

Intellectual Property

Public Consultation on Proposed Licence Conditions and Code of Conduct for Collective Management Organisations

Introduction

The Ministry of Law and the Intellectual Property Office of Singapore ("IPOS") are conducting a public consultation ("**Consultation**") on the proposed licence conditions and Code of Conduct for collective management organisations ("**CMOs**"). The public consultation period is from **3 June 2020 to 30 June 2020**. This follows the [Singapore Copyright Review Report](#) published on 17 January 2019 ("**Singapore Copyright Review Report**") where one of the key proposals was the introduction of a class licensing scheme for CMOs (the "**Proposed Licensing Scheme**"). Currently, there is no regulation or independent oversight over the governance and management of CMOs, and as such no minimum standard which CMOs have to adhere to in their dealings with members and users. The objective of the Consultation is to ensure that the Proposed Licensing Scheme fosters a well-functioning collective management ecosystem. The Proposed Licensing Scheme will be "light touch" in nature and will hold CMOs to certain standards of transparency, governance, accountability and efficiency.

Key Features of the Proposed Licensing Scheme

Five measures to ensure that CMOs maintain minimum standards of transparency, governance and accountability, so as to engender trust between CMOs, members, and users

1. **Rights of members:** In order to ensure that CMOs treat their members fairly and without discrimination, and to provide mechanisms for members to participate in the management and key decision-making processes of the CMO, it has been proposed that CMOs must grant certain rights to its members. This includes entering into a membership agreement with members stating, *inter alia*, the nature and types of rights granted to the CMOs and the scope of the rights of administration granted by the members to the CMO, convening annual general meetings to enhance transparency and corporate governance, and giving members control over the rights granted to CMOs (e.g. allowing members the right to vary and terminate the scope of rights granted to the CMO upon serving reasonable notice).
2. **Distribution of licence fees:** Several measures have also been proposed to enhance transparency of the distribution of licence fees and allay members' concerns that distributed fees are inaccurate. These measures include making a CMO's distribution policy available to members which should set

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out the basis for calculating the quantum of licence fees due to members, encouraging CMOs to diligently collect accurate and timely information on the usage of works and to base their distribution on actual usage of works or on a statistically valid sample approximating actual usage of works, and ensuring that CMOs regularly and accurately distribute and pay amounts to their members in accordance with their distribution policy, with such payments being made no later than six months after the end of the financial year in which the licence fee was collected.

3. Information to be provided by CMOs to users: In order to foster a relationship of mutual trust between CMOs and users, CMOs will need to make certain information available to users. The lack of transparency on CMOs' portfolios was highlighted in the Singapore Copyright Review Report by many stakeholders. Concerns had been raised as to whether the CMO charging the licence fee actually had such rights of administration over the work, with users providing feedback that certain CMOs were not able to prove that they had specific works in their portfolio even after the user had contacted the CMO specifically on this. Many users also displayed scepticism about how the quantum of licence fees were determined and distributed, pointing out that similar establishments which used approximately the same amount of music seemed to be charged differently (paragraph 2.15.3 of the Singapore Copyright Review Report). Therefore, it has been proposed that CMOs must make the following information available to users:
 - a. **The portfolio of copyrighted materials managed by the CMO.** The Consultation recognised the need for users to know the portfolio of copyrighted materials that they are entitled to use upon the grant of a licence, in order to decide whether to obtain or renew a licence with a CMO. Therefore, it has been proposed that CMOs must provide accurate and clear information on their websites about the portfolio of copyrighted materials they manage and administer, so that a potential user would be able to determine whether a work he intends to use is managed by the CMO. Furthermore, it has also been proposed that where a CMO receives a request for information on the copyrighted materials it administers or the rights that it manages (whether directly or under representation agreements), it must give a written reply no less than three weeks from receipt of the request.
 - b. **Other information relating to the CMO.** In order to create a more positive perception of CMOs and strengthen the public's trust and confidence in CMOs, it has also been proposed that CMOs should provide basic information about their rights, operations and processes to the public. Therefore, it has been proposed that each CMO must publish and keep up to date on its public website information such as the membership terms and details of the application process, the type and nature of rights being administered, the full range of licences available, details of representation agreements entered into by the CMO with other CMOs, the names of the persons involved in the management of the CMO, and the CMO's general policy on distribution of licence fees.

