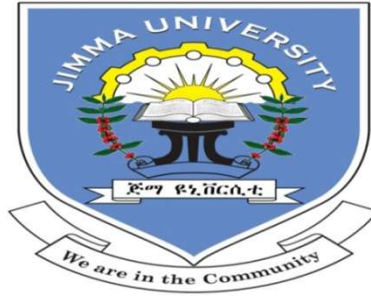


JIMMA UNIVERSITY



COLLEGE OF LAW AND GOVERNANCE SCHOOL OF LAW

Examining the Regulatory Framework of Collective Management under the
Ethiopian Copyright and Neighboring Rights Law

A Thesis Submitted in Partial Fulfillment of the Requirements
for the Master of Laws Degree (LL.M) in Commercial and Investment Law

By: Tilahun Lire

Advisor: Dr. Biruk Haile(PhD)

Jimma University, Ethiopia

June 2017

Declaration

Tilahun Lire, hereby declare that this thesis is my original work and it has not been presented for a degree in any other university. All sources of the materials utilized in the study have been properly attributed.

Signature: _____

Jimma University

June, 2017

This dissertation has been submitted for examination with my approval as a university advisor:

Advisor: Dr Biruk Haile(PhD)

Signature: _____

Examining the Regulatory Framework of Collective Management under the
Ethiopian Copyright and Neighboring Rights Law

By: Tilahun Lire

Approved by: Board of examiners

Advisor: Dr Biruk Haile(PhD) Signature_____

Examiners

1. _____ Signature_____

2. _____ Signature_____

3. _____ Signature_____

Table of Contents

Acknowledgment	ii
Acronyms	iii
Abstract.....	v
CHAPTER ONE	1
Introduction.....	1
1.1. Background of the study	1
1.2. Literature review	3
1.3. Statement of the problem	4
1.4. Research questions.....	7
1.5. Objectives of the study.....	8
1.6. Scope of the study	9
1.7. Significance of the study.....	9
1.8. Methodology	9
1.9. Organization of the study	10
1.10. Limitation of the study	10
CHAPTER TWO	11
Conceptual Framework, Historical Background and Theoretical Justifications of Collective Management System of Copyright and Neighbouring Rights	11
2.1. Conceptual Framework of Collective Rights Management	11
2.2. Historical Development of the Collective Management of Copyright	14
2.3. The role of collective management organizations	17
2.4. Theoretical Foundations of Collective Management	18
2.5. Assessing the costs and benefits of collective management	22
2.6. The natural monopoly of copyright collectives and regulation	24
2.7. Blanket licensing.....	25
CHAPTER THREE	26
Experiences of Selected Jurisdictions	26
3.1. Introduction.....	26
3.2. The experience of France	27
3.2.1. The primary management collective societies	28

3.2.2. Intermediary collective societies.....	30
3.2.3. The regulatory framework of royalty collection and distribution societies (RCDSs).....	31
3.3. Collective management of copyright in Germany	42
3.3.1. Overview of collecting societies in Germany	42
3.3.2. The CMOs regulatory framework.....	44
3.4. The Experience of Nigeria	53
3.4.1. Overview of the existing collecting societies in Nigeria.....	53
3.4.2. The regulatory framework of the CMOs.....	54
3.5 The Experience of Kenya.....	60
3.5.1. Over view of the existing CMOs	60
3.5.2. The Regulatory Framework of the Collecting Societies	61
CHAPTER FOUR.....	65
Examining the Regulatory Framework of Collective Management under the Ethiopian Copyright and Neighboring Rights Law.....	65
4.1. Introduction	65
4.2. Establishment of the CMO.....	67
4.3. The relationship between the CMO and members	70
4.4. Legislative back up to the rights acquisition process.....	73
4.5. The relationship between the CMO and users	75
4.6. The role of collective management society.....	76
4.7. The supervision of collective management societies	80
4.8. Dispute resolution and complaint procedure.....	82
4.9. Challenges and issues for establishing collective management society in Ethiopia	82
4.10. International Instruments Affecting Collective Management of Copyright	87
Conclusion	90
Recommendations.....	94
Bibliography	97

Acknowledgment

First of all I would like to praise my heavenly father, God for helping me by giving patience and strength throughout the study.

Secondly, I would like to extend my heartfelt thanks to my Principal advisor, Dr Biruk Haile for his devoted and extra-ordinary commitment and constructive comments provided in the course of my study in the absence of which the work could not have been successfully accomplished. I am also grateful to my co-advisor, Obsinan Girmaye for his comments on my work.

I am also indebted to extend my thanks to my uncle, Tefera Molla for his encouragement and priceless support until the accomplishment of the study. I would also like to thank Tamene Hiboro, my innate friend, for his invaluable support during my stay at Addis Ababa.

Finally, I would like to extend my deepest thanks to my family, and friends who have helped me in every aspect during my study.

Acronyms

AVRS	Audiovisual Rights Society of Nigeria
CFC	Centre francais'exploitation du droit de copie
COSON	Copyright Society of Nigeria
CMO(s)	Collective Management Organization(s)
EIPO	Ethiopian Intellectual Property Office
FCPI	French Intellectual Property Code
GEMA	German musical copyright monitoring body
GVL	Society for the Exploitation of Neighboring Rights in Germany
GÜFA	Gesellschaftzur Übernahme und Wahrnehmvon Filmauf-führungsrechtenmbH
GPO	German Patent Office
KAMP	Kenya Association of Music Producers
KOPIKEN	Reproduction Rights Societies of Kenya
LACNR	Germany Law on the Administration of Copyright and Neighboring rights
PRISK	Performers Rights Society of Kenya
REPRONIG	Reprographic Rights Organization of Nigeria
RCDS	Royalty Collection and Distribution Societies
SACEM	Society of Authors, Composers and Publishers of Music of France
SACD	Société des auteurs etcompositeursdramatiques
SCAM	Sociétécivile des auteurs multimedia
SDRM	Société pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs

VG WORT	Verwertungsgesellschaft Wort
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
WIPO	World Intellectual Property Office

Abstract

The roles played by literary, artistic and other creative works are indispensable in enhancing cultural, social, economic, scientific and technological development of a country. To achieve this objective countries in different parts of the world have granted protection to copyright by entitling owners of creative works with certain exclusive exploitation rights. Accordingly, the owners of copyright and neighboring rights have exclusive rights of doing, authorizing, or prohibiting certain acts in relation to such works. This enables the owners of the protected works to directly control the utilization and distribution of their works, personally decide the terms and the manner of remuneration for the use of their works and oversee whether their moral and economic rights are properly respected. Nevertheless, the advent of technology and digitization has caused the individual management of copyrights extremely difficult if not impossible. The system of collective rights management was developed as a means to relieve the difficulty encountered by the right holders in personally administering their rights. The collecting society by representing right holders negotiates the terms of license with users of the copyright works, collects royalty and distributes the same to its members. It also benefits users by enabling them access the protected works for a reasonable price as it reduces transaction costs. However, since the collecting society holds a monopoly power, countries have come up with regulatory framework to minimize and prevent the negative effects of monopoly against the interests of the society's members and users of the copyright work. Similarly, the Ethiopian government has provided regulatory framework for collective management of rights.

The aim of this study is to critically examine and explore the loopholes in the regulatory framework of collective management under the Ethiopian copyright and neighboring rights proclamation No.872/2014. The research indicates that there are regulatory challenges regarding the collective management organization's establishment, relationship with members and users, and its roles and functions. The study also shows the problem of organizational arrangement existing in the Ethiopian Intellectual Property Office. This on the other hand indicates that there is a need to improve the collecting societies' regulatory framework in order to have the effective and functional societies in the country.

Key Words: Copyright, Neighboring Rights, Collective Management

Examining the Regulatory Framework of Collective Management under the Ethiopian Copyright and Neighboring Rights Law

CHAPTER ONE

Introduction

1.1. Background of the study

Literary, artistic and other similar creative works play a pivotal role in enhancing cultural, social, economic, scientific and technological development of a country.¹ With a view to achieve this objective the creation of a system that bears up further development of an author's creativity and encourages the creation of new works is the essential concern in the copyright.² Accordingly, the right holder of the copyright and related rights³ is granted with certain exclusive exploitation rights.⁴ To put in other words copy right grants the creator of the original work with the exclusive rights of doing, authorizing, or prohibiting certain acts in relation to such work. This enables the owner of the protected work to directly manage the utilization and distribution of his work, personally decide the terms and the manner of remuneration for the use of his work and look after whether his moral and economic rights are properly respected.⁵

The introduction of digital technology and the global interactive network caused the copyright works to be used by a large number of users from different places at different times.⁶ In this condition the owners of copyright and neighboring rights are not able to personally monitor the use of their work, and negotiate with users on the terms and manner of remuneration required to be paid for the use of protected work. So as to relieve the difficulty of individual control over

¹ Edwin C. Hettinger, 'Justifying Intellectual Property'(1989) 18.1 Philosophy and Public affairs 31; see also Stanley M. Besen and Leo J. Raskind, 'An Introduction to the Law and Economics of Intellectual property' (1991)5.1 The Journal of Economic Perspectives 3

²Daniel Gervais, *Collective Management of Copyright and Related Rights* (2ndedn, Kluwer Law International BV 2010) 2

³ Throughout this study unless stated clearly, the term copyright also refers to neighboring rights

⁴Tarja Koskinen-Olsson, 'Three Pillars of a Well Functioning Copyright System'

<http://www.wipo.int/edocs/pubdocs/en/copyright/924/wipo_pub_924.pdf>Accessed 28 November 2016

⁵ Dr. MihályFicsor, 'Collective Management of Copyright and Related Rights at a Triple Crossroads: Should It Remain Voluntary or May It be Extended or Made Mandatory?'

<http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf/Ficsor%2BEng.pdf>accessed16

January 2017

⁶ WIPO, *WIPO Intellectual Property Hand Book: Policy, Law and Use* (2ndedn, WIPO 2004)387

copyright work the collective management system was emerged. The system of collective management enables owners of rights to authorize collective management organization so as to monitor the use of their works, negotiate with users, allow use of protected work, collect appropriate remuneration from users and distribute the remuneration among the right owners. Collective management organization not only enable the copyright and neighboring rights' owners to effectively enforce their rights but also it helps the users to access the works at low transaction costs by easing negotiations and simplifying the source from where such works can be accessed.⁷ Historically, the first fully fledged collective management organization was emerged in France in 1850 which was named as 'collective agency'.⁸ Thenceforth, in almost all European countries and some other countries the collecting societies were established at the end of 19th century and during the first decades of 20th century.⁹

Though the introduction of collective management system in those countries has turned century and over, in the context of Ethiopia it can be notably identified as a recent phenomenon as of 2015 which is recognized by copyright and neighboring rights proclamation No. 872/2014.¹⁰ Under this proclamation copyright and neighboring rights' owners are permitted to establish collective management society to jointly administer their rights.¹¹ The provisions of this proclamation prescribe preconditions for the formation of collective management society,¹² powers and duties of collective management society,¹³ its budget,¹⁴ and obligation to keep books of accounts.¹⁵ It also provides grounds for the revocation of recognition given to the collective management society.¹⁶ Moreover, any person who uses the works protected under the proclamation for commercial purpose is under obligation to pay royalty to the concerned collective management society.¹⁷ The collective management society is also responsible to

⁷AlhajiTejan-Cole, 'Collective Management of Copyright and Related Rights' <<http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>> accessed 16 December 2016

⁸ ibid

⁹Ficsor(n 5)389

¹⁰Ethiopian Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014(hereinafter referred to as the proclamation as amended), Effective Date

¹¹ Ibid art 32(1)

¹² Ibid art 33

¹³ Ibid art 34

¹⁴ Ibid art 35

¹⁵ Ibid art 36

¹⁶ Ibid art 37

¹⁷Ibid art 38

collect royalty from the use of works without master when assigned by the Ethiopian intellectual property office.¹⁸ The proclamation has given the adjudication power concerning civil cases to the intellectual property tribunal to be established under the intellectual property office.¹⁹ However, even if the law had endeavored to provide regulatory framework for the right holders to collectively manage their rights, it lacks clarity on different issues. Starting from the mandate of collective management society i.e. as to how the organization acquire management power from the right holders, up to the operation and its relationship with users concerning terms of tariffs and grant of license there are lack of clarity concerning the rules and principles to be followed by the organization.

1.2. Literature review

Since the introduction of collective rights management to Ethiopia is a new incident, there are no sufficient domestic literatures in this area. As per the best of the writer's knowledge the only existing literatures are LL.M thesis of Kabsay Gebremedin under the title 'the emerging Ethiopian copyright and related rights collecting society: assessment of challenges and prospects' and an article written by Amenti Abera under the title 'collective management of copyright: more than two centuries of existence in history; two years old in Ethiopia'. However, none of them are concerned with exploring regulatory deficiency of collective management society under the existing law of the country. Under the following paragraphs each of them will be discussed briefly.

Kabsay Gebremedin in his master's dissertation 'the emerging Ethiopian copyright and related rights collecting society: assessment of challenges and prospects' discussed the challenges faced by Ethiopian copyright and neighboring rights collective management society (ECNRCMS) which was established in 2009. It discussed that Ethiopian copyright legal regime and charities and societies' proclamation are not in a position to facilitate the operation of ECNRCMS as the former does not have specific provisions dealing with collective management of copyright and the latter is not also appropriate to regulate collecting society since it is enacted to regulate associations. It concluded that among the challenges faced by ECNRCMS is absence of specific provisions in the then existing copyright law regime which regulates the establishment and

¹⁸The proclamation as amended (n 10) art 39(1)

¹⁹ Ibid art 44

operation of the collecting society.²⁰ Since this work is based on the former Ethiopian copyright and neighboring rights proclamation it is not concerned with the current regulatory framework of collective management societies under new copyright and neighboring rights amendment proclamation.

Amenti Abera under his article ‘collective management of copyright: more than two centuries of existence in history; two years old in Ethiopia’ discussed an overview of Ethiopia’s copyright law, establishment of Collective management organizations (CMOs), powers and duties of CMOs and their controlling mechanisms under the copyright amendment proclamation.²¹ But since this article is primarily focused on explaining basic concepts of collective management of copyright under Ethiopian law it did not make extensive critical examination on each provisions of the law concerning the CMOs. In other terms the article is not principally aimed in investigating the loopholes in the regulatory framework of the system of collective management provided under the amendment proclamation.

1.3. Statement of the problem

In contemporary time, personal management of rights is hardly possible practically with respect to certain types of works.²² The invention of new technologies caused use of the protected works by multiple users at different places.²³ The right holders have no capacity to make personal negotiations with these multiple users and enforce their rights before court of law against each and every infringements caused by users. It is also difficult and costly for the users to access multiple works of right holders by approaching each and every right holder.²⁴ For instance, it is very difficult for the radio broadcasting and television transmissions to get license from every multiple right holders as they transmit a large number of musical works. Moreover, at times it will be difficult for users to access only a single work because with respect to such work there may be multiple right holders.²⁵ Therefore, CMOs will play a pivotal role in relieving all these

²⁰Kahsay Gebremedhn, ‘The Emerging Ethiopian Copyright and Related Rights Collecting Society: Assessment of Challenges and Prospects’ (LLM thesis, Addis Ababa University 2013)

²¹Amenti Abera, ‘Collective Management of Copyright: More Than Two Centuries of Existence in History; Two Years Old in Ethiopia’(December 2016) 3 IJRSI 2321

²²WIPO (n 6)388

²³ Paula Schepens, *Guide to the Collective Administration of Authors’ Rights* (UNESCO 2000)16

²⁴ ibid

²⁵ Schepens(n 23)16

problems by enabling the right holders to reap the proper benefits from the use of their work, and also help users easily and less costly access the protected works of right holders.

By taking into account the important functions provided by the collective management societies, Ethiopia under its copyright and related rights protection amendment proclamation No. 872/2014 introduced collective administration of copy right and neighboring rights.²⁶ Even if the move made by the legislator in providing regulatory framework for the right holders of copyright and neighboring rights to collectively manage and exercise their rights is not under estimable, this study endeavors to expose the regulatory problems that will obstacle the CMOs in achieving their objectives. Therefore, the primary aim of this study is exploring the loopholes in the regulatory framework of the CMOs. In the following paragraphs I will briefly discuss them by making specific focus on the relationship between the CMOs and members, users and CMOs, functions of CMOs and mechanism for dispute resolution that will arise in relation with collective management of copyright and neighboring rights.

With respect to the relationship between members and CMOs the proclamation states that right holders of copyright and neighboring rights may form collective management society to jointly administer their rights.²⁷ It envisages the preconditions that must be satisfied for the formation of collective management society.²⁸ These are the documents, which are accompanied with the application letter, describing members' creative works, internal rules of regulations, memorandum of association, and list of sector associations established under it and their respective individual members. The proclamation further required that the number of sector association established under collective management societies shall at least be three. However, the proclamation is silent as to the membership rules of the collective management societies. To put in clear terms the law did not set principles by which membership rules of the CMOs have to be guided like objectivity, transparency and non discrimination. For instance, in the absence of these and such a like rules CMOs may discriminate among right holders of copyright and neighboring rights during application for membership. The law also does not require the CMOs to provide the appropriate mechanisms for the participation of their members in their decision making process. In this scenario the CMOs may abuse their power against the interest of their

²⁶ The Proclamation as Amended(n 10) art 32

²⁷ Ibid art 32(1)

²⁸ Ibid art 33

members which is totally in contravention of the objective for which they are established. Likewise, the law is silent as to how can the right holder withdraws or terminates management of his rights from the collective management society and the time framework to do the same. Furthermore, since CMOs are established to reasonably maximize interests of right holders of the protected works some forms of obligations towards their members are logically expected. However, there is no obligation put on the CMOs towards their members under the law. At this juncture, collective management societies may not be under obligation to act in the best interests of their members. Nor does the law ensure the rights of right holders as to the choice of category of rights and form of works to authorize the CMOs to exercise management functions. The law also does not guarantee other rights of right holders as an obligation to be respected by the CMOs.

With regard to the relationship between the CMOs and users the proclamation provides that any person who uses any protected work for commercial purpose is under obligation to pay royalty to the concerned collective management society.²⁹ Moreover, CMOs are duty bound to prepare and submit royalty scheme to the Ethiopian intellectual property office (EIPO) and implement the same up on approval.³⁰ However, the law beyond requiring CMOs to prepare royalty scheme and users pay appropriate royalty for the use of the protected work it does not prescribe the ground rules that guide the relationship between the CMOs and users. To make it clear there must be rules that regulate the behaviors of CMOs and users while conducting negotiations so that both will act in good faith which for one thing enable the CMOs to collect appropriate remuneration and for the other help users get access to the protected work for reasonable price. To achieve this objective both the CMOs and users must be able to get the necessary information from each other. In the absence of obligation set under the law for users and CMOs the parties may be reluctant to give necessary information to one another. Moreover, since there are no guidance rules set under the law as to how license terms have to be prepared the CMOs may abuse their dominant positions against users by unreasonably setting higher prices. Furthermore, as the law is silent the CMOs may not reply without undue delay to the requests from users. Hence, the CMOs may not give license to the users in a reasonable time or may not provide reasons for the refusal of granting license. Therefore, there are these and such a like issues that

²⁹ The Proclamation as Amended (n 10) art 38(1)

³⁰ Ibid, art 34(2)

are left unregulated under the proclamation with respect to the relationship between collective management societies and users of the protected work.

Concerning the functions of the collective management societies it is envisaged under the law that collective management societies have powers to collect royalties from users of the protected work under the proclamation as well as works protected abroad and distribute the same to right holders.³¹ The law also provides that CMOs collect royalty for the use of works without master when notified by EIPO.³² The proclamation, beyond assigning these tasks, failed to require CMOs to engage on welfare benefits to give assistance for their members at the time of hardships like illness, permanent or temporary disability and retirement which are, like other countries, among the main problems faced by the right holders of the protected work in Ethiopia.

With respect to dispute resolution the law states that the power of adjudication of civil cases other than tort cases arising in relation with collective management of copyright and neighboring rights is vested in the EIPO tribunal.³³ On the other hand, the law is silent as to how complaint procedure is available within CMOs. This is because while exercising their functions the CMOs will encounter complaints either from members concerning distribution of royalties or users regarding terms of use or other interested party. In the absence of rules that guide complaint procedure of CMOs like manner and time of responding to complaints the interests of the right holders and users will be in jeopardy.

To sum up, the law that deals with collective management of copyright and neighboring rights does not regulate different issues with respect to the relationship between CMOs and members, users and the CMOs, the functions of the CMOs and other issues. Therefore, exploring these matters will be among the primary jobs of this study.

1.4. Research questions

The questions that this research going to answer are the following:

- Does the law adequately regulate formation of collecting societies?

³¹ The Proclamation as Amended (n 10) art 34(1)

³² Ibid art 39(1)

³³ Ibid art 44(1)

- Does the law properly regulate the relationship between members and the collective management society so that the later acts to the best interest of the former?
- Does the law sufficiently regulate how the behaviors of CMOs and users have to be guided during their interaction?
- Does EIPO have the capability and organizational arrangement in place to administer collecting societies?
- Are there other functions that have to be provided by the organization in addition to those provided under the law?
- Does the law provide standard rule to guide complaint procedures used by CMOs?

1.5. Objectives of the study

This research will be conducted with the aim of achieving the following objectives.

4.1 General objective:

To critically examine whether the regulatory framework provided under the proclamation enables the collective management societies achieve their goals without compromising the interests of right holders and users of the protected work.

4.2 Specific objectives:

- ❖ To investigate whether the law has adequately regulated the establishment of collecting societies
- ❖ To scrutinize whether the law properly regulated the relationship between members and the collective management society so that the later acts to the best interest of the former.
- ❖ To assess whether the law sufficiently regulated as to how the behaviors of CMOs and users have to be guided during their interaction.
- ❖ To investigate whether there are other functions that have to be provided by the organization in addition to those provided under the law.
- ❖ To critically examine what rules of procedure shall CMOs follow to resolve complaints brought before them

- ❖ To investigate whether EIPO has the capability and organizational arrangement in place to administer the collecting societies
- ❖ To draw the possible lessons from the experiences of other countries' regulatory framework on collective management society
- ❖ To make the appropriate recommendations that have to be taken by the country to improve its legislation of collective management societies

1.6. Scope of the study

The study is primarily limited to assessing and critically examining the regulatory framework of collective management of copyright and neighboring rights under proclamation No. 872/2014 of Ethiopia. In an endeavor to make clear the regulatory problems under Ethiopian law the study will also consult the experiences of other countries with respect to the way they regulated collective management societies of protected works. To this end the experiences of France, Germany, Nigeria and Kenya will be examined. The research is limited only on critically examining and exploring the regulatory challenges of collective management society under the Ethiopian law.

1.7. Significance of the study

The study serves many functions. Since the concept of collective rights management is newly recognized under the Ethiopian law, the research helps right holders as well as users of the protected work and other readers understand its current regulatory framework. The research will also function legislator to improve the regulation of copyright and neighboring rights collective administration as the study is principally aimed in disclosing the gaps in the existing law. Furthermore, it will serve as an input for other researchers.

1.8. Methodology

The research is doctrinal that it is based, as a primary source, on critical analysis and exploration of Ethiopian Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014. It also consults the relevant international instruments affecting enforcement and exploitation of intellectual property in general and collecting societies in particular. The study also examines the regulatory framework of selected jurisdictions on systems of collective

management. Accordingly, based on developed experience on the subject matter and suitability to the Ethiopian scenario the study explores experiences of France, Germany, Nigeria and Kenya. With the aim of making clear the issues which are going to be investigated by the research, the study employs secondary sources like interviews, books, journals, unpublished materials, reports and internet sources. Interviews are conducted in an endeavor to explore the challenges faced by right holders as well as EIPO in forming collective management society. Accordingly, the representatives of some of the associations of copyright owners as well as the concerned personnel from the EIPO have been interviewed.

1.9. Organization of the study

The research has four chapters. This proposal part of the study forms chapter one of the research. Chapter two provides historical background and theoretical foundations of copyright and related rights collective management societies. The experiences of some countries concerning the same are dealt in chapter three. Chapter four makes critical examination of the regulatory framework of copyright and neighboring rights collective management under the law of Ethiopia. Finally, the study ends with making conclusion and relevant recommendations.

1.10. Limitation of the study

Absence of sufficient domestic materials on the subject matter of the study is the challenge encountered while conducting this research. To ease this challenge foreign literatures are consulted so long as they are relevant to the study.

