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Our Ref: LS/RLR/Committees/IPPC/2020/MinLaw/TL/jc/lf

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Intellectual Property Policy Division
Ministry of Law
100 High Street,
#08-02, The Treasury
Singapore 179434

BY EMAIL
MLAW_Consultation@mlaw.gov.sg

Dear Sirs,

Public Consultation on the Proposed Licence Conditions and Code of Conduct for CMOs

1. We refer to the Ministry of Law's public consultation on the Proposed Licence Conditions and Code of Conduct for Collective Management Organisations which commenced on 3 June 2020 ("the Consultation").
2. The Law Society of Singapore's Intellectual Property Practice Committee 2020 has considered the Consultation paper and prepared the enclosed submission in response. The submission is supported by the Council of the Law Society of Singapore.
3. If you have any questions or require further assistance on the matter, please contact Ms Ting Lim, Manager of the Representation and Law Reform Department by email at huiting@lawsoc.org.sg.
4. Thank you.

Yours sincerely,

Jonathan Foong
Chairperson, Intellectual Property Practice Committee

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The Law Society of Singapore’s Intellectual Property Practice Committee’s response to the Ministry of Law’s public consultation on Proposed Licence Conditions and Code of Conduct for Collective Management Organisations (“Consultation Paper”)

Preamble

The Law Society of Singapore’s Intellectual Property Practice Committee supports the Ministry of Law’s (“**MinLaw**”) action in this area, given that self-regulation by the Collective Management Organisations (“**CMOs**”) have failed. In general, we agree with the approach of:

1. applying a “light touch” by limiting the conditions in the Proposed Licensing Scheme and Code of Conduct to minimum standards so as not to put too much burden on CMOs for compliance; and
2. encouraging competition by lowering entry barriers through terms in membership agreement.

Therefore, we have limited our comments (set out below) to specific areas or details of the Consultation Paper.

We have adopted the numbering set out in the Consultation Paper. The first column is the topic number, the second column sets out the questions posed and specific paragraphs in the Consultation Paper with which we have comments and feedback on. Our comments and feedback to the relevant issue is set out in column 3. Where the questions or issues posed in the Consultation Paper are not found in the table below, we are either in accord with the MinLaw or do not have any comments to these questions.

Please do not hesitate to contact us if you require any further information or clarification on our feedback.

S/N Topic Number	Consultation Paper¹ (Paragraphs)	Comments
1.	3.5 Nonetheless, to facilitate the oversight of the Proposed Licensing Scheme and enable access for users, it is proposed that the licence conditions will require CMOs to provide their contact details to IPOS within a specified time period after they commence operations. These details will be	1. It is important for members of the public to know who they should approach for copyright licenses. Therefore, an easily searchable webpage of the various CMOs in Singapore is important. Without this, it could be difficult for the public to know where to go for their licenses.

¹ “Public Consultation on Proposed Licence Conditions and Code of Conduct for Collective Management Organisations, dated 3 June 2020, Accessible at https://www.mlaw.gov.sg/files/news/public-consultations/2020/02/CMO_Consultation_Paper_.pdf

