

Collective Management Organizations – Tool Kit

Neighboring Rights

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INTRODUCTION

From a national legislative perspective there are various academic treatises on matters relating to neighboring rights and copyright. Over the years there have also been a number of books, publications and papers published on the important subject of collective management of neighboring rights and copyrights.

The World Intellectual Property Organization (WIPO) has, in addition to its extensive contributions in the international neighboring rights and copyright fields, commissioned experts to write material to be used in conjunction with various collective management training activities. To enhance practical materials available to interested parties, WIPO has engaged the writers to further produce and compile two ‘tool kits’ in co-operation with a number of Non-governmental Organizations (NGOs) representing Collective Management Organizations (CMOs) in the fields of neighboring rights in sound recordings and copyright in musical and audio-visual works. In the neighboring rights field, CMOs are often referred to as Music Licensing Companies, but we retain the term CMO for these tool kits.

The contribution and assistance of the NGOs and other experts has been valuable and the writers’ appreciation is extended to them all.

The two tool kits – one covering neighboring rights in sound recordings and the other covering copyright in musical and audio-visual works – address five subjects in detail with a short sixth subject for balance :

Unit 1: Start-up CMOs

Unit 2: Strategy development for existing CMOs

Unit 3: Society tariff development and licensing practices for intermediate CMOs

Unit 4: Finance and legal matters for CMOs

Unit 5: Communication and marketing plans for CMOs

Unit 6: Documentation and distribution – notes

Apart from the content detail, the writers have attempted to create each unit as a stand-alone module. However, in certain instances it was recognized that information applicable in respect of one tool kit applies equally in respect of another, and these similarities have been retained. The practical administrative issues covered in both sets of tool kits are indeed similar and the respective texts reflect this. In both tool kits, a short list of some significant tools emanating from each unit is included at the end of the unit.



Objectives of each tool kit unit

The unit subject matter covered in the tool kits has been selected by WIPO as areas of practical application and interest to those involved in collective management of neighboring rights in sound recordings and copyright in musical and audio-visual works. CMO officials involved in start-up operations through to intermediate societies will be able to find a subject of interest provided in the various units which follow. Each unit is written to be short enough to retain the reader's interest, but detailed enough to provide some practical principles on the subject matter.

Bibliography, publications and general reference material

References to textual sources used are found at the end of each Unit, which generally exclude Internet sources which are accessible through the footnotes on the relevant pages of each unit.

UNIT 1 START UP CMO

LEGISLATIVE AND REGULATORY ENVIRONMENT

1.1 Introduction

1. Before incorporating a CMO it is important to clearly understand the laws and regulations that apply in respect to the CMO concerned. It may be that the country concerned does not have any legal regime regarding the rights that the proposed CMO intends to administer. In that case the first step would be to lobby legislators to introduce relevant laws. To do so it would, of course, be necessary to garner enough support from those affected by the lack of laws. This would include performers and record producers and others who, while not directly affected, may be sympathetic to their cause. For example, it may be that the particular country's law already has a regime for the functioning of authors' societies. In that case the management or board of the authors' society may be approached to lend their support.¹
2. To launch a successful lobbying program it is important to present a persuasive case as to why it is necessary to have a CMO in the area of neighboring rights. If the country's constitution makes provision for the protection of human rights, especially those aligned to Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, this can be used as a starting point in making arguments for the need to protect performers' rights. This would also empower the lobbyists to appeal to a broader section of society that is committed to the protection of human rights. Even without such constitutional protection, lobbyists can raise strong moral and economic arguments for the need to provide legal protection, especially the fact that performers are in fact responsible for 'breathing life' into the compositions created by authors and composers, and that without the involvement of performers many wonderful tunes would never have been made known to the world.

1.1.1 Applicable laws and regulations

3. Given an understanding of the local law, the new CMO must identify what laws and regulations are necessary to ensure the formation and operation of neighboring rights. Internationally, the Rome Convention² provides the

¹ The board or management of the authors' society may also feel that it is proper to lend support to the cause of performers, seeing that many authors are also performers.

² The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, 1961.



bedrock for the protection of neighboring rights but it does not, however, provide for exclusive rights. Instead, it provides for ‘the possibility to prevent’³ the unauthorized use of performances and recordings (termed ‘phonograms’ in the Convention). It further provides for *remuneration rights*, while making no specific provision in relation to the protection of moral rights. The second important international treaty in this regard is the WIPO Performances and Phonograms Treaty of 1996 (WPPT). Unlike the Rome Convention, the WPPT does provide for exclusive rights in addition to providing for remuneration and moral rights. More importantly, the WPPT applies particularly in respect of the digital exploitation of sound recordings.

4. Another important international treaty providing protection in respect of neighboring rights is the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement, part of the 1994 Marrakesh Agreement of the World Trade Organization (WTO). However, the TRIPs Agreement does not provide for the right of remuneration.
5. Another treaty to consider is the Beijing Treaty on Audio-Visual Performances of 2012,⁴ which accords performers certain moral and economic rights in respect of the exploitation of their performances in audio-visual works. The economic rights include the right of making available and the right of broadcasting and of communication to the public. Article 12(3) provides that national law or agreement between the parties may provide for performers to receive royalties or equitable remuneration for the use of their performances. These rights can therefore lend themselves to collective management. Nevertheless this treaty had not, at the time of the writing of this tool kit, come into force.

1.2 Scope of protected rights

6. It is clear from the foregoing that the economic rights granted to a performer generally include both exclusive rights,⁵ and rights of remuneration. All these rights lend themselves to collective management, although in differing degrees. For example, in respect of exclusive or similar rights only ‘secondary uses’ of sound recordings are likely to lend themselves

³ The use of the expression ‘possibility of preventing’ in the Rome Convention was aimed at enabling contracting states ‘to choose from among various means of protection (such as an exclusive right of authorization, the application of the law on unfair competition, or criminal sanctions)’. Implications of the TRIPs Agreement on Treaties Administered by WIPO, WIPO Publication No 464 (E) page 28 par. 68.

⁴ See http://www.wipo.int/treaties/en/text.jsp?file_id=295837

⁵ Or rights akin to exclusive rights. The Rome Convention and the TRIPs Agreement do not make provision for exclusive rights *per se*, instead providing for ‘the possibility to prevent’ the unauthorized use of performances and the right to authorize or prevent the reproduction of phonograms. The WPPT however, provides for exclusive rights.

to collective management,⁶ while remunerative rights are generally only administered collectively.

1.2.1 Exclusive rights

7. The exclusive or similar rights of performers apply in relation to the fixation (or recording) of their unfixed (i.e. live) performances; the reproduction of a fixation of their performance (unless the use and the original fixation were authorized), and the broadcasting and communication to the public of the performance (except where made from a recorded performance or where it is already a broadcast performance).⁷ The WPPT, which applies specifically in the digital environment, adds the rights of distribution, rental, and making available of recorded performances.⁸ Producers also have the right of reproduction,⁹ distribution,¹⁰ rental¹¹ and making available.¹²
8. Primary or so-called ‘first destination’ uses in respect of the above-mentioned rights of performers have been identified as those constituting the ‘normal activity of a performer’ within the scope of their contractual relationship with a record producer.¹³ The rights of fixation, reproduction and distribution fall within this category.¹⁴ These rights are generally administered privately, and thus do not easily lend themselves to collective management. Nevertheless the recording agreement will also include many of the secondary uses relating to the recorded performance, such as use in the sound track of a film, use in an advertisement, or the recording of a sound track album. Although it is theoretically possible, in practice it is not very common for secondary use to be administered through the system of collective management. An exception in this regard relates to the administration of remuneration rights.

⁶ As contrasted with so-called ‘first generation’ uses, e.g. authorizing the fixation of a performance by way of a sound recording; authorizing the reproduction of the initial recording through the making of copies; and authorizing the distribution (or making available to the public) of the copies through commercial means. See http://www.aepo-artis.org/pages/75_1.html (accessed on 4 Sep 14).

⁷ See Article 7 of the Rome Convention, Articles 6 and 7 of the WPPT and Article 14.1 of the TRIPs Agreement.

⁸ Articles 8 – 10 of the WPPT.

⁹ Articles 10 of the Rome Convention, 11 of the WPPT and 14.2 of TRIPs.

¹⁰ Article 12 of the WPPT.

¹¹ Articles 14.4 of TRIPs and 13 of the WPPT.

¹² Article 14 of the WPPT.

¹³ Undertaken through a recording contract.

¹⁴ See http://www.aepo-artis.org/pages/75_1.html.



1.2.2 Remuneration rights (including private copy)

9. Remuneration rights are provided for in terms of both the Rome Convention and the WPPT. These rights, while not exclusive, enable performers and record producers to receive remuneration for the broadcast or communication to the public of their sound recordings, and the performances embodied by them.¹⁵ Article 12 of the Rome Convention provides that domestic law needs to lay down the conditions for the sharing of this remuneration ‘in the absence of agreement between the parties’. The WPPT has a similar provision (in Article 15(2)), but adds the fact that national legislation may establish the party that is entitled to claim the remuneration from the user, whether it be the performer, the producer or both.
10. It is important that the issue of who is entitled to *receive* the remuneration from the user is dealt with very clearly in national legislation as failure to do so may result in serious problems in the administration of the right. Disputes between performers and record producers as to who is entitled to receive payment may arise, and this can lead to litigation.¹⁶ In many jurisdictions record producers own the copyright in sound recordings, and so they have an exclusive right to license all uses of the sound recording. Because of this it is the record producers who would ordinarily be entitled to license the use of this right. Theoretically it is possible for the user to pay the license fee directly in equal shares to both the CMO representing performers and the CMO representing producers. This is however, likely to present practical and administrative difficulties for the user.¹⁷
11. A better option would be for the legislation to make provision (or create an option) for the formation of a CMO that represents both performers and producers equally, as well as to provide for the equal sharing of the remuneration between performers and producers. The CMO – joint or single – would also be better placed to administer any agreements between performers and producers which provide for a different share split. The joint CMO option has, for example, been used successfully in the UK where

¹⁵ See Article 12 of the Rome Convention and Article 15 of the WPPT. The Rome Convention provides that the remuneration is payable to the performer or the producer or both, while the WPPT provides that it is payable to the performers and producers.

¹⁶ This was the case in South Africa, where the matter was only resolved after the parties agreed to form a joint CMO. See <http://www.samro.org.za/node/19383> (accessed on 8 Sep 14).

¹⁷ For example, the user may not be privy to the terms and conditions of the agreement between the producer and performer.

Phonographic Performance Ltd (PPL) issues licenses and, on receiving remuneration, pays it directly to both record producers and performers.¹⁸

12. The remunerations contemplated under Article 12 of the Rome Convention and Article 15 of the WPPT are both *single equitable remunerations*. This means that the remuneration consists of only one payment which must be shared amongst performers and producers. Under both arrangements the right applies in respect of a phonogram (i.e. a sound recording) which has been published for commercial purposes, where the phonogram is used for broadcasting or communication to the public.
13. Both the Rome Convention and the WPPT make it clear that the remuneration right applies in respect of a phonogram which has already been exploited in respect of the primary uses – i.e. ‘published for commercial purposes’. That expression includes phonograms made available to the public by wire or wireless means ‘in such a way that members of the public may access them from a place and at a time individually chosen by them’.¹⁹ It is common ground that this *making available right* may form part of the right of communication to the public.²⁰ While record producers generally control acts relating to the publication of a sound recording, the use of a published phonogram for purposes of broadcasting or communication to the public is nevertheless generally dealt with through collective management. It is also possible that where a formal recording industry does not exist, CMOs may play a role in ensuring that rights holders are remunerated for other forms of commercial publication of a phonogram, including primary and secondary uses).²¹ Such a regime may come to the assistance of independent recording artists who produce their own recordings. Article 15(3) of the WPPT also provides that a contracting party may notify the Director General of WIPO that it will apply the provisions relating to payment of a single

¹⁸ Although the PPL was originally formed to represent record producers, it started paying performers in 1996 after performers were given the right to receive equitable remuneration for the broadcast and public performance of their recorded performances. In 2006 PAMRA and AURA, representing performers, merged with PPL. See <http://www.ppluk.com/About-Us/Who-We-Are/Company-history/> (accessed 5 Sep 14).

¹⁹ Article 15(4) of the WPPT.

²⁰ This is in light of the ‘umbrella solution’ adopted under the WPPT, where it was agreed to define the act of digital transmission in a neutral manner free from any legal characterization and leaving it to member states to define the act. Thus the ‘making available’ right can be protected as a stand-alone exclusive right or as part of another exclusive right, such as the ‘communication to the public’ right. See in this regard www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf (accessed 06 December 2014).

²¹ This may be the position contemplated in terms of Section 30A (1) and (2) of the Kenya Copyright Act (No. 12 of 2001, as amended), which provides for the payment of a single equitable remuneration if a sound recording (or a fixation of a performance ‘is published for commercial purposes or a reproduction’ thereof is used for broadcasting or communication to the public, or is publicly performed).



equitable remuneration 'only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all'.

14. Another type of remuneration right, namely that relating to private copy levies, needs mention also. This remuneration right is justified on the basis of the private copying exception, in terms of which the reproduction of copyright works for private or personal use or study, is permissible. Accordingly rights holders are entitled to receive equitable remuneration in compensation for this limitation of their exclusive right of reproduction. The levy is charged on devices and media capable of being used for private copying such as blank CDs, DVDs, USB keys, iPods, and recording devices. This levy or royalty is often collected by an accredited CMO, and where the right exists, the CMO representing producers or performers in respect of the broadcast and communication rights is also often involved in the administration of private copy royalties. The levy is often paid at the point of sale by the commercial manufacturer or importer of the media or device concerned.

1.2.3 Conclusion: Implementation

15. This discussion highlights the fact that the legislation regulating remuneration rights needs to be clearly drafted to ensure that no ambiguities exist. Where the country concerned is a member of either the Rome Convention or the WPPT or both, this would form the basis for the national legislation.²² Constitutions of certain countries have specific provisions regarding the reception or incorporation of treaty law and mere accession to a treaty may not mean that the treaty has force in the country. The treaty would still need to be ratified by the country's legislature and national legislation would need to be passed to incorporate the relevant provisions of the treaty.
16. The type of legislation or law regulating the protection of the rights will largely be dependent on the system applicable in each country. In **open market** jurisdictions with a strong emphasis on private ownership the legislation may simply recognize the existence of the rights, leaving it to rights holders to organize themselves and form a CMO. In such cases a CMO is often constituted on a *voluntary* basis, permitting anyone who meets the membership requirements of the CMO to join. The incorporation of the CMO may take a variety of corporate forms or personae, depending on what the particular jurisdiction makes provision for. In some **planned**

²² In particular with regard to the WPPT, Article 4 provides for the principle of national treatment in relation to the rights granted under the Treaty. This will facilitate reciprocal representation of rights among the CMOs of different countries.

economies or **mixed systems** the CMO may be specifically *regulated by statute* and it may not be possible to form a voluntary or private society. In such systems only the statutory society is authorized to conduct activities as a CMO and rights holders would be required to join the entity if they want to benefit from collective management. The statute may provide for a system of accreditation for qualifying entities that want to function as CMOs, in which case the relationship between the society and its members may more or less be like that applicable in private systems;²³ or it may provide that the CMO shall be a *public entity* forming part of the state administration such as a unit in a Copyright Office. The focus of this toolkit is on CMOs that permit rights holders to join the CMO as members, with the possibility of appointing representatives to a board of governance. However, much of the information relating to the effective establishment and running of a CMO will be applicable to most CMOs.