CHAPTER TWO

Conceptual Framework, Historical Background and Theoretical Justifications of Collective Management System of Copyright and Neighbouring Rights

2.1. Conceptual Framework of Collective Rights Management

Collective management refers to a system by which organizations exercise copyright and neighbouring rights by representing right holders with the aim of securing the interests of the latter.³⁴ The organizations that carry out collective management are referred to as copyright collectives, collecting societies or copyright management organizations (CMOs).³⁵ The owners of artistic and literary works have the exclusive legal rights to do, authorize or forbid certain acts in relation to such works.³⁶ For practical reasons, however, the individual management of rights is difficult with respect to certain categories of works.³⁷ For instance, it would be very difficult for a musician to make contact with every single radio or television station to negotiate licenses and terms of remuneration for the use of his works.³⁸ At this instance Collective management is the solitary mechanism of guaranteeing that the legitimate interests of the right owner are protected when the right holder is dealing with variety of users.³⁹

Collective management is the most efficient way to ease the access of works by public when user faces large quantity of works owned by different right holders.⁴⁰ It would, for example, be almost impossible for a television station to get authorization for the broadcasting of the musicians' works.⁴¹ Likewise, the operator of a cable network who does not even know the content of radio and television programmes in the absence of collective society would not be able to ensure that he had the consent of all different kinds of works whether it is music, films, drama, and works of

³⁴ WIPO, 'Collective Management of Copyright and Related Rights' <http://www.acpcultures.eu/upload/ocr_document/WIPO_CollectiveManagementCopyright_EN.pdf> accessed 13 December 2016 p.4

³⁵ Christian Handke, 'The Economics of Collective Copyright Management' <[file:///C:/Users/User/Downloads/SSRN-id2256178%20\(1\).pdf](file:///C:/Users/User/Downloads/SSRN-id2256178%20(1).pdf)> accessed 5 April 2017 p.1

³⁶ Alhaji Tejan-Cole, 'Collective Management of Copyright and Related Rights' <<http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>> accessed 20 December 2016 p.6

³⁷ Ibid

³⁸ Ibid

³⁹ Paula Schepens, *Guide to the Collective Administration of Authors' Rights* (UNESCO 2000)15

⁴⁰ ibid

⁴¹ Ibid

visual art or photographs.⁴² This state of affairs accentuates the need for collective management organizations.

Collective management organizations help right owners receive appropriate remuneration for the use of their works by serving as effective links between right owners and users.⁴³ This remuneration in turn encourages composers, writers, musicians, singers and performers to engage in more and better creative works from which the whole public will be benefitted.⁴⁴

The other function of collective management organization is to help copyright owners enforce their rights.⁴⁵ The copyright laws of most nations empower right holders to enforce their rights legally and administratively.⁴⁶ Nevertheless, the practice has revealed that the copyright and neighbouring right owners can only effectively enforce their rights with the help of collective management organizations.⁴⁷ This is particularly true with respect to the right owners in developing states who are frequently not as well-heeled as their counterparts in more developed countries.⁴⁸

The other commonly accredited job of the collective management organizations is that they work in the same way to a trade union for right holders.⁴⁹ The copyright holders through collective societies while negotiating with the potential users could achieve a better deal than that would be achieved individually.⁵⁰ Therefore, the collecting societies by providing collective management strengthen the bargaining power of the copyright holders.

These days with the development of technology creative works are easily exploited throughout different parts of the world via internet. This has caused difficulty of not only individually managing works in a cost effective and accurate manner given to the enormous and ever growing

⁴²Schepens(n 39)15

⁴³Tejan-Cole(n 36)6 Para 3

⁴⁴ ibid

⁴⁵ ibid

⁴⁶ Concerning the rights of copyright owners, recognized under the laws of different countries, Alhaji Tejan-Cole provides “Copyright and related rights holders can obtain court orders to force the inspection of premises for evidence of production or possession of pirated goods. Court orders can also be obtained in order to stop the activities of pirates. The right holders can also seek remedies such as damages for loss of financial rewards and recognition” Ibid 7 Para 1

⁴⁷ ibid

⁴⁸ ibid

⁴⁹Handke (n 35)2 Para 3

⁵⁰ Ibid

number of use; it also has challenged enforcement of the rights all over the world because of the increasing level of piracy.⁵¹ Only CMOs are capable to alleviate these problems as they can provide the necessary facility to manage such vast and ever increasing exploitation of works in a fair and efficient way.⁵² The collecting societies also provide collective anti-piracy support by organizing technical and legal cooperation among their members to prevent unauthorised use of works.⁵³

Finally, the last but by no means the least issue worth discussion as far as the conceptual framework of the collective rights management is concerned, is regarding various forms of the collecting societies. Generally, CMOs are classified as traditional CMOs, one-stop-shops and rights clearance centers.⁵⁴

Under the traditional forms of CMOs the individual rights owners does not directly involve in the management of rights.⁵⁵ It is the collecting society that will negotiate rates and terms of use with users, issue licenses authorizing uses, and collect and distribute royalties on behalf of its members.⁵⁶

In the case of one-stop-shops types of CMOs different collecting societies form coalition so as to provide users with a centralized source where licenses can be obtained speedily and without difficulty.⁵⁷ On the other hand, rights clearance centers provide room for each individual rights holder to set terms and conditions of remuneration for the use of the works and in this case the task of the collecting society will be to collect remuneration from the use of copyright works as per the license terms set by each individual members.⁵⁸ In other terms, the rights clearance

⁵¹ International Confederation of Societies of Authors and Composers, 'The Role of Collective Management Organizations' <[file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20\(7\).pdf](file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20(7).pdf)> accessed 15 April 2017 p.3

⁵² ibid

⁵³ ibid

⁵⁴ WIPO, 'Collective Management of Copyright and Related Rights' <<http://www.wipo.int/copyright/en/management/>> accessed 7 June 2017

⁵⁵ ibid

⁵⁶ ibid

⁵⁷ There is an increasing tendency towards one-stop-shops types of CMOs in the field of multimedia productions. Ibid

⁵⁸ For example, in the sphere of reprography rights holders of written works like books and magazines set terms and conditions for the use of such works. ibid

centers serves as agents of the rights holders who will directly involve in setting the terms for the use of their works.

2.2. Historical Development of the Collective Management of Copyright

The collective management of rights in creative works for the first time started in France in the 18th century.⁵⁹ During this period actors were more powerful than authors as they hold a monopoly on the performance of plays.⁶⁰ This had pressured authors to dump their rights.⁶¹ A well-known author, Beaumarchais refused to acknowledge this situation and insisted that a work as long as has an economic life, its author must be granted with the revenues it generates.⁶² In 1777 Beaumarchais called together a group of 22 other authors to devise a response for the use of their works by the Théâtre-Français with little remuneration.⁶³ This group of authors had previously complained in writing about their treatment by the powerful theatrical institution.⁶⁴ Concerning the case of Beaumarchais, the complaint is based on the low remuneration given to him by the Comédie Française for the use of his play named “Le Barbier de Séville”.⁶⁵ The meeting of these writers which was originally focused on some financial matters later on turned into a debate about collective protection of rights.⁶⁶ “They appointed agents, conducted the now famous pen strike and laid a foundation for the French Society of Drama Authors.”⁶⁷ Even though the move made by these authors was not successful at the beginning, it had attracted support from strong political connections which did in the long run led to a change.⁶⁸ In 1791 France enacted the first law on the rights of authors which laid the foundation for all modern legislation on intellectual property by broadening protection of the property rights of all

⁵⁹Daniel Gervais, *Collective Management of Copyright and Related Rights* (2ndedn, Kluwer Law International BV 2010) 15

⁶⁰ Ibid 155

⁶¹ ibid

⁶² International Confederation of Society of Authors and Composers, ‘The History of Collective Management’ <[file:///C:/Users/User/Downloads/CISACUniversity The History of Collective Management FINA L%20\(1\).pdf](file:///C:/Users/User/Downloads/CISACUniversity%20The%20History%20of%20Collective%20Management%20FINA%20(1).pdf)> accessed 15 April 2017 p. 2

⁶³ ibid

⁶⁴ ibid

⁶⁵ ibid

⁶⁶ Daniel Gervais and Alana Maurushat, ‘Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management’

<http://discoverarchive.vanderbilt.edu/bitstream/handle/1803/8339/Fragmented_Copyright.pdf?sequence=1&isAllowed=y> accessed 20 December 2016 p.16

⁶⁷ ibid

⁶⁸ International Confederation of Society of Authors and Composers(n 62) 2

categories to music composers, painters and draughtsmen.⁶⁹ In the year 1829 the society of Dramatic Authors and Composers (SADC) was established by combining two societies which were created in 1791 and 1798 respectively.⁷⁰

The French society of authors, composers and music publishers (SACEM) was formed in 1851 with the mandate to manage rights of public performance in the works of music.⁷¹ The establishment of SACEM had its root in 1847 when the French composer, Ernest Bourget visited a Paris cafe, Les Ambassadeurs, where live music was being performed.⁷² When he heard his compositions being played without seeking authorization for their use and also making any payment, the composer together with a lyric writer, Paul Henrion, and a publisher, Victor Parizot brought an action against the cafe requiring the court to either ban the performance of their works in the cafe or to rule that the owners of the work should get payment for the performance of their works.⁷³ They won the case before the court and similarly the appellate courts in 1948 and 1949 also gave judgment by upholding the original decision.⁷⁴ Following this decision the principle was established that authors and composers had a performing right in their works which warranted them to be paid whenever and wherever their works were performed in public.⁷⁵ So as to come away with the difficulty of individually supervising and implementing the performing right, the France Authors and composers created SACEM after two years.⁷⁶

The example of French was later followed by many other countries in Europe as well as in other parts of the world which established CMOs to manage the rights of authors and composers of musical works.⁷⁷ The collective management of copyright was perceived as the way that will practically and efficiently enable workers to be compensated. In 1903 the German CMO managing performance rights in musical works (GEMA) was founded.⁷⁸ In the United Kingdom

⁶⁹ International Confederation of Society of Authors and Composers(n 62) 2

⁷⁰ ibid

⁷¹ ibid

⁷² UNESCO, 'the ABC of Copyright'

<http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf> accessed 26 March 2017 p.70

⁷³ International Confederation of Society of Authors and Composers(n 62)2

⁷⁴ ibid

⁷⁵ ibid

⁷⁶ ibid

⁷⁷ Gervais and Maurushat(n 66)16

⁷⁸ ibid

the Performing Rights Society (PRS) was formed in 1914. In Italy the Societa ` Italianadegli Autoried Editori (SIAE) was created in 1882 with the power to collect theatre and cinema taxes.⁷⁹ In United States the American Society of Composers, Authors and Publishers was created in 1913 by nine composers and music publishers which were led by Nathan Burkan.⁸⁰

It was realized that the new system of collective management by CMO could attain efficiency in administration and licensing which could not be achieved by the direct management of individual rights owners.⁸¹ The CMOs, therefore, were developed to satisfy the needs of the right owners and users by enabling the former get appropriate remuneration from the use of creative works and also aiding the latter get access to the creative work with less transaction costs.⁸²

In the 20th century the proliferations of new technologies like digital copying and the distribution of works through the internet in addition to the increasing public reliance on new categories of works such as computer programs, electronic games and data bases have caused a challenge on the setting of the rights administration.⁸³ Consequently, the task and function of collective management via different forms of CMOs have flourished significantly.⁸⁴

The developments of CMOs in different national states had caused the quest for collaboration and synchronization at international level.⁸⁵ In 1925 the committee for the organization of congresses of foreign author's societies was structured by Romain Coolus.⁸⁶ The committee was established to deal with some of the overwhelming problems containing international concerns.⁸⁷ During the same time Firmin Ge ´mier formed the universal theatrical society.⁸⁸ After these initiatives the International Confederation of Authors and Composers (CISAC) was formed in

⁷⁹Aurobinda Panda and Atul Patel, 'Role of Collective Management Organizations for Protection of Performers' Right in Music Industry: In the Era of Digitization' (2012) 15(2) The Journal of World Intellectual Property 155 pp.157 Para two

⁸⁰ ibid

⁸¹ International Confederation of Societies of Authors and Composers, 'The Role of Collective Management Organizations' <[file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20\(6\).pdf](file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20(6).pdf)> accessed 16 December 2016

⁸² ibid

⁸³ ibid

⁸⁴ ibid

⁸⁵ Gervais and Maurushat(n 66)16

⁸⁶ ibid

⁸⁷ ibid

⁸⁸ ibid

1926.⁸⁹ The founding members, with the aim of guaranteeing the protection and recognition given to the literary and artistic property all over the world, recognized that there is necessity of creating consistent principles and methods in each country for the collection of royalties and the protection of works.⁹⁰ By the year 2015, CISAC has its members of 230 societies in 120 countries, and these societies have mandate to administer the rights of authors in the areas of literary, musical, audiovisual, dramatic and visual arts.⁹¹

2.3. The role of collective management organizations

The roles performed by copyright collectives are not under estimable. They, among other things, play political, economic, legal, social and cultural roles.⁹² With respect to the political role of the collecting societies they maintain the balance between the societies' right to information and the right of the creators to be provided with effective protection.⁹³ They must make sure that the balance is set to the benefit of authors as well as the societies' right of information. There is no *raison d'être* why culture should be accessed free of charge to the disadvantage of the right holders legitimate interest who are the creators of cultural wealth. On the other hand, the price charged must be such a reasonable amount that it does not arbitrarily obstacle the society from accessing the creative works. The copyright collectives ensure that the balance between both rights is protected.

Regarding the legal roles played by the collective management organizations they support their members in their individual administration concerning subsequent derivative use.⁹⁴ The copyright collective is the honoured advisor for its members. They have to provide model contracts and prepare standard clauses ensuring that the author will retain the right. They must deal with publishers or producers so that these principles are adopted. However, remark should be given that this service will generate costs and are paid by way of commission that the collecting societies collect when works are used.

⁸⁹Panda and Patel(n 79)157 Para 3

⁹⁰ Gervais and Maurushat(n 66)16

⁹¹ International Confederation of Societies of Authors and Composers, 'CISAC Membership' (January 2015, CISAC)<<file:///C:/Users/User/Downloads/CISAC+Membership+-+Jan+2015.pdf>> accessed 30 march 2017

⁹²Schepens(n 39)16

⁹³ Ibid 17

⁹⁴Schepens(n 39)17 Para 2

As discussed above the main rationale why the collecting societies are established is to provide economic functions. By collecting royalties from users for the use of creative works and distributing them among members of the society, the copyright collective guarantees the justifiable payment of the right holders for the creation of cultural wealth.⁹⁵

The collective management organization also plays a social role.⁹⁶ The life of the author and his/her income is not regular.⁹⁷ The social structure requirements set by the public authorities do not become accustomed with the careers of the creators. Since success is not only exciting, but also untrustworthy and doubtful for the authors the collecting society compels its member to deposit small amount of royalty for difficult days.⁹⁸ The society by deducting a little percentage from distribution helps creators who are its members when they encounter great hardships of humanity like illness, old age and death.⁹⁹

Lastly, but not the least, among the roles played by the copyright collective is a cultural role. A collecting society enables owners of creative works receive proper sums of remuneration from the use of their works.¹⁰⁰ This will in turn incentivise creators to engage in creative works with a higher quantity as well as quality.¹⁰¹ On one hand devoid of new creators, culture will pass away, and on the other hand in the absence of authors' rights, authors will die out.¹⁰² Hence, the CMO plays a crucial role in promoting cultural development by encouraging persons to engage in creative works.

Based on their specific features the collective management organizations will put emphasis on all or some different facets of their role.¹⁰³

2.4. Theoretical Foundations of Collective Management

a) General theory and efficiency

⁹⁵ Schepens(n 39)17 Para 3

⁹⁶ Ibid Para 4

⁹⁷ ibid

⁹⁸ ibid

⁹⁹ Phnom Penh, 'Collective Management Organizations: Their Roles, Functions & structure' <http://copyrightkh.org/imgs/CollectiveManagementOrganizations_Functions,Role_Structure.pdf> accessed 1 May 2017 p. 4

¹⁰⁰ Penh(n 99)4

¹⁰¹ ibid

¹⁰² Ibid 18 Para 1

¹⁰³ ibid

The outcomes that are achieved under collective management and individual management will determine whether copyright collective is economically efficient than the latter.¹⁰⁴ The theory makes efficiency comparison between collective management and individual management of copyright by taking into account the actual level of costs involved in administering the system.¹⁰⁵ The costs that are entirely incurred to get the work created, licensed and consumed may be actual financial expenses of money, and they may be non financial such as effort costs or the discomfort of upholding a risky income stream. These costs are transaction costs which are easily lost to the system or incurred to other economic agents not in the purview of the environment of exchange in question.¹⁰⁶ To put in other words transaction costs are not the amount of money that will be paid by users to the right holders for consumption of the creative works in the form of licensing fees rather they are costs lost to other economic agents outside of the concerned transaction. A more efficient outcome will result when a greater utility is obtained to one or both of the contracting parties with the smaller amount of transaction costs.

Unlike individual management the efficiency gains of collective management are mainly rested up on the savings of transaction costs that can be attained by collective management.¹⁰⁷ Collective management is more efficient than the alternative individual management if the same or more works of the same or greater quality are created and consumed under collective management with a smaller amount of costs than that would be consumed under individual management. This can be construed in more economic terms as ‘Paretto efficiency’ even if the same quantity and quality of works are produced and consumed, someone at some where is achieving a higher level of welfare or individual utility as a result of reduction of transaction costs.¹⁰⁸

b) Transaction cost rationale

As per the standard economic theory of collectives the presence of transaction costs, which can be efficiently shared when copyrights are utilized collectively justifies the necessity of a

¹⁰⁴Dr Richard Watt, ‘Collective Management as a Business Strategy for Creators: an Introduction to the Economics of Collective Management of Copyright and Related Rights’ <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_3.pdf> accessed 20 December 2016 pp.15

¹⁰⁵ ibid

¹⁰⁶ ibid

¹⁰⁷ ibid

¹⁰⁸ ibid

copyright collective.¹⁰⁹ Under individual license system for the creative work to be accessed by user and the appropriate remuneration to be paid for the right holder there are many transaction costs which will be incurred.¹¹⁰ These include “the initial costs for search that the user and copyright holder can locate each other, costs of bargaining on agreeable royalty, costs incurred to monitor use and collect the appropriate royalties, and the cost incurred to assure that the contract is complied by contracting user and other users.”¹¹¹ The collecting societies by way of establishing central contact and information points canalizes access to licenses and accelerates the clarification of rights which will in effect reduce the search and information costs for users who want to use the creative works.¹¹² The collective management organizations reduce bargaining costs in different ways.¹¹³ By providing fixed contractual terms and tariff rates the time and costs incurred on the negotiation of a licensing agreement will be reduced. They provide legal certainty via application of uniform conditions upon all involved parties and this reduces the bargaining costs that would result by resorting for legal advice. The copyright collectives also further reduce bargaining costs by way of blanket licenses which allots bundle of rights to users without listing in detail which individual works of the individual repertory may be used. By recording the uses and the administrative facilitation of the handling of payments the enforcement costs will be reduced.

In the absence of collective management the contract will not take place with respect to some uses since the transaction costs can be greater than the benefit the transaction will accrue for the contracting parties.¹¹⁴ Moreover, if the contracts are carried out under individual license system the aggregate transaction costs increase unnecessarily at the time when many users seek to contract with a similar set of many copyright holders and vice versa. This is because by replicating actions that are already carried out for a different contract these forms of many

¹⁰⁹ Richard Watt, ‘the Efficiencies of Aggregation: an Economic Theory Perspective on Collective Management of Copyright’ (2015) 12 *Review of Economic Research on Copyright Issues* 26. See also Martin Kretschmer, ‘Access and Reward in the Information Society’ <<http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>> accessed 29 May 2017

¹¹⁰ Gerd Hansen and Albrecht Schmidt-Bischoffshausen, ‘Economic Functions of Collecting Societies –Collective Rights Management in the Light of Transaction Cost and Information Economics’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328> accessed 10 April 2017

¹¹¹ Watt(n 104)17

¹¹² Watt(n 104)17

¹¹³ *ibid*

¹¹⁴ *ibid*

contractual actions will generate additional costs to the collecting society and this in turn will increase prices of works for users.

The collective management organizations, by joining together owners of copyright and providing users with a blanket license to access all of the copyright works contained in the repertoire, reduce transaction costs in a large extent and the savings can be shared on both sides of the resulting contract.¹¹⁵ The theory of natural monopoly based on the sharing of transaction costs dictates that the average cost decreases with the increase in the size of collective. In such a scenario, it is efficient that licenses are granted collectively than individually because the same numbers of end users are supplied with what they want at a lower cost.¹¹⁶

Nevertheless, there are some critics to the efficiency argument. Under collective management since users via blanket license are forced to license all works including those they actually do not want, it reduces extremely the choices of licenses that users can negotiate.¹¹⁷ The individual licensing unlike collective management provides choices to users which enables them to license those works that they are interested in. Hence, it is argued that collective licensing is unfair to users and is a source of inefficiency. However, the counter argument is that under individual management the costs of establishing differential licenses for different users according to their preferences and desires will increase the prices paid by users as the prices would have to reflect the transaction costs implied. This will make users worse off under individual licensing than that of the collective one because users are expected to pay higher price which might not be the case under blanket license. Therefore, it is individual licensing, but not the collective one, which is the source of inefficiency. In other terms, under individual management users are not Pareto efficient.¹¹⁸

Moreover, since blanket licensing is common, tolerable and non contentious facet of many economic transactions, it is not something unique to collective management.¹¹⁹ For instance, “bas tickets provide the same price for a variety of travel distances, pay-TV channel prescriptions cost the same amount whether you watch a lot of TV or little, includes lots of

¹¹⁵ Watt(n 104) 17

¹¹⁶ *ibid*

¹¹⁷ *Ibid* 19

¹¹⁸ *ibid*

¹¹⁹ *ibid*

programs that may not be used by many users, and news papers including academic journals which have many articles that are not in fact read by all readers”.¹²⁰

The other issue worth to be raised in relation to the transaction cost theory is whether digitization and the digital environment which will have the effect in reducing the transaction costs in many aspects could be the best alternative to the natural monopoly facet of copyright management. If this is the case individual licensing will be so efficient that there shall be no practical significance of copyright collectives. However, the practice reveals that even if there is proliferation of individual licensing, it is feasible for only particular and determined forms of uses.¹²¹ The data on royalty collections by the CMOs indicates an increase from year to year.¹²² It is plausible to hold based on the practical reality that collective management can also take the importance of technological development to modernize their business to the advantage of both copyright owners and users.¹²³

2.5. Assessing the costs and benefits of collective management

Collective management organizations as they administer many copyright works collectively in a particular repertory exhibit enormous significant features. However, they also have some negative effects that need to be considered against the benefits. In the following paragraphs I will discuss them briefly.

The first argument against copyright collectives provides that the copyright collectives by creating a legal monopoly affects the welfare of users in their dealings to access use of the repertoire.¹²⁴ The monopoly power normally brings higher price, smaller consumption and as a result it will have negative effect on the consumers’ welfare. Nevertheless, the counter argument is that in reality the copyright collectives play a crucial role in protecting the welfare of users by incentivizing the supply side of the market so that the users are provided with numerous number and quality of creative works.¹²⁵ Contrary to collective administration individual management is

¹²⁰ Watt(n 104) 19

¹²¹ Evangelia Vagena, ‘The Challenges of Collective Management in the Digital Era’ <file:///C:/Users/User/Downloads/papers-vagena_evangelia_full.pdf> accessed 15 June 2017 p.1 Para 5

¹²² Watt(n 104) 19

¹²³ Christian Handke and Ruth Towse, ‘Economics of Copyright Collecting Societies’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085> accessed 4 April 2017

¹²⁴ Watt(n 104)21 Para 1

¹²⁵ *ibid*

financially feasible for insignificant minority of works like popular works.¹²⁶ Thereby, without the alternative of additional benefits such as transaction cost savings and risk sharing offered by copyright collectives the large number of works would never come to the market and consumer welfare would be extremely less than that would be available via copyright collectives. It does look as if it is mostly agreed by many economists that in the absence of collective management many works that would be available for use will be considerably diminished. The practice supports this fact that throughout the world governments have decided to allow collective management organizations to form and operate despite the fact that it is time and again considered that their actions should be regulated.¹²⁷

The other argument is that the advent of digitization which has the effect in reducing the transaction costs associated with individual management of copyright, have offset the benefits of collective management and have caused copyright collectives obsolete.¹²⁸ To put in other terms the development of digitization enabled the copyright holder to individually manage his rights with a lessen transaction costs and this in turn has faded away the very justification of collectively administering the copyrights. Nevertheless, it is very difficult to consider that digitization reduces the risks of every work rather the riskiness of a particular work will increase under digitization because such a system is prone to piracy.¹²⁹ From this it follows that there is strong rationale on upholding operation of copyright collectives by which the welfare of right holders will be protected from the effects of digitization via risk sharing syndicate. In other words, if digitization brings the risk central in administering copyrights to rise, then it should increase demand for the CMOs.¹³⁰

One may also argue that in countries like Ethiopia the collecting societies would have negative effect on foreign exchange reserve because foreign nationals can also be members to such societies. Nevertheless, one can also logically argue that since the copyright works of nationals of one country can also be used in other countries, there is equal possibility to get remittance

¹²⁶ Watt(n 104)21 Para 1

¹²⁷ ibid

¹²⁸ Ibid Para 2

¹²⁹ Richard Watt, 'Copyright Collectives and Contracts: An Economic Theory Perspective' <<file:///C:/Users/User/Downloads/CREATe-Working-Paper-2015-08.pdf>> accessed 5 April 2017 p.9. See also Ana María PÉREZ GÓMEZ, 'Digital Copyright Administration A Cross-Border Solution' <<http://www.serici.org/2013/perez.pdf>> accessed 5 April 2017

¹³⁰ ibid

from the use of work in those countries and as a result the collective societies would also have positive effect on the country's foreign exchange reserve.

In general, when one examines the comparative costs and benefits of copyright collectives one is required to address the issue of which is the most economically efficient size. When the size of the copyright collective is small the collective management will be less efficient because the costs of management would be higher than the benefits. By the same token, the larger is the economically efficient collective size, more efficient would be collective rights management since the benefits of joint management outweighs the costs.

