Collecting Societies
Codes of Conduct - Executive Summary

BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald

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Executive Summary

Collecting societies – also known as collective management organisations (CMOs)[1] – are organisations in charge of administering statutory copyright law via collective rights management[2] (CRM). Collecting societies license, gather and distribute royalties on behalf of the copyright owners they represent. They are complex institutions insofar as the rights they manage. Their tariffs and distribution structures are not always self-evident to the licensors (members) or licensees (users), nor often to regulatory bodies[3].

In October 2011, the Intellectual Property Office (IPO) produced an initial impact assessment of the move to adopting a code of conduct for collecting societies. It set out that the main benefit from adopting a code will be improvements in collecting societies' governance and transparency and the delivery of better information to both members and users. It also listed a series of hypothetical benefits[4] that could flow from this. This report interrogates the plausibility and extent of these hypothetical benefits through comparative analysis of the Australian collecting societies' code of conduct adopted in 2002[5] and other models for the regulation of collecting societies used across Europe.

Three conclusions from the comparative analysis performed in this report are:

There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members[6].

The most numerous and fierce criticisms of collecting societies stem from users not members. Any consideration of how regulation can improve collecting societies' performance thus needs to focus far more on addressing users' concerns rather than members.

Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies *per se*.

In terms of potential benefits that the UK could gain from moving to a code of conduct, it can be concluded that a voluntary code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, the Australian case does seem to indicate that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model.

1 CMOs are also known as Reproduction Rights Organisations (RROs) in the case of reproduction rights.
2 See Sections 1.1 and 1.2 for the economics and models of collective rights management.
3 Kretschmer, 2007
4 See Introduction. The hypothetical benefits include a reduction in the number of complaints, lower charges to licensees and increased revenue for both the collecting societies and their members.
5 This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has been suggested be adopted by collecting societies.
6 For example, there are instances where more highly regulated collecting societies perform worse than self-regulated collecting societies.

The Australian example suggests a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies' governance and operations already[7]. It should be stressed that all indicators point to UK collecting societies having strong governance mechanisms, good member relations and no recent history of malpractice. No evidence was found that a code of conduct would directly result in any increase in collections for members.

In regards to collecting societies, the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency[8]. Secondary evidence[9], however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to members[10]. A statutory code of conduct, then, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency.

In terms of impact on users, evidence from the UK PRS[11] suggests that a code of conduct in isolation is unlikely to make a difference to the number of user complaints, but it may make some contribution as part of a package of measures aimed at improving the service that collecting societies provide to users. The Australian case is also clear that a code of conduct on its own does not provide greater redress for users - independent and inexpensive dispute resolution is additionally required.

The international comparative evidence documented in this report indicates then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria. However, a statutory[12] code of conduct for the UK is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and thus, in turn, strengthening confidence in the system.

However, there seems to be few other net economic gains or losses associated with the likely improvements that would arise through even a statutory code of conduct. This is because the underlying structural characteristics of the market[13] would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

7 Essentially, members do not tend to complain very often as they are already involved in the internal governance of collecting societies. For example, collecting societies are in many cases member-owned and/or Boards of Directors are elected by members on a regular basis. Strong internal governance can overcome any potential 'principal-agent' problem between rights holders and the collecting society management and staff.

8 Measured as the ratio of expenditure over revenue. A declining trend in this ratio implies an increase in efficiency.

9 Reviewing relevant literature and data.

10 This can be measured by looking at the frequency of royalties distribution to members, and also at the amount of time it takes to process royalties (i.e., identify authors and pay them royalties).

11 UK Performing Right Society. In 2009, the PRS launched a code of practice at the same time as instigating a new complaints procedure.

12 With independent review and enforcement

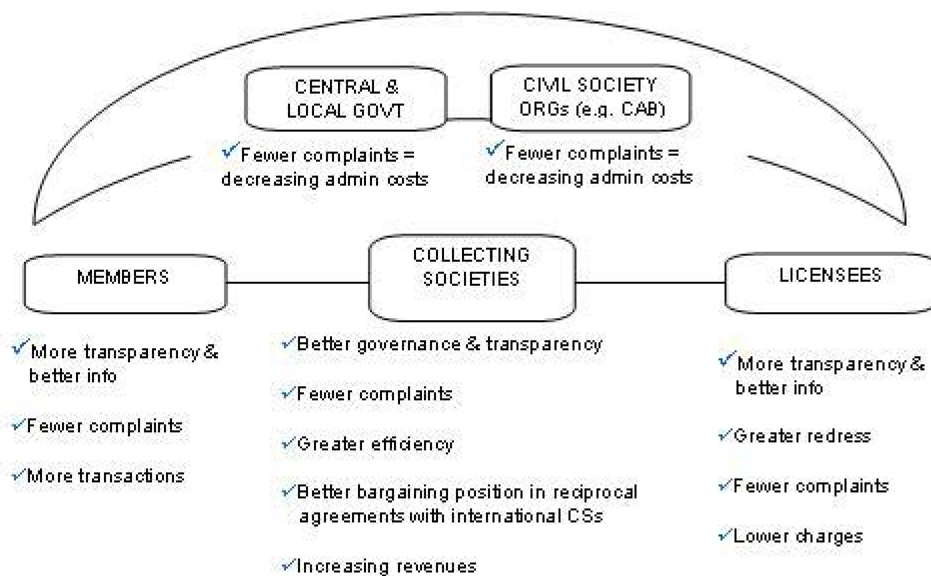
13 Tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights

Introduction

This is the Final Report by BOP Consulting, in collaboration with Benedict Atkinson and Brian Fitzgerald,[14] detailing the work commissioned by the Intellectual Property Office (IPO) on Work Package 2 of the Hargreaves Review Implementation, focusing specifically on the issue of collecting societies' codes of conduct. The aim of this work package is to assess the costs and benefits of a code of conduct for collecting societies, their members and users.