INITIAL MARKET ASSESSMENT AND CONSIDERATION OF OTHER KEY ENVIRONMENTAL FACTORS

17. Apart from the legal and regulatory considerations dealt with above it is important to conduct an initial market assessment of the broader environment in which the new CMO would operate, an activity which involves analyzing some key environmental factors. These include: (a) the history of collective management in the country; (b) economic and market factors; (c) technological factors; and (d) socio-political factors. This exercise is normally carried out by the group of people who have conceived the vision of forming a new CMO ('the promoter group'), ideally with the assistance of business planning and strategy specialists. At this stage only a preliminary consideration of these factors will be made. A fuller analysis in this regard will be done during the development of the new CMO's Start-Up Development Plan (see from paragraph 35 below).

1.3 The history of collective management in the country

18. Before taking a decision to start a new CMO it is important to consider any history of collective management in the country. This will involve determining if any CMOs already exist, either in the area of neighboring rights or of authors' rights.²⁴ If there is one or more functional CMOs in the area of neighboring rights already it would not be wise to re-invent the wheel. What might be required is to strengthen the operations of the existing CMO in

²³ In the sense of having a board of directors that is normally elected by the rights holders and a system of membership and members' general meetings etc.

²⁴ In the music industry societies dealing with authors' rights will include *mechanical or reproduction rights societies* and *performing rights societies*.



order to make it more effective.²⁵ The existence of factions (particularly in voluntary systems) in one area of rights administration has proven to give rise to problems. This results in the stifling of efforts to have a functioning system of collective management of music rights in the country. It has often been stated that having one CMO to represent one bundle of rights or one group of rights holders is an optimum way of administering rights.²⁶ The fragmentation of rights of one category among different CMOs may give leverage to user groups to take advantage of the situation and to argue that none of the CMOs has broad enough representation among rights holders to necessitate procuring a blanket license.²⁷ This may result in users electing to deal directly with rights holders on a transactional basis, or encouraging rights holders to deal directly with them, a practice that defeats the purpose and advantage of collective management. It may also expose rights holders to exploitation or pressure from users to accept lower licensing fees because of the lack of bargaining strength that a fully-representative CMO has in licensing negotiations.²⁸

19. If a CMO in the area of neighboring rights once existed but is no longer in operation, it would be important to carefully consider the reasons for its failure so as to avoid the same fate. If other CMOs exist in other areas of rights it would be important for the promoter group to form a working relationship with them. Other than being able to obtain useful information regarding market conditions, it may also be possible, during the nascent stages of the new CMO, to receive back-office or technical assistance from the existing CMO in areas such as assistance with the formulation of tariffs and license agreements; assistance with royalty administration (where the new CMO may outsource this function to an existing CMO, until such time as it has set up its own systems); or even front-office operations such as membership recruitment and works declaration. Support by an existing CMO may enhance the new CMO's standing and provide the early legitimacy required in dealing with users, government, and others.

²⁵ In which case the discussion under Unit 2 below will be applicable.

²⁶ See for example Ficsor M *Collective Management of Copyright and Related Rights* (WIPO, Geneva 2002) 135 – 136.

²⁷ The system of collective management works best through the use of blanket licenses, which is what makes the system attractive to users. A blanket license is a license issued by a CMO permitting the user, during the term of the license, to use any one of such works or performances without the need of procuring an individual or transactional license for such use.

²⁸ In some cases rights holders may also be pressurized to completely transfer their rights to the user through assignment or a buy-out arrangement in return for a meagre, or what may appear to be a generous but one-off, payment. While legislation often prohibits a performer from assigning his remuneration right to anyone other than a collecting society (see for example section 182(D) (2) of the UK Copyright, Designs and Patents Act, 1988), some local legislations do permit a general assignment.

1.4 Economic and market factors

20. In relation to this it would be important to start by considering **the economy of the country** (i.e. the general state and health of the economy in relation to GDP – both nominal and per capita). A negative state of the economy, resulting in few music-using businesses that are active in the economy may have implications for a fully operational CMO. Often during economic slowdowns businesses cut back on expenses that they may deem to be not crucial to their operations and this may include the use of music. Under such circumstances the CMO (or in this case, the promoter group) may need to ‘sell’ the idea of the value of music in business in order to get businesses interested. It may also involve giving users some incentives to take a music license, such as offering rebates or charging incremental license fees that make it easy for the businesses to benefit from the use of music without feeling unduly strained financially. It is however also important to note that even during periods of economic slowdowns some businesses that claim not to be using music may in fact, be doing so stealthily. It is thus important to build a team of effective licensing representatives that can visit such business premises and collect information, and, where necessary, evidence of users’ unauthorized use of music. Identifying one flagrant infringer and successfully taking them to court can send a message to other infringers that they need to procure a music license.
21. In addition to assessing the general state of the economy it would also be important to do a thorough *market potential assessment* in respect of various types of **music uses**. The assessment is aimed at estimating the size of the market in order to determine the potential licensing income that will be received from licensing users. Intellectual property rights are often in the form of a ‘bundle of rights’ which means that the protection afforded to a recording or a performance is often not granted in respect of one exclusive act only, but rather in respect of two or more exclusive acts. In the case of the remuneration rights under discussion, the bundle of rights may include the right to broadcast the recorded performance and the right to communicate it to the public in a number of ways. With respect to the market potential assessment it would thus be crucial to determine, in respect of all possible uses of the recording, what the potential market is for such a use. Within each area of exploitation one would need to consider the major forms of uses such as terrestrial, cable or satellite broadcasting, webcasting, or other forms of digital transmission including that by telecommunication companies, Internet service providers and digital service providers. In doing the assessment it would also be important to distinguish between major users such as public and commercial broadcasters and smaller ones. In



the *public performance area*, the consideration would include major users in the accommodation (hotels, resorts, lodges), hospitality (restaurants, pubs, clubs), retail (supermarkets, shopping malls, specialized retail), manufacturing, and transportation (air, road, rail and sea) sectors.

22. In addition to identifying potential users the market potential assessment must also determine the **potential rights holder market** in order to determine the CMO's potential repertoire. The extent to which a voluntary CMO can issue user licenses is largely dependent on the CMO's repertoire. In this regard it would be important to have rights in respect of both domestic and international repertoire. This would mean identifying both major and independent record producers and artists, both locally and internationally. Major international record labels and some of the major independent labels may have local affiliates in a country, or at least have relationships with existing national labels that enable them to distribute or license their recordings in that country. These local representative companies can join the CMO as members, giving the CMO access to their international repertoire.
23. The identification of international repertoire also involves identifying similar CMOs in foreign jurisdictions which will ensure reciprocal representation of the rights of the members of these CMOs. Reciprocal representation will be of particular benefit to many independent producers and artists, who may not have the resources to control the use of their repertoire internationally.²⁹ The foreign CMOs can collect royalties on their behalf and send them to the local CMO for redistribution. Major international producers also benefit from reciprocal representation in jurisdictions where they do not have local affiliates or representatives. It is important to remember that national legislation sometimes prohibits the payment of royalties to nationals of countries which do not provide reciprocal protection to the nationals of the other country.
24. The market potential assessment will enable the promoters and future management of the new CMO to identify the relationships and partnerships that it needs to forge in order to operate successfully. The promoters may, even before the formal registration of the new CMO, start having preliminary interactions with the major rights holders, foreign CMOs and users, with a view to reaching agreements in principle. The parties may reach a memorandum of understanding (MOU).

²⁹ See in this regard Piaskowski N 'Collective Management in France' in Gervais D (ed) *Collective Management of Copyright and Related Rights 2* ed (2010) 177, distinguishing between the roles of SPPF in France, which mainly represents the majors and is thus 'authorized to give permission for use only within France', as contrasted with SPPF, which has a worldwide mandate because it only represents independent producers.

1.5 Technological factors

25. It is important to analyze the technological factors that would have an impact on the operations of the new CMO. These factors can either be *external* or *internal*.
26. **External factors** will include: the state of the telecommunications regulatory environment in the country concerned (e.g. the extent to which the frequency spectrum is regulated); bandwidth development; the availability of broadband and other Internet access methods; general levels of access to personal computers and other technological devices such as cell phones, iPods and tablets; and any other factors having an impact on the licensing of on-line music services. These factors will determine to what extent a market exists for the dissemination of music through broadcasting and other telecommunication networks. They will also determine the ease with which the end user can access such services.
27. **Internal factors** also need to be considered. Central to this is the CMO's ability to use computers and networks to license uses and process data in a quick and seamless manner. Much will depend on the availability and accessibility of computer systems capable of handling the voluminous data that a CMO needs to process daily. The computer technology required to effectively run the operations of a CMO can be costly to develop. There is also the human resource consideration of availability of software developers who are fully acquainted with the business of collective management of neighboring rights. The CMO may therefore face significant costs to obtain such services, or else license software systems from other existing societies. The extent to which sharing or transfer of technology is possible also needs to be considered. It may be advantageous in the end for the CMO to have its own in-house services and expertise. A CMO needs to have access to reliable and automated systems that can be used to process the many layers of data it works with daily.

1.6 Socio-political factors

28. The socio-political analysis involves an assessment of the social and political environment in which the new CMO will be operating. On the **social** side it would be important to assess the cultural environment in which music is performed, produced and consumed; attitudes towards the respect of intellectual property rights; and the rights holders' own levels of knowledge about their rights. It would also be important to identify the various cultural associations, unions and arts-supporting organizations that exist, since it may become necessary to work with these organizations in the advancement of



the CMO's business. For example, the CMO may need the support of these organizations when lobbying government for new laws or revised regulations; when launching antipiracy campaigns; or even as a recruitment base for members.

29. On the **political** side the considerations include relations with government, including government's attitude towards the creative industries and intellectual property protection, and the speed of government's response in respect of policy and legislative amendments. Also included is an assessment of the regulatory framework within which the new CMO will be operating, such as what operating licenses will be required, or any restrictions on conducting CMO activities. To ensure that the new CMO operates without hurdles it may be important to obtain the support of government, by forging relations with relevant government departments such as the Department of Economic Affairs or Trade and Industry; the Department of Arts and Culture; and Department of Justice. This may require the promoter group to introduce themselves and their plans to key officials within these government departments in order to establish lines of communication. This will prove valuable whenever it becomes necessary to communicate with government.

IDENTIFICATION OF THE 'PROMOTER GROUP'

30. We have alluded above to the 'promoter group'. This refers to the people or groups who first conceive the vision or desire to form a neighboring rights CMO. These may be a group of rights holders such as record producers and recording artists who take it on themselves to organize the rights holder community with a view to starting a CMO. It may even be people who are not rights holders *per se* but who have an interest in the safeguarding of neighboring rights in music recordings. This group might also provide the initial capital outlay for starting the new CMO,³⁰ or their involvement might be limited to organizing the rights holder groups and leaving it to them to determine how the new CMO would be financed. The initiative may even be taken by government, for example officials from the Department of Economic Affairs, Trade and Industry, or the Copyright Office. This may particularly be the case if the national legislation only provides for a statutory society or one that is part of the state administration.

³⁰ Whether in the form of outright grants or by securing loans from other parties or by way of guarantees.

IDENTIFICATION OF RIGHTS HOLDER GROUPS AND RIGHTS HOLDER SENSITIZATION

1.7 Identification of the rights holder groups

31. The first priority of the promoter group is to garner as much support for the proposed CMO as is possible. More importantly in this regard is to obtain a 'buy in' from rights holder groups, whose support the CMO needs to operate. The success and effectiveness of any CMO is largely dependent on the type and value of the rights that it represents. This is true with regard to both local and foreign rights.
32. In view of this, it is important to clearly and strategically identify the rights holders or rights holder groups that the new CMO wants to represent. Enlisting the membership of the major (and major independent) record labels as well as successful recording artists, would of course, be the first port of call for any CMO hoping to have an influence in its market.³¹ The promoter group should not, however, be short-sighted in this regard. The lifespan of a successful recording career or production business is sometimes short. Solely depending on 'hit artists' and major production houses may therefore at times only prove helpful in the short-term. A strategy that combines the recruitment of top artists and labels as well as younger, promising artists and producers will prove worthwhile in the long run. Much depends on the market size and the focus of the CMOs concerned. Some CMOs may be formed to service 'the majors', while others may be formed to cater for the needs of the 'independents', or to cater for only one category of rights holders.³² Perhaps a better strategy might be to open up the CMO's membership to all groups; the SCPP in France represents both independents and majors, in contrast with the SPPF which represents only independents.

1.7.1 Rights holder sensitization

33. Having identified the rights holder group which the new CMO wishes to represent, the next step is to *sensitize* these rights holders to the idea of forming a new CMO. It is important that things are done correctly from the outset so as to avoid disputes later. The rights holders must identify with the new CMO and must sense that they will make a contribution to its formation. As part of the sensitization, workshops or other industry-wide meetings

³¹ Some jurisdictions may not provide protection for performers or performances, in which case the CMO's target group would be those for whom the law provides protection, such as record companies.

³² This may be influenced by the existence of another CMO in the market. For example, if the market already has a society representing the major groups the promoter group may focus its effort on forming a society that will only represent the independents.



should be organized, and the various rights holder groups must be invited to these meetings. The purpose of the workshops is to highlight the importance of working together through the system of collective management. Ideally the promoter group would already have had separate meetings or contact with – and at least have obtained preliminary support from – some or most of the major rights holder groups before conducting the broader workshops. This will ensure that the workshops are not disrupted through a visible lack of support and understanding from these important industry players. Visible support from the major players is likely to inspire the confidence of the rest of the rights holder groups in the new initiative and to prompt them to also express their support.

34. Depending on budgetary constraints it would be ideal to involve experts such as officials from international and intergovernmental organizations like IFPI, SCAPR or WIPO to make presentations at the workshops. Some of these organizations may even be able to provide support or grants to assist in the running of the workshops. It is also important to receive support from legislators and regulators where possible. Inviting a key government official such as the Registrar of Copyright to the workshop can be viewed in a positive light and can ensure government support in the long run. Government may also be able to provide some funding in support of the sensitization workshops. Where the society to be formed is regulated by statute or will form part of the state administration, the state itself may initiate the process and actually sponsor the running of the workshops. In such cases the promotion process might involve sending an official communication to the rights holder groups, inviting them to information or implementation sessions relating to the new CMO. In the case of societies that are public entities within the state administration this may even involve the publication of a statutory notice inviting musicians and record producers to register as rights holders or beneficiaries.

INITIAL START-UP PLAN DEVELOPMENT

35. Having sensitized the various rights holder groups regarding the need for a new neighboring rights CMO, and having obtained general support in this regard, it will now be time for the promoter group to get down to work. This involves developing a proper business plan and strategy for the new CMO, which will define the parameters and scope of operation of the new body. This process will ideally take place at a special strategy session organized by the promoter group. Ideally an experienced business strategy consultant will be invited to assist in the process. It would also be important to have representatives from the major rights holder groups attend the session. This

would demonstrate that wide consultations took place before the CMO was formed. To be effective the plan will have to include some or more of the following components:

1.8 Legal nature and bundle of rights considerations

1.8.1 Legal nature

36. A CMO may be a private entity based on voluntary membership, a statutorily-regulated entity which may permit voluntary membership, provide for compulsory membership of all rights holders, or be an entity forming part of the state administration such as a unit within the Copyright Office. The legal nature of the CMO will be largely-dependent on the system applicable in each jurisdiction. Where the particular jurisdiction permits the formation of private or rights holder entities these would normally be constituted as non-profit organizations.³³ A company limited by guarantee has been used successfully in many Commonwealth countries. Trusts, foundations and other similar entities have also been used. In the case of statutorily regulated CMOs, the regulations may provide for accreditation terms that are either more or less stringent. For example the statute may only set minimum standards that a society has to comply with while permitting rights holders to decide how the CMO will be constituted. It may go to the extent of regulating how the CMO will be constituted and what its governance structure will look like. In the case of an entity forming part of the state administration a legislative instrument or regulation will usually determine how it will function.