2.6. The natural monopoly of copyright collectives and regulation

The copyright collective's efficiency is based on the fact that when more and more works are added to the repertory of the collective the average costs including transaction costs and non financial outlets will decrease substantially.¹³¹ The average costs refer to the total costs that will be incurred to license the repertory divided by the number of works in the repertory. If there is decrease in the average costs, it will be more efficient for a single licensing body to offer all works together in spite of having many small ones each offering a small collection of works. In other terms, this is referred by economists as a natural monopoly which is a situation by which the most efficient way in terms of costs to supply works to the consumers is through a monopoly supplier.¹³² Hence, in such instances there is a sound argument supporting the operation of copyright collective as a monopolist.

Nevertheless, there is also the negative effect of permitting the operation of monopoly.¹³³ This is because the copyright collectives with monopoly power exert excessive power on consumers concerning how they operate particularly with respect to their decisions on membership, terms of price and the particular set of items that are offered to consumers.¹³⁴ So as to benefit from the efficient supply of monopoly on one hand, and averting its negative consequences on the other, it is often the case that the copyright collectives are allowed to form, but are regulated in terms of

¹³¹Zijian Zhang, 'Rationale of Collective Management Organizations: An Economic Perspective' (2016) 10 Masaryk University Journal of Law and Technology 73

¹³² ibid

¹³³ ibid

¹³⁴ ibid

their operation.¹³⁵ It is therefore, the task of the law maker to put restrictions on the pricing arrangements offered by the collective, the membership rules the collective employs, and the distribution rules used to share the aggregate collective income among members in a manner that maximizes the welfare of consumers by guaranteeing sufficient incentive for the suppliers like creators, publishers and distributors to offer and make available a sufficient number and quality of works.¹³⁶

2.7. Blanket licensing

The most vital aspect of the day to day operations of a collective management organization is the decision to provide a blanket license to the whole repertory.¹³⁷ The collecting societies often bundle the members' entire repertoire in a single blanket license and the users in turn acquire the license to access the entire works managed by the collective.¹³⁸ However, it is not something peculiar to copyright collective since the same practice is routine in other industries such as newspaper publishing, public transport and gymnasium membership.¹³⁹ It is only by mechanism of the blanket licensing arrangement that the natural monopoly efficiencies can be fully utilized.¹⁴⁰ If the copyright collective has to offer smaller subset of repertory with each user determining which works are to be included in his or her particular subscription, the transaction cost savings that would have been provided by the collective management organization would be lost as this requires the separate negotiation of each individual subscription package and also monitoring for actual use. This would, in effect; increase the price required to be paid by users to access only the subset of the repertory they require which would not be the case had they purchased the license to the entire repertory. Hence, it is sound for the copyright collective to hold its decision of offering a blanket license to access the entire repertory.

¹³⁵ Ruth Towse, Christian Handke and Paul Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5 Review of Economic Research on Copyright Issues 1

¹³⁶ *ibid*

¹³⁷ Christian Handke, 'The Economics of Collective Copyright Management' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256178> accessed 1 April 2017

¹³⁸ *ibid*

¹³⁹ Watt(n 104) 17

¹⁴⁰ *ibid*

The other argument provided for blanket license is that it averts the ‘tragedy of anti commons pricing’.¹⁴¹ This means that extreme multiplicity of rights owners and works consequences in no trade being possible owing to the high cost or difficulty of identifying owners. Therefore, when the works in the repertoire of the CMO are complementary the problem of the tragedy of anti commons pricing is relieved through blanket license, and as a result blanket licensing is the efficient mechanism than individual licensing.¹⁴²

Moreover, since the willingness of users is accommodated in setting the license fee by employing price discrimination in a detailed manner like setting the rate by considering the size of the premises or presumed number of users, the collective pricing provided by the CMO is efficient.¹⁴³ The CMO also offers solidarity to its members by mechanism of collective bargaining for the license fee because it is through this means that many individual creators get a sensible reward for secondary usage.¹⁴⁴

To sum up, both efficiency and equity arguments have been forwarded towards collective management of copyright by means of blanket licensing and functional to both analogue and digital technologies.¹⁴⁵

CHAPTER THREE

Experiences of Selected Jurisdictions

3.1. Introduction

Under this chapter the experience from other selected jurisdictions will be explored with respect to the regulatory frame work of copyrights collective management organizations. So as to

¹⁴¹ Ruth Towse, ‘Economics of Copyright Collecting Societies and Digital Rights: is there a case for a Centralized Digital Copyright Exchange?’(2012) 9(2) Review of Economic Research on Copyright Issues 3 p.20 Para 4

¹⁴² Ibid

¹⁴³ Towse (n 141)21 Para 2

¹⁴⁴ Ibid 22 Para 1

¹⁴⁵ Ibid Para 2

understand and take lesson on how other countries have regulated the collective management systems of copyright and neighboring rights under their laws, the discussion will focus on exploring how other countries have regulated the CMOs' establishments, their operations particularly their relationship with the right holders and users, and their controlling mechanisms. By discussing the experience of other countries concerning the regulation of collective management system, the study helps to draw the appropriate lessons that have to be taken by the country to improve its regulatory framework of the collective management system. Accordingly the legal systems of France, Germany, Nigeria and Kenya will be discussed. Furthermore, to have a clear understanding on the subject matter the discussion shades light on some of the existing collective societies in each country.

3.2. The experience of France

The idea of collectively managing copyright and related rights first emerged in France. In France the collective management organizations of copyright are referred to as royalty collection and distribution societies (RCDS).¹⁴⁶ The French intellectual property code provides regulatory framework for the collective management organizations in a separate chapter from article L.321-13.¹⁴⁷ The collecting societies in France are categorized as primary management collective societies and intermediary societies.¹⁴⁸ The primary management collective societies can make direct contact with their members and most of the times conduct other tasks like defending the legal and economic interests of their members.¹⁴⁹ On the other hand, the intermediary societies are concerned with the task of collection and distribution of royalty and are a kind of common gate way for one class of rights or works. Their function is limited to collecting royalty from users and distributing the same to the primary management collective societies which are members to them.¹⁵⁰

¹⁴⁶ The French Intellectual Property Code, The Act of 11 march 1957, which was modified by the act of 3 July 1985,(herein after, the FCPI 1985) Arts L321-13.

¹⁴⁷ Ibid art L321-1

¹⁴⁸ Daniel Gervais, *Collective Management of Copyright and Related Rights* (2ndedn, Kluwer Law International BV 2010)157

¹⁴⁹ ibid

¹⁵⁰ Ibid 157

3.2.1. The primary management collective societies

The primary management collective societies include authors' societies of copyright and the neighboring rights societies.¹⁵¹ The authors' societies were formed at the beginning to manage rights in light of voluntary collective management. Later on they were also developed to manage rights in the context of mandatory collective management.¹⁵² The authors' societies include SACEM, SACD, SCAM, ADAGP, and SOFIA.¹⁵³ For the purpose of this topic it suffices to discuss SACEM, SACD and SCAM.

The society of authors, composers and publishers of music (SACEM), also named as Sociétés des Auteurs, Compositeurs et Éditeurs de Musique, administers all rights associated with public execution, public performance and mechanical reproduction throughout all countries.¹⁵⁴ SACEM is authorized to administer the repertoire of all of the foreign societies within its purview via representation contracts.¹⁵⁵ Generally, SACEM is aimed in attaining three main missions namely collecting and distributing royalties, promoting and supporting the creators, and defending and protecting its members.¹⁵⁶ Currently SACEM represents 161,000 members in France and worldwide, and manages the repertoire of 118 million works.¹⁵⁷

The SACD (Société des auteurs et compositeurs dramatiques), which is another authors' society, was created in 1777.¹⁵⁸ It contains three types of members, namely authors and composers, heirs and legatees, and assignees admitted as members.¹⁵⁹ It administers the members' rights of adaptation and performance and their right to authorize and forbid communication of their works to public by any means other than dramatic performance, and reproduction by any means and use for publicity or advertising purposes.¹⁶⁰ Its repertoire composes dramatic works and audiovisual

¹⁵¹Gervais(n 148)158

¹⁵² In France authors' societies administer rights in a mandatory collective management like collecting payments from users for private copying, lending rights, reprography and remuneration for cable transmission. Ibid

¹⁵³ ibid

¹⁵⁴ SACEM's Corporate Statutes of 1851 as Amended on March 2017, art 4

¹⁵⁵ SACEM's territory of activity is mainly France, Luxemburg and Monaco. See Gervias(n 148)158

¹⁵⁶ SACEM, 'SACEM in a Nut Shell' <<https://societe.sacem.fr/en/presentation>> accessed April 13 2017

¹⁵⁷ ibid

¹⁵⁸ SACD, 'Who are the SACD Members?' <<http://www.sacd-scam.be/Les-membres-de-la-SACD?lang=fr>> accessed 15 April 2017

¹⁵⁹ ibid

¹⁶⁰ ibid

works.¹⁶¹ It is among the few societies which have incorporated individual management form with in their collective management activities.¹⁶²

The SCAM (Société civile des auteurs multimedia) is also the other authors' society and its members are authors of multimedia works¹⁶³. Its repertoire composes documentary audiovisual works, audio works other than musical and dramatic, written works, still images and documentary interactive works.¹⁶⁴ SCAM represents directors, authors of interviews and commentaries, writers, translators, journalists, video makers, photographers and illustrators.¹⁶⁵ It acts on their behalf in dealing with the law maker, producer and broadcasters and settles their economic rights, collects and distributes royalties, and claims their moral rights and preserves their future interests.¹⁶⁶ Members may contribute their rights to the society either in management or in property for the entire life span of the society.¹⁶⁷ When SCAM is contributed in property, it administers totally or partially the reproduction and performance rights for works in its repertoire and translation rights for published books, and the right to give permission or prohibit the publication of these works.¹⁶⁸ However, when members contribute their rights in management, the task of SCAM is limited to making supervision on execution of contracts concluded by the author.¹⁶⁹ Nevertheless, if SCAM is specifically authorized by the authors, it can negotiate and conclude contracts with users by representing the author regarding exploitation of works.¹⁷⁰

In France the primary collective management societies also include neighboring rights societies. Contrary to authors' societies, most societies that administer the neighboring rights were formed with the aim of achieving the objective of mandatory collective management related to the system of non voluntary licensing employed for exploitation of sound recordings.¹⁷¹ The

¹⁶¹ ibid

¹⁶² Gervais(n 148) 159

¹⁶³ SCAM, 'The Civil Society of Multimedia Authors' <<http://www.scam.fr/EN>> accessed 15 April 2017

¹⁶⁴ ibid

¹⁶⁵ ibid

¹⁶⁶ ibid

¹⁶⁷ ibid

¹⁶⁸ Gervais(n 148) 159

¹⁶⁹ ibid

¹⁷⁰ ibid

¹⁷¹ Ibid 160

neighboring rights societies compose sound recording producers' societies, artists' societies and producers' societies.¹⁷²

3.2.2. Intermediary collective societies

It is because these societies form additional layer in the courses of remuneration that they are named as intermediary.¹⁷³ Typically, their members are primary collective societies. They fall within the ambit of mandatory collective management apart from SDRM and SESAM.¹⁷⁴ In the following paragraphs among the intermediary collecting societies discussions will be made about SDRM, and CFC.

The SDRM (Société pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs) was created in 1935 with the mandate to administer the mechanical reproduction rights of authors, composers and publishers of music and directors and subtitling doublers.¹⁷⁵ Its main missions are to authorize the reproduction of the works of repertoires, collect and allocate royalties and prepare the conditions for such authorization.¹⁷⁶ In real terms SDRM have no proper management power rather it operates chiefly through SACEM's scheme of management.¹⁷⁷

The CFC (Centre français d'exploitation du droit de copie) was established in 1996 with the mandate of defending the rights of authors and publishers against the illegal reproduction in the context of administering the reproduction rights of the press and book.¹⁷⁸ It is the only company in France which can issue reproductions for the photocopying of the press and book.¹⁷⁹ It comprises authors and author's societies, and newspapers and book publishers as members.¹⁸⁰

¹⁷²“The sound record producers' societies compose SCPP and SPPF which were created in 1985 and 1987 respectively; the artists' societies comprise ADAMI (Agencenationale de gestion des oeuvres audiovisuelles) and SPEDIDAM (Société de perception et de distribution des droits des artistes interprètes de la musique et de la danse); and ANGOA (Agencenationale de gestion des oeuvres audiovisuelles) and PROCIREP (Société civile des producteurs de phonogrammes en France) are established to manage the rights for simultaneous and complete transmission by cable and remuneration for private copying.” Ibid 161

¹⁷³ Ibid 163

¹⁷⁴ ibid

¹⁷⁵ SDRM, ‘What is SDRM?’ <<https://sdrm.sacem.fr/>> accessed 15 April 2017

¹⁷⁶ ibid

¹⁷⁷ Gervais(n 148)163

¹⁷⁸ CFC, ‘CFC Mission’ <<http://www.cfcopies.com/cfc/missions>> accessed 15 April 2017

¹⁷⁹ ibid

¹⁸⁰ ibid

3.2.3. The regulatory framework of royalty collection and distribution societies (RCDSs)

Under this subsection the regulatory framework of the collecting societies in France will be discussed by making emphasis on their establishment, royalty –collection operations, and the course of distributing the collected royalties. The control of the collective societies will also be explored.

i) Establishment of RCDSs

a. Legal form

The French intellectual property code (FCPI) dealing with RCDSs provides that all RCDSs regardless of the fact that they are managing copyright or neighboring rights must be formed as civil law companies whose members are owners of either copyright or neighboring rights.¹⁸¹ Moreover, it states that the contracts entered by RCDSs, to achieve their purpose, with the users of all or part of their repertoire shall constitute civil law instruments.¹⁸² Daniel Gervais had explained the consequences of considering the contracts entered by RCDSs as civil law instruments.¹⁸³ The first consequence is related to the jurisdiction of the court to entertain cases in relation to such contracts. The common law civil courts have jurisdiction to hear the cases arising from such transactions because the contracts made by the CMOs are considered as civil law instruments.¹⁸⁴ The other effect of considering such contracts as the civil law instruments is that the RCDSs must give focus on collecting their resources for the purpose of serving their members interests as they are not aimed at generating profit.¹⁸⁵ In addition to this, the collecting societies are not subject to the law which is reserved for businesses, either taxation or commercial legislation. Lastly, the RCDSs, to the extent set out by the CPI, fall under article 1845 which is envisaged for civil law companies. Nevertheless, their feature of civil law instrument does not authorize the CMOs to disregard the French competition law.¹⁸⁶

b. Legal basis for activity

¹⁸¹ FCPI 1985(n 146) art L321-1

¹⁸² Ibid art L321-2

¹⁸³ Gervais(n 148)166

¹⁸⁴ *ibid*

¹⁸⁵ *ibid*

¹⁸⁶ *ibid*

In principle, a collecting society is established without need to get prior approval and may operate freely provided that the government ministry of culture has not required its dissolution at the high court.¹⁸⁷

In some areas of collection sector; however, approval which is issued or withdrawn by ministry of culture is necessary to engage on the activities of the collective management.¹⁸⁸ Nevertheless, this is the exception, and the principle is freedom of establishment and collection provided that the members have given due authorization for collecting societies. Daniel Gervais explains three forms of exploitation which requires Approval for the collecting societies to operate in such areas. “First, regarding collective management of reprography right approval will be granted by taking into account the professional requisite of the officers, the human and material capital and the unbiased nature of the proposed manners of distribution. The other collection sector which needs approval is collective management of right for simultaneous, complete, unchanged retransmission in France of those works broadcast on television in one of the member states of the European Union as set out by act 97-283 of 27 March 1997. Lastly, the same is true with regard to the management of remuneration for library book lending based on similar criteria set for the above situations. Approval requires not only the fulfillment of the requirements for the concerned performing activity, but it also necessitates that these conditions must be fulfilled over time otherwise the approval may be withdrawn.”¹⁸⁹

c. Assignment and mandates

Mostly the contributions made by members to RCDSs are in kind which involves a transfer of property for current and future rights from members to the collecting societies.¹⁹⁰ However, these contributions of rights are considered as assignments on a fee basis, but not contributions to companies.¹⁹¹ Likewise, the function of the society is not making profits and members also do

¹⁸⁷ FCPI 1985(n146) art L321-3

¹⁸⁸ Gervais(n 148)167

¹⁸⁹ *ibid*

¹⁹⁰ For instance, article 1 of the SACEM’s articles of association provides that members contribute to the society the right to authorize or prohibit the public performance of their works as soon as they are created. See <https://societe.sacem.fr/docs/SACEM_statutes_2017.pdf> accessed 15 April 2017

¹⁹¹ Gervais (n 148)168

not share in the profits rather the society collects the royalty for the use of its members' works and distribute the same to the members.¹⁹²

The contributions made by owners of copyright to a collecting society are of a fiduciary nature in which the society acts on behalf of its members for their interest.¹⁹³ Moreover, a member may withdraw his rights from the society without being required to pay to repurchase them.¹⁹⁴ This mechanism of contribution simplifies the society's burden of establishing members' ownership rights at the time of infringement actions.

Mandate enables members exercise greater control over the activities of the society and enable them assure the society to be more transparent.¹⁹⁵ Accordingly, members may determine which rights they want to be assigned or administered to the society. Some argue that the mandate has its own drawbacks in such a way that for one thing, it weakens the society's negotiating power as it increase uncertainty of the repertoire available to users, and for the other it makes infringement actions more complex as the society is required to prove that it has mandate from its members.¹⁹⁶

ii) The royalty-collection and distribution operations

a. Collection of remuneration

In France collective administration of copyright adopts contractual approach in which users are protected by exclusive rights save for copying for the private use of the copier and lending royalties which takes the approach of legal licenses.¹⁹⁷ Regarding the nature of these contracts the CPI envisages that the contracts entered with users of all or part of their repertoire by civil law societies of owners in executing their objective constitutes civil law instruments.¹⁹⁸

With respect to SACD, contracts concluded with users take a different approach in which playwrights want to maintain the chance of making direct negotiation with theatre operators the

¹⁹² *ibid*

¹⁹³ *ibid*

¹⁹⁴ Nevertheless, article 2 of the SACEM articles provides that members contribute to the society their mechanical reproduction rights over their works for the duration of the society even if they want to leave the society.

¹⁹⁵ Concerning the legal basis of CMO to engage in collective rights management Daniel Gervais provides "In copyright management, the usual legal basis of rights management is the contribution; with regard to neighboring rights, however, the mandate is mentioned expressly in legal texts". Gervais(n 148)169

¹⁹⁶ *ibid*

¹⁹⁷ *ibid*

¹⁹⁸ FCPI 1985(n 146) art L321-2

financial state of affairs for performance of their play.¹⁹⁹ Accordingly, SACD while concluding a framework agreement with theatre operators or their union which defines the general conditions for use, it has left to each right holder the chance to set his royalties.²⁰⁰

The character of remuneration for the use of the subject under contract may differ; which could be either the form of a lump sum agreement or take a percentage of user's receipts.²⁰¹

With respect to collection of neighboring rights the contracts concluded with members by the collecting societies are referred to as a general contract of joint interest but not a general representation contract.²⁰² Hence, main feature of the mandate in neighboring rights collecting societies is that the contract of CMO with its members is considered as the contract of joint interest and as a result the collecting society while making transactions with users is required to act in the best interest of its members.

Similar to copyright, all contracts entered by neighboring rights collective societies with users require the later to send declarations of use. Without such declaration the society will not be able to distribute the remuneration collected among the right holders. This is the fundamental obligation with which users must comply.²⁰³ On the other hand, users have the right to know the list of the societies' members.²⁰⁴ They may see it on society's premise, or require for a copy by making payment of copy charges. The CPI obliges the collecting societies to sort out for a deduction in remuneration for associations on the rational of joint interest.²⁰⁵

With regard to the collection of remuneration for non voluntary licenses there are two forms of collecting remuneration.²⁰⁶ They are collection of fair remuneration and collection of remuneration for private copying. Fair remuneration refers to royalties' payable for a direct communication of a recording in a public place²⁰⁷. The CPI under its provision envisages the basis for remuneration that it must be based on the receipts of user or charged on a lump-sum

¹⁹⁹SACD, 'The Role of the SACD: What is the Procedure with Regard to Negotiation of the Terms of a Stage License and Approval of Such Conditions?' <<https://www.sacd.fr/en/role-sacd>> accessed 30 May 2017

²⁰⁰ Gervais(n 148)171

²⁰¹ ibid

²⁰² FCPI 1985(n 146)art L321-10

²⁰³ Ibid art L321-5

²⁰⁴ Ibid art L321-7

²⁰⁵ Ibid art L321-8

²⁰⁶ Gervais(n 148)171

²⁰⁷ ibid

basis as well as the distribution formula by which artists and producers each earn half of the royalty.²⁰⁸ This responsibility has been given to SPRE²⁰⁹ by the producers and performing artists. By virtue of article L214-4 of the CPI another administrative committee was created with the responsibility to determine the schedules for fair remuneration.²¹⁰ The committee has laid down the applicable schedules for different types of broadcasters.²¹¹ Concerning fair remuneration in a public place involving PA system, SACEM is responsible to collect remuneration on its behalf and for SPRE.²¹² Users are required to pay two separate invoices; one for SACEM and other for SPRE and from this SACEM makes payment of a global remuneration sum for SPRE.²¹³ With respect to the collection of remuneration for private copying the CPI and the decisions of ad hoc administrative committee determined modalities of collection and the remuneration schedule by the makers of blank media. These royalties are collected by SORECOP for private copying of sound recordings and Copie France for private audiovisual copying both acting in the framework of joint collective management.²¹⁴

b. Distribution of remuneration

With respect to distribution of remuneration the law has provided regulation for those royalties collected under legal license. With regard to the distribution of fair remuneration the law states that it will be shared half and half between sound recording producers and performing artists.²¹⁵ Concerning remuneration for private copying of sound recordings the distribution formula is one half to authors, one quarter to performing artists, and one quarter to record producers.²¹⁶ Among the body of artists, distribution is made pursuant to the provisions of a 1985 arbitration decision that the whole remuneration would be given to SPEDIDAM when the label does not display the

²⁰⁸ FCPI 1985(n 146) art L214-1

²⁰⁹ The SPRE (sosiété civile pour de la remunération équitable) is a French collecting society and it comprises four companies (SCPP , SPPF , ADAMI , SPEDIDAM) that represent producers and the performers. See web site of SPRE <https://www.spre.fr/index.php?page_id=38> accessed 15 April 2017

²¹⁰ Gervais(n 148)173

²¹¹ Decision of 9 December 1987, which was Modified by 22 December 1993 for Private Radio Stations and 1 January 2002 for Discotheques

²¹² *ibid*

²¹³ *ibid*

²¹⁴ The French Copie Private Commission Decision No. 1 of 4 January 2001; Decision No 3 of 4 July 2002.

²¹⁵ FCPI 1985(n 146) art L214-1

²¹⁶ *Ibid* art L311-7

name of an artist, and when the label bears the names of all performers it will in the whole be given to ADAMI.²¹⁷

The remuneration for private copying of audiovisual materials will be distributed in equal thirds to authors, producers and artists.²¹⁸ At last, the remuneration for private copying of books will be allotted one half each to authors and publishers.²¹⁹ Apart from these cases, the general regulations of the respective collecting societies provide the detail terms for distribution.²²⁰ In the entire cases, unless the society utilizes the database of another collective society, each society needs from its members to declare their work, their production, or their performance so that it has basics essential to recognize the protected object in the declaration of use provided by users.²²¹

c. Levies on monies collected

Management fees are charged from the remuneration owed to the right holders.²²² Based on the use and type of society the fees differ broadly from one society to the other. The board of directors and annual general meetings of the respective societies set the nature and the rate of levy on collection which is used to finance management costs.²²³ The percentage of the management fee for all societies is 15% on average.²²⁴

d. Sums that it is not possible to distribute

With respect to the funds not distributed article L311-2 of the CPI provides “Subject to the international conventions, the right to remuneration referred to in Articles L214-1(fair remuneration) and in the first paragraph of article L311-1(remuneration for private copying), shall be shared between the authors, performers, phonogram or video gram producers in respect of phonograms and video grams fixed for the first time in France”.

²¹⁷Gervais(n 148)174

²¹⁸ ibid

²¹⁹ ibid

²²⁰ ibid

²²¹Ibid 175

²²² ibid

²²³ ibid

²²⁴ ibid

Regarding undistributed funds collected under legal license the CPI states that the societies shall use 25% of the sums from remuneration for private copying and the total sums from fair remuneration, which could not be distributed either because of international agreements or difficulty of identifying right holders, for assistance to creation, dissemination of live shows and training of artists.²²⁵ These sums are collected for works or sound recordings not transcribed in France or European Union because of the exclusionary clauses of France at the time of the signing international conventions which are reserved from being distributed to right holders.²²⁶

Concerning undistributed funds collected under obligatory management the CPI enshrines that the collective society shall utilize royalties collected for the simultaneous, complete and unchanged retransmission of programs broadcast from another member state of the European Union, which could not be distributed either because of the international convention to which France is party or the recipients cannot be known or found before the expiration of a ten year period before the date of collection, for assistance to creation of all of the copyright and neighboring rights.²²⁷

Similarly, article L321-9 of CPI states that funds that could not be distributed either because of international conventions or because the right holder could not be known shall be allocated to assist creation, promote live entertainment and for training schemes for performers. The state council in its decision of 8 December 2000 specified the nature and scope of the assistance to creativity actions that it should not be understood as the use of funds for the support of activities, operations or manifestations which would not have the direct objective of creation of works.²²⁸

e. Prescription of actions in payment

The CPI sets out a two-path prescription i.e. the first is the prescription for payment of remuneration collected by collective societies at ten years starting from the date of collection,²²⁹ and the other is the sums that cannot be distributed may be used for assistance at the end of the fifth year following their being made available for distribution subject to the payment of non

²²⁵ FCPI 1985(n 146) art L321-9

²²⁶ Gervais (n 148) 176

²²⁷ FCPI 1985(n 146) art L321-9

²²⁸ The Decision of French State Council Nos. 202076 and 203626 of December 8, 2000

²²⁹ FCPI 1985(n 146) art 321-1 Para 3

statute barred royalties.²³⁰ In other terms the collective society may make use of the royalties that it is unable to distribute to a particular right holder for the function of assisting creators at the end of a five year term. Nevertheless, the collective society will be obliged to give back the sums payable in case if the right holder turns up in the five years following the use of these sums.

iii) Supervision of collective societies

There are two systems of exercising supervision over collective societies in France. These are internal and external systems of monitoring.

a. Internal monitoring

The internal oversight system is exercised through two ways. These are supervision conducted by members of the society and the audit conducted per year by the statutory auditor.

