel that their complaint has not been satisfactorily resolved via the internal complaints procedure of a collecting society.

In the UK the frictions between collecting societies and users is reflected in the complaints received in the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints about collecting societies, covering 118 issues in total.<sup>8</sup> Figure 5 shows the breakdown of those issues, compiled and published by the IPO. The most common issue (aggregated under the heading ‘licensing requirements’) encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the ‘heavy handed and aggressive licensing tactics’ used by collecting societies (BIS, Impact Assessment, 2011). The ‘Small and micro businesses’ issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

<sup>8</sup> Of course, this is only one means by which complaints are made about collecting societies – others could include complaints made to trade associations, to local government bodies such as Trading Standards, or to the collecting societies themselves

Complaints from members only account for 3% of the total issues covered in the complaints Minister for Intellectual Property, which could reflect two factors (i) that members tend not to complain or (ii) that their complaints are satisfactorily dealt with within the existing system (e.g. collecting societies' in-house complaint resolution process).

**Figure 5: Breakdown of complaints received by Ministers via MPs.**



Source: IPO (2012)

Even though there is evidence on the usually strained relationship between collecting societies and users, there is very limited literature on the efficiency of the relationship between them. Section 2 explains the problems that have arisen in Australia between users and the collecting society in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between the two agents involved in the transaction.

## 2. Code of conduct in Australia

There are ten collecting societies in Australia (see Figure 6). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Figure 6: Collecting societies in Australia**

Collecting society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

Source: BOP Consulting (2012)

## 2.1 Regulatory background

This section explains the legal context and regulatory developments that have taken place in Australia before the introduction of a voluntary code of conduct. It describes two specific mechanisms within the regulatory system (i.e. the Copyright Tribunal and the Statutory Licence), as well as the government attitude and policies towards intervening with or regulating collecting societies.

### APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies: the *Australasian Performing Right Society*,<sup>9,10</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>11</sup>

### Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>12</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as business, the system remained voluntary.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third collecting society, the Phonographic Performance Company of Australia Limited<sup>13</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>14</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>15</sup> CAL has

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<sup>9</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>10</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>11</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to the discovery of any detail of the company's trading.

<sup>12</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended the establishment of a copyright tribunal.

<sup>13</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>14</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>15</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase of collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles<sup>16</sup>.

By, in effect, endorsing the purpose and practices of Australian collecting societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the societies. However, in the period of growth that began in the 1980s, collecting societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward have shaped attitudes to collecting societies in Australia.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though this has not led to any substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some collecting societies, has also caused considerable resentment. Copyrights, such as the public performing right and reproduction rights, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them. This is, for example, the experience of the main educational organisations in Australia (see below).

They allege oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by collecting societies. The double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continues to characterise Tribunal proceedings.

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<sup>16</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

## Statutory licence

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that – by law – schools and university libraries have the right to copy, as long as the 'rights holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the collecting society in charge of collecting the statutory licence.

The school sector is a major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to collecting societies in Australia, only surpassed by the retail sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If this is the case, either party can request the Copyright Tribunal to determine the rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for these organisations (see Section 2.4.2 below, point 2).

It is worth pointing out that the UK Copyright Tribunal also arbitrates on the terms and conditions of a licence when the two sides cannot reach agreement themselves. However – and in stark contrast with Australia – only users and not collecting societies can take matters to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

## Government attitudes to collective administration

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay).

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>17</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to collecting societies by the competition law.<sup>18</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>19</sup>

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<sup>17</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>18</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>19</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

## **Don't Stop the Music report – genesis of the collecting societies' code of conduct**

In 1996 a Liberal coalition administration assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>20</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

In 1997, the Government asked a joint Committee of Parliament to investigate collecting societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>21</sup> for the creation of the office of Copyright Ombudsman, and most supported the establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>22</sup> advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998<sup>23</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by collecting societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for collecting societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

## **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC

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<sup>20</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

<sup>21</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>22</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>23</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and collecting societies (and received 20 submissions, as discussed below). However, six years on the ACCC is yet to release a final version of the 2006 draft guide.

## 2.2 Characteristics of the code

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.<sup>24</sup> The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide information about payment entitlements to members on request
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The code requires collecting societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, collecting societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, collecting societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about collecting societies' compliance with the code. The code provides for the monitoring and review of compliance, and for amendments.

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<sup>24</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PCCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAcollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

## Enforcement and review of the code

In 2003, the collecting societies appointed The Hon James Burchett QC<sup>25</sup> to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the code Reviewer – advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and summarising all complaints/disputes, and assessing how societies have handled them. The reports have consistently found general compliance with the code.

## 2.3 Collecting society performance before and after the code

In compliance with the code of Conduct the Copyright Agency Limited (CAL) publishes an Annual Report every year with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 7, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>26</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could go towards explaining the tensions between the school sector (its biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEED), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEED) was created in the first place.

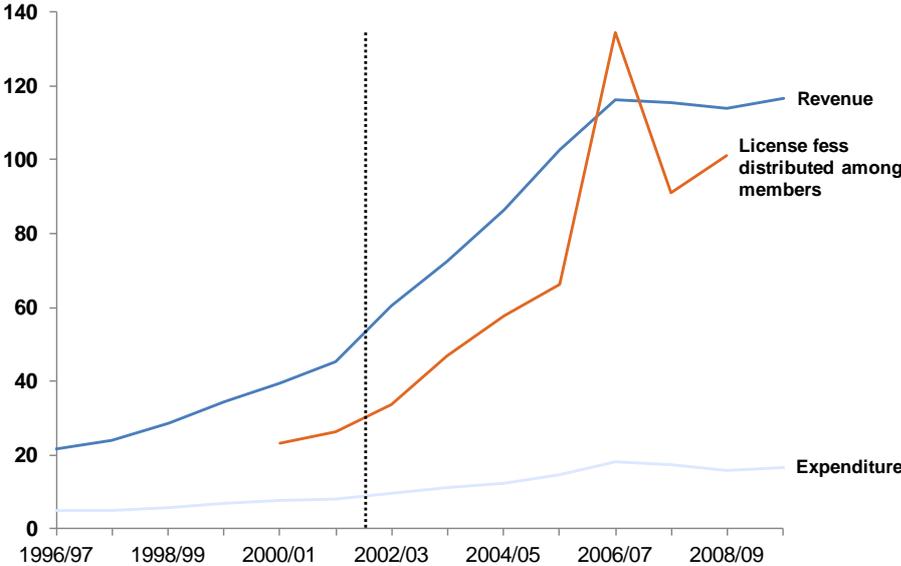
Figure 7 also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

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<sup>25</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

<sup>26</sup> The figures are shown in Australian dollars (AUD), and have not been deflated.

**Figure 7: CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions)**

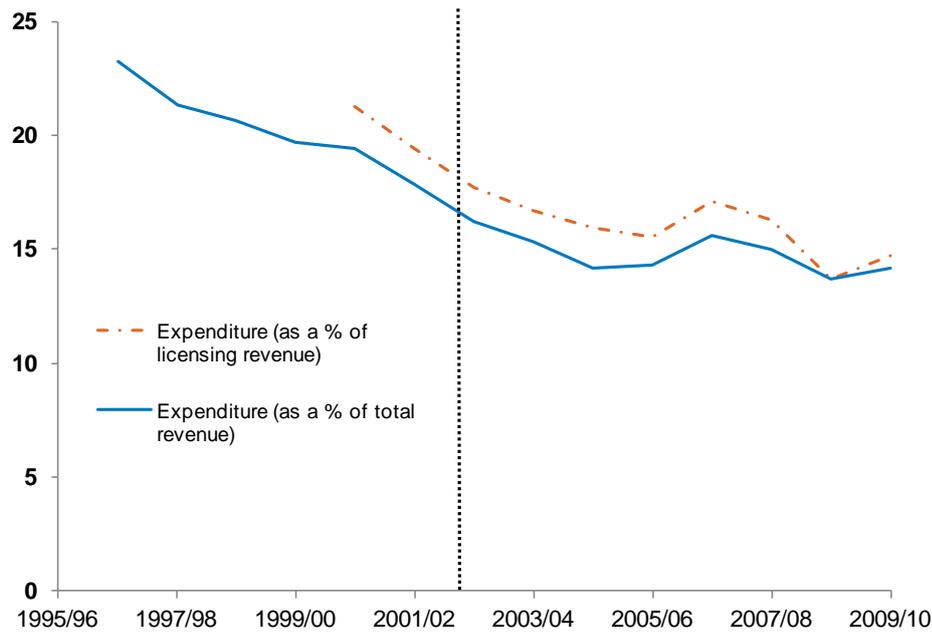


Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 8). This downward trend can be observed before the implementation of the code of conduct.

After 2005, the ratio of expenditure over revenue has shown a less clear path. Another measure of productivity is given by net income (defined as revenue minus expenditure) per employee. Figure 9 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

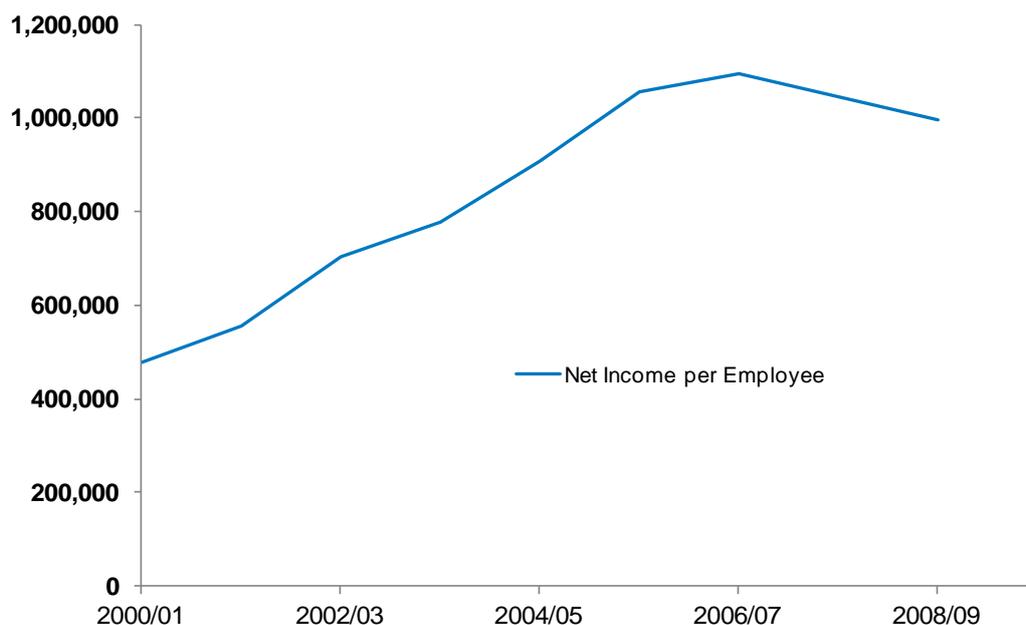
**Figure 8: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)**



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

More informative measures of efficiency would be the collected and distributable sums analysed per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 9: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

At first glance, the generally rising trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (a rise of 500% in 10 years), in a sector that accounts for around 48% of CAL's total revenue.

In particular, the large increase in CAL revenue from the schools sector stems from a decision made by the Copyright Tribunal in 2002 (plus related back payments to 1999). The 2002 Tribunal decision determined that differential rates were payable for copying of general works, artistic works, plays, short stories, poems, overhead transparencies, slides and permanent display copies, as follows:

- 4 cents for general works
- 6 cents for short stories and plays
- 8 cents for artistic works and poems
- 40 cents for overhead transparencies/slides.

The new differential rates led to a very large increase in Part VB licence fees paid by Schools and the rate has increased each year with CPI. Previously Schools had paid CAL a flat rate of \$2.442 per primary student and \$3.342 per secondary student.

The second major change made by CAL relates to digital copying. In 2002, the Tribunal declined to fix a rate for digital copying as there was insufficient evidence for it to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to appropriate digital copying rate, the schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment of electronic payment in schools. The schools also said that they would voluntarily pay CAL 85 cents per FTE student for 2005 and 85 cents per FTE student plus CPI in

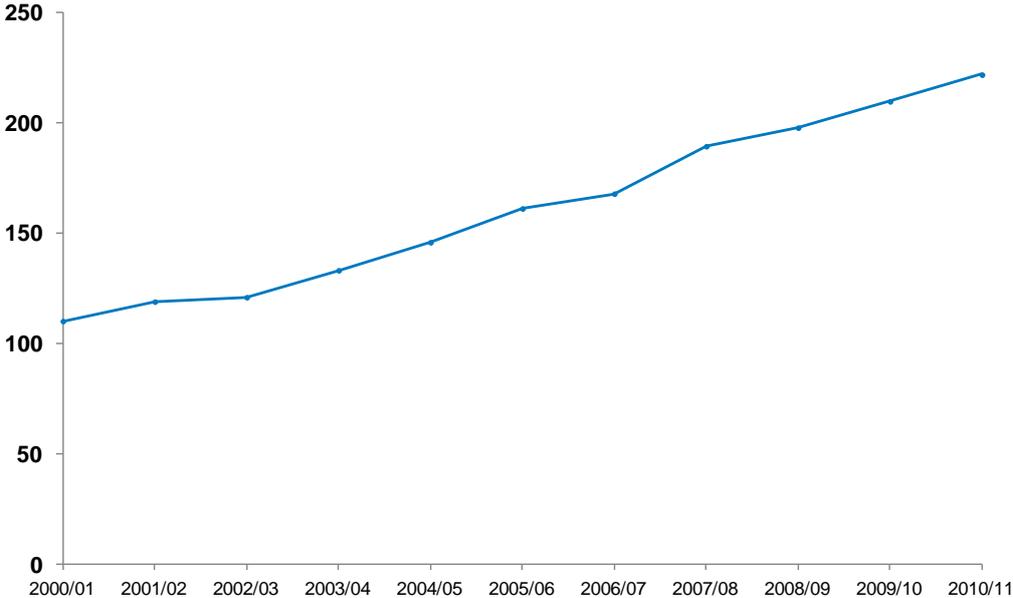
subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by Schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

In 2005, CAL duly commenced proceedings in the Copyright Tribunal for a higher electronic use rate and other matters in relation to an Electronic Use Scheme survey in Schools, but the proceedings in relation to rates go to a hearing. In 2009, a single rate for both hard and digital copying was agreed by negotiation between the schools and CAL for 2010-2012 of 16 dollars per FTE student plus CPI in the subsequent years; this settled the Copyright Tribunal litigation instigated by CAL in 2005 in relation to a rate for electronic use. The agreement is due to expire 30 December 2012 and negotiations are about to re-commence.

**APRA**

There is less information available about APRA, the Australian music collecting society. Therefore, it is only possible to build a time series for their revenue (total amount of licence fees collected from their users) (see Figure 10). Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA’s revenue increased by 90%. In contrast, CAL’s revenue increased by 195% over the same period. This provides further evidence that the CAL’s financial results are largely due to the constant increases in tariffs over the period.

**Figure 10: APRA: Revenue 2000-2010 (AUD millions)**



Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)

**2.4 Benefits and criticisms**

Ten years into the code, it is possible to identify some benefits but mostly criticisms of the Australian code of conduct. As it has already been established in the preceding section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition, this trend

has co-existed with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

This section looks into other benefits and criticisms of the code in terms of the service provided to both members and users.

### 2.4.1 Benefits

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

### 2.4.2 Criticisms

Criticism of the code can be divided into four main categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores any effect that the code has had on behavioural change of the collecting societies. The final one explains a number of structural factors that are external to the code and that may have the effect of rendering the code nugatory.

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and collecting societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.<sup>27</sup>

The department's submission stated four specific shortcomings. The code:

- is voluntary
- prescribes but does not enforce minimum standards of conduct
- permits collecting societies to appoint the code reviewer
- does not facilitate independent criticism: licensees who supply comments to the code reviewer are usually 'in relationships' with collecting societies.

The submission also stated dissatisfaction with the way in which, during the code review process, the code reviewer dealt with concerns raised about the conduct of certain collecting societies. During negotiation of licence fees, one particular society, CAL, proved unco-operative in supplying financial and historical data necessary for judging equitable remuneration and a number of collecting societies were unwilling to engage in Alternate Dispute Resolution (ADR) – even though the code

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<sup>27</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

provides for ADR. Collecting societies – according to the NSW submission – would only engage instead in mediation with individuals and not a collective, such as a ministerial copyright taskforce.<sup>28</sup>

Independently of the submission, a number of criticisms can be added. The code does not establish a standard stating that collecting societies should publish (or make available on request) summary and detailed information about distributions and patterns of distributions. The lack of information in this regard makes it difficult to ascertain the extent to which collecting societies benefit those they claim to benefit.

Additionally, the efficacy of the code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as mentioned above, focuses on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL itself mediated 15 matters – but equally noticeably, most concerned complaints made by members not licensees.

It is unlikely that the dissatisfaction with various collecting societies, particularly the largest societies such as APRA-AMCOS and CAL, expressed over the course of 30 years, has vanished. Hence, as the following issues related to Dispute Resolution below illustrate, it is not possible to assert that the lack of complaints from licensees actually reflects the fact that the code has encouraged licensees to resolve issues with collecting societies.

## 2. Dispute resolution

Most code-related dispute resolution is initiated by complaints from members of collecting societies, not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding groups of organisations (e.g. schools) or representative bodies/trade associations.

Ideally, the code would have set a requirement for an independent copyright ombudsman, as was previously recommended in 1995, to act as a fallback in the dispute resolution process. In lieu of an ombudsman, the Copyright Tribunal exists to arbitrate in disputes between collecting societies and users of copyright material. However, the Tribunal has major limitations. Firstly, the Tribunal only adjudicates on issues related to tariffs. Secondly, the procedure is perceived as lengthy and costly, which largely prevents users from initiating a case in the Tribunal. In some cases, the collecting society takes a case to the tribunal, when an agreement is not reached regarding the terms of a tariff or the conditions of the licence (see the example above in section 2.3 related to digital copying).

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it cost them AUD 2million. She claims that the “costs and delays of the Tribunal effectively bar most licensees, and this limits its utility as a forum. Licensees have no other option but to reach agreement with the collecting society and pay a higher price for licence fees than what the Copyright Tribunal may have determined”. This suggests that it is very questionable as to whether the code has ensured that collecting societies have set ‘fair and reasonable’ licence fees (which is one of the requirements of the code).

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<sup>28</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

### **3. Behavioural effect**

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information about a number of activities of collecting societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of the minimal behavioural effect of the code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely available digital content in schools. According to her, it is estimated that schools pay between AUD 8 - 10 million per year (£5 - £7 million) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### **4. External structural factors**

As discussed, the background to the consideration of the 'in principle' merits of the code – and the extent to which it is implemented – is the nexus of legislation and Tribunal, and the constraint that this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the code.

Even licensees willing to interrogate assertively the practices of collecting societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of collecting societies agreeing to mediation of disputes.

Viewed from this perspective, the code helps to regularise the reporting and information practices of collecting societies, but has done nothing to reduce the distrust between them and licensees, nor to lessen the disparity in bargaining power.

## 3. EU developments regarding collecting societies

### 3.1 Overview

European collecting societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in:

- legal status and organisation, ranging from private non-profit organisations (as in the UK) to bodies subject to direct government control (France, Germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

Revenues from European collecting societies in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervisory framework under which collecting societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of collecting societies in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a code of conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU's

competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004, the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM(2004) 261). It was not specifically concerned with the legal status of collecting societies which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific collecting society operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on collecting societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the collecting society of their choice – which in turn implies they can make judgements about each collecting society's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services'* (SEC (2005) 1254. This laid out three options:

1. do nothing
2. allow wider reciprocal agreements; and
3. allow rights-holders to appoint an EU-wide collecting society (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given collecting societies' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a code of conduct, setting out each collecting society's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collecting societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on collecting societies' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. Based on a public consultation that took place in 2008, the document identifies some possible actions in order to reach a 'competitive Digital Market'. In terms of the protection of rightholders, the document includes as possible options (i) extended collective licensing, (ii) creating financial incentives for online multi-territory offers and (iii) extending the scope of the Satellite and Cable Directive to online delivery.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many collecting societies gave their views on the need for reform and codes of conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The European Parliament was also less enthusiastic, emphasising collecting societies' contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music. The framework, expected in June 2012, is expected to introduce harmonised standards of governance and transparency for collecting societies.

### **Main themes included in different Directorates' publications**

As the prior section shows, there is not a single body of rules and regulations under which collecting societies operate in the EU. It is, however, possible to identify recurring themes across the different documents that deal with collective management. These are:

#### *Governance and administration*

- Extent of external oversight by statute or bodies such as regulatory bodies
- Transparency, especially of collecting societies' revenues and costs, notably deductions to third parties (not right holders), and net distributions
- Exclusivity. Historically, collecting societies have had the exclusive right to license national and international repertoire to users located in their territory. However, the Commission is challenging this territorial exclusivity insofar as it prevents the creation of a single market (e.g. a pan-European one-stop licensing operation).
- Dispute settlement

#### *Members*

- Flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.

- Service level agreements
- Member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
- Treatment of national and global repertoire. Traditionally, collecting societies use reciprocal agreements to get access to foreign repertoire. However, attempts by collecting societies to protect their own national repertoire could lead to the avoidance of reciprocal agreements that might threaten that protection – seeing these as effectively a competitive threat. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.
- Distribution of royalties to right holders in other countries
- Ability of a right-holder to negotiate their own tariffs

#### *Users*

- Access to information about licences
- Fairness and equal treatment of users by collecting societies
- Education. This includes educating trade users about the need for collective licensing and the role of collecting societies under this system.

## 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and other countries where regulation has been looser. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium and the Nordic countries seem to score well.

### **France**

The Intellectual Property Code states that collecting societies must be established as civil law societies ('société civile') of which right holders are members ('associés'). Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the 'Tribunal de Grande Instance' in the event of substantial concerns. The Ministry's approval is necessary if a collecting society collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) has acted as a permanent committee in charge of supervising the collecting societies. This committee is composed of senior civil servants and operates under the Cour des Comptes (Court of Auditors). Once every two years the CPC publishes a detailed report on all 24 collecting societies that assesses their financial results, activity and redistribution strategies.

Collecting societies' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a collecting society was fulfilling a legal mandate, such as the private copying levy or the right of remuneration for cable re-transmission, but that they should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of collecting societies now see the CPC as a useful way of legitimising their activities to members and users as well as to the public.

For instance, SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. They have described the CPC review as a useful 'free' audit. However, others continue to be opposed to the CPC's intervention in what they see as the affairs of a private company (e.g. SACEM criticised the publication of the salaries of its management by the CPC).