1.8.2 Bundle of rights considerations

37. The strategy session must also agree on the bundle of rights that the new CMO will be involved in. Again this will depend on what the legislation provides for. The full bundle in respect of neighboring rights will include broadcasting (including cable transmissions), public performance and communication to the public. If the regime concerned makes provision for private copy levies these would also be included in the scope of rights that the CMO will be involved in. However, the fact that legislation makes provision for these rights does not mean that the new CMO needs to administer all of them. It could be that for strategic reasons a decision is taken to limit the operations of the CMO to only one area of rights, either

³³ See, however, Article 3a) of the Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use, *supra*.



broadcasting or communication to the public.³⁴ Even within one area of rights a decision may be taken that the new CMO will only focus in one aspect, such as cable transmissions or digital exploitation.

1.9 Organizational design, structure and governance

38. Organizational design has to do with how the different functions and operations of an organization can be integrated to ensure that the organization best achieves its goals and purposes. This will determine the organizational structure and governance of the CMO. An organization's structure is a hierarchical arrangement in terms of which the various roles, functions, powers and responsibilities in the organization are determined and managed. This then gives rise to the organization's governance system, i.e. 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations.'³⁵
39. Central to the corporate governance system is a board of directors or governors. The type of corporate governance system adopted by the new CMO will largely depend on whether the jurisdiction concerned is influenced by a Common Law system, a Civil Law system, Mixed law systems etc. So for example in Common Law systems the board of directors is usually a *unitary* or *single board* appointed by shareholders (and in the current case, members of the CMO), which in turn delegates its authority to various levels and components of management usually led by a General Manager, Chief Executive Officer or Managing Director. In contrast, many Civil Law and some Asiatic systems provide for a *dual-board* system comprising of a supervisory board (elected by members) and a management board (appointed by the supervisory board). Another official whose role is becoming increasingly important in corporate governance discussions is the company secretary, whose main function is assisting the board in carrying out its duties.³⁶
40. An organization's corporate governance system, which is generally reflected in its **constitution**,³⁷ regulates the various relationships existing between

³⁴ It may be that an existing CMO already effectively administers rights in one area and it is therefore felt that rather than competing with the existing CMO, the new CMO will focus on another area.

³⁵ See the so-called Owen Report, i.e. the Report of the HIH Royal Commission (2003) in Australia, available at <http://www.hihroyalcom.gov.au/finalreport/index.htm> (date of access 05 October 2014).

³⁶ This includes organizing board and company meetings, keeping minutes and other company records, and making the board aware of statutory, legal and other regulatory compliance issues.

³⁷ A company's memorandum and articles of association, also known as its charter, or memorandum of incorporation. This also includes the company's governance rules.

the organization and its members, the organization and the board, and the members and the board. The constitution deals with such matters as the objects of the organization, qualifications for membership, qualifications to be a board member, meetings of members and board, accounting matters, and the dissolution of the organization. While the members of a CMO's board of directors have traditionally been appointed from members of the CMO, it has become common to include a certain number of 'independent directors' who have no involvement in the music business in the board, in line with wider developments in corporate governance. CMOs that are public entities or are otherwise regulated by statute may require the appointment of government officials to the board. The **governance rules**, which form part of the CMO's constitution, generally include the CMO's membership rules and royalty distribution rules. The membership rules provide for such matters as qualifications for membership, election to membership, termination of membership etc.,³⁸ while its royalty distribution rules determine the manner, basis and frequency of royalty distributions, the division of fees amongst rights holders, the valuing of or weighting attached to particular uses, and possibly the deduction of administration costs by the CMO.

41. The role of the strategy meeting is to agree on the general organizational structure and governance of the new CMO. The actual constitution of the CMO will then be prepared by lawyers or other experts with expertise in corporate law.

1.10 Methodology of funding and finance

42. It will be important for the strategy session to carefully determine how the new CMO will finance its operations. Especially in the early stages, the new CMO will require finances to cover start-up costs and operating overheads. The need for careful financial planning cannot be overemphasized as this constitutes one of the overriding aspects of the new CMO's development. If financial planning is not done correctly at this stage this may have an impact on the effectiveness of the CMO later. The CMO's board and management need to be cognizant of the main aim of a CMO, namely to administer the rights of its members in the most cost-effective manner to ensure that the bulk of the CMO's collections are paid out to members as royalties.
43. If the CMO adopts reckless financial practices from the outset by paying high salaries, having a bulging administration, funding recreational activities for

³⁸ Related to the membership rules is the affiliation agreement with foreign societies, which determines the relationship between the CMO and these foreign societies, including the manner of representation of the repertoire of the other society, the frequency of royalty distributions, and the CMO's administration fee.



staff, or holding out-of-town meetings that could be effectively conducted locally, this is likely to create a culture where the CMO always struggles to achieve its objective of championing the interests of its members. While employee satisfaction is important, so is member satisfaction. If there is member satisfaction, this should translate into employee satisfaction. The board needs to encourage and inculcate a culture of thriftiness and financial efficiency from the very outset.

44. The strategy meeting needs to determine where the initial funding of the CMO's operations will come from. This funding strategy needs to have a horizon of at least three years as it will take that long to set up operations, commence licensing activities, collect licensing income from users, and generate a surplus for distribution. If the CMO is a private entity the funding will normally have to be sourced privately. The funding may come from one or more of the promoters or promoter groups in the form of a term loan. The loan may also be obtained from a lending institution,³⁹ or an existing local or international society. The state may also provide some seed capital to cover the start-up costs of a statutory body. Where the CMO is a part of the state administration the state will usually provide the funding, either in the form of term funding or a one-off grant to be administered by the CMO. The CMO should strive to keep its overheads to the minimum. It is of course normal to expect a higher administrative cost to income ratio for the CMO as it commences its activities, improving over time as it starts licensing users and getting them to pay. In this regard a phased-in approach in which the CMO works at steadily reducing its administration to a sustainable level should be implemented.⁴⁰ In all cases proper budgeting and thriftiness in the use of funds are crucial aspects of a CMO's operations. This will prevent the 'pay-as-you-go' syndrome prevalent among some collecting societies where lack of proper financial planning results in the society operating in deficit with poor (if any) distributions to members.

1.11 Operations management

45. There is a difference between the role played by the board and that played by management. The board provides general, high-level oversight of the

³⁹ The sourcing of funding from a lending institution where the activities of a start-up CMO whose performance has not yet been tested will often require collateral (security) for the loan, or require one or more of the promoters to stand surety. If the promoters would have secured an agreement-in-principle from one or more major users, or have acquired rights from major rights holders, this can be used in support of a loan application.

⁴⁰ Where regulations require a society to keep administration costs at a certain level it would be important to communicate with legislators to permit a phasing-in system, so that the stipulated cost level only becomes mandatory after a certain period. The CMO can only deduct costs that are 'reasonable and indispensable'. See Ficsor *Collective Management of Copyright and Related Rights* 147.

functioning of the CMO, determining its strategic direction and vision. It ensures that the CMO operates in a sound, financially-defensible manner and that its activities are sustainable. It is left to management, led by the General Manager (GM),⁴¹ to attend to the day-to-day operations of the CMO. It happens at times that board members are tempted to get involved in the day-to-day running of the CMO; this should be discouraged. Management should be allowed to carry out the day-to-day affairs of the organization without encroachment from the board. The board is there to provide direction and support. For this reason board meetings are conducted at regular intervals.⁴² Management must, however, assist the board in carrying out its duties by ensuring that the board is provided with all information necessary to enable it to undertake its oversight role.

46. The main areas of operations for a CMO are **membership** (having to do with the acquisition of rights to represent rights holders and their works); **licensing** (having to do with the setting of licensing terms and tariffs (prices to users); issuing of licenses to users; and **distribution** (having to do with the collection of use data from users and using the data to distribute royalties to members).⁴³ In view of these operational areas a society will usually have the following departments, or a combination thereof: *membership department* (responsible for the *membership system* which keeps records of the members of the CMO and their various statuses); *documentation department* (responsible for the *documentation system* which keeps records of the sound recordings and recorded performances associated with various members and affiliated societies);⁴⁴ *licensing department* (responsible for the development of tariffs and issuing of licenses to users and keeping the *licensing system*, which records information about licensees, the amounts due, prospective licensees and infringers); and the *distribution and music use department* (responsible for processing music use data from users, linking this to the information in the documentation system, with the surplus available for

⁴¹ Who may also be called a Chief Executive Officer (CEO) or Managing Director (MD).

⁴² The norm is for board meetings to take place once in three months, when management presents the organization's operational reports to the board. Having said this, it may be necessary for the board of a new CMO to meet more frequently to assist management while the CMO's operations stabilize.

⁴³ See generally in this regard Gervais D (ed.) *Collective Management of Copyright and Related Rights* (2010) 6 – 10.

⁴⁴ The membership and documentation departments may be merged into one department, sometimes called the *membership and repertoire department*. However as the society grows bigger, it may be necessary to separate the two functions to ensure greater efficiency.



distribution and computing the distribution and issuing royalty distribution statements).⁴⁵

47. Apart from these departments, there are other support structures that are essential to a CMO's operations, both in respect of its role as a collecting society but also its corporate role generally. These include the *finance section*; the *legal and compliance section*; the *human resources section*; the *information services section*;⁴⁶ and the *marketing or public affairs section*.⁴⁷ It is often common to speak about 'front office' and 'back office' functions, with departments or sections such as membership, licensing and sales, and marketing being seen as front-office functions, and departments or sections such as documentation, distribution, finance, legal, compliance, and human resources being seen as back-office functions. These various operational functions are carried out by management and other employees of the CMO and are not the function of the board.⁴⁸ It is thus not proper for the board to encroach into the day-to-day running of the organization unless management has displayed gross mismanagement of the CMO's affairs.

1.12 Time-based development stages and phases for 'Time to Market'

48. It is important for the business plan to incorporate a time-based developmental strategy that realistically takes into account the time that it will take for the new CMO to start issuing licenses and reach its 'break-even point'. Often organizations conduct their strategy plans over an initial period of three years. In this regard a thorough analysis of the *environmental factors* dealt with above (paragraphs 17 and following) needs to be undertaken. This will also determine the *human capital needs* of the new CMO. Much in this regard will depend on the rights that the new CMO represents. If, for example, the CMO represents all the major producers and artists, it may be easier and quicker to enter the market, issue licenses and start receiving licensing fees, since the bulk of recordings used in the market are controlled or owned by these parties. Wide-scaled licensing activities will, however, require many of the departments dealt with under *operations management* to

⁴⁵ The music use department may be part of the documentation department. The actual computation of royalties and processing of royalty statements may be done by the CMO's information systems section, using data received from the music use department.

⁴⁶ Also called information technology (IT) or information and communication technology (ICT) section.

⁴⁷ In established CMOs the marketing and public affairs roles are often separated, with the former focusing on communication that relates to projecting the image of the CMO and the latter focusing on building relations between the CMO and important institutions such as government, industry organizations, intergovernmental organizations etc. It often involves lobbying and public or stakeholder relations in general and may be part of the corporate legal role.

⁴⁸ With the possible exception of lobbying and general public affairs where members of the board may be co-opted to provide assistance.

be functional, thus requiring more staff. If the new CMO has only managed to secure few or less-lucrative rights, setting up several departments or sections all at once and appointing managers to head such departments may not be possible and would, in fact, not be wise. Under such circumstances it would be prudent to merge closely-linked functions into single departments and to appoint fewer staff members. Overhead expenses relating to human resources need to be closely watched in the early developmental stages of a CMO. Each CMO will adopt a work plan for the roll out of its activities linked to the various goals and objectives set in time. The details of the work plan will be determined by the prevailing circumstances faced by the CMO.⁴⁹

1.13 Basic marketing and communication including member, rights holder and owner recruitment

49. Having dealt with the above matters, it is then important to deal with issues relating to marketing the services of the new entity, and how this will be communicated. The word needs to go out there that a new CMO has been formed. The strategic session will need to identify the 'customers' that the marketing plan wishes to target, and must adopt a differentiated communications strategy using various platforms that will ensure that the message which the new CMO wishes to communicate is communicated effectively and to the right audiences. The marketing and communications plan must clearly show how the CMO will reach both key rights holders and users. A strategy for recruiting members to the organization needs to be devised which may involve rights holder associations, unions or similar representative bodies. The marketing and communications plan must not neglect how communication to other stakeholders (e.g. government, other music industry associations, and other cultural industry organizations) is to be conveyed. Over the years, marketing and communications information and literature and their delivery platforms have played an important role in the success of CMOs. For further elaboration on marketing and communication plans for CMOs see Unit 5.

1.14 Licensing and other core operational functions

1.14.1 Licensing

50. Based on the initial market survey it would be important to then segment the user market and to estimate the size of the various segments in

⁴⁹ See in this regard a 'by month' template guide for new copyright CMOs – U Uchtenhagen in 'The Setting-up of New Copyright Societies – Some Experiences and Reflections', chapter 4. http://www.wipo.int/edocs/pubdocs/en/copyright/926/wipo_pub_926.pdf (accessed on 1 Oct 14).



order to devise a licensing strategy that will focus on each of the various market segments. This will also enable the team to prioritize those market segments that are likely to bring in significant licensing revenue, those that are likely to bring revenues quickly, as well as those that are less likely to resist licensing initiatives. More importantly, the segmentation will assist management in identifying the key tariffs that need to be developed as soon as possible in order to commence with licensing activities. It may be useful to send introductory letters to the identified major users and user groups informing them about the formation of the new CMO, the rights and rights holders it represents, the reasons for forming the CMO, and the need to procure a license from the CMO in order to avoid infringement of copyright or neighboring rights. Ideally the letter must be accompanied by a more detailed information brochure written in easy-to-understand language, which clearly outlines the rights protected, the legislative framework relating to the protection of the rights and a 'frequently asked questions' (FAQ) section.

51. In the meantime the organization needs to develop its major tariffs in line with the segmentation assessment of the user market as mentioned in paragraph 20. For example, the broadcast market would be divided into radio broadcasting and television broadcasting. Within these categories the market would further be divided into public broadcasters, commercial broadcasters and community broadcasters. These may be further divided into terrestrial broadcasting, cable broadcasting and digital broadcasting, with tariffs being developed for all these areas. The development of public performance tariffs could be undertaken in line with the earlier identified segments such as accommodation, hospitality, retail and transport segments, further separating the tariffs according to categories such as essential, necessary and background uses.
52. The actual tariff development is often based on benchmarking, which takes into account national, regional, continental and international best practices. The unique local conditions applicable in the particular jurisdiction are also an important consideration. Even where there is correlation with practices elsewhere, the tariffs still need to be adapted to the local conditions. Courts and copyright tribunals have often used a 'standard of reasonableness' to determine if a disputed tariff or license fee is acceptable and whether the fee is reasonable under the circumstances. In developing tariffs it is thus important to demonstrate that reasonable steps have been taken when arriving at a particular tariff. When establishing international benchmarks it would be important to assess degree of correlation between those CMOs chosen as best practice and the new CMO's market and value attributed to culture.