The FCPI states that the right to communication envisaged under article 1855 of the civil code shall apply to the royalty collection and distribution societies provided that without a member being able to obtain communication of the amount of royalties distributed on an individual basis to any other right holder than himself.²³¹ The April 17, 2001 decree described the right to communication of all members of the collective societies. The right to information contains permanent and recurrent aspects. The permanent right to communication aspect enables the member to request, at any time, the society to which he is a member the announcement of the company managers' list, a table showing over a five year period the annual-amounts collected and distributed and the levies for management fees and other levies, a document telling the applicable distribution rules, the overall royalties payable to him over the last twelve months, and an explanation of the way in which this result is determined.²³² On the other hand, the right to recurrent communication may be exercised once a year only during annual general meetings.²³³

The decree provides mechanism of appeal for a member who is refused of communication to bring his appeal to a special committee consisting at least five members elected at annual general

²³⁰ Ibid art 321-9 Para 2

²³¹ Ibid art L321-5

²³² The French Conseil d'Etat Decree No. 2001-334 of 17 April 2001

²³³ ibid

meeting from among those who are not corporate officers.²³⁴ The committee should make a report and send out it to the ministry of culture every year.²³⁵

In order to guarantee that a member's right to communication is respected the decree sets out liability to an officer of a collecting society who refuses to communicate the list of items mentioned in the pertinent articles for the fines set out for third class-infractions.²³⁶

The decree, with the objective of protecting collective societies against repetitive and abusive demands that could expose them to a risk, provides limitation to the right of communication.²³⁷ These limitations, for instance, are the rules of confidentiality and commercial confidentiality regarding third parties, the prohibition of access to personal information, documents made in preparation for decisions by corporate bodies, or documents related to an ongoing court case, and repetitive and abusive demands.²³⁸

Moreover, the CPI permits members to compel the designation of a minority expert. It states “any group of members representing at least one-tenth of the membership may take legal action for the designation of one or more experts to be entrusted with submitting a report on one or more administrative operations”.²³⁹ It also gives the same power to the public officer.²⁴⁰

Concerning statutory auditors the CPI states that at least one auditor and one alternate from an official list is required to be appointed by the RCDSs.²⁴¹ This provision also makes the auditors liable under penal provision for non-revelation of tortuous facts and the confirmation of false information.²⁴²

b. Mechanisms for external audit

²³⁴ *ibid*

²³⁵ *ibid*

²³⁶ *ibid*

²³⁷ *ibid*

²³⁸ *ibid*

²³⁹ FCPI 1985(n 146)art L321-6

²⁴⁰ *ibid*

²⁴¹ *Ibid* art L321-4

²⁴² *ibid* art L321-4

External audits are conducted through two mechanisms. The first mechanism is audits conducted by the ministry in charge of culture, and the other is audits conducted by a permanent audit committee.²⁴³

The government exercises its audit power over collective societies in two ways. The first is through a right to information which enables it to intervene in the case of irregularities and the other is it intervenes indirectly in the process of formulating certain types of remuneration.²⁴⁴

The minister in charge of culture exercise audit through the right to information by requiring an audit of RCDSs when they are formed and at certain crucial times in their existence. When a collective society is established the CPI requires it to send its statutes and general rules to the minister of culture²⁴⁵. The minister of culture may, within a month after receiving them, insist that a civil law judge dissolve them if he believes that there are “substantial and earnest reasons” which obstacle the creation of the society.²⁴⁶ The criteria for assessment are basically related to the professional qualifications of the society’s founders and the human and material resources that are proposed by them.²⁴⁷ In addition to this, the minister of culture exercises surveillance during the key times in the life of RCDSs to ensure that there have been no irregularities.²⁴⁸ Accordingly, the RCDSs have obligation to send their annual accounts to the minister and inform at least two months before the annual general meeting studies any plan to amend their statutes or rules for collection and distribution.²⁴⁹ The RCDSs may also be required by the minister to send all documents related with collection and distribution of realities and a copy of the agreements made with third parties.²⁵⁰

The public authorities also exercise monitoring over collective societies through surveillance of the formulation of certain kinds of remuneration.²⁵¹ It composes supervision and support on the formulation of certain types of remuneration related to non-voluntary license or mandatory

²⁴³ Gervais(n 148)183

²⁴⁴ ibid

²⁴⁵FCPI 1985(n 146) art L321-3

²⁴⁶ ibid

²⁴⁷ ibid

²⁴⁸ Gervais(n 148)184

²⁴⁹ FCPI 1985(n 146) art 321-12

²⁵⁰ Ibid art 321-12

²⁵¹ Gervais(n 148)185

collective management.²⁵² The CPI envisages for the formation of administrative committees with the task of setting up the amount of remuneration and the terms of collection.²⁵³ There are two committees established for this purpose. The first committee is used as an instrument for fixing and modifying fair remuneration for communication of commercial sound recordings in public places and broadcasting.²⁵⁴ It is lead by a magistrate and consists of a member of the state council, a qualified person appointed by the minister of culture, and representatives of the right holders and users concerned. On the other hand, the other committee is responsible to determine the types of media, the remuneration rates and the terms of payment for private copying.²⁵⁵

The CPI created the permanent audit committee via the act of 1 august 2000. The members of this committee are magistrates from the court des comptes, the court de cassation, the state council, and one member each of the inspection generale des finances and the inspection generale de l'adminstration des affiresculurelles.²⁵⁶ Its task is to monitor the accounting and the management of RCDSs. It assesses the internal audit procedures, the statutes, the distribution procedures and the use of sums for support to creation.²⁵⁷ The officers of the collective societies are under obligation to cooperate with the committee otherwise they may be liable to a one year imprisonment and pay a fine of EUR 15,000.²⁵⁸

The committee can access any document essential to the carrying out of its mission including computer data and software used by the society to make its distributions.²⁵⁹ It can also require a transcription of the computer data by any suitable processing means so that the data are exploitable in the context of its task.²⁶⁰ Additionally, it may question the auditors for any information on the societies that it investigates, and the auditors cannot refuse to give response to the committee based on their obligation of professional confidentiality.²⁶¹

²⁵²Gervais(n 148)185

²⁵³FCPI 1985(n 146) art L321-13

²⁵⁴ Gervais(n 148)186

²⁵⁵ ibid

²⁵⁶ FCPI 1985(n 146)art L321-13 Para 1

²⁵⁷ ibid arts R. 325-1 to R.325-4

²⁵⁸ ibid art L321-13 Para 4

²⁵⁹ Ibid Para 2

²⁶⁰ ibid

²⁶¹ ibid

The committee prepares an annual report that it sends to the concerned society under the adversary principle.²⁶² The society makes remarks on the part of report that it is concerned.²⁶³ The remarks are attached to the final report. Then, the final report will be presented to the parliament, government and annual general meetings of the societies.²⁶⁴

The point to be stressed here is that the committee has no decision making power.²⁶⁵ Its objective is not to interfere in the RCDSs management rather it is to exercise supervision of legality.²⁶⁶ In other terms, it has the objective of strengthening the surveillance of collection and distribution processes particularly the destination and use of the sums of the royalty collected that are to be utilized for supporting creation. By doing so it makes the collective management of RCDSs more transparent.²⁶⁷

3.3. Collective management of copyright in Germany

3.3.1. Overview of collecting societies in Germany

In Germany Collective management organizations (CMOs) manage copyrights and related rights on a trustee basis for a great number of authors.²⁶⁸ In the following paragraphs discussion will be made concerning the most important collecting societies in Germany.

GEMA (German musical copyright monitoring body) is the oldest CMO in Germany and among the largest societies of authors in the world for the administration of musical works.²⁶⁹ It administers principally reproduction rights and communication to the public rights of composers, text authors and music publishers on works of music²⁷⁰. Currently about 69,000 composers, text authors and music publishers have joined GEMA.²⁷¹

²⁶² Ibid Para 3

²⁶³ ibid

²⁶⁴ Ibid, Para 3

²⁶⁵ Gervais (n 148)187

²⁶⁶ ibid

²⁶⁷ ibid

²⁶⁸ Bild-Kunst 'Collecting Societies in Germany' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

²⁶⁹ ibid

²⁷⁰ See Home Page of GEMA <<https://www.gema.de/die-gema/karriere/die-gema-als-ihr-arbeitgeber/>> accessed 21 April 2017

²⁷¹ ibid

The VG WORT (Verwertungsgesellschaft Wort), which was created in 1958, collectively administers rights of authors of literary works and their publishers.²⁷² To date there are more than 682,000 authors and publishers who have entrusted their rights to the VG WORT for collective exploitation of copyrights.²⁷³ Its function is to exercise the contractual rights and to ensure an adequate remuneration of the authors and publishers in return for the use of their works.²⁷⁴

The GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten mbH or the Society for the Exploitation of Neighboring Rights) is primary CMO for the administration of neighboring rights in Germany since 1959.²⁷⁵ The remuneration rights for broadcasting and communication to the public of performing artists, phonogram producers, film producers, video producers, and organizers of public performances is collectively managed by the GVL.²⁷⁶

The VG Musikedition is a collecting society managing music rights.²⁷⁷ It has members of music publishers, composers, lyricists and publishers of musicological works and it administers a broad range of copyrights and statutory royalty claims for them.²⁷⁸ Its most essential tasks are providing training and professional development for school, church, child-care centre, adult education centre and other non commercial institutions.²⁷⁹

The GÜFA (Gesellschaft zur Übernahme und Wahrnehmung von Filmauf-führungsrechten mbH) CMO, which was established in 1976, administers the remuneration rights for public performance and communication to the public of those authors and film producers who are chiefly engaged in the production of erotic and pornographic films.²⁸⁰ It has the legal status of company with limited liability.²⁸¹

²⁷² Bild-Kunst 'Collecting Societies in Germany' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

²⁷³ ibid

²⁷⁴ See the home page of VG Wort <<http://www.vgwort.de/die-vg-wort.html>> accessed 21 April 2017

²⁷⁵ GVL, 'Our Mission' <<https://www.gvl.de/en/gvl/about/our-mission>> accessed 21 April 2017

²⁷⁶ GVL, 'Legal Basis' <<https://www.gvl.de/gvl/ueber-uns/rechtliche-grundlagen>> accessed 21 April 2017

²⁷⁷ Bild-Kunst 'Collecting Societies in Germany: VG Musikedition' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

²⁷⁸ ibid

²⁷⁹ ibid

²⁸⁰ Bild-Kunst 'Collecting Societies in Germany: GÜFA' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

²⁸¹ ibid

AGICOA manages entirely remuneration rights of non German film producers in the redistribution by cable and its aim is to manage as a trustee royalty claims due from wired and wireless retransmission of cinematographic works for film producers.²⁸²

In Germany the CMOs are first established as economic non-profit associations; however, they later developed as commercial CMOs which have the status of a limited company.²⁸³

3.3.2. The CMOs regulatory framework

The Germany's LACNR (law on the administration of copyright and neighboring rights) has an inclusive legal framework concerning the joint management of rights and the CMOs operations.²⁸⁴ Under this part to comprehend a full picture of the regulatory framework of collective management under LACNR, the discussions will be made based on the CMOs establishment, their rights and obligations, the Arbitration Board and access to Courts, and the surveillance mechanisms of CMOs.

a) The establishment of CMOs

The LACNR defines collective rights management as managing jointly the exploitation rights, exclusive rights or remuneration rights recognized under the copyright act on behalf of the right holders.²⁸⁵ The LACNR provides that to engage in the collective management of author's right or neighboring rights one must get a prior authorization.²⁸⁶ Accordingly, a prior authorization to do so is mandatory and if any person engages in the collective rights management without acquiring such authorization, the person cannot assert the rights or claims entrusted to him for exercising the management.²⁸⁷

The LACNR also envisages that it is only those collective rights management which are done on a regular business activity basis that will fall under the purview of the Germany's copyright

²⁸² Bild-Kunst 'Collecting Societies in Germany: AGICOA' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>>accessed 21 April 2017

²⁸³ ibid

²⁸⁴ Gervais(n 148)201

²⁸⁵ The German Law on the Administration of Copyright and Neighboring Rights(Text of September 9, 1965 as last amended by the Law of May 8, 1998) herein after LACNR 1998, sec 1(1)

²⁸⁶ ibid

²⁸⁷ ibid sec 1(3)

administration law. The occasional or short term managements of the rights or claims are not given protection under the LACNR.²⁸⁸

Concerning as to whom would engage in the collective rights' management the LACNR provides that it can be conducted by the legal person or partnership.²⁸⁹ It also allows natural person to engage in the activity of collective administration and in such case the provisions of the copyright administration law applies *mutatis mutandis*.²⁹⁰

The application for authorization shall be filed in writing to the supervisory authority, the German patent office (GPO).²⁹¹ The application has to accompany the statutes of the society, the names, addresses and nationalities of its representatives, and additionally, it shall include a declaration about the number of represented right holders and the quantities and economic importance of the rights entrusted to the society for management.²⁹² The authorization will be given by the GPO in agreement with the German federal Cartel office.²⁹³ This shows that the activities of the CMOs have to be in line with the competition law.

With respect to the grounds for refusal of application, the LACNR exhaustively provides that the authorization can be denied if the statutes of the collective society do not comply with the provisions of the LACNR, there are reasons to believe that the representatives of the CMO are not reliable, or as per the economic basis of the CMO it is unlikely that the rights and claims entrusted to it will be managed efficiently.²⁹⁴ Regarding the last ground, it would be the case that when the society applying for collective rights management does not represent an adequate number of right holders in order to attain rational economies of scale for both right holders and users.²⁹⁵ The law also envisages that when the GPO refuses authorization it has to give reasons for the refusal and notify the same to the collecting society.²⁹⁶ This duty of providing reasons for rejecting the CMO's application of recognition has bearing on preventing the arbitrariness of the decision given by the office.

²⁸⁸ LACNR 1998(n 285) sec 1(2)

²⁸⁹ Ibid sec1(4) Para 1

²⁹⁰ Ibid Para 2

²⁹¹ Ibid sec 2

²⁹² *ibid*

²⁹³ Ibid, sec 18(3)

²⁹⁴ Ibid, sec 3(1)

²⁹⁵ Gervais (n 148)204

²⁹⁶ LACNR 1998(n 285) sec 3(2)

The copyright administration law of Germany provides grounds for the revocation of authorization granted to the CMO. These are if the grounds for refusal were not known at the time of granting authorization or occurred subsequently and the deficiency is not rectified within the time to be fixed by the GPO; or if the CMO repeatedly violates one of its obligations under the law regardless of a warning given by the GPO.²⁹⁷ The CMO whose authorization is revoked shall be provided and notified with the grounds for repealing the authorization.²⁹⁸ The revocation comes in to force after the lapse of three months provided that no appeal is made on the decision of revocation.²⁹⁹

Finally, the law states that the grant of authorization and any revocation shall be published in the official bulletin.³⁰⁰

b) Rights and duties of the CMOs

Under this part discussion will be made on the rights and obligations of CMOs. Accordingly, in the following paragraphs an in depth analysis will be made on how the relations between CMOs and right holders on one hand, and on the other how the relations between users and CMOs are regulated under the LACNR.

With respect to the CMOs obligation towards the right holders the German copyright administration law provides that CMOs are obliged to manage, on equitable terms, the rights and claims belonging to its area of activity up on request of the right holder, if the right holder is a German, a citizen of a member state of the European Union or the European economic area, or has his regular residence in Germany, and if an effective management of his rights or claims is otherwise not possible.³⁰¹ This article has important elements and requirements for its application. The first is CMOs are not under obligation to administer every rights or category of works, but they are only obliged to manage those rights that fall under their sphere of activity. Secondly, only those right holders who have either the nationality of Germany or citizens of European Union or the European Economic Area can claim the obligation under the provision.

²⁹⁷ LACNR 1998(n 285) sec 4(1)

²⁹⁸ Ibid sec 4(2)

²⁹⁹ ibid

³⁰⁰ Ibid sec 5

³⁰¹ Ibid, sec 6(1)

Thirdly, this obligation applies only if the otherwise effective rights management would not be possible. The obligation to prove this is under the right holder.

Furthermore, the CMOs are required to manage the rights of the right holders on equitable terms. Daniel Gervais, explains the CMOs obligation to manage the rights under equitable terms in such a way that the contractual conditions are fair and equitable when the administrative fees charged by the CMOs are not exaggerated, the right holders are unduly required to transfer all of their rights, the right holders are given adequate flexibility under their rights management contract, and when the right holders have room to participate on the way the CMOs operate.³⁰²

With regard to the distribution of remuneration among the right holders article 7 of the LACNR states “a collecting society shall distribute the revenue from its activities according to the fixed rules (distribution plan) that prevent any arbitrary act of distribution. The distribution plan shall conform to the principle that culturally important works and performances are to be promoted. The principles of the distribution plan shall be incorporated in the statutes of collecting societies”.³⁰³ The rationale of this provision is to promote transparency and avoid any arbitrary distribution. This provision requires that distribution should be transparent and not be done at random, and at the same time it allows differentiation to be made so long as it is necessary for the promotion of culturally important works.

In any case, the distribution plan and principles have to get approval from the right holders whose rights are represented by the CMOs.³⁰⁴

Concerning the welfare and assistance schemes, the LACNR provides that the CMOs, for the rights and claims of the right holders they manage, have to establish the welfare and assistance mechanisms.³⁰⁵ This provision reveals the social functions of the CMOs. As a common rule, the CMOs spend up to ten percent of the revenues for social functions.³⁰⁶

Moreover, the German copyright administration law provides detailed rules for rendering accounts and auditing. The intention of the German legislator in providing detailed accounting

³⁰² Gervais(n 148)206

³⁰³ LACNR 1998(n 285) sec 7

³⁰⁴ *ibid*

³⁰⁵ *Ibid*, sec 8

³⁰⁶ Gervais(n 148)208

rules is to promote good governance for CMOs. Accordingly, the CMOs are under obligation to prepare their annual account every year which indicates the income, payments and losses in a clear and understandable way, and also they have to submit an annual report concerning their activities and assessment of their situations.³⁰⁷ Lastly, the annual account and report have to be examined by the qualified accountants in conformity with the law and the statutes of the CMOs.³⁰⁸ After the approval of the accountants, the CMOs are required to publish in the German federal Gazette (Bundesanzeiger) the annual account and annual report within eight months after lapse of the reporting year.³⁰⁹

Furthermore, the CMOs have obligation to furnish the proper information when requested by users. In this respect, the LACNR states that the CMOs, up on a written request, are under obligation to provide information as to the management of exploitation rights in a given work they administer.³¹⁰ This provision on one way avoids the difficulty of users in identifying whether protection is given to a particular work, and the other is it enables them to Know who administers the rights on such work.

The German copyright administration law also provides that the CMOs have an obligation to grant exploitation rights or authorizations up on request to any person on equitable terms in respect of the rights they manage.³¹¹ Firstly, this means that the CMOs when requested by users to exploit the copyright works cannot refuse to give a license. Secondly, the term “equitable conditions” under the provision means that the conditions of exploitations like the license fee, the frequency and type of use of protected works have to be proper and reasonable.³¹² The law also envisages that if the potential user and the concerned CMO failed to reach into an agreement regarding the amount of remuneration to be paid for the grant of an exploitation rights or authorization, the rights are deemed to be granted once the amount of the licensing fee recognized by user is paid, and the remaining part of the licensing fee as claimed by the collecting society is paid under reservation or deposited to its benefit.³¹³

³⁰⁷ LACNR 1998(n 285) sec 9

³⁰⁸ *ibid*

³⁰⁹ LACNR 1998(n 285) sec 9

³¹⁰ *ibid* sec 10

³¹¹ *Ibid* sec 11(1)

³¹² Gervais (n 148)209

³¹³ LACNR 1998(n 285) sec 11(2)

The other issue worth discussion as long as the relationship between CMO and user is concerned is regarding the inclusive contracts with users. The law provides that regarding the rights and claims managed by CMOs, they are under obligation to conclude inclusive contracts based on equitable terms with associations whose members exploit works or subject matter protected or who are obliged to pay remuneration under the copyright law unless the collecting societies are not reasonably expected to conclude such inclusive contract particularly because the membership of the association is too small.³¹⁴ The point to be underlined here is that the CMOs are under obligation to enter into inclusive contracts with users associations; however, they could not be obliged to enter in to such contracts when the associations do not have sufficient members to endow the CMOs with economies of scale. The provision also states that the condition of such inclusive contracts have to be equitable i.e. the conditions of the inclusive contract have to be reasonable in such a way that the balance should exist between what both parties give and take.³¹⁵

Regarding tariffs the LACNR states that the CMOs are under obligation to prepare tariffs in respect of the remuneration they ask for the rights and claims they manage.³¹⁶ It also further states that when the contracts concluded are inclusive contracts, the rates of remuneration agreed in such contracts amount the tariffs. It also envisages that the CMOs have to publish the tariffs and any amendment immediately in the German Official Bulletin.³¹⁷ This is significant for the potential users and their associations to have knowledge of the terms of the tariffs before entering into transactions with the concerned CMOs. The provision also sets the fairness rules for the calculation of tariffs.³¹⁸ It states that the basis of establishing tariffs shall generally be based on the monetary gains accrued from exploitation. However, the CMOs can commute tariffs on other grounds provided that these result in proper criteria for the earnings of exploitation which may be examined with reasonable economic outlay. In any case, the CMOs, while determining tariffs, have to give due consideration for the share of the exploitation of the protected work compared to the entire act of use. Finally, the CMOs have to give proper

³¹⁴ LACNR 1998(n 285)sec 12

³¹⁵ Gervais (n 148) 210,

³¹⁶ LACNR 1998(n 285) sec 13(1)

³¹⁷ Ibid sec 13(2)

³¹⁸ Ibid sec 13(3)

consideration to the religious, cultural and social interests of the users including the interests of youth wellbeing in drawing the tariffs and in collecting the remuneration.³¹⁹

The LACNR also provides some sort of obligations on users of the protected work. With the aim of enhancing control of the CMOs on public communications of copyrighted works, the organizers of the public communications of copyrighted works are required to get authorization from the concerned CMOs.³²⁰ Moreover, the organizers after the occurrence of events are required to provide the CMOs with a list of works used at the event.³²¹ This obligation of providing the CMOs with the list of works used; however does not apply on organizers to the non live performances.³²² The law also puts specific obligation on broadcasters to provide the CMOs with information which are necessary for the collecting societies to distribute the remuneration to the right holders.³²³

The German copyright administration law provides presumption for the legal standing of the CMOs during their transaction with users concerning claims of rights of equitable remuneration and rights of information. Accordingly, the LACNR envisages that where a claim to information asserted by the CMO is one that may only be exercised by the collecting society, the CMO is presumed to represent the rights of all right holders.³²⁴ With respect to the claim of remuneration it is provided that when the CMO asserts a right of equitable remuneration pursuant to articles 27,54(1), 54a(1) or (2), 75(3), 85(3) or 94(4) of the German copyright law, it is presumed to represent the rights of all right holders.³²⁵

c) The arbitration board and access to courts

Regarding the mandate of the arbitration board the LACNR provides that it can entertain disputes between the CMOs and users which may arise from either individual agreements or inclusive contracts.³²⁶ All the interested parties can initiate the proceeding before the arbitration

³¹⁹ LACNR 1998(n 285) sec 13(3)

³²⁰ Ibid sec 13a(1)

³²¹ Ibid sec 13a(2)

³²² *ibid*

³²³ Ibid sec 13a(3)

³²⁴ Ibid sec 13b(1)

³²⁵ *ibid* sec 13b(2)

³²⁶ Ibid sec 14(1)

tribunal in writing.³²⁷ Furthermore, the agreements on future disputes to settle their disputes through private arbitration board must not affect the right of each party to seek the proceedings before the arbitration board and a decision by the courts.³²⁸ Additionally, initiating proceedings before the arbitration board has the effect of interrupting prescriptions similar to initiating the court proceedings.³²⁹ The settlements of the arbitration board are enforceable as per the civil procedure law.³³⁰

With respect to the composition of arbitration board, it is constituted at the supervisory authority (the German Patent Office).³³¹ It composes a chairman or his deputy and two assessors.³³² The members must have qualification to act as judges in line with the German law of judges. They are appointed by the federal ministry of justice for the term of four years which can be renewable.³³³ The members act independently without being bound by any instructions.³³⁴

The arbitration board adopts a decision by a simple majority and presents it to the parties as a proposal for an agreement.³³⁵ The parties will be provided with one month to contest the proposal for agreement. Similarly, regarding disputes involving cable redistribution rights the parties are provided with three months to object the proposal for agreement.³³⁶ If no objection is raised within the maximum time limit, the proposal is deemed as accepted by the parties and becomes legitimate settlement of the disputes.³³⁷

Regarding the relations between access to the courts and proceedings before the arbitration board in copyright disputes, the LACNR provides that for those disputes that fall under section 14(1) the parties in dispute must first bring their case before the arbitration board.³³⁸ Hence, disputes concerning the application or equitability of tariff, disputes about the inclusive contracts, and the

³²⁷ LACNR 1998(n 285) sec 14(4)

³²⁸ Ibid sec 14(6)

³²⁹ Ibid sec 14(7)

³³⁰ Ibid sec 14(5)

³³¹ Ibid sec 14(2)

³³² ibid

³³³ ibid

³³⁴ Ibid sec 14(3)

³³⁵ ibid sec 14a(1)

³³⁶ Ibid sec 14a(3)

³³⁷ ibid

³³⁸ Ibid sec 16(1)

disputes regarding cable redistribution rights have to first be brought before the Arbitration Board.