	<p>published on IPOS' website for general information.</p>	<ol style="list-style-type: none">2. Having the information on the IPOS website is a good solution. However, the Consultation Paper is unclear on the method the government will use to ensure registration.3. There should be ways to discourage CMOs from not informing IPOS. Criminal or civil sanctions could be considered if CMOs do not comply.4. The criminal solution is to make it an offence where a fine is levied.5. The civil approach is to limit the remedies available in cases of infringement.6. There are merits and drawbacks to each approach.7. Where the remedies are being limited to non-registration, we would, in effect, be penalising the owner of the copyright for the CMO's lack of efficiency. This seems inequitable.8. If we create an offence of failing to inform IPOS, we are criminalising an omission which results in little public harm.9. Perhaps, we can implement a mixture of both criminal and civil sanctions and allow the body enforcing compliance to decide according to the facts which sanction would be most appropriate to apply in light of the specific circumstances of the case.
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<p>2.</p>	<p>Question 2(a): What are your views on the considerations for defining a CMO that we have set out above?</p> <p>Question 2(b): Are there further considerations that you wish to propose?</p>	<p>We shall answer the two questions together.</p> <p>It has to be made clear what magnitude of licensing would make a seemingly individual licensing body a CMO. For instance, a CMO may claim to only cover 50 individual's works and argue that it is an individual licensing body in order to avoid being regulated.</p> <p>We suggest consideration be given to the number of owners whose works the CMO is managing. A very prolific and popular composer could have an entity licensing its works e.g. P. Ramli, Irving Berlin and George Michael. It could, therefore, be licensing a huge catalogue of works.</p> <p>One of the reasons for the Proposed Licensing Scheme is to address the lack of control by members of the CMO. If the copyright owner is the owner of the entity, it is very easy for him/her to obtain the information he wants. If the copyright owner is the sole person whose works the entity is managing, his bargaining position is such that management of his works can be left to contract.</p> <p>We distinguish conditions which protect the interest of members and conditions which facilitate copyright clearance for users. Here, we are looking at the former.</p> <p>In view of the "light touch" policy, such an entity with 5 or less members should not be required to comply with all the conditions in the licence. However, due to the size of the catalogue and popularity of its works, the entity should still be</p>
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		<p>required to register and publish their works on their website.</p> <p>Few entities like to be subject to compliance and regulatory measures. Relieving entities which service copyright owners with the power to take care of their own interests will encourage registration. Further, it could encourage the establishment of independent CMOs licensing their sizeable catalogue themselves.</p>
<p>3.</p>	<p>3.17.3 Members must have the right to attend and vote at Annual and General Meetings of members, including by proxy.</p>	<p>It is important to define who a member is (for example, would that include a foreign CMO which enters into a representation agreement with the CMO?) in the membership agreement which should set out the voting rights that each member is given.</p> <p>For example, is each member entitled to only one vote or are their voting rights dependent on the amount of works the CMO is managing? The former, being the more egalitarian, is preferred.</p>
<p>4.</p>	<p>3.17.9 Members are entitled to deal with their works either via a non-exclusive arrangement with the CMO, or in specific scenarios. During the 2017 Consultation, a large percentage of members reflected that they wanted more flexibility or some control in how their rights were handled, citing specific restrictions.</p> <p>Question 3(b): Do you foresee any difficulties or challenges in implementing the above proposals? If so, please also</p>	<p>Whilst this section is on the rights of members, we would like to mention that the management of information by the CMO affects users.</p> <p>The nature of the arrangement (whether exclusive / non-exclusive / assignment) must be made clear to the public, in order for the public to determine if the CMO has the right to sue (if the CMO is an exclusive licensee or assignee), or only the right to collect licenses (non-exclusive arrangement).</p> <p>From past experience, the CMOs have had difficulties in providing such information, which is surprising given that it is a fundamental point</p>

	<p>suggest possible measures how these difficulties or challenges could be mitigated.</p>	<p>underlying their right to enforce their members' rights.</p>
<p>5.</p>	<p>3.21 ... Therefore, we propose that there be greater transparency about the sampling methodology and process, and the distribution process, in order to (i) allay members' concerns that the distributed fees are inaccurate; (ii) assure users that the licence fees paid do indeed compensate the relevant rights-holders; and (iii) attenuate the pressure that CMOs face in the determination of the distribution.</p>	<p>These proposals are important and welcome.</p> <p>We understand that:</p> <ol style="list-style-type: none"> 1. there are technological solutions at present that can assist the CMOs in calculating licence fees based on actual use; and 2. this is an area more appropriate for accounting. Hence, any mention or recommendation on distribution is more from a layperson's point of view. <p>We agree that the legislation should prescribe the minimum information that the CMOs must provide to ensure consistency (such as those stated in 3.22.1 to 3.22.9).</p> <p>In this regard, the information that should be provided for each distribution for a copyright work should include:</p> <ol style="list-style-type: none"> (a) the total amounts collected from users in respect of that copyright work; (b) out of the above, the amount attributable to that copyright work alone which should be paid as royalties to the copyright owner; (c) the methodology for calculating (b) (e.g. the percentage of airtime on the radio, for example); and (d) the CMO's administration fees. <p>While we are not in favour of forcing CMOs to adopt technological solutions, the prescription of the minimum information that a CMO should provide sufficient impetus for CMOs to adopt technological solutions where possible.</p>