53. As part of the licensing process a *licensing system* needs to be developed, which must take into account the various stages involved or contemplated in approaching users with a view to getting them to obtain a license. A number of licensing platforms and methodologies may be used. A web based on-line application system may work for some categories of users, whereas a tele-sales system may be better for others. The well-established correspondence system of standard letters has been used over many years, where a series of letters are generated to prompt a user to procure a license, as soon as a licensing representative has visited the user's premises and made the user aware of the need to procure one.⁵⁰ The series of letters could commence with an introductory letter highlighting the need for a user to procure a license, followed by a reminder letter after thirty days, a more strongly-worded reminder after sixty days, and a final letter of demand after ninety days. Should the user not respond to the final letter of demand they may then be deemed to be an infringer of rights. Appropriate steps can then be taken to commence infringement proceedings.⁵¹
54. A more detailed discussion on the subjects of CMO licensing and litigation is dealt with in Units 3 and Unit 4.

1.14.2 Other core operational functions

55. Apart from licensing issues, attention needs to be given to other core operational functions, in particular **membership, repertoire documentation**, and **music use reporting**. Appropriate systems need to be developed in all these areas. Developing such systems can be costly, and start-up CMOs may find it better to use 'off the shelf' systems,⁵² or systems licensed from other CMOs. Societies may in due course develop their own 'home-grown' systems based on their own local needs, but developing such systems requires expertise and technical input and is likely to be a costly exercise.
56. The **membership system** needs to accurately link a member's name with all relevant information relating to the member, including their biographical information,⁵³ all works or performances associated with

⁵⁰ Or as soon as CMO staffs have somehow become aware of the fact that a particular premises use music, such as through information available in daily newspapers etc.

⁵¹ This system will also serve to place the user 'in guilty knowledge' in cases of secondary infringement of the rights, where the user may claim that he or she was not aware that the use constituted infringement.

⁵² WIPO has for example developed a software program called WIPOCOS which assists CMOS in setting up their operations. The application focuses on the administration of the rights of performers and record producers. See http://www.wipo.int/edocs/pubdocs/en/copyright/957/wipo_pub_957.pdf (accessed 6 Oct 14).

⁵³ It should be able to capture any changes to a member's details in real time.



them, past and current affiliations,⁵⁴ and when they became a member. In the **documentation system** the details of a work (a sound recording or a recorded performance) must indicate the people associated with it as well as the extent to which each rights holder participated in the work. It is important to keep this database up-to-date at all times and reflect all changes to the information. Equally important is the **distribution system** which involves specialized software applications which merge music use data with revenue information in order to ensure accurate distribution to rights holders. Where good use information from users is sourced and not accurately or timeously linked to the correct rights holder, this may lead to inaccurate distributions. It is also important to understand that the use information from users often comes in a 'raw' or unprocessed state and thus needs to be carefully analyzed before a use can be allocated to particular members. For this reason, staff involved in the analysis must undergo thorough training and where practicable or appropriate, electronic matching systems should be deployed. The information services unit plays a pivotal role in processing distributions. Staff in this unit have to process and merge information from various databases in order to accurately determine who should be paid in respect of what use. This involves linking music use information to information in the revenue pools and with the works ownership information in the documentation system. This is a very technical activity which requires high levels of expertise.

1.15 Prioritization of administration activities

57. It will be important for the new CMO to set up proper administrative processes from the outset. Any lapse in implementing proper administrative practices at any time is likely to prove costly for the CMO, and so the keeping of proper records and reports is crucial.
58. As the CMO commences activities there will be a lot of data sourcing and processing. It will be important to ensure that the processing of all data is systematized and correctly channeled within relevant administrative functions or functional areas in the organization, thus avoiding wasted effort in having to correct errors later. These functional areas include finance, human resources, legal and compliance, and general administration. It will be important at all times to understand what type and level of data or information the organization is dealing with.

⁵⁴ The term 'affiliation' here includes, in respect of performers, to record labels, production companies, and CMOs, and in respect of record labels, to the group which the label belongs to, and the label's predecessor.

59. The **finance** function is crucial to the proper functioning of any organization, not to mention a CMO. It can be argued that a CMO is essentially a business because its main purpose is to collect and distribute royalties (and possibly other income) to rights holders. It is important to make informed decisions regarding setting up proper accounting systems and such matters as the layout of a chart of accounts, budgets, financial reports (statements of comprehensive income, statement of financial position, statement of changes in funds and reserves and statement of cash-flows), debtor reports and ageing, risk, and internal control systems. An effective credit control policy and system that ensures that debtors are actively pursued to ensure payment is very important for the proper functioning of a society. It does not help to have a large debtors book which is ageing without actually receiving payment. A CMO would soon run into difficulties if it distributes license fees it has invoiced but not collected. For more detailed information on financial matters, see Unit 4.
60. Similarly important is the **human resources** function. Employee matters and relations need to receive attention. A society is a service business and is thus dependent on its human resources. Because collective management is a specialist form of business which requires some unique and scarce skills, it is important to maintain a good level of employee retention and have a culture of continuing skills development. The loss of corporate and institutional memory through the departure of key employees can create a temporary, sometimes serious lapse in the operations of the CMO. Another equally important administrative section is **legal and compliance**. Apart from dealing with normal corporate legal functions the legal and compliance section – which can either consist of one corporate ‘counsel’ in smaller CMOs or a full department in bigger CMOs – is integral to the core functions of a CMO. The section assists with the drafting of licensing agreements, membership agreements and assignments, involvement in important licensing negotiations, and dealing with infringement cases. The section often carries out its duties in conjunction with external law firms and counsel. The CMO lawyer also provides ongoing legal advice to the society on many areas of general law. Part or all of the section’s functions may also be outsourced to an external law firm if this is more cost-effective. The **general administration** function relates to such matters such as procurement, office accommodation, building or general facilities management, and transportation. This is an important support function for any organization.^{oo}



1.16 Decisions on ancillary services

61. We have dealt above with a number of functions and activities that a society is involved with. It is, however, important that everyone is clear as to what constitutes the core services of a CMO, and what amounts to ancillary services. In terms of categorization and prioritization it can be safely said that being *able* to (i) license users, (ii) collect license fees and (iii) distribute royalties to members constitutes the core functions of any CMO. A CMO must be able to effectively and efficiently perform all these functions at all times. Other activities are ancillary to these, and their level of importance is dependent on how they contribute to these three goals. A society's management and board should avoid goals which detract from carrying out the CMO's core functions, although ancillary goals may be justified if they are a natural consequence of pursuing the CMO's core functions. A society might also be involved in some activities of a cultural or social nature such as promotion of neighboring rights awareness in the wider business environment, providing financial support to producing sound recordings in certain genres of music, or providing some type of social support to members. These, while laudable, are not the core functions of a society and should only be pursued if doing so is a natural outcome of effective collective management and does not distract the CMO from carrying out its core activities.⁵⁵

1.17 CMO assessment, review and quality assurance processes

62. Having worked on the initial business plan it is important to note that a regular measurement of progress against the objectives set out in the business plan and the CMO's budget needs to take place. There need to be monthly internal meetings in which various sections and departments report on their progress and any challenges they may be facing. The assessment of progress should take place at appropriate management and board levels. While the review of financial performance is crucial, the assessment should not be limited to consideration of narrow financial reports but must comprise a review process which can be divided into three sections, namely: (i) general financial reporting against approved budgets including relevant commentaries and observations on the CMO as a going concern; (ii) identification, understanding and consequences of risk and opportunities, the measures introduced to mitigate against potential and actual losses while exploring these opportunities, and performance and effectiveness of the CMO's internal controls and reporting systems for deviations from set standards;

⁵⁵ It can of course, be argued that some of these activities are a form of corporate social responsibility and that in this way, they enhance the corporate citizenry of the society, thus enhancing its legitimacy, 'license to operate' and general effectiveness.

and (iii) integrated sustainability review covering non-financial assurance relating to engagement of CMO stakeholders, health and safety, the CMO's impact on its wider environment and the ethical conduct of the CMO and its commitment to certain codes and standards of behavior.

63. Where progress is poor, management and the board need to indicate a clear path of remedial action and processes to address the deviations. A short annual review of CMO strategy implementation by way of sessions between the CMO board, the management team and other essential staff would also be recommended.

REGIONAL AND INTERNATIONAL MATTERS

1.18 Affiliation

64. It is customary for CMOs to be affiliated with international, non-governmental federations formed to foster cooperation amongst the CMOs and to develop common standards and rules, amongst other objectives. In relation to performers' societies the Societies' Council for the Collective Management of Performers' Rights (SCAPR)⁵⁶ fulfils this role, while the International Federation of the Phonographic Industry (IFPI)⁵⁷ represents record producers. SCAPR, for example, maintains an International Performers' Database (IPD) which identifies performers in audio recordings and audio-visual works and assigns an International Performer Number (IPN) to each. In the same way the IFPI maintains the International Standard Recording Code (ISRC), which is an international identification system for sound recordings and music video recordings. Regional organizations also exist, such as the Association of European Performers' Organizations (AEPO-ARTIS) in Europe.⁵⁸

1.19 Support and collaboration

65. It will be important for the start-up society to forge good working relationships with other CMOs in its region, where they exist, and internationally. This can result in the new society receiving *support* of various forms from these existing CMOs. The new society can benefit from the experiences and expertise of existing societies in the form of technical advice; receiving a secondment of a person with expertise in a particular area to coach or mentor staff, or sending staff from the new CMO on a 'learning mission' to one or more of the established societies. The support can be in various areas relating to the core operations of the CMO.

⁵⁶ See <http://www.scapr.org/>.

⁵⁷ See <http://www.ifpi.org/>.

⁵⁸ See <http://www.aepo-artis.org/>.



66. Apart from receiving support the new CMO can also *collaborate* with societies in other areas of mutual interest, such as the sharing of common repertoire and forming collaborations with other national, international and multilateral agencies active in the field of neighboring rights collective management. In some regions, such collaborations have proven critical to the success of the CMO in the long run.

CONVERSION OF INITIAL START-UP PLAN INTO FULL HORIZON PLAN

1.20 Monitoring and review

67. The information in this unit is informed by years of collective management observation, practice and experience. Nevertheless the commentary has also taken into account a generalized situation which prevails in many countries. Variations exist, and in some countries the progress of a CMO has been either quicker or slower, depending on various internal or external factors with the effect of either advancing or reducing the ‘time to efficient market’ of the CMO. Some of these factors are discussed below.

1.20.1 Internal factors

68. The internal factors include the quality of leadership of the board and management team in comparison to the contribution and skills sets required; the existence of a domestic repertoire; support for the CMO from domestic and foreign rights holders; the accuracy of initial assessments made by the promoter group and contained in the environmental scans – whether of a legal, economic, technological or political nature; and resourcing capital for the start-up.

1.20.2 External factors

69. External factors include societal views and the value placed on culture and in particular music; changes in environmental factors (as dealt with above) as compared to the initial market assessment.

1.21 Plan adjustment

70. What was said in the foregoing paragraph illustrates the fact that the results or outcomes of growth in a start-up CMO may either be positive or negative. This situation would need to be evaluated to ensure that any strengths identified are augmented, and any weaknesses are eliminated. Where a start-up plan may have envisaged a particular time frame for the delivery of the CMO’s core services, this may have to be adjusted with reference to

realities faced by the CMO. This in turn may result in longer or shorter time horizons for the delivery of particular goals and objectives. This and other related issues are dealt with in some depth in Unit 2, and when the promoter group commences the initial start-up strategy session they should do so with an understanding that the plan can only deal with considerations relating to a start-up CMO and that at some stage it will need to be converted into a full horizon plan. In this regard an awareness of the contents of other units of this tool kit can greatly assist the process of formulating the start-up plan.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 1

Copy of national legislation and regulations (including guidelines (if any) published by a regulator.

Executive summary of initial market assessment and environmental factors.

Promoter group – probable list of members.

CMO structure documents including draft constitution, member and distribution rules and basic CMO organigram.

Probable funding model and two to three year budget.

Time-based two to three year work plan (WIPO publication sample extract).

Initial list of significant members and rights holders (domestic and foreign).

Basic communications and marketing plan

Sales and licensing plan including major tariffs and supporting licensing docs.

LIST OF REFERENCES

Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO 1994.

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Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

Sevinga AG *Before the Start* (IFPI 2014).

UK Copyright, Designs and Patents Act, 1988.

WIPO Performances and Phonograms Treaty of 1996 (WPPT).



UNIT 2 STRATEGY DEVELOPMENT FOR EXISTING CMOs

INTRODUCTION

1. In Unit 1 we looked at the considerations that need to be made when setting up a new CMO. We dealt with some issues relating to the initial market assessment that needs to be undertaken to ensure that the new CMO is based on a sound foundation. We also considered what is required to develop a start-up plan for the new CMO as well as deal with matters relating to building cooperation with domestic, regional and international partners, including affiliating with international federations and forging relationships with like-minded CMOs and support agencies. At this stage the CMO is 'up and running' and well on its way to achieving its goal of ensuring that its members are remunerated for the exploitation of their sound recordings and performances. By now the CMO should have received mandates to represent the rights of many of the major rights holders, including the rights of international rights holders obtained through representation agreements with foreign societies or through the local or international representatives of the major record producers. The new CMO would have started issuing licenses, probably also reaching agreement with major and other significant users. Having done this, the CMO's management cannot then sit back and hope that everything will continue to run smoothly. As hinted at in Unit 1, it is important to constantly assess and review the CMO's progress and to convert the start-up plan into a full-horizon strategy plan. This unit seeks to deal with what is required to develop and review a strategy plan in respect of existing CMOs.

THE PLACE OF STRATEGY IN CMO DEVELOPMENT

2. Good corporate governance demands the constant development and review of corporate strategy to ensure that an organization remains true to corporate objectives and best practices. Thus while it is the normal duty of management to initiate and implement plans, the duty of the board is to ratify the plans and to constantly monitor them. This is linked to the age-old 'principal-agent' (or simply 'agency') construct, which is a scenario which arises whenever the advancement of the interests of one party (the 'principal', in this case members of the CMO or other rights holders) depend on the actions of another (the 'agent', namely the CMO as represented by the board and management). In an agent-principal relationship, the agent is required to shun his own interests and to work in the best interests of the principal. However, in such a relationship the agent may be tempted to 'act

opportunistically' and to pursue his own interests to the detriment of those of the principal.⁵⁹ Thus the agent-principal relationship sometimes gives rise to a clash between the interests of the agent and those of the principal.

3. Because the principal does not have direct access to information that could enable him to advance his own interests, it is incumbent on the board of directors of an organization to ensure that the interests of the principal are not overridden by those of management. Corporate governance facilitates the principal's control over the agent's behavior, and thus becomes a 'principal empowering' strategy.⁶⁰ Good corporate governance is thus an important tool in ensuring the safeguarding of the interests of a CMO's members. In recent times, fueled by various corporate scandals and failures which have left shareholders and other stakeholders stranded, shareholders have begun to assert their rights more actively and to demand more accountability from management and the board of directors. Instances of member or rights holder activism can also be detected in the field of collective management, where more rights holders are demanding to know how their societies operate and how license fees are accounted for. Corporate governance is also of interest because, as often observed, it 'makes good economic sense'.⁶¹ The negative economic consequences and loss of confidence that inevitably arise from the failure of good governance make corporate governance more than just a moral or ethical issue.⁶²
4. In an environment characterized by economic liberalization and globalization, where competition for the best services is on the increase, it is important for a CMO to justify to its members why they should prefer it to other CMOs offering similar services. While CMOs have traditionally operated on a territorial and often, monopolistic basis with one CMO in each given territory, it is now becoming increasingly possible for a CMO to extend its operations beyond its traditional territorial reach and to offer services in other countries. The reputation to adhere to the highest possible corporate governance practices will therefore increasingly become a determining factor when choosing between one society or another, or as a way of expressing confidence in the board or management of a CMO. The importance of good corporate governance for CMOs was highlighted by the recent introduction of the so-called *TAG of Excellence* project, a WIPO-initiated project. The project

⁵⁹ See Armour J, Hansmann H and Kraakman R 'Agency Problems, Legal Strategies and Enforcement' Discussion Paper No. 644 (2009) Harvard John M. Olin Discussion Paper Series at 2, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf (accessed 8 Nov 14).

