

CHANGING TIDES OF COLLECTIVE LICENSING IN CHINA

*Ye Jiang**

I. AN OVERVIEW OF COPYRIGHT REFORM IN CHINA	730
II. COLLECTIVE RIGHTS MANAGEMENT ORGANIZATIONS IN CHINA	732
A. Introduction to the Extended Collective License System	733
1. Extended Collective License v. Compulsory License	733
2. Wanting Qu v. Daimo Lee: You Exist In My Song.....	733
3. Users Access to an Adequate Repertoire of Copyrighted Works.....	734
B. Implementing Extended Collective License System.....	736
1. Who Can Manage The Extended Collective License System in China?	737
2. How Can CMOs Manage Extended Collective License System in China?	738
a. CAVCA Makes the “Pie” for Rights holders.....	738
b. Relations Between Chinese CMOs and Foreign Authors ...	740
III. CALL FOR REFORM IN A DIGITAL AGE	741
A. Transparent Governance of CMOs in China	742
1. An Umbrella CMO as the Supply Apparatus for Subset CMOs.....	742
2. Regulate CMOs Under Principles of Company Law.....	743
B. Dispute Resolution Mechanisms for CMOs in China.....	744
1. Rate Court for Flat Rate Dispute	744
2. Arbitration Board for Royalty Claims	746
C. CMOs As Royalty Managing Instruments	747
1. Pros and Cons of Collective Rights Management	747
2. Collective Monitoring and Enforcing in a Digital Era.....	749
CLOSING REMARKS	750

* The author would like to thank Professor Sean A. Pager, Professor Bruce W. Bean and Professor Adam Candeub for their valuable comments and insights on an earlier draft. The author also wants to thank Professor Jennifer Carter-Johnson, Professor Michael Epstein, Professor Dennis Greene, Professor Todd Brabec, Professor Eric Priest, Professor Sean O'Connor, Professor Ivan Reidel, Professor Guy Pessach, Professor Philippa Loengard, Professor Jonathan Band, Professor J. Joel Baloyi, Professor Jon M. Garon, Professor Mark F. Schultz, Nnamdi Ezera, Susan Cleary, Sandra Aistars, Ana Santos, Kate Darling and other attendants of the 2013 IP Creative Upstarts Conference for their supports on the development of this article. The author also wants to express a special appreciation to the editors of the *Michigan State International Law Review* for their hard work. All errors are my own.

I. AN OVERVIEW OF COPYRIGHT REFORM IN CHINA

In recent decades, the world has witnessed the explosive growth of China. Apart from its phenomenal economic achievement, however, China has long been criticized as the brazen center of pirated goods, which has little respect for intellectual property rights. Under international and domestic pressures, the National People's Congress of China (NPC) has modified China's Copyright Act several times since its first enactment in 1986.¹ The latest revision of China Copyright Act (2012) is under way this year.² The National People's Congress of China (NPC) also has preliminarily scheduled ratification of the new amendment at its 2013 Annual Meeting,³ the first meeting ever held after the transition to the new Communist Party (CCP) leadership in November 2012.

On March 31, 2012, the National Copyright Administration (NCA) published the first draft of Revised Provisions to the Copyright Act of China (2012) for public review.⁴ The new amendment soon became a target for stakeholders, especially musicians and record labels.⁵ The most controversial provision of the new amendment is section 60:

Collective rights management organizations may apply to the Copyright Administration of the State Council for extended collective management of copyright representing the *entire body* of rights holders across the nation if the collective rights management organization has acquired authorizations from a *substantial number* of rights holders across the

1. Liu Binjie, Chairman, Nat'l Copyright Admin. at the Eleventh Nat'l People's Cong. Standing Comm. 13th Meeting: On the Amendment of the Copyright Law of the People's Republic of China (Feb. 24, 2010), in NAT'L PEOPLE'S CONG. GAZ., available at http://www.npc.gov.cn/wxzl/gongbao/2010-05/10/content_1580444.htm.

2. Press Release, First Notice of Inquiries, NAT'L COPYRIGHT ADMIN. (NCAC), <http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html> (last visited Dec. 27, 2012). In the First Notice of Inquiries, National Copyright Administration received over 1,600 postal letters from experts, musicians, business men and other citizens. More than one million pertinent comments could be found over the Internet about the new amendment. See National Copyright Administration, *National Copyright Administration Annual Report of the Third Copyright Reform in China*, CENT. ADMIN. PRESS AND PUBL'N (Nov. 16, 2012), <http://www.gapp.gov.cn/govpublic/96/116997.shtml>.

3. Zhang Hong, *The State Council Is Estimated to Review The Third Draft of Revised Provisions of Copyright Act In the End of This Year*, PEOPLE NEWS (Nov. 01, 2012, 2:59 PM), <http://legal.people.com.cn/n/2012/1101/c42510-19455887.html>.

4. See *supra* note 2.

5. SINA Entertainment, *Copyright Amendment Bill Causes Criticisms: Gao Xiaosong and Song Ke Opposed on Weibo*, SINA NEWS (Apr. 3, 2012, 12:16 AM), <http://ent.sina.com.cn/y/n/2012-04-05/12163597772.shtml>; *Record Labels Association Declares that Section 60 and 70 of the Copyright Amendment Bill Must Be Deleted*, CHINA NEWS (Apr. 28, 2012, 8:49 AM), <http://www.chinanews.com/cul/2012/04-28/3853299.shtml>; *Copyright Amendment Bill Caught in Fire of Musicians*, NAN FANG MEDIA (Apr. 6, 2012, 8:34 AM), <http://www.chinanews.com/cul/2012/04-28/3853299.shtml>.

nation, other than the individual rights holders announced in a written description *declining* the extended collective management by the collective organization.⁶

Critics of the new amendment claim that this new provision is conspicuously favorable to collective rights management organizations (“CMOs”), who are thus granted an extended collective license to represent *all* rights holders, while depriving the music industry of its exclusive rights to monetize creative works.⁷ Proponents of the new amendment counter that an extended collective license is the optimal resolution for rights clearance of protected works, more specifically for mass licenses to commercial users.⁸ At the same time, rights holders would also benefit from this system in which they are empowered to bargain with the music industry for fair remunerations.⁹ For example, the Music Copyright Society of China (MCSC) has just concluded a landmark Memorandum of Understanding with 32 Chinese TV stations after a two-year negotiation.¹⁰ Thirty-two TV stations eventually agreed to pay a royalty every time they air a song.¹¹

In response to strong public opposition, four months later in July 2012, the framers of the new amendment rephrased section 60 in a second draft, deliberately narrowing the application of an extended collective license to only three fields: radio broadcasts, TV stations and karaoke parlors.¹² In terms of radio broadcast and TV stations, a compulsory license has already been imposed by virtue of Chinese Copyright Act. Thus, an extended collective license is suitable to the creator’s right of remuneration under the compulsory license. Karaoke parlors constitute a big industry in China. In 2011, the annual revenues of karaoke parlors in China rose to \$1.5 billion.¹³ Music content providers share only approximately 0.1 percent of revenues with the karaoke parlors while film content providers share more than 40

0

6. *First Drafted Revised Provisions of Copyright Act*, NCAC, <http://www.ncac.gov.cn/cms/html/309/3502/201203/740608.html> (last visited Dec. 27, 2012) (emphasis added).