## Germany

Germany passed the world's first law specifically on collecting societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says that the government regulates collecting societies to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a collecting society is said to be collective management for the benefit of rights holders. The German Patent and Trademark Office (DPMA) has the power to refuse any application to operate a collecting society if: (i) the statutes of the collecting society do not comply with the provisions of the UrhWahrnG; (ii) there is a reason to believe that a person entitled by law or the statutes to represent the collecting society does not possess the trustworthiness needed for the exercise of his activity, or (iii) it is unlikely, in view of the collecting societies' business structure, that the rights and claims entrusted to it will be effectively administered. DPMA also has the power to revoke the authorisation granted to a collecting society for the performing of its operations.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a collecting society has to grant licences to all users according to the same published tariff and cannot refuse a licence. Collecting societies must notify the DPMA of any change to its statutes, management, tariffs, contracts or agreements with foreign collecting societies, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees. Finally, the UrhWahrn also states that collecting societies should provide welfare institutions for their members, such as pension funds (KEA, 2006)

DPMA operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (i.e. Germany and the UK, though the remit of the Tribunal in the UK is strictly limited to disputes related to the price/terms and conditions of the licence). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais (2010) 'Germany has the most comprehensive legal framework of collecting societies in the world'. Despite this, it is difficult to find useful evaluations of whether the system has achieved its stated aims. For instance, Figure 4 in Section 1.3 above shows that GEMA makes the fewest distributions a year and also takes the longest maximum time to process royalties in comparison with music collecting societies in the UK and Australia.

Similarly, the fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972 (some six years after the LACNR was established) – related to abusing its dominant position by imposing unreasonable membership terms – suggests that the system does not necessarily prevent collecting societies from abusing their monopoly position.

### **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to right holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million of undistributed revenues. The case is pending and there are moves in the government to establish a new public body to provide regulatory oversight. There are also concerns about SGAE's overly vigorous search for potential users (which is seen as aggressive), and the Spanish Competition Commission has ruled against Spanish collecting societies' unfair practices on several occasions.

On the other hand, SGAE fulfils a social role since it allocates a large proportion of its income to social causes such as pensions. In Spain, collecting societies are obliged to provide 20% of the remuneration for private copying for welfare activities and services for the benefit of their members – they must do this either themselves or through non-profit-making entities (KEA, 2006).

According to BEUC (European Consumers' Organisation), the Spanish Competition Authority has also questioned the fitness-for-purpose of the underlying business model of current collective rights management: 'the recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two collecting society governance issues in recent years. The first is an example of a lack of professional management in a small collecting society. In 1994, when the government introduced a neighbouring right, an authors' union set up a new collecting society, URADEX, which faced problems with managing its database and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second issue are the challenges faced by SABAM, by far the country's largest collecting society. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being in February 2012, but the case continues.

Belgium's collecting societies have also faced complaints from users such as bars and other small businesses in which public performance takes place. Its collecting societies work closely with trade associations to address public concern and, where possible, collaborate, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate collecting societies. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. Collecting societies pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical voluntary code of conduct.

Figure 9 summarises the regulatory initiatives in the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

**Figure 9: Collecting societies Legal Framework in the EU**

Country	Legal status	Establishment and supervision	Operations and accountability	Dispute resolution	Social and Cultural function
France	Collecting societies must be established as civil law societies of which right holders are members. The law is not specific about the monopoly status	Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture. Authorisation is needed just for compulsory rights (i.e. reprography and cable retransmission). The Minister of Culture and the CPC supervises collecting societies' operations and has the power to revoke their licence to operate.	The CPC produces a bi-annual report assessing collecting societies' financial results, activity and re-distribution strategies. Royalty redistribution schemes are established by law in the case of private copying, and music public performance and broadcasting.	Mediation procedures for cable re-transmission rights. CPS mediates remuneration for broadcasting and public performance in case of disagreement.	50% of undistributed sums and 25% of the sums collected from private copy must be used for cultural purposes.
Germany	The law is not specific about the legal or monopoly status of collecting society.	Collecting societies need an administrative authorisation for starting their operations. Supervision is by the DPMA, which has the power to revoke a collecting society's authorisation to operate.	Collecting societies have to be open to all right holders and must license to all users without discrimination. Re-distribution rules have to be established in their statutes.	DPMA operates an arbitration board in case of disputes	Collecting societies should provide welfare contributions for their members, such as pension funds
Spain	Collecting societies must be non-profit organisations. Competition between collecting societies that manage the same rights is possible	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Culture, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (ad hoc body)	20% of the remuneration for private copying has to be allocated to welfare activities and services for members.
Belgium	Collecting societies can be commercial organisations or any other type of legal entities.	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Economy, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (neutral mediator)	30% of the private copying royalties may be allocated to promote new works

Source: KEA (2006), BOP Consulting (2012)

## 4. A code of conduct for the UK

### 4.1 Moves towards a code

In recent years, there has been increasing support from collecting societies and their members and users in the UK that a code of conduct is needed. For instance, this was confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012<sup>29</sup>. At this meeting, representatives of ten collecting societies expressed that:

- they are willing to support a voluntary code of conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, *PRS for Music* published a Code of Practice, the characteristics of which made it closer to a service level agreement – insofar as it delineated the level of service that should be expected from *PRS for Music*. This set of standards seems to have been part of the change in cultural and organisational characteristics that has taken place within the organisation over previous years, but it has arguably also resulted from political pressure and media attention resulting from the level of complaints before its adoption. Similarly, in January 2012, PPL also chose to publish a first code of conduct similar to the guidelines published by *PRS for Music*.

In 2011 the British Copyright Council (BCC) published a set of principles for its collecting society members which includes 10 out of the approximately 15 collecting societies that operate in the UK. These include *PRS for Music*, PPL, CLA, PLS, ALCS, Directors UK and BECS, among others.

The set of principles contain minimum standards that can be used by BCC members to develop their individual codes of conduct. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed principles; in-principle agreement was established at the Codes of Conduct Ministerial Roundtable held in March 2012.<sup>30</sup>

The intention is that these minimum standards would be adopted and implemented by all of the BCC's members by November 2012. At this point, the BCC will conduct an internal review to assess the success of the implementation and any need for change.

Finally, in December 2011 the UK government started a consultation process on proposals to change the UK's copyright system (closed at the end of March 2012), based on recommendations contained in the Hargreaves Review of Intellectual Property and Growth. As part of the consultation, the UK government is discussing proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. The government has consulted on a proposal for codes which contain minimum standards of fairness, transparency and good governance that have been set by the government. The content of the code has been mainly informed by the Australian code of conduct.

The consultation requested views on these proposed minimum standards, the scope of the code, implementation timescale, as well as initial views on potential penalties for non compliance in the case that back-stop legislation is introduced to enable the imposition of statutory codes if required. With this initiative, the UK government is attempting to lead the debate on the standards that should be expected from collecting societies. A UK code could then serve as a model to be used in the EU, for instance.

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<sup>29</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

<sup>30</sup> Minutes available at: <http://www.ipo.gov.uk/hargreaves-cce-20120307.pdf>

Figure 10 shows the three different initiatives implemented by *PRS for Music*, PPL and the BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

**Figure 10: Codes of conduct in the UK**

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
General Description	Voluntary Code of Practice, first published in 2009	Voluntary code of conduct Available since 1 January 2012	<ul style="list-style-type: none"> <li>- Good Practice Principles, published in 2011.</li> <li>- Provides collecting societies with a baseline to be used to write their own voluntary code of conducts.</li> <li>- Suggested themes:                             <ul style="list-style-type: none"> <li>• transparency</li> <li>• accountability and consultation</li> <li>• service levels and operational issues</li> <li>• data protection</li> <li>• queries, complaints and dispute resolution</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies to adopt codes based on minimum standards that cover:                             <ul style="list-style-type: none"> <li>• obligations to right holders</li> <li>• obligations to licensees</li> <li>• control of the conduct of employees and agents</li> <li>• information and transparency</li> <li>• complaint handling</li> <li>• ombudsman</li> <li>• review of code</li> </ul> </li> <li>- Based on the Australian code and subject to public consultation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>- Code of conduct, launched in 2002.</li> <li>- Objectives:                             <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in collecting society</li> <li>• set out the standards of service</li> <li>• ensure that members and licensees have access to efficient, fair and low cost procedures for handling of complaints and dispute resolution.</li> </ul> </li> </ul>
Accountability and transparency	It states that <i>PRS for Music</i> processes are clear and transparent, but does not specify how that will achieve this.	<ul style="list-style-type: none"> <li>- Sets up standards of service: e.g.                             <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide members and licensees with accurate information</li> </ul> </li> <li>- Promises to act promptly, fairly and consistently.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency</li> <li>- Accountability and consultation</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should deal with members and licensees transparently.</li> <li>- Inform member, licensees, and potential licensees of scope of repertoire and reciprocal representation.</li> <li>- Make available clear distribution policy</li> <li>- It also set standards for reporting (including members, distribution policy, revenue, cost, allocation and distribution, and report regarding compliance with its code).</li> </ul>	<ul style="list-style-type: none"> <li>- States that collecting societies will maintain, and make available to members on request, a distribution Policy that sets out from time to time.</li> <li>- Also states that collecting society will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the collecting society of expenses and other amounts.</li> <li>- It also set standards for reporting.</li> </ul>
Education, training and awareness				<ul style="list-style-type: none"> <li>Collecting societies should give an undertaking that:                             <ul style="list-style-type: none"> <li>- Staff will receive training so</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Collecting societies are expected to take 'reasonable steps' to ensure that its</li> </ul>

UK

Area	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	Australia
				employees, agents and representatives refrain from using 'high pressure selling techniques'. - Employees and agents are aware of procedures handling complaints and resolving disputes.	employees and agents are aware of and comply with the code. Additionally, they are supposed to engage in appropriate activities to promote awareness among members, licensees and the general public.
Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> <li>- Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager.</li> <li>- If member/licensees is not satisfied with decision she can resubmit complaint, but this time addressing the Managing Director</li> <li>- Members and licensees can refer to the <u>Ombudsman</u> for <i>PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure</li> </ul>	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> <li>- Suggests that each stage of complaint procedure should be clearly explained.</li> <li>- Recently, it has been discussed that an <u>ombudsman</u> could also be included.</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> <li>• define categories for complaints</li> <li>• ensure relevant information is available and understandable</li> <li>• define who is responsible of handling the complaint and the timeframe</li> </ul> </li> <li>- Government also proposes to appoint a <u>ombudsman</u> to be a final arbiter on complaints between the collecting society and its members and licensees</li> </ul>	<ul style="list-style-type: none"> <li>- Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>• dealing with complaints from members and licensees; and</li> <li>• resolving disputes.</li> </ul> </li> <li>- These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.</li> </ul>
Compliance	None	None	Recently, it has been discussed that	- The role of ombudsman	Even though the code is

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
			an independent review process could also be included.	could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code. - Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties)	voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.
Code review	No systematic process	No systematic process			It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

Source: BOP Consulting (2012)

## 4.2 Main concerns regarding the collective management system in the UK

In assessing the costs and benefits of any such code of conduct, it is worth summarising the main concerns among members and users (but mostly users) about the current service provided by collecting societies in the UK. In this section we will focus on the music collecting societies (which are by far the major licensors across the world) and the reprographic collecting society that operates in the educational sector.

Some of these issues can be tackled through a code of conduct, in particular, the issues related to transparency, accountability, governance, and dispute resolution. However, and as the Australian case demonstrates, a voluntary code is unlikely to be strong enough to attain these results, since under a voluntary system collecting societies do not have any obligation to comply with the minimum standards stipulated in the code.

It is important to note that other issues (e.g. tariffs) lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary code seems to be a necessary but not sufficient condition to improve the relationship between collecting societies and agents.

### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, collecting societies are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different collecting societies can have a mandate to collect from the same licensee for the use of the same content.

This problem is one faced by businesses in the UK who in certain circumstances have to obtain licences from two different collecting societies for the public performance of the same copyrighted material. One example of this problem concerns businesses in the hospitality, leisure and retail sectors (hairdressers, pubs and restaurants, warehouses, etc.) that play recorded music in their establishments. Those businesses legally require a licence from (1) *PRS for Music* (which collects on behalf of songwriters, composers and music publishers) for the public performance and mechanical reproduction of their works and from (2) PPL (Phonographic Performance Limited, which collects on behalf of performers and record companies) for the public performance of their works.

This legal requirement can be burdensome for businesses given that *PRS for Music* and PPL seem to have different business strategies. *PRS for Music* conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on a regular basis. PPL, on the other hand, seems to focus its efforts on a more limited pool of users. This seems to reinforce the lack of awareness of licensing requirements among some businesses. For instance, it was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of *PRS for Music* (and of its duties), but much less aware of PPL (since they will seldom have been approached by them).

Furthermore, when PPL approaches a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)<sup>31</sup>. Additionally, it also states that, 'in

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<sup>31</sup> PPL FAQ: <http://www.ppluk.com/en/I-Play-Music/Businesses/Why-do-I-need-a-licence>

certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is one day late on paying the renewal fee.

*PRS for Music* also applies surcharges but is less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence<sup>32</sup>.

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed her association's concern "that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."<sup>33</sup>

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society – either *PRS for Music* or PPL – collect on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a *PRS for Music* licence (before that date just a *PRS for Music* licence was needed). For these organisations, *PRS for Music* has been administering a joint music licence since January 2012, which incorporates charges from both organisations. *PRS for Music* remains the single point of contact for the joint licence.

Reprographic ('text') collecting societies in the UK have established a different organisational solution but with the same end in mind. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and performs collective licensing on their behalf.

With regards to issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge if and when all collecting societies decide to make a thorough assessment of the potential universe of licensees.

However, a code on its own would not effect the joint collection of music licences that would simplify the market for users.

<sup>32</sup> PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

<sup>33</sup> Quoted in the online article, 'How should Collecting Societies be Reformed?', *Managing Intellectual Property*, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

## 2. Tariffs and scope for negotiation

There are clear differences in the scope for negotiation with collecting societies among users, according to the scale of the operations:

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is a 5-year tariff deal with yearly adjustments for inflation and audience size. They pay royalties to four different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors' and performers' rights). Their most efficient dealings are with PRS for Music and PPL, with which they have negotiated a blanket licence (the BBC uses approx. 200,000 different music works a week).
- **Medium users (e.g. hospitality sector):** Medium users do have some level of co-ordination with collecting societies, usually through their trade associations. These associations have on occasion referred a tariff to the Copyright Tribunal for adjudication, where they have been unable to reach agreement through discussions with the relevant collecting society (for example, the background music tariffs for the hospitality sector were set in this way – for PRS in 1991, and for PPL in 2009 – and have subsequently been adjusted annually based on inflation and usage indicators). However users, including trade associations, report that the Copyright Tribunal is expensive to access; this means that in practice such users are often dependent on the willingness of the collecting society to negotiate.
- **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of *PRS for Music*' existence mostly because of *PRS for Music*'s business strategy, which is based on a comprehensive identification of all businesses likely to be music users.

With regards to issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, ability to negotiate is limited. Though the licensee can refer to the Copyright Tribunal to adjudicate on the price, terms and conditions of a tariff this does not happen frequently (e.g. the *PRS for Music* tariff for the hospitality sector was established in 1991).

## 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, though their recently overhauled website shows a marked improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a

bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

With regards to transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the code is voluntary and (ii) the language used in the code is vague. These are two lessons that can be drawn from the Australian case.

#### 4. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged: "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies' idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). This is because the UK recognises the benefits of monopoly providers and has sought to address potential concerns through the minimum standards proposed.

With regards to issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

#### 5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change which opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>34</sup>. According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights

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<sup>34</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=1197>)

for pre-digital material'. They estimate that 43% of potential 'in copyright' work in the Library are orphan works<sup>35</sup>.

With regards to issues of repertoire and mandate, a code of conduct for the UK would have:

- no direct effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to successfully apply to operate an Extended Collective Licensing scheme.

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<sup>35</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

## 5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

### Code of conduct in Australia

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism.
- Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
- Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
- External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### Regulation of collecting societies in the European Union

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.

- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

### Overall conclusions from the comparative analysis

In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:

- there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
- there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
- wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and which will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for instance, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. But the efficiency and size of the distributions made to members are not the only indicators with which to assess the performance of collecting societies, though they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for 'principal-agent' problems and for collecting societies to extract 'managerial rents' from members now seems relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain relatively ubiquitous, though are often not pursued through collecting societies' own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing users' concerns rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

## A code of conduct for the UK

Looking against the potential benefits of a code of conduct that were outlined in the BIS Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a *voluntary* code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model, as summarised below.

### Members

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already (i.e. they do not tend to complain)<sup>36</sup>. This is in contrast with the case of collecting societies in Spain and Belgium which shows that mismanagement of and malpractices with rights holders' revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. We should stress that all indicators point to UK collecting societies having strong governance mechanisms, good member relations, and no recent history of malpractice.
- More collections for members – we have found no evidence that a code of conduct would directly result in any increase in transactions. Any distinction that might be made here between the potentially different affects that a voluntary or mandatory code might have seem unlikely as increases in collections seem to be instead driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of who are the potential users of the rights that they manage – neither of which are directly influenced by whether any code of conduct is voluntary or mandatory.

### Collecting Societies

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.
- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for the new rights than by an expansion in transactions driven simply by a better informed marketplace.

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<sup>36</sup> This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

## Users

- Fewer complaints – evidence suggests that users direct more complaints through government, civil society organisations and industry trade bodies than through collecting societies. Consultation with industry trade bodies for this study suggests that this is because users feel that their bargaining position is very weak. As complaints to government and civil society organisations have been outside the scope of this research, it is not possible here to state what effect a code of conduct may or may not have on the level of these complaints. There is some evidence in the UK as regards to user complaints to collecting societies. After the launch of their code of practice in 2009, PRS reported an 8% reduction in the number of complaints from licensees in the first year after its introduction, albeit only representing a fall of 17 complaints in total. Equally, at the same time as establishing their code of practice, PRS also instigated a new complaints procedure with a three stage tracking system. As this suggests, the PRS code of practice was one factor among others in improving PRS' relations with users, and licensees consulted for this study reported that these factors together were an expression of a more fundamental and progressive cultural and organisational change within the collecting society. The PRS example suggests that a code of conduct in isolation is unlikely to make a difference to user complaints, but it may make some contribution as part of package of measures aimed at improving the service that collecting societies provide to users.
- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The international comparative evidence documented in this report indicates, then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a *statutory* code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be little other net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting

societies and the profusion of rights<sup>37</sup>) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

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<sup>37</sup> As an indication of the current complexity and confusion surrounding rights, one year after introducing their code of practice, PRS surveyed their licensees and the majority (60%) still did not 'fully understand the role of PRS and MCPS' – let alone how the rights managed by PRS/MCPS interact with those managed by PPL (Harris Interactive survey of 1,200 businesses, cited in PRS' submission to the Hargreaves Review, at: <http://www.prsformusic.com/aboutus/press/latestpressreleases/Documents/PRS%20for%20Music%20Response%20to%20Hargreaves%20IP%20and%20Growth%20Review%20Final.pdf>)

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## Notes and comments on C3

### 1. Understanding of the legal framework

The authors have a poor understanding of the legal framework:

- they fail to distinguish between authors' rights and related (neighbouring) rights,
- they say nothing accurate about performers and their rights, which include moral rights,
- they mistakenly refer to BECS, a performers' collecting society, as an authors' collecting society
- In their definition of types of rights (3-4) they describe what is meant by a work being communicated to the public but say nothing about the making available right.
- they refer to "owners of copyright works (eg performing artists) (5)
- they confuse the rights which PPL exercises on behalf of the record industry with the rights that PRS and MCPS exercise in relation to musical works. For example, they state that the BBC pay royalties to PRS for Music, PPL and MCPS for musical works (40)

>As discussed briefly Pippa at the end of the last meeting, while having a working knowledge of copyright, we are not legal experts at BOP and we would look for the IPO to pick up any omissions/errors/misunderstandings in relation to the legal details. The report went through about three drafts with the IPO's policy teams.

Therefore the only point above that we have changed in the document is the third bullet, which appears to be a simple error. Much of the rest of comments seem to relate to the level of technical detail to which the outline of the legal framework runs to. This is only a short intro section and therefore cannot include everything, so we précised what ought to be a widely accepted guide to the basic notions of copyright (from WIPO).

They refer to collecting societies as "twofold monopolists" (5) and later identify as "one of the major complexities" that "different collecting societies can have a mandate to collect from the same licensee for the use of the same content" (38). The claim that the subject matter being licensed is "the use of the same content" is a polemical oversimplification.

> We would strongly contend that it is not – in carrying out the brief set by the IPO, it is important to understand why users, small businesses in particular, may have issues in understanding the legal complexities of some copyright content. The fact that the industry has constructed a system such that musical composition and mechanical rights are dealt with separately is not the fault of the customers; to them it does appear as the same content.

### 2. Analytic approach to collecting societies

#### How the authors classify collecting societies

The authors divide collecting societies into two categories: collective management organisations and reproduction rights organisations (4). The implication is that this is an exhaustive categorisation. In reality, RROs, which authorise the reproduction of print- and image-based material (books, magazines, journals) are a relatively tiny part of the European licensing business. It seems that the reason for spending as much time as the authors do in talking about how RROs operate is because this is a much bigger part of the Australian collectively managed/licensed market. But that is surely back to front.

In fact, the authors acknowledge that most collective licensing is done by the CMOs that license the public performance, broadcasting, communication to the public and recording/reproduction rights in musical works and sound recordings. It would therefore seem sensible that any discussion of codes of conduct should focus principally on the arguments for and against such codes in relation to the collective licensing of music and should do so in relation to the European experience and should also take account of the specific issues around the internet and the problems around licensing uses on the internet. For example, it is strange that no mention is made of CELAS, and that nothing is said about the amounts of money involved in music licensing in the UK (were the authors told to avoid this? If so, why?).

>As discussed previously, this is a criticism of the brief of the research, so not relevant here.

The authors say that collecting societies are “private firms” (4), but later in the paper the authors acknowledge that “[t]here are ... wide disparities in ... legal status and organisation [between the character of collecting societies in different EU member states] (25). SIAE, the Italian music rights organisation, is described in Wikipedia as a “public body”. BUMA, the Dutch music collecting society, was established by statute.

> Agreed, the terminology is inconsistent so changed from ‘private firms’ to: ‘organisations (both private and public)’

In describing transaction costs (4) they mention “identifying and locating the owner” but don’t point out that where the CMO takes an assignment from the author/composer as a condition of membership the identification and location of the owner is going to be a relatively minor concern.

>There is clearly a misreading here – the whole point of the section is to say exactly what he has just said, i.e. that CMOs reduce the transaction costs.

### 3. Regulation and codes of conduct

The authors take a lot of time to describe the collective management landscape in Australia. They don’t say much to provide a rationale for going into the Australian set up in so much detail except to say that the UKIPO drew some inspiration from the Australian code, but that surely begs the question whether the Australian code was a good model.

Their conclusion is that although the Australian code did make a difference in some ways it couldn't make a difference in what the authors regard as the important areas, in part because it was a voluntary code.

>As discussed previously, this is a criticism of the brief of the research, so not relevant here.

It is a pity that we are told so little about the new Belgian system, which the authors describe as “one of the most robust systems of regulatory oversight in Europe” and “much stronger than would normally be provided by a typical voluntary code” (31) The heading “dispute resolution” (Figure 9, 32) refers to the existence of mediation procedures in Spain and Belgium for cable retransmission rights. It would be helpful to know if parties to disputes about these rights have ever invoked the procedures.