⁶⁰ Ibid at 4.

⁶¹ See Spedding LS *Due Diligence and Corporate Governance* (LexisNexis, Croydon, 2004) 364.

⁶² Ibid.



seeks to enhance understanding and respect for collective management of copyright and related rights by assisting a CMO in communicating to the outside world and its mandating rights holders that it maintains a high level of transparency (T), accountability (A) and governance (G).

5. Corporate governance focuses on the relevance, continuity and fiduciary aspects of the company and entails the following activities:
 - (i) It involves the monitoring and overseeing of **strategic direction** and is, in this regard, concerned with the exercise of power over the *direction* of the enterprise;
 - (ii) It is concerned with the **supervision of executive actions**;
 - (iii) It ensures **accountability** (by putting in place mechanisms to respond adequately to demands for responsibility; and
 - (iv) It is concerned with the **regulation of the affairs** of the corporation.⁶³

It is underpinned by the universal principles of transparency, accountability, fairness and responsibility.⁶⁴ This makes **strategic planning** crucial for any organization. The success or failure of an organization often depends on the particular strategy chosen by the organization. The two main components of strategic planning which have an impact on good corporate governance are **strategy formulation** and **strategy execution**.⁶⁵ Strategy formulation includes conducting a *strategic analysis*, while strategy execution includes both the *implementation* and *monitoring* of the strategy. In the case of a CMO *strategic analysis* involves properly answering the following questions:

- (i) What 'rights business' is the CMO concerned with?⁶⁶
- (ii) What specific rights should the CMO administer?⁶⁷
- (iii) (What other services should the CMO render?
- (iv) Who are the CMO's customers? and
- (v) How will success be measured?

⁶³ See in this regard Fernando AC *Corporate Governance – Principles, Policies and Practices* (Dorlin Kindersley, Dehli, 2006) 251.

⁶⁴ Ibid at 251 – 252.

⁶⁵ See in this regard Wixley T and Everingham G *Corporate Governance – A Practical Guide for Effective Implementation* (Siberlnk Claremont 2005) 14 – 15.

⁶⁶ In other words, is it only concerned with neighboring rights (and does this only involve the rights of performers or the rights of record producers as well); or is it also involved in authors' rights (and then is it just music authors' rights or does this also include literary authors). Sometimes through a decision of the founders of the CMO when drafting the CMO's constitution, or through legislative sanction, a CMO may be a 'multi-purpose society', administering more than one category of rights or representing more than one category of rights holders. However, '... it seems desirable to avoid parallelism and to establish only one organization for each category of rights for each category of rights owners.' Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002) 135 at para. 362.

⁶⁷ Does it administer the whole bundle of remuneration rights or is it only concerned with some of them?

Strategy formulation requires the setting of goals and objectives; assessing current resources; the appointment of competent staff; obtaining the necessary resources; and responding to the regulatory environment. In this regard everything must align with and respond to the vision of the organization. **Strategy execution** involves the setting of priorities; preparing detailed plans (including forecasts and budgets); communicating necessary information to members and other stakeholders; taking action to implement the plans; measurement and monitoring of plans against objectives and goals; and responding to any requirements for corrective action.

CLARIFICATION OF VISION, MISSION AND CMO VALUES EXERCISE

6. When the CMO started, the promoters would have formulated the vision and mission statements for the CMO and the values that underpin its operations. It is important to constantly revisit and review these statements in order to determine if they remain relevant to the operations of the CMO. This would involve either adjusting or confirming the vision, mission and values.
7. Burt Nanus defines a vision as a realistic, credible and attractive future for the organization – an ‘articulation of a destination towards which [the] organization should aim’.⁶⁸ An organizational mission or purpose has been defined as ‘a clear and compelling goal that serves to unify and organization’s effort’.⁶⁹ A vision is concerned with the future, stating in idealistic terms what the organization wants to do, while a mission is concerned with the present and must be expressed in concrete terms. The vision and mission are often expressed in statements that are seen to best describe the organization’s goals and objectives, and how it intends to carry these out. These statements need to be expressed in a simple, concise and direct manner, expressing the CMO’s vision and mission in an attractive manner. The following could be a simple example of a CMO’s mission statement:

‘XYZ collects remuneration on behalf of national and international rights holders, passing it on to these rights holders in as rapid, accurate and cost-effective manner as possible’.
8. An organization’s vision and mission are informed by the values to which the organization subscribes or adheres. It is important to undertake a values-determination exercise. This exercise must, amongst others, determine the *values* that drive the CMO’s operations, informed by the core *purpose and mission* of the CMO. The exercise needs to consider the ethics, principles

⁶⁸ Nanus B *Visionary Leadership* (Jossey-Bass Publishers San Francisco 1992) 8.

⁶⁹ Collins JC and Porras JI ‘Organizational Vision and Visionary Organizations’ 1991 *California Management Review* (34:1) 42.



and motivation that direct the work of the CMO as expressed in the *behavior* of the organization's staff when undertaking certain *actions* or when involved in certain *events*. It must also assess the *attitudes* that are detectable from patterns of behavior. If the behavior displayed by the staff of the CMO when interacting with stakeholders does not meet required standards, positive values (which are then inculcated amongst the staff members) can be adopted in order to change such behavior. In a nutshell therefore we see that a *belief* system (as expressed in the CMO's purpose or mission) must define *values* (ethics, rules for success), which in turn give rise to *attitudes*, which determine *patterns of behavior* (actions).⁷⁰ Thus behavior is the external expression of the internal belief system.

STAKEHOLDER REVIEW

9. CMO stakeholders are often identified as people or groups who can affect or be affected by the operations of the society. It is important to conduct a review of all identified stakeholders of a CMO, especially those who depend on the success of the CMO and on whom its success is similarly dependent. This would ensure that a clear strategy is devised on how to deal with each. It is of course true that the CMO will not deal with all the stakeholders in the same manner, and preparing a list of all identified stakeholders is a useful exercise. Prioritization will further be facilitated by distinguishing between the different stakeholder groups. This could be accomplished by dividing the groups into *primary* (those who have influence over the CMO's vision and mission, such as the members of or rights holders represented by the CMO), *secondary* (other important stakeholders having an impact on the CMO's operations, such as users or government) and possibly *other* stakeholders. The two groups would then need to be further separated into those which are *internal* to the CMO and those which are *external*.
10. Once the CMO's stakeholders have been identified, prioritized and categorized each stakeholder group's expectations from the CMO need to be identified and listed clearly so as to ensure proper review or assessment of the progress made by the strategy formulation in addressing their expectations in an appropriate manner. See a possible simple illustrative table below.

⁷⁰ See Manley M *The Leadership – Building Leadership Structure and Styles for the Great Journey* (Crucial Publishing Hilton 2012) 46 – 48.

STAKEHOLDER REVIEW

GROUP	STAKEHOLDERS' REQUIREMENTS AND EXPECTATIONS FROM CMO
<i>Primary:</i>	
Members/rights holders	Proper governance, transparency and accountability; convenience for works and catalogue registrations; timely and accurate distribution
Affiliated CMOs	Representation of works; timely and accurate distributions
Rights Holder Assocs.	Regular and pertinent communication
<i>Secondary:</i>	
Music Users	Justification for licensing; fair tariffs; efficient and equitable licensing arrangements
Government	Compliance with laws and regulations; justification for awarding of license to operate

11. It would also be important to also consider the question of who the primary customers of the CMO are, bearing in mind what constitutes the CMO's 'services mix' – i.e. the delivery system or chain needed to produce output required from the CMO as well as to receive input from customers (i.e. license fees).⁷¹ The CMO's initial experiences at licensing users and distributing royalties after its formation should have enabled management to recognize who the more-important licensing customers of the CMO are in terms of customer loyalty, the size of the market or user share. It may then be important to appoint 'account executives' to look after these customers and maintain good communication with them. It may at this stage also be important to more clearly identify the core services of the CMO and to differentiate them from secondary and other services. It may be that when the society started, its service offering was defined in very broad terms and it may have become necessary to more clearly refine this offering in order to have more focus.⁷² It may, at this stage, also be important to formulate a 'customer service charter', which indicates the CMO's commitment in relation to the quality of service that it undertakes to offer to its members and licensees, and the overall standards of performance that they can expect.

FACTORS AND FORCES AFFECTING CMO BUSINESS

12. Having conducted the stakeholder review referred to above it would, at this stage, be useful to consider the various factors or forces affecting the CMO's business in a general way. At this stage we are not concerned with

⁷¹ For a detailed discussion of the concept of 'services mix' see paragraph 49 below.

⁷² For example, the CMO may decide that 'broadcast reproduction licensing' should not form part of its core activities. Support for the creation of new productions in certain music genres or welfare services to performers (if any) would also need to be clearly categorized or defined.



a full environmental scan. It is a listing of all *internal* and *external* factors and forces affecting the CMO, which will then be carefully categorized when dealing with the full environmental scan. This is to encourage the planning team's thinking in a structured manner before doing the full scan. Some internal factors would include human resources (or the lack thereof), CMO infrastructure, current systems and processes, licensing market penetration, existence and accuracy of reports and reporting structures, while external factors would include issues such as sufficiency of legislation and regulations, public perception, new technological methods, the problem of piracy, and the political environment.

ENVIRONMENTAL SCANS

13. A full and detailed environmental scan is often built on the initial market assessment (see Unit 1) when the CMO was first established, or on earlier scans undertaken in a previous strategic planning exercise conducted by intermediate CMOs. These scans are used to review or to consider the various factors dealt with earlier, taking into account emerging issues that have since come to light after the previous assessments and planning activities and with the passing of time. These factors and issues are frequently categorized into themes and include:

2.1 Historical factors

14. At this stage the focus is on the factors that have influenced the CMO to date. The CMO may be a relatively new one or an established one which has not frequently used strategy development techniques. Nonetheless, the review would undertake similar processes, although there may be a more detailed focus on specific elements in respect of either CMO.
15. In the case of a relatively new CMO some of the questions to ask are: How has the reception of the CMO been since it commenced operations? Has there been resistance to its existence, or has it been well received? Are there any notable successes or failures? Has it succeeded in its member recruitment or rights holder representation drive? What has been the reaction of the user community to its efforts to license the specific bundle of rights forming part of its repertoire? How much money has the CMO so far managed to distribute to its members? It may be that new legislation has recently been introduced to provide for a new source of income, such as a system of private copy levies. Is the CMO addressing its strategy for this new source of income for members and rights holders so as to ensure that they can receive their equitable share of the proceeds from these levies?

16. In the case of an established CMO but a relatively new user of strategy development techniques, some of the questions to ask are: What has been the track record of the CMO since its last formally adopted Business or Strategic Plan, where there was one? Has the growth of the CMO met primary stakeholder expectations? Has the licensing market penetration achieved the expected results? Have distributions of royalties been undertaken on an equitable basis? Is there general member satisfaction, or are there murmurings among the membership? What is the substance of membership concerns and can these be addressed by taking specific action?
17. These and other related questions form part of the strategy review process and will assist the CMO's management and board to regroup their efforts in order to ensure a more effective management of the CMO and its operations in future.

2.2 Legal and regulatory factors

18. Having been in operation for some time, it may have become clear that certain aspects of the legislation or regulations relating to the operations of the CMO have resulted in difficulties in the administration of the rights. It could be that certain provisions in the relevant legislation or regulations have not been adequately phrased or have created loopholes that make it difficult to license certain uses of music. The regulations themselves may make it difficult for the CMO to operate effectively, such as where there is some encroachment on the operations of the CMO from regulators, or where the permissible administration costs make it difficult for the CMO to break even.⁷³
19. It is not only legislative or regulatory matters related to the administration of the rights that can create problems for the CMO. The CMO is a 'corporate citizen' and thus many other laws that affect organizations generally (such as tax laws, both in respect of residents and non-residents; company laws, information privacy laws, competition and antitrust laws) are likely to also affect the CMO. The CMO's legal counsel or Company Secretary need to be always vigilant to ensure that the CMO is not caught unawares by legal developments or associated regulations affecting corporate citizens. It is important for the CMO to actively engage in regular reviews of legislative processes to ensure that no laws have been passed which would have a

⁷³ Of course the CMO needs to strive to lower administration costs. However, in the early years of operation, especially the first 5 years, the CMO may experience some high costs of operation and if the permissible deduction to cover administrative expenses is set very low, the CMO may find it difficult to 'pull through' and may not survive beyond the first five years. In certain countries the regulator permits a deviation from specified cost to income levels based on representations and undertakings from their CMOs.



negative effect on the operations of the CMO. Often a law that does not directly deal with the rights that the CMO administers can have an impact on the effective administration of these rights. For example, if corporate law prohibits the distribution of financial benefits to members of a non-profit corporation without providing for exceptions resulting from the administration of members' rights, this is likely to affect the functioning of the CMO.

20. In view of this it goes without saying that the CMO should constantly interact with legislators and relevant government departments in order to help them appreciate the unique nature of the CMO's operations. This will ensure that whenever new laws or policies are contemplated, the legislators or government officials are aware of the impact that this could have on the operations of the CMO and that the CMO is at least invited to comment prior to the finalization of the laws or policies. The CMO also needs to establish good contact with law enforcement agencies such as the business licensing agencies, the police and custom officials in order to facilitate bi-lateral exchanges of information and to make it easy to solicit their assistance whenever it becomes necessary, for example when dealing with piracy and illegal importation of sound recordings. Much will of course depend on the 'rights enforcement profile' of the particular CMO, and whether it sees itself as being responsible for *policing* the protection of the rights through the implementation of antipiracy measures, or whether it sees itself merely as an administrator of rights with no direct concern with piracy issues, leaving the implementation of such measures to other industry bodies. In some countries the legislation specifically provides for the manner in which the CMO can be involved in anti-piracy measures in conjunction with law enforcement agencies. Whatever the position, it is important to consider all these matters and to ensure that they form part of the strategy review process in order to develop a better strategy for dealing with them.
21. The review of legal and regulatory issues should also extend to the review of the CMO's litigation profile, which includes the CMO's propensity to tackle cases of copyright infringement or contractual infringement where licensees default on the license agreement, and its level of success in dealing with such cases. If the CMO's level of success is poor it is important to 'go back to the drawing board' (with the help of legal experts) to understand why this is. Perhaps the CMO needs to change its legal counsel and to replace them with counsel that has greater understanding of related rights and copyright and in particular the CMO's business. Perhaps the CMO is getting involved in too many infringement cases and not able to prepare adequately for them, rather than taking only a few, high profile cases to set a precedent and to send a message that the CMO will not hesitate to go after infringers.