7. *See supra* note 5.

8. Wang Ziqiang, *A Summary of the Drafted Revised Provisions of Copyright Act*, GAPP.GOV (Nov. 06, 2012), <http://www.gapp.gov.cn/govpublic/96/116997.shtml>. Wang Ziqiang is the director of the Department of Laws and Polices of the National Administration of Press and Publications. *Id.*

9. Liu Ping, Vice Chairman, Music Copyright Society of China, Speech at the IFRRO-NCA Workshop on Copyright Protection in the Digital Age: Challenges and Solutions of Music, MCSC NEWS (Jan. 17, 2012), <http://morp.mcsc.com.cn/www/caction/detail.php?id=45>.

10. Wang Kang, *MCSC Signed Royalty Payment Contract with 32 TV Stations*, CIP NEWS (Feb. 01, 2012, 11:08 AM), <http://www.cipnews.com.cn/showArticle.asp?ArticleId=22712>.

11. *Id.*

12. *Revised Provisions of Copyright Act, Second Draft*, NCAC. (2012), <http://www.ncac.gov.cn/cms/html/309/3502/201207/759779.html>.

13. *See Infra* note 38.

percent of revenues with cinemas each year.¹⁴ The China Audio Video Copyright Association (CAVCA) was created in 2008 at the request of karaoke parlors to obtain licenses of songs for use in its repertoire.¹⁵ The new draft intends to ratify the market monopoly of CAVCA in the statute and strengthen the bargaining power of CAVCA to charge karaoke parlors for royalties.

In a third draft of the Revised Provisions of the Copyright Act, the National Copyright Administration (NCA) confirmed the aforementioned collective management system, which is a hybrid between the opt-out extended collective management system and the classic opt-in collective rights management system.¹⁶ With nascent collective societies and a vulnerable copyright regime, it is an opportunity as well as a challenge for China at the helm of the new collective management system. A successful operation of such a hybrid system requires more transparent governance of CMOs and innovative mechanisms to rebalance the users' access to copyrighted works and authors' need for remunerations.

II. COLLECTIVE RIGHTS MANAGEMENT ORGANIZATIONS IN CHINA

In China, there are five collective rights management organizations: Music Copyright Society of China (MCSC), China Audio-Video Copyright Association (CAVCA), China Film Copyright Association (CFCA), China Written Works Copyright Society (CWWCS) and Images Copyright Society of China (ICSC). Music Copyright Society of China (MCSC), founded in 1992, is the largest CMO in China.¹⁷ The other four CMOs were nascent organizations, instituted after the enactment by the State Council of China of *Regulations on Collective Rights Management Organization Rules* in 2005.¹⁸ Among these five CMOs, China Audio-Video Copyright Society (CAVCA) enjoys the largest revenues from its collective licenses scheme.¹⁹ In 2011, CAVCA collected 110 million RMB in total for its members.²⁰ But CAVCA also has the highest operation/administration fee rate, estimated at 50% in 2011²¹ while MCSC, a twenty-year old CMO in China, has the

14. *Id.*

15. Editor, *CAVCA Instituted As The Royalty Collector Targeting Karaoke Parlors*, XINHUA NEWS (May 29, 2008, 9:13 AM), http://news.xinhuanet.com/newmedia/2008-05/29/content_8274396.htm.

16. Wang Ziqiang, *A Summary of the Drafted Revised Provisions of Copyright Act*, NAPP.GOV (Nov. 6, 2012), <http://www.gapp.gov.cn/govpublic/96/116997.shtml>.

17. *Chinese Copyright Holders Received 170 million RMB in 2011*, GOV.CN, http://www.gov.cn/gzdt/2012-12/04/content_2282411.htm (last visited Dec. 28, 2012).

18. Yan Xiaohong, *Collective Rights Management Will Play A Vital Role in Future Copyright Protection*, NCAC.GOV.CN (Dec. 27, 2012), <http://www.ncac.gov.cn/cms/html/309/3517/201212/771942.html>.

19. *Id.*

20. *Id.*

21. *Id.*

lowest operation fee rate at 20% in 2011.²² None of these five CMOs are fully member-operated. They are state-controlled and affiliated with the National Copyright Association.

A. Introduction to the Extended Collective License System

1. *Extended Collective License v. Compulsory License*

Extended collective license (“ECL”) rules were first introduced in Nordic countries in the 1960s as an effective means of solving the problem of broadcasters in reaching all rights holders.²³ It stipulates that as soon as a CMO is able to show its recruitment of a substantial number of rights holders, the CMO would have the right to apply to represent all relevant rights holders on a non-exclusive basis, except for those who expressly decline to be represented.²⁴ According to Professor Daniel Gervais of Vanderbilt Law School, such an extended collective license system follows an “opt-out” formula.²⁵

ECL advocates accentuate that an extended collective license is different from a compulsory license in that rights holders cannot veto the statutory grant of licenses. In an extended collective license system, member rights holders can choose to withdraw their membership from the CMO. In addition, non-member rights holders can choose to decline the extended licenses if they think their exclusive copyright is impaired by the CMO.

By contrast, some scholars argue that even in cases where the right holders can opt out from the ECL system, the extended collective license may have the same effect as a compulsory license; for example, the rights holder might not know that her works are being used under an extended collective license between users and CMOs.²⁶

2. *Wanting Qu v. Daimo Lee: You Exist In My Song*

This foreseeable conflict between CMOs and non-member rights holders under an extended collective license system is reflected in *Wanting Qu v. Daimo Lee*. In this case, Daimo Lee, a contestant on the TV Reality Show

22. See *supra* note 18.

23. Dr. Gunnar Karnell, *Extended Collective License Clauses and Agreements in Nordic Copyright Law*, 10 COLUM. VLA J.L. & ARTS 73, 76 (1985).

24. Daniel Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues to Implementation* 5 (Dept. Can. Heritage, June, 2003), http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf.

25. *Id.* According to Professor Gervais, classic collective license system follows an “opt-in” formula in which rights holders must choose to participate, the extended collective license is based on the opposite principle: an “opt-out” formula.

26. Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience: It’s a Hybrid but is it a Volvo or a Lemon?*, 33 COLUM. J.L. & ARTS 471, 476 (2010).