Concerning the competent court to entertain the case LACNR states that for all disputes that are associated with inclusive contracts and cable redistribution agreements, the competent first instance court is the provincial high court.³³⁹ Furthermore, it is stated that concerning the claims by the CMOs for infringement of an exploitation right or an authorization right managed by them, the exclusive jurisdiction of litigating such cases resides with the court where the infringement took place or where the infringer has his domicile.³⁴⁰

d) The supervision of the CMOs

The main rationale of exercising control over the CMOs is to guarantee that the collective societies devotedly carry out their obligations under the law.³⁴¹ The supervising authority of the CMOs is the GPO (German Patent Office).³⁴² Nevertheless, the GPO gives its decision on granting and revoking the authorization of the CMOs in agreement with the German Federal Cartel office.³⁴³ If the two offices failed to reach into agreement, the GPO takes the case to the Federal Minister for Justice.³⁴⁴ The Federal Minister for Justice, in consultation with the Federal minister for the Economy, issues directives which will replace the agreement.

As stated above the GPO is under obligation to ensure that the CMOs are properly discharging their obligations under the law. To this end the GPO can take all the necessary measures. It can at any time ask information on any issues from CMOs about their business behavior and consult their books or other business papers.³⁴⁵ It also has right to be represented at the meetings of members as well as at the meetings of the supervisory board.³⁴⁶ Moreover, if the GPO believes that the person representing the CMO is lacking reliability necessary to perform the task, it can require the revocation of the authorization.³⁴⁷

³³⁹LACNR 1998(n 285) sec 16(4)

³⁴⁰ Ibid sec 17(1)

³⁴¹ Ibid sec 19(1)

³⁴² Ibid sec 18(1)

³⁴³ Ibid sec 18(3)

³⁴⁴ ibid

³⁴⁵ Ibid sec 19(2)

³⁴⁶ Ibid sec 19(3)

³⁴⁷ Ibid sec 19(4)

With the aim of facilitating the GPO's tasks of supervision the law puts the obligation of notification on collecting societies. The obligation of notifying the GPO is related to the change of a person representing the CMO, any amendment to the statute, the change on tariffs, the inclusive contracts, the annual account, annual report and report of the auditors, agreements with foreign collective societies and the like.³⁴⁸

3.4. The Experience of Nigeria

3.4.1. Overview of the existing collecting societies in Nigeria

CMOs are established in Nigeria with the principal aim of negotiating and granting copyright licenses, collecting royalties from the use of works and distributing remuneration for the right holders.³⁴⁹ In Nigeria the CMOs are required to obtain prior approval from the Nigerian Copyright Commission to operate in the activities of the collective rights management.³⁵⁰ To date three CMOs obtained approval in the literary and music industries, namely Reprographic Rights Organization of Nigeria (REPRONIG), Copyright Society of Nigeria (COSON), and Audiovisual Rights Society of Nigeria (AVRS).³⁵¹

COSON was established in 2009 to collectively manage rights in musical works and sound recordings in Nigeria.³⁵² It operates in a non-for profit basis.³⁵³ Its function is to collect royalties from the use of musical works and sound recordings and distribute the same to the right holders.³⁵⁴ By the year 2014 COSON has distributed to its members the royalty in the total sum of \$ 490,000.00.³⁵⁵

The AVRS was approved by the copyright commission of Nigeria to operate in the sector of cinematograph films in Nigeria.³⁵⁶ The mission of the organization is “to create a durable

³⁴⁸ LACNR 1998(n 285)sec 20

³⁴⁹ Nigerian Copyright Commission, ‘Collective Management Organization (CMO)’ <<http://www.copyright.gov.ng/index.php/regulatory-schemes/cmo-regulations>> accessed 8 June 2017

³⁵⁰ *ibid*

³⁵¹ *ibid*

³⁵² COSON, ‘The Copyright Society of Nigeria’ <<http://www.cosonng.com/the-copyright-society-of-nigeria/>> accessed 8 June 2017

³⁵³ *ibid*

³⁵⁴ *ibid*

³⁵⁵ *ibid*

³⁵⁶ AVRS, ‘Press Statement in Commemoration of the First Anniversary of Licensing of AVRS by Nigerian Copyright Commission’ <<file:///C:/Users/User/Desktop/Nigeria/1st-Anniversary-Press-Statement.pdf>> accessed 8 June 2017

implementation structure and deploy effective mechanisms to mitigate the acts of abuse, piracy and revenue leakage on right owners, towards the development of a virile audio-visual industry in Nigeria”.³⁵⁷

Reprographic Rights Organization of Nigeria (REPRONIG) operates as a CMO in the literary industry.³⁵⁸

3.4.2. The regulatory framework of the CMOs

The regulatory framework for the collecting societies is provided under the Nigerian copyright act 2004³⁵⁹ and the copyright collective management regulation which was enacted in 2007.³⁶⁰ Under the following paragraphs the discussions will brief the formation, operation and supervision of the CMOs as per the laws of Nigeria.

i) Formation of the CMOs

In Nigeria the collecting society is defined as “an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works; "group of persons" includes "a body corporate””.³⁶¹ The collecting society is, therefore, formed to perform mainly activities of negotiating and granting licenses, collecting royalties from the use of copyright works and distributing the same to the right holders who are its members.

As to the form of the collecting society the copyright act provides that “a society may be formed in respect of one or more rights of copyright owners”.³⁶² This provision indicates that a single society may manage multiple rights. The act also envisages that “The Commission shall not approve another Society in respect of any class of copyright owners if it is satisfied that an existing approved society adequately protects the interests of that class of copyright owners”.³⁶³

³⁵⁷ AVRS, ‘Vision and Mission’ <<http://www.avrsnigeria.com/?q=page/vision-mission>> accessed 8 June 2017

³⁵⁸ Nigerian Copyright Commission, ‘Collective Management Organization (CMO)’ <<http://www.copyright.gov.ng/index.php/regulatory-schemes/cmo-regulations>> accessed 8 June 2017

³⁵⁹ The Nigerian Copyright Act as Amended by Decree No.42 of 1999 which Became Part of the Codification of Nigerian Law 2004 (herein after referred to as NCA 2004)

³⁶⁰ The Nigerian Copyright (Collective Management Organizations) Regulations 2007 herein after referred to as Regulations 2007

³⁶¹ NCA 2004(n 359) sec 39(8)

³⁶² Ibid sec 39(1)

³⁶³ Ibid sec 39(3)

From this one can understand that the Nigerian copyright commission may allow operation of more than one CMO concerning the same class of copyright owners when it believes that the interests of the class of right holders are not sufficiently protected by the existing society otherwise the single society operates under one class of copyright owners. Therefore, even if the act leans towards the single society for a class of copyright owners, it allows operations of multiple societies under limited conditions.³⁶⁴

In Nigeria the CMOs are formed based on prior approval from the country's copyright commission.³⁶⁵ The act further provides that it is illegal for the CMO to operate in the activities of collective rights management without obtaining approval from the commission, and the otherwise engagement in the activities of collective administration is punishable "on conviction to a fine of N 1,000 on the first conviction and for any other subsequent conviction to a fine of N 2,000 or to imprisonment for a term not exceeding 6 months or to both such fine and imprisonment".³⁶⁶

There are some prerequisites provided under the act that have to be fulfilled by the CMO to get approval from the copyright commission. These are incorporation of the society as a company limited by guarantee; the objectives of the society must be to perform functions of negotiating and granting licenses, collecting royalties and distributing the same to the right holders; a substantial number of copyright owners must be represented by the society; and the terms and conditions provided by regulation must be complied with.³⁶⁷ One of the requirements that must be satisfied by the society to get approval from the commission is that the society must be incorporated as a company limited by guarantee. In Nigeria a company limited by guarantee operates in a non for-profit basis.³⁶⁸ Hence, the model followed by the country for the CMO is a not-for-profit model. The other requirement is that the objectives of the society must be to carry out the general duty of "negotiating licenses, granting licenses, collecting royalties and distributing royalties".³⁶⁹ The society must also represent the substantial number of copyright owners. The rationale behind this provision is to ensure that the society attains the reasonable

³⁶⁴OLA Olukunle Rotimi, 'Operation and Regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa' (LL.M thesis, University of South Africa 2012) 44

³⁶⁵ NCA 2004(n 359) sec 39(1)

³⁶⁶ Ibid sec 39(4&5)

³⁶⁷ Ibid sec 39(2)

³⁶⁸ Olukunle (n 364) 42

³⁶⁹ Ibid 43

economies of scale. In other terms, when the society comprises a large number of right holders, the remuneration that it collects will increase via blanket license than that would be collected by individual license and it also enables users easily access the copyright works with reasonable charges. Finally, the society must also comply with the terms and conditions provided under the regulation so as to get approval from the commission. The Nigerian copyright (collective management organizations) regulations 2007 provides for the terms and conditions the society must comply for its approval in addition to the requirements provided under the copyright act.³⁷⁰ Accordingly, a collecting society may apply to the copyright commission in the prescribed form upon payment of the prescribed fee to obtain approval for functions of collective rights management, and such application shall accompany the following documents:

- “a Certificate of registration in respect of the company issued under the Companies and Allied Matters Act;
- the Memorandum of Association of the Company;
- the Articles of Association of the Company;
- a Statement indicating the class of right or category of right owners in which the society owns rights, or intends to represent or act for;
- membership list of not less than 100 right owners representing the class (es) of right to which the company is seeking a license to operate as a Collective Management Organization, which list shall indicate the signed consent of such persons to belong to the Organization, or where the Organization has been in existence, that they are members of the society;
- Undertakings by at least 5 (five) Directors including the Chairman of the Company that the Company shall comply with provisions of the Copyright Act and these Regulations in respect of the operations of the Organization;
- membership agreement used by the organization;
- evidence of payment of the prescribed fee(s); and
- Such other documents as may be required by the Commission.”³⁷¹

³⁷⁰ Regulations 2007(n 360) sec 2

³⁷¹Regulations 2007(n 360) sec 2(2)

Furthermore, the CMOs regulation provides additional requirements for approval of the society like the competence of the chief executive officer and the organization's management, the inclusion of Nigerian citizens, who are residents of the country, in both governing board and management organization, and other requirements.³⁷² To sum up when all the requirements provided under the act as well as regulation for the approval of the CMO are satisfied, the commission grants approval for the concerned society,³⁷³ and if the requirements for approval are not satisfied the commission rejects the application by providing grounds for its decision in writing.³⁷⁴

Licenses granted to the CMOs are valid for three years and renewable every two years which is subject to the discretion of the commission.³⁷⁵

The regulation also provides grounds for the revocation of the license granted to the CMO. These are when the society fails to comply with the provisions of the act or regulation, the commission later on recognized the non fulfillment of the requirements for granting of approval, or the organization no longer represents the interests of the rights holders.³⁷⁶

ii) The CMOs operations

The first issue that worth consideration as far as the operations of the CMOs is concerned is the membership rules of the collecting society. The regulation states that the membership of the CMO shall not be discriminatory rather it shall be open to all copyright owners of the category of works administered by the CMO, and shall not impose conditions requiring a member to

³⁷² The copyright commission approves the society's application to grant of license after ascertaining the fulfillment of the requirements provided under the CMOs regulation as "all the requirements stipulated in the Act and under these Regulations for grant of a license have been met; the organs of the Company comprises at least a General Assembly of all its members and a Governing Board; the Management of the organization have been approved as competent to run affairs of a Collective management Organization; the memorandum of Association of the organization provides the main function of the organization to be the administration of collective management of copyright; the Articles of Association of the Organization makes provision for attendance of representative of the Commission at the Governing Board and other general meetings of the organization of the Organization as an observer; no person shall be qualified to be appointed as Chairman of the Governing Board of the Collective Management Organization unless he is a member of the Organization; and the Governing Board and Management of the Collective Management Organization consist of persons who are citizens of Nigeria and ordinarily resident in Nigeria". Regulations 2007(n 360) sec 2(3)

³⁷³ Ibid sec 2(5)

³⁷⁴ Ibid sec 2(6 & 8)

³⁷⁵ Ibid sec 4

³⁷⁶ Ibid sec 3(1)

constitute the CMO as the member's sole collecting agent.³⁷⁷ The breach of these requirements may subject the society liable to a fine of N50, 000.00.³⁷⁸

Regarding the relationship between the members and CMO, the regulation envisages some rights of the members that have to be respected by the society. Accordingly, each member of the CMO is entailed to one vote with similar rights and privileges³⁷⁹ and also has right to obtain from the organization "annual statements of accounts; list of persons that Constitute the Governing Board of the Organization; annual report of the Governing Board; report of the auditors; and information on the overall amount of remuneration paid to any Director or employee of the organization certified by the auditors."³⁸⁰ It is also provides that different classes of the right owners must be represented in the CMO's governing board to the extent possible.³⁸¹ The law has endeavored to ensure that the CMO acts to the best interests of the right holders in general and to the interests of each individual member by requiring that they must be represented in the governing board of the CMO.

The regulation also recognized members' right of withdrawal from membership of the CMO. When a member wants to with draw his membership from the society, he can do so by providing reasonable notice of his intention.³⁸²

The CMO also has an obligation towards users of the protected work to furnish them with reasonable information of its services up on written demand; particularly the information that describes the rights or category of rights it administers and its licensing arrangements.³⁸³

The other important issue that needs discussion regarding operations of the CMO is as to how the society prepares the schemes to collect royalty and distribute the same to the rights holders. The regulation beyond requiring that the society has to make accessible to users the complete repertoire of the works it administers on a non-discriminatory terms,³⁸⁴ it has also provided particulars that have to be considered by the society while drawing the terms of tariff. The issues

³⁷⁷ Regulations 2007(n 360) sec 5(1-3)

³⁷⁸ Ibid sec 5(5)

³⁷⁹ Ibid sec 6(1)

³⁸⁰ Ibid sec 6(2)

³⁸¹ Ibid sec 6(3)

³⁸² Ibid sec 7

³⁸³ Ibid sec 8(3)

³⁸⁴ Ibid sec 14(1)

that have to be considered in setting the tariff are “the monetary advantage obtained from the exploitation, the value of the copyright material, the purpose for which, and context in which, the copyright material is used, the manner or kind of use of the copyright material, the proportion of the utilization of a work in the context of exploitation, and any relevant decision of the Court or the Dispute Resolution Panel.”³⁸⁵ The law by providing these particulars tried to ensure the reasonableness of the price charged by the CMO on users of the copyright works.

Concerning distribution of royalties to the right holders, it is stated that the CMO shall prepare the distribution plan in a fair and equitable manner based on the procedure acceptable by the right holders and information obtained from users.³⁸⁶ It is further stated that the royalties distributed by the CMO to its member shall “reflect as nearly as possible the actual usage of works covered by its repertoire”.³⁸⁷

The regulation also provides for the mechanism of compensation to the users at the time when licensee is unable to exploit copyright works based on the license granted by the CMO. In this condition, the CMO is obliged to make available compensation, refund or other arrangements provided that the fault is attributable to the CMO.³⁸⁸

iii) Dispute resolution

The disputes that arise in relation to the matters governed under regulation are resolved through a Dispute Resolution Panel established by the Commission. When the dispute arises any interested party may apply to the Commission and the Commission establishes the panel constituting three persons to resolve the dispute.³⁸⁹

iv) The CMOs’ supervision

The Nigerian copyright commission exercises control over the CMO at different stages. During formation the commission exercises control over the society by checking whether the society is compatible to get approval by considering the requirements set under the act as well as

³⁸⁵ Regulations 2007 (n 360) sec 14(3)

³⁸⁶ Ibid sec 16(2)

³⁸⁷ Ibid sec 16(1)

³⁸⁸ Ibid sec 17

³⁸⁹ The chairman of the panel is expected to be a legal practitioner with at least 10 years experience having the requisite knowledge in copyright matters. Ibid sec 15

regulation.³⁹⁰ The commission also supervises the CMO's operation by way of information submitted to it like change of memorandum of association or articles of association, adopted tariffs including their alterations,³⁹¹ general report of its activities and audited financial report of each year.³⁹² The reports of the meetings comprising the minute and decisions taken at every stages of the general assembly and the CMO's governing board shall also be furnished to the commission up on its request.³⁹³ Moreover, the commission when it believes that it is necessary it can at any time appoint an auditor to audit the accounts of the CMO, and the costs of auditing is met by the CMO.³⁹⁴ The Commission may initiate criminal proceedings against the CMO or its officers where the result of inspection of any account or audit of any account shows that an offence has been committed.³⁹⁵

3.5 The Experience of Kenya

3.5.1. Over view of the existing CMOs

In Kenya, the Kenya Copyright Board has responsibility to grant licenses and supervise the operations of the CMOs.³⁹⁶ The existing collecting societies in the country are Kenya Association of Music Producers (KAMP), Reproduction Rights Societies of Kenya (KOPIKEN), Music Copyright Society of Kenya (MCSK) and Performers Rights Society of Kenya (PRISC).³⁹⁷

The MCSK was created in 1983 with the mandate to administer mechanical, reproduction and synchronization rights.³⁹⁸ The reproduction or mechanical rights are concerned with the right to make copies and modify the musical works in any material form.³⁹⁹ Performing rights on the other hand refers to the right to broadcast, communicate and publicly perform the musical

³⁹⁰ NCA 2004(n 359) sec 39

³⁹¹ Regulations 2007(n 360) sec 8(1)

³⁹² Ibid sec 8(2)

³⁹³ Ibid sec 9

³⁹⁴ Ibid sec 10(2)

³⁹⁵ Ibid sec 10(3)

³⁹⁶ Kenya Copyright Board, 'Protecting Copyright, Encouraging Creativity' <<http://copyright.go.ke/8-program/4-cmo.html>> accessed 6 June 2017

³⁹⁷ ibid

³⁹⁸ MCSK, 'Rights Administered by MCSK' <<http://www.mcsk.or.ke/index.php/membership/rights-administered-by-mcsk>> accessed 6 June 2017

³⁹⁹ ibid

works.⁴⁰⁰ The right to use musical works in any advertisements, films and the like is related to the synchronization rights.⁴⁰¹

The KOPIKEN was established in 1994 to administer the reproduction rights of literary works.⁴⁰² Its mandate is drawn from the Kenya Copyright Act 2001 and from its membership which comprises associations of the right holders.⁴⁰³ The member associations of the KOPIKEN are Kenya non-fiction authors association, writers association of Kenya, Kenya oral literature association, Kenya union of journalists, Kenya publishers association, music copyright society of Kenya, and Kenya association of photographers, illustrators and designers.⁴⁰⁴ It is governed by the board of directors, the directors being appointed from member associations.⁴⁰⁵

The KAMP is formed in 2008 as a non-profit making company.⁴⁰⁶ By representing the rights of producers of sound recordings, it collects remuneration from the use of sound recordings and distributes the same to its members.⁴⁰⁷ It also has responsibility to collect private copying remuneration and distribute it to its members.⁴⁰⁸

The PRISK is a non-profit company limited by guarantee.⁴⁰⁹ It is created with the mandate to represent the rights of performers in musical and dramatic works.⁴¹⁰

3.5.2. The Regulatory Framework of the Collecting Societies

In Kenya the system of collective management of copyright is regulated under the copyright act no.12 of 2001⁴¹¹ and the copyright regulations, 2004.⁴¹² In the following paragraphs the manner of regulation provided for CMOs in this country will be briefed.

⁴⁰⁰ MCSK(n 398)

⁴⁰¹ ibid

⁴⁰² KOPIKEN, 'KOPIKEN's History and Background' <<http://www.kopiken.org/about/history.html>> accessed 6 June 2017

⁴⁰³ ibid

⁴⁰⁴ KOPIKEN, 'Organization of KOPIKEN' <<http://www.kopiken.org/about/organization.html>> accessed 6 June 2017

⁴⁰⁵ ibid

⁴⁰⁶ KAMP, 'What is Kamp All About?' <<http://www.kamp.or.ke/who-we-are/>> accessed 6 June 2017

⁴⁰⁷ ibid

⁴⁰⁸ ibid

⁴⁰⁹ PRISK, 'About PRISK' <<http://www.prisk.or.ke/index.php/en/>> accessed 6 June 2017

⁴¹⁰ ibid

⁴¹¹ The Copyright Act of Kenya No.11 of 2001(hereinafter referred to as CAK 2001)

⁴¹² The Copyright Regulations of Kenya, 2004(hereinafter referred to as CRK 2004)

In the act a collecting society is defined as “an organization which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of copyright works or performer’s rights”.⁴¹³The principal aim of the CMO in Kenya is, by acting on behalf of the right holders, to negotiate with users as to the terms and conditions of royalty, collect royalties and distribute the same to its members.

The grant of license to operate as the collecting society by the Kenya Copyright Board is a prerequisite for one to engage in the business of collective management.⁴¹⁴ Hence, the prior approval of the CMO by the Copyright Board is mandatory.

