



INTELLECTUAL
PROPERTY OFFICE

Collecting Societies Codes of Conduct

**BOP Consulting in collaboration with Benedict Atkinson
and Brian Fitzgerald**

December 2012

This is an independent report commissioned by the Intellectual Property Office (IPO)

ISBN: 978-1-908908-41-4

Collecting Societies Codes of Conduct

Published by The Intellectual Property Office
7th December 2012

1 2 3 4 5 6 7 8 9 10

© **Crown Copyright 2012**

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to:

The Intellectual Property Office
Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Minicom: 0300 0200 015
Fax: 01633 817 777

e-mail: information@ipo.gov.uk

This publication is available from our website at www.ipo.gov.uk

Contents

1. Introduction	5
1.1. Economics of collective management	8
1.2. Models of collective management	10
1.3. Collecting societies' incentives and governance	11
2. Code of conduct in Australia	15
2.1. Regulatory background	16
2.2. Characteristics of the code	21
2.3. Collecting society performance before and after the code	22
2.4. Benefits and criticisms	26
2.4.1. Benefits	27
2.4.2. Criticisms	27
3. EU developments regarding collecting societies	30
3.1. Overview	30
3.2. Case Studies	34
4. A code of conduct for the UK	39
4.1. Moves towards a code	39
4.2. Main concerns regarding the collective management system in the UK	43
5. Summary and conclusions	48
Bibliography	53

Executive Summary

Collecting societies – also known as collective management organisations (CMOs)¹ – are organisations in charge of administering statutory copyright law via collective rights management² (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 bodies³.

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 benefits⁴ 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 2002⁵ 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 members⁶.

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 already⁷. 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 efficiency⁸. Secondary evidence⁹, 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 members¹⁰. 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 PRS¹¹ 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 statutory¹² 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 market¹³ 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

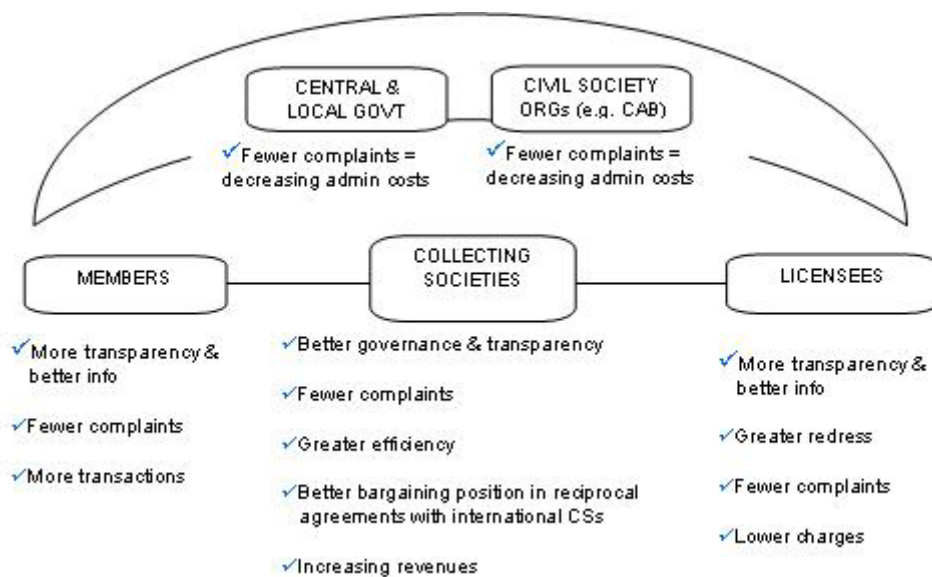
13 Tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, the simple confusion for users produced by the profusion of collecting societies and the profusion of rights

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 assumptions¹⁵ 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. WIPO¹⁷ 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 reproduction 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” (Kretschmer, 2007).

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

Table 1.1 Collection through authors’ collecting societies (2010)

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 licence”)	A licence to copy is provided by law (hence no agreement with the rights owner is needed). Rights holders have a right to receive equitable remuneration or fair compensation. The remuneration is collected by an RRO and distributed to rights holders.	Netherlands, Switzerland, 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: IFRRO²⁰ 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.

1.3 Collecting societies’ incentives and governance

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

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

²⁰ WIPO/International

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

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

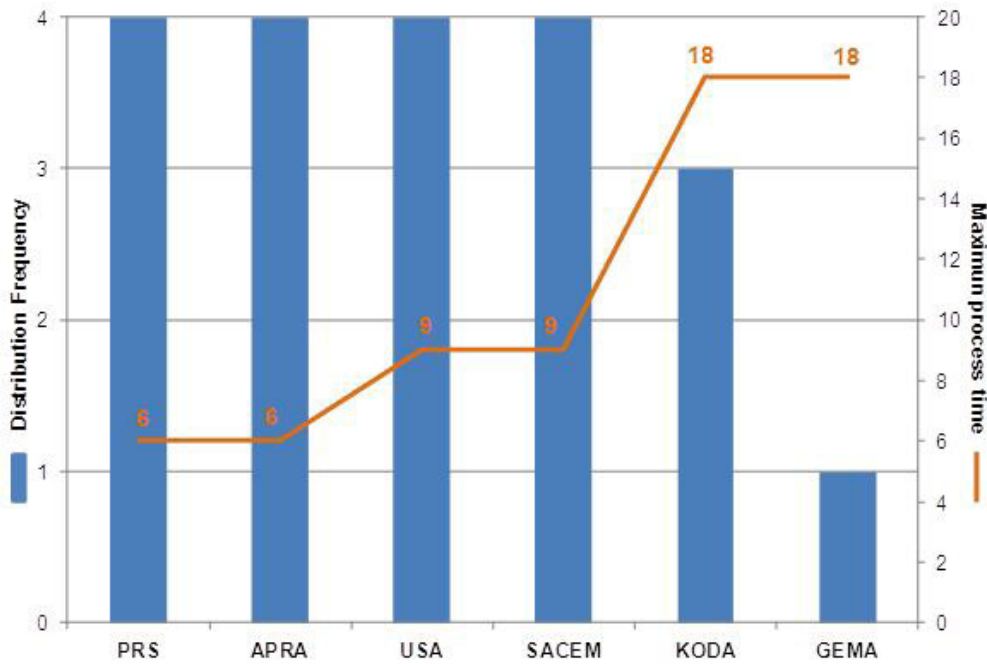
Rochelandet (2003) follows this approach and explores the financial efficiency of collecting societies in different regulatory settings. He looks at the music collecting societies in the UK, France and Germany. He concludes that no general positive correlation can be made between the intensity of legal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

These findings seem to be reflected in other indicators of efficiency. Figure 1.2 below shows (i) the frequency of distribution of royalties and (ii) the maximum amount of time that it can take to process royalties (i.e. identify authors and pay them their royalties) for six music collecting societies. PRS for Music (UK) and APRA (Australia) score better in terms of both indicators, while GEMA (Germany) is the collecting society that redistributes fewest times a year (once) and takes the longest (maximum) time to process those royalties. These results provide more evidence for the hypothesis that a strong internal governance mechanism may generate more efficient results than strong external regulation – at least when looking at efficiency indicators of the service provided to members.