The Voice (of China), was sued by a Canadian musician for copyright infringement. On the show, Daimo Lee has rocketed to fame after singing a Chinese song “You Exist In My Song” written by plaintiff, Wanting Qu.²⁷ Wanting Qu, with her contracted music label, Universal Music Group (UMG), complained that Daimo Lee and the TV station did not obtain a license from her before the public show.²⁸ Daimo Lee was also accused of illegally using the disputed song on his music television video.²⁹ The TV station responded that it had purchased a blanket license from Music Copyright Society of China (MCSC) and thus were not liable to copyright infringement.³⁰ The case was ultimately settled before going to trial.³¹

With such a defense, the station postulated that Music Copyright Society of China (MCSC) would have been representing Wanting Qu regardless of the fact that Wanting Qu was not yet a member of the collective society. Under a classic license system, this presumption is evidently flawed because CMOs cannot license copyrighted works on behalf of non-member rights holders. Thus, the blanket license purchased by the station did not cover the copyrighted works of Wanting Qu.

Under an extended collective license system, however, although non-member rights holders could opt out of the system, for the most part they would not notice the extended collective license until the emergence of accused copyright infringement. In Qu’s case, she might not have been aware of the CMO managing her copyrighted works under an extended collective license system until Daimo Lee and the station actually exploited her songs. If the extended collective license system goes into effect, it is likely that Wanting Qu would not have been able to allege cannot allege copyright infringement against the TV Station because she did not opt out before the grants of extended collective licenses by the Music Copyright Society of China (MCSC). Similarly, an extended collective license is analogous to a compulsory license in which rights holders only keep the right of remunerations from commercial users.

3. Users Access to an Adequate Repertoire of Copyrighted Works

There are always imbalanced attitudes of users and rights holders towards extended collective license: users hope to pay a fair amount of

27. The judges overwhelmingly acclaimed Lee’s performance. Three of four judges wanted him to work for them, respectively. *UMG Sued Daimo Lee for Copyright Infringement*, PEOPLE NEWS (Aug. 31, 2012, 12:05 AM), <http://media.people.com.cn/n/2012/0831/c40606-18881442.html>.

28. *Id.*

29. *Id.*

30. Xu Ning & Shi Xisheng Zhang Yun, *UMG Sued The Voice for Copyright Infringement*, SINA NEWS (Aug. 4, 2012, 8:15 AM), <http://ent.sina.com.cn/y/2012-08-04/12053703073.shtm>.

31. See GERVAIS, *supra* note 24.

money for an “adequate”³² repertoire of music, while rights holders demand to control the exclusive dissemination of copyrighted works.

The music industry in China worries that if extended collective license becomes prevalent, its current business model will collapse.³³ Take an extreme example: the music industry in China argued that, in an extended collective license system, competing record labels may monetize the music works of other music labels before their competitors notice the appropriation.³⁴ More specifically, music works can be performed by any singer in any concert in the name of extended collective license authorized by CMOs.³⁵

The music industry cannot tolerate losing exclusive exploitation of their copyrighted works. For example, Song Ke, a godfather in Chinese album industry, upset by the slow down of album industry, shut down his record label and opened a new Peking duck restaurant last year.³⁶ But only six months later, after his famous outcry that “album is dead,” he returned to the music industry and became the general manager of a newly launched music company, Hengda Music, Inc.³⁷ In an interview, Song Ke announced to his audience, “album is dead, but music is alive.”³⁸ He expected his company to expand monetizing their large stock of 3,500 new songs assigned by music creators from live concerts and digital music³⁹ since live concert and digital music contributed notably increased profits to Chinese music companies in recent years.⁴⁰ In opposition, commercial intermediaries claimed that the extended collective license system managed by CMOs would threaten their exclusive exploitation and distribution of copyrighted works.

By contrast, some commercial users have a growing demand for an adequate repertoire of music works. Take karaoke parlors industry as an example. Karaoke parlors in China compete with each other in some areas, i.e., the price of ticket, the quality of service and the quantum of songs in its music storage system. It is not rare that some customers have a very customized preference of some brand new songs. As a result, karaoke parlors usually confront a desperate need for an adequate music repertoire

32. See Xiaohong, *supra* note 18.

33. Han Lei, *Music Industry Cannot Survive Without Royalty Revenues*, PEOPLE NEWS (Mar. 30, 2012, 1:45 PM), <http://ip.people.com.cn/GB/17543690.html>.

34. *Id.*

35. *Id.*

36. Eric Priest, Assistant Professor, Univ. of Or. Law School, Keynote Speech on Chinese Music Industry Addressed at Michigan State University College of Law’s 2012 IP Creative Upstarts Conference (Nov. 10, 2012).

37. Xie Mengyao, *The Man Is Back: Song Ke Returns to Music Industry After Launching His Peking Duck Restaurant*, HEXUN NEWS (July 16, 2012, 2:05 PM), <http://news.hexun.com/2012-07-16/143616457.html>.

38. *Id.*

39. *Id.*

40. *Id.*

obtained from CMOs. Extended collective license is an optimal resolution of the rights clearance for karaoke parlors. With an extended collective license, karaoke parlors can expand their music repertoire as much as possible to meet the growing demands of its customers. Music creators, even those non-member rights holders, can have remunerations from karaoke parlors as creative content providers in the booming industry.

Extended collective licenses can also pitch in rights clearance problems encountered by new media. Mass usage of copyrighted works is a key feature of the new media. Take Internet Radio as an example. Pandora, the popular Internet Radio Station in United States has over 800,000 tracks in its library, tens of hundreds of times more than its traditional competitors, the AM/FM radio stations.⁴¹ Pandora's stock of music keeps growing to meet the personalized demands of millions of audiences.⁴²

The mass usage of music in a digital age calls for more cost-effective means of rights clearance. It is onerous, if not impossible, for users to contact with scads of rights holders for licenses. Moreover, it is also costly for CMOs to find out every artist listed in the billboard of Pandora, even though few audiences might play the song. The extended collective license system is an optimal mechanism to reduce transaction costs between CMOs and rights holders. Moreover, CMOs managing extended collective licenses would also acquire remunerations for the universality of artists including those non-aligned rights holders.⁴³

B. Implementing Extended Collective License System

Under an extended collective license system, CMOs in China grant rights in works not only of authors who cede their copyright to the CMO but also those authors remaining outside of the CMO. One might contend that the implement of an extended collective license system violates the Berne principle of exclusive reproduction right. According to Professor Jane Ginsburg, however, this argument is rather meaningless.⁴⁴ The basic assumption underlying the creation of CMOs is the inability of authors to

41. See Note, *CBS v. ASCAP: Performing-Rights-Societies and The Per Se Rule*, 87 YALE L. J. 783, 786 (1978) (estimating that an AM/ FM radio station in the 1970s could broadcast over 6,000 tracks); Laura Houston Santhanam et al., *Audio: How Far Will Digital Go?*, PEW RESEARCH CENTER, <http://stateofthemedias.org/2012/audio-how-far-will-digital-go/> (last visited Dec. 31, 2012) (estimating that the United States program iHeart Radio offers consumers 11 million songs).