		<p>The Companies Act has audit requirements for public companies limited by guarantees, which most CMOs are. Obviously, they seem inadequate. We are also aware that accounting principles may change from time to time.</p> <p>We suggest that CMOs subject their accounting and distribution method to an audit akin to “internal audits” carried out by MNCs on their subsidiaries. They should also publish how their accounting and distribution method compare with other CMOs every few years.</p> <p>However, we are mindful that mandating audits could unnecessarily increase the operational costs of the CMOs. As such, it can be one of the rights which the Code Reviewer can exercise.</p>
6.	<p>Question 4(b): How can CMOs and users work together in order to achieve a higher reporting rate of actual usage records of copyrighted materials?</p>	<p>We are aware that the amount of reporting on usage and its accuracy by users enables CMOs to distribute royalties to members based on actual usage of their works. However, we are also aware of the difficulties encountered of doing this in practice. Whilst the technology may be available, the costs may be prohibitive.</p> <p>After the market is liberalised and competition exists, copyright owners will most likely terminate their membership with CMOs which under-report.</p>
7.	<p>3.27.1 CMOs must allow the public to determine from their websites the portfolio of copyrighted materials they manage and administer. The information on the CMO’s portfolio must be accurate and provide sufficient clarity for a</p>	<p>We agree with this proposal. This is important for the public in their copyright clearance process. It promotes efficiency in the copyright licensing ecosystem.</p> <p>We are aware that some of the difficulties could be caused by members who do not fulfil</p>

	<p>potential user to determine whether a work the user intends to use is managed by the CMO.</p>	<p>their reporting obligations. The CMO database on works are as accurate as the information provided by their members.</p> <p>Our experience is that CMOs often provide information which is too generic. (e.g. recording labels that they work with, which has been adopted by many CMOs now). The public is unable to identify works by reference to record labels. Further, a work could have multiple owners e.g. joint ownership, co-ownership or if it is a song, owners for musical works and lyrics may differ.</p> <p>The information used to identify works should be benchmarked against:</p> <ol style="list-style-type: none">1. International industry standards; and2. Easy comprehension or availability by members of the public. <p>A book, for example, should be known by its title and author. A song, by its title and composer of the music; and title and lyricist of the lyrics. A sound recording, by its song title, artist and label. Information such as ISBN for books could also be present. The CMOs should already be using this information to manage their works.</p> <p>Besides accurate identification of works the CMOs should be required to make available a database of the titles of all works and rights arising therefrom that they are managing/administering, as well as information as to whether the administration relationship is that of exclusive licensee, non-exclusive licensee or assignee (see comment in S/N 4 above). The date on which they acquired/ were granted the right must also be stated. We therefore agree with the</p>
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		requirements under 3.32.1, with 3.32.1(d) to take into account the matters in the foregoing paragraph.
8.	3.37.1 ... Such information must clearly describe: ... e. stages of appeal, if any.	If a CMO decides to include an appeal process in its dispute resolution procedures, the person who decides the appeal should be an independent third party and not a person within the CMO's organisation.
9.	3.37.2 Where a CMO has received a complaint in accordance with its complaint handling and dispute resolution procedures, it must respond in writing. Where the CMO rejects the complaint, it must give its reasons in writing for doing so.	There should be an avenue of appeal / complaint against the rejection. Though paragraph 3.37.4, Consultation Paper makes some mention of it, the process is not clear.
10.	3.40.7 Members must be allowed to inspect the financial records, upon request. Question 7(b): Should there be any requirements imposed before members are allowed to inspect the financial records of a CMO?	Although members ought to be allowed to inspect the financial records, there needs to be a balance so that this right is not abused. As such, CMOs should be allowed to charge a reasonable administrative fee / printing fees if hard copies are requested.
11.	3.45.1 Option A: All contracts between CMOs and members must only be on a non-exclusive basis. CMOs will be given a transition period (e.g. six months) to convert all existing contractual arrangements to non-exclusive ones. Question 8(a): Do you agree that members should be given the choice to grant their rights to a different CMO at any point of time?	We agree that members should be given the choice to grant their rights to a different CMO at any point in time. Option A is preferable. It would prevent confusion in the marketplace. This would also facilitate competition among CMOs, which would increase market efficiency and potentially lead to lower prices for users and increased pay-out to members. The other reason for preferring Option A is that a proliferation of too many types of transfer of