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4. Dispute resolution: It has been proposed that CMOs should develop their own internal complaint handling and dispute resolution procedures to deal with potential disputes. A formal complaint can be made to IPOS if there is an alleged breach of licence conditions, provided that parties have exhausted the CMO's internal procedures and have attempted mediation before making a formal complaint.
5. Governance and management of CMOs: Several safeguards have been proposed to enhance the accountability of CMOs and their stakeholders. These include mandating that CMOs establish a governing board that is responsible for monitoring the activities of the CMO and for its compliance with the Proposed Licensing Scheme, disqualifying certain persons from being on the governing board, such as where the person has previously been involved in the management or governing board of a CMO whose licence has been revoked, and mandating that CMOs keep and maintain proper financial records.

Two measures to facilitate an efficient and non-fragmented market

1. Requiring members to contract with CMOs on a non-exclusive basis: The rationale behind requiring members to contract with CMOs on a non-exclusive basis is that it would lower the barrier of entry into the market for new entrants. Two potential options are being explored: (a) Mandating that all contracts between CMOs and members must only be on a non-exclusive basis, with a transition period given to CMOs to convert all existing contractual arrangements to non-exclusive ones; or (b) Requiring CMOs to offer members the option of granting their rights on a non-exclusive basis, although this option may result in CMOs administering a mix of exclusive and non-exclusive management rights, which may give rise to confusion. As CMOs would lose their standing to enforce rights against infringers under the Singapore Copyright Act if they are no longer exclusive licensees, the possibility of allowing CMOs to sue in their own name is also being explored. This will require appropriate amendments to be made to the Copyright Act.
2. Enhancing Copyright Tribunal proceedings: Another proposed measure is to enhance the Copyright Tribunal's effectiveness for resolving licensing disputes and reviewing the reasonableness of licence schemes and fees, including, where relevant, allowing the Tribunal to take into account broader systemic concerns regarding anti-competitive conduct by CMOs. To this end, enhanced powers to be given to the Copyright Tribunal may include the suspension of any payment of licence fees pending determination by the Copyright Tribunal, and obtaining the expert opinion of the Competition and Consumer Commission of Singapore in determining the reasonableness of licence fees and conditions.

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Other proposed measures to increase regulatory oversight of CMOs

1. Granting IPOS powers over CMOs to ensure compliance with the Proposed Licensing Scheme:
 - a. **General powers:** IPOS will have the power to request for information and documents, sit in on members' meetings and investigate the operations of the CMO. IPOS will also be granted powers to require a performance bond, refer licensing related issues to the Copyright Tribunal, and publish investigation results.
 - b. **Impose sanctions:** If a CMO is found to be in breach of the licence conditions, IPOS will also have the power to impose sanctions on the CMO. The sanctions will increase in severity depending on the degree of non-compliance by the CMO.
2. Appointment of Code Reviewers: It has also been proposed that as part of IPOS' supervisory functions, IPOS may appoint one or more Code Reviewers, or compel parties to appoint Code Reviewers, to audit a CMO's compliance with licence conditions. The key function of the Code Reviewers is to evaluate whether the CMO complies with the licence conditions, and to report their findings to IPOS.

Comments

A key challenge in regulating the collective management ecosystem is striking the right balance between the protection of members/rights holders on the one hand, and transparency and fairness to users on the other. There will also be a need to ensure flexibility for rights owners to choose between CMOs to administer their rights, while maintaining the efficiency of access by users to copyright works and ensuring that the regulations and measures imposed do not result in an overly onerous compliance system. One of the key considerations to bear in mind is that allowing rights to be licensed on a strictly non-exclusive basis may hurt the profitability of CMOs, who may have to reduce their licence fees in order to compete effectively. This may result in fewer CMOs being able to survive in a more competitive environment, and if so, less choice for both members and users in the long term.

Nevertheless, many of the proposed measures in the Consultation are welcome as they bring clarity and a minimum standard to the currently unregulated collective management ecosystem in Singapore. Ensuring that our local creators are properly compensated will incentivise the creation and use of more works, which will go towards establishing Singapore as a creative hub. Providing more information, accountability and transparency in this area would also encourage users to obtain licences from CMOs before using a copyrighted work, and lead to a reduction in infringing uses of copyrighted works.

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