42. *Music Licensing Part One: Hearing Before the H. Subcomm. on Intellectual Prop., Competition and the Internet Comm. on the Judiciary*, 112th Cong. (2012) (statement of Jeffrey A. Eisenach) (showing that the percentage of Americans who listened to online radio has grown by nearly 50 percent in the last two years and now to 39% of Americans listen to their music online).

43. See Kang, *supra* note 10.

44. Jane Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 J. COPYRIGHT SOC'Y U.S.A. 181, 198 (1992).

enforce their rights.⁴⁵ Thus, “it is difficult to argue that ECL-statutes have deprived authors of a right that, practically speaking, was impossible to enforce prior to the existence of the ECL-statutes.”⁴⁶ In China, some authors in remote areas may *never* discover that they should join the CMO for remunerations; the extended collective license could overcome this information asymmetry between rights holders and CMOs. In this section, the author will address two issues: first, who can manage the extended collective license system in China, and second, how can CMOs manage this brand new system in China.

1. *Who Can Manage The Extended Collective License System in China?*

From the plain language of the extended collective license clause of the newly drafted amendment of China’s Copyright Act, a CMO can apply to manage the extended collective license only when it is able to show its recruitment of a substantial number of rights holders. What does it mean by “a substantial number”? Does it mean “a majority”? The word “substantial” is not defined in the new amendment.

Assume that “a substantial number” means “a majority” or in other words “more than fifty percent.” It is still a theoretical invariable hardly accepted into practice because the total exact number of rights holders is unknown. As a result, the appropriate percentage of a majority varies when the sum number is uncertain. Even if the total number of relevant rights holders can be pinpointed, “the need for a CMO to meet the 50%+1 criterion would almost inevitably lead to recruitment wars.”⁴⁷ In Nordic countries, “a substantial number” is defined by the Minister of Culture or Education. The Administration will take both the quality and quantity of the number into consideration when determining whether to grant an extended collective license to a CMO or not.⁴⁸ In Russia, a pre-accreditation mechanism was introduced in 2008 to fix the emerging problems of the legal presumption clause of the Russian copyright act.⁴⁹ Under the new

45. *Id.*

46. *Id.*

47. See Gervais, *supra* note 24, at 37.

48. See *id.* at 33 (suggesting that the administration should be given the discretion to determine “a substantial number” in reference to four measuring criterion: the presumed number of rights holders concerned; the ease of finding and contacting them; the efforts made by CMO; and the response obtained).

49. Dmitry Golovanov, *Transformation of Authors Rights’ and Neighboring Rights in Russia*, EUROPEAN AUDIOVISUAL OBSERVATORY, http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus2_2008.pdf.en (last visited Dec. 24, 2012); In the 2012 copyright reform, the Congress of Philippine are taking the similar option of a prior accreditation system. With the prior accreditation functions, the Intellectual Property Office of Philippine will be able to exercise some form of regulations or adjudications over the CROs to ensure that there is no abuse, that royalties are properly remitted to the rights owners, and that blanket license fees

amendment, only those CMOs accredited by the National Copyright Administration can represent all rights holders without prior consent.⁵⁰ The issues related to extended collective licenses become more complicated when there is the coexistence of two or more CMOs.⁵¹ As a result, many countries choose one CMO model to manage extended collective license, which in turn causes antitrust concerns.⁵²

By virtue of existent copyright statutes, the copyright administration of China is inclined to adopt one CMO model in one particular category to manage extended collective licenses. In Article 7 of *Regulations on Collective Rights Management Organization Rules*, the state council stipulates that the field of interests of new CMOs shall not overlap with the field of interests of an existent CMO in China.⁵³ In other words, the state council only approves new CMOs to manage new categories of copyrights not covered by existent CMOs. After the enactment of *Regulations on Collective Rights Management Organization Rules* in 2005, China Audio-Video Copyright Association (CAVCA), China Film Copyright Association (CFCA), China Written Works Copyright Society (CWWCS) and Images Copyright Society of China (ICSC) were founded.⁵⁴ None of these four CMOs manage cooperative categories of copyrights. The newly drafted amendment of China Copyright Act did not define this issue. An extended collective license system managed by monopolistic CMO in divided areas may eliminate the uncertainty of who can manage the ECL system, but it also enhances the magnitude of antitrust requirements.

2. *How Can CMOs Manage Extended Collective License System in China?*

a. CAVCA Makes the “Pie” for Rights Holders

In 2006, the State Council of China built up China Audio-Video Copyright Association (CAVCA), 47 years after the establishment of BMI

are not onerous for end users. Antonio Ray A. Ortiguera, *IP Code Amendment: To Accredite a Pied Piper?*, BUSINESS WORLD ONLINE, www.bworldonline.com/adserver/bworldonline/print_preview.php?article_id=58697 (last visited Dec. 24, 2012).

50. Golovanov, *supra* note 49. Ortiguera, *supra* note 49.

51. See Mengyao, *supra* note 37.

52. COPY-DAN, an umbrella CMO leading seven separate CMOs in Denmark, is authorized by the administration to grant extended collective license to users. KOPINOR, an umbrella CMO grouping together twenty-one collective societies in Sweden, is authorized by the administration to grant extended collective license to users. See *Kopinor*, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANIZATIONS (Sept. 3, 2012, 3:29 PM), <http://www.ifrro.org/members/kopinor>; see also Ziqiang, *supra* note 8.

53. Zhùzuò Jítǐ quán Guǎnlǐ Tiáoli (著作·集体管理条例) [Collective Management of Copyright Regulations] (promulgated by the St. Council, Dec. 28 2004, effective Mar. 1, 2005) 2005 ST. COUNCIL GAZ. 7 (China).

54. See Xiaohong, *supra* note 18.

and almost a century after the establishment of ASCAP.⁵⁵ The debut of China Audio-Video Copyright Association (CAVCA) in the music market was its collection of royalties from karaoke parlors in 2007.⁵⁶ Every karaoke parlor needs to pay an amount of \$2 per booth per day for the public performance rights of composers and publisher.⁵⁷

At the very beginning, nascent CAVCA were degraded by karaoke parlors. Few karaoke parlors contacted CAVCA for a blanket license. After hundreds of cases against karaoke parlors, CAVCA started to produce revenue from karaoke parlors.⁵⁸ From 2007 to 2009, CAVCA has filed over 960 cases against karaoke parlors and collected over \$30 million in revenue from the royalty charges.⁵⁹

In order to charge royalty efficiently, TianTai, Inc. (“TTI”), a private commissioner of CAVCA, established 26 wholly owned subsidiaries in 18 major areas around the nation.⁶⁰ These subsidiaries have police functions – monitoring the usage of music works by karaoke parlors. In order to cover the high operating costs of these wholly owned subsidiaries and their hundreds of employees, payments made by karaoke parlors are thus split 50/50 between CAVCA and copyright holders.⁶¹ This unilateral command of royalty distribution inevitably disappointed other market participants in China.⁶²

CAVCA counter argued that the 50/50 royalty distribution plan was temporary. As long as the organization matures, the operation fee will gradually drop as what ASCAP does in the past century. They challenged that, copyright holders only saw how CAVCA divides the “pie” but they selectively ignored the fact that CAVCA enlarges the “pie” for them. Half of a larger “pie” is much better than a whole smaller “pie” that individual rights holders could have ever earned themselves. They reemphasized the

55. CHINA AUDIO-VIDEO COPYRIGHT ASSOCIATION, available at <http://www.cavca.org/en/index.php> (last visited Apr. 22, 2012).