There are requirements under the act that must be satisfied to approve the application made by the prospective CMO in seeking recognition to operate in the activities of collective management. The criteria that will be considered by the Board to grant approval for the CMO are registration as a company limited by guarantee, non-profit making motive, rules and regulations must be in the best interests of the members, its main objectives must be collection and distribution of royalties and its accounts must be regularly audited.⁴¹⁵ Moreover, the regulation which is enacted to enforce the act provides lists of documents that have to accompany the statutory application.⁴¹⁶ These documents are examined by the Board to ascertain whether the requirements for approval of the CMO are satisfied. If the Board finds that all the requirements for approval are complied, it shall declare the body as a CMO.⁴¹⁷

The act provides for a single CMO in a certain sphere of copyrights. It prohibits the Board from approving another CMO concerning “the same class of rights and category of works” if the existing CMO functions to the satisfaction of its members.⁴¹⁸

The act also provides for the duration of validity of the certificate of registration. Accordingly, the certificate of registration issued for the CMO is valid for a period of twelve months from the date when it is issued unless it is cancelled.⁴¹⁹

⁴¹³ CAK 2001(n 411) sec 48(4)

⁴¹⁴ Ibid sec 46(1)

⁴¹⁵ Ibid sec 46(4)

⁴¹⁶ CRK 2004(n 412) sec 15(1)

⁴¹⁷ CAK 2001(n 411) sec 46(2)

⁴¹⁸ Ibid sec 46(5)

There are situations whose occurrence will cause the CMO to be deregistered. These are the failure of the CMO to act as a collecting society, non compliance with its memorandum and articles of association or failure to act in the best interest its members, change of its rules so that it no longer complies with subsection 4 of this section, and its refusal or failure to comply with the provisions of the act.⁴²⁰ Victor Buziba clarifies the problem in the interpretation of this section that one may from the outset argue for the cumulative existence of the requirements to deregister the CMO; however, in the MSCK deregistration case the Copyright Board decided that the presence of only two requirements provided under the act suffice for deregistration.⁴²¹

Moreover, the tariff for collection of royalty must get approval and it also has to be published in the Gazette by Cabinet Secretary before its implementation.⁴²² The CMO is also under obligation to submit the Board with a report of its operations and a copy of its audited account at the end of each financial year.⁴²³ The regulation requires that annual report shall be submitted within three months at the end of each financial year.⁴²⁴ It also lists the particulars that must be contained in the annual report.⁴²⁵

Finally, in order to prevent arbitrariness and injustice from the part of the collecting society as well as the Copyright Board, the act has provided mechanism to rectify the wrong from the either side. The act requires for the appointment of the competent authority by the minister where the dispute has been referred to the latter based on either of the grounds that “the Board is unreasonably refusing to grant a certificate of registration in respect of a collecting society; the Board is imposing unreasonable terms or conditions on the granting of such a certificate; a collecting society is unreasonably refusing to grant a license in respect of a copyright work; or a collecting society is imposing unreasonable terms or conditions on the granting of such a

⁴¹⁹ Ibid sec 46(3)

⁴²⁰ Ibid sec 46(9)

⁴²¹ Victor Buziba, ‘Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies’ (LL.M thesis, University of Nairobi 2014) 30

⁴²² CAK 2001(n 411) sec 46A

⁴²³ Ibid sec 47(1)

⁴²⁴ CRK 2004(n 412) sec 16(2)

⁴²⁵ The annual report must contain “a comprehensive report of all the society’s activities during the year, a list of all its members at the end of the financial year, the total amount of royalties collected by the society, the amount of royalties paid to each member, the amount of money spent by the society on the administration of the society and for all its operations, the name postal and physical address of the auditors of the collecting society, the names, addresses and occupations of current officials of the society and any other information that the board may require”. Ibid sec 16(3)

license”.⁴²⁶ The competent authority comprises an authority of at least three but not greater than five persons appointed by the minister to resolve disputes before it.⁴²⁷ A person who acts as a chairman must have the qualification of advocacy at the high court of Kenya with at least seven years standing, or must held or has hold judicial office in Kenya.⁴²⁸ The Regulation has specific provisions on the proceedings before the competent authority.⁴²⁹

⁴²⁶ CRK 2004(n 412) sec 48(2)a-d

⁴²⁷ Ibid sec 48(4)

⁴²⁸ ibid

⁴²⁹ Ibid part six

CHAPTER FOUR

Examining the Regulatory Framework of Collective Management under the Ethiopian Copyright and Neighboring Rights Law

4.1. Introduction

The role played by the literary, artistic and other creative works in enhancing cultural, social, economic, scientific and technological development of the country is not under estimable. Copyright law gives protection to these works so as to encourage creation of new works and promote further development of creativity. It provides an owner of copyright with exclusive rights of doing, authorizing or prohibiting certain acts in relation to such works. Likewise, in Ethiopia for the first time legal protection for the copyright has been given under the 1960 of the civil code.⁴³⁰ However, protection to the copyright in a more comprehensive manner was provided under the 2004 proclamation.⁴³¹ As per this proclamation an owner or author of copyright has exclusive exploitation right to individually conduct or authorize certain acts in relation to the work; namely reproduction of the work; translation of the work; adaptation, arrangement or other transformation of the work; distribution of the original or a copy of the work to the public by sale or rental; importation of original or copies of the work; public display of the original or a copy of the work; performance of the work; broadcasting of the work; and other communication of the work to the public.⁴³² Despite the law has granted the exclusive exploitation rights to the copyright holders, the right holders are not able to reap economic benefits from the use of their works because the level of copyright violation is rampant in the country which is exacerbated with the advent of digital technology.⁴³³ This problem could have been reduced to some extent had the law provided mechanism for the copyright holders to manage their rights collectively. However, the proclamation had not provided the regulatory framework for collective rights management. The copyright owners have established the copyright management organization named as Ethiopian copyright and neighboring rights

⁴³⁰ Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960, Articles 1647-1674

⁴³¹The Ethiopian Copyright and Neighboring Rights Protection Proclamation No. 410/2004 (hereinafter referred to as the Copyright Proclamation)

⁴³² Ibid art 7(1)

⁴³³Kahsay Gebremedhn, 'The Emerging Ethiopian Copyright and Related Rights: Assessment of Challenges and Prospects'(LL.M thesis, Addis Ababa University 2013) 86

collective management society (ECNRCMS) in 2009, even in the absence of legal base, with the aim of enabling the right holders get benefit from exploitation of their works and to decrease copyright violations.⁴³⁴

Later on, in order to fill the gap on the existing law the legislator has come up with the new amendment proclamation which for the first time provided the regulatory framework for the collective management of copyright and neighboring rights.⁴³⁵ The proclamation comprises provisions concerning formation of collective management society, pre-conditions for the formation of collective management society, powers and duties of collective management societies, its budget, duty to keep books of account, revocation of recognition, users obligation to pay royalty, and issue of power of adjudication. Under this chapter, the study will be concerned with making critical examination of these provisions so as to assess whether the legislator has provided rational and adequate regulation which enables the CMO achieve its objective of maximizing the interests of the copyright holders without jeopardizing the interests of the society in general and users in particular. This is because the effectiveness and efficiency of a collecting society depends overwhelmingly on whether a country properly establishes the legal status of the CMO, the approach of rights acquisition, the system of dispute settlement, and mechanism of controlling the CMO's possible anti-competitive effects.⁴³⁶ Accordingly, in the following sections the writer investigates the CMO's regulatory framework provided in the current proclamation with respect to the CMO's establishment and mandate, its relationship between members and users, its role, the controlling mechanisms, and the complaint procedure and dispute resolution mechanisms. Under this chapter, the study also examines the challenges and issues in forming collective management societies in Ethiopia. Lastly, by no means the least, the study briefs the international instruments that will affect the functions and operations of the collecting societies.

⁴³⁴ The founding members of ECNRCMS are the Ethiopian musicians association, the Ethiopian audiovisual producers association, the Ethiopian film producers association, the Ethiopian film makers association, the Ethiopian theatre professionals association, the Ethiopian book publishers association, the Ethiopian writers association, the Ethiopian comedians association and film professionals association. Kaysay(n 433) 65

⁴³⁵ The Ethiopian Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014(hereinafter referred to as the Copyright Proclamation as Amended), Part Six

⁴³⁶Wenqi Liu, 'Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance'(2012) 17 Journal of Intellectual Property Rights 46

4.2. Establishment of the CMO

The proclamation defines CMO as the society created by the owners of copyright and neighboring rights so as to collectively administer their rights.⁴³⁷ The owners of copyright can be authors where they are entitled with economic rights, or a natural person or a legal entity other than the author where that person or legal entity is originally accredited with economic rights, or where that person or legal entity became owner of economic rights by way of transfer.⁴³⁸ On the other hand, the performers, producers of sound recordings and broadcasting organizations are owners of neighboring rights over their works.⁴³⁹ Therefore, to establish the collecting society in Ethiopia, one must be the owner of copyright or neighboring rights.

The proclamation further states that it is up to the right holders' choice to establish the CMO.⁴⁴⁰ Accordingly, in Ethiopia the CMO is established on a voluntary basis. Ones the right holders of the works protected under the proclamation are opted to establish the CMO to collectively manage their rights, prior approval from the Ethiopian Intellectual Property Office (EIPO) must be granted.⁴⁴¹ The law also states that the application for the approval of the establishment of the CMO must be submitted to the EIPO in the written form and it has to be annexed with documents describing the types of members' creative works, internal rules of regulations, memorandum of association and list of sector associations established under it including their respective individual members.⁴⁴² Furthermore, the proposed CMO must at least have three sector associations as its members.⁴⁴³

Nevertheless, the law is silent as to what standard shall EIPO employ in evaluating the application documents to give approval for the establishment of the CMO. To make the issue further clear, shall the office immediately grant approval for the formation of CMO once the application letter accompanying all the particulars of the documents provided under the law is submitted to it? In other jurisdictions there are criteria set by the legislator that have to be considered by the concerned authority while giving recognition for the establishment of the

⁴³⁷ The Proclamation as Amended (n 435) art 2(32)

⁴³⁸ Proclamation(n 431) art 2(16)

⁴³⁹ *ibid*

⁴⁴⁰ The Copyright proclamation as amended (n 435) art 32(1)

⁴⁴¹ *Ibid*, art 32(2)

⁴⁴² *Ibid* art 33(1)

⁴⁴³ *Ibid*, art 33(1)

collective society. In France, concerning CMOs which are required to obtain prior approval from the France minister of tourism for their operation in certain sectors, the minister is required to examine the professional requisite of the officers, the human and material resources proposed, and the unbiased nature of the proposed manners of distribution (the nature of the proposed means of distribution must be equitable).⁴⁴⁴ Likewise, even on those sectors where the CMOs can operate without prior approval the France minister of tourism can bring application to the appropriate court by opposing incorporation of the CMOs if there are substantial and serious reasons. The court before which an application opposing the formation of the CMO is brought is required to evaluate such application in line with “professional requisites of the founders of such society, the human and material means that they intend to use to collect royalties and to exploit their repertoire.”⁴⁴⁵ In Germany, the law on the CMOs states that authorization for the CMO’s operation may be refused if the CMO’s statutes do not conform the provisions of the law, there are reasons to believe that the representatives of the CMO are not reliable, or as per the economic basis of the CMO it is unlikely that the rights and claims entrusted to it will be managed efficiently.⁴⁴⁶ However, as discussed above in the case of Ethiopia the law is silent as to the standards to be considered while giving decision on the request for approval of the CMO’s establishment. This in turn creates the possibility for the EIPO to give arbitrary decision, and it will also have the bearing on the effectiveness of the concerned CMO since the law does not require EIPO to evaluate the trustworthiness and professional qualifications of the persons who are going to represent the CMO, and the economic basis of the CMO so as to attain rational economies of scale for both right holders and users.

Moreover, in Ethiopia the collective management societies are established for non-profit purpose.⁴⁴⁷ Hence, the CMOs responsibility is to protect the interests of the right holders and collect remuneration for the use of the protected work, and handover such remuneration to its members. Regarding roles and functions of the CMO and the regulatory challenge on the issues, the detail discussion is provided under section 4.5 below.

⁴⁴⁴ The French Intellectual Property Code, The Act of 11 march 1957, which was modified by the act of 3 July 1985(hereinafter referred to as FCPI 1985) art L321-3

⁴⁴⁵ *ibid*

⁴⁴⁶ The German Law on the Administration of Copyright and Neighboring Rights(Text of September 9, 1965 as last amended by the Law of May 8, 1998) hereinafter referred to as LACNR 1998, Sec 3(1)

⁴⁴⁷ The proclamation as amended (n 435)art 32(3)

The proclamation provides grounds based on which EIPO revokes the recognition it has granted to the collecting society. These are when the CMO conducts activities in contravention to the powers and duties provided in the proclamation, when the members of the organization decide its dissolution by majority vote, or when a court with jurisdiction orders revocation of the recognition given to the organization.⁴⁴⁸ The main rationale to provide regulation for the formation and operation of the collecting society is to make sure that the society acts in the best interest of its members and at the same time to protect users of the protected work from the likely abuse of the CMO in accessing such works. Hence, when the CMO fails to respect its obligation provided under the law, for instance, if it fails to distribute the royalty it has collected for its members, if it fails to submit to the office the royalty scheme and working manual, or if it fails to withhold income to tax from the royalty collected and pay to the concerned body, it is logical for the EIPO to revoke the recognition it has granted to the CMO. Similarly, members of the CMO having majority vote can also request the dissolution of the collecting society. If the majority of the CMO members are agreed for the dissolution, the implication is that the interests of the copyright holders are not being served by the organization. At this instance, there is no reason to let the CMO in life by whose existence its members are not pleased.

Furthermore, the EIPO also takes away the recognition it has granted to the CMO when the court of law orders to do so. However, the issue here is can the interested party make application for the CMO's dissolution either to the EIPO or directly to the court to seek an order for dissolution based on his/her good will? If he/she can do so, would this not be against the rule of interpretation? The writer holds the view that since the provisions of the law should be interpreted in a way that gives effect to the provisions in question, any interested party must firstly make application for the CMO's dissolution to the EIPO. If he/she is aggrieved on the decision of the EIPO concerning the CMO's dissolution, the aggrieved party can make appeal to the court in seeking the dissolution order. Therefore, it is logical to argue that the court of law has a room to order the CMO's dissolution only by way of appeal otherwise the provision of the proclamation that grants the EIPO with the power of revoking the CMO's recognition will be ineffective.

⁴⁴⁸ The proclamation as amended (n 435) art 37

Nevertheless, the law is silent as to availability of other grounds for the revocation of the recognition granted to the collecting society. As discussed above what if the EIPO came to know later that the concerned CMO did not satisfy the preconditions set under the law for its establishment? Concerning the non fulfillment of the prerequisites for the formation of the CMO the writer is of the opinion that for stronger reason if the CMO fails to satisfy the preconditions required for its establishment despite the fact that it is provided with the opportunity to rectify it even after establishment, this should have been considered as a ground for the EIPO to revoke the recognition.⁴⁴⁹

Furthermore, the law is silent whether the office can revoke the collecting society's recognition when the representatives of the CMO are not reliable, or it is unlikely that the rights and claims of the right holders will be managed efficiently based on the economic basis of the collecting society. As long as the collective management of copyright is concerned the economic basis of the collecting society is of paramount importance since the main rational of the collective rights management is founded on its efficiency in such a way that it manages the rights more efficiently than that provided under individual rights management. Hence, when the economic basis of the CMO is not sufficient enough to justify the efficiency of collective rights management, there is no rational for the existence of the collecting society. Finally, the law is silent as to when does the revocation of recognition come into force, and nor does it provide the possibility of making appeal to court by opposing the revocation of recognition given by the office and the time framework to do so.

4.3. The relationship between the CMO and members

As long as the relationship between the CMO and members is concerned the first issue worth discussion is the membership rules of the collecting societies. The proclamation, beyond providing that the right holders of the protected work can establish the CMO to collectively administer their rights, is silent concerning how right holders become members of certain collective management society after its establishment.

⁴⁴⁹ The German counterpart provides that the GPO can revoke the recognition of the CMO if it came to know the non-fulfillment of the preconditions required for the formation of the CMO after establishment of the later and if it fails to comply with the requirements in a given time provided by the office. See LACNR 1998(n 446) sec 4(1)

In other jurisdictions, for instance, in Germany the law on the administration of copyright and neighboring rights states that CMOs are obliged to manage, on equitable terms, the rights and claims belonging to its area of activity up on request of the right holder, if the right holder is a German, a citizen of a member state of the European Union or the European economic area, or has his regular residence in Germany, and if an effective management of his rights or claims is otherwise not possible.⁴⁵⁰ Accordingly, the CMOs are under obligation to accept requests of the right holders to administer their rights on equitable terms provided that the rights and claims are relevant to their sphere of activity. The point to be stressed here is that the CMOs are under obligation to accept new right holders as their members “on equitable terms” subject to the fulfillment of other requirements. Daniel Gervais explains the CMOs obligation to accept requests of the right holders on equitable conditions for the collective management of their rights in such a way that the contractual conditions are fair and equitable when the administrative fees charged by the CMOs are not exaggerated, the right holders are not unduly required to transfer all of their rights, the right holders are given adequate flexibility under their rights management contract, and when the right holders have room to participate on the way the CMOs operate.⁴⁵¹ Furthermore, the EU Directive on the collective management of copyright envisages that the membership rules of the CMOs must be based on “objective, transparent and non-discriminatory criteria”.⁴⁵² In the absence of criteria that guide the CMOs’ membership rules the collecting societies may discriminate among right holders of copyright and neighboring rights during application for membership. It also creates opportunity for the CMOs to charge exaggerated administrative fees and require unjustified packaging conditions for the bundling of certain rights.⁴⁵³ In the case of Ethiopia too there must be obligation put by law on the CMOs to craft their membership rules in a non-discriminatory, objective and transparent manner.

The other point that needs to be addressed regarding the relationship between the collective management society and its members is concerning the distribution of remuneration. The

⁴⁵⁰ LACNR 1998(n 446)sec 6(1)

⁴⁵¹ Gervais(n 148)205

⁴⁵² The EU Directive on the Collective Management of Copyright Regulations 2016 No.221(herein after the EU Directive 2016), art 5(2)a

⁴⁵³ In the case involving the German CMO (GEMA I Case), the European commission described the packaging conditions required by the CMOs as unreasonable when its members are required to assign unduly broad categories of rights, for instance requiring exclusive assignment of all the current and future rights concerning all categories of works. See European Commission Decision 71/224/EEC of 2 June 1971 relating to a proceeding under Article 86 of the EEC Treaty.

proclamation provides that the CMO has power and duty to set up and put forward to the EIPO for approval the working manual for distribution of royalty.⁴⁵⁴ Nevertheless, the law is silent as to how the working manual has to be prepared so as to get approval from the office. In this respect, the counterpart of Germany states that a CMO has to make distribution of remuneration among its members based on fixed rules which is aimed in preventing any act of arbitrariness on distribution.⁴⁵⁵ The distribution plan has to be in line with the principle of promoting culturally important works and performances.⁴⁵⁶ It further requires that the statutes of the CMO shall comprise the principles of the distribution plan.⁴⁵⁷ The France counterpart provided regulation to those remuneration collected under legal license.⁴⁵⁸ For instance, regarding distribution of remuneration between sound recording producers and performing artists, the law states that half of the remuneration will be allotted to each of them.⁴⁵⁹ Similarly, concerning the distribution of royalty collected from private copying of sound recordings the law envisages one half to authors, one quarter to performing artists, and one quarter to record producers.⁴⁶⁰ Beyond these stipulations, in France the particular terms of distribution will be provided in the general regulation of the concerned collective society.

With respect to the manner of distribution it is indispensable to provide insight on some detail scheme of distribution employed by the CMOs of other countries. Often times some CMOs make distribution of royalties to its members based on the members' documentation and the information provided by the broadcasting organizations.⁴⁶¹ This may sometimes require employing the census method to get full lists of all music played. Other CMOs may employ a sampling system to distribute remunerations among their members.⁴⁶² There are three forms of sampling systems utilized by the CMOs. In the first form of sampling system the inspectors of the organization collect information on the performed musical works by visiting the places

⁴⁵⁴ The proclamation as amended (n 435) art 34(3)

⁴⁵⁵ LACNR 1998(n 446) sec 7

⁴⁵⁶ *ibid*

⁴⁵⁷ *ibid*

⁴⁵⁸ The FCPI did not provide regulation concerning the distribution of royalty collected from the sphere of voluntary collective management. In this respect the statute of the CMO will determine manner of distributing royalty among its members. For instance, see the General regulation of SACEM 2012 art 52-77.

⁴⁵⁹ FCPI 1985(n 444) art L214-1

⁴⁶⁰ *Ibid* art L311-7

⁴⁶¹ AlhajiTejan-Cole, 'Collective Management Of Copyright And Related rights' <<http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>> accessed 16 January 2017 pp. 12

⁴⁶² *ibid*

where such works are played like restaurants and bars.⁴⁶³ In the second form of the sampling method, relatively a small amount of information will be gathered in a selective manner which is then considered to symbolize the composition of utilization of works by certain types of users.⁴⁶⁴ In the third sampling system almost no information is gathered from certain category of users. In this instance, the repertoire information provided by the professional organizations or other information obtained from radio logs, sales charts and top lists will be employed by the CMO as a basis to make distribution of remunerations among its members. The rationale to use sampling system to make distribution of royalty among the members of the concerned CMO is that in many instances the cost of collecting and processing information on all performances would surpass the revenue which would be collected from such performances.⁴⁶⁵

Finally, the proclamation is silent as to the duration of the authorization given to the collective management societies. Regarding the duration of authorization given to the CMOs the legislations of some countries provide members with the freedom to withdraw whereas other jurisdictions impose a maximum duration.⁴⁶⁶ By considering the interests of right holders, it is logical to permit the members to withdraw their membership from a CMO.⁴⁶⁷ Accordingly, the point that needs to be stressed is whether and on what conditions a rights holder may depart the CMO when the contract has no definite duration. In other words from the side of the CMO it is rational to require that right holders give reasonable notice in advance so as to ensure a certain level of predictability and stability in the eyes of users.⁴⁶⁸

4.4. Legislative back up to the rights acquisition process

The system of collective management provided under the Ethiopian law is a voluntary system. The copyright holders can opt to form collective management society to jointly manage their rights. The mandate of CMO to exercise its function of collective administration normally depends on the contract that it enters with the right holders. At this juncture, so as to protect the

⁴⁶³ Tejan-Cole(n 461) 12

⁴⁶⁴ *ibid*

⁴⁶⁵ *ibid*

⁴⁶⁶ Most CMOs in Germany have a duration of three years except GEMA which has the six years duration. In Japan in the sphere of neighboring rights members have freedom to leave the CMOs. See Daniel J. Gervais, 'Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective' <http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf> accessed 12 April 2017 p.31

⁴⁶⁷ *ibid*

⁴⁶⁸ For instance, in U.K. members of the PRS, the UK performing rights societies may terminate the contract by giving six months notice. *ibid*

interests of the right holders who are not members to the CMO, and also to protect users who have obtained license from the CMO to access repertoire from the risk of unauthorized use, countries have provided legislative support for the rights acquisition process of the CMO. Nevertheless, the Ethiopian law is silent concerning legislative backup to the rights acquisition process of the collective management society.

The most common models of legislative support for the rights acquisition process employed in other jurisdictions are implied licenses, legal presumptions, mandatory collective management and extended collective licensing system.⁴⁶⁹

When the law provides for implied license (indemnity) it confines the remedy available to a right holder not roofed by a collective scheme, or the impending liability of the user.⁴⁷⁰ This approach is considered as being favorable to users as it enables users to use works contained in the licensed scheme without being worried to check whether such repertory contains an individual work in fact.⁴⁷¹ The weakness of this approach is that it goes against the principle which states that the CMOs shall have authority from the rights holders to act on their behalf.⁴⁷² The legal presumption model, on the other hand, facilitates the rights acquisition process in such a way that it is the user who shall proof that the CMO does not have mandate to grant license.⁴⁷³

In the case of mandatory collective management model, the authority of the CMO to operate in collective rights management emanates from the law.⁴⁷⁴ This model in principle is advised only when there is no other alternative to exercise rights; in most cases the right holders should have their choice.⁴⁷⁵ Finally, the extended collective licensing system is the most important mechanism in facilitating the rights acquisition process as it offers “a legal extension and the freedom of opting out with a voluntary license”.⁴⁷⁶ Under this model the non-member right holders are

⁴⁶⁹J. Gervais(n 466)35

⁴⁷⁰ ibid

⁴⁷¹ ibid

⁴⁷² ibid

⁴⁷³ Ibid 37

⁴⁷⁴ ibid

⁴⁷⁵ ibid

⁴⁷⁶Lui(n 436) 48

treated in the same manner as the members of the CMO.⁴⁷⁷ It also gives room for the right holder to opt out.⁴⁷⁸

Since the extended collective licensing model balances the efficiency and justice, it is proposed to be taken to the Ethiopian case to facilitate the rights acquisition process of the collective management societies.

4.5. The relationship between the CMO and users

As discussed above the function rendered by the copyright collecting society benefits not only the copyright owners but also users of the protected work. It reduces the transaction costs incurred by users to access the copyright work. Regarding the relationship between CMO and users the proclamation provides that the former is under obligation to prepare royalty scheme for the collection of remuneration and submit to the EIPO,⁴⁷⁹ and the latter are under obligation to pay royalty for the concerned CMO to access protected works for commercial purpose.⁴⁸⁰ Accordingly, the royalty scheme prepared by the CMO must get approval from the EIPO before its implementation. However, the law is silent concerning the criteria employed by the EIPO to grant approval for the royalty scheme proposed by the collecting societies. With respect to this issue the German copyright administration law provides that the CMOs have an obligation to grant exploitation rights or authorizations up on request to any person on equitable terms in respect of the rights they manage.⁴⁸¹ Firstly, this means that the CMOs when requested by users to exploit the copyright works cannot refuse to give a license. Secondly, the term “equitable conditions” under the provision means that the conditions of exploitations like the license fee, the frequency and type of use of protected works have to be proper and reasonable. On the other hand, the EU directive provides that the CMO is duty bound to make sure that licensing conditions are based on objective and non discriminatory criteria.⁴⁸² In the absence of such a like

⁴⁷⁷Lui(n 436) 48

⁴⁷⁸ ibid

⁴⁷⁹The Proclamation as amended (n 435) art34(2). Regarding non commercial use of copyright work the law states that the copyright holder cannot prohibit private reproduction of a published work provided that it is made in a single copy, by a physical person and exclusively made for the person’s own personal purpose. See Proclamation(n 431) art 9(1)

⁴⁸⁰ Ibid, Article 38(1)

⁴⁸¹LACNR 1998(n 446)sec 11(1)

⁴⁸² EU Directive 2016(n 452)art15(2). Reasonableness of the tariff is considered in line with “economic value of the use of the rights in trade taking into account the nature and scope of the use of work and other subject matter; and the economic value of the service provided by the collective management organization”. See ibid, Article 15(4)b

requirement in our law, the EIPO may arbitrarily approve the CMO's royalty scheme and this in turn may result with the royalty scheme that did not reflect the economic value of the use of rights and the service provided by the CMO.

Regarding the obligations of users towards CMO the proclamation provides that any person who exploits works protected for commercial purpose is under obligation to pay royalty for the concerned CMO. However, the law does not put users with obligation of providing the CMO with information when requested by the latter. If the CMO is not able to obtain information from the user which is relevant for the distribution of remuneration among its members, it cannot properly conduct its activities. In France the obligation to send declaration of use to the concerned collecting society is the fundamental obligation that users have to comply with because it is based on this information that the society distributes royalty among its members.⁴⁸³ Likewise, the German counterpart provides that on one hand users have obligation to provide relevant information concerning use of the protected work to the CMO, and on the other hand, CMO is also duty bound to furnish information when it is requested by users regarding the management of exploitation rights in a given work they administer.⁴⁸⁴ Therefore, so as to enable the CMOs function effectively and to avoid difficulty of users in identifying who administers the right on such work, the law must put obligation on the CMOs and users to provide each other with all the necessary information.