>There was a clear limit to what could be done under the EU analysis as this was only added to the brief at inception and accorded a modest amount of days.

It would seem that the authors are in the end rather pessimistic about what even a compulsory code can do to address what they see as major issues – the disparity of bargaining power between licensors and licensees (46-7) and the cost of challenging licensing schemes via the Tribunal or some alternative dispute resolution mechanism.

> This is just a comment; he reads our view correctly.

“... a matter of making a bigger effort to simplify the complexity of ... the tariff structure” (40-41) Is this a matter for regulation or a code of conduct?

> We are clear in the report that a) no Codes of Conduct we came across in the research touch tariff setting and b) we see no reason for this to change if the UK were to adopt one.

What is the argument on the other side for having a complex rather than a simple tariff?

> The question is posed as if a complex tariff is a hypothetical situation, when it is of course the status quo, and is a key reason why users are unhappy with the status quo

“The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.” (44)

This is a striking comment coming more or less out of the blue given how little the authors have to say about online multi-territory distribution.

> This is just a comment; the area of online multi-territory distribution was not central to the concerns of the brief, but we have reported it in passing.

#### 4. Evidence

### PWC Study (5)

Annex B of the PWC study describes the methodology by which the range of figures quoted (between £145 and £720 million) as the cost of a hypothetical “atomised framework” was arrived at. It seems to involve an assumption that an average value can be ascribed to each transaction. That assumption is likely to produce a sensible result if the Gini coefficient is close to zero. In the real world, however, returns to copyright holders are extremely uneven (see MMC report, Kretschmer), so that many copyright holders receive small or very small returns while a few scoop most of the pool. A more general claim – that a blanket licence is more efficient and cheaper if the use is heavy and across a wide range of the repertoire – would be endorsed by, for example, the BBC.

> We note later in the report the importance of blanket licences for heavy users like the BBC; we don't think that this negates the more general principle illustrated by the PWC report.

### Rochelandet (8)

“a collecting society with a large number of members that holds a lot of market power ... could minimise agency problems”

But the issue is surely not the number of members as such but how the market power is dispersed among the membership. There may well be agency problems if a small number of large rightsowners see their interests as being at variance with the interests of the great majority of very small rightsowners. PRS gives equal representation to music publishers and composers/writers on its board. GEMA and SACEM give majority control to composers and writers.

> Agreed. Wording changed to:

For instance, a collecting society with members that hold a lot of market power and which play a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Right Society, PRS for Music) – could minimise agency problems (although at the same time there is a possibility that this same market power could be used to advantage larger members at the expense of a majority of very small rights owners).

### 'Seeking new landscapes' Stratton (ftnote 34, 41)

“According to the British Library ‘the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material.’ They estimate that 43% of potential ‘in copyright’ work in the Library are orphan works” (41-42)

It would be interesting to know if the authors have looked at all at the description of the methodology used to generate the 43% figure.

If they have, do they believe that the figure has any statistical validity?

To cite it as an estimate implies that it might be accurate within certain defined bounds. Would the authors identify what in their opinion those bounds are?

If the BL believes that the main barrier to mass digitisation is the fragmentation of rights, what has this to do with orphanage?

It would also be helpful to know what the relative cost of digitisation itself is - on the assumption that the cost of rights clearance is disregarded, as is of course the case with the substantial body of public domain material remaining undigitised on the BL's shelves.

> Points related to orphan works are not a major concern of this study and are flagged here only to complete a list of current concerns. Re us having specifically looked into the methodology of the study, I'm sure that Cristina did and looking briefly at the description of it, there seems no major *a priori* cause for concern. However, we note in passing that the British Library study contains this acknowledgement:

“The British Library would like to thank Tom Rivers for his helpful advice, keen eye and support in the preparation of this study.

So maybe Tom has privileged information in this regard?

### Minor matters

**Extended collective licence** (7) - although ECL is used in Nordic countries in the field of reprographic licensing it does not (as far as I am aware) apply in the field of music licensing.

> Have added 'for reprographics' to the description

**“Collecting societies in the UK operate voluntary collective licensing”** (7)

Is “voluntary” a fair description of the Section 35 provisions?

> This was the description agreed with the IPO

**“As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors.”** (25) - this is very unclear. Is it a reference to Figure 2? And in that case does it (simply) mean that music collecting societies collect much more money?

> This is a minor point but to avoid any potential confusion, we have just removed the offending line.

It would be helpful to have a breakdown of the €4.6 billion along the same lines as Figure 2. And if the split is along the same lines as Figure 2, as seems likely, then when the authors say that “[T]he next largest sector is dramatic and literary works what this actually means is: 85 per cent for music and around 8 per cent for the “next largest”.

> Tom is actually not quoting the current phrasing, which is as follows: “Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.” We think the use of ‘by far’ is sufficient to convey the quantum of difference without going into much greater length.

**“major competition cases ... in 1971 and 1972”** (30) – are the authors suggesting that cases 40 years ago are relevant?

> The cases cited are to make a point of principle: that even in the existence of what amounts to relatively strong levels of regulation from government, of its own this cannot always ensure good performance or equitable outcomes for members and users. The cases remain relevant when used in this respect.

**“Spain ... appears to lack effective regulatory oversight ...there are moves in government to establish a new public body to provide regulatory oversight”** (30)  
The second comment seems to imply that the problem is not that the existing regulatory oversight is ineffective but that there is no regulatory oversight.

> No it doesn’t – we later note that the Spanish Competition Commission has acted against Spanish collecting societies (which clearly constitutes ‘regulatory oversight’).

**“the current monopolistic management of copyright is becoming obsolete”** (30) - but BEUC’s comment is (presumably) about the possibility of different business models of licensing in a digital environment and not about the lack of effective regulatory oversight.

> We agree that the current structure can lead to some confusion in the argumentation so we have re-structured the section to address the issue.

**“Even more convenient for members [ie users] would be a system similar to the one that exists in France whereby only one collecting society ... collect [sic] on behalf of both”** (39)

But the disadvantage of a single guichet system of this sort is that the user may well lose the transparency inherent in separate agreements.

> As noted above, the vast majority of users are small businesses who’s business is quite remote from the creative sector and they are therefore completely unfamiliar with how intellectual property rights operate. All evidence collected for this study and others suggest that small users are not likely to favour a complex system that is transparently communicated over one that is simply less complicated

**“[The BBC’s] most efficient dealings are with PRS for Music and PPL which act as a one-stop shop to clear rights”** (40)

The rights in question are exercised by the BBC under a blanket licence, there is no question of the rights being cleared as such.

> Wording changed to: Their most efficient dealings are with PRS for Music and PPL, with which they have negotiated a blanket licence

### Style and proofreading

“It is worth point out” (5) should be “It is worth pointing out”

> Corrected.

“... leaves copyright collecting societies in control of the term of access ...” (5)  
Should this be “terms”?

> This is a direct quote and so can't be changed

“the ‘agent’ who withholds more information than the ‘principal’ ” (8)  
This is obscure

> This relates to the ‘principal-agent’ problem which is outlined immediately above. It is a widely understood term within regulatory economics.

“inherent to” (8)  
Should be “inherent in”

> Changed

“fraud for deviating royalties” (8)  
Should be “fraud for diverting royalties”

> Changed

“the document includes as possible options ... as possible options” (27 top, line 4)  
Delete last three words.

> Changed

“the business” should be “businesses” (38 penultimate § line 3)

> There is no need to change.

Quote from Brigid Simmonds (39) – first word “is” – is redundant.

> Changed

“Though the licensee can refer ... but this does not happen ...” The “but” is redundant (40)

> Changed

“This has historically not been the case for PPL, though there” [sic] (40)  
Should be “their”

Tom Rivers

13 June 2012

#### DACS Comments

We would also express some concern that the report seems to suggest that a statutory code will achieve the generally envisaged regulation objectives better than a voluntary code, although there is no evidence available to substantiate this claim. The report does not take into account that any voluntary solution may actually encourage collecting societies to strive for compliance with such codes, whilst an imposed statutory obligation may have a chilling effect on the sector.

> The report shows that in the case of the Australian CoC – which is a voluntary code – very little change to the status quo has occurred due to its introduction. As we have not studied a statutory CoC, we can only draw conclusions from what we have examined, not from what we have not examined. However, what we know from other cases of self regulation (e.g. the press) or ‘light touch’ regulation (e.g. banking) would not suggest that the industry would react in the way that DACS suggest given the self regulation choice. Rather, recent experience would suggest the opposite. It is also not clear what any purported ‘chilling effect’ means in practice, so it is hard to comment any further. Finally, we are quite clear that even a statutory CoC would only have limited positive effects.

(Draft) Final Report

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# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
13<sup>th</sup> March 2012

**THIS IS A DRAFT. PLEASE DO NOT QUOTE**

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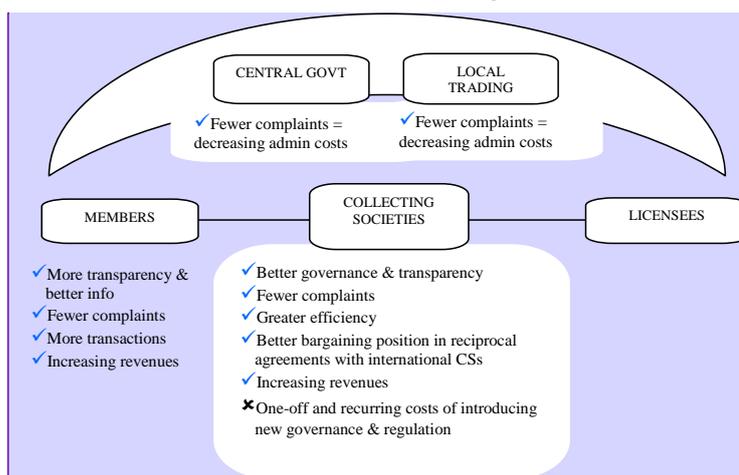
# 1. Introduction

This is the (Draft) Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of Collecting Societies Codes of Conduct.

The aim of this work package is to look at whether the introduction of a Code of Conduct, whether voluntary or with a backstop in legislation, could help to reduce any deadweight and inefficiency losses generated by the current state of the Collecting Societies in the UK (which are subject to EU and UK competition policy but operate without any other specific government regulation).

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a Code of Conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a Code of Conduct in the UK. These are grouped together and summarised below in Figure 1.

**Figure 1: Potential benefits and costs to each stakeholder of the proposed introduction of a Code of Conduct for UK Collecting Societies**



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new Codes of Conduct is that it will improve the governance and transparency of Collecting Societies and deliver better information to both members and users/licensees. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.<sup>2</sup>

<sup>1</sup> Both Atkinson and Fitzgerald are experts on Australian Intellectual Property policy.

<sup>2</sup> It should be noted that any change to the costs to government related to the processing of complaints was deemed to be out of scope of the present research.

**Comment [U1]:** Can we add a new hypothesis in light of finding about voluntariness being a principal weakness of codes that fail?

**Comment [Ip2]:** Would be inclined to make this more general – i.e. about assessing the costs and benefits of codes for CS's and their users.

**Comment [Ip3]:** BOP mentioned in the meeting that they had originally included benefits for licensees – it was lost through a drafting error but will be reinserted

**Comment [U4]:** I think there are benefits for licensees too. Greater transparency, more efficient licensing process, enhanced access to information about what happens to the licence fee, what is in the repertoire etc. There are also costs to licensees who complaints, so if complaints fall, so will costs to licensees. Overall benefit for licensees is that they have safeguards when dealing with a monopoly supplier.

**Comment [U5]:** I'm not clear what the note in this reference means?

But the Impact Assessment also proceeds to hypothesise that charges to licensees **w**ould fall as Collecting Societies (due to greater transparency and **s**crutiny); and that revenues **c**would also ultimately increase for members and the CSs under the new Codes of Conduct as members and licensees would (effectively) find it easier to do business with the Collecting Societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing the Code of Conduct will fall on the Collecting Societies themselves.

Comment [U6]: This sentence doesn't make sense

The report interrogates the plausibility and extent of these hypothetical assumptions through comparative analysis. In particular, the case of Australia is examined, where a Code of Conduct was adopted by Collecting Societies in **2002**, which allows for an assessment of whether the Code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of Collecting Societies from across Europe.

Comment [U7]: And on which the UK's proposals are modelled?

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK Collecting Societies has been gathered, to assess in more detail what current problems the Code of Conduct might address.

The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of Collecting Societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of Collecting Societies.

#### Definitions: Types of rights

Copyright, as established in the Berne Convention **back** in 1886, gives exclusive rights to owners of literary and **artistic** works. WIPO<sup>4</sup> provides explanation for the rights entailed by that exclusivity. They can be classified in 4 domains:

Comment [U8]: Also dramatic, musical, sound recordings, films, broadcasts, databases etc- need to get this right

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of her works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. This includes the mechanical reproduction rights in musical works.

2. **Rights of public performance, broadcasting and communication to the public** –

- Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present. Public performance also includes performance by means of recordings. **Hence, m**usical works **are can be said to have been considered** "publicly performed" when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls **or when the radio is turned on or musical works are played in the workplace.**

Comment [U9]: . Also a public performance where the radio is on in an office with more than one employee – not limited to large PA systems, for example.

<sup>3</sup> The views of some Collecting Societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific Collecting Society, as their representative body.

<sup>4</sup> WIPO. 'Basic Notions of Copyright and Related Rights'

- The right of “broadcasting” covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.
- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights.

**Comment [U10]:** In the UK, moral rights can be waived although they cannot be transferred.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organization was established, also in France, to manage rights in the field of music. It is estimated that similar organizations now function in more than 100 countries (Koskinen-Olsson, 2005).

**Comment [U11]:** Please can we use UK and not US spellings?

Collecting Societies (CSs) - also known as Collective Management Organisations (CMOs), CMOs, and/or as Reproduction Rights Organizations, RROs, in the case of reproduction rights - are private firms in charge of administering statutory copyright law via Collective Rights Management (CRM) (Towse and Handke, 2007). CSs license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage, their tariffs and distribution structures are not self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

**Comment [U12]:** The verb is “license” and the noun is “licence”

They function under different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimize transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner

- negotiating a price
- monitoring and enforcement of rights ownership.

Collecting Societies also make international agreements with 'sister' **CCSs** in other countries to **guarantee-enable** access to a **worldwide-international** repertoire.

**Comment [AS13]:** But they can licence foreign rep in the UK and vice versa

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE **institutions**, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>5</sup>.

**Comment [U14]:** In the UK? If so, worth saying.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licenses. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Townse, 2007)

It is worth point out that CSs are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. public **performance**). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up clearing the rights of a piece of work with many different Collecting Societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between CSs and users, even more so if CSs do not provide a standardised service (which largely they do not).

**Comment [U15]:** This is not a great example as it is where the licensing of the right is split between PPL and PRS. Maybe CLA for reprographics is better

Secondly, owners of copyright works (e.g. performing artists) usually have just one agency in charge to collect and redistribute the royalties generated in a particular domain of rights. "This monopolistic structure leaves copyright Collecting Societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 author's societies around the world and published by the International Association of Collecting Societies of Authors and Composers (CISAC), in 2010, 73% of the total collection comes from public performance rights (€ 5.5 billion). Additionally, Music is, by far, the largest licensor to Author's Collecting Societies. The music sector represents 87% of the total amount collected in 2010.

**Comment [U16]:** Could you clarify what this sentence means?

**Figure 2: Collection through Authors' Collecting Societies (2010)**

Sector	Amount (€ million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

<sup>5</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

Source: CISAC, 2012

## 1.2 Models of collective management

**Comment [U17]:** Clarify that this is for reproductive rights

There exist different legal systems of collective management of ~~these~~ rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the three main models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between CSs and its member and users.

**Figure 3: Different legal systems for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A CS can only collect fees for those right holders who have given it the mandate to so on their behalf. Right holders can opt out the system and make claims outside a CMO. User can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Voluntary collective licensing with back-up in legislation		
a. Extended collective licence	An extended collective license extends the effects of a copyright license to also cover non-represented rights holders.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
b. Compulsory collective management	Even though the management of rights is voluntary, rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>
3. Legal licence		
a. Non-voluntary system with a	A licence to copy is provided by law	Netherlands, Switzerland, <b>Australia</b>

**Comment [U18]:** No. Rightsholders have to opt in.

**Comment [U19]:** I think ECL can either be grouped under voluntary licence or treated as sui generis. Shall we discuss?

**Comment [U20]:** Not sure how this works under voluntary?

legal licence ("statutory licence")	(hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	(educational statutory license)
b. Private copying remuneration with a levy system	The license to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, Germany, Hungary, Poland, Portugal

Source: IFRRO. [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

**Comment [U21]:** No, private copying is an exception to copyright licensing. The levy is the fair compensation for use.

**Comment [U22]:** I realise all of the above has been sourced from here, but my comments still stand as I don't think the categorisations are correct.

The UK operates under a model of voluntary collective licensing with no regulation. In turn Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between CS and users in Australia arise from the statutory licence.

### 1.3 Collective Societies incentives and governance

In addition to (and as a consequence of) the different legal systems, Collecting Societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private memberships associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, Collecting Societies' main mission is to look after the interest of their members (provided that they have been given the mandate to collect on their behalf). Consequently, in most cases their incentives are aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

**Comment [U23]:** Only in voluntary models

There might be principal-agent problems between right holders and the management and staff of a monopolistic Collecting Society. However strong internal governance seems to ameliorate this negative effect. CSs are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance is subject to close scrutiny by right holders. Furthermore, the possibility for the existent of so called managerial rents (rents appropriated by the 'agent' who withholds more information than the 'principal') can be analysed by looking at CSs financial results (e.g. total amount collected from content users over administration costs).

**Comment [Ip24]:** Is there any evidence on this from the primary research? We anecdotally hear about a lot of dissatisfaction with governance procedures from some members.

Rochelandet (2003) follows this approach and explores the financial efficiency of Collecting Societies in different regulation settings. He looks at the music CSs in the UK, France and Germany. He

**Comment [U25]:** Dont think you need to capitalise the C and S in collecting societies.

concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed Collecting Societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a CS with large members with market power who play a major role in defining copyright -such as music publishers or record companies- (e.g. the UK Performing Rights Society ,PRS) could minimise agency problems.

The author also indicates that if the internal governance mechanism fails then there is room to strengthen government legal supervision. An extreme case of poor management in the absence of under ~~no~~ legislation can be found in Spain where a CS has been accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

Major frictions can be identified in the relationship between Collecting Societies and users who, by definition, lack the mechanisms available to members to monitor CSs performance. However there is very limited literature on the efficiency of the relationship between Collecting Societies and users. Section 2 explains the problems that have arisen in Australia between users and the CS in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between those two agents.

Comment [Ip26]: Possible to spell out what these frictions are or cross-reference to what we said they were in the IA?

## 2. Code of Conduct in Australia

There exist are ten Collecting Societies in Australia (see Figure 3). As explained above they operate under two different legal systems. Collecting licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Comment [U27]:** I think these are licensing models rather than legal systems

Figure 4: Collecting Societies in Australia

Collecting Society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

### 2.1 Regulatory background

This section explains the legal context and regulatory developments taken place in Australia before the Code of Conduct. It describes two specific mechanisms within the regulatory system (i.e. Copyright Tribunal, Statutory Licence), as well as the government attitude and policies towards intervening or regulating CSs.

### APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest Collecting Societies, the *Australasian Performing Right Society*,<sup>6,7</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for copying of literary works.

Tensions between Australian Collecting Societies and licensees have been documented since 1926. Licensees have criticised CSs for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>8</sup>

### Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>9</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the Collecting Society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as businesses, the system remained voluntary (WIPO, 2005).

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third Collecting Society, the Phonographic Performance Company of Australia Limited<sup>10</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>11</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>12</sup> CAL has focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

<sup>6</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>7</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>8</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to discovery of any detail of the company's trading.

<sup>9</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended establishment of a copyright tribunal.

<sup>10</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>11</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>12</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. Determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the instance of Collecting Societies. The annual revenues of APRA and CAL, in particular, increase substantially and progressively after Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively Collecting Societies.
3. Tribunal determinations played a critical role in the progressive increase of Collecting Society revenues – APRA and PCCA relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates; Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising Collecting Societies and excluding from debate the consideration of collective rights administration consideration of competition policy principles<sup>13</sup>.

**Comment [U28]:** Very useful if somewhere in this section you could weave in the absence of the right to refer in the UK which is intended to act as a check against the imbalance of power that is usually present at the negotiating table.

By, in effect, endorsing the purpose and practices of Australian Collecting Societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the Societies. However, in the period of growth that began in the 1980s, Collecting Societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward, shaped attitudes to Collecting Societies.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though not substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some Collecting Societies, has caused considerable resentment. Copyrights, such as the public performing right, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them.

**Comment [AS29]:** Is there any evidence of this eg some significant judgments

They alleged oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by Collecting Societies. However, the double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continue to characterise Tribunal proceedings.

### Statutory licence

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that -by law- schools and universities libraries have the right to copy, as long as the 'rights

<sup>13</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the CS in charge of collecting the statutory licence.

The school sector is major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to Collecting Societies in Australia, only surpassed by the Retail, sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the Hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If that is the case, parties can request the Copyright Tribunal to determine rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for this organisations (see Section 2.4 for further details).

**Comment [U30]:** Here may be a good place to contrast with the UK copyright tribunal

### Government attitudes to collective administration

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay). In principle, and by analogy, it followed that the government must disapprove of the Copyright Tribunal.

**Comment [U31]:** ? Not sure this follows?

As explained above, Collecting Societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>14</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to Collecting Societies by the competition law.<sup>15</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>16</sup>

### Don't Stop the Music report – genesis of the Collecting Societies' Code of Conduct

In 1996, a Liberal coalition government assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>17</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

<sup>14</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>15</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>16</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

<sup>17</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

In 1997, the Government asked a joint Committee of Parliament to investigate Collecting Societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>18</sup> for the creation of the office of Copyright Ombudsman, and most supported establishment of an alternate dispute resolution process for settling disputes between Collecting Societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>19</sup> advised support of 'light touch self-regulation' by Collecting Societies. The IDC recommended a voluntary code of conduct for Collecting Societies.

The parliamentary committee reported in 1998<sup>20</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by Collecting Societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for Collecting Societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

### Application of competition policy

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC
- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and Collecting Societies (and received 20 submissions, as discussed below). However, five years on the ACCC is yet to release a final version of the 2006 draft guide.

## 2.2 Characteristics of the Code

<sup>18</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>19</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>20</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian Collecting Societies adopted a voluntary Code of Conduct for Copyright Collecting Societies.<sup>21</sup> The Code established minimum standards for disclosure and reporting by Collecting Societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide members on request with information about payment entitlements
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The Code requires Collecting Societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, Collecting Societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, Collecting Societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the Code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about Collecting Societies' compliance with the Code. The Code provides for the monitoring and review of compliance, and the necessity for amendments.

In 2003, the Collecting Societies appointed The Hon James Burchett QC<sup>22</sup> to undertake the first review of the societies' compliance with the Code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the Collecting Societies. Mr Burchett found that Collecting Societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the Code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the Code reviewer - advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a Collecting Society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and

**Comment [U32]:** Elsewhere you say that the weakness of the code is that it does not have minimum standards

**Comment [U33]:** + obligations to licensees and members

<sup>21</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGACS), Australian Screen Directors Authorship Collecting Society Limited (ASDACS).