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

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

Figure 1.2. International comparison of distribution frequency (times a year) and royalty process time (in months), for collecting societies



Source: CISAC, PRS for Music (2012)

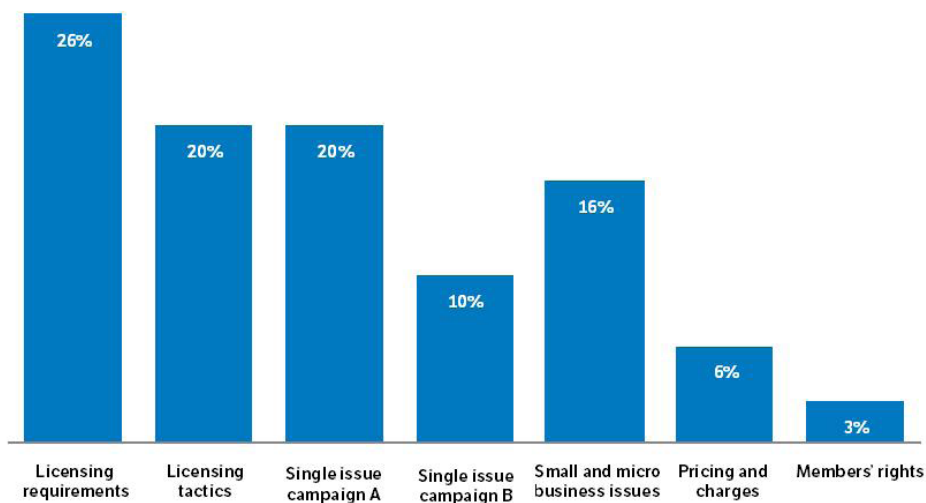
On the other hand, major frictions can be identified in the relationship between collecting societies and users who, by definition, lack the mechanisms available to members to monitor a collecting society’s performance. In most cases, licensees do not have recourse to an independent appeal mechanism,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

In the UK the frictions between collecting societies and users is reflected in the complaints received by the ministerial postbag. For instance, between October 2010 and December 2011 the Minister for Intellectual Property received 103 complaints about collecting societies, covering 118 issues in total.²¹ Figure 1.3 shows the breakdown of those issues, compiled and published by the IPO. The most common issue (aggregated under the heading ‘licensing requirements’) encompasses the administrative burdens involved in holding multiple licences and the lack of awareness of licensing requirements (26% of total). Another common theme is the ‘heavy handed and aggressive licensing tactics’ used by collecting societies (BIS, Impact Assessment, 2011). The ‘Small and micro businesses’ issues arise from the perceived inflexibility of collecting societies in relation to the resource constraints and difficulties faced by small business.

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

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

Figure 1.3: Breakdown of complaints received by Ministers via MPs.



Source: IPO (2012)

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

2. Code of conduct in Australia

There are ten collecting societies in Australia (Table 2.1). As explained above they operate under two different licensing systems. Collective licensing for commercial use is voluntary (as it is in the UK). However, the education and government sectors operate under a non-voluntary system with a statutory licence.

Table 2.1 Collecting societies in Australia

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

Source: BOP Consulting (2012)

2.1. Regulatory background

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

APRA – the first collecting society

The history of collective rights administration in Australia begins in 1926, and is dominated by the activities of the two largest collecting societies: the *Australasian Performing Right Society*,^{22,23} founded in 1926 to collect licence fees for the public performance of copyright music, and the *Copyright Agency Limited*, established in 1974 to collect licence fees for the copying of literary works.

Tensions between Australian collecting societies and licensees have been documented since 1926. Licensees have criticised collecting societies for demanding exorbitant fees, and refusing to adequately disclose methods of determining remuneration liability or rates, or financial information, especially details of distributions.²⁴

Copyright Tribunal

In 1968 the Australian Copyright Act established a Copyright Tribunal to determine, on request, equitable remuneration payable for the exercise of copyrights.²⁵ The 1968 Act also established the statutory licence model for the educational sector, and declared CAL as the collecting society for the administration of the educational statutory licence and the government copying provisions. For other sectors, such as business, the system remained voluntary.

The Tribunal has thus principally determined matters concerned with the public performance of musical works and recordings and the copying of literary works. The main applicants, APRA, CAL and PPCA, have mostly asked the Tribunal to determine, and vary, base remuneration rates for the public performance of music, or copying of works by relevant industries, government or private service providers. Between 2007 and 2010, a third collecting

22 Original subscribers comprised eight musical importers and publishers controlling the sale of sheet music in Australia and the United Kingdom music publishers Chappell & Co.

23 Now APRA-AMCO (Australasian Mechanical Copyright Owners' Society).

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

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

society, the Phonographic Performance Company of Australia Limited²⁶ made 80% of applications heard by the Tribunal (that is, four out of the five applications; APRA was the other applicant, in a matter heard in 2009).²⁷

APRA and PPCA have concentrated on securing the determination of minimum performance fees payable by commercial users, the television, radio, entertainment and fitness industries.²⁸ CAL has focused on the determination of rates payable for copying by government and the educational sector under government and educational statutory licences.

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

1. The determination of rates has the effect of creating an irreducible base rate subject to periodic increase at the insistence of collecting societies. The annual revenues of APRA – and CAL in particular – increase substantially and progressively after the Tribunal determinations of base rates.
2. The Tribunal principally determines or ratifies licence fees, which means applicants are almost exclusively collecting societies.
3. Tribunal determinations have played a critical role in the progressive increase in collecting society revenues – APRA and PPCA have relied on determinations to secure payments from broadcasters and entertainment and fitness venues, while in the last 15 years CAL has secured exponential revenue growth by collecting for copying by schools and universities at Tribunal-determined rates (see Section 2.4.2 below); Screenrights has also relied on Tribunal determinations to obtain remuneration for audiovisual copying.
4. The Tribunal has played a primary role in legitimising collecting societies and excluding from debate the consideration of collective rights administration within competition policy principles²⁹.