4.6. The role of collective management society

CMOs act as facilitators between owners of copyright and users. Their service is classified in two groups, namely service to the members and service to the users. Their tasks, in general, include overseeing where, when and who is using the copyright works, making negotiations with users and their representatives, giving licenses for users in exchange for appropriate remuneration and terms of use, collecting royalty, and distributing remuneration among its members by analyzing usage data.⁴⁸⁵

⁴⁸³ FCPI 1985(n 444) art L321-5

⁴⁸⁴ LACNR 1998(n 446) sec 10

⁴⁸⁵ Tarja Koskinen-Olsson and Nicholas Lowe, General Aspects of Collective Management <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf> accessed 1 January 2017

The CMOs also provide welfare benefits to the right holders which may comprise payments for medical treatment or insurance, permanent or temporary disablement, annuities at the time of retirement or some form of guaranteed income by taking into account the royalty payments record of the members.⁴⁸⁶

With respect to the functions of the CMOs in Ethiopia, the proclamation states that they have power to collect royalties from works protected under the proclamation and works protected abroad, distribute the remuneration to the right holders, prepare royalty scheme and working manual for the collection and distribution of royalty, with hold income tax from the royalty, and collect royalties from use of works without masters.⁴⁸⁷ The CMOs also have an obligation to “perform other functions necessary for the performance of their objectives” when they are assigned by the EIPO.⁴⁸⁸ Among the powers and functions of the CMOs that needs clarification is as to how to prepare the royalty scheme and working manual for the collection and distribution of royalty⁴⁸⁹ so that it gets approval from the EIPO. In other terms what standards shall the EIPO employ to approve the royalty scheme and working manual prepared by the collecting societies as the law simply puts obligation on the CMO to prepare the royalty scheme and working manual for the collection and distribution of royalty? Concerning this issue the Nigerian counterpart provides a good lesson to be drawn for the case of Ethiopia. The Nigerian copyright regulation provides standards that the collecting societies must take into account while preparing the royalty scheme for the collection as well as distribution of remunerations. Concerning the royalty scheme prepared for the collection of remuneration from the use of copyright works the regulation explicitly states that it shall consider “the monetary advantage obtained from the exploitation, the value of the copyright material, the purpose for which, and context in which, the copyright material is used, the manner or kind of use of the copyright material, the proportion of the utilization of a work in the context of exploitation,..”⁴⁹⁰ As these standards are general in their character, they need analysis and decision on a case by case basis. Accordingly, the reasonableness of the royalty scheme prepared by the concerned CMO to collect royalty will be ascertained by considering the value and monetary benefit that will be obtained from the

⁴⁸⁶WIPO, *Intellectual Property Handbook: Policy, Law and Use* (2ndedn, WIPO 2004) p.391

⁴⁸⁷ The proclamation as amended (n 435) art 34

⁴⁸⁸ Ibid art 34(9)

⁴⁸⁹ Ibid art 34(3)

⁴⁹⁰ The Nigerian Copyright (Collective Management Organizations) Regulations 2007 herein after referred to as Regulations 2007 sec 14(3)

exploitation of copyright work, the purpose and context in which the copyright work will be used, and the proportion of utilization of the work in line of exploitation. By considering such a like standards to approve the royalty scheme prepared for the collection of royalty, the concerned organ will be able to control the arbitrariness and excessiveness of price likely imposed by the CMO on users for the use of copyright work, and this in turn helps users to access the copyright work for a reasonable price. Similarly, regarding the standard that must be considered by the CMO in preparing the distribution plan, the Nigerian regulation requires that the collecting society shall prepare the distribution plan in a fair and equitable manner based on the procedure acceptable by the right holders and information obtained from users.⁴⁹¹ It also further requires that the royalties distributed by the CMO to its member shall “reflect as nearly as possible the actual usage of works covered by its repertoire”.⁴⁹² The point to be underlined here is that the fairness and equitability of the royalty scheme prepared for the distribution of remuneration among the members of the CMO is determined on a case by case basis in line with whether the distribution plan reflects as nearly as possible the actual usage of the works covered by the repertoire of the CMO. Thereby, the particulars that must be considered in preparing the royalty scheme and working manuals for the collection and distribution of royalty by the CMO must be clarified in the case of Ethiopia in the same manner as to the Nigerian counterpart, likely by way of regulation.

The other issue that worth discussion regarding functions of the CMO is the phrase which states that the Collecting society have an obligation to “perform other functions necessary for the performance of their objectives” when they are assigned by the EIPO. The question is what sort of function does the EIPO assign to the CMO other than those provided under the law? The bottom line; however, is that the EIPO has power to assign other functions to the collecting society to the extent that they are relevant for the CMO to achieve its objectives. As discussed above the principal objectives of the CMO in Ethiopia is to collect royalties from users for the use of copyright work and distributing such remuneration for its members. The issue again is what are other functions which will help the CMO to achieve its objectives so that the EIPO can assign on it? Concerning this matter the proclamation lacks clarity. In other jurisdictions the CMO is entitled with the responsibility to enforce the rights of copyright owners legally as well

⁴⁹¹Regulation 2007(n 490) sec 16(2)

⁴⁹² Ibid sec 16(3)

as administratively.⁴⁹³To this end the CMO by representing its members may seek court orders to force the inspection of premises for evidence of production or possession of pirated goods and to stop the activities of pirates.⁴⁹⁴ It can also claim remedies such as damages for loss of financial rewards and recognition.⁴⁹⁵ In the same manner, the writer is of the view that the EIPO can assign the CMO with the responsibility to enforce the rights of the copyright owners that it represents before the court of law as well as administrative tribunal as other functions that help the CMO in achieving its objective. This is because if the CMO is not able to enforce the rights of its members for instance, instituting court proceeding to stop activities of pirates, the objective of maximizing its members interest by collecting appropriate remuneration from users of the copyright will not be achieved in the existence of unauthorized use of works.

However, the law does not provide for the welfare benefits as the tasks of the CMOs that have to be granted for their members. In this respect the Germany law provides that the CMOs have to establish the welfare and assistance mechanisms for the rights and claims of the right holders they manage.⁴⁹⁶ Similarly, in France the experience is that the collecting societies deduct up to ten percent of the remuneration for social functions.⁴⁹⁷ These welfare and social functions provided by the CMOs in other countries have to be considered by the legislator in Ethiopia as the task of the CMO which would be provided for creators (who are its members) when they encounter great hardships of humanity like illness, old age and death by deducting a little percentage from distribution.

⁴⁹³ AlhajiTejan-Cole, 'Collective Management of Copyright and Related Rights' <<http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>> accessed 20 December 2016 p.7

⁴⁹⁴ *ibid*

⁴⁹⁵ In the seminar prepared by WIPO concerning collective management of copyright and related rights in the digital era, the importance of the CMOs in enforcing the rights of copyright owners is presented as "for individual right owner to commence legal action against a radio or television station, or a hotel or airline using his/her music would require deep financial pockets. For example, in the tribunal hearing between PRS and SBC in Singapore, the legal costs were US\$170,000." See WIPO, 'WIPO Seminar on Collective Management of Copyright and Related Rights in the Digital Era: Trends, Problems and Prospects' <http://www.wipo.int/mdocsarchives/WIPO_CCM_DEL_05/WIPO_CCM_DEL_05_7a_E.pdf> accessed 15 June 2017 p.3

⁴⁹⁶ LACNR 1998(n 446) sec 8

⁴⁹⁷ In France, for instance, SACEM's board of directors decides the amount of withholding for members' welfare and social scheme; however, it cannot be greater than 10 percent. See SACEM Articles of Association 2017 art 33

4.7. The supervision of collective management societies

The main rationale of exercising supervision over the CMOs is to make sure that the collecting societies devotedly carry out their obligation under the law. In Ethiopia the intellectual property office exercises control over the CMOs. It is this office which gives recognition for the formation of the CMOs based on the prerequisites set under the law.⁴⁹⁸ The office can also revoke the recognition granted to any CMO based on the grounds set under the law; namely when the CMO commits acts contrary to its power and duties provided under the law, when its members constituting majority vote agreed for dissolution, and when the court of law orders for the revocation of the CMO's recognition.⁴⁹⁹

The Ethiopian intellectual property office exercises supervision over the operations of the CMOs through different mechanisms. The CMOs are required to submit the royalty scheme and working manuals for the collection and distribution of remuneration for the office to get approval. As discussed under sections 4.3 and 4.4, the criteria that would be used by the office to grant approval for the royalty scheme and working manual prepared by the CMOs is not clear under the law because the law states only "by taking into account the country's objective reality". Here, in assessing whether the royalty schemes and working manuals are prepared in line with the country's objective reality, the standards used by the EIPO is not clear. Since this issue has been extensively discussed under the above mentioned sections it is not necessary to discuss it again. Nevertheless, the point to be stressed here is that the EIPO exercises control over the operations of the CMOs via granting approval on the royalty schemes and working manuals of the CMOs prepared for the collection and distribution of royalties. Moreover, the EIPO also exercises supervision over the CMOs budget.⁵⁰⁰ Concerning the deductions made from royalty to cover the administrative expenses of the CMOs the law beyond providing the maximum limit of deductions that it cannot exceed 30% of the total collected amount of royalty,⁵⁰¹ it also requires the collecting societies to submit the proposed amount of deduction annually to the office for approval before its implementation.⁵⁰² This enables the EIPO to check whether the amount of

⁴⁹⁸ The proclamation as Amended (n 435) art 33(1)

⁴⁹⁹ Ibid art 37

⁵⁰⁰ The budget of the CMOs is drawn from the sources of deductions made from the royalties, membership contributions and fees from other related services. See Ibid art 35(1).

⁵⁰¹ Ibid art 35(2)

⁵⁰² Ibid art 35(3)

deduction proposed by the concerned CMO does not exceed the maximum amount permitted under the law. Additionally, this also enables the office to control misappropriation of the royalty collected by the CMO under the pretext of covering administrative expenses.

The EIPO also has power to ensure whether the CMO is discharging its obligation of keeping complete and accurate books of accounts.⁵⁰³ Normally, the CMO is obliged to submit audited financial reports of the preceding year and its budget of the next year annually to the office.⁵⁰⁴ However, the office can also request the CMO to submit financial report and inspect its books of accounts at any time.⁵⁰⁵ This enables the office to control the fraud and cheating which would likely occur on the royalty collected by the CMO.

The other mechanism of exercising supervision over the CMO is through external auditors. The law provides that the CMO's books of accounts and financial documents have to be audited by external auditors on a yearly basis.⁵⁰⁶

However, the law is silent regarding how the right holders whose rights are managed by the CMO can exercise control over the collecting society. Since the main rationale for the creation of the CMO is securing the best interests of the right holders, the latter shall have a room to control the operations of the former. In this respect the French counterpart entitled members with the right to information which has permanent and recurrent aspects.⁵⁰⁷ The permanent aspect of the right to seek information enables the member to request, at any time, the society to which he is a member the announcement of the company managers' list, a table showing over a five year period the annual-amounts collected and distributed and the levies for management fees and other levies, a document telling the applicable distribution rules, the overall royalties payable to him over the last twelve months, and an explanation of the way by which this result is determined.⁵⁰⁸ The recurrent aspect of the right to seek information, on the other hand, is exercised once a year during annual general meeting.⁵⁰⁹ Likewise, the EU Directive states that the CMO is under obligation to provide not less than once a year each right holder with

⁵⁰³The proclamation as Amended (n 435) art 36(1)

⁵⁰⁴ Ibid art 36(3)

⁵⁰⁵ Ibid art 36(5)

⁵⁰⁶ Ibid art 36(2)

⁵⁰⁷ The French Conseil d'Etat Decree No. 2001-334 of 17 April 2001

⁵⁰⁸ *ibid*

⁵⁰⁹ *ibid*

information like the contact details provided by the right holder to the CMO to identify and locate the right holder; the rights revenue accredited to the right holder; the amount of deductions for management costs, and deductions made for the provision of social and welfare services.⁵¹⁰

4.8. Dispute resolution and complaint procedure

The proclamation provides for the establishment of intellectual property tribunal to entertain cases of civil nature arising in relation to the copyright issues.⁵¹¹ It also states that the aggrieved party on the decision of the tribunal can take appeal to the federal high court within 60 days.⁵¹² The power of adjudicating such civil cases other than those related to extra-contractual liability, until the establishment of the intellectual property tribunal, is vested with the regular courts.⁵¹³

However, concerning rule of complaint procedure that have to be followed by the CMOs to deal with complaints brought before them, the proclamation does not provide anything. The CMOs while exercising their functions will encounter complaints either from members concerning distribution of royalties or users regarding terms of use or other interested party. At this juncture there must be rules that guide the complaint procedures of the CMOs as to the manner and time of responding to the complaints brought by the interested party. Concerning this issue the EU directive prescribes that the CMO must make available, effective and timely procedures for dealing with complaints, to its members, users and other parties.⁵¹⁴ As to the manner of responding to the complaints it also provides that the CMO must give response to the complaints in writing and give reasons when it rejects the complaint.⁵¹⁵

4.9. Challenges and issues for establishing collective management society in Ethiopia

As explained in the introduction part of this chapter, in 2009 owners of the copyright have tried to establish a collecting society by the name ECNRCMS (the Ethiopian Copyright and Neighboring Rights Collective Management Society). This society had disappeared without providing any function. The main rational for the non functionality of the ECNRCMS was for

⁵¹⁰ The EU Directive 2016(n 452)art 17

⁵¹¹The proclamation as amended (n 435)art 44(1)

⁵¹² Ibid art 44(2)

⁵¹³ Ibid art 44(2)

⁵¹⁴ The EU Directive 2016(n 452)art 31(1)

⁵¹⁵ Ibid art 31(3)

one thing there had not been regulatory framework that regulates its establishment and operation, and for the other it was established just like other professional associations because the right holders as well as government did not understand well about the operation and function of the collective management society.⁵¹⁶ The ECNRCMS similar to the professional associations had registered with the Ethiopian charities and societies agency and required to renew its license. From then onwards the ECNRCMS did not renew its license and by now it is nonexistent.⁵¹⁷

Even if the Ethiopian government has come up with the regulatory framework in 2015 that regulates the formation and operation of the CMO, currently no collective rights management organization is established in the country. In June 2015 the EIPO had made meeting with the representatives of the copyright holders so as to create awareness on how to establish the CMO.⁵¹⁸ From each sphere of the copyright, five representatives have appeared in the meeting. In this meeting discussion was made deeply as to whether different CMOs shall be established in each sector of copyright or a single CMO shall be established to administer the rights of the right holders in all sectors. At the end, the attendants of the meeting had reached in to agreement to establish one umbrella CMO to collectively administer rights in all sphere of copyright. Later on, the musicians association had withdrawn itself from the agreement to establish single umbrella CMO by insisting to establish independent CMO in the music sector. Currently, with the exception of musicians association other right holders are on the move of establishing one CMO to collectively administer their rights.

The EIPO encourages the right holders to establish one umbrella CMO to collectively administer the rights in all areas of the copyright by providing different reasons.⁵¹⁹ The first reason provided by the office to establish a single CMO is based on the interest of the right holders. The interests of the right holders will be better protected under one and strong CMO than different CMOs established in each sectors. The second rational is to avoid the difficulty encountered by the users of the protected work in identifying CMOs which administer rights in each sector. When there is only one collecting society users will be relieved from trouble of identifying the CMOs with mandate to administer rights in every sectors. The other reason provided by the office in favor of

⁵¹⁶ An Interview with Ato Abirido Birhanu, the Transitional Head of the Copyright Directorate, Ethiopian Intellectual Property Office(15 May 2017)

⁵¹⁷ *ibid*

⁵¹⁸ *ibid*

⁵¹⁹ *ibid*

establishing the umbrella CMO is based on its capacity to exercise supervision over many CMOs. If many CMOs are established to manage rights on behalf of the right holders, it will be difficult for the office to exercise supervision on the formation and operation of every CMO. On the other hand, the musicians association disagrees with the justifications provided by the EIPO towards forming one CMO to administer rights of the different categories of copyright owners. The association argues that as long as the right holders in the music sector satisfy the requirements of formation set under the law they are eligible to form separate CMO in the music sector. It also asserts that the law does not require the establishment of only one collecting society in the country to administer different categories of rights.

However, the reasons provided by the EIPO for the establishment of the single CMO do not hold sound. This is because for one thing the law does not require establishment of the single collecting society as what the law requires, among other things, is “the number of sector associations established under a collective management society may not be less than three”. For the other thing, the users will also not be in trouble to identify the CMO who has mandate to manage rights in certain sector because the current information shows that even those who want to establish independent CMO is with the objective of managing rights in music sector.⁵²⁰ Hence, the fear that the users will be in difficulty to identify the CMOs with mandate to administer rights in specific sectors is not sound since the right holders are not intended to establish different CMOs in the same sector of copyright. With respect to this issue the experiences of Nigeria and Kenya reveal that the competent authorities of the respective countries may not approve another collecting society for the management of the same right and for the same category of rights owners which is efficiently administered by the existing CMO. The rationale behind such stipulation is that the benefits of exercising rights collectively will be fully obtained when one CMO is established for the management of the same right and the same category of the rights owners. Thereby, in the case of Ethiopia too under each class of right and category of rights owners the establishment of one CMO to administer same class of right must be required by law. In other terms, by way of regulation it has to be provided that on the same sector of copyrights more than one organization is not allowed to exercise functions of collective rights management.

⁵²⁰ An Interview with Ato Dawit Yifru, the President of the Musicians Association, Addis Ababa(15 May 2017)

The other most important barrier currently being observed in forming the collecting society is the ambiguity surrounding the prerequisite of the number of sector associations that must be satisfied for the formation of the CMO. The proclamation states that the CMO *inter alia* must at least contain three sector associations to get approval from the EIPO. On the other hand, the law envisages that it is owners of the copyright who can establish the collective management society. So if the owners of the copyright are eligible to establish the collecting society, what is the relevance of putting the requirement of the minimum number of sector association to form the CMO? An equally important question that needs clarity is the meaning of the phrase ‘sector association’. In the following paragraphs the effort is made to address these issues.

For the first time the Ethiopian legislator has provided regulation for associations under the civil code of Ethiopia. It is defined as “a grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits”.⁵²¹ As per this definition securing economic interests to its members is not the objective of a certain association. Hence, the objective of association is different from that of the CMO since the latter is formed with the principal aim of securing the economic interests for the owners of copyright who are its members. Furthermore, the Ethiopian charities and societies proclamation is enacted to provide for the registration and regulation of charities and societies.⁵²² In the following paragraph I’ll assess the compatibility of the requirement of the minimum number of sector association required to form the CMO in line with the charities and societies proclamation and the very objective for which the collecting societies are formed.

The charities and societies proclamation is enacted with the objective to realize the rights of citizens to form association as enshrined in the Constitution of the Federal Democratic Republic of Ethiopia and it is also aimed in helping and facilitating the role of charities and societies in the overall development of the peoples of Ethiopia.⁵²³ From the preamble of the proclamation one can understand that its aim is facilitating the role played by the charities and societies in the development of the public in general which is different from the very rationale of the CMO i.e. maximizing the economic interests of its members, but not the public in general. Under the

⁵²¹ Civil Code(n 430) art 404

⁵²² The Ethiopian Charities and Societies Proclamation No. 871/2009(hereinafter referred to as the charities and societies proclamation)

⁵²³ Ibid preamble

proclamation the term society is defined as “an association of persons organized on a non-profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes as well as to coordinate with institutions of similar objectives”.⁵²⁴ According to this definition the aim of the association⁵²⁵ is promoting the rights and interests of its members, and at the same time the interests and rights protected by the association must not have any relation with the objective of making profit. Furthermore, it is prohibited from engaging in income generating activities unless it obtains a written approval from the charities and societies agency.⁵²⁶ Even if the approval is granted by the agency, performing the income generating activities is incidental to the achievement of its objectives and such income is not distributable among the members of the association instead the income is used to further the purpose for which it is established.⁵²⁷ In case the association is found distributing the profits among its members, the agency may take appropriate measures against the concerned association even to the extent of cancelling its license.⁵²⁸ When we return to the issue at hand, the requirement of having the minimum of three sectors association to form the CMO does not hold sound. This is because as per this criterion the copyright holders must form a minimum of three associations in the sector before establishing the collecting society. To do so they have to be registered with the charities and societies agency and this on the other hand subjects the associations to the supervision exercised by agency. If this is the case, the participation of associations in the income generating activities is only in a limited circumstance and even the profits obtained from such activities are not distributable among the members of the associations. Therefore, this requirement defeats the very purpose for which the CMOs are to be established i.e. the collection of royalty from use of the copyright works and the distribution of the same among their members. To sum up, the provision of the copyright amendment proclamation which requires having the minimum of the three sector association to form the CMO must be amended otherwise it remains a serious challenge for the formation as well as operation of the collecting society in Ethiopia.

⁵²⁴ Charities and Societies Proclamation(n 522) art 55(1)

⁵²⁵The Amharic version of the provision uses the term that has equivalent meaning with the term association (“Mahber”) rather than the term society. Ibid(Amharic version)

⁵²⁶ Ibid art 103(1)

⁵²⁷ ibid

⁵²⁸ Ibid art 103(3)

The other challenge in establishing collective management society is that under EIPO there is no separate unit or sub office established to solely deal with matters of copyright collective administration. Rather the responsibility to deal with this matter is assigned to the existing unit under the office, the right holders associations and their support team.⁵²⁹ Hence, having the broad issues involved in approving formations of the CMOs as well as controlling their operations, the office must establish separate unit to deal with the issues of collective rights management.

4.10. International Instruments Affecting Collective Management of Copyright

There are international instruments that have bearing on the exploitation and enforcement of intellectual property in general and the collecting societies in particular. For the purpose of this study the Berne convention for the protection of literary and artistic works and agreement on trade related aspects of intellectual property will be explored since for one thing Ethiopia is member to WIPO and for the other Ethiopia is on the process of acceding WTO.

The Berne convention for the protection of literary and artistic works, which is adopted in 1886 as an agreement to honor the rights of all authors who are nationals of states party to the convention, is among the WIPO⁵³⁰-administered treaties.⁵³¹ It provides minimum protection to be granted by member states for creative works and the rights of their authors.⁵³² Ethiopia has joined WIPO in 1998.⁵³³ Nevertheless, the country does not sign the Berne convention.

The Berne convention contains some provisions on the collective rights management of copyright.⁵³⁴ It provides the principle of national treatment that the same treatment accorded to

⁵²⁹ Currently EIPO comprises five core business units and two support units. Interview with Abirdo(n 516)

⁵³⁰ WIPO was established in 1967 with its objective of promoting “the protection of intellectual property throughout the world through cooperation among states and, where appropriate in collaboration with any other international organization, and ensuring administrative cooperation among unions”. See Convention Establishing World Intellectual Property Organization Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979 art 3

⁵³¹ The UK Copyright Service ‘International Copyright Law-The Berne Convention <http://www.copyrightservice.co.uk/copyright/p08_berne_convention> accessed 8 June 2017

⁵³² See Web Site of WIPO at <<http://www.wipo.int/treaties/en/ip/berne/>> accessed 8 June 2017

⁵³³ For information about Ethiopia’s membership to WIPO See <http://www.wipo.int/members/en/details.jsp?country_id=56> accessed 8 June 2017

⁵³⁴ Dr. Mihály Ficsor, ‘Collective Management of Copyright and Related Rights at a Triple Crossroads: Should It Remain Voluntary or May It be Extended or Made Mandatory?’ <http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf/Ficsor%2BEng.pdf> accessed 16 January 2017 p. 4

national rights holders must be granted to the right holders of foreign countries which are signatory to the convention.⁵³⁵ When Ethiopia signs this treaty, the country will be under obligation to provide equal treatment to the authors of other signatory countries with the treatment given to the national rights holders.

The convention also provides that “It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph⁵³⁶ may be exercised, but these conditions shall apply only in the countries where they have been prescribed”.⁵³⁷ As per this provision the convention while recognizing the exclusive rights for the authors of creative works leaves room for the member states to exercise their regulatory power to determine the conditions of exercising the exclusive rights. However, the conditions set by states as to how exclusive rights may be exercised “shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority”.⁵³⁸ Hence, states can by way of regulation provide the manner of exercising authors’ exclusive rights provided that such conditions are neither against the moral rights of the authors nor to their right to obtain equitable remuneration. From this it follows that authors of creative rights can exercise their exclusive rights individually or by way of collective rights management subject to the regulatory conditions set by states. Specifically to the present case states can provide regulatory framework for the operation of CMOs subject to the limitations discussed above. Regarding the case of Ethiopia, the country has provided regulatory framework for collective management societies, among other things, the law provides for voluntary collective rights management by CMOs on a non for-profit basis. Thereby, even when the country signs this treaty, providing the regulatory frame work for the operation of the CMOs is its job; however, it shall not be prejudicial to the moral rights of authors nor to their remuneration rights.

⁵³⁵ The Berne Convention for the Protection of Literary and Artistic Works as Amended on September 28, 1979 art 5(1)

⁵³⁶ The convention provides the exclusive rights of authors of literary and artistic works in explicit manner as rights of authorizing “the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; and the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work”. Ibid art 11bis (1).