<sup>22</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

summarising all complaints/disputes, and assessing how societies have handled them. Consistently, reports have stated general compliance with the Code.

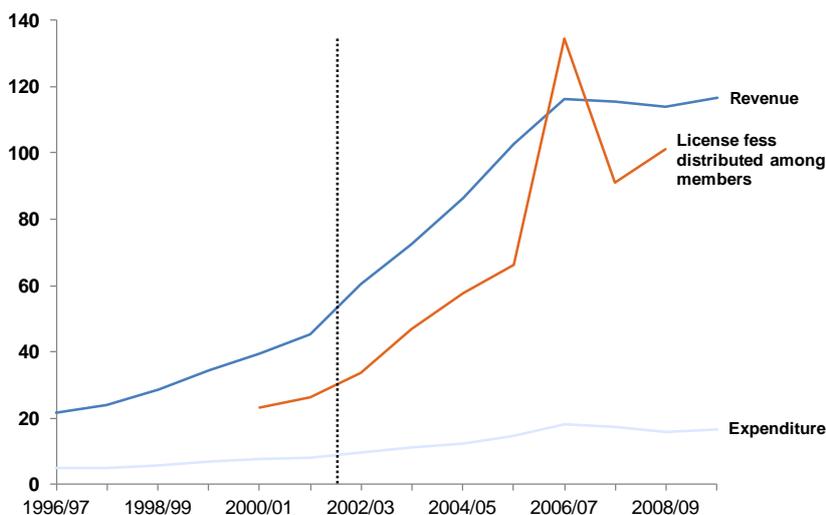
### 2.3 Collecting Society performance before and after the code

In compliance with the Code of Conduct the Copyright Authors Licensing (CAL) publishes every year an Annual Report with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 4, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>23</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charge to users (e.g. schools), which could somewhat explain the tensions between the school sector (it's biggest contributor) and CAL. According to Delia Brown, in the last 10 years, the fees charge to the school sector has increased by 500%. This is one of the main reasons why her unit (the National Copyright Unit within the Standing Council on School Education and Early Childhood Development) has been created in the first place.

Figure 4 also shows the total amount of money distributed among member and non members ('license fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

Figure 5: CAL: Revenue, expenditure and license fees 1996-2010 (AUD millions)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

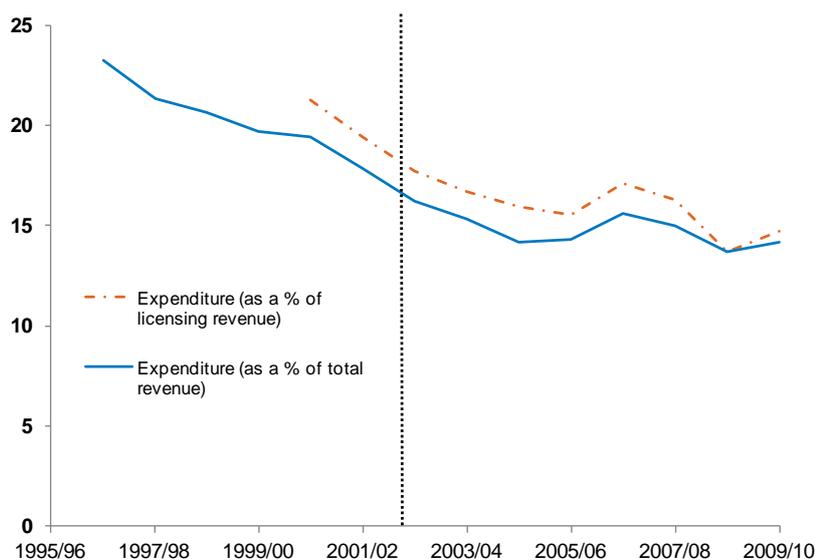
<sup>23</sup> The figures are shown in Australian dollars (AUD), and have not been deflated yet.

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 5). This downward trend is observed since before the Code of Conduct was implemented. At first glance, this trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (500% in 10 years), a sector which payments represent around 48% of the total revenue. In this sense, the trend also reflects the effect of increases in tariffs, which does not seem to be explained by any change in the nature of the business.

However, after 2005 the ratio has shown a less clear path. Another measure of productivity is given by Net Income (defined as Revenue minus expenditure) per employee. Figure 6 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards, however no more information is available in the Annual Reports for more recent years.

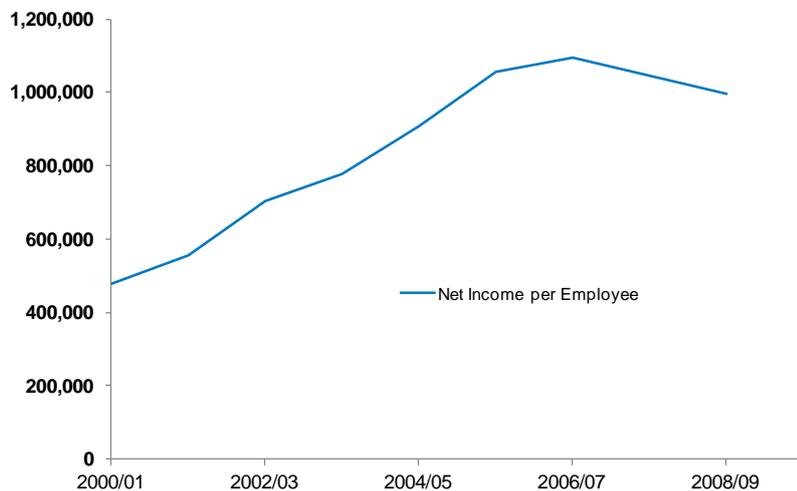
More informative measures of efficiency in this economy would be the collected and distributable sums per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 6: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Figure 7: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

## 2.4 Benefits and criticism

**Comment [lp34]:** Before starting this section, would be good to briefly summarise the findings from the financial work above (even if this is effectively that there's no evidence on codes impact)

### 2.4.1 Benefits

The primary benefit of the Code's introduction appears to be that it has caused Collecting Societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.
- In addition, societies have established or improved complaints and dispute resolution procedures.

Criticism of the Code primarily can be divided into four categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores the mild effect of the Code in terms of behavioural change. The final one explains external factors that may have the effect of rendering the effect of the Code nugatory.

### 2.4.2 Criticism

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and Collecting Societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the Code.<sup>24</sup>

The department's submission stated four specific shortcomings. The Code:

- is voluntary
- does not prescribe minimum standards of conduct
- permits Collecting Societies to appoint the Code reviewer
- does not facilitate independent criticism – licensees who supply comments to the Code reviewer are usually 'in relationships' with Collecting Societies.

Comment [U35]: See comment U27

Comment [Ip36]: Were these substantiated by primary research? Would be useful to say so if this is the case.

The submission also stated dissatisfaction with the way in which, during the Code review process, the Code reviewer dealt with concerns raised about the conduct of certain Collecting Societies. During negotiation of licence fees, one particular society, CAL, proved uncooperative in supplying financial and historical data necessary for judging equitable remuneration and a number of Collecting Societies were unwilling to engage in alternate dispute resolution – even though the Code provides for ADR. Collecting Societies, according to the submission, would engage in mediation with individuals, not a collective such as ministerial copyright taskforce.<sup>25</sup>

Independently of the submission, a number of criticisms can be added. The Code does not require Collecting Societies to publish or make available on request summary and detailed information about distributions and patterns of distributions. It is therefore nearly impossible to ascertain whether, and the extent to which, Collecting Societies benefit those they claim to benefit.

Comment [U37]: It cant make them do anything as it is voluntary

Additionally, the efficacy of the Code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as noted, focuses on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL mediated 15 matters, and APRA-AMCOS 9 – but equally noticeable, most concern complaints made by members not licensees.

It is unlikely that the dissatisfaction with various Collecting Societies, particularly the largest societies APRA-AMCOS and CAL, expressed over 30 years, has vanished. Hence, the lack of complaints from licensees seems to be reflecting the fact that the Code has encouraged licensees to resolve issues with Collecting Societies.

Comment [U38]: Is that they are using the complaints procedures set up via the codes and resolving their complaint in that way?

## 2. Dispute-resolution

Most Code-related dispute resolution is initiated by complaints from members of Collecting Societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.

Ideally, the Code would have set an independent Copyright Ombudsman, as it was previously recommended in 1995, to deal with complaints from users and members. The Copyright Tribunal proceedings are extremely time consuming and expensive and these factors act as very real disincentives to licensees initiating legal actions.

Comment [Ip39]: This seems to contradict the preceding paragraph, which says that licensees seem to be resolving their issues with CS's. If CS's are genuinely excluding some complaints from eligibility from the dispute resolution process, then should that be flagged as another weakness of the voluntary code?

Comment [U40]: Would be value for us in making more of this. Independent ombudsman is a key component of our proposals.

<sup>24</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

<sup>25</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

As mentioned above the Copyright Tribunal exists to arbitrate in disputes between Collecting Societies and users of copyright material. However, the procedure is perceived as lengthy and costly, which prevents users from initiating a case in the Tribunal. And in some cases, it ends up being the Collecting Society ~~who~~ which takes an organisation to court, when an agreement is not reached in terms of tariffs or the conditions of the license.

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it costed them 2 AUD 2 millions. She claims that “costs and delays of the Tribunal effectively bar most licensees, and limits its utility as a forum. Licensees have no other option but to reach agreement with the Collecting Society and pay a higher price for licence fees than it what the Copyright Tribunal may have determined”.

### 3. Behavioural effect

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information on a number of activities of Collecting Societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of minimum behavioural effect of the Code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely (?) available digital content in schools. According to her, it's estimated that schools pay between AUD 8 - 10 AUD millions per year (£5 - £7 millions) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### 4. External factors

As discussed, forming a background to the consideration of 'in principle' merits of the Code, and the extent to which it is implemented, is the nexus of legislation and Tribunal, and the constraint this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the Code.

Even licensees willing to interrogate assertively the practices of Collecting Societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of Collecting Societies agreeing to mediation of disputes.

Viewed from this perspective, the Code helps to regularise the reporting and information practices of Societies, but has done nothing to reduce the distrust between Societies and licensees, nor to lessen their disparity in bargaining power.

## 3. EU developments regarding Collecting Societies

### 3.1 Overview

European Collecting Societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in

- legal status and organisation, ranging from private non-profit organisations (as in the uk) to bodies subject to direct government control (france, germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European CSs in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest licensor to CSs in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervision framework under which Collecting Societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of CSs in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a Code of Conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the

**Comment [U41]:** Collecting Societies and CSs are used interchangeably throughout the report. Would be better, I think, to stick to one or the other.

**Comment [U42]:** Not quite sure what this means? I understand that music CSs are the largest licensors, but not that "the music sector...is the largest licensor to CSs"

EU's competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004 the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM(2004) 261). It was not specifically concerned about the legal status of CSs which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific CS operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on Collecting Societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the CS of their choice which in turn implies they can make judgements about each CS's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services'* (SEC (2005) 1254. This laid out three options:

1. do nothing
2. allow wider reciprocal agreements and
3. allow rights-holders to appoint an EU-wide CS (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist CSs in formulating 'Codes of Conduct' (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given CSs' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a Code of Conduct, setting out each CS's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collection societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on CSs' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

Comment [U43]: Either collecting society or CS

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. The document recommended extending collective

licensing, a multi-territory licensing process and extending the scope of the Satellite and Cable Directive to online delivery.

**Comment [U44]:** Not sure this is right. Think it was one of the options considered rather than a recommendation. Also, pls check whether it was multi-territorial in scope.

**Comment [Ip45]:** I don't think the paper had any recommendations as such; it was a discussion/reflection paper

In 2010, DG InfoSoc published a Communication entitled 'A Digital Agenda for Europe' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many CSs gave their views on the need for reform and Codes of Conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works* in the European Union: Opportunities and Challenges towards a Digital Single Market. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The Parliament was also less enthusiastic, emphasising the CSs contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music.

**Comment [U46]:** And introduce harmonised standards of governance and transparency for CSs?

#### Main themes included in the different Directorates publications

As the prior section shows, there is not a single body of rules and regulations under which Collecting Societies operate in the EU. It is, however, possible to identify recurrent themes across the different documents that deal with collective management:

- Governance and administration
  - External oversight
  - Transparency, especially of CSs' revenues and costs, notably deductions to third parties not right holders, and net distributions
  - Exclusivity
  - Dispute settlement
- Members
  - Flexibility of contracts (mandates) between right holders and CSs
  - Service level agreements
  - Member representation
  - Treatment of national and global repertoire
  - Distribution of royalties to right holders in other countries
  - Ability of a right-holder to negotiate their own tariffs
- Users
  - Access to information on licences

**Comment [U47]:** Of what?

- Fairness and equivalence
- Education

Comment [U48]: With what or whom?

### 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and others where the situation is more problematic. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium, the UK and the Nordic countries seem to score well.

Comment [Ip49]: But the UK doesn't specifically regulate collecting societies.

#### France

The Intellectual Property Code states that CSs must be established as civil law societies ('société civile') of which right holders are members ('associés').

CSs do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the Tribunal de Grande Instance in the event of substantial concerns. The Ministry's approval is necessary if a CS collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, all CSs have been subject to the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) which operates under the Cour des Comptes (Court of Auditors). Each year the CPC publishes a detailed report on all 24 CSs. It also investigates special issues.

CSs' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a CS was fulfilling a legal mandate, such as the private copying levy or the right of remuneration to cable re-transmission, but should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of CSs now see the CPC as a useful way of legitimising their activities to members and users as well as to the public. SACD has described the CPC review as a useful 'free' audit.

SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. According to SACD this even more true now that the Internet has increased people's reluctance to pay for music. However, others continue to be opposed to the CPC's intervention in what they see as their own private company (e.g. SACEM has been critical of such when the CPC published its management salaries).

#### Germany

Germany passed the world's first law specifically on Collecting Societies and has comprehensive regulation. The Urheberrechtswahrmehungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says the government regulates CSs to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

Comment [U50]: And regularly updated since then, I think.

The purpose of a CS is said to be collective management for the benefit of right holders. The Patent and Trademark Office (PTO) has the power to refuse any application to operate a CS if the statutes of the Collecting Society do not comply with the provisions of the UrhWahrnG, if there is a reason to believe that a person entitled by law or the statutes to represent the Collecting Society does not possess the trustworthiness needed for the exercise of his activity, or if it is unlikely, in view of the CSs' business structure, that the rights and claims entrusted to it will be effectively administered.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a CS has to grant licences to all users according to the same published tariff and cannot refuse a licence. CSs must notify the PTO of any change to its statutes, management, tariffs, contracts or agreements with foreign CSs, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees.

PTO operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (ie, Germany and the UK). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais, 'The Collective Management of Copyright and Neighbouring Rights' (2010), 'Germany has the most comprehensive legal framework on Collecting Societies in the world. However it is difficult to find realistic evaluations of whether the system has achieved its stated aims. The fact that the German Collecting Society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972, some six years after the LACNR was established, in relation to abusing its dominant position by imposing unreasonable membership terms, suggests that the system does not necessarily prevent Collecting Societies from abusing their monopoly.'

#### Other countries

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to rights-holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing, and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million undistributed. The case is unresolved but there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as oppressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of their income to social causes such as pensions, sometimes up to 20%.

The Spanish Competition Commission has ruled against Spanish CSs' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two CS governance issues in recent years. The first is an example of a lack of professional management in a small CS. In 1994, when the government introduced a neighbouring right, an authors' union set up a new CS, URADEX, which faced problems with managing its database

**Comment [U51]:** No, the copyright tribunal in the UK does not handle disputes between licensor and licensee. It is a price regulator and no more.

**Comment [AS52]:** References are made by licensees on price and terms and conditions of licenses

**Comment [U53]:** Of their members?

and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second is the challenges faced by SABAM, which is by far the country's largest CS. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being February 2012, but the case continues.

Belgium's CSs have also faced complaints from users such as bars and other small businesses for public performance. Its CSs work closely with trade association to meet public concern and, where possible, collaborate together, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate CSs. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. CSs pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical Code of Conduct.

**Comment [Ip54]:** Is there such a thing as a 'typical' Code of Conduct? AUS example seems to be the only one on a national scale and the UK proposal is quite different.

**Comment [AS55]:** Typical regarding those in other non regulated markets?

## 4. A Code of Conduct for the UK

### 4.1 Main concerns regarding the collective management system in the UK

There seems to be five main concerns among members and users (but mostly users) ~~on~~ about the service provided by CSs. ~~In~~ In this section we will focus on the music CSs (which are by far the major licensors across the world) and the text CSs that operate in the educational sector.

Some of these issues can be tackled through a Code of Conduct. Others lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary Code seems to be a necessary but not sufficient condition to improve the relationship between CSs and agents.

#### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, CSs are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different CSs can have the mandate to collect from the same licensee for the use of the same content.

This precise problem is one faced by businesses in the UK who have to pay licences to two different Collecting Societies for the public performance of the same copyrighted material. This is the case for the businesses in the hospitality, leisure and retail sectors (hairdressers, pubs and restaurants, warehouses, etc.) who –in theory- have to pay *PRS for Music* and *PPL* (Public Performing Licensing) in advance, for playing music in their establishments.

Additionally, PRS and PPL seem to have different business strategies. PRS conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on regular basis. PPL, on other hand, seems to focus its effort on a more limited pool of users.

It was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of PRS and of its duties but much less aware of PPL, since they will seldom have been approached by them.

When PPL approach a business that has been playing music in its establishment and find that they do not have a 'PPL license' (and may or may not have a 'PRS license'), they apply a 50% surcharge on their fee for the first year. PRS will do the same thing.

Trade associations do accept the fact that their members have to pay both CSs. However, they feel that CSs have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds - from the British Beer and Pub Association - has expressed that her association's concern "is that Collecting Societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the Collecting Societies themselves need to do more" (Managing Intellectual Property, January 2012).

Even more convenient for members would be a system similar to the one that exists in France, whereby only one Collecting Society –either PRS or PPL- collect on behalf of both organisations so that users don't have to deal with two different organisations. Reducing duplication has already been partially achieved. PRS and MCPS (Mechanical-Copyright Protection Society) who have recently merged into one company.

**Comment [U56]:** I think that reprographic is more commonly used. I've not seen text been used before.

**Comment [U57]:** I think that there is only one text/ reprographic CS licensing in schools: the CLA,

**Comment [U58]:** I think it would be useful to indicate what is achievable in relation to the minimum standards proposed by the government and those published by the BCC. The main point of difference is that BCC's proposals are voluntary, but that is helpful as you can cross reference that to why codes fail.

**Comment [U59]:** I think here you can develop the argument that the starting point is voluntary and this has some effect

**Comment [Ip60]:** Need to clarify this point as discussed during meeting

Additionally, the 'text' CSs here in the UK operates under a similar system. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and Collecting Society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and perform collective licensing on their behalf.

With regards to liabilities and awareness, ~~then~~, a Code of Conduct could help to:

- improve CSs efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge when ~~and if~~ PPL decides to start collecting from the full base of music users.

**Comment [Ip61]:** Would be inclined to make this a more general point rather than singling out PPL

## 2. Tariffs and scope for negotiation

There are clear differences in the scope of negotiation with CSs among users, according to the scale of the operations:

- Big users (e.g. broadcasters): The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is 5-year tariff deal with yearly adjustments by inflation and audience size. They pay royalties to four different CSs (PRS, PPL and MCPS for musical works, and to Directors UK and BECS for directors and authors rights). Their most efficient dealings are with PRS and PPL that act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- Medium users (e.g. hospitality sector): They do not get to negotiate ~~fees~~. Tariffs ~~have been set were~~ by the Copyright Tribunal in 1991 and are adjusted every year by inflation. Medium ~~users do have some level of coordination with CSs (mostly with PRS) through their trade associations (e.g. BHA, BBPA). The BHA maintains 'good' relations with PRS, which have improved in the last five years due to changes in PRS's management culture.~~
- Small users (e.g. offices and warehouses): ~~Unrepresented small users don't have any degree of negotiation with CSs. As explained above, they are generally aware of PRS' existence mostly because of PRS business strategy which is based on a comprehensive identification of all businesses likely to be music users.~~

**Comment [U62]:** They do. Most collecting societies will invite negotiation. The BBPA has publicly said in its submission to the copyright consultation that it regularly negotiates with collecting societies.

**Comment [U63]:** Just to be clear, this is a decision that affects only a PRS tariff. There is a separate tribunal ruling for the equivalent tariffs operated by PPL.

**Comment [U64]:** Collecting societies do consult with representative bodies of the sectors affected when they are seeking to make a tariff adjustment. The level of co-ordination between the two parties is open to question, it seems to be very ad hoc.

**Comment [U65]:** And the adoption of a code of practice? I think you should consider making some linkages to the adoption of a code by PRS and the reduction in the number of complaints received by government about PRS. PRS has said publicly that the code has helped, but it alone is not a panacea. The code was part of a package of measures including the cultural and organisational changes you mention.

**Comment [U66]:** Meaning that they don't belong to a trade association?

**Comment [U67]:** Note that the government's minimum standards creates an obligation for collecting societies to consult on tariff changes/new tariffs.

**Comment [U68]:** . Two things to note here. First, that the parties can go back to the tribunal for a revision of the fixed tariff, and, second, that the fixed tariff can include periodic adjustments for inflation.

With regards to tariffs and scope for negotiation, ~~then~~, a Code of Conduct could help to:

- possibly improve the ability of users to negotiate fees by improving their access to the ~~information~~ about how the fees are set and by guarantying that CSs will make an effort to negotiate/coordinate with trade associations to set fees, timetables, etc.

However, ability to negotiate is limited when the tariff are ~~fixed~~, as it is the case for the hospitality sector.

## 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by CSs. PRS has by far the most accessible website, making it possible to access to information on the different type of licensees and tariff structure.

As it has been expressed by a representative of the National Federation of Hairdressers (NFH) is not just a matter of making information available but also a matter of making a bigger effort on simplifying the complexity of, for instance, the tariff structure so user feel less alienated from this economy and, hence more willing to abide it.

**Comment [U69]:** PPL has revised its website recently and it is a vast improvement on their old one. May be worth talking to Andrew Smith about this.

**Comment [Ip70]:** Did licensees point to any examples of bad practice so we could draw out the comparison?

With regards to transparency, then, a Code of Conduct could help to:

- standardised information and made it publically available for users and members, but also for policy makers.
- increase CSs' efforts to transmit the complexity of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the Code is voluntary and (ii) the language use in the Code is rather vague. These are two lessons that can be drawn from the Australian case.

**Comment [U71]:** I am not sure what this means?

#### 4. Repertoire and mandate

Other concerns in the UK comes from the ability of the actual collective management system to adapt to technological change than open new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>26</sup>.

According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material'. They estimate that 43% of potential in copyright work in the Library are orphan works<sup>27</sup>.

This issue lies outside the scope of a Code of Conduct, and is likely to be tackled by change in the legal systems under which CS currently operate in the UK (e.g. changes towards extended collective rights management).