By, in effect, endorsing the purpose and practices of Australian collecting societies and helping to regulate revenue collection, the Copyright Tribunal has proved a boon to the societies. However, in the period of growth that began in the 1980s, collecting societies also

26 Established in 1969 to collect fees for the public performance of sound recordings (and now also music videos).

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

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

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

provoked considerable criticism and hostility from the industries and sectors from which they received most of their revenues. Two factors, from the 1990s onward have shaped attitudes toward collecting societies in Australia.

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

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

Statutory licence

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

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

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

It is worth pointing out that the UK Copyright Tribunal also arbitrates on the terms and conditions of a licence when the two sides cannot reach agreement themselves. However – and in stark contrast with Australia – only users and not collecting societies can take matters

to the Tribunal in the UK. This is intended to act as a check against the imbalance of power that is usually present in negotiations between collecting societies and users.

Government attitudes to collective administration

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

As explained above, collecting societies solve problems of market failure and there is a widespread view that collective rights administration, subject to regulation, facilitates rather than restricts market activity. However, in Australia, some policymakers, and the federal competition authority,³⁰ were cautious about the market failure argument, and wary too of the partial exemption from anti-monopoly provisions granted to collecting societies by the competition law.³¹ Others, such as the Attorney General's Department (the administrator of the copyright legislation), have always insisted on the primacy of rights protection and enforcement.³²

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

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

APRA (and PPCA, which attracted no criticism³³) launched national campaigns to ensure that small businesses which played recorded or broadcast music on their premises signed licence agreements that permitted them to do so. The prospective licensees protested about what they perceived as APRA's threatening behaviour.

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

30 The Australian Competition and Consumer Commission, created in 1995 by merging the previous authorities, the Australian Trade Practices Commission and Prices Surveillance Authority.

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

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

33 PPCA apparently adopted a more consultative and explanatory, and less coercive, approach than APRA.

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

Some witnesses supported the recommendation of a prior report³⁴ for the creation of the office of Copyright Ombudsman, and most supported the establishment of an alternate dispute resolution process for settling disputes between collecting societies and licensees. A representative of the Interdepartmental Committee (IDC)³⁵ advised support of 'light touch self-regulation' by collecting societies, in the shape of a voluntary code of conduct for collecting societies.

The parliamentary committee reported in 1998³⁶, making six recommendations, half of which concerned dispute resolution and governance. The report (without elaborating reasons) did not adopt the recommendation to create the office of Copyright Ombudsman.

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

Application of competition policy

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

The Government subsequently amended the copyright legislation to provide that:

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

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

34 'Review of Australian Copyright Collecting Societies'. A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson (1995).

35 Including representatives of Treasury, the Attorney General's Department and the Department of Communications and the Arts.

36 Don't Stop the Music: A Report of the Inquiry into Copyright Music and Small Business, Cth of Australia 1998.

2.2. Characteristics of the code

In 2002, further to the recommendation of the Don't Stop the Music report, eight Australian collecting societies adopted a voluntary code of conduct for copyright collecting societies.³⁷ The code established minimum standards for obligations, disclosure and reporting by collecting societies to members and licensees. Societies are required to ensure that:

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

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

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

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

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

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

37 APRA, Australasian Mechanical Copyright Owners Limited (AMCOS), PPCA, CAL, Screenrights, Viscopy Limited, Australian Writers' Guild Authorship Collecting Society Limited (AWGAcollecting society), Australian Screen Directors Authorship Collecting Society Limited (ASDAcollecting society).

Enforcement and review of the code

In 2003, the collecting societies appointed The Hon James Burchett QC³⁸ to undertake the first review of the societies' compliance with the code. He began his review by advertising requests for submissions from members, licensees, trade associations, the ABC (Australian Broadcasting Corporation) and the collecting societies themselves. Mr Burchett found that collecting societies observed the obligation to 'treat members fairly, honestly, impartially and courteously', and also took their other obligations seriously. Licences were drafted in plain English. Societies made positive efforts to publicise the nature and purpose of their activities. In total, the review found that societies had achieved significant compliance with the code.

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

2.3. Collecting society performance before and after the code

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

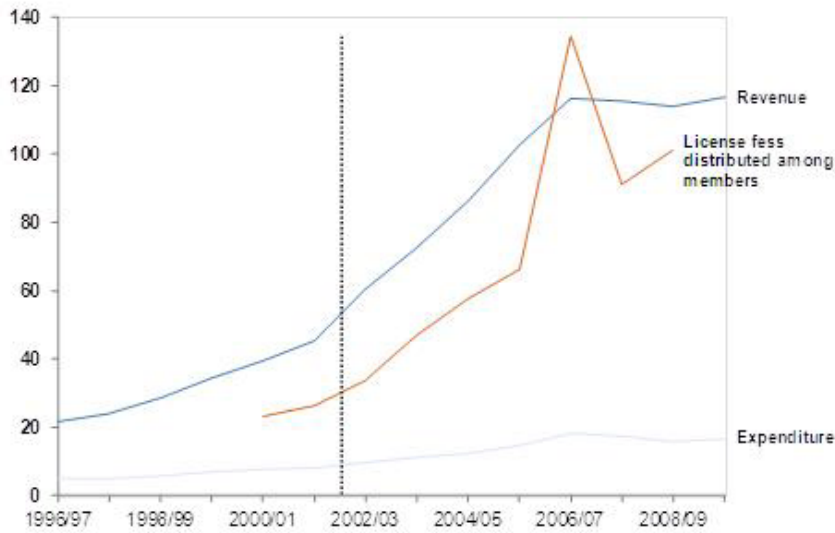
As is shown in Figure 2.1, there has been a steady increase in CAL's revenue between 1997 and 2007. There is a slight decrease in 2008, but revenue seems to have recovered its upward trend again³⁹. Expenditure has remained more or less stable. This increase in revenue seems to come from a constant increase in the fees charged to users (e.g. schools), which could go towards explaining the tensions between the school sector (its biggest contributor) and CAL. According to Delia Brown, National Copyright Director of the Standing Council on School Education and Early Childhood Development (SCSEECD), the fees charged to the school sector have increased by 500% over the last 10 years. Indeed, this is one of the main reasons why her unit (the National Copyright Unit within SCSEECD) was created in the first place.