	<p>Question 8(b): Between options A and B, which option is preferable, and why? Do you foresee any difficulties or challenges in implementing arising from the above proposals? Please also suggest possible measures how these difficulties or challenges could be mitigated?</p> <p>Question 8(d): Do you agree that CMOs should be allowed to commence proceedings for copyright infringement even if they are not exclusive licensees?</p>	<p>ownership or rights could lead to confusion when the market has a few CMOs. Thailand is an example. The country has approximately 30 CMOs for musical works. Some songwriters are members of a few. There have been instances when these songwriters assign their works to two CMOs at the same time.</p> <p>The issue arising from the grant of a non-exclusive licence is that CMOs will lack standing to sue for infringement under the Copyright Act (i.e., the issue raised in Question 8(d)). Whilst the law is not absolutely clear, assigning the right to sue <i>per se</i> (without any copyright or slice thereof) may not be sufficient for the CMO to commence a suit, and they will have to add their members (or foreign members) as plaintiffs if they are to take out an action. See <i>PCCW Media Ltd v M1 Ltd</i> [2018] SGHC 99, where the High Court had commented that an assignment of the right to seek a remedy under s 193DDA of the Copyright Act does not make the plaintiff the owner / exclusive licensee and therefore the assignee does not have sufficient standing to bring a suit. This is despite the original owner no longer having the right to bring a suit either. Although the High Court made these comments in the context of s 193DDA, it is arguable that these same comments can be extended to the other infringement provisions of the Copyright Act.</p> <p>One way would be to include a provision in the Copyright Act to give CMOs the locus standi to bring actions in its own name if this is provided for in the membership agreement, or else it defeats the purpose of a CMO.</p>
<p>12.</p>	<p>Question 8(c): Where the Singapore market is concerned,</p>	<p>This is a chicken and egg problem, assuming that the CMOs are equally efficient.</p>

	<p>what are the difficulties or challenges that prevent potential CMOs from entering the market or members from engaging a competing CMO to administer their rights? How could the proposals address these difficulties or challenges?</p>	<p>On one hand, the CMOs need to have sufficient works under their administration to convince users to enter a licensing arrangement with them. However, they need a sufficient volume of users for them to be able to attract a sufficient body of works to administer. With the liberalisation of market by ensuring that all CMO agreements are non-exclusive in nature, thereby removing the barriers to entry, a competitive equilibrium will be reached.</p>
<p>13.</p>	<p>Question 10: What are some of the requirements or expertise a Code Reviewer should have?</p>	<p>We agree that IPOS should be in charge of this.</p> <p>A Code Reviewer should be a qualified lawyer or auditor with sufficient experience in compliance or fact-finding work. Please also see our comments on audit in S/N 5.</p>