**Comment [Ip72]:** It's not directly in scope of the Code of Conduct proposal – however, the UK govt has made clear that having a code of conduct in place would be a pre-condition for a CS being able to apply to operate an ECL scheme or clear orphan works.

#### 5. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged (Colston and Galloway, 2010). "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses CSs under competition law and tests for the abuse of dominant position. However, CSs' idiosyncratic legal status and the cultural role make competition analysis more complex.

**Comment [U73]:** Can we move this up in the order of concerns.

<sup>26</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=1197>)

<sup>27</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

The UK seems to be more inclined to treat CSs as a regulated or supervised monopoly rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights).

**Comment [U74]:** Why do you think this? One of the planks for our case for regulation of collecting societies through codes is that they are unregulated monopolies.

## 4.2 Codes of Conduct

In the last years, there has been an increasing consensus among CSs in the UK that a Code of Conduct is needed for this industry. This has been confirmed by many CSs in the Roundtable on the Codes of Conduct organised by the IPO in January 2012<sup>28</sup>. In this meeting, representatives of ten CSs have expressed that:

- they are willing to support a voluntary Code of Conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, PRS published a Code of Practice. The Code seems to have been a reflection of the change in cultural and organisational characteristics within the organisation over the previous years. In January 2012, PPL also published a Code of Conduct, while the British Copyright Council has published a set of principles that are intended to serve as baseline for other CSs when designing their own voluntary Codes in the future.

**Comment [U75]:** Both these codes came as a result of political pressure and media attention. I think it is worth noting that these are really service level agreements rather than fully fledged codes of conduct. You could consider what the OFT looks at in approving codes.

Figure 7 shows these three different initiatives and compares them with the Australian Code of Conduct.

Here may be a good place to take account of comment U50. The table in the following page could be where you highlight how it is really only a service level agreement. Y

<sup>28</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cco-20120110.pdf>)

Figure 8: Codes of Conduct in the UK

Organisation	UK			Australia
	PRS	PPL	British Copyright Council	
General Description	<u>Voluntary</u> Code of Practice, first published in 2009	<u>Voluntary</u> Code of Conduct Available since 1 January 2012	Good Practice Principles Published made available in 2011, it provides CS with a baseline that could be used to write their own <u>voluntary</u> Code of Conducts. The suggested themes are: <ul style="list-style-type: none"> <li>• Transparency</li> <li>• Accountability and consultation</li> <li>• Service levels and operational issues</li> <li>• Data protection</li> <li>• Queries, complaints and dispute resolution</li> </ul>	Code of Conduct, launched in 2002. Objectives: <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in CS</li> <li>• set out the standards of service</li> <li>• ensure that Members and Licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes.</li> </ul>
Accountability and transparency	It states that PRS processes are clear and <u>transparent</u> .	Sets up standards of service: e.g. <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide you with accurate information</li> </ul> Promises to act promptly, fairly and <u>consistently</u> .	Transparency Accountability and <u>consultation</u>	States that CS will maintain, and make available to Members on request, a Distribution Policy that sets out from time to time.  Also states that CS will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the Collecting Society of expenses and other amounts.
Education, training and awareness				CSs are supposed to take 'reasonable steps' to ensure that its employees and agents are aware of and comply with the

Comment [U76]: But does it say what it has to do to make them so?

Comment [U78]: This is more code-like

Comment [U77]: Service level agreement

				Code. Additionally, they are supposed to engage in appropriate activities to promote awareness among Members, Licensees and the general public.
Tariffs	States that wherever possible, PRS tariffs are set in consultation with trade bodies and representative associations.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that Code of Conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	None
Complaints and dispute resolution	Complaints should be addressed to PRS Customer Relations Manager. If member/licensees is not satisfied with decision she can resubmit complain, but this time addressing the Managing Director Member and licensees can refer to the Ombudsman for PRS Music if they feel that they are not satisfied with the outcome of the complaints procedure	Not part of the Code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	Suggests that each stage of complaint procedure should be clearly explained	Each Collecting Society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>dealing with complaints from Members and Licensees; and</li> <li>resolving disputes.</li> </ul> These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.
Compliance	None	None	None	Even though the Code is voluntary it has established some compliance mechanism. Code Reviewer. However, the independence of the Code Reviewer has been put into question.
Review	None	None	None	It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the Code.

**Comment [U79]:** But does not create any obligation for them to do so in the way that the gov't's minimum standards or the BCC principles would (albeit on a voluntary basis in the case of the BCC)

Source: BOP Consulting (2012)

## 5. Conclusions

### Code of Conduct in Australia

- The primary benefit of the Code's introduction appears to be that it has caused Collecting Societies:
  - to try conscientiously to respond to requests from members and licensees
  - to better explain distribution policy
  - to explain and publicise their functions.
  - In addition, societies have established or improved complaints and dispute resolution procedures.
- Criticism of the Code primarily can be divided into four categories:
  - *Omissions and weaknesses*: (1) it is voluntary, (2) does not prescribe minimum standards of conduct, (3) permits Collecting Societies to appoint the Code reviewer and (4) does not facilitate independent criticism
  - *Dispute-resolution*: most Code-related dispute resolution is initiated by complaints from members of Collecting Societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
  - *Behavioural effect*: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
  - *External factors*: the Code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

**Comment [Ip80]:** How does this square with the suggestion earlier that licensees are able to resolve their issues with CS's?

### European developments

The analysis of European developments leads to the following conclusions:

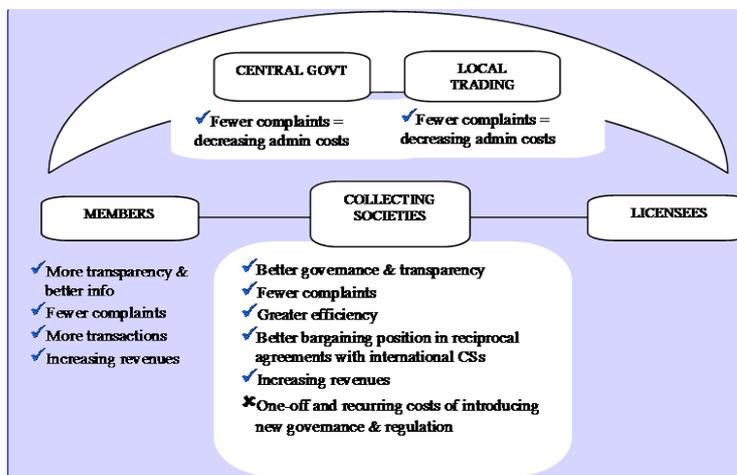
- There is wide disparity between national attitudes and behaviour towards CMOs.
- CMOs differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management
- Many European countries have one CMO which is significantly larger than the rest and which has assumed national social and cultural powers.
- Some countries, notably Germany, France and Belgium, have robust regulations.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- [Voluntary \(?\)](#) Codes of Conduct are seen as having marginal benefits except in reassuring users.
- The priority is to rebalance the needs of right holders and users to maximise the potential of online, multi-territory distribution.

- For this to happen, Europe has to ensure right holders and users can choose CMOs on the basis of transparent, comparable information.

### A Code of Conduct for the UK

The Australian case shows that a voluntary Code of Conduct is of limited use. It's generally written in an ambiguous tone and lack effectiveness in terms of holding CSs accountable if the Code is voluntary and if the mechanisms set to review compliance with the Code is not independent from Collecting Societies.

Figure 1 in Section 1 summarises the potential benefit of a Code of Conduct. In general lines, an increase in transparency will benefit members and users. However, in the light of the Australian case it seems that other potential benefits are minor.



**Comment [U81]:** See my comments at the beginning about benefits to licensees

**Comment [Ip82]:** This is not our experience – the IA for the UK proposal is clear that there are a large volume of complaints. Some CS's have data on this as well. It looks like this is based just on complaints which reach the mediation stage?

**Comment [AS83]:** Most complaints that we are aware of are directed to MPs/ Ministers / Trade bodies when a collecting society fails to respond adequately. We know that complaints are made to Trading Stds, consumer bodies, CABs etc, but don't have data on this.

**Comment [Ip84]:** See my comment 79 above – evidence from PRS in the UK is that complaints decrease substantially

**Comment [Ip85]:** This refers to the Copyright Tribunal in aus presumably? Limited in scope, there are other means of complaining.

**Comment [U86]:** But it could be different if the code was not voluntary. Then, the CSs would have real obligations in terms of transparency and governance which could have a knock on effect on efficiency?

#### Members

- Complaints do not decrease as members do not tend complain in the first place
- There is no evidence that there is any associated increase in transactions – increases in transactions seem to be driven by (i) technological change (digital tech creating more rights to be handled by CSs) and (ii) more zealous patrolling of who are the potential users.

#### Collecting Societies

- Complaints do not decrease as members tend not to complain in the first place and users do not complain in volume to the CSs' either. They may complain to government and to industry trade bodies, but both are outside scope. Users tend not to complain since they perceive the process as a) costly and b) see that it is futile as their bargaining position is so weak compared to the CSs
- Greater efficiency – There is little evidence that Code of Conduct has an effect on this. The increases in efficiency show in the Australian case seem to be explained by the effect of economies of scale, but also by the constant increment to fees charge to users.

- Better bargaining position with other CSs – This has not been examined in this research. However, it is difficult to imagine that a Code of Conduct would have this effect. In the Impact Assessment of a Code of Conduct prepared by BIS, the assumption is that by adopting a Code of Conduct, UK Societies would somehow be able to play a 'leading' role internationally, but as other CSs overseas all have Code of Conducts and more regulation than the UK, it's hard to see how this leadership role would be fulfilled.
- Increasing revenues – Again, revenues may increase but much more likely to be driven by increases in volume of rights traded and by ability to set new tariffs for the new rights.

**Comment [U87]:** This comment in the impact assessment was made in the context of the forthcoming Framework Directive

#### Users

- Code of Conduct on its own would not necessarily provide greater redress. In order to do so it would require dispute resolution to a) be less expensive and b) more independent
- Fewer complaints- As above, relatively few complaints addressed to the CSs by users as a) its costly and b) see that it's futile as their bargaining position is so weak compared to the CSs
- Lower charges - There is zero evidence that this is a likely outcome from adopting a Code of Conduct as the ability to set and enforce tariffs remains largely untouched within Code of Conducts (least any that we have looked at)

Therefore a Code of Conduct could increase transparency and, in turn, strengthen confidence in the system. However, but there seems to be no real net economic gain or loss associated with this. This is because the underlying structural characteristics (tariff bargaining power of each agent, efficacy and cost of dispute/arbitrary procedures, the simple confusion for users produced by the profusion of CSs and the profusion of rights) remain untouched – and these are the factors that would actually drive changes in costs and benefits.

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## Executive Summary

Collecting societies – also known as collective management organisations (CMOs)<sup>1</sup> – are ~~private firms-organisations~~ in charge of administering statutory copyright law via collective rights management<sup>2</sup> (CRM). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies<sup>3</sup>.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct for collecting societies. It set out that the main benefit ~~from adopting a code~~ will ~~be~~ improvements in collecting societies' governance and transparency and ~~the delivery of~~ better information to both members and users. It also listed a series of hypothetical benefits<sup>4</sup> that could flow from this. This report interrogates the plausibility and extent of these hypothetical benefits through comparative analysis of the Australian ~~collecting societies'~~ code of conduct adopted in 2002<sup>5</sup> and other models for the regulation ~~used~~ of collecting societies ~~used from~~ across Europe.

~~Three~~ 3 conclusions from the comparative analysis performed in this report are:

- 1) There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members<sup>6</sup>.
- 2) The most numerous and fierce criticisms of collecting societies stem from users not members. Any consideration of how regulation can improve collecting societies' performance thus needs to focus far more on addressing users' concerns rather than members.

**Comment [RN1]:** CMOs have a diversity of legal statuses and governance structures so we just need to be careful here.

<sup>1</sup> CMOs are also known as Reproduction Rights Organisations (RROs) in the case of reproduction rights.

<sup>2</sup> See Sections 1.1 and 1.2 for the economics and models of collective rights management.

<sup>3</sup> Kretschmer, 2007

<sup>4</sup> See Introduction. The hypothetical benefits include a reduction in the number of complaints, lower charges to licensees and increased revenue for both the collecting societies and their members.

<sup>5</sup> This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has been suggested be adopted by collecting societies.

<sup>6</sup> For example, there are instances where more highly regulated collecting societies perform worse than self-regulated collecting societies.

- 3) Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

In terms of potential benefits that the UK could gain from moving to a code of conduct, it can be concluded that a voluntary code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, the Australian case does seem to indicate that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model.

The Australian example suggests a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already<sup>7</sup>. It should be stressed that all indicators point to UK collecting societies having strong governance mechanisms, good member relations and no recent history of malpractice. No evidence was found that a code of conduct would directly result in any increase in collections for members.

In regards to collecting societies, the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency<sup>8</sup>. Secondary evidence<sup>9</sup>, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to members<sup>10</sup>. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency.

In terms of impact on users, evidence from the UK PRS<sup>11</sup> suggests that a code of conduct in isolation is unlikely to make a difference to the number of user complaints, but it may make some contribution as part of a package of measures aimed at improving the service that collecting societies provide to

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<sup>7</sup> Essentially, members do not tend to complain very often as they are already involved in the internal governance of collecting societies. For example, collecting societies are in many most cases member-owned, and/or Boards of Directors are elected by members on a regular basis. Strong internal governance can overcome any potential 'principal-agent' problem between rights holders and the collecting society management and staff.

<sup>8</sup> Measured as the ratio of expenditure over revenue. A declining trend in this ratio implies an increase in efficiency.

<sup>9</sup> Reviewing relevant literature and data.

<sup>10</sup> This can be measured by looking at the frequency of royalties distribution to members, and also at the amount of time it takes to process royalties (i.e., identify authors and pay them royalties).

<sup>11</sup> UK Performing Right Society. In 2009, the PRS launched a code of practice at the same time as instigating a new complaints procedure.

users. The Australian case is also clear that a code of conduct on its own does not provide greater redress for users - independent and inexpensive dispute resolution is additionally required.

The international comparative evidence documented in this report indicates then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria. However, a statutory<sup>12</sup> code of conduct for the UK is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and thus, in turn, strengthening confidence in the system.

However, ~~aside from possible improvements in distributions to members~~, there seems to be few little other net economic gains or losses associated with the likely improvements that would arise through even a statutory code of conduct. This is because the underlying structural characteristics of the market<sup>13</sup> would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

**Comment [RN2]:** I have removed this sentence as the original wording is much more nuanced: 'For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).' I don't think it's therefore right to include the statement without this very important caveat.

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<sup>12</sup> With independent review and enforcement

<sup>13</sup> Tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights

# IPO

## Collecting Societies Codes of Conduct

BOP Consulting  
*in collaboration with Benedict Atkinson and Brian Fitzgerald*  
May, 2012

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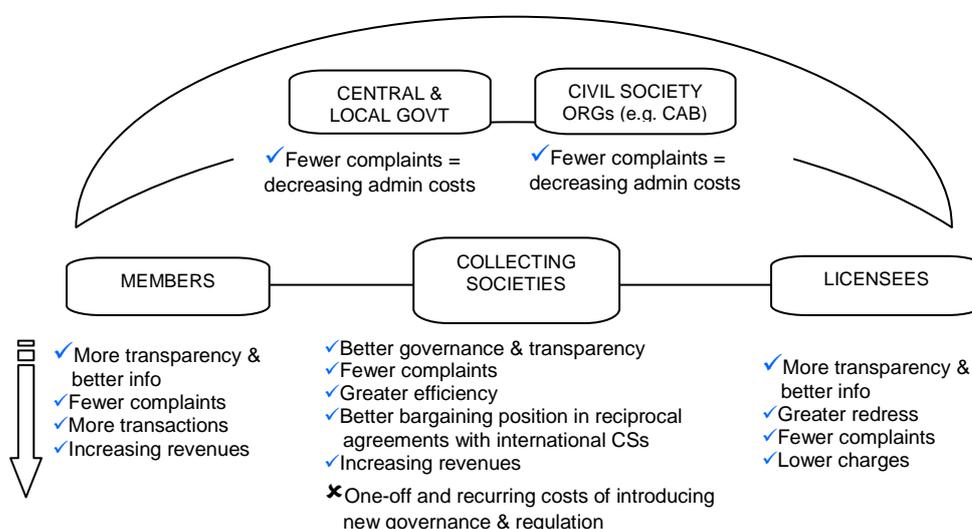
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# 1. Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald<sup>1</sup>, detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Department for Business, Innovation and Skills (BIS) produced an initial impact assessment of the move to adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in Figure 1.

Figure 1 Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies



Source: BOP Consulting (2012)

As can be seen in Figure 1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

But the Impact Assessment also proceeds to hypothesise that charges to licensees could fall as collecting societies (due to greater transparency and scrutiny) provide licensees with better information for negotiating and contracting; and that revenues could also ultimately increase for members and the collecting societies under the new codes of conduct as members and licensees would (effectively) find it easier to do business with the collecting societies (hence the volume of transactions would increase). The assumption in the Impact Assessment is that all the costs of implementing codes of conduct will fall on the collecting societies themselves.

<sup>1</sup> Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

The report interrogates the plausibility and extent of these hypothetical assumptions<sup>2</sup> through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has suggested be adopted by collecting societies. The report analyses whether the Australian code has helped to improve their services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, together with primary research (interviews) with licensees in both Australia and the UK.<sup>3</sup>

The remainder of the Introduction summarises some key concepts in understanding the workings of collecting societies: the different types of right that they handle; the economic basis of collective rights management; the different models that collective management can take, and the incentives and governance arrangements of collecting societies.

### Definitions: Types of rights

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO<sup>4</sup> provides an explanation of the rights entailed by that exclusivity. They can be classified as follows:

1. **Right of reproduction and related rights** – The right of the owner of copyright to prevent others from making copies of their works. It covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. It also includes the mechanical reproduction rights in musical works.
2. **Rights of public performance, broadcasting and communication to the public** –
  - Numerous national laws consider a 'public performance' as any performance of "a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present."<sup>5</sup> Public performance also includes performance by means of recordings. Musical works can be said to have been "publicly performed" when they are played over amplification equipment in such places as discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.
  - The right of "broadcasting" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite.

<sup>2</sup> The exception here is that area of complaints to central and local government and civil society organisations was deemed out of scope of the present research at inception.

<sup>3</sup> The views of some collecting societies' members was also sought in Australia, but they were reluctant to take part in the research as they felt that any questions on these issues should better be addressed to their specific collecting society, as their representative body.

<sup>4</sup> WIPO (undated) 'Basic Notions of Copyright and Related Rights', available at: [http://www.wipo.int/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf)

<sup>5</sup> WIPO (undated) 'Understanding Copyright and Related Rights', available at: [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html)

When a work is “communicated to the public,” a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of “communication to the public” is cable transmission.

- This also includes ‘synchronisation rights’ which is the right to the right to reproduce music onto the soundtrack of a film or video.

3. **Translation and adaptation rights** - “Translation” means the expression of a work in a language other than that of the original version. “Adaptation” is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture.

4. **Moral rights** - The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (right of “paternity”); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (right of “integrity”). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. In the UK, though, moral rights can be waived but cannot be transferred.

## 1.1 Economics of collective management

Collective management of copyright can be traced back to the 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. However, it was not until 1850 that the first collective management organisation was established, also in France, to manage rights in the field of music. It is estimated that similar organisations now function in more than 100 countries (Koskinen-Olsson, 2005).

Collecting societies - also known as collective management organisations (CMOs), or as Reproduction Rights Organisations, RROs, in the case of reproduction rights - are private firms in charge of administering statutory copyright law via collective rights management (CRM) (Towse and Handke, 2007). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies (Kretschmer, 2007).

They tend to operate different business models which, in most cases, are tied to the different legislative frameworks under which they operate (including voluntary collective licensing, and voluntary collective licensing with back-up in legislation) - see section 1.2 for further explanation.

From an economic point of view CRM can minimise transaction costs for members (i.e. right holders) and users (i.e. businesses, educational institutions and the public sector). They have operating advantages over the open market option insofar as they internalise transaction costs that otherwise could make the exchange prohibitively costly for both parties. In the case of copyright these transaction costs include (Kretschmer, 2007):

- identifying and locating the owner
- negotiating a price

- monitoring and enforcement of rights ownership.

Collecting societies also enter into international agreements with 'sister' collecting societies in other countries to enable access to an international repertoire not included among its international membership. These are known as reciprocal agreements.

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical 'atomised framework' (individual-to-individual exchange) would be between £145-£720 millions<sup>6</sup>.

In addition to lower transaction costs CRM for copyright also has economies of scale particularly when fees are set as blanket licences. "Where there are high transaction costs and economies of scale, collective action by right holders that pools costs can make some markets for copyright works more efficient or even help to establish new markets for their use" (Handke and Towse, 2007)

It is worth point out that collecting societies are twofold monopolists. Firstly, there is typically one supplier of licences to the user of copyright works in one particular domain of rights (e.g. CLA for reprographics rights). However, given the existence of the different rights explained above (e.g. performing rights, reproduction rights) a user (e.g. business) could end up having to clear the rights in a piece of work with many different collecting societies (Section 4 provides an example of the different fees that have to be paid by hotels and broadcasters in the UK). This could create further tensions between collecting societies and users, even more so if collecting societies do not provide a standardised service (which largely they do not).

Secondly, owners of copyright works (e.g. performing artists) usually have just one CMO that administers their particular category of rights. "This monopolistic structure leaves copyright collecting societies in control of the term of access and royalty distribution in their particular rights domain" (Kretschmer, 2007).

According to information corresponding to 200 authors' societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection came from public performance rights (€5.5 billion). Additionally, music is, by far, the sector that generates the highest amount of royalties for the authors' collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Figure 2).

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<sup>6</sup> This range depends on assumptions on the number of transactions that would occur under the new system as more transactions (i.e. rights exchange) imply more costs (e.g. making contact with right holder or negotiating a fee with her). PwC (2011) 'An economic analysis of copyright, secondary copyright and collective licensing'.

**Figure 2: Collection through Authors' collecting societies (2010)**

Sector	Amount (€million)	Percentage
Music	6,523	86.5
Audiovisual	103	1.4
Dramatic	496	6.6
Visual Arts	184	2.4
Literary	100	1.3
Other	144	1.9
Total	7,545	100

Source: CISAC, 2012

## 1.2 Models of collective management

There are different systems for the collective management of rights. The International Federation of Reproduction Rights Organisations (IFRRO) summarises those models for reproduction rights. Furthermore, the four models explained below cover the full range of models for collective rights management.

The material contained in the table stresses the fact that international comparisons are, in general, challenging – given the important differences in legal systems, which in turn, determine different business structures and generate different sets of relationships between collecting societies and their members and users.