Figure 2.1 also shows the total amount of money distributed among member and non members ('licence fees distributed') by CAL. There is a spike in 2007 due to a one-off 'accelerated distribution payment' programme implemented that year. According to CAL, this was 'intended to reduce the overall Trust Fund balance'.

38 Retired judge of the Federal Court and former President of the Copyright Tribunal.

39 The figures are shown in Australian dollars (AUD), and have not been deflated.

Figure 2.1 CAL: Revenue, expenditure and licence fees 1996-2010 (AUD millions)

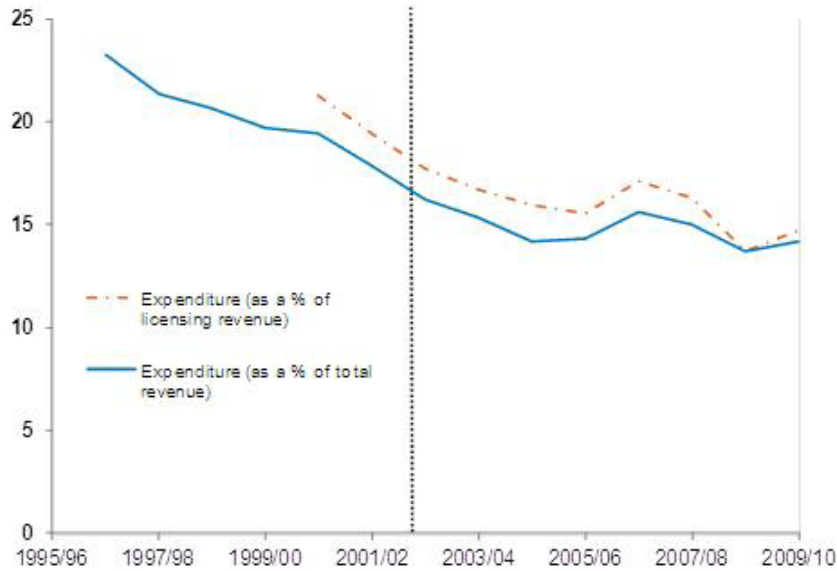


Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012)

Between 1996 and 2005 there is a declining trend in the expenditure over revenue ratio, which implies an increase in efficiency (see Figure 2.2). This downward trend can be observed before the implementation of the code of conduct.

After 2005, the ratio of expenditure over revenue has followed a less clear path. Another measure of productivity is given by net income (defined as revenue minus expenditure) per employee. Figure 2.3 CAL: Net Income per Employee, 1996-2009 (%). Source: CAL Annual reports 2004/05 – 2010/11. BOP Consulting (2012) shows an upward trend between 2000 and 2006 of the net income generated by employees. There is a slight change in this trend afterwards; however no more information is available in the Annual Reports for more recent years.

Figure 2.2 CAL: Expenditure as a proportion of revenues, 1996-2009 (%)



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

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

Figure 2.3 CAL: Net Income per Employee, 1996-2009 (%)



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

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

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

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

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

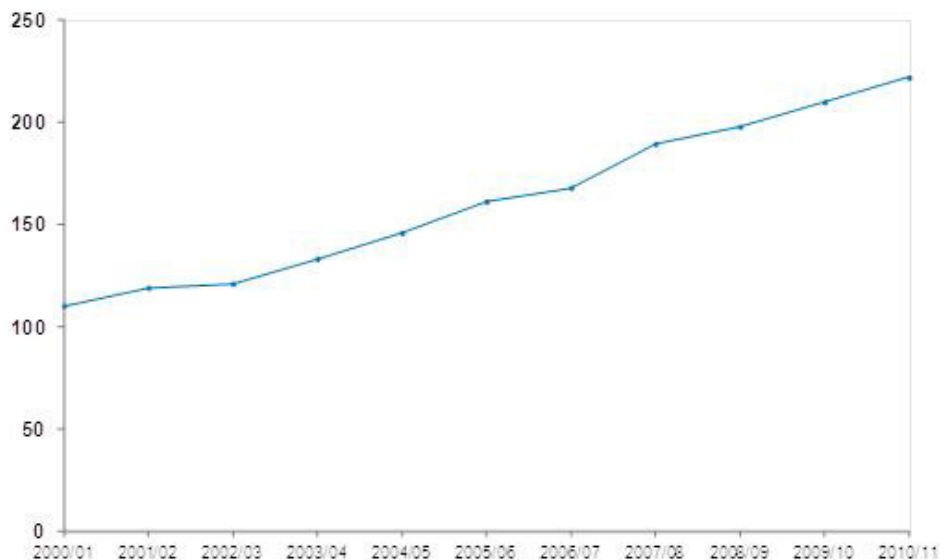
The second major change made by CAL relates to digital copying. In 2002, the Tribunal declined to fix a rate for digital copying as there was insufficient evidence for it to make a decision, even on an interim basis (*Copyright Agency Ltd v Queensland Department of Education and Others* (2002) 54 IPR 19). In 2004, after two years of discussion and no sign of an agreement between the parties as to an appropriate digital copying rate, the schools offered a voluntary payment of \$6 million for 2001 - 2004 inclusive as full and final payment for electronic use in schools. The schools also said that they would voluntarily pay CAL 85 cents per FTE student for 2005 and 85 cents per FTE student plus CPI in subsequent years for electronic use. CAL accepted the back payment of \$6 million and the rate offered by schools of 85 cents per FTE student plus CPI in 2006, but reserved its rights to seek higher remuneration as CAL did not consider the amount paid for the period 2001 – 2004 or offered for 2005-2006 to be fair and equitable.

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

APRA

There is less information available about APRA, the Australian music collecting society. Therefore, it is only possible to build a time series for their revenue (total amount of licence fees collected from their users) (see Figure 2.4). Here, revenue also shows an upward trend: between 2000/01 and 2009/10 APRA's revenue increased by 90%. In contrast, CAL's revenue increased by 195% over the same period. This provides further evidence that the CAL's financial results are largely due to the constant increases in tariffs over the period.