⁵³⁷ Ibid art 11bis

⁵³⁸ Ibid art 11bis(2)

Moreover the Berne convention also provides that “Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority”.⁵³⁹ As explained by Dr Mihaly Ficsor, article 11bis through article 13 of the Berne convention provides minimum requirements that must be respected by states when they require for non voluntary licensing i.e. they shall not be against rights of the authors’ to obtain equitable remuneration.⁵⁴⁰

The other international instrument that has relevance to the collective rights management is an agreement on trade-related aspects of intellectual property rights (TRIPS). It is administered by World Trade Organization (WTO).⁵⁴¹ Ethiopia is on the process of accession to the WTO.⁵⁴²

The main rationale that necessitated for countries to enter into the TRIPS agreement is “to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”.⁵⁴³ Hence, states who are members to the TRIPS/WTO are duty bound to give protection to the intellectual property in general and copyright in particular as per the minimum standards provided under TRIPS and at the same time the measures taken by states to enforce the intellectual property rights do not themselves constitute a barrier to legitimate trade. The TRIPS provides minimum standards of regulation for the WTO member states concerning intellectual property. By virtue of articles 9 and 14 of TRIPS, it has incorporated all the conditions of the Berne Convention. In other terms, members are obliged to give protection

⁵³⁹ Berne Convention(n 535) art 13(1)

⁵⁴⁰Ficsor(n 534)4

⁵⁴¹ WTO, ‘Overview: the TRIPS Agreement’ <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed

⁵⁴² Ethiopia’s accession talk to the WTO has started in 2008. However; the first membership talks has been broken and the accession talks has re launched on 6 May 2011. For the next steps of membership talks “the secretary will prepare a factual summary of the points raised, outlining the discussions in the working party”, however, the date for the next meeting is left opened. See WTO, ‘After 3 Year-Break, Ethiopia’s Membership Talks Resume on Its Trade Regime’<https://www.wto.org/english/news_e/news11_e/acc_eth_06may11_e.htm> accessed 7 June 2017

⁵⁴³ The Agreement on Trade-Related Aspects of Intellectual Property Rights which came into effect on 1 January 1995(hereinafter referred to as TRIPS) Preamble

to the intellectual property as per the minimum standards provided under the Berne convention plus those standards provided under the TRIPS.

Moreover, the TRIPS agreement requires member states to enact sound copyright law that will ensure appropriate protection of the copyright and that will cop up with the challenges of the digital age.⁵⁴⁴ This obligation of providing legislative measure to cop up with the challenges of digital age has positive effect on the operation of the collecting society in Ethiopia if the country succeeds in acceding the WTO.⁵⁴⁵ Hence, the main obligation for the country will be to provide effective protection to the copyright and this includes (even if it is indirect) ensuring successful collecting societies in addition to the availability of strong judiciary, legal and institutional form.⁵⁴⁶

Conclusion

In enhancing the social, cultural, economic, scientific and technological development of a country; the literary, artistic and other creative works play an indispensable role. Taking into account these overwhelming benefits of the creative works countries throughout the world have granted protection to copyright so as to encourage further development of an author's creativity and promote the creation of new works. Accordingly, an owner of creative works is granted with exclusive exploitation rights of doing, authorizing, or prohibiting certain acts in relation to such works. This enables the owner of the protected work to directly deal with the utilization and distribution of his work, personally settle on the terms and the manner of remuneration for the use of his work and oversee whether his moral and economic rights are properly respected.

However, the introduction of digital technology and global interactive network has enabled the exploitation of copyright works by a large number of users from different places possibly at the same times. In this scenario the copyright holders are not capable enough to personally monitor the use of their work, negotiate with users on the terms and manner of remuneration required to

⁵⁴⁴Kahsay(n 433) 99

⁵⁴⁵Kahsay Gebremedin in his thesis dissertation provided that the obligation of enacting copyright law in a manner that takes into account the challenges of digital age enables the country to have effective law that will combat the act of piracy via internet, and this in turn will have the effect of increasing the royalty collected by the CMOs. *ibid*

⁵⁴⁶*ibid*

be paid for the use of protected work and enforce their moral as well as economic rights. As a way out to the difficulty of individual administration of copyrights, the system of collective rights management was emerged. The system of collective management empowers the owners of the rights to authorize collective management organization to monitor the use of their works, negotiate with users, allow use of protected work, collect appropriate remuneration from users and distribute the remuneration among the right owners. The CMO also helps users access the Copyright works at affordable transaction costs by easing negotiations and simplifying the source from where the works can be accessed.

The collective management of copyright for the first time started in France during 18th century. In the year 1829 the society of Dramatic Authors and Composers (SADC) was established to collectively administer the rights of dramatic authors and composers. Following this the SACEM was created in 1851 with a mandate to administer the rights of public performance in musical works. This example was later spread to many other countries in Europe as well as other countries of the world like GEMA in Germany, PRS in UK, SIAE in Italy, and the American Society of Composers, Authors and Publishers in USA. The developments of CMOs in different national states had caused the quest for collaboration and synchronization at international level. To this end CISAC was formed in 1926 with the aim of granting protection to the literary and artistic works throughout the member countries. In Ethiopia, however, the CMO has got legal protection in the 21st century by the year 2015.

There is also theoretical foundation developed to justify the functions of the CMO. The theory of transaction cost provides that it is the existence of transaction cost which could be minimized by way of the collective rights management that justifies the existence of the CMO for the benefits of both the right holders as well as users of the protected work. Apart from the transaction cost minimizing role, the CMO also plays legal, social and cultural role which will maximize the interests of the public in general and the owners of the creative works in particular.

Since the CMOs hold monopoly power that may affect the interests of the right holders and users of the creative works, countries have come with the regulatory frame work to ensure the collective societies achieve their objectives by controlling their negative consequences. In this study, the experiences of France, Germany, Nigeria and Kenya were examined concerning each countries regulatory framework on the collective management. The experiences from these

countries indicate that the existence of robust regulatory framework that will regulate the formation, operation, and mechanisms of supervision and dispute resolution of the collecting society is of paramount importance to ensure the CMOs achieve their objectives without compromising the interests of their members and users in accessing the copyright works.

The study has made a critical examination on the regulatory framework of collective management provided under the Ethiopian copyright and neighboring rights proclamation No. 872/2014. Through this proclamation the country's legislator for the first time has regulated the formation, operation, and dispute resolution and supervision mechanisms of the collective management societies. This study explored some loopholes in the regulatory framework of the collective management system that challenges the formation and operation of the CMO in the country.

One of the regulatory challenges associated with the formation of the CMO is a requirement of having a minimum of three sector associations. This is a serious challenge currently encountered by the copyright holders in the process of establishing the CMO. This study has explored through the very objective to be achieved in establishment of association in accordance with respective law yet the writer has identified non conformity of the objective of association in case of the collecting society. The association is established to protect the rights and interests of its members other than profit making objective where as the CMO is established to secure the economic interests of its members. The current legal regime that governs association is the charities and societies proclamation. This proclamation required the association to be registered with the charities and societies agency and subjects it to the supervision exercised by the agency. If the agency exercise control over the associations, the CMO can never engage in royalty collection and distribution function because associations are only allowed to incidentally engage in income generating activities with the agency's approval and even they are not allowed to distribute such income to its members. This provision must be amended as it is not only challenging the formation, but it also seriously obstacles the CMO's operation. The other challenge in the formation of the CMO is that regarding the standards utilized by the EIPO to evaluate the documents submitted by the right holders to form the collecting society. In the absence of standards like trustworthiness and professional qualifications of the persons who are going to represent the CMO, and the economic basis of the CMO so as to attain rational economies of

scale for both right holders and users, the EIPO may not be able to properly play its role in establishing the effective collecting society.

The study also has examined regulatory problem at the dissolution stage of the CMO. There is gap in the law as to whether the office can revoke the collecting society's recognition when the representatives of the CMO are not reliable, or it is unlikely that the rights and claims of the right holders will be managed efficiently based on the economic basis of the collecting society, or when the office later on finds that the pre-requisites for the CMO's formation are not satisfied.

The other loophole in the law is that it does not provide as to how membership rules of the CMO has to be guided like objectivity, non-discrimination and transparency. Nor does the law entitle the right holders to withdraw membership from the CMO, and the manner and time framework to do so. Similarly, the law is silent as to how members exercise control over the operation of the CMO and no single explicit obligation is put on the collecting society so that the latter will act to the best interest of the former. Regarding the models of legislative backup to facilitate the rights acquisition process of the CMO like implied license model, legal presumption approach, mandatory management model and extended licensing approach, the proclamation provides nothing. This will affect the rights of the copyright owners who are not member to the CMO and also interests of users in using unauthorized works by the fault of the collecting society.

With respect to the relationship between the CMO and users, the study examined that there is no obligation of providing information between each other. Since the distribution plan as much as possible has to reflect the actual usage of works, in the absence of information from users concerning the extent of exploitation of each copyright works the CMO will be in difficulty to appropriately distribute royalty for its members. On other hand, in the absence of information from the CMO users will be in difficulty in identifying which works are administered by the CMO.

With regard to the roles and functions of the CMO, the law does not regulate whether the collecting society operates in the social and cultural functions. Additionally, while preparing the royalty scheme and working manual for the collection and distribution of royalty, the law is silent as to the standards that must be considered.

Likewise, regarding the complaint procedures used by the CMOs to resolve the complaint before them either by their members or users of the work administered by the collecting societies, no guidance is provided under the law like the manner and time of responding to the complaints.

Finally, the practically observed challenges in forming the collecting societies are ambiguity surrounding the requirement of having minimum number of sector association provided under the law, the number of the CMOs that have to be established, and absence of separately established unit under the EIPO institutional structure that will deal with the matters of the collecting societies.

Lastly, the study has examined the international instruments affecting the collective management societies, namely the Berne convention and the TRIPs agreement.

Recommendations

By relying on the findings of the study the writer recommends the following measures that must be taken to improve and strengthen the regulatory framework of the collective management to ensure that the CMOs achieve their objectives.

- i) Concerning the CMOs establishment, the serious regulatory challenge inhibiting the formation of the collecting societies and that will, by necessary implication, challenge their operations is the requirement of the minimum number of sector associations that the CMOs shall comprise for their establishment. The legislator shall mend the provision which provides for this requirement to facilitate the formation and operation of the collecting societies in the country. Additionally, to ensure the formation of an effective collecting society the legislator shall also provide for additional requirements that must be satisfied to establish the CMO, namely the trustworthiness and professional qualification of the persons who are going to represent the CMO, and reasonable number of the right holders who are going to be represented by the organization. It shall also incorporate the non-fulfillment of these requirements as among the grounds for the dissolution of the CMO.
- ii) With respect to the relationship between the CMO and its members, the legislator either by way of amendment or regulation shall provide general standards by which the membership rules crafted by the collecting society has to be guided. It shall provide for

the principles of non-discrimination, objectivity and transparency as an obligation to guide the CMO's membership to ensure that its membership is open to every right holder based on reasonable and transparent criteria. In addition to this, it shall enact regulation that contains provision which entitles the right holders to leave the CMO upon granting of notice, and fixes the time framework to do so. The government shall also enact regulation comprising a provision that provides legislative backup to the rights acquisition process of the CMO (advisably via extended licensing) in order to protect the interests of the non-member right holders as well as users' liability from unauthorized use of works devoid of their fault. Likewise, an obligation shall be put on the CMO to act for its members' best interest. The law also has to provide the room for the members of the CMO to exercise control over the latter by entitling the former with the right to get information about the affairs of the collecting society.

- iii) Regarding the relationship between the CMO and users of the protected work, the government shall by enacting regulation put the requirement of providing obligation to each other so as to relieve the difficulty of the CMO in obtaining information from users and the intricacy of users to get the information they want from the collecting society.
- iv) Concerning the roles and functions of the CMO, the government shall enact regulation that will require the royalty scheme prepared for the collection of remuneration should take in to account the value and monetary benefit that will be obtained from the exploitation of copyright work, the purpose and context in which the copyright work will be used, and the proportion of utilization of the work in line of exploitation. Similarly, the government shall also enact regulation which contains provision that requires the royalty scheme and working manual for the distribution of royalty shall be prepared in fair and equitable manner based on the procedure acceptable by right holders, and it must as much as possible reflect the actual usage of works contained in the repertoire. Furthermore, the government through regulation shall encourage the CMOs participation in the welfare benefits for its members and cultural function by deducting a little percentage from the royalty.
- v) Furthermore, the government shall come up with regulation that comprises a provision which requires that the CMOs have to make available effective complaint procedure to

resolve complaints brought before them, that their decision must contain reasons in a written form and that it must be given within a fixed time.

- vi) The EIPO shall establish a separate unit to deal with the sole issues of the collecting societies as the matters related to the formation and operation of the CMOs by themselves are broad enough involving different complex issues.

Bibliography

Books

- Ghidini G, *Innovation, Competition and Consumer Welfare in Intellectual Property Law* (Edward Elgar Publishing Limited 2010)
- Mckoewn J, *Canadian Intellectual Property Law and Strategy* (Oxford University Press 210)
- Crews K, *Copyright Law for Libertarians and Educators Creative Strategies and Practical Solutions* (2ndedn, American Library Association 2006)
- Torremans P, *Copyright Law A Hand Book of Contemporary Research* (Edward Elgar Publishing Limited 207)
- Foreman S, *Copyright Law: World Study*(1stedn, University Publications 2012)
- Deazelay R, *On the Origin of the Right to Copy* (Hart Publishing 2004)
- Giubault L, and Gompel S, *Collective Management of Copyright and Related Rights*(Kluwer Law International 2006)
- Helfer L, *Collective Management of Copyrights and Human rights: An Uneasy Alliance Revisited* (2ndedn, Kluwer Law International 2010)
- Gervais D, *Collective Management of Copyright and related Rights* (2ndedn, Kluwer Law International 2010)
- Koskinen-Olsson T, and Lowe N, *Educational Material on Collective Management of Copyright and Related Rights* (WIPO 2012)
- Ficsor M, *Collective Management of Copyright and related Rights* (WIPO 2002)
- WIPO Publication, *WIPO Intellectual Property Hand Book: Policy, Law and Use* (2ndedn, WIPO 2004)
- Schepens P, *Guide to the Collective Administration of Authors' Rights* (UNESCO 2000)

Thesis

- Olukunle O, 'Operation and Regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa'(LL.M thesis, University of South Africa 2012)
- Buziba V, 'Collective Management of Copyright and Related Rights in Kenya: Towards an Effective Legal Framework for Regulation of Collecting Societies' (LL.M thesis, University of Nairobi 2014) 30
- Gebremedhn K, 'The Emerging Ethiopian Copyright and Related Rights Collecting Society: Assessment of Challenges and Prospects' (LLM thesis, Addis Ababa University 2013)

Journal Articles

- ❖ Abera A, 'Collective Management of Copyright: More Than Two Centuries of Existence in History; Two Years Old in Ethiopia'(December 2016) 3 IJRSI
- ❖ Kishani D, 'Universities and Copyright Collecting Societies' (2010) 38.2 International Journal of Legal Information
- ❖ Sladič J, 'Introduction to Copyright and Collective Management in Competition Law' (June 2013) 1 Journal of Law and Economics

- ❖ Liu W, ‘Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance’(January 2012) Journal of Intellectual Property Rights
- ❖ Keele B, ‘Copyright Provisions in Law Journal Publication Agreements’ (2010) 102.2 Law Library Journal
- ❖ Graber C, ‘Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads’ (2012) 4.1 The WIPO Journal
- ❖ Monsef A, Sameti M, and Mojahednia M, ‘The Effect of Intellectual Property Rights and Information and Communication Technology on Human Development Index in Developing Countries During 2005-2010’ (December 2011) 1.9 Australian Journal of Business and Management Research
- ❖ Hettinger E, ‘Justifying Intellectual Property’(1989) 18.1 Philosophy and Public affairs
- ❖ Besen S, and Raskind L, ‘An Introduction to the Law and Economics of Intellectual property’ (1991)5.1 The Journal of Economic Perspectives
- ❖ Panda A, and Patel A, ‘Role of Collective Management Organizations for Protection of Performers’ Right in Music Industry: In the Era of Digitization’ (2012) 15(2) The Journal of World Intellectual Property
- ❖ Zhang Z, ‘Rationale of Collective Management Organizations: An Economic Perspective’ (2016) 10 Masaryk University Journal of Law and Technology
- ❖ Towse R, Handke C, and Stepan P, The Economics of Copyright Law: A Stocktake of the Literature’ (2008) 5 Review of Economic Research on Copyright Issues
- ❖ Towse R, ‘Economics of Copyright Collecting Societies and Digital Rights: is there a case for a Centralized Digital Copyright Exchange?’(2012) 9(2) Review of Economic Research on Copyright Issues

Interviews

- An Interview with Ato Abirido Birhanu, the Transitional Head of the Copyright Directorate, Ethiopian Intellectual Property Office (15 May 2017)
- An Interview with Ato Dawit Yifru, the President of the Musicians Association, Addis Ababa (15 May 2017)
- An Interview with Ato Gezahegn Habte, the Representative of the Ethiopian Authors Association Concerning Matters Associated with Establishing Collecting Society, Addis Ababa (15 May 2017)

Other Internet Sources

Daniel J. Gervais, ‘Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective’ <http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf> accessed 12 April 2017 pp.31

Dr. Mihály Ficsor, ‘Collective Management of Copyright and Related Rights at a Triple Crossroads: Should It Remain Voluntary or May It be Extended or Made Mandatory?’ <http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf/Ficsor%2BEng.pdf> accessed 16 January 2017

WIPO, 'Collective Management of Copyright and Related right' <http://www.acpcultures.eu/upload/ocr_document/WIPO_CollectiveManagementCopyright_EN.pdf> accessed 13 December 2016 p.4

Christian Handke, 'The Economics of Collective Copyright Management' <[file:///C:/Users/User/Downloads/SSRN-id2256178%20\(1\).pdf](file:///C:/Users/User/Downloads/SSRN-id2256178%20(1).pdf)> accessed 5 April 2017 p.1

Alhaji Tejan-Cole, 'Collective Management of Copyright and Related Rights' pp.6 <<http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>> accessed 20 December 2016

International Confederation of Societies of Authors and Composers, 'The Role of Collective Management Organizations' <[file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20\(7\).pdf](file:///C:/Users/User/Downloads/CISACUniversity_The_Role_of_CMOs_FINAL%20(7).pdf)> accessed 15 April 2017 p.3

International Confederation of Society of Authors and Composers, 'The History of Collective Management' <[file:///C:/Users/User/Downloads/CISACUniversity_The_History_of_Collective_Management_FINAL%20\(1\).pdf](file:///C:/Users/User/Downloads/CISACUniversity_The_History_of_Collective_Management_FINAL%20(1).pdf)> accessed 15 April 2017 p. 2

Daniel Gervais and Alana Maurushat, 'Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management' <http://discoverarchive.vanderbilt.edu/bitstream/handle/1803/8339/Fragmented_Copyright.pdf?sequence=1&isAllowed=y> accessed 20 December 2016 p.16

UNESCO, 'the ABC of Copyright' <http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf> accessed 26 March 2017 p.70

International Confederation of Societies of Authors and Composers, 'CISAC Membership' (January 2015, CISAC) <<file:///C:/Users/User/Downloads/CISAC+Membership+-+Jan+2015.pdf>> accessed 30 march 2017

Phnom Penh, 'Collective Management Organizations: Their Roles, Functions & structure' <http://copyrightkh.org/imgs/CollectiveManagementOrganizations_Functions,Role_Structure.pdf> accessed 1 May

Dr Richard Watt, 'Collective Management as a Business Strategy for Creators: an Introduction to the Economics of Collective Management of Copyright and Related Rights' <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_3.pdf> accessed 20 December 2016 pp.15

Richard Watt, 'the Efficiencies of Aggregation: an Economic Theory Perspective on Collective Management of Copyright' (2015)12 Review of Economic Research on Copyright Issues 26. See also Martin Kretschmer, 'Access and Reward in the Information Society' <<http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>> accessed 29 May 2017

Gerd Hansen and Albrecht Schmidt-Bischoffshausen, 'Economic Functions of Collecting Societies – Collective Rights Management in the Light of Transaction Cost and Information Economics' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328> accessed 10 April 2017

See<[http://www.cisac.org/searching/result/\(year\)/2015/\(query\)/Collection%20reports](http://www.cisac.org/searching/result/(year)/2015/(query)/Collection%20reports)> accessed 4 April 2017

Christian Handke and Ruth Towse, 'Economics of Copyright Collecting Societies' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159085> accessed 4 April 2017

Richard Watt, 'Copyright Collectives and Contracts: An Economic Theory Perspective'<<file:///C:/Users/User/Downloads/CREATE-Working-Paper-2015-08.pdf>> accessed 5 April 2017 p.9. Ana María PÉREZ GÓMEZ, 'Digital Copyright Administration A Cross-Border Solution'<<http://www.serici.org/2013/perez.pdf>> accessed 5 April 2017

Christian Handke, 'The Economics of Collective Copyright Management'<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256178> accessed 1 April 2017

SACEM, 'SACEM in a Nut Shell'<<https://societe.sacem.fr/en/presentation>> accessed April 13 2017

SACD, 'Who are the SACD Members?'<<http://www.sacd-scam.be/Les-membres-de-la-SACD?lang=fr>>accessed 15 April 2017

SCAM, 'The Civil Society of Multimedia Authors' <<http://www.scam.fr/EN>> accessed 15 April 2017

SDRM, 'What is SDRM?'<<https://sdrm.sacem.fr/>> accessed 15 April 2017

CFC, 'CFC Mission'<<http://www.cfcopies.com/cfc/missions>> accessed 15 April 2017

SACD, 'The Role of the SACD: What is the Procedure with Regard to Negotiation of the Terms of a Stage License and Approval of Such Conditions?' <<https://www.sacd.fr/en/role-sacd>> accessed 30 May 2017

Web site of SPRE <https://www.spre.fr/index.php?page_id=38> accessed 15 April 2017

Bild-Kunst 'Collecting Societies in Germany'<<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

Home Page of GEMA<<https://www.gema.de/die-gema/karriere/die-gema-als-ihr-arbeitgeber/>>accessed 21

Home page of VG Wort <<http://www.vgwort.de/die-vg-wort.html>>accessed 21 April 2017

GVL, 'Our Mission'<<https://www.gvl.de/en/gvl/about/our-mission>> accessed 21 April 2017

GVL, 'Legal Basis' <<https://www.gvl.de/gvl/ueber-uns/rechtliche-grundlagen>> accessed 21 April 2017

Bild-Kunst 'Collecting Societies in Germany: VG Musikedition' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

Bild-Kunst 'Collecting Societies in Germany: GÜFA' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

Bild-Kunst 'Collecting Societies in Germany: AGICOA' <<http://www.bildkunst.de/en/copyright/collecting-societies-in-germany.html>> accessed 21 April 2017

Nigerian Copyright Commission, 'Collective Management Organization (CMO)' <<http://www.copyright.gov.ng/index.php/regulatory-schemes/cmo-regulations>> accessed 8 June 2017

COSON, 'The Copyright Society of Nigeria' <<http://www.cosonng.com/the-copyright-society-of-nigeria/>> accessed 8 June 2017

AVRS, 'Press Statement in Commemoration of the First Anniversary of Licensing of AVRS by Nigerian Copyright Commission' <<file:///C:/Users/User/Desktop/Nigeria/1st-Anniversary-Press-Statement.pdf>> accessed 8 June 2017

AVRS, 'Vision and Mission' <<http://www.avrsnigeria.com/?q=page/vision-mission>> accessed 8 June 2017

Nigerian Copyright Commission, 'Collective Management Organization (CMO)' <<http://www.copyright.gov.ng/index.php/regulatory-schemes/cmo-regulations>> accessed 8 June 2017

Kenya Copyright Board, 'Protecting Copyright, Encouraging Creativity' <<http://copyright.go.ke/8-program/4-cmo.html>> accessed 6 June 2017

MCSK, 'Rights Administered by MCSK' <<http://www.mcsk.or.ke/index.php/membership/rights-administered-by-mcsk>> accessed 6 June 2017

KOPIKEN, 'KOPIKEN's History and Background' <<http://www.kopiken.org/about/history.html>> accessed 6 June 2017

KOPIKEN, 'Organization of KOPIKEN' <<http://www.kopiken.org/about/organization.html>> accessed 6 June 2017

KAMP, 'What is Kamp All About?' <<http://www.kamp.or.ke/who-we-are/>> accessed 6 June 2017

PRISK, 'About PRISK' <<http://www.prisk.or.ke/index.php/en/>> accessed 6 June 2017

Tarja Koskinen-Olsson and Nicholas Lowe, General Aspects of Collective Management <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf> accessed 1 January 2017

For information about Ethiopia's membership to WIPO See <http://www.wipo.int/members/en/details.jsp?country_id=56> accessed 8 June 2017

WTO, 'Overview: the TRIPS Agreement' <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 8 June 2017

Laws

- ✚ The Ethiopian Copyright and Neighboring Rights Protection Proclamation No. 410/2004
- ✚ The Ethiopian Copyright and Neighboring Rights Protection (Amendment) Proclamation No. 872/2014
- ✚ The Ethiopian Charities and Societies Proclamation No. 871/2009
- ✚ Civil Code of the Empire of Ethiopia Proclamation No. 165 of 1960, Articles 1647-1674
- ✚ The French Intellectual Property Code, The Act of 11 march 1957, which was modified by the act of 3 July 1985
- ✚ The German Law on the Administration of Copyright and Neighboring Rights(Text of September 9, 1965 as last amended by the Law of May 8, 1998)
- ✚ The Nigerian Copyright Act as Amended by Decree No.42 of 1999 which Became Part of the Codification of Nigerian Law 2004(herein after referred to as NCA 2004)
- ✚ The Nigerian Copyright (Collective Management Organizations) Regulations 2007
- ✚ The Copyright Act of Kenya No.11 of 2001
- ✚ The Copyright Regulations of Kenya, 2004

International Instruments

- ✚ Convention Establishing World Intellectual Property Organization Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979
- ✚ The EU Directive on the Collective Management of Copyright Regulations 2016 No.221
- ✚ The Berne Convention for the Protection of Literary and Artistic Works as amended on September 28, 1979
- ✚ The Agreement on Trade-Related Aspects of Intellectual Property Rights which came into effect on 1 January 1995