**Figure 3: Different models for Reproduction Rights Collection**

Reproduction rights models	Description	Countries
1. Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to do so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	<b>UK</b> , Ireland, Luxembourg, Russia, US, Canada, <b>Australia (for Businesses)</b>
2. Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	<b>France (1995)</b>

3. Extended collective licence	An extended collective licence extends the effects of a copyright licence to also cover non-represented rights holders who have to opt out rather than opt in.	Nordic countries (Norway, Denmark, Finland, Iceland, Sweden)
4. Legal licence		
a. Non-voluntary system with a legal licence ("statutory licence")	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, <b>Australia</b> (educational statutory licence)
b. Private copying exemption with a levy system for fair compensation for use	The licence to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, <b>Germany</b> , Hungary, Poland, Portugal

Source: IFRRO<sup>7</sup> adapted by the UK Intellectual Property Office

Collecting societies in the UK operate voluntary collective licensing with no regulation of collecting society functions; price is effectively regulated by the Copyright Tribunal. In turn, Australia has a mixed model. A statutory licence exists for the educational and public sector, while businesses can clear rights through a voluntary licensing scheme. Most of the tensions between collecting societies and users in Australia arise from the statutory licence.

### 1.3 Collecting societies' incentives and governance

In addition to (and as a consequence of) the different legal systems, collecting societies also operate under different legal statuses. In some countries, such as the UK and Australia, they are corporate non-profit organisations. In others, they operate under a government monopoly grant (e.g. Austria, Italy, Japan). In the rest of the EU, they are private membership associations but subject to close regulatory supervision (Kretschmer, 2007).

In most of these settings, the main goal of collecting societies is to look after the interest of their members. Consequently, in most cases their incentives are understandably aligned to prioritise arrangements to increase the amount of royalties to be redistributed among right holders.

There might be principal-agent problems between right holders and the management and staff of a monopolistic collecting society. However, strong internal governance could help ameliorate this potential negative effect. Collecting societies are in most cases member owned. Boards of Directors are elected by members on a regular basis and, hence, their performance tends to be subject to close

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<sup>7</sup> WIPO / International Federation of Reproduction Rights Organisations (IFRRO) classification available at: [http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)

scrutiny by right holders. Furthermore, the possibility for the existence of so-called managerial rents (rents appropriated by the ‘agent’ who withholds more information than the ‘principal’) can be analysed by looking at collecting societies’ financial results (e.g. the total amount collected from content users over administration costs).

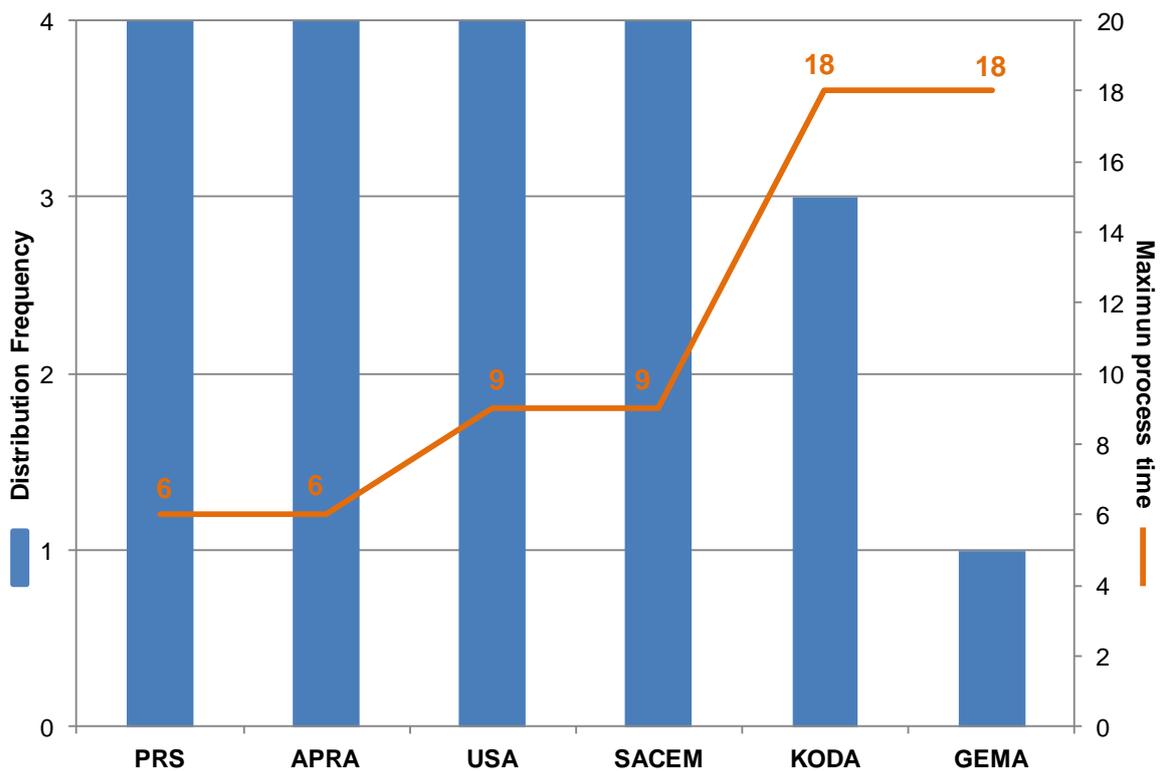
Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation could be made between the intensity of legal supervision and the financial results of the analysed collecting societies. Furthermore, strong internal control seems to be sufficient to overcome the potential failure inherent to the institutional characteristics of these monopolistic organisations. For instance, a collecting society with a large number of members that holds a lot of market power and which plays a major role in defining copyright – such as music publishers or record companies (e.g. the UK Performing Right Society, *PRS for Music*) – could minimise agency problems.

These findings seem to be reflected in other indicators of efficiency. Figure 4 below shows the (i) frequency of royalties’ distribution and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence for the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

However, as Rochelandet indicates, if the internal governance mechanism fails then there is room to strengthen government legal supervision. If this weakness exists, one of the most common complaints among members is the speed and transparency with which collecting societies redistribute to right holders their corresponding royalties.

An extreme case of poor management in the absence of legislation can be found in Spain where a collecting society was accused of fraud for deviating royalties that should have been redistributed among its members (see Section 3 for further explanation).

**Figure 4: International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies**



Source: CISAC, PRS for Music (2012)

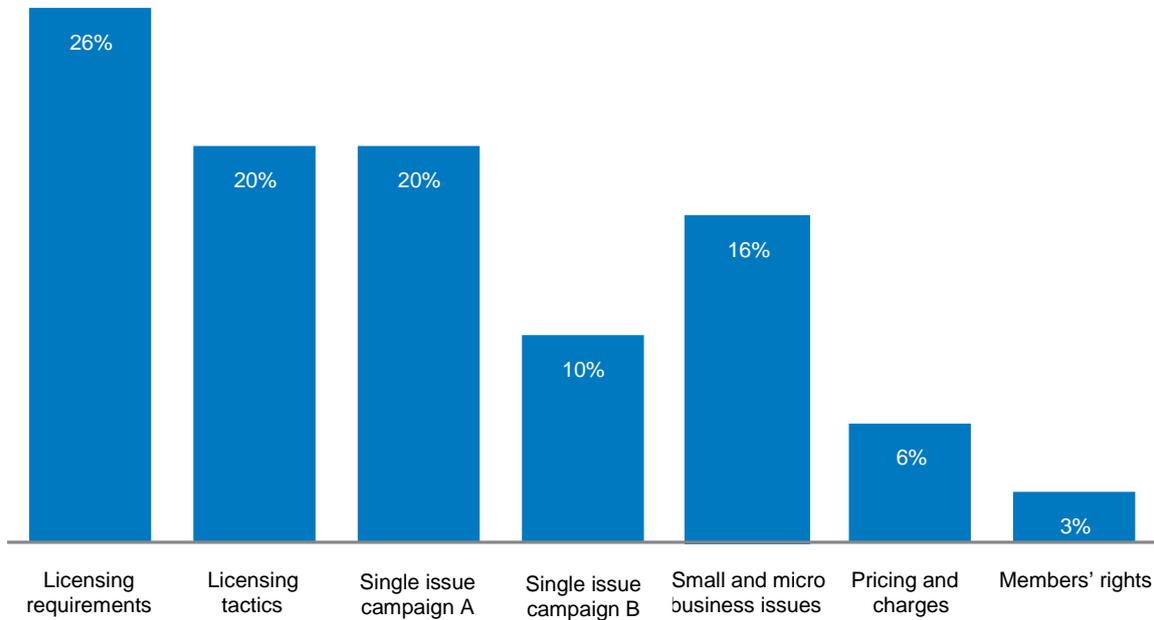
On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor a collecting society’s performance. In most cases, licensees do not have recourse to an independent appeal mechanism, such as an ombudsman, if they feel that their complaint has not been satisfactorily resolved via the internal complaints procedure of a collecting society.

In the UK the frictions between collecting societies and users is reflected in the complaints received in the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints about collecting societies, covering 118 issues in total.<sup>8</sup> Figure 5 shows the breakdown of those issues, compiled and published by the IPO. The most common issue (aggregated under the heading ‘licensing requirements’) encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the ‘heavy handed and aggressive licensing tactics’ used by collecting societies (BIS, Impact Assessment, 2011). The ‘Small and micro businesses’ issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

<sup>8</sup> Of course, this is only one means by which complaints are made about collecting societies – others could include complaints made to trade associations, to local government bodies such as Trading Standards, or to the collecting societies themselves

Complaints from members only account for 3% of the total issues covered in the complaints Minister for Intellectual Property, which could reflect two factors (i) that members tend not to complain or (ii) that their complaints are satisfactorily dealt with within the existing system (e.g. collecting societies' in-house complaint resolution process).

**Figure 5: Breakdown of complaints received by Ministers via MPs.**



Source: IPO (2012)

Even though there is evidence on the usually strained relationship between collecting societies and users, there is very limited literature on the efficiency of the relationship between them. Section 2 explains the problems that have arisen in Australia between users and the collecting society in charge of collecting statutory licenses. This case stands as a clear example of the negative consequences that may arise in a compulsory legal system for collective management, given the imbalance in power between the two agents involved in the transaction.

## 2. Code of conduct in Australia

There are ten collecting societies in Australia (see Figure 6). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

**Figure 6: Collecting societies in Australia**

Collecting society	Members	Rights administered
Copyright Agency Ltd	Authors, publishers, journalists, photographers, surveyors and visual artists	Copyright fees and royalties for the use of text and images, including uses of digital content.
APRA/AMCOS	Composers, songwriters and publishers	Performing and communication rights / Rights to reproduce a musical work in a material form ('mechanical' rights)
Screenrights	Right owners in television and radio	Copyrights in films and other audio-visual products
PPCA	Record companies and music publishers	Licences for the broadcast, communication or public playing of recorded music (e.g., CDs, records and digital downloads) or music videos.
ASDACS	Film, television and all audiovisual media directors	Rights for film and television directors.
AWGACS	Film and television writers	Royalties for broadcasting or Screening writers' works
Viscopy	Painters, sculptors and other graphic artists	Visual artists' rights
Christian Copyright Licensing Asia-Pacific Pty Ltd (CCLI)		
LicenSing (a division of MediaCo19m Inc)	Publishers of church music	
Word of Life Pty Ltd		

Source: BOP Consulting (2012)

## 2.1 Regulatory background

This section explains the legal context and regulatory developments that have taken place in Australia before the introduction of a voluntary code of conduct. It describes two specific mechanisms within the regulatory system (i.e. the Copyright Tribunal and the Statutory Licence), as well as the government attitude and policies towards intervening with or regulating collecting societies.

### APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies: the *Australasian Performing Right Society*,<sup>9,10</sup> founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.<sup>11</sup>

### Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.<sup>12</sup> The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as business, the system remained voluntary.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries or government or private service providers. Between 2007 and 2010, a third collecting society, the Phonographic Performance Company of Australia Limited<sup>13</sup> made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).<sup>14</sup>

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.<sup>15</sup> CAL has

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<sup>9</sup> Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

<sup>10</sup> Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

<sup>11</sup> Articles 113 and 114 of CAL's Articles of Association required directors or employees to keep secret details of transactions or accounts of the company unless ordered to make disclosures by a court, or a person to whom the matter in question related. No one else was entitled to the discovery of any detail of the company's trading.

<sup>12</sup> In 1968, when the new Copyright Act passed, the Government stated that the Tribunal's primary function was to arbitrate disputes over the public performance or broadcasting of copyright works. Legislative provision for the Tribunal implemented a recommendation of the 1959 Spicer Report (*Report of the Copyright Law Review Committee*, Cth Government Printer 1960). The Spicer Report followed the 1952 UK Gregory Report (*Report of the Board of Trade Copyright Committee 1951*, HMSO 1952), which also recommended the establishment of a copyright tribunal.

<sup>13</sup> Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

<sup>14</sup> In 2007, the Tribunal awarded the PPCA a 1500% increase in the royalty payable by nightclubs on the performance of recordings. The PPCA subsequently won an increase in the royalty payable by gymnasiums and fitness centres for the performance of recordings in classes.

<sup>15</sup> The Australian Broadcasting Corporation is not a commercial user though it contributes significantly to APRA/PPCA revenues. The ABC is government funded though editorially independent.

focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

Proceedings in the Copyright Tribunal over three decades have had four particular effects:

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase of collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles<sup>16</sup>.

By, in effect, endorsing the purpose and practices of Australian collecting societies, and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the societies. However, in the period of growth that began in the 1980s, collecting societies have also provoked considerable criticism and hostility from the industries and sectors from which they have received most of their revenues. Two factors, from the 1990s onward have shaped attitudes to collecting societies in Australia.

1. The subjective perception (of licensees) that together, legislation and the Tribunal empower the societies to act as monopolists fixing price. This perception has fuelled resentment and has contributed to a continued policy debate over the bifurcation of copyright and competition policy – though this has not led to any substantive policy action.
2. The compulsory nature of the Tribunal process, and the litigiousness of some collecting societies, has also caused considerable resentment. Copyrights, such as the public performing right and reproduction rights, are legally enforceable and even allowing for the adjudicative nature of arbitral proceedings, licensees seemed often to feel that the Tribunal set its face against them. This is, for example, the experience of the main educational organisations in Australia (see below).

They allege oppressive conduct by the Societies, but they have been principally disturbed by the size of licensing fees, and what they perceive as the Tribunal's uncritical attitude to remuneration arguments advanced by collecting societies. The double effect of legislation governed by treaty, and the Tribunal's statutory mandate to determine rates of equitable remuneration, have meant that inequality of bargaining power continues to characterise Tribunal proceedings.

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<sup>16</sup> The Tribunal adopts the conventional arbitral method of estimating equitable remuneration, which involves the following steps: 1. Identify the market and apply market values 2. If a market is not identifiable, posit a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. The first President of the Tribunal stated that estimating in 1985 the 2c per page fee for educational copying was 'a most arbitrary selection of a figure'. The Tribunal will not assess whether: a. the inability of a majority of rights holders to enforce rights can legitimately be said to constitute market failure, b. identified markets are artificially created by legal coercion, c. the marginal value of broadcast or copied copyright material could be nil.

## Statutory licence

As mentioned above, Australia operates under a model of 'statutory licence' for the educational sector, which means that – by law – schools and university libraries have the right to copy, as long as the 'rights holders receive equitable remuneration or fair compensation'. In principle the 'statutory licence' for the educational sector was established to allow schools and other institutions to access and reproduce material without having to worry about clearing rights first. CAL is the collecting society in charge of collecting the statutory licence.

The school sector is a major contributor to CAL. In 2009/10, 48% of CAL's revenue (56 AUD millions, £37 millions) came from schools while a further 21% came from Universities. This makes schools one of the biggest contributors to collecting societies in Australia, only surpassed by the retail sector which contributed 73 AUD millions to APRA/AMCOS in 2009/10. (The same year the hospitality sector paid 53 AUD millions in fees to APRA/AMCOS).

By law CAL cannot refuse to grant a licence. It can, however, refuse to reach agreement with a licensee with respect to its price. If this is the case, either party can request the Copyright Tribunal to determine the rate. In practice, this has meant that CAL takes educational organisations to court which ends up being prohibitively costly for these organisations (see Section 2.4.2 below, point 2).

It is worth pointing out that the UK Copyright Tribunal also arbitrates on the terms and conditions of a licence when the two sides cannot reach agreement themselves. However – and in stark contrast with Australia – only users and not collecting societies can take matters to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

## Government attitudes to collective administration

In 1993, Australia abandoned nearly 90 years of fixing national wage rates by a federal government body, and in principle both major political parties rejected government determination of any kind of remuneration (other than the minimum rate of pay).

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,<sup>17</sup> were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to collecting societies by the competition law.<sup>18</sup> Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.<sup>19</sup>

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<sup>17</sup> The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

<sup>18</sup> Australian competition and consumer legislation exempts intellectual property licences from provisions relating to, among other things, price fixing. Additionally, Collecting Societies may apply to the competition regulator for an exemption, for a fixed period, from the operation of competition provisions. APRA and PPCA have obtained and renewed exemptions.

<sup>19</sup> In the 1930s, the Commonwealth Attorney General's Department (AGD) and Postmaster General's Department (PGD) argued over policy to APRA, the latter department supporting the position of radio broadcasters against APRA's public performance fee claims. From the 1980s onwards, the successors of the PGD (communications departments in various incarnations) supported scrutiny of Collecting Societies.

## **Don't Stop the Music report – genesis of the collecting societies' code of conduct**

In 1996 a Liberal coalition administration assumed government in Australia. The Government planned a program of economic reforms revolving around competition principles. In the field of copyright, the first policy test emerged when small businesses, such as cafes, flooded government with complaints about APRA's copyright licensing tactics.

APRA (and PPCA, which attracted no criticism<sup>20</sup>) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

In 1997, the Government asked a joint Committee of Parliament to investigate collecting societies' collection of royalties for the public performance of music by small businesses.

The NSW Department of Fair Trading informed the Committee that many small businesses had never heard of the Copyright Tribunal, and that in any case its jurisdiction did not extend to many matters with which they were concerned. The ACCC (Australian Competition and Consumer Commission) stated that many small businesses would lack resources to approach the Tribunal.

Some witnesses supported the recommendation of a prior report<sup>21</sup> for the creation of the office of Copyright Ombudsman, and most supported the establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the Interdepartmental Committee (IDC)<sup>22</sup> advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998<sup>23</sup>, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

Instead, it proposed the Copyright Tribunal offer a mediation service to resolve licensing disputes and complaints. The report also recommended development, by collecting societies, relevant government departments, user groups and other interested parties, of a voluntary code of conduct for collecting societies. The report stated that 'implementation [of] a code of conduct would be an effective way of outlining acceptable licensing practices and activities'.

## **Application of competition policy**

In 1999, the Government commissioned an economist, Henry Ergas, to review the effect of intellectual property regulation on competition. The Ergas Report (2000) recommended, among other things, formal expansion of the ACCC's role in application of competition principles to proceedings in the Copyright Tribunal.

The Government subsequently amended the copyright legislation to provide that:

- in licensing proceedings, the Copyright Tribunal, if requested by a party, must consider relevant guidelines made by the ACCC

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<sup>20</sup> PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

<sup>21</sup> 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

<sup>22</sup> Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

<sup>23</sup> *Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business*, Cth of Australia 1998.

- at the ACCC's request, and if satisfied that it would be appropriate to do so, the Tribunal may make the ACCC a party to proceedings.

In 2006, the ACCC released for public comment a draft guide to copyright licensing and collecting societies (and received 20 submissions, as discussed below). However, six years on the ACCC is yet to release a final version of the 2006 draft guide.

## 2.2 Characteristics of the code

In 2002, further to the recommendation of the *Don't Stop the Music* report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.<sup>24</sup> The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

- their company boards are representative of, and accountable to, members
- they report finances transparently and commission annual audits
- they provide information about payment entitlements to members on request
- annual reports specify revenue and expenses for the reporting period, and distributions made in accordance with distribution policy.

The code requires collecting societies to ensure that they maintain distribution policies which state: (i) how entitlements are calculated, (ii) how distributions are determined, (iii) the method of payment to members and (iv) the times of payment, and deductions.

In dealing with members and licensees, collecting societies are required:

- to act fairly
- respond to requests for information about a society's licences or licence schemes
- draft clear and comprehensible licences
- consult on the terms and conditions of licences
- set 'fair and reasonable' licence fees, taking account of factors such as context and purpose of use of copyright material and its identifiable value.

Separately, collecting societies are to foster awareness among members, licensees and the public of their activities. Societies are required to establish and make known and regularly review, dispute or complaints resolution procedures, consistent with Australian Standard 4269-1995 *Complaints Handling*.

Copies of the code are to be supplied, on request, to members, licensees and the public. Annual reports are to provide a statement about collecting societies' compliance with the code. The code provides for the monitoring and review of compliance, and for amendments.

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<sup>24</sup> APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PCCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAcollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

## Enforcement and review of the code

In 2003, the collecting societies appointed The Hon James Burchett QC<sup>25</sup> to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

The first report established the pattern for reporting in the next decade. Prior to each review, Mr Burchett - who remains the code Reviewer – advertises for submissions, performs the task of review, holds a public meeting, usually at the premises of a collecting society, then publishes his report. Each review report has focused largely on how societies have managed complaints and disputes, listing and summarising all complaints/disputes, and assessing how societies have handled them. The reports have consistently found general compliance with the code.

## 2.3 Collecting society performance before and after the code

In compliance with the code of Conduct the Copyright Agency Limited (CAL) publishes an Annual Report every year with very detailed information on their operations, including information on revenue, expenditure and redistributed royalties.

As is shown in Figure 7, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again<sup>26</sup>. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could go towards explaining the tensions between the school sector (its biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEED), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEED) was created in the first place.

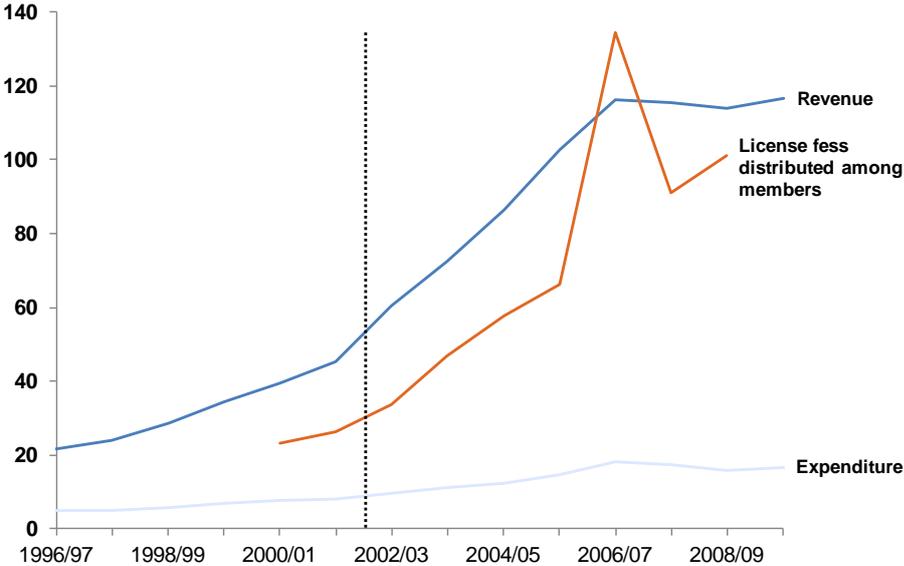
Figure 7 also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

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<sup>25</sup> Retired judge of the Federal Court and former President of the Copyright Tribunal.