Figure 2.4 APRA: Revenue 2000-2010 (AUD millions)



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

2.4. Benefits and criticisms

Ten years into the code, it is possible to identify some benefits but more criticisms of the Australian code of conduct. As has already been established in the preceding section, the available financial information demonstrates an upward trend in terms of revenue and efficiency (calculated as expenditure as a proportion of revenue) that was present before the code was implemented. In addition, this trend has co-existed with the fact that licence fees have been progressively increasing over the last 10 years. Furthermore, it should be remembered that these increases in efficiency and revenues have only benefitted members, not users.

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

2.4.1. Benefits

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

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

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

2.4.2. Criticisms

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

1. Omissions and weaknesses

In 2007, in a submission (one of 20) to the ACCC for its draft Guide to Copyright Licensing and collecting societies, the NSW Department of Education and Training provided perhaps the most cogent summary of the deficiencies of the code.⁴⁰

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

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

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

40 Submission of the National Copyright Director, Ministerial Council on Employment, Education, Training and Youth Affairs for NSW Department of Education and Training.

to the NSW submission – would instead only engage in mediation with individuals and not a collective, such as a ministerial copyright taskforce.⁴¹

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

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

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

2. Dispute resolution

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

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

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

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

questionable as to whether the code has ensured that collecting societies have set 'fair and reasonable' licence fees (which is one of the requirements of the code).

3. Behavioural effect

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

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

4. External structural factors

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

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

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

3. EU developments regarding collecting societies

3.1. Overview

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

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

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

Regulation and Supervision

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

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

- internal market (DG Market)
 - industry, innovation and creative industries (DG Information Society and Media)
-

- culture (DG Education and Culture)
- competition (DG Competition)

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

Background

From the 1990s onwards the EU adopted several Directives to harmonise copyright. Although these affected collective licensing, the Commission made few proposals as to how national societies might operate, partly because many societies had a cultural remit and were therefore partly outside the EU’s competence, and partly because the Commission felt that its competition rules were sufficient to ensure fair market behaviour.

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

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

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

The Commission also raised the possibility of ‘guidelines’, saying it stood ready to assist collecting societies in formulating codes of conduct (Tilman Lüder, EC, Fordham Conference, 2005). The result was a Recommendation on the Collective Cross-border Management of

Copyright and Related Rights for Legitimate Online Music Services (12 October 2005), favouring a mix of options (2) and (3) above.

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

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

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

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

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

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

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

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

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

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

Main themes included in different Directorates' publications

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

Governance and administration

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

Members

- flexibility of contracts (mandates) between right holders and collecting societies to ensure a member's ability to manage her repertoire.
 - service level agreements
 - member representation. Most collecting societies are governed to some extent by their right-holders as members but the extent to which an individual right-holder is able to influence the collecting societies seems variable and hence, it is a Directorate concern.
-

- treatment of national and global repertoire. Traditionally, collecting societies use reciprocal agreements to get access to foreign repertoires. However, attempts by collecting societies to protect their own national repertoires could lead to the avoidance of reciprocal agreements that might threaten that protection – seeing these as effectively a competitive threat. For the EU, this is a policy conundrum which is split between the desire to promote competition and the desire to protect cultural diversity in the face of Anglo-American satellite and online services. Hence, this is a subject that is constantly being discussed but for which there is still not a clear position.
- distribution of royalties to right holders in other countries
- ability of a right-holder to negotiate their own tariffs

Users

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

3.2. Case Studies

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

France

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

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

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

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

Germany

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

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

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

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

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

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

Other countries

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

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

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

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

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

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

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

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

Table 3.1 summarises the regulatory initiatives in the EU countries analysed in this section highlighting the differences between establishment, operation and activity and dispute resolution.

Table 3.1 Collecting societies Legal Framework in the EU

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

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

4. A code of conduct for the UK

4.1. Moves towards a code

In recent years, there has been increasing recognition from collecting societies and their members and users in the UK that a Code of Conduct is needed. For instance, this was confirmed by many collecting societies in the Roundtable on codes of conduct organised by the IPO in January 2012⁴². At this meeting, representatives of ten collecting societies expressed that:

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

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

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

The principles contain minimum standards that can be used by BCC members to develop their individual codes of conduct. The BCC and its membership have also been discussing the possibility of including an external arbitration mechanism and independent review process as part of the agreed principles; in-principle agreement was established at the Codes of Conduct Ministerial Roundtable held in March 2012.⁴³

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

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

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

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

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

Table 4.1 shows the three different initiatives implemented by PRS for Music, PPL and the BCC and compares them with UK government proposed minimum standards and the Australian code of conduct.

Table 4.1 Codes of conduct in the UK

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

Tariffs	States that wherever possible, <i>PRS for Music</i> tariffs are set in consultation with trade bodies and representative associations, but does not establish any obligation to do so.	Any change in tariffs will be consulted with trade associations and other representative bodies.	States that code of conduct should contain an explanation on how members and licensees will be consulted regarding changes in tariffs.	Provide information on tariffs using a uniform format.	None
Complaints and dispute resolution	<ul style="list-style-type: none"> - Complaints should be addressed to <i>PRS for Music</i> Customer Relations Manager. - If member/licensees is not satisfied with decision she can resubmit complaint, but this time addressing the Managing Director - Members and licensees can refer to the <i>Ombudsman for PRS for Music</i> if they feel that they are not satisfied with the outcome of the complaints procedure 	Not part of the code, but PPL has an Independent Complaints Review Service (Blackstone Chambers reviews complaints)	<ul style="list-style-type: none"> - Suggests that each stage of complaint procedure should be clearly explained. - Recently, it has been discussed that an <i>ombudsman</i> could also be included. 	<ul style="list-style-type: none"> - Collecting societies should adopt and publicise procedures for dealing with complaints, including: <ul style="list-style-type: none"> • define categories for complaints • ensure relevant information is available and understandable • define who is responsible of handling the complaint and the timeframe - Government also proposes to appoint a <i>ombudsman</i> to be a final arbiter on complaints between the collecting society and its members and licensees 	<ul style="list-style-type: none"> - Each collecting society will develop and publicise procedures for: <ul style="list-style-type: none"> • dealing with complaints from members and licensees; and • resolving disputes. - These procedures should comply with the requirements of Australian Standard ISO 10002-2006 – Customer Satisfaction.
Compliance	None	None	Recently, it has been discussed that an independent review process could also be included.	<ul style="list-style-type: none"> - The role of ombudsman could include monitoring and reviewing performance of collecting societies against the minimum standards set by a code. - Additional mechanisms to ensure compliance are subject to consultation and analysis (e.g. penalties) 	<p>Even though the code is voluntary, it has a compliance mechanism (Code Reviewer). However, the independence of the Code Reviewer has been strongly questioned.</p>
Code review	No systematic process	No systematic process			It establishes a timetable for code review. For that purpose the code invites written submissions on the operation of the code.