56. *The Second Annual Conference of CAVCA Members*, CHINA AUDIO-VIDEO COPYRIGHT ASSOCIATION, http://www.cavca.org/news.php?un=ztwx_list&up=36 (last visited Apr. 22, 2012).

57. *Id.*

58. *Zhōngguó Yīnzhù Xiéduì Běijīng 100 Jiāqīnquán KTV Tíqǐsùdòng* (中国音著协对北京100家侵权KTV提起诉讼) Xinhua News (Oct. 17, 2008), http://news.xinhuanet.com/legal/2008-10/17/content_10211180.htm.

59. *Id.*

60. *See The Second Annual Conference of CAVCA Members*, *supra* note 56.

61. *Id.*

62. In 2009, hundreds of karaoke parlors in Guangdong Province, the birthplace of Dr. Sun Yat-sun, boycotted the per location fee rate made by CAVCA. They complaint that, \$12 per location fee rate is too high and has deprived their profits capability. As the exclusive collective rights organization in the market, CAVCA refused to compromise with those karaoke parlors. *See Harry Yang, Who is the Final Winner in the Karaoke Parlors Royalty Dispute?*, CHINA INTELLECTUAL PROPERTY, Feb. 2007, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=373>.

case of karaoke parlors: without the 960 litigations filed by CAVCA against thousands of karaoke parlors around the nation, it would take another five years for individual copyright holders to realize their public performance rights among karaoke parlors in the chaos market of China.

Besides karaoke parlors, the next major interest groups targeted by CAVCA are hotels that provide copyrighted entertainment to consumers. The reality is that there are thousands of small hotels and world-class hotel chains in China. It is impractical for individual rights holders to negotiate with these thousands of small hotels located in different areas of the nation vis-à-vis for royalty collections. One of the possible solutions is collective rights management by CAVCA.

Although CAVCA plays a vital role in implementing public performance rights of individual authors in China, many stakeholders in the music industry concerns that CAVCA might abuse its market monopoly and distort the fair market value of copyrighted works. The opaque royalty distribution process of CAVCA also exacerbates its failure of transparent governance, which in turn deprives authors of fair remunerations. Under an extended collective license system, royalty distribution becomes more complex between CMOs and non-aligned rights holders. Some experts advocate that, in special circumstances where non-aligned rights holders are untraceable and the remuneration is deemed to be not enough to justify individual distribution, a cultural fund might be a preferable option to disburse these orphan royalties.⁶³

b. Relations Between Chinese CMOs and Foreign Authors

By virtue of the extended collective license clause of the new copyright amendment, if a CMO acquires the authorization from a substantial number of rights holders, it can apply to represent *all* rights holders. Does this provision include foreign authors?

The answer to this question would highly likely be yes. Under the classic opt-in license system, Chinese CMOs can represent foreign authors on the basis of reciprocal agreements between Chinese CMOs and foreign equivalent CMOs. Arguably, as long as a Chinese CMO recruits the largest percentage of domestic rights holders and contract with the majority of foreign CMOs in the world, it would satisfy the “substantial number” requirement and represent *all* rights holders including domestic and overseas rights holders, aligned and non-aligned rights holders. In the birthplace of extended collective license system, most Nordic countries recognize the extended collective license of CMOs so long as the CMO concludes reciprocal agreements with most major CMOs around the world.

63. See Gervais, *supra* note 24, at 51.

In China, most CMOs have reciprocal agreements with foreign CMOs. For example, Music Copyright Society of China (MCSC) has signed reciprocal agreements with 53 equivalent CMOs around the world including the four major CMOs in U.S., such as ASCAP, BMI, SESAC and HAFOX.⁶⁴ Other CMOs in China have separate reciprocal agreements with foreign CMOs. Some scholars suggest an umbrella CMO associated by these separate collective societies. Without signing separate reciprocal agreements, an umbrella CMO is deemed to represent all members of its founding collective societies and thus has the largest percentage of rights holders both from domestic and from foreign nations. An umbrella CMO also works as a central mechanism remitting collected royalties to its foreign partners.

III. CALL FOR REFORM IN A DIGITAL AGE

The development of technology has profoundly changed society. Ten years ago, people purchased physical albums to enjoy their favorite songs. Today, a growing number of music fans resort to mobile phones, tablet computers, and live concerts for entertainment. Internet radio, stream portals, digital ringtones and other user-generated platforms have emerged and flourished in many nations. According to Professor Sean Pager, “just as mobile technologies have allowed developed countries to leapfrog wired infrastructure and develop innovative e-commerce models, so too, developing countries have an opportunity to bypass outdated legal standards and pioneer 21st century models.”⁶⁵ With a growing middle class and ubiquitous Internet and mobile technology, China represents a key frontier for the reform of collective licensing of author’s rights.⁶⁶

64. *Reciprocal Agreements with Foreign CMOs*, MCSC.COM.CN, <http://www.mcsc.com.cn/mcscInforList.php?partid=7> (last visited Jan. 12, 2012).

65. Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT’L L. REV. 223, 287 (2012).

66. *Annual Report 2011*, CISAC, <http://www.cisac.org/CisacPortal/security.do;jsessionid=4BB6A77E8A3C51FA194964082B97C9DA?method=beforeAuthenticate> (last visited Apr. 4, 2013). CISAC, the International Confederations of Societies of Authors and Composers, is launching a specific BRICS strategy seeking to mobilize its members, and position CISAC as a leader in the promotion of Intellectual Property rights in these emerging countries. CISAC is also building a momentum towards a copyright conference specifically for BRICS countries in 2014. BRICS stands for Brazil, Russia, India, China and South Africa, an acronym coined by Jim O’Neil, a Goldman Sachs economist in 2001.

A. Transparent Governance of CMOs in China

1. An Umbrella CMO as the Supply Apparatus for Subset CMOs

An umbrella CMO is an association of associations, instituted by the other CMOs in a nation—examples include ECAD in Brazil, COPY-DAN in Denmark and KOPINOR in Sweden.⁶⁷ An umbrella CMO oversees the administration, accounting and technology departments of its member CMOs, and each member CMO has its representatives in the board or directors, supervising the joint umbrella CMO. The proposal of an umbrella CMO to manage the extended collective license has three strengths.