<sup>26</sup> The figures are shown in Australian dollars (AUD), and have not been deflated.

**Figure 7: CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions)**

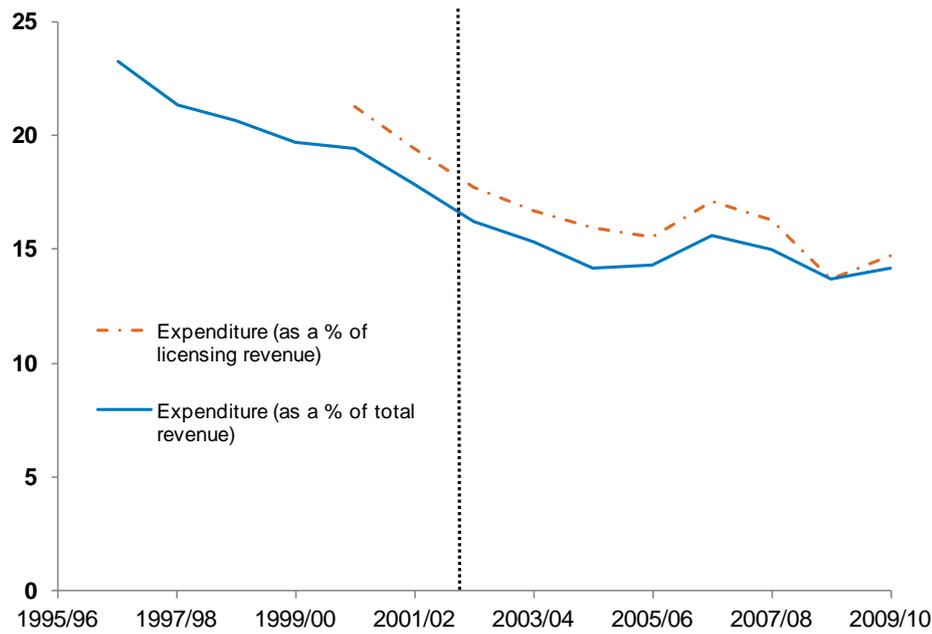


Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 8). This downward trend can be observed before the implementation of the code of conduct.

After 2005, the ratio of expenditure over revenue has shown a less clear path. Another measure of productivity is given by net income (defined as revenue minus expenditure) per employee. Figure 9 shows an upward trend between 2000 and 2006 of the net income generated by employee. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

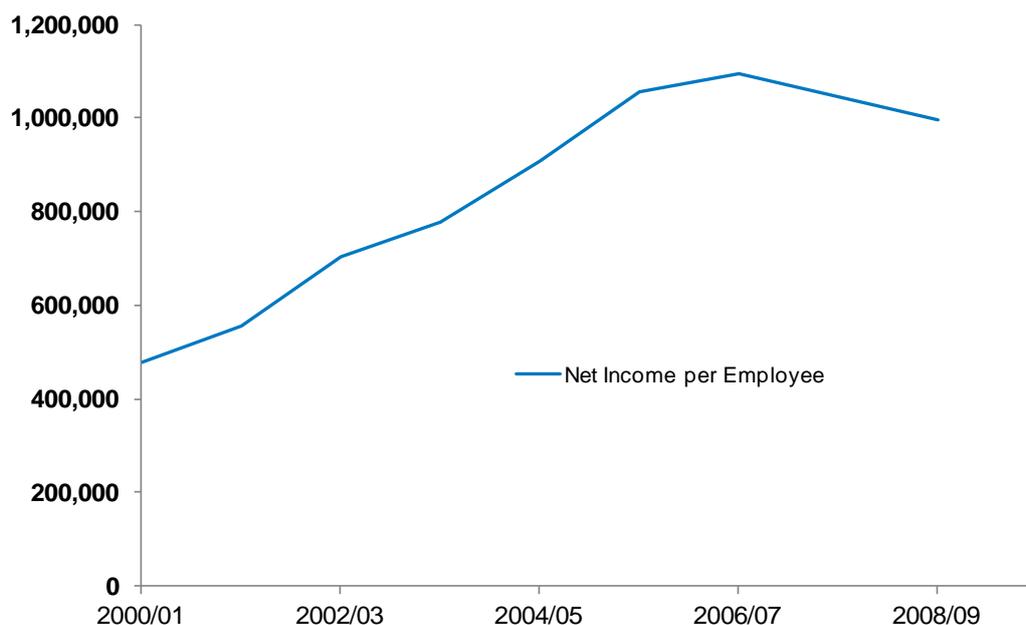
**Figure 8: CAL: Expenditure as a proportion of revenues, 1996-2009 (%)**



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

More informative measures of efficiency would be the collected and distributable sums analysed per number of users and per number of members. Unfortunately, CAL's Annual Reports do not have information on number of users, and there is not enough information on number of members to build a time series.

Figure 9: CAL: Net Income per Employee, 1996-2009 (%)



Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

At first glance, the generally rising trend seems to show the presence of economies of scale in this market. However, as has been explained before, it also reflects the constant increment in the fees charged to schools (a rise of 500% in 10 years), in a sector that accounts for around 48% of CAL's total revenue.

In particular, the large increase in CAL revenue from the schools sector stems from a decision made by the Copyright Tribunal in 2002 (plus related back payments to 1999). The 2002 Tribunal decision determined that differential rates were payable for copying of general works, artistic works, plays, short stories, poems, overhead transparencies, slides and permanent display copies, as follows:

- 4 cents for general works
- 6 cents for short stories and plays
- 8 cents for artistic works and poems
- 40 cents for overhead transparencies/slides.

The new differential rates led to a very large increase in Part VB licence fees paid by Schools and the rate has increased each year with CPI. Previously Schools had paid CAL a flat rate of \$2.442 per primary student and \$3.342 per secondary student.

The second major change made by CAL relates to digital copying. In 2002, the Tribunal declined to fix a rate for digital copying as there was insufficient evidence for it to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to appropriate digital copying rate, the schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment of electronic payment in schools. The schools also said that they would voluntarily pay CAL 85 cents per FTE student for 2005 and 85 cents per FTE student plus CPI in

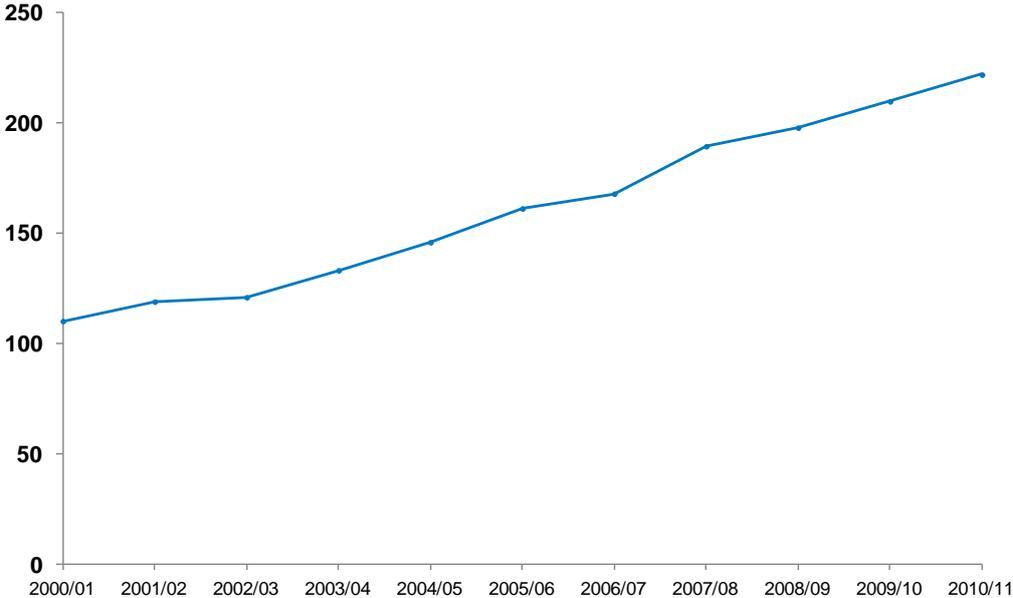
subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by Schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

In 2005, CAL duly commenced proceedings in the Copyright Tribunal for a higher electronic use rate and other matters in relation to an Electronic Use Scheme survey in Schools, but the proceedings in relation to rates go to a hearing. In 2009, a single rate for both hard and digital copying was agreed by negotiation between the schools and CAL for 2010-2012 of 16 dollars per FTE student plus CPI in the subsequent years; this settled the Copyright Tribunal litigation instigated by CAL in 2005 in relation to a rate for electronic use. The agreement is due to expire 30 December 2012 and negotiations are about to re-commence.

**APRA**

There is less information available about APRA, the Australian music collecting society. Therefore, it is only possible to build a time series for their revenue (total amount of licence fees collected from their users) (see Figure 10). Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA’s revenue increased by 90%. In contrast, CAL’s revenue increased by 195% over the same period. This provides further evidence that the CAL’s financial results are largely due to the constant increases in tariffs over the period.

**Figure 10: APRA: Revenue 2000-2010 (AUD millions)**



Source: APRA Annual reports 2008/09 – 2010/11. BOP Consulting (2012)

**2.4 Benefits and criticisms**

Ten years into the code, it is possible to identify some benefits but mostly criticisms of the Australian code of conduct. As it has already been established in the preceding section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition, this trend

has co-existed with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

This section looks into other benefits and criticisms of the code in terms of the service provided to both members and users.

### 2.4.1 Benefits

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

### 2.4.2 Criticisms

Criticism of the code can be divided into four main categories. The first deals with its omissions and weaknesses. The second, analyses the issue of dispute resolution. The third, explores any effect that the code has had on behavioural change of the collecting societies. The final one explains a number of structural factors that are external to the code and that may have the effect of rendering the code nugatory.

#### 1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC on its draft *Guide to Copyright Licensing and collecting societies*, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.<sup>27</sup>

The department's submission stated four specific shortcomings. The code:

- is voluntary
- prescribes but does not enforce minimum standards of conduct
- permits collecting societies to appoint the code reviewer
- does not facilitate independent criticism: licensees who supply comments to the code reviewer are usually 'in relationships' with collecting societies.

The submission also stated dissatisfaction with the way in which, during the code review process, the code reviewer dealt with concerns raised about the conduct of certain collecting societies. During negotiation of licence fees, one particular society, CAL, proved unco-operative in supplying financial and historical data necessary for judging equitable remuneration and a number of collecting societies were unwilling to engage in Alternate Dispute Resolution (ADR) – even though the code

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<sup>27</sup> Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

provides for ADR. Collecting societies – according to the NSW submission – would only engage instead in mediation with individuals and not a collective, such as a ministerial copyright taskforce.<sup>28</sup>

Independently of the submission, a number of criticisms can be added. The code does not establish a standard stating that collecting societies should publish (or make available on request) summary and detailed information about distributions and patterns of distributions. The lack of information in this regard makes it difficult to ascertain the extent to which collecting societies benefit those they claim to benefit.

Additionally, the efficacy of the code in resolving the concerns of licensees becomes open to doubt when each annual review report is examined. The reports, as mentioned above, focuses on evaluating each society's success in dispute resolution during the financial year. The number of mediations undertaken is relatively small – in the year ending 2010, for example, CAL itself mediated 15 matters – but equally noticeably, most concerned complaints made by members not licensees.

It is unlikely that the dissatisfaction with various collecting societies, particularly the largest societies such as APRA-AMCOS and CAL, expressed over the course of 30 years, has vanished. Hence, as the following issues related to Dispute Resolution below illustrate, it is not possible to assert that the lack of complaints from licensees actually reflects the fact that the code has encouraged licensees to resolve issues with collecting societies.

## 2. Dispute resolution

Most code-related dispute resolution is initiated by complaints from members of collecting societies, not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding groups of organisations (e.g. schools) or representative bodies/trade associations.

Ideally, the code would have set a requirement for an independent copyright ombudsman, as was previously recommended in 1995, to act as a fallback in the dispute resolution process. In lieu of an ombudsman, the Copyright Tribunal exists to arbitrate in disputes between collecting societies and users of copyright material. However, the Tribunal has major limitations. Firstly, the Tribunal only adjudicates on issues related to tariffs. Secondly, the procedure is perceived as lengthy and costly, which largely prevents users from initiating a case in the Tribunal. In some cases, the collecting society takes a case to the tribunal, when an agreement is not reached regarding the terms of a tariff or the conditions of the licence (see the example above in section 2.3 related to digital copying).

According to Delia Browne, National Copyright Director at the Standing Council on School Education and Early Childhood Development, the last time that CAL challenged them in court, it cost them AUD 2million. She claims that the “costs and delays of the Tribunal effectively bar most licensees, and this limits its utility as a forum. Licensees have no other option but to reach agreement with the collecting society and pay a higher price for licence fees than what the Copyright Tribunal may have determined”. This suggests that it is very questionable as to whether the code has ensured that collecting societies have set ‘fair and reasonable’ licence fees (which is one of the requirements of the code).

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<sup>28</sup> The submission proposed legislative provision for mediation by the Copyright Tribunal, a measure proposed in the 1998 *Don't Stop the Music* report, but not implemented.

### **3. Behavioural effect**

Licensees and the experts consulted in this study have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings. The Commonwealth Department of Communications, Information Technology and the Arts has expressed concern about the dearth of information about a number of activities of collecting societies, and has pointed out that, for instance, it is not possible to determine the level of payments to Australian creators and rights holders compared with overseas counterparts, nor the spread of the distribution of payment to individual rights holders.

Another sign of the minimal behavioural effect of the code can be found again when looking at the statutory licence. According to Margaret Allen, State Librarian of Western Australia, CAL has been exploiting the statutory licence to monetise the use of freely available digital content in schools. According to her, it is estimated that schools pay between AUD 8 - 10 million per year (£5 - £7 million) for freely available digital content. The digital material subject to fees includes educational information available at the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian national science agency.

### **4. External structural factors**

As discussed, the background to the consideration of the 'in principle' merits of the code – and the extent to which it is implemented – is the nexus of legislation and Tribunal, and the constraint that this nexus places on prospective or existing licensees hoping to negotiate advantageous terms of use. The perceived hopelessness of their bargaining position perhaps explains why licensees are virtually absent from reviews of the code.

Even licensees willing to interrogate assertively the practices of collecting societies, such as the educational sector, are unwilling to engage with the review process, have no confidence in securing access to relevant financial information, and see no prospect of collecting societies agreeing to mediation of disputes.

Viewed from this perspective, the code helps to regularise the reporting and information practices of collecting societies, but has done nothing to reduce the distrust between them and licensees, nor to lessen the disparity in bargaining power.

## 3. EU developments regarding collecting societies

### 3.1 Overview

European collecting societies have evolved on a national basis according to cultural, business and legal factors. There are therefore wide disparities in:

- legal status and organisation, ranging from private non-profit organisations (as in the UK) to bodies subject to direct government control (France, Germany)
- fiduciary duties (stated and actual)
- transparency
- regulatory oversight
- the make-up of national cultural sectors
- revenue from levies on private copying
- spending on 'social support' for authors.

As is shown in Section 1 there are wide differences between the music, audio-visual and text sectors. Revenues from European collecting societies in 2010 reached €4.6 billion. Similar to what happens in the rest of the world, the music sector is by far the largest generator of royalties in Europe. The next largest sector is dramatic and literary works.

#### Regulation and Supervision

The EU treats intellectual property as an Internal Market matter but the Competition Directorate has long intervened and the Information Society Directorate is increasingly involved.

Today, four directorates are involved in policy-making, which illustrates the complexity of the regulatory and supervisory framework under which collecting societies operate in the EU. These directorates are:

- Internal market (DG Market)
- Industry, innovation and creative industries (DG Information Society and Media)
- Culture (DG Education and Culture)
- Competition (DG Competition)

The European Parliament tends to emphasise the role of collecting societies in culture and cultural diversity and takes a less legalistic line than does the Commission. However, it has been open to proposals for a code of conduct. This has been expressed in the report 'The Collective Management of Rights in Europe', commissioned from KEA, which states that "voluntary codes of conduct might be a useful tool to guide relationships between right holders and users. They would improve mutual understanding and establish clear rules for good faith negotiation and contractual implementation".

#### Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU's

competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

In 2004, the Commission considered legislation for the first time in its *Communication on 'The Management of Copyright and Related Rights in the Internal Market'* (COM(2004) 261). It was not specifically concerned with the legal status of collecting societies which 'may be corporate, charitable, for profit or not for profit entities' (Communication COM(2004)). It was more concerned with whether any specific collecting society operates in the cause of market efficiency. Its subsequent 2005 Work Programme said the purpose of any legislation would not be to harmonise the rules on collecting societies but 'to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them'. Such 'smooth functioning' implies the freedom of licensors and licensees to select the collecting society of their choice – which in turn implies they can make judgements about each collecting society's management and commercial operations.

The Communication was followed by a '*Study on a Community Initiative on the Cross-Border Collective Management of Copyright*' (7 July 2005), and an *Impact Assessment, 'Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services'* (SEC (2005) 1254. This laid out three options:

1. do nothing
2. allow wider reciprocal agreements; and
3. allow rights-holders to appoint an EU-wide collecting society (direct licensing).

The Commission also raised the possibility of 'guidelines', saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a *Recommendation on the Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* (12 October 2005), favouring a mix of options (2) and (3) above.

The Recommendation pointed out that divergent rules were problematic for licensors and licensees, given collecting societies' monopolistic position and their reciprocal agreements (#3.5.4). It stated that a code of conduct, setting out each collecting society's duties, would 'introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs'.

A Recommendation is a weaker instrument than a Directive but it seemed to have an effect. The International Confederation of Music Publishers (ICMP) said that, 'there is no question that just after the Recommendation was adopted a series of new cross-border licensing models has emerged that would not have seen the light of day otherwise. New business models were given the opportunity to benefit from an agile and more flexible system of licensing' (ICMP, EC Conference, April 2010).

Also in 2005, the Commission launched its *i2010* initiative for a competitive single market for online content. DG-InfoSoc's subsequent Communication on *Creative Content Online in the Single Market* (COM 2007 (836)) focussed on four areas including cross-border licensing.

During this time, DG Competition, which had previously investigated GEMA (the German Music SC) and SABAM (Belgian Society of Authors, Composers and Publishers), was investigating the music collecting societies' umbrella organisation, CISAC, following a request by Music Choice, a UK company. In 2008 it decided that CISAC's reciprocal agreements were contrary to Art 81 especially its clauses on collecting societies' policies on the exclusivity of membership and licensing (Case COMP/C-2/38.698).

In 2009, the Commission published a *Reflection Document* on 'Creative Content in a European Digital Single Market: Challenges for the Future'. Based on a public consultation that took place in 2008, the document identifies some possible actions in order to reach a 'competitive Digital Market'. In terms of the protection of rightholders, the document includes as possible options (i) extended collective licensing, (ii) creating financial incentives for online multi-territory offers and (iii) extending the scope of the Satellite and Cable Directive to online delivery as possible options.

In 2010, DG InfoSoc published a Communication entitled '*A Digital Agenda for Europe*' which proposed a framework Directive on collective rights management. It also held a conference in Brussels on 23 April 2010 at which many collecting societies gave their views on the need for reform and codes of conduct. There was a strong push for comparable rules on operation, transparency, governance and scrutiny by competent authorities

In July 2011 the EC Market Directorate, with the support of the InfoSoc and Culture Directorates, published a *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*. Its aims are to enhance the content industries by creating a single digital market through online, multi-territorial licensing.

In their response, many industry and right holders' organisations urged the Commission to show restraint and not intervene as the market was still developing. The European Parliament was also less enthusiastic, emphasising collecting societies' contributions to cultural diversity, a view which it has repeated since.

Industry responses warned against introducing any legislation that might impede the market's commercial freedom. However, there is little consensus between music and audio-visual and publishing, authors, content suppliers and aggregators, rights-holders and users, etc.

DG-Market is currently in the process of preparing its framework directive for collective management that would focus on online music. The framework, expected in June 2012, is expected to introduce harmonised standards of governance and transparency for collecting societies.

### **Main themes included in different Directorates' publications**

As the prior section shows, there is not a single body of rules and regulations under which collecting societies operate in the EU. It is, however, possible to identify recurring themes across the different documents that deal with collective management. These are:

#### *Governance and administration*

- Extent of external oversight by statute or bodies such as regulatory bodies
- Transparency, especially of collecting societies' revenues and costs, notably deductions to third parties (not right holders), and net distributions
- Exclusivity. Historically, collecting societies have had the exclusive right to license national and international repertoire to users located in their territory. However, the Commission is challenging this territorial exclusivity insofar as it prevents the creation of a single market (e.g. a pan-European one-stop licensing operation).
- Dispute settlement

#### *Members*

- Flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.

- Service level agreements
- Member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
- Treatment of national and global repertoire. Traditionally, collecting societies use reciprocal agreements to get access to foreign repertoire. However, attempts by collecting societies to protect their own national repertoire could lead to the avoidance of reciprocal agreements that might threaten that protection – seeing these as effectively a competitive threat. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.
- Distribution of royalties to right holders in other countries
- Ability of a right-holder to negotiate their own tariffs

#### *Users*

- Access to information about licences
- Fairness and equal treatment of users by collecting societies
- Education. This includes educating trade users about the need for collective licensing and the role of collecting societies under this system.

## 3.2 Case Studies

The national models vary from France and Germany, which have strong regulations, to Spain and other countries where regulation has been looser. SACD (The Societe des Auteurs et Compositeurs Dramatiques) suggest that, naturally, countries with a traditional respect for government regulation tend to have more effective regulations for collective management and be more transparent than countries where government regulation is traditionally less rigorous. In this regard, France, Belgium and the Nordic countries seem to score well.

### **France**

The Intellectual Property Code states that collecting societies must be established as civil law societies ('société civile') of which right holders are members ('associés'). Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture who can call upon the 'Tribunal de Grande Instance' in the event of substantial concerns. The Ministry's approval is necessary if a collecting society collects compulsory remuneration from, for instance, cable re-transmission.

Since 2000, the Commission Permanente de Controle des Sociétés de Perception et de Répartition des Droits (CPC) has acted as a permanent committee in charge of supervising the collecting societies. This committee is composed of senior civil servants and operates under the Cour des Comptes (Court of Auditors). Once every two years the CPC publishes a detailed report on all 24 collecting societies that assesses their financial results, activity and redistribution strategies.

Collecting societies' attitudes to the CPC vary. Initially, most felt that government had the right to intervene where a collecting society was fulfilling a legal mandate, such as the private copying levy or the right of remuneration for cable re-transmission, but that they should not otherwise be involved in what was, according to the Intellectual Property Code, a private company. However, the majority of collecting societies now see the CPC as a useful way of legitimising their activities to members and users as well as to the public.

For instance, SACD was originally opposed to the CPC but its current management now regards it as beneficial in reassuring members and users that the money collected is being properly distributed. They have described the CPC review as a useful 'free' audit. However, others continue to be opposed to the CPC's intervention in what they see as the affairs of a private company (e.g. SACEM criticised the publication of the salaries of its management by the CPC).