Source: BOP Consulting (2012)

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

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

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

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

1. Duplication of liabilities and awareness

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

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

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

Furthermore, when PPL approaches a business that has been playing music in its establishment and find that they do not have a 'PPL licence' (and may or may not have a 'PRS licence') they apply surcharges and penalties. PPL states on its website that 'when a business is first found to be playing recorded music without a PPL licence (or continuing to play recorded music without renewing a PPL licence), PPL is legally entitled to charge for all recorded music use dating back to when the recorded music was first played (up to a maximum of six years)⁴⁴. Additionally, it also states that, 'in certain cases, PPL is entitled to add a surcharge of an additional 50% of the licence fee where businesses play recorded music in public without first obtaining (or renewing) their PPL licence'. This means, in practice, that the surcharge can be applied as soon as a business is just one day late in paying the renewal fee.

PRS for Music also applies surcharges but these are less severe in comparison with PPL. The 'higher royalty rate' is the standard rate plus 50% and applies if the music user has not obtained a licence before starting to play music in their premises or at their event'. However, this surcharge only applies to the first year of the licence⁴⁵.

This all means that a business could end up paying a high level of surcharges and penalties if it was unaware of the existence of one of those two collecting societies (or if it has a minimal delay in payment). These surcharges have been approved by the Copyright Tribunal.

Trade associations accept the fact that their members have to pay both collecting societies. However, they feel that collecting societies have to do a better job in raising awareness on this issue. For instance, Brigid Simmonds -from the British Beer and Pub Association - has expressed her association's concern "that collecting societies could do more to reach out to small businesses regarding their obligations. We as an industry association try to provide this kind of information to our members but the collecting societies themselves need to do more."⁴⁶

Even more convenient for members would be a system similar to the one that exists in France, whereby only one collecting society – either PRS for Music or PPL – collects on behalf of both organisations so that users do not have to deal with two different organisations. This is a system that has been already put in place in the UK in a limited way. Since 2011, community buildings playing recorded music in public have been required to hold a PPL licence as well as a PRS for Music licence (before that date just a PRS for Music licence was needed). For these organisations, PRS for Music has been administering a joint music licence since January 2012, which incorporates charges from both organisations. PRS for Music remains the single point of contact for the joint licence.

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

45 PRS for Music FAQ: <http://www.prsformusic.com/users/businessesandliveevents/musicforbusinesses/Pages/FAQ.aspx#3>

46 Quoted in the online article, 'How should Collecting Societies be Reformed?', Managing Intellectual Property, January 2012, <http://www.managingip.com/Article/2968000/How-should-collecting-societies-be-reformed.html>

Reprographic ('text') collecting societies in the UK have established a different organisational solution but with the same end in mind. In this case CLA (Copyright Licensing Agency Limited) is owned by the Authors' Licensing and collecting society Ltd. (ALCS) and the Publishers' Licensing Society Ltd. (PLS) and performs collective licensing on their behalf.

Regarding issues related to liabilities and awareness, a code of conduct for the UK could help to:

- improve collecting societies efforts to explain to a small business the full extent of their obligations
- reduce the potential frictions and pressure to businesses that could emerge if and when all collecting societies decide to make a thorough assessment of the potential universe of licensees.

However, a code on its own would not effect the joint collection of music licences that would simplify the market for users.

2. Tariffs and scope for negotiation

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

- **Big users (e.g. broadcasters):** The BBC (and other broadcasters) gets to negotiate the value of their blanket licence, which is a five year tariff deal with yearly adjustments for inflation and audience size. They pay royalties to five different collecting societies (PRS for Music, PPL and MCPS for musical works, and to Directors UK and BECS for directors' and authors' rights). Their most efficient dealings are with PRS for Music and PPL which act as a one-stop shop to clear rights (the BBC uses approx. 200,000 different music works a week).
 - **Medium users (e.g. the hospitality sector):** Medium users do have some level of co-ordination with collecting societies, usually through their trade associations. These associations have on occasion referred a tariff to the Copyright Tribunal for adjudication, where they have been unable to reach agreement through discussions with the relevant collecting society (for example, the background music tariffs for the hospitality sector were set in this way – for PRS in 1991, and for PPL in 2009 – and have subsequently been adjusted annually based on inflation and usage indicators). However users, including trade associations, report that the Copyright Tribunal is expensive to access; this means that in practice such users are often dependent on the willingness of the collecting society to negotiate.
 - **Small users (e.g. offices and warehouses):** Small users that do not belong to any trade association do not have any degree of negotiation or coordination with collecting societies. As explained above, they are generally aware of PRS for Music's existence mostly because due to PRS for Music's business strategy, which is based on a comprehensive identification of all businesses likely to be music users.
-

Regarding issues related to tariffs and scope for negotiation, a code of conduct for the UK could help to:

- improve the ability of some users to negotiate fees by improving their access to the information about how the fees are set
- enforce all collecting societies to negotiate/coordinate with trade associations in regards of new tariffs, timetables, etc.

However, the ability to negotiate is limited. Although the licensee can refer to the Copyright Tribunal to adjudicate on the price, terms and conditions of a tariff, this does not happen frequently (e.g. the PRS for Music tariff for the hospitality sector was established in 1991).

3. Transparency

Transparency is highly related to points 1 and 2. There is a high degree of heterogeneity in the information made available for users and members by collecting societies. For some time *PRS for Music* has had a very accessible website, making it possible to access information on the different type of licensees and related tariff structures. This has historically not been the case for PPL, although their recently overhauled website shows a marked improvement in this respect.

However, as has been expressed by a representative of the National Federation of Hairdressers (NFH) it is not just a matter of making information available but also a matter of making a bigger effort to simplify the complexity of, for instance, the tariff structure. The assumption here is that if a user feels less alienated from this economy and how it operates, the more willing she will be to abide by it.

Regarding transparency, a code of conduct for the UK could help to:

- standardise information and make it publicly available for users and members, but also for policy makers.
- increase collecting societies' efforts to transmit in a comprehensive manner the complex nature of their dealings to users and members.