22. Lastly, the review may also involve considering the CMO's own internal governance documents (i.e. its constitution/memorandum and articles of association, membership rules and distribution rules). However it needs to be mentioned that the review of these documents should happen less frequently than the review of the CMO's normal processes and activities. Furthermore, the review of these documents will also not necessarily come up as part of a strategy review session and will take place as and when necessary when it becomes clear that the CMO cannot function effectively apart from such review. Since these documents normally comprise the constitution of the CMO their review will usually follow a more formal process which involves compliance with statutory requirements including the need to obtain the approval of members before any changes can be affected.

2.3 Economic factors

23. The factors to be considered in this regard include a consideration of the general health of the country's economy; issues relating to GDP and the inflation; and the country's and CMO's growth history and trajectory which, in the case of the CMO, would involve a summarized review of the CMO's financial performance over a certain period as reflected in its annual reports, together with 'year-to-date' performance, as compared to the state of the country's general business. It would also be important to consider and compare the performance of various income streams based on the segmentation of the market in order to determine trends and identify possible future opportunities. This comparison of income growth could be divided into broadcasting and communication to the public (including public performance). The broadcasting income stream could be further segmented into radio and television; public and private or commercial services; free-to-air or pay and encrypted; and terrestrial versus satellite or cable services. Comparisons of communication to the public or public performance could be evaluated based on the number of particular types of users or premises such as hotels, restaurants, bars, shops and the transport industry⁷⁴ and further assessed in terms of cities, towns or other geographic regions. Private copy income could be assessed from sources such as blank media (audio or video, CDR and DVD), devices (video, audio, memory cards/USBs; external hard drives; mobile phones), PCs and other consumer electronic items.
24. An exercise to consider the CMO's expenditure and cost-center profiles would also be very helpful in order to determine where costs are concentrated and possibly where wastage occurs. Generally CMO expenditures can be divided into a number of broad categories which can

⁷⁴ See Unit 3 (Licensing Practices) for more details on market segmentation.



be compared from one accounting period to the next and correlated with income generated during the same or subsequent periods. The extent of centralization of licensing and membership activities and associated expenses relating to staffing and office accommodation may also be compared to the income derived from and services delivered in those offices. Some CMOs choose to have in-house professional services such as legal counsel, accounting, ICT, and music use monitoring, while others choose to outsource some of these activities. The careful costing, comparison and consideration of whether certain services should be in-house or outsourced is a matter for each CMO to determine. However, knowledge and awareness of the actual cost implications can have significant implications on the choice made, and thus the performance of a CMO.

25. The economic review is incomplete without an exercise to consider the history and patterns of distribution of royalties among rights holders, both domestic and foreign. CMOs are sometimes accused of distributing more royalties to foreign rights holders than local rights holders, a phenomenon especially prevalent in music importing countries, or vice versa. Of course royalties have to be distributed based on actual use of works. Nevertheless, it is important to keep regular and accurate statistics of distributions made to producers and performers. Exercises such as the above will ensure that empirical data is available for strategy development as well as dispel false perceptions by providing actual distribution statistics. Other uses of distribution statistics have been to indicate market shares, sources (in respect of both rights and uses) and categories of rights holders.
26. It often happens that certain license fees received cannot be paid out as royalties because of the existence of undocumented or unidentified works or unidentified rights holders. This results in 'reserved income', namely, income that is not immediately distributable. It is important for a CMO to put in place systems to ensure that the issue of undocumented works and unidentified rights holders is dealt with expeditiously to prevent the accumulation of undistributed license fees. One way of doing this is to publish undocumented works and information about unidentified rights holders immediately after any distribution, and to invite rights holders to study the lists and, if applicable, lay claim to works that belong to them. To ensure the equitable treatment of all rights holders, a system must be put in place that assures rights holders that works (and the related royalties) are allocated to the correct rights holders in an objective and systematic manner. In view of the need to have ongoing research and matching of works and performances, the CMO needs to invest in a team of competent researchers within the documentation or music use department, who are capable of carrying out this research. Reference to

other neighboring rights CMOs' distribution regulations will provide further guidance.

27. Other than reserved income arising from undocumented works or unidentified rights holders, another important source of reserved income is the interest earned from the investment of license fees pending distribution. This investment is made possible by the fact that there is always a delay between the reception of license fees and the distribution to members. The board must be empowered to address this unallocated income (either through a resolution of members at a general meeting or through a general authority in the CMO's constitution), and to place the money on investment for a period of time pending distribution, possibly set-off against the period's expenditure, resulting in a greater distribution to rights holders. Alternatively the invested monies may be paid out separately as non-royalty distribution to rights holders in proportion to their participation in the previous distributions.
28. The CMO may itself (through the board), set aside a certain portion of income during a particular year into a reserve fund in order to cater for future expenditure or further infrastructural developments. This reserve fund may be used for a number of purposes. For example, a *technological reserve* can be created to ensure that the CMO always has money available for the development of better information technology systems to ensure greater efficiency and to keep up with technological changes. An *anti-piracy reserve* is also conceivable, where money is set aside for use in efforts to combat piracy. Some CMOs also allocate a certain portion from the reserve fund for *cultural* purposes such as the promotion of the arts, or as *social assistance* or *development fund* for members. Transfers from the reserve fund could also be used to augment the royalty income of members in a year where performance has been affected by problematic market conditions. The allocation of any license fees into a reserve fund needs to be approached with caution, so that where this is provided for, it must not affect the payment of royalties to members. The *level* of the reserve allocation and the patterns thereof need to be the subject of a clear CMO Policy which must specifically indicate the circumstances when the allocation is done. This policy needs to be constantly reviewed to cater for changing needs.
29. Another important consideration relating to economic factors is the general state of the recording business in the country. This can have an impact on the financial performance of the CMO. Thus where there are high levels of piracy and low levels of respect for copyright, the CMO's revenue can be drastically affected. It would thus be important to consider this, in order to devise a proper plan of action to deal with the situation. For CMOs that form part of the state administration, much will depend on the state of finances



of the copyright office or the ministry under which the CMO falls. It goes without saying therefore that periods of economic recession and general poor economic growth will very likely have an impact on the operations of CMOs.

2.4 Technological factors

30. A review of the impact of technological factors would include: (i) the state of internal CMO operations; (ii) a consideration of the external rights holder environment; (iii) a consideration of the user or licensee environment; and (iv) the growing 'new media' environment and its challenges.
31. For internal CMO operations, a number of focus areas need to be considered. The level of documentation of the CMO's internal systems and processes needs to be reviewed. To a large extent, CMO operations need to be capable of functioning on a turnkey basis. Because CMOs are specialized entities processing large volumes of data requiring particular skills and expertise, it is important that all essential CMO processes and systems are fully documented and that they have a high degree of automation.⁷⁵ This makes it easy to train staff on the use of the systems, it ensures the security of operations, and it guards against the loss of organizational memory – a situation that tends to have serious consequences for a CMO where systems and processes are not well documented. A CMO must be able to issue licenses, process royalties, capture the details of members or applicants, and capture information about works and performances in *real time* using uniform systems. In some circumstances to ameliorate increased cost of investments in new systems a CMO may interact with other existing CMO's so as to ascertain what systems might be purchased or licensed.
32. Related to this, the CMO's information and communications technology (ICT) needs to be continually borne in mind. On-going review of the levels and degree of computerization and related functions as well as office automation including printing and photocopying facilities needs to be undertaken so that the computerized and automated systems and processes can achieve a high level of availability. If one considers that a single radio channel transmitting music fifty percent of its on-air time will play over eighty thousand tracks in a single year, and that one sound recording may have a number of participating rights holders in the royalty division, it is clear that with less than a dozen licensed radio channels a CMO will have to process millions of transactions to be able to effect the distribution of the collected income. Where not only domestic but also foreign works are used, the documentation databases of the CMO need to be able to respond to these 'non-domestic' additions

⁷⁵ See Unit 1 (operations management) for more information on the essential systems and processes of a CMO.

with changes in its documentation data base reflecting the foreign rights holders who in turn may be members of one of scores of CMOs from various countries across the world. This also applies in respect of television transmissions, with the further refinement being that where only parts of sound recordings are used in transmissions these also need to be reflected.

33. All of this has an impact on the performance of the CMO. High performance CMOs have high levels of computerization and connectivity between the CMO, its members and affiliated CMOs around the world. The appropriate use and choice of software solutions and applications, both in terms of commercial software and specialized software are strategic considerations due to the high level of investment required. Where use is made of recordings of foreign origin, it is also important to ensure that the CMO's systems have conformity with international standards and tools. One of the positive aspects of the system of collective management is the use of certain common standards and systems among CMOs administering a particular category of rights such as the ISRC, IPD and IPN for neighboring rights CMOs.⁷⁶ These standards ensure uniformity in essential areas and facilitate the efficient administration of rights across countries around the world.
34. A technological assessment of the external rights holder environment involves a consideration of the CMO member or rights holders' level of exposure to technological advancements and use of various types of technology. In an environment that is becoming increasingly paperless, a lot of time and money can be saved through the use of technology.⁷⁷ Often the extent to which a CMO can innovate in the area of technology is dependent on the levels of access to technology of its members and users. Low levels of access to technology among rights holders may stymie the CMO's efforts. The members' and rights holders' market interface – that is their ability to access bank accounts and Internet banking services, and their access to Internet connected devices such as smart phones and personal computers – will also determine the measures that the CMO can take in implementing member interface projects. Thus if there is limited access to Internet or other electronic banking infrastructure or low access to computers the CMO may be hampered from creating an Internet payment interface for royalties, or creating member portals for the electronic submission of works and rights holder information and documents. The existence of data protection

⁷⁶ See Unit 1 – regional and international matters.

⁷⁷ For example, rights holders could notify about new recordings and lodge documents electronically using secure web portals supplied by the CMO, rather than submitting them physically.



and electronic communication laws will also determine if the CMO can successfully implement some of these rights holder interface systems.⁷⁸

35. It is also important to consider the impact of technology on the user and licensee environment. The digital revolution has ushered in new business models that involve the convergence of rights and undermine the ‘clean’ fragmentation of rights that has characterized the traditional market of music rights licensing.⁷⁹ Thus instead of just providing access to sound recordings, digital service providers (DSPs) provide access to a digital library of multimedia products incorporating musical works, sound recordings, films, games, images, and literature. The DSP considers it cumbersome (and at times costly) to procure licenses from several copyright owners of the different content forming part of the multimedia offering, and would prefer to deal with just one party and have a *single fee license* for all uses. DSPs often consider the prospect of negotiating with each rights holder unnerving, frustrating and sometimes a hindrance to their business. This is a global scale problem for which there is no uniform solution. The current reality is that the user is required to obtain a license in respect of all uses of the rights combined in the multimedia offering. Because the user will often have difficulty in this regard, the CMO must ready itself for delays in issuing licenses and receiving licensing income from such uses.
36. The use of online media monitoring services may go some way to providing a solution to the problem, but will not eliminate it.⁸⁰ A better solution is if the CMO acquires a mandate to license all uses in the multimedia offering,⁸¹ something which could divert the neighboring rights CMO from its primary mandate of representing only performers and record producers. Another problem relates to the *format* that the DSP must use when reporting on use, which involves electronic reporting which may not conform to the CMO interface (e.g. use of incompatible metadata, tagging, record layouts and ftp sites). The CMO may also assist DSPs by creating an online portal or application that the DSP can use when reporting use. The portal can also contain general information, tariffs applicable, application forms and frequently asked questions (FAQs).

⁷⁸ If the local laws do not recognize electronic evidence the CMO may be compelled to rely on the use of physical documentation.

⁷⁹ By fragmentation we mean the fact that copyright is a ‘bundle of rights’ often involving the rights of several parties. Gervais D (ed) *Collective Management of Copyright and Related Rights* (Wolters Kluwer The Netherlands 2010) 10 – 13 addresses this fragmentation problem, which he observes, ‘has its roots in the pre-Internet history of copyright ...’

⁸⁰ Besides cost considerations in the use of such services, the accuracy of the information supplied may be a matter of some legal debate.

⁸¹ Gervais *Collective Management* 13 suggests this solution in relation to the fragmentation problem.

37. A technological review must, of necessity, also consider the growing new media piracy profile. The digital revolution has made it very easy through peer-to-peer file-sharing technology to infringe on copyright works. Easy, 'one-touch' access makes it possible to access multiple works without the need to procure a license. A lot of innovation has taken place in this regard, with new models providing easy access to digital content springing up every time. Many of these services are not subscription-based and provide easy access to content without actually paying rights holders. Digital piracy has proven to be a thorn in the flesh of rights owners, and regulators are still grappling with finding a workable solution to the problem. Jurisdictional issues arising mainly from the territorial nature of related rights and copyright make it very difficult to police infringements. Some countries have come up with solutions such as the use of take-down notices which are issued to the DSP or ISP (Internet Service Provider), compelling them to remove content over which there is a claim of copyright infringement.

2.5 Socio-political factors

38. A review of socio-political factors would include factors such as: (i) the CMO's relations with rights holders and rights holder associations; (ii) the level of the rights holders' knowledge of the CMO and its activities; and (iii) government relations and general public affairs.
39. In relation to the CMO's relations with rights holders and rights holder associations the review needs to consider things like the level of communication with rights holders and rights holder associations and the actual information being disseminated. It is important that the CMO constantly communicates with its members and rights holder bodies regarding important matters. Often CMOs are criticized for not communicating adequately with members on important decisions. This may lead to member disillusionment and, where there is an opportunity to form an alternate society, members may leave the CMO and establish one, or they may join a rival society if one exists. The board and management must not think that members are entitled to only receive the mandatory information disseminated at the annual general meeting. Crucial information should be disseminated as and when it arises, whether through letters, email communication, regular posts on the CMO's website and social media platforms, or by calling a special general meeting of members.
40. Rights holder associations, such as the national association of record companies or the performers' association, also expect the CMO to communicate and confer with them regarding matters of general interest to the rights holder community. For example, if the CMO intends to adopt



a certain position with regard to a pending legislative amendment, national policy or other important development, it may at the least be necessary to keep the rights holder associations abreast of developments or to obtain their support. Thus the CMO needs to consider whether any strained relations with rights holders and rights holder associations may not be as a result of insufficient or poor communication. A complication may arise where the CMO is part of the copyright office or the state administration in general. Under such circumstances it may prove difficult for CMO officials to take the initiative to influence legislative changes, thus leaving rights holders and their associations to their own devices.

41. The issue of the level of the rights holders' knowledge of the CMO and its activities is related to the communication and information dissemination issue. Rights holders will only be aware of the activities of the CMO if these are made known to them. Knowledge of the CMO and its activities can be disseminated through formal publications such as the annual report and annual financial statements, as well as newsletters, the CMO's website, FAQs, the CMO's magazine and e-zines. The CMO can also use various educational platforms, including the use of physical material, website material, workshops, webinars and the like. It is important for the CMO to see itself as playing a role not only in imparting knowledge about its activities but also in building the members' knowledge capacity in relation to neighboring right or copyright issues in general, including the economic and moral nature of the rights and the importance of not permitting a 'buy-out' or other adverse form of disposition of their rights. This would also include imparting knowledge on the role that the CMO plays in safeguarding and administering the rights, as well as the CMO's obligations to its members.
42. In the area of government relations and public affairs the assessment should include consideration of the CMO's interaction with regulators and relations with the oversight ministry (often the Ministry of Economic Affairs, Trade and Industry, or Justice, but sometimes the Ministry of Arts or Culture). The CMO should endeavor to remain on good terms with these entities. An assessment of government relations needs to also consider the CMO's lobbying profile, that is, the extent to which it may influence legislative and regulatory changes and improvements. The CMO may consider the use of formal lobbyists in this regard, or it may form a board advocacy group, which may in fact be the best option for the CMO in view of the profile

of the board.⁸² Reports that deal with the contribution of the neighboring right- and copyright-based industries to the national economy, such as the various studies conducted by WIPO, the various annual IFPI industry reports, and other similar studies can be useful tools in convincing authorities of the positive role played by the neighboring right and copyright industries in promoting economic growth. These studies are also important for purposes of the strategy session in that they enable the CMO to see the possible impact and role of its activities on the economy.