First, an umbrella CMO makes it easier to define the statutory premise to apply extended collective license. An umbrella CMO is an association of all the CMOs in a nation and it is deemed to represent all the members of these founding CMOs. Therefore, it can be inferred that an umbrella CMO has the largest percentage of rights holders compared with its founding member CMOs.

Second, an umbrella CMO alleviates copyright fragmentation in the digital environment. In general, fragmentation of copyright means that users of the copyrighted work need a license from each fragment of the copyright bundle. For instance, multimedia work is usually divided into various components such as a sound, an image, a photograph, or a software program, where rights clearance is required for each subcomponent.⁶⁸ An umbrella CMO can work as “a single window” of rights clearance for users of multimedia works in the digital environment. Moreover, an umbrella CMO can also play a role of a one-stop shop for pan-territorial license.⁶⁹

Third, an umbrella CMO allocates resources for cultural affirmative actions in the society. In special circumstances in which the non-aligned rights holders are untraceable, and the remuneration is deemed to be not enough to justify individual distribution, the umbrella CMO can choose to disburse the royalties to a fund, supporting affirmative projects for independent artists.⁷⁰ Moreover, the umbrella CMO can also use the fund to educate young artists, to award new talents and to promote new genres.⁷¹

67. See Xiaohong, *supra* note 18.

68. Daniel Gervais & Alana Maurushat, *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 CAN. J. L. & TECH. 15, 20 (2003).

69. For example, with respect to the EU Commission *Proposal of Directive on Collective Management of Copyright and its Related Rights*, Belgian Society of Authors, Composers and Publishers (“SABAM”) has just concluded a landmark agreement with Google. SABAM became the first medium size CMO in Europe to offer a one-stop shop for music repertoire on a pan-territorial basis. *News Release, SABAM*, (Dec. 19, 2012), available at http://www.sabam.be/sites/default/files/pdf/google_play_en.pdf.

70. Mengyao, *supra* note 37, at 51.

71. See *infra* note 108, at 4. For example, the CISAC model contract provides that “. . . each of the societies shall be entitled to deduct from the sums collected by it on behalf of

For example, the Malaysian collective management organization, MACP, spends 2% of its annual gross revenues on music promotion activities such as music awards, competitions, copyright workshops and seminars.⁷²

Besides its notable strengths in implementing an extended collective license system, the intrinsic drawback of this two-tiered management structure is the increased administrative costs. For instance, ECAD, the umbrella CMO in Brazil, deducts 17 percent operation fees from its total revenues, while in the meantime its member CMOs deduct 7.5 percent in operation fees from the total royalties.⁷³ It is arguable that in a long run, however, the total operation fees will drop down because the umbrella CMO functions as a central supply apparatus providing uniform administrative, accounting and technology services to its member CMOs. As a result, its member CMOs do not waste their budgets on separate administrative, accounting, and technology departments.

2. Regulate CMOs Under Principles of Company Law

CMOs are neither perfect nor a panacea for collective license in China. They have been criticized for lack of transparency, lack of efficacy, and abuse of market monopoly. In some countries, CMOs are registered under company law and thus must adhere to the regulation of company acts, i.e., publishing accounting information to shareholders.⁷⁴ In China, CMOs are state-owned and the disclosure of accounting information is not mandatory. The copyright act of China only stipulates that CMOs shall report accounting information to the Copyright Administration, and rights holders instead shall *apply* to access and reproduce the financial reports of CMOs.⁷⁵ In real life, it is usually burdensome for rights holders to acquire accounting information from the bureaucratic officials.⁷⁶ Even in the case that CMOs agreed to disclose their accounting information to applicants, the released accounting information is more often than not incomplete and useless. Rights holders rarely know about each payment in the administrative process of CMOs. The author of this article suggests that the legislature of China takes one step further by specifying the items of accounting

the co-contracting society 10% at the maximum, which shall be allocated to ... the purposes of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favor of any funds serving similar purposes." *Id.*

72. *Id.*

73. Volker Ralf Grassmuck, *A Copyright Exception for Monetizing File-Sharing: A Proposal for Balancing User Freedom and Author Remuneration in the Brazilian Copyright Law Reform*, VGRASS.DE (Mar. 19, 2010), <http://www.vgrass.de/?p=193>.

74. THE INDIAN PERFORMING RIGHT SOCIETY LIMITED, <http://www.iprs.org/index.asp> (last visited Dec. 28, 2012).

75. Regulation on Collective Management of Copyright, art. 31, 32 (promulgated by the State Council, Dec. 28, 2004, effective Mar. 1, 2005) (China).

76. CMOs in China are state-controlled and most employees of CMOs receive stipends directly from the government.

information and mandating its publication during the administration of CMOs. As Justice Louis Brandeis said, “[s]unlight is the best disinfectant.”⁷⁷ The openness of accounting information helps rights holders and end users supervise the routine operation of CMOs.

Besides disclosure of accounting information, democratizing the directory board also accelerates the course of transparent governance of CMOs. In China, CMOs are state-controlled and most employees of CMOs receive stipends directly from the government. CMOs in China operate more like an administration agency rather than a collective society. Rights holders have little control of the royalty allocation plan and the operation fee deduction. A possible direction for the reform of Chinese CMOs might be recruitment of rights holders to the directory board and guarantee their voting strength in royalty distribution plans.⁷⁸ It is a way to empower rights holders in the supervision of CMOs. The check and balance from a diverse body of rights holders would thus enhance the transparency and efficacy of CMOs and in return promote the welfare of rights holders.

B. Dispute Resolution Mechanisms for CMOs in China

1. Rate Court for Flat Rate Dispute

In 1941, ASCAP and BMI entered into an antitrust decree with the U.S. government.⁷⁹ There are various restrictions on ASCAP and BMI under the antitrust consent decree. For example, the BMI antitrust consent decree prohibits BMI from itself publishing, recording or distributing music commercially (Section IV (B)), from refusing to contract with a potential affiliate (Section V (A)), and from discriminating between similarly situated

77. Louis Grumet, *Sunlight Is The Best Disinfectant*, <http://www.nysscpa.org/cpajournal/2003/1203/nv/nv2.htm> (last visited Dec. 27, 2012).

78. See Xiao Hong, *supra* note 18. In 2013, CAVCA, CSSWC and ICSC will have a power transition of their director board. Members of these CMOs will vote new representatives in the director board. It is the first election for the director board of CAVCA, which was founded in 2008. By contrast, Chinese record labels have already made a history of collective rights management in 2012. The Department of Recording Industry of CAVCA elected their new board members. More than forty record labels from inland, Hong Kong and Taiwan that have over ninety-percent market shares of Chinese recording industry participated in the meeting. New directors were appointed, all from the recording industry. New Director General is Lu Jian, the CEO of Haidie Record Label. This meeting has a historic meaning. As observed, it converted an affiliated department of CAVCA into a *quasi* collective society of record labels. At this meeting, record labels also announced that if section sixty of the first draft of copyright act amendment adopted, they would segregate the Department of Recording Industry from CAVCA and institute their own CMO. Han Lei, *Without Royalties, Music Industry Cannot Stand*, PEOPLE NEWS (Mar. 30, 2012, 13:45 AM), <http://ip.people.com.cn/GB/17543690.html>.