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

4. Abuse of dominant position

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

The EU analyses collecting societies under competition law and tests for the abuse of dominant position. However, collecting societies’ idiosyncratic legal status and the cultural role that they play in many member states make competition analysis more complex. The UK seems to be more inclined to treat collecting societies as an unregulated monopoly (or regulated through a code of conduct) rather than to promote more competition (even though the 1998 Competition Law applies to IP Rights). This is because the UK recognises the benefits of monopoly providers and has sought to address potential concerns through the minimum standards proposed.

Regarding issues of dominant position, a code of conduct for the UK would have:

- no effect as market position would remain unchanged.

5. Repertoire and mandate

Other concerns in the UK come from the ability of the actual collective management system to adapt to technological change which opens up new possibilities such as mass digitisation, or new research techniques like text and data mining for the purposes of medical research⁴⁷. According to the British Library ‘the main barrier to the mass digitisation of material not born digital is the fragmentation of rights for pre-digital material’. They estimate that 43% of potential ‘in copyright’ work in the Library are orphan works⁴⁸.

Regarding issues of repertoire and mandate, a code of conduct for the UK would have:

- no direct effect as these issues would fall outside of the scope of a code of conduct.

However, the UK government has made it clear that having a code of conduct in place would be a pre-condition for a collecting society being able to successfully apply to operate an Extended Collective Licensing scheme.

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

48 Electronic clearance of Orphan Works significantly accelerates mass digitisation

5. Summary and conclusions

Before drawing some conclusions regarding the likely costs and benefits of a code of conduct for UK collecting societies, it is worth summarising the research findings.

Code of conduct in Australia

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

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

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

Criticisms of the code can be grouped into four main categories:

- Omissions and weaknesses: (1) it is voluntary (2) does not prescribe minimum standards of conduct (3) permits collecting societies to appoint the Code Reviewer and (4) does not facilitate independent criticism;
 - Dispute-resolution: most code-related dispute resolution is initiated by complaints from members of collecting societies not licensees. Licensees have reported that societies will only consider the complaints of individuals, excluding bodies such as schools or the hospitality industry;
 - Behavioural effect: licensees have indicated that the code has not substantively changed behaviour. APRA and CAL, in particular, continue to withhold information and try to secure agreement on fees by threatening expensive Tribunal proceedings; External factors: the code has helped to regularise the reporting and information practices of societies, but has done nothing to reduce the distrust between societies and licensees or to lessen their disparity in bargaining power.
-

Regulation of collecting societies in the European Union

The analysis of European developments leads to the following conclusions:

- There is wide disparity between national attitudes and behaviour towards CMOs.
- Collecting societies differ in their sense of fiduciary responsibility to members. In some cases, there has been a lack of good management.
- Many European countries have one collecting society which is significantly larger than the rest and which has assumed national cultural and social powers, these organisations are arguably less amenable to external regulation as a result (which is very different to the UK case).
- Some countries, notably Germany, France and (latterly) Belgium, have robust regulations that go far beyond a code of conduct.
- There is a European-wide move towards stricter regulation although some sectors are apprehensive about its effect on commercial flexibility.
- Voluntary codes of conduct are seen as having marginal benefits except in reassuring users.
- The priority is to re-balance the needs of right holders and users to maximise the potential of online, multi-territory distribution.
- For this to happen, Europe has to ensure right holders and users can choose collecting societies on the basis of transparent, comparable information.

Overall conclusions from the comparative analysis

- In undertaking a comparative study of Australia and an overview of European-wide policy and member state examples, it is clear that:
 - there are a number of different ways in which collecting societies can be regulated, principally regulation by statute and regulation by an appointed body – as well as regulation by a code of conduct
 - there are very significant endogenous variations in the mandate, governance structure, culture and operations of different collecting societies in different jurisdictions
 - wider legal traditions, policy priorities and – particularly – regulatory mechanisms (specifically the legal model of collective licensing in a given jurisdiction and the mechanism for tariff setting) are important exogenous factors that shape the outcomes of collecting societies' performance, particularly as viewed by users.
-

The result is that it is not straightforward to attempt to extrapolate how the change in one variable (i.e. the introduction of a code of conduct) will play out in one territory having observed how it has functioned in another, as there are many other confounding factors that will have a bearing on the outcome and which will interact differently in different territories. However, three conclusions can be drawn from the examples reviewed for the study.

- There is insufficient evidence to assert a determining link between the degree or type of regulation and the performance of collecting societies – viewed through the lens of their returns to members, for example, there are instances where more highly regulated collecting societies perform worse than self regulated collecting societies. However the efficiency and size of the distributions made to members are not the only indicators by which to assess the performance of collecting societies, although they are the ones that the research literature – and collecting societies themselves – have traditionally focused upon.
- The most numerous and fierce criticisms of collecting societies stem from users not members – the potential for ‘principal-agent’ problems and for collecting societies to extract ‘managerial rents’ from members now seems relatively low, beyond specific reported cases of malpractice. On the contrary, criticisms of collecting societies by users remain relatively ubiquitous, although these are often not pursued through collecting societies’ own channels as users have such little faith in gaining redress through these routes. Any consideration of how regulation can improve the performance of collecting societies thus needs to focus far more on addressing the concerns of users rather than members.
- Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies per se.

A code of conduct for the UK

Looking back at the potential benefits of a code of conduct that were outlined in the IPO Impact Assessment (Figure 1 in Section 1 above), it can be concluded that a voluntary code of conduct will increase transparency and this is likely to have some small benefits for members and users. However, in the light of the Australian case it seems that other mooted benefits of a code are either minor or non-existent in the case of an entirely voluntary model, as summarised below.

Members

- Member complaints – the evidence from Australia suggests that a voluntary code of conduct has little effect on member complaints as members have sufficient leverage over collecting societies’ governance and operations already (i.e. they do not tend to complain)⁴⁹. This is in contrast with the case of collecting societies in Spain

49 This was evidenced by the fact that none of the six members targeted for interview in Australia wanted to participate in the research as each felt that their point of view was explicitly aligned with the collecting societies that represented them.

and Belgium which shows that mismanagement of and malpractices with rights holders' revenues by collecting societies may still occur – but as both instances relate to criminal charges, once again, this type of behaviour is unlikely to be curbed by the establishment of the much weaker behavioural deterrent of a code of conduct. We should stress that all indicators point to UK collecting societies having strong governance mechanisms, good member relations, and no recent history of malpractice.