43. The public affairs function extends to relations with rights holder groups and other parties involved or having an interest in intellectual property (IP) matters. These may include other parties involved in the music industry (e.g. authors' rights CMOs, composer and publisher groups), actors' groups, the film industry, and the software industry. Mounting a lobbying strategy that involves all these parties will create a strong united front and can more effectively convince legislators of the need to implement legislative or regulatory changes. Further to this, user and consumer groups must not be left out in the CMO's public affairs strategy. This includes a review of the state of communication and relations with trade associations representing the users of sound recordings, consumer associations as well as public sector and government users which may to a greater or lesser extent be impacted by some policies or practices of the CMO.

2.6 CMO views of possible future developments

44. The strategy review should also consider other issues relating to possible future developments which may not have been covered in any of the above-mentioned environmental scans. These would include short-term issues relating to matters that are imminent or may be expected to arise in the near future, as well as medium-term issues relating to internal CMO operations or external and structural issues, which can be anticipated. A plan would need to be devised to deal with these issues. Some of these issues may relate to legal risks arising from an inevitable, negative change of laws, political risks as a result of a possible change of government and or government policy, or risks posed by an imminent leadership change.

⁸² Often CMO boards are comprised of persons who are national icons in the arts industries, such as popular musicians or well-known producers. When such persons make impassioned pleas to legislators for the amendment of legislation, the level of reception for their submissions may be higher than if these submissions were made by unknown administrators.



SWOT ANALYSIS

45. A SWOT analysis is an important aspect of strategy planning. It is used to determine the **S**trengths and **W**eaknesses of the CMO; the **O**pportunities available to it as well as the **T**hreats it is facing or may face. This is what the acronym SWOT stands for.
46. A SWOT analysis is normally divided into a consideration of *internal issues* (which is concerned with the strengths and weaknesses of the CMO) as well as a consideration of *external issues* (which is concerned with opportunities and threats).

2.7 Internal issues

47. The strengths of the CMO need to be carefully identified and a list of the top 5 – 8 strengths should be made. This will enable the CMO to identify areas of competitive advantage to build on and the corresponding actions and tactics that need to be adopted or maintained in order to capitalize on these strengths. For example, it may be that the CMO has acquired rights from the main rights holders. It may also have managed to license a major broadcaster, or it may be seen in positive light by the regulator. All these are strengths on which the CMO can build. However, not only must the exercise identify the strengths of the CMO but its weaknesses as well. As with strengths, a list of 5 – 8 key weaknesses relating to areas where the CMO is perceived to be performing in a less than optimal manner needs to be identified. For example, if the CMO is perceived as bullying or aggressive by the user community, this is a clear weakness on the part of the CMO which can frustrate its efforts to license the users. The CMO must devise corresponding strategies to reduce or, where possible, eliminate the identified weaknesses.

2.8 External issues

48. In dealing with this the CMO must identify the opportunities available to it; i.e. the areas of business that are currently available for it to exploit. The aim is to capitalize on these opportunities in order to further build on the CMO's strengths. Capitalizing on these opportunities may also improve the CMO's position in the market and reduce the ability of competitors to enter the same market. Here also a list of 5 – 8 top opportunities should be prepared and relevant actions and tactics devised to capitalize on these opportunities. A consideration of the threats facing the CMO needs to be also made, and a list of 5 – 8 key threats identified, in order to devise actions to lower or ease these threats. A common threat for CMOs that is likely to present

itself sooner or later, is the threat of unfavorable regulations or legislation, which is likely to affect the CMO's legitimacy.⁸³ However, the CMO's sense of legitimacy may also be negatively affected by the CMO's own unethical practices, which could prompt the legislature to further remove the CMO's legitimacy through regulatory means.

CMO 'SERVICES MIX'

49. Today, conventional marketing strategies are employed by most organizations world-wide. In some countries there is a view taken that marketing strategies are not really applicable to CMOs due to the special field of endeavor in which they operate. There is, however, a growing view among many CMOs that marketing strategy is equally relevant to their operations. Particularly in voluntary systems of collective management, CMOs have two key 'customer bases'; the suppliers of the CMO's rights, i.e. its members and rights holders; and the users of rights such as broadcasters and other 'communicators to the public'. In marketing theory the concept of 'marketing mix' relates to the so-called four Ps of marketing decisions (Product, Price, Place and Promotion) which, in this case a CMO has to make, and to which three additional Ps of service marketing could be added, namely – People, Process and Physical evidence.
50. Whereas consideration has already been given to factors and forces affecting the CMO's business and a detailed environmental scan and SWOT analysis conducted, the question as to which services, and where, when and how these are to be offered, still needs to be addressed. The following discussion aims to do so.

2.9 Product or service

51. The Bundle of Rights which a CMO represents and subsequently offers to Users as Licenses depend on the scope of *services* offered by the particular CMO and which are 'acquired' from the owners of these rights, either through an assignment, exclusive license, agency arrangement or

⁸³ Legitimacy in business is defined as 'a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate', and is fully discussed by Zott C and Huy QN 'How Entrepreneurs use Symbolic Management to Acquire Resources' 2007 Administrative Science Quarterly (52:1) 70 – 105. It has to do with the perceptions that society has about an organization; i.e. whether the organization is seen as having a useful contribution to make to society and thus whether there needs to be a positive reaction to the organization's existence, activities and advances. In the case of a CMO, legitimacy would include the perceptions of users (whether they feel that it is necessary to procure a license for music use, or instead feel that they are not doing anything wrong by not procuring such a license); the perception of rights holders (whether they feel that the CMO can adequately represent their rights) and society at large (whether they should be sympathetic to the cause of the CMO or not).



some other form of representation. A relationship thus exists between the CMO and these 'suppliers of rights', usually evidenced by a member / rights holder affiliation agreement and often based on some form of *membership rules*. The *service* the CMO offers in acting as an intermediary between its members / rights holders and music users is usually evidenced in the form of various licensing schemes offered to categories of users and frequently reduced to a license agreement or contract.

2.10 Price

52. There is a science to the pricing of the use of music by CMOs. The price level of specific licensing schemes or tariffs offered by CMOs to users are related to a combination of factors including but not limited to: (i) the rights used; (ii) nature and scope of use (sometimes classified as essential, necessary, background and incidental); (iii) whether the use covers the whole repertoire (i.e. based on a blanket license) or if it has certain limitations; (iv) the value attributed to the rights by the owners of rights (whether national, regional and international); (v) duration of use; (vi) harmonization principles for particular user groups; (vii) consultations / negotiations with rights owners and representative user groups; and (viii) the fast evolving music using market. Unit 3 deals more with the issue of tariffs and pricing.

2.11 Place

53. Place refers to the services distribution channels which the CMO may use to deliver services to members, rights holders and users including various platforms and institutions. Choices are made as to whether to deliver services via the use of formal CMO representatives, agencies, third parties and other contractors or intermediaries. Other examples of *place* are the use of what may be termed comprehensive or group licensing agreements whereby a whole music using sector (e.g. an association of hotels) or region (a particular province in a country) is offered a licensing scheme to cover that sector's or region's affiliates.

2.12 Promotion

54. To some the possible use of member and rights holder funds to advertise, promote or generate publicity for the CMO's activities may be questionable. However, a CMO's promotion strategy is a specific program of communications, materials and methods devised to present the CMO's services to its customers, (both members or rights holders and users, so as to contribute to its long-term success. It is therefore inevitable that

some form of promotional activity has to be undertaken if the CMO is to be successful.

55. The additional three P's specific to service marketing (relevant because CMOs are generally service entities) are dealt with below.

2.13 People

56. This refers to all the human actors (employees and management) who play a part in service delivery and influence customers' perceptions. A CMO is a service organization that depends to a large extent on its staff to carry out its mandate. The *skilling* of staff, both in terms of efficiently executing the various activities and processes that a CMO is involved with and properly interacting with users, members and other stakeholders, is at the core of the CMO's mandate. In this regard organizational culture and customer-service orientation play an important role here.

2.14 Process

57. This relates to the operating systems and service delivery mechanisms and procedures by which services are delivered to customers. Processes and systems, and their proper documentation and automation, are central to the operations of a CMO. They represent the 'engine room' which powers the activities of the CMO. In this regard the IT function of a CMO plays a pivotal role, especially in transaction processing and information and data security – processes that often involve the use of complex mainframe computers in many CMOs.

2.15 Physical evidence

58. This refers to tangible means used to deliver or communicate the service, such as brochures, letters, business cards, report formats, application and notification forms, and physical facilities.
59. In considering the services mix the strategy team needs to distinguish between primary and secondary services so that the CMO does not focus resources on services that are only of a secondary nature, to the detriment of its core functions. As indicated in Unit 1,⁸⁴ the core functions of a CMO are acquisition of rights (i.e. membership), licensing of users and distribution of royalties. All other activities that do not directly relate to these three core functions constitute secondary services. Where resources are strained, the

⁸⁴ See commentary under paragraph 61 of Unit 1 – operations management.



Neighboring Rights

CMO may outsource the secondary services, reduce them, or eliminate them completely.⁸⁵

CMO ORGANIZATIONAL DESIGN AND STRUCTURE

60. The strategy review process needs to also consider the CMO's organizational design and structure in terms of both its legacy systems⁸⁶ and its corporate structure. This is done in view to determining their appropriateness in light of the CMO's continuing quest to remain relevant in a changing rights holder and user market. The review will thus need to consider aspects in the organizational design and structure that remain effective or relevant in light of the CMO's previous strategic plan and goals. In determining the relevance of the legacy systems and the existing corporate structure, consideration will also need to be made of the current profile and needs of the CMO's customers (both members and users) and the ability to effectively and efficiently carry out the CMO's core functions. The review will need to carefully consider all the key processes and systems of the CMO (whether manual, automated or computerized), and interconnected activities associated with such processes.
61. The CMO's current corporate structure will also need to be reviewed to determine if it is capable of enabling the CMO to continue to carry out its mandate. In this regard it needs to be considered what style of corporate structure would suit the needs of the CMO; whether a *centralized*, *decentralized* or *functional* corporate structure is most appropriate.⁸⁷ It would then be crucial to respond to any need for adjustments. Apart from a consideration of the CMO's legacy systems and corporate structure it would also be important to consider the organization culture.⁸⁸ The current

⁸⁵ CMO boards and management should not adopt a hard-line approach towards the offering of services that fall within the category of corporate social responsibility (CSI), such as providing support for cultural activities and social assistance to rights holders, as these services can provide the CMO with a social responsibility *premium* in the sense of increased customer loyalty, as the CMO would be seen as adding value to society.

⁸⁶ The CMO's rights holder, user, documentation, distribution and office systems and applications that it has always used, but which may (on review) prove irrelevant to or incompatible with current developments and thus may be costly to maintain.

⁸⁷ This has to do with the level of independence given to business units or sections with regard to decision making. Does the decision-making power reside in the center, with senior management (*centralized*) or is it devolved or delegated further down the management hierarchy to the business and / or regional units (*decentralized*). A *functional* organizational structure focuses on organizing people based on the functions that they perform, placing those with similar knowledge in one unit. It places an emphasis on coordination, supervision and task allocation within a particular functional area.

⁸⁸ Organization culture refers to 'the values and behaviors that contribute to the unique social and psychological environment of an organization', and includes the organization's expectations, experiences, philosophy and values, as expressed in its 'self-image, inner workings, interactions with the outside world and future expectations.' See www.businessdictionary.com/definition/organizational-culture.html (accessed 15 Dec 14).

organization culture needs to be assessed and considered against the organization's vision, mission and values to see if it properly aligns with them. The influence of past leadership, whether positive or negative, also needs to be considered. This is to be done with a view to developing a shared awareness of the current corporate culture in order to determine its positive aspects and what may need to change in order to move the organization forward. A redefinition or confirmation of the organization's culture may then result. Changing an organization's culture involves the change of attitudes, behaviors and habits and is not something that can merely be expressed in a statement.

62. The management of culture change is a full process in itself and may be driven by a number of reasons including: (i) building better customer relations; (ii) a new strategic approach; (iii) new service delivery methods; (iv) outsourcing or acquisition of services; (v) right-sizing or down-sizing; and (vi) new strategic alliances or joint ventures. Once the drivers of the need for the change of corporate culture have been identified, resistance to such change may either be work-related or non-work-related. A process should be activated to ensure buy-in for the new culture. Some of the elements supporting a change in culture by staff would include ensuring participation by affected parties in the change process; clear communication on all issues which affect staff or changes to the working environment; further training where appropriate; recognition of and reward for contribution; and working on attitudinal dispositions.

HUMAN RESOURCES, INTELLECTUAL CAPITAL AND OTHER RESOURCES

63. A CMO is in largely a knowledge and systems-driven business and is significantly reliant on human and information systems and related resources for its effectiveness. It would thus be important to do an overview of the current inventory and investment in staff in relation to the various functional areas in the organization (i.e. front office, back office and management, including the board). This can be done based on the following focal areas.

2.16 The human resources (HR) function

64. A closer scrutiny of the operations of the HR function, in particular its role in staff recruitment, selection and retention, needs to be undertaken. This is the key role of the HR function and it plays an integral part in the deployment of human capital to the organization. The question therefore needs to be asked whether HR is correctly carrying out this role: What is the impact of HR's policies on human capital deployment? If the wrong person is deployed



Neighboring Rights

in a place or function in the organization this can lead to *regression*; on the other hand if the right person is deployed in the wrong place this can lead to *frustration*. If however the right person is deployed in the right place, this leads to *progression*. Overall, the placing of the right people in the right places in the organization results in *multiplication*.⁸⁹

2.17 The role of leadership

65. The role of leadership in the advancement of human and intellectual capital in the CMO also needs to be considered. True leaders value their team members and in fact, add value to them, making them more valuable. Good CMO leaders use their influence at the right times for the right reasons. They ensure that they can lead themselves successfully before attempting to lead others and appreciate that their dispositions are more important than their positions. They take a little greater share of the blame and a smaller share of the credit. True leaders do not leave their team to be loose and without structure, but instil within them a sense of responsibility by creating structures of authority and accountability, while allowing the team enough freedom to be creative and innovative.⁹⁰

2.18 The level of the CMO's investment in learning and development

66. In the beginning of this section we emphasized that a CMO is largely a knowledge and systems-based business. In view of this it is important to invest resources in providing training and learning opportunities for CMO staff in critical areas of their roles, particularly in relation to the core functions of the CMO. A CMO needs to have a sleek team of well-trained and coordinated licensing representatives that are able to confidently approach users and adequately and convincingly explain the basis for requiring music licenses. In the same manner, an effective and efficient *debtors* control team and function must augment the work of licensing representatives by ensuring that licensees promptly deliver on their undertaking to pay license fees. This is important to ensure that members are in fact paid in respect of the exploitation of their recordings. In the end however, license collections must be distributed and this must be done accurately and on time. Staff involved in this function must therefore be well-trained in matching works with earnings and rights holders and effectively carrying out the research required to do so. In addition to this, a well-trained and equipped CMO leadership is necessary

⁸⁹ See Maxwell JC, *What every Leader needs to Know 101 Series*, Maxwell Motivation Inc. (Georgia 2003), generally

⁹⁰ Ibid.

to steer the CMO ship to its desired destination. In all these instances on-going training and development is important.