79. Carly Olson, *Changing Tides in Music Licensing? BMI v. DMX and In re THP*, 10 NW. J. TECH. & INTELL. PROP. 277, 278 (2012); see also *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172 (2d Cir. 2001).

licenses (Section VIII).⁸⁰ In the antitrust consent decree of ASCAP, there is a “rate court” provision providing that when the negotiation of fee rate between licensors and licensees is broken up, the court has the power to order a reasonable license fee.⁸¹

Nowadays, when voluntary agreements between CMOs and commercial users cannot be reached, federal rate courts usually make decisions as to what license fees will be.⁸² Some scholars thus observed that, CMOs are in the “business of yes.”⁸³ Under the antitrust consent decree, ASCAP and BMI could hardly deny a license to a user who prepared to pay the prices set by federal rate court.⁸⁴ Even CMOs that do not operate under antitrust decrees, such as SESAC or CCC, would think twice before saying no to a willing licensee.⁸⁵

In recent years, the U.S. federal rate court has been involved in the movement to reform the blanket license of ASCAP and BMI. In *BMI v. DMX*, after a bench trial, the court ruled that an Adjustable Fee Blanket License (AFBL) is applicable to DMX.⁸⁶ AFBL is a blanket license from BMI with a carve-out for a direct licensing program from individual music authors or their publisher-representatives.⁸⁷ In this case, the court rejected the argument made by plaintiff that the court should set a fee rate solely on the basis of the fees BMI charged on other users. The court cautioned that, it is unjust because the monopoly such as BMI and ASCAP would subject all users to an unreasonably high rate.⁸⁸ For example, per location fee rate charged by BMI on DMX, Inc. has risen from \$12 to \$36 in five years (2004 – 2009).⁸⁹

To promote competition in the market place, the court adopted DMX’s proposal for a blanket license fee with adjustments for its ongoing direct licensing program.⁹⁰ The structure of DMX’s proposal can be depicted algebraically as:⁹¹ Per-Location Fee = Floor Fee + [Unbundled Music Fee × Shares licensed via CRO].⁹² This per location flat fee rate dispute between DMX and BMI is similar to the per booth flat fee rate dispute between

80. *Broad. Music*, 275 F.3d at 172.

81. *Id.*

82. JEFFREY BRABEC & TODD BARABEC, *MUSIC, MONEY, AND SUCCESS: THE INSIDER’S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS* 318, 318-19 (1994).

83. Daniel Gervais, *The Landscape of Collective Management Schemes*, 34 *COLUM. J. L. & ARTS* 591, 597 (2011).

84. *Id.*

85. *Id.*

86. *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 367 (S.D.N.Y. 2010); *see also United States v. Broad. Music, Inc.*, 316 F.3d 189, 194 (2d Cir. 2003).

87. *Id.*

88. *Showtime*, 912 F.2d at 570; *In re THP*, 756 F. Supp. 2d at 538.

89. *DMX, Inc.*, 726 F. Supp. 2d at 358.

90. *Id.* at 356-57.

91. *Id.* at 356.

92. *Id.*

karaoke parlors and CAVCA in China. By contrast, karaoke parlors in China do not have such a rate court to draw a compromise from the CAVCA and set up a new flat fee rate for karaoke parlors. CAVCA imposed the \$2 per booth flat fee rate on karaoke parlors and arrogantly ignored their opponents.

A rate court can play a crucial role of antitrust mechanism against monopolistic CMOs in China. An adjustable fee blanket license recognized by rate court allows individual rights holders to compete with their CMOs and to reflect the fair market value of their copyrighted works in a direct license program. Under an adjustable fee blanket license system, the deduction of direct license fee rate stimulates users to reach rights holders directly. It might help CMOs in China identify non-aligned rights holders and remit royalties to them. The chance of remuneration for non-aligned rights holders under an extended collective license system thus increases.

To realize the promise of a rate court, two major issues need to be clarified in the context of Chinese CMOs: First, judges in China have less discretion than U.S. judges when deciding a case. In a civil law system, it is less tolerable for Chinese judges to set up a flat fee rate for karaoke parlors in the absence of a written statute. Should China create a brand new rate court expertise in antitrust dispute between users and CMOs? Or instead building a regulatory administration erects adjudicatory functions upon the disputes between users and CMOs in China? Second, whether an adjustable fee blanket license has price advantage over a traditional blanket license from CMO. If CMOs set unreasonably high floor fee rate in an adjustable fee blanket license, the total amount of flat fees might exceed the price of a single traditional blanket license. A rate court or an adjudicatory administration needs to scrutinize the floor fee rate of an adjustable fee blanket license agreement between users and CMOs in this case.

2. Arbitration Board for Royalty Claims

As aforementioned, in a case when non-aligned rights holders are untraceable, CMOs in China can choose to disburse the royalties in a fund for cultural affirmative actions. What if the deemed untraceable non-aligned rights holder voluntarily contacts CMOs for royalty claims? What if rights holders dissatisfy with the royalty distribution schemes? An arbitration board under the umbrella of National Copyright Administration might be a possible solution.

An arbitration board can moderate disputes between rights holders and CMOs. For instance, a rights holder may file complaints to the arbitration board to rebut an unreasonable royalty distribution scheme. After exhausting the procedure of arbitration, either party in the royalty dispute case can appeal to a regular court attacking the arbitration board's decision. In other words, the final decision of an arbitration board for CMOs must subject to appeals to court.

According to some scholars, this arbitration-adjudication structure is too complicated and costly to be recommended to developing countries.⁹³ Rather a specialized court would be a preferable option in lieu of the arbitration board. For instance, in Britain, a copyright tribunal competent for all kinds of cases has proved adequate to solve aforementioned issues.⁹⁴

C. CMOs As Royalty Managing Instruments

*Authors are not supposed to spend their time going after their rights.
They create.*⁹⁵

1. Pros and Cons of Collective Rights Management

The evocative story of collective rights management recounts the visit of a French composer to a Paris Café in 1847.⁹⁶ Ernest Bourget, a famous French composer of popular *chansons* and *chansonnettes comiques*, found his music, among other pieces, was played by the café without his permission.⁹⁷ He then refused to settle the bill for his drink arguing that “you consume my music, I consume your wares.”⁹⁸

Ernest Bourget understood that, as an individual composer, he should not devote his life chasing unauthorized performances of his music.⁹⁹ On the other hand, it is also unnecessarily expensive for each venues performing popular music to track and negotiate with various rights holders in France.¹⁰⁰

As a solution to the failures of individual contracting, Ernest Bourget, with his colleagues Victor Parizot, Paul Henrion and Jules Colombier, founded an *Agence Centrale*, a predecessor of the first modern collecting society *Societe des Auteurs et Compositeurs et Editeurs de Musique* (SACEM) established in 1851.¹⁰¹

According to Professor Jane Ginsburg, a similar problem torturing Ernest Bourget in mid-nineteenth century has analogies in contemporary society, e.g., educational reprography, library archives and file sharing in the

93. Sibylle E. Schlatter, *Copyright Collecting Societies in Developing Countries: Possibilities and Dangers*, in *NEW FRONTIER OF INTELLECTUAL PROPERTY LAW* 53, 68 (Christopher Heath & Anselm Kamperman Sanders ed., 2005).