In October 2011, the Intellectual Property Office (IPO) produced an initial impact assessment of the move toward adopting a code of conduct. Although the initial impact assessment is short and makes clear that there are many knowledge gaps that need to be filled, it is useful in that it outlines the main hypothetical benefits and costs for each of the key stakeholders in moving to a code of conduct in the UK. These are grouped together and summarised below in Figure 1.1.

Figure 1.1. Potential benefits and costs to each stakeholder of the proposed introduction of a code of conduct for UK collecting societies



Source: BOP Consulting (2012)

As can be seen in Figure 1.1, the heart of the hypothetical case for new codes of conduct is that it will improve the governance and transparency of collecting societies and deliver better information to both members and users. The Impact Assessment then variously lists a series of hypothetical benefits that would effectively flow from this. Most commonly identified is the likelihood of a reduction in the number of complaints.

14 Both Benedict Atkinson and Brian Fitzgerald are experts on Australian Intellectual Property policy.

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

The report interrogates the plausibility and extent of these hypothetical assumptions[15] through comparative analysis. In particular, the case of Australia is examined, where a code of conduct was adopted by collecting societies in 2002. This has served as the basis for the code proposed by the UK Government which contains the minimum standards it has suggested should be adopted by collecting societies. The report analyses whether the Australian code has helped to improve the collecting societies' services and whether it has improved customer satisfaction. The report also looks at other models for the regulation of collecting societies from across Europe.

In looking to apply the findings from the comparative analysis to the UK situation, further evidence on licensees' opinions regarding UK collecting societies has been gathered, in order to assess in more detail what current problems the code of conduct might address. The research has combined both secondary research, in the form of reviewing relevant literature and data, and primary research (interviews) with licensees in both Australia and the UK.[16]

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

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

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

Definitions: Types of rights

Copyright, as established in the Berne Convention in 1886, gives exclusive rights to owners of literary and artistic works. It was then expanded to include other creative work such as dramatic and musical works, sound recording films, broadcasts, and databases. WIPO[17] provides an explanation of the rights entailed by that exclusivity. They can be classified as follows:

1. **Right of reproduction and related rights –** The right of the owner of copyright to prevent others from making copies of their works. This covers reproduction in various forms, such as printed publication, sound recording or digital reproduction. It also includes the mechanical reproduction rights in musical works.

2. Rights of public performance, broadcasting and communication to the public –

- Numerous national laws consider a ‘public performance’ as any performance of “a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons is present.”[18] Public performance also includes performance by means of recordings. Musical works can be said to have been “publicly performed” when they are played over amplification equipment in places such as discotheques, airplanes, and shopping malls or when the radio is turned on or musical works are played in the workplace.

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

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

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

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

17 WIPO (undated) ‘Basic Notions of Copyright and Related Rights’, available at: http://www.wipo.int/copyright/en/activities/pdf/basic_notions.pdf

18 WIPO (undated) ‘Understanding Copyright and Related Rights’, available at: http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html

1.1 Economics of collective management

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

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

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

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

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

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

As a demonstration of the effectiveness of CRM, a study conducted by PwC and commissioned by the UK Copyright Licensing Agency in 2010, estimated that the costs associated with the collective licensing method are £6.7 million for HE institutions in the UK, while the cost of a hypothetical ‘atomised framework’ (individual-to-individual exchange) would be between £145-£720 millions.[19]

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

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

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

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

According to information corresponding to 200 authors’ societies around the world and published by the International Association of collecting societies of Authors and Composers (CISAC), in 2010, 73% of the total collection came from public performance rights (€ 5.5 billion). Additionally, music is, by far, the sector that generates the highest amount of royalties for the authors’ collecting societies. The music sector represents 87% of the total amount collected in 2010 (see Table 1.1).

Table 1.1 Collection through authors’ collecting societies (2010)

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

Source: CISAC, 2012

1.2 Models of collective management

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

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

Table 1.2 Different models for reproduction rights collection

Reproduction rights models	Description	Countries
Voluntary collective licensing	Under voluntary collective licensing, the RRO issues licences to copy protected material on behalf of their members. A collecting society can only collect fees for those right holders who have given it the mandate to so on their behalf. Right holders have to opt into the system and can make claims outside a CMO. Users can only use copyright material if they have cleared the rights first.	UK, Ireland, Luxembourg, Russia, US, Canada, **Australia (for Businesses)**
Compulsory collective management	Even though the management of rights is voluntary, legislation ensures that rights holders are legally obliged to make claims only through a CMO. This safeguards the position of users, as an outsider cannot make claims against them.	**France (1995)**
Extended collective licence	An extended collective licence extends the effects of a copyright licence to also cover non-represented rights holders who have to opt out rather than opt in.	Nordic countries (Norway, Denmark, Finland, Iceland,Sweden)

Legal licence		
Non-voluntary system with a legal licence ("statutory license")	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, Australia (educational statutory licence)
Private copying exemption with a levy system for fair compensation for use	The licence to copy is given by law and consequently no consent from rights holders is required. A small copyright fee is added to the price of copying equipment such as a photocopying machine. Producers and importers of equipment are liable for paying the fees (levies) to the RRO, which then distributes the collected revenue to rights holders.	Austria, Belgium, Czech Republic, Germany, Hungary, Poland, Portugal

Source: IFRRO[20] adapted by the UK Intellectual Property Office

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

20 WIPO/International
Federation of Reproduction Rights Organisations (IFRRO) classification available at: http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf

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