- More collections for members – we have found no evidence that a code of conduct would directly result in any increase in transactions. Any distinction that might be made here between the potentially different affects that a voluntary or mandatory code might have seem unlikely as increases in collections seem to be instead driven by (i) technological change (digital technology is creating more rights to be handled by collecting societies) and (ii) more zealous patrolling by collecting societies of the potential users of the rights that they manage. Neither of these are directly influenced by whether any code of conduct is voluntary or mandatory.

Collecting Societies

- Greater efficiency – the comparative analysis of the Australian case provides little evidence that a voluntary code of conduct has an effect on efficiency. The apparent increases in efficiency shown in the Australian case are better explained by the twin effects of economies of scale and tariff increases. Secondary evidence, however, does show that collecting societies with strong internal governance mechanisms can achieve greater results in terms of efficiency in the service they provide to their members. A statutory code of conduct, therefore, could serve as a mechanism to increase transparency and governance for those collecting societies with less strong internal mechanisms. This in turn could create greater efficiency in the terms described here.
- Increasing revenues – again, while it appears that collecting societies' revenues are growing, they are much more likely to be driven by increases in the volume of rights traded and by the ability to set new tariffs for new rights than by an expansion in transactions driven simply by a better informed marketplace.

Users

- Fewer complaints – evidence suggests that users direct more complaints through government, civil society organisations and industry trade bodies than through collecting societies. Consultation with industry trade bodies for this study suggests that this is because users feel that their bargaining position is very weak. As complaints to government and civil society organisations have been outside the scope of this research, it is not possible here to state what effect a code of conduct may or may not have on the level of these complaints. There is some evidence in the UK regarding to user complaints to collecting societies. After the launch of their code of practice in 2009, PRS reported an 8% reduction in the number of complaints from licensees in the first year after its introduction, albeit only representing a fall of 17 complaints in total. Equally, at the same time as establishing their code of practice, PRS also instigated a new complaints procedure with a three stage tracking system.
-

As this suggests, the PRS code of practice was one factor among others in improving PRS' relations with users, and licensees consulted for this study reported that these factors together were an expression of a more fundamental and progressive cultural and organisational change within the collecting society. The PRS example suggests that a code of conduct in isolation is unlikely to make a difference to user complaints, but it may make some contribution as part of package of measures aimed at improving the service that collecting societies provide to users.

- Greater redress – the Australian case is very clear on this: a code of conduct on its own does not provide greater redress. What is additionally required is dispute resolution that is independent and inexpensive – this could be designed into the operation of a UK code of conduct.
- Lower charges – there is zero evidence that this is a likely outcome from adopting a code of conduct as the ability to set and enforce tariffs remains largely untouched within codes of conduct (at least within any that have been reviewed for this study).

The international comparative evidence documented in this report indicates, therefore, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria – codes are ambiguous in tone and mechanisms that require compliance with the minimum standards stipulated in a code are not always established and if they are, are rarely independent. Holding collecting societies to account is therefore difficult if the principal regulatory mechanism that exists is a voluntary code of conduct.

However, a statutory code of conduct for the UK, with independent review and enforcement, is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and, in turn, strengthening confidence in the system. For collecting societies that currently lack strong internal governance mechanisms, it may also help to increase efficiencies in terms of distributions to members relative to costs (although it is not clear whether there are collecting societies in the UK that would still benefit from this, i.e. they may well all have strong existing internal governance mechanisms).

Possible improvements in distributions to members aside, there seems to be fewer net economic gains or losses associated with the likely improvements that would arise through the adoption of even a statutory code of conduct. This is because the underlying structural characteristics of the market (tariff setting capability and bargaining power of each agent, efficacy and cost of dispute/arbitration procedures, and the simple confusion for users produced by the profusion of collecting societies and the profusion of rights⁵⁰) would largely remain untouched by a code – and these are the factors that would actually drive changes in costs and benefits.

50 As an indication of the current complexity and confusion surrounding rights, one year after introducing their code of practice, PRS surveyed their licensees and the majority (60%) still did not 'fully understand the role of PRS and MCPS' – let alone how the rights managed by PRS/MCPS interact with those managed by PPL (Harris Interactive survey of 1,200 businesses, cited in PRS' submission to the Hargreaves Review, at: <http://www.prsformusic.com/aboutus/press/latestpressreleases/Documents/PRS%20for%20Music%20Response%20to%20Hargreaves%20IP%20and%20Growth%20Review%20Final.pdf>)

Bibliography

Allendesalazar, R. (2005). 'Collecting Societies: The Usual Suspects', European University Institute, EU Competition Law and Policy Workshop, 2005.

Consumer Focus (2011). 'Competition, Copyright and Collective Rights Management. A consultation on growth and innovation in the creative and digital technology industries'. January, 2011.

Gervais, D. (ed) (2010). 'Collective Management of Copyright and Related Rights'. Klumer Law International.

Handke, C. and Towse, R. (2007). 'Regulating Copyright Collecting Societies: Current Policy In Europe'. Society for Economic Research on Copyright Issues (SERCI) Annual Congress 2007 at Humboldt-Universität zu Berlin/Centre for British Studies, 12-13 July 2007.

Handke, C. and Towse, R. (2008). 'Economics of Copyright Collecting Societies'. International Review of Intellectual Property and Competition Law, Vol. 38, No.8, pp. 937-957, 2007. Available at SSRN: <http://ssrn.com/abstract=1159085> or doi:10.2139/ssrn.1159085

IFFRO (2009). 'Overview of models of operation of RROs under national exceptions and limitations regarding educational activities'.

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

KEA (2006) 'The Collective Management of Rights In Europe. The Quest for Efficiency' (2006). Report commissioned by the European Parliament.

Kretschmer, M. (2007). 'Access and Reward in the Information Society: Regulating the Collective Management of Copyright' <http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>, (Access 26/10.12, 14:40).

Rochelandet, F. (2003) 'Are copyright collecting societies efficient? An Evaluation of Collective Administration of Copyright in Europe'. The economics of copyright: developments in research and analysis edited by Wendy J. Gordon, Richard Watt. Chapter 10. Edward Elgar Publishing

PwC (2011). 'An economic analysis of copyright, secondary copyright and collective licensing'. March, 2011. Report commissioned by the Copyright Licensing Agency Ltd. (CLA).

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

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Minicom: 0300 0200 015
Fax: 01633 817 777

For copies in alternative formats please
contact our Information Centre.

**When you no longer need this booklet,
please recycle it.**

DPS/IP Research - 12.12



INVESTOR IN PEOPLE



The Government Standard