94. *Id.*

95. See Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking The Collective Administration of Performing Rights*, 1 *J. COMP. L. & ECON.* 245, 553-57 (2005).

96. Richard Watt, *Copyright And Contract Law: Economic Theory Of Copyright Contracts*, 18 *J. INTELL. PROP. L.* 173, 199 (2010).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Watt, *supra* note 96, at 199.

cyberspace.¹⁰² In the century-long practice of collective rights management, however, some pros and cons of CMOs have been debated repeatedly among experts and scholars.

A traditional theory promoting collective rights management is that it reduces transaction costs between individual rights holders and numerous users.¹⁰³ The costs of monitoring, negotiating, and enforcing rights by individual authors might exceed what they can reasonably hope to collect.¹⁰⁴ Other concerns focus on the greater access to a repertoire of copyrighted works and the simplified price structure that users would prefer through a CMO.¹⁰⁵ Moreover, others supports that CMOs would strengthen the bargaining power of individual rights holders in the market. Otherwise, individual rights holders can be easily discriminated by the user who may decide never to use the work of a particular artist who has demanded for his rightful royalties.¹⁰⁶

To the contrary, some argue that the increased administrative costs of CMOs might exceed the saved transaction costs between individual rights holders and users.¹⁰⁷ Other scholars illustrate that the blanket license by CMOs limits broadcast airtime for new artists and exacerbate the inequitable SuperStar effects in music industry.¹⁰⁸ Other scholars propose that technology advancement profoundly undermines the classic transaction costs theory of collective rights management.¹⁰⁹ According to Professor Ivan Reidel, in music license markets 3.0, an eBay or Google like online

102. Jane Ginsburg, *Putting Cars On The "Information Superhighway": Authors, Exploiters And Copyright in Cyberspace*, in *THE FUTURE OF COPYRIGHT IN DIGITAL ENVIRONMENT* 189, 210 (P. Bernt Hugenholtz ed., 1996); Jane Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 *J. COPYRIGHT SOC'T U.S.A.* 181 (1992).

103. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 455 (Wolters Kluwer 3d ed. 2010).

104. Abraham Hollander, *Market Structure And Performance In Intellectual Property*, *INT'L J. INDUS. ORG.* 199, 200 (1984).

105. STANLEY M. BESEN & SHEILA NATARAJ KIRBY, *COMPENSATING CREATORS OF INTELLECTUAL PROPERTY: COLLECTIVES THAT COLLECT* 6 (1989).

106. ANG KWEE TIANG, *RIGHTSHOLDERS' PERSPECTIVE IN MANAGING THEIR RIGHTS: ECONOMIC INTERESTS AND PROMOTION OF CREATIONS*, *WIPO SEMINAR ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ERA: TRENDS, PROBLEMS, AND PROSPECTS 2* (2005), http://www.wipo.int/mdocsarchives/WIPO_CCM_DEL_05/WIPO_CCM_DEL_05_7a_E.pdf.

107. Jonathan Band, *Cautionary Tales About Collective Rights Organizations* 6 (Geo. U. L. Ctr., Working Paper, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

108. See Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 *N.Y.U. J.L. & BUS.* 731 (2011).

109. Ariel Katz, *Copyright Collectives: Good Solution But For Which Problem?*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW* 395, 406 (Zimmerman et al. ed., 2010).

license platform might be the optimal model for direct licenses between individual rights holders and potential users.¹¹⁰

2. Collective Monitoring and Enforcing in a Digital Era

In China, copyright enforcement infrastructure is still underdeveloped, which makes individual administration of public performance rights unreasonably burdensome. As the “pie” theory aforesaid by CAVCA illustrates, in spite of the existent drawbacks of collective rights management, CMO is still the optimal means to compensate authors otherwise they would receive no payments.

As to the CMO managing extended collective licenses, its monitoring and enforcing function extends to non-aligned rights holders before they discover that the CMO is in their interest to join.¹¹¹ The universal membership under an extended collective license system also grants CMOs the absolute titles to monitor and enforce public performance rights in the market.¹¹² However, until recently, monitoring by CMOs in China is a low-tech enterprise. Chinese CMOs employ investigators to physically monitor every user on a day-to-day basis. Rights holders in China have criticized this futile monitoring technology. For instance, in the karaoke parlors cases, the twenty-six monitoring subsidiaries of CAVCA were attacked as being responsible for the dramatically increased administrative costs of CAVCA.

Technologies that enable computerized automatic scanning and tracking of all songs, jingles, movies, and video clips¹¹³ might be future substitutes to the current brick-mortar monitoring methods adopted by Chinese CMOs. The cost-effective monitoring technologies would reduce administrative costs of CMOs in China. Some scholars even suggest that, with efficient monitoring technologies, individual rights holders can thus enforce public performance rights or other related copyrights on their own.¹¹⁴ The author in this article disagrees with the presumption that individual administration of copyright is preferable to every author. Some authors may still want to entrust their copyright to intermediaries for simple remunerations, just as taxpayers resort to tax refund services to get money back.

In the future, CMOs in China may function as royalty managing instruments expertise in tracking the usage of copyrighted works¹¹⁵ and collecting royalties from number users on behalf of both aligned and non-

110. See Reidel, *supra* note 108, at 805.

111. See Watt, *supra* note 96.

112. *Id.*

113. See Katz, *supra* note 109, at 406.

114. *Id.* at 407.

115. In the future, each copyrighted work might receive a digital fingerprint, like the identification tags buried in food package, which is traceable both online and on air. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 203 (2004).

aligned rights holders. Users acquiring licenses directly from rights holders, no matter through an online platform or offline channels, can apply to adjust the flat fee rate set by CMOs in China. Non-aligned rights holders can appeal to a copyright tribunal for fair compensation. Such an adjustable royalty collection system managed by Chinese CMOs provides both the carrot and the stick to enforce payments from users to authors.

CLOSING REMARKS

In the third draft of the new copyright amendment, the legislature of China affirmed the employment of an extended collective license system. With nascent collective societies and a vulnerable copyright regime, it is an opportunity as well as a challenge for China at the helm of the new collective management system. A successful operation of such a hybrid system requires transparent governance of CMOs and innovative mechanisms of CMOs to rebalance the users' access to copyrighted works and authors' need for fair remunerations.