## Germany

Germany passed the world's first law specifically on collecting societies and has comprehensive regulation. The Urheberrechtswahrnehmungsgesetz (or Law of the Administration of Copyright and Neighbouring Rights, the so-called UrhWahrnG or LACNR), passed in 1965, provides a comprehensive legal framework. It says that the government regulates collecting societies to ensure oversight of the 'trustee relationship' and to prevent misuses of a monopoly position.

The purpose of a collecting society is said to be collective management for the benefit of rights holders. The German Patent and Trademark Office (DPMA) has the power to refuse any application to operate a collecting society if: (i) the statutes of the collecting society do not comply with the provisions of the UrhWahrnG; (ii) there is a reason to believe that a person entitled by law or the statutes to represent the collecting society does not possess the trustworthiness needed for the exercise of his activity, or (iii) it is unlikely, in view of the collecting societies' business structure, that the rights and claims entrusted to it will be effectively administered. DPMA also has the power to revoke the authorisation granted to a collecting society for the performing of its operations.

Other regulations cover the need for fair treatment, the calculation of tariffs and the obligation to grant rights on equitable terms. This means that a collecting society has to grant licences to all users according to the same published tariff and cannot refuse a licence. Collecting societies must notify the DPMA of any change to its statutes, management, tariffs, contracts or agreements with foreign collecting societies, and of resolutions of all meetings of members, supervisory boards, advisory boards and committees. Finally, the UrhWahrn also states that collecting societies should provide welfare institutions for their members, such as pension funds (KEA, 2006)

DPMA operates an arbitration board in case of disputes. It is notable that only two countries in the EU have public bodies to handle disputes between right holders and users (i.e. Germany and the UK, though the remit of the Tribunal in the UK is strictly limited to disputes related to the price/terms and conditions of the licence). Even in these two countries there are reports of a lack of resources, especially for complex cases that require not only legal expertise but also an understanding of a rapidly changing business environment.

According to Daniel J Gervais (2010) 'Germany has the most comprehensive legal framework of collecting societies in the world'. Despite this, it is difficult to find useful evaluations of whether the system has achieved its stated aims. For instance, Figure 4 in Section 1.3 above shows that GEMA makes the fewest distributions a year and also takes the longest maximum time to process royalties in comparison with music collecting societies in the UK and Australia.

Similarly, the fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972 (some six years after the LACNR was established) – related to abusing its dominant position by imposing unreasonable membership terms – suggests that the system does not necessarily prevent collecting societies from abusing their monopoly position.

### **Other countries**

**Spain** is an example of a country which appears to lack effective regulatory oversight. One issue is the distribution of fees to right holders, especially for digital uses. In July 2011, the police raided the offices of the Sociedad General de Aurores y Editores (SGAE) and its subsidiary SDAE over the operation of digital rights licensing and charged officials with fraud. There was also concern over links with a management company called Microgenesis. There are reports that SGAE has €100-200 million of undistributed revenues. The case is pending and there are moves in the government to establish a new public body to provide regulatory oversight.

There are also concerns about SGAE's overly vigorous search for potential users, which is seen as aggressive. On the other hand, SGAE fulfils a social role since it allocates a large proportion of its income to social causes such as pensions. In Spain, collecting societies are obliged to provide 20% of the remuneration for private copying for welfare activities and services for the benefit of their members – they must do this either themselves or through non-profit-making entities (KEA, 2006)

The Spanish Competition Commission has ruled against Spanish collecting societies' unfair practices on several occasions. According to BEUC (European Consumers' Organisation), 'The recent study by the Spanish Competition Authority on collective management of copyright has been a clear sign that the current monopolistic management of copyright is becoming obsolete in the face of technological development' (EU Conference, April 2010).

**Belgium** has experienced two collecting society governance issues in recent years. The first is an example of a lack of professional management in a small collecting society. In 1994, when the government introduced a neighbouring right, an authors' union set up a new collecting society, URADEX, which faced problems with managing its database and with distributions, as well as managing authors' pensions. After government intervention, URADEX changed its name and its statutes.

The second issue are the challenges faced by SABAM, by far the country's largest collecting society. In 2004 a composer brought a criminal case against SABAM relating to alleged mismanagement of his royalties between 1985 and 1995. The courts have made several preliminary judgements, the latest being in February 2012, but the case continues.

Belgium's collecting societies have also faced complaints from users such as bars and other small businesses in which public performance takes place. Its collecting societies work closely with trade associations to address public concern and, where possible, collaborate, as in France, so that one body collects all licences due.

As a result of the SABAM case, in particular, the government proposed a new section in the copyright law to regulate collecting societies. After extensive consultation, the new law was passed in 2009. The government is now preparing a Royal Decree which will set rules for management and financial reporting. Collecting societies pay the cost of this oversight: 0.02% of turnover.

The outcome of these two cases is that Belgium will have one of the most robust systems of regulatory oversight in Europe. It will be much stronger than would normally be provided by a typical voluntary code of conduct.

Figure 9 summarises the regulatory initiatives in the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

**Figure 9: Collecting societies Legal Framework in the EU**

Country	Legal status	Establishment and supervision	Operations and accountability	Dispute resolution	Social and Cultural function
France	Collecting societies must be established as civil law societies of which right holders are members. The law is not specific about the monopoly status	Collecting societies do not need government approval but must send their statutes and general regulations to the Minister of Culture. Authorisation is needed just for compulsory rights (i.e. reprography and cable retransmission). The Minister of Culture and the CPC supervises collecting societies' operations and has the power to revoke their licence to operate.	The CPC produces a bi-annual report assessing collecting societies' financial results, activity and re-distribution strategies. Royalty redistribution schemes are established by law in the case of private copying, and music public performance and broadcasting.	Mediation procedures for cable re-transmission rights. CPS mediates remuneration for broadcasting and public performance in case of disagreement.	50% of undistributed sums and 25% of the sums collected from private copy must be used for cultural purposes.
Germany	The law is not specific about the legal or monopoly status of collecting society.	Collecting societies need an administrative authorisation for starting their operations. Supervision is by the DPMA, which has the power to revoke a collecting society's authorisation to operate.	Collecting societies have to be open to all right holders and must license to all users without discrimination. Re-distribution rules have to be established in their statutes.	DPMA operates an arbitration board in case of disputes	Collecting societies should provide welfare contributions for their members, such as pension funds
Spain	Collecting societies must be non-profit organisations. Competition between collecting societies that manage the same rights is possible	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Culture, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (ad hoc body)	20% of the remuneration for private copying has to be allocated to welfare activities and services for members.
Belgium	Collecting societies can be commercial organisations or any other type of legal entities.	Prior authorisation to operate is needed. Supervision of management is made by the Minister of Economy, who has the power to revoke their licence to operate.		Mediation procedures only in the case of cable re-transmission rights (neutral mediator)	30% of the private copying royalties may be allocated to promote new works

Source: KEA (2006), BOP Consulting (2012)

## 4. A code of conduct for the UK

### 4.1 Moves towards a code

In recent years, there has been increasing support from collecting societies and their members and users in the UK that a code of conduct is needed. For instance, this was confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012<sup>29</sup>. At this meeting, representatives of ten collecting societies expressed that:

- they are willing to support a voluntary code of conduct
- but are reluctant to attach a regulatory backstop to it.

In 2009, *PRS for Music* published a Code of Practice, the characteristics of which made it closer to a service level agreement – insofar as it delineated the level of service that should be expected from *PRS for Music*. This set of standards seems to have been part of the change in cultural and organisational characteristics that has taken place within the organisation over previous years, but it has arguably also resulted from political pressure and media attention resulting from the level of complaints before its adoption. Similarly, in January 2012, PPL also chose to publish a first code of conduct similar to the guidelines published by *PRS for Music*.

In 2011 the British Copyright Council (BCC) published a set of principles for its collecting society members which includes 10 out of the approximately 15 collecting societies that operate in the UK. These include *PRS for Music*, PPL, CLA, PLS, ALCS, Directors UK and BECS, among others.

The set of principles contain minimum standards that can be used by BCC members to develop their individual codes of conduct. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed principles; in-principle agreement was established at the Codes of Conduct Ministerial Roundtable held in March 2012.<sup>30</sup>

The intention is that these minimum standards would be adopted and implemented by all of the BCC's members by November 2012. At this point, the BCC will conduct an internal review to assess the success of the implementation and any need for change.

Finally, in December 2011 the UK government started a consultation process on proposals to change the UK's copyright system (closed at the end of March 2012), based on recommendations contained in the Hargreaves Review of Intellectual Property and Growth. As part of the consultation, the UK government is discussing proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. The government has consulted on a proposal for codes which contain minimum standards of fairness, transparency and good governance that have been set by the government. The content of the code has been mainly informed by the Australian code of conduct.

The consultation requested views on these proposed minimum standards, the scope of the code, implementation timescale, as well as initial views on potential penalties for non compliance in the case that back-stop legislation is introduced to enable the imposition of statutory codes if required. With this initiative, the UK government is attempting to lead the debate on the standards that should be expected from collecting societies. A UK code could then serve as a model to be used in the EU, for instance.

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<sup>29</sup> IPO (2012) 'Minutes of the Collecting Society Roundtable on the Codes of Conduct' (<http://www.ipo.gov.uk/hargreaves-cce-20120110.pdf>)

<sup>30</sup> Minutes available at: <http://www.ipo.gov.uk/hargreaves-cce-20120307.pdf>

Figure 10 shows the three different initiatives implemented by *PRS for Music*, PPL and the BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

**Figure 10: Codes of conduct in the UK**

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
General Description	Voluntary Code of Practice, first published in 2009	Voluntary code of conduct Available since 1 January 2012	<ul style="list-style-type: none"> <li>- Good Practice Principles, published in 2011.</li> <li>- Provides collecting societies with a baseline to be used to write their own voluntary code of conducts.</li> <li>- Suggested themes:                             <ul style="list-style-type: none"> <li>• transparency</li> <li>• accountability and consultation</li> <li>• service levels and operational issues</li> <li>• data protection</li> <li>• queries, complaints and dispute resolution</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies to adopt codes based on minimum standards that cover:                             <ul style="list-style-type: none"> <li>• obligations to right holders</li> <li>• obligations to licensees</li> <li>• control of the conduct of employees and agents</li> <li>• information and transparency</li> <li>• complaint handling</li> <li>• ombudsman</li> <li>• review of code</li> </ul> </li> <li>- Based on the Australian code and subject to public consultation in 2011/12.</li> </ul>	<ul style="list-style-type: none"> <li>- Code of conduct, launched in 2002.</li> <li>- Objectives:                             <ul style="list-style-type: none"> <li>• promote awareness of and access to information</li> <li>• promote confidence in collecting society</li> <li>• set out the standards of service</li> <li>• ensure that members and licensees have access to efficient, fair and low cost procedures for handling of complaints and dispute resolution.</li> </ul> </li> </ul>
Accountability and transparency	It states that <i>PRS for Music</i> processes are clear and transparent, but does not specify how that will achieve this.	<ul style="list-style-type: none"> <li>- Sets up standards of service: e.g.                             <ul style="list-style-type: none"> <li>• act in a professional, friendly and courteous manner</li> <li>• follow clear and transparent procedures</li> <li>• provide members and licensees with accurate information</li> </ul> </li> <li>- Promises to act promptly, fairly and consistently.</li> </ul>	<ul style="list-style-type: none"> <li>- Transparency</li> <li>- Accountability and consultation</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should deal with members and licensees transparently.</li> <li>- Inform member, licensees, and potential licensees of scope of repertoire and reciprocal representation.</li> <li>- Make available clear distribution policy</li> <li>- It also set standards for reporting (including members, distribution policy, revenue, cost, allocation and distribution, and report regarding compliance with its code).</li> </ul>	<ul style="list-style-type: none"> <li>- States that collecting societies will maintain, and make available to members on request, a distribution Policy that sets out from time to time.</li> <li>- Also states that collecting society will maintain proper and complete financial records, including in relation to (i) the collection and distribution of Revenue, (ii) the payment by the collecting society of expenses and other amounts.</li> <li>- It also set standards for reporting.</li> </ul>
Education, training and awareness				<ul style="list-style-type: none"> <li>Collecting societies should give an undertaking that:                             <ul style="list-style-type: none"> <li>- Staff will receive training so</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Collecting societies are expected to take 'reasonable steps' to ensure that its</li> </ul>

UK

Area	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	Australia
				employees, agents and representatives refrain from using 'high pressure selling techniques'. - Employees and agents are aware of procedures handlings complaints and resolving disputes.	employees and agents are aware of and comply with the code. Additionally, they are supposed to engage in appropriate activities to promote awareness among members, licensees and the general public.
Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> <li>- Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager.</li> <li>- If member/licensees is not satisfied with decision she can resubmit complaint, but this time addressing the Managing Director</li> <li>- Members and licensees can refer to the <u>Ombudsman</u> for <i>PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure</li> </ul>	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> <li>- Suggests that each stage of complaint procedure should be clearly explained.</li> <li>- Recently, it has been discussed that an <u>ombudsman</u> could also be included.</li> </ul>	<ul style="list-style-type: none"> <li>- Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> <li>• define categories for complaints</li> <li>• ensure relevant information is available and understandable</li> <li>• define who is responsible of handling the complaint and the timeframe</li> </ul> </li> <li>- Government also proposes to appoint a <u>ombudsman</u> to be a final arbiter on complaints between the collecting society and its members and licensees</li> </ul>	<ul style="list-style-type: none"> <li>- Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> <li>• dealing with complaints from members and licensees; and</li> <li>• resolving disputes.</li> </ul> </li> <li>- These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.</li> </ul>
Compliance	None	None	Recently, it has been discussed that	- The role of ombudsman	Even though the code is

Area	UK				Australia
	<i>PRS for Music</i>	PPL	British Copyright Council	Government proposals	
			an independent review process could also be included.	could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code. - Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties)	voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.
Code review	No systematic process	No systematic process			It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

Source: BOP Consulting (2012)

## 4.2 Main concerns regarding the collective management system in the UK

In assessing the costs and benefits of any such code of conduct, it is worth summarising the main concerns among members and users (but mostly users) about the current service provided by collecting societies in the UK. In this section we will focus on the music collecting societies (which are by far the major licensors across the world) and the reprographic collecting society that operates in the educational sector.

Some of these issues can be tackled through a code of conduct, in particular, the issues related to transparency, accountability, governance, and dispute resolution. However, and as the Australian case demonstrates, a voluntary code is unlikely to be strong enough to attain these results, since under a voluntary system collecting societies do not have any obligation to comply with the minimum standards stipulated in the code.

It is important to note that other issues (e.g. tariffs) lie outside the scope of such a regulatory mechanism. As the Australian case illustrates, a voluntary code seems to be a necessary but not sufficient condition to improve the relationship between collecting societies and agents.

### 1. Duplication of liabilities and awareness

As mentioned in the Introduction, collecting societies are institutions that reflect the complexity of the economic context in which they operate. One of the major complexities of this economy is that different collecting societies can have a mandate to collect from the same licensee for the use of the same content.

This problem is one faced by businesses in the UK who in certain circumstances have to obtain licences from two different collecting societies for the public performance of the same copyrighted material. One example of this problem concerns businesses in the hospitality, leisure and retail sectors (hairdressers, pubs and restaurants, warehouses, etc.) that play recorded music in their establishments. Those businesses legally require a licence from (1) *PRS for Music* (which collects on behalf of songwriters, composers and music publishers) for the public performance and mechanical reproduction of their works and from (2) PPL (Phonographic Performance Limited, which collects on behalf of performers and record companies) for the public performance of their works.

This legal requirement can be burdensome for businesses given that *PRS for Music* and PPL seem to have different business strategies. *PRS for Music* conducts a very comprehensive search of all the business that could potentially be playing music in their establishments and approaches them on a regular basis. PPL, on the other hand, seems to focus its efforts on a more limited pool of users. This seems to reinforce the lack of awareness of licensing requirements among some businesses. For instance, it was reported by a representative of the British Hospitality Association (BHA), that businesses such as hotels tend to be very well aware of the existence of *PRS for Music* (and of its duties), but much less aware of PPL (since they will seldom have been approached by them).

Furthermore, when PPL approaches a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)<sup>31</sup>. Additionally, it also states that, 'in

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<sup>31</sup> PPL FAQ: <http://www.ppluk.com/en/I-Play-Music/Businesses/Why-do-I-need-a-licence>

certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is one day late on paying the renewal fee.

*PRS for Music* also applies surcharges but is less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence<sup>32</sup>.

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed her association's concern "is that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."<sup>33</sup>

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society – either *PRS for Music* or PPL – collect on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a *PRS for Music* licence (before that date just a *PRS for Music* licence was needed). For these organisations, *PRS for Music* has been administering a joint music licence since January 2012, which incorporates charges from both organisations. *PRS for Music* remains the single point of contact for the joint licence.

Reprographic ('text') collecting societies in the UK have established a different organisational solution but with the same end in mind. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and performs collective licensing on their behalf.

With regards to issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain a small business the full extent of their obligations
- reduce the potential frictions and pressure to business that could emerge if and when all collecting societies decide to make a thorough assessment of the potential universe of licensees.

However, a code on its own would not effect the joint collection of music licences that would simplify the market for users.

<sup>32</sup> PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

<sup>33</sup> Quoted in the online article, 'How should Collecting Societies be Reformed?', *Managing Intellectual Property*, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

## 2. Tariffs and scope for negotiation

There are clear differences in the scope for negotiation with collecting societies among users, according to the scale of the operations:

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is a 5-year tariff deal with yearly adjustments for inflation and audience size. They pay royalties to four different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors' and authors' rights). Their most efficient dealings are with PRS for Music and PPL which act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
- **Medium users (e.g. hospitality sector):** Medium users do have some level of co-ordination with collecting societies, usually through their trade associations. These associations have on occasion referred a tariff to the Copyright Tribunal for adjudication, where they have been unable to reach agreement through discussions with the relevant collecting society (for example, the background music tariffs for the hospitality sector were set in this way – for PRS in 1991, and for PPL in 2009 – and have subsequently been adjusted annually based on inflation and usage indicators). However users, including trade associations, report that the Copyright Tribunal is expensive to access; this means that in practice such users are often dependent on the willingness of the collecting society to negotiate.
- **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of *PRS for Music*' existence mostly because of *PRS for Music*'s business strategy, which is based on a comprehensive identification of all businesses likely to be music users.

With regards to issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, ability to negotiate is limited. Though the licensee can refer to the Copyright Tribunal to adjudicate on the price, terms and conditions of a tariff but this does not happen frequently (e.g. the *PRS for Music* tariff for the hospitality sector was established in 1991).

## 3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, though there recently overhauled website shows a marked improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a

bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

With regards to transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

However, the gains in transparency seem to be limited if (i) the code is voluntary and (ii) the language used in the code is vague. These are two lessons that can be drawn from the Australian case.

#### 4. Abuse of dominant position

Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged: "Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood" (Consumer Focus, 2011).

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies' idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). This is because the UK recognises the benefits of monopoly providers and has sought to address potential concerns through the minimum standards proposed.

With regards to issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

#### 5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change which opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research<sup>34</sup>. According to the British Library 'the main barrier to the mass digitisation of material not born digital is the fragmentation of rights

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<sup>34</sup> B. Stratton (2012). 'Seeking New Landscapes' A rights clearance study in the context of mass digitalisation of 140 books published between 1870 and 2010. British Library (<http://pressandpolicy.bl.uk/image/library/downloadMedia.ashx?MediaDetailsID=1197>)

for pre-digital material'. They estimate that 43% of potential 'in copyright' work in the Library are orphan works<sup>35</sup>.

With regards to issues of repertoire and mandate, a code of conduct for the UK would have:

- no direct effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to successfully apply to operate an Extended Collective Licensing scheme.

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<sup>35</sup> Electronic clearance of Orphan Works significantly accelerates mass digitisation

## 5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

### Code of conduct in Australia

The primary benefit of the code's introduction appears to be that it has caused collecting societies:

- to try conscientiously to respond to requests from members and licensees
- to better explain distribution policy
- to explain and publicise their functions.

In addition, societies have established or improved complaints and dispute resolution procedures.

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism.
- Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry.
- Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings.
- External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.

### Regulation of collecting societies in the European Union

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation though some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.

- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

### Overall conclusions from the comparative analysis

In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:

- there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
- there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
- wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and which will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for instance, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. But the efficiency and size of the distributions made to members are not the only indicators with which to assess the performance of collecting societies, though they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for 'principal-agent' problems and for collecting societies to extract 'managerial rents' from members now seems relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain relatively ubiquitous, though are often not pursued through collecting societies' own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing users' concerns rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

## A code of conduct for the UK

Looking against the potential benefits of a code of conduct that were outlined in the BIS Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a *voluntary* code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model, as summarised below.

### Members

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already (i.e. they do not tend to complain)<sup>36</sup>. This is in contrast with the case of collecting societies in Spain and Belgium which shows that mismanagement of and malpractices with rights holders' revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. We should stress that all indicators point to UK collecting societies having strong governance mechanisms, good member relations, and no recent history of malpractice.
- More collections for members – we have found no evidence that a code of conduct would directly result in any increase in transactions. Any distinction that might be made here between the potentially different affects that a voluntary or mandatory code might have seem unlikely as increases in collections seem to be instead driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of who are the potential users of the rights that they manage – neither of which are directly influenced by whether any code of conduct is voluntary or mandatory.

### Collecting Societies

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.
- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for the new rights than by an expansion in transactions driven simply by a better informed marketplace.

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<sup>36</sup> This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

## Users

- Fewer complaints – evidence suggests that users direct more complaints through government, civil society organisations and industry trade bodies than through collecting societies. Consultation with industry trade bodies for this study suggests that this is because users feel that their bargaining position is very weak. As complaints to government and civil society organisations have been outside the scope of this research, it is not possible here to state what effect a code of conduct may or may not have on the level of these complaints. There is some evidence in the UK as regards to user complaints to collecting societies. After the launch of their code of practice in 2009, PRS reported an 8% reduction in the number of complaints from licensees in the first year after its introduction, albeit only representing a fall of 17 complaints in total. Equally, at the same time as establishing their code of practice, PRS also instigated a new complaints procedure with a three stage tracking system. As this suggests, the PRS code of practice was one factor among others in improving PRS' relations with users, and licensees consulted for this study reported that these factors together were an expression of a more fundamental and progressive cultural and organisational change within the collecting society. The PRS example suggests that a code of conduct in isolation is unlikely to make a difference to user complaints, but it may make some contribution as part of package of measures aimed at improving the service that collecting societies provide to users.
- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The international comparative evidence documented in this report indicates, then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a *statutory* code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (though it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be little other net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting

societies and the profusion of rights<sup>37</sup>) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

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<sup>37</sup> As an indication of the current complexity and confusion surrounding rights, one year after introducing their code of practice, PRS surveyed their licensees and the majority (60%) still did not 'fully understand the role of PRS and MCPS' – let alone how the rights managed by PRS/MCPS interact with those managed by PPL (Harris Interactive survey of 1,200 businesses, cited in PRS' submission to the Hargreaves Review, at: <http://www.prsformusic.com/aboutus/press/latestpressreleases/Documents/PRS%20for%20Music%20Response%20to%20Hargreaves%20IP%20and%20Growth%20Review%20Final.pdf>)

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