2.19 Systems and processes

67. A systems and processes review needs to be conducted to ensure that there is an appropriate level of integration between human and computerized resources. It does not help to have an expensive IT system that is, in fact, not being used effectively and optimally. The review must also consider the CMO's ICT resources (i.e. its hardware and peripherals and both pre-packaged and special applications software) to determine if they are able to adequately satisfy the growing needs of the CMO. Issues relating to Internet connectivity and the choice of telecommunication services need to be considered also. Important considerations in selecting an appropriate Internet Service Provider (ISP) for the CMO include considerations of the availability of the particular ISP's connectivity and 'uptime'; the level of bandwidth required and available, and connection with *decentralized* operations (i.e. individual workstations and office locations). In today's economy with its energy problems access to clean power is also an important consideration to take into account.

2.20 Other resources

68. Important considerations in this regard include the financial and other related assets of the CMO and the fiduciary management of such assets. Is there a proper surplus cash management system that will ensure that members obtain the most optimal benefit from such funds? Does the CMO invest money received pending distribution in safe, interest-bearing instruments administered by reputable, approved institutions?⁹¹ Further to this the CMO needs to monitor and minimize costs through the implementation of sound financial management practices. This includes the proper use of budgeting processes linked to the achievement of goals (see below under 81 for a discussion of budgeting⁹²). The traditional capital expenditure (capex) budgets may be used and a template circulated to all cost centers to ensure capex uniformity. The budget needs to be reviewed on a regular basis and amortization sufficient to cover developmental needs must be provided for. Expansion (or special capex) budgets, to cater for the expansion of existing

⁹¹ Often there is a delay between the time when license fees are collected and the time when they are actually distributed – sometimes between six months and a year. It would be prudent for management under such circumstances to invest such moneys in reliable investment instruments. The invested portion can then be paid out as additional, 'non-royalty' income to members or it can be used to defray administration costs, thus releasing most of the collected license fees for distribution to members.

⁹² See also Unit 4 for more detail on Finance & Administration matters.



programs, new programs, special adjustments in reward schemes and the like may also be used. These can be particularly useful in the allocation of portions of the collections to reserve funds, as dealt with earlier above. Appropriate reserves policies would then need to be created in this regard.

CMO CRITICAL SUCCESS FACTORS

69. A CMO is expected to grow its income and number of license users in order to retain its credibility in a market oriented business environment. Likewise, it must manage its expenditures and add value to its member constituency, whilst also distributing income to members timeously and accurately.
70. Critical success factors (CSFs) are those factors and activities that are necessary or critical for an organization and must be properly executed to achieve success or to carry out the organization's mission. These are factors or areas where things have to go right in order for the organization to perform in a competitive and successful manner and without which the organization's performance will be below the desired results. It is important to identify and assess the CSFs in respect of both the CMO's current business model and any planned future and diversified business.
71. Each CMO's CSFs need to be clearly identified in order to place correct and balanced focus on them. In the administration of neighboring rights it is important to consider factors that affect income, factors that affect expenditure and those that affect distributions. Some of the common factors that have influence on a CMO's income generation include: scope of rights represented; broadcast income (which is influenced by the number, controlled content of works, classification and location of radio and television channels); public performance income (influenced by the number, type of premises, location and extent of music use by the establishments involved); communication of the public income (influenced by offering models, number of telecommunications operators, and content aggregators involved); private copy income (influenced by the type of carriers and devices covered by the levy regime); international income (influenced by foreign uses of CMO repertoire of sound recordings, foreign exchange rates etc.); and investment income (influenced by prevailing interest rates and domestic licensing schemes and tariffs related to Consumer price inflation rates).
72. Common factors in CMO expenditure control include: membership expenses (influenced by number of members, works, services offered and communications); human resources expenses (influenced by number of staff, their location, training and skills development); collection and legal costs (influenced by number of representatives or agents, licensing trips and

legal cases); distribution and computerization expenses (influenced by data availability, systems and general IT costs); office accommodation expenses (influenced by number of premises, size and location) and other expenses (influenced by such activities as marketing, professional, advisory and other outsourced services).

- 73. Some factors common to delivery of successful distributions involve: documentation data matters, including accuracy of works documentation (domestic and foreign) and members data base, and the responsibility of members to declare works; use report data, based on monitoring, capturing and matching of uses, the representativeness, accuracy and timing of receipt of use reports; distribution system, which is dependent on the availability of special application software; the clarity, complexity and uniform application of distribution rules; and post-distribution factors, in particular member queries and the CMO’ system of claims management.

BUSINESS SUSTAINABILITY AND RISK MATTERS

- 74. The next step in the review process involves focusing on matters affecting the sustainability of the CMO. These matters need to be listed based on certain categories identified as presenting a risk to the future of the CMO or impacting on its sustainability, such as: the legislative and regulatory environment and its impact on the CMO’s sustainability and risk profile; rights holder affiliation (both domestic and international); delivery of income and control of expenditure; licensing and distribution operations; technology and systems; the CMO’s image; and public standing.
- 75. This can be done by creating a table listing the matters, key areas, the responsible person or function, how the risks will be monitored and reported on, and the frequency of the risk review. See a possible simple illustrative table below.



SUSTAINABILITY AND RISK OVERVIEW

MATTER IDENTIFIED	COMMENTS ON RISK/ SUSTAINABILITY	RESPONSIBILITY ALLOCATION	FREQUENCY and METHOD OF MONITORING
Legislative Environment	CMO dependent on modern/defined legal/ regulatory system	Board/Member advocacy group and CEO	Quarterly legal reports
Income – Low	CMO not able to sustain operations	CEO, Licensing Executive	Monthly segmental licensing reports
Distributions	Accurate and representative; Internal / external data integrity	CEO, Finance and Distribution Executives	Monthly reports on works documentation and use monitoring
Public Image	...	...	...
Expenditure	...	...	...
Technology / Systems	...	...	...

76. Where the environmental scans did not identify matters now identified in the sustainability and risk table, these are carried over to the gap analysis exercise table so as to ensure that all risk and sustainability areas are adequately addressed.

GAP ANALYSIS

77. A gap analysis (also termed need-gap analysis, needs analysis or needs assessment) has to do with comparing the CMO's current or actual performance with its planned, potential, or desired performance. The exercise involves an analysis and comparison of factors relating to the present situation ('what is' or 'where we are') and those required to achieve the desired objectives ('what should be' or 'where we want to be'), in order to highlight gaps that need to be filled. It is about determining whether the organization is measuring up against its previous strategic plans and member expectations, while making the best possible use of its available resources. This exercise can be carried out by creating a table of the CMO's main critical success factors (CSFs), and listing them against the CMO's strengths, weaknesses, risks and issues relating to risk and sustainability (see paragraph 75 above), categorized under 'main themes' and 'secondary themes' in order to prioritize the areas that require the most urgent attention. A list of the identified gaps can then be established so that focused attention can be given to dealing with the gaps as identified in the table. See a possible simple illustrative table below.

COMPARATIVE GAP IDENTIFICATION

CSFs	STRENGTHS	WEAKNESSES	RISK and SUSTAINABILITY MATTERS	KEY GAPS
<i>Main Themes:</i>				
– Infrastructure	Established CMO infrastructure	...	Need for modern systems and processes	...
– Human resources		Insufficiently trained staff	Skills shortage	...
– ICT	Availability of appropriate equipment	Lack of reliable ISP	Possibility of significant systems downtime	...
Etc.				
<i>Secondary Themes:</i>				
– Membership	Positive disposition	Diversion of attention		...
Etc.				

ESTABLISHMENT OF HORIZON PLAN TO ADDRESS ‘GAP’

78. The gaps identified need to be listed against actions that need to be taken to address these gaps. A gap analysis deals with the gap between where the organization is and where it ought to be. In order to bring the CMO to where it ought to be, a horizon plan, listing specific goals and objectives, and indicating specific actions that need to be taken and tactics that must be employed, needs to be developed.

79. *Goals* are normally the predominant principles which guide the CMO’s main decision making whereas *objectives* tend to be more specific, measurable actions that may be undertaken to meet the stated goals. To evaluate the plan’s progress, it is important for goals and objectives to be measurable. A popular mnemonic used in many planning sessions is ‘SMART’ which denotes that the goals and objectives should be: **S** – specific; **M** – measurable; **A** – attainable, **R** – relevant; and **T** – time-based. This expresses the fact that the goals and objectives are to be achieved over a particular period, namely the time it would reasonably take for the CMO to achieve the stated goals and objectives taking into account the imminence of the threat or risk of not doing so. For example, how long would it take for the CMO to license a critical user, whose unauthorized use of recordings is affecting the welfare of members?

80. There are various methods used to consolidate all the strategy development inputs assembled during the review exercise. A possible simple illustrative table is provided below.



MAJOR GOALS/OBJECTIVES MATRIX

GOALS	OBJECTIVES and ACTION ITEMS	RESPONSIBILITY ALLOCATION	TIMING (DATES)	BUDGET IMPLICATIONS
Increase Income	Draw up a Formal Licensing plan by Income segments	Licensing Executive	Within 2 weeks of plan adoption	Estimates in currency amounts
	– Broadcasting <ul style="list-style-type: none"> • Radio • TV 	Broadcast manager	...	...
	– Public performance <ul style="list-style-type: none"> • Major Users • Zone/region 	Public performance manager	...	...
	– Communication to public / Making Available <ul style="list-style-type: none"> • Streaming • Downloads 	New media manager	...	...
	– Private copy (PC)	PC manager	...	...
Etc.				
Reduce Expenses	Identify all major cost centers	Finance Executive	Within 3 weeks of plan adoption	...
	Review major line items	Financial accountant		...
	Prepare cost benefit analysis	Management accountant		...

FINANCIAL BUDGETS AND PROJECTIONS

81. Having undertaken the activities and processes dealt with above it is now crucial to develop a budget or financial projection which considers the CMO’s income and expenditure forecasts, probable distributable revenue and possible future cash flow statement based on the CMO’s current business model and any future or diversified business model (see paragraphs 71-73).
82. The *income* should be broken down into the rights or works administered, the market segments (e.g. broadcasting, public performance, communication to the public, new media, digital, private copy) as well as by economic and geographic regions, both in respect of the current business model and the possible future or diversified business model. The *expenditure* should be forecasted based on the major cost centers identified when dealing with the CSFs above (e.g. membership expenses, human resources expenses, collection and litigation expenses, distribution and computerization expenses, accommodation costs), and could also (in respect of both the current

business model and the future or diversified business model) be dealt with in relation to the main areas of business operations (front office, back office, common or centralized services, management and outsourced services). The expenditure budget should include a separate section for capex costs based on both the current and the future business model. Budgeting in respect of *distributions and improvements* needs to take into account the data base operations of existing administration of works and the members' interests as well as the administration of any future rights and works⁹³ and the frequency of distributions. The budget should also include consideration of any specific hardware, software and systems networking improvements and refinements that have been planned. A *probable future cash flow statement* could also be generated using a reliable financial model such as the discounted cash flow (DCF) model.

STRATEGY IMPLEMENTATION

83. Having undertaken the above activities the CMO's strategy is now ready for implementation. The strategy must be implemented (i) based on specific goals and objectives; and (ii) based on major CMO functions.

2.21 Specific goals and objectives

84. Key actions and tactics must be identified in relation to each goal and objective. It is common to express each action and tactic using a verb rather than using a noun (e.g. 'identify' rather than 'identification'). It is also important to ensure that the actions concerned are SMART actions. Responsibilities for each action must be allocated to particular departments or functions within the CMO and sometimes to specific individuals within such departments or functions. Target dates have to be set within the period covered by the horizon plan. The cost and budgetary implications of each action then need to be reflected. To further facilitate focus on the budgetary implications, various objectives and actions can be grouped or classified into whether the cost implications are anticipated to be high, moderate or low.

2.22 Major CMO functions

85. The strategy can also be implemented based on major CMO functions such as: (i) repertoire representation; (ii) revenue generation; (iii) distribution, which involves use monitoring, pooling of income streams, database operations, works documentation and distribution software applications based on the CMO's membership and distribution rules; (iv) legislative and regulatory

⁹³ In respect of future rights this can only be done if the acquisition of the rights is imminent or if a clear, achievable plan of acquiring such rights is in place.



reform; and (v) communications or public affairs (which must deal with the strategy both in respect of rights holders and other stakeholders). Clearly-articulated actions must be formulated in respect of each of these functions.

86. It is acknowledged that the challenge for CMOs lies not only in the development of appropriate strategy but also in sound implementation of an adopted strategy. Strategy implementation involves change. To ensure that the momentum of strategic initiatives is not lost in the face of any changes required at the implementation stage, a set of *Short-term/quick wins* are also often identified. *Quick wins* are goals/objectives which are part of an adopted strategy but identified as those which are generally achievable / deliverable in the short run. The achievement of these would give the CMO and its staff a taste of success providing motivation in the early stages of the strategy implementation.⁹⁴

EXECUTIVE SUMMARY

87. Once the plan has been finalized and has incorporated all the above-mentioned aspects, an *executive summary* needs to be prepared and inserted in the beginning of the strategy plan. The executive summary is an important aspect of the strategy plan and sometimes considered to be the most-important section of the plan. It provides a synopsis and overview of the plan and highlights its key features and is the first part of the plan that many will read.
88. The executive summary needs to be brief and to the point. It must cover the *market analysis* conducted in the strategy process. The *main issues* reviewed and dealt with in the strategic plan must also be highlighted, as well as the *proposed solutions* and *objectives*. The summary must highlight the various *stakeholder relations and alliances* as well as the CMO's *business systems and processes*. The *risks and opportunities* identified must also be made explicit to provide a snapshot of the CMO's competitiveness. A short *financial summary* of the plan will be included with projected incomes, expenditures, distributions and a separate estimation of capital expenditures. The financial summary may also include any major cash flow implications for the CMO. Last, but not least, an organogram showing the CMO's *management team and board* needs to be included (although this may also be included at the beginning of the executive summary).

⁹⁴ See Kotter JP *Leading Change* (Harvard Business Review Press Watertown 2012) generally.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 2

Re-confirmation and revision of CMO vision, mission and values and beliefs.

Stakeholder list and 'requirements' table.

Five key environmental scans summary.

SWOT analysis.

CMO services – primary and secondary.

Critical success factors summary.

Business risk and sustainability table.

Gap analysis and key goals summary.

Financial forecast.

Executive summary.

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UNIT 3 SOCIETY TARIFF DEVELOPMENT AND LICENSING PRACTICES FOR INTERMEDIATE CMOs

A. TARIFF DEVELOPMENT

1. The importance of developing tariffs that adequately reflect market conditions while ensuring proper and fair remuneration of rights holders cannot be overemphasized. The CMO's ability to license users will to a large extent be dependent on having a broad range of tariffs that adequately reflects the CMO's marketing strategy and market segmentation (i.e. the variety of forms of music used in the market). In many jurisdictions, CMOs are *de facto* monopolies. It is well-known that markets and regulators do not favor monopolies. For this reason it is important to have a proper and indeed scientific approach to the design of tariffs and the licensing and administration of the CMO's rights, thus justifying the CMO's licensing endeavors.⁹⁵ Such an approach needs to take into account appropriate legal, economic and marketing considerations. The following discussion aims to highlight some of the factors and considerations that need to be taken into account when developing a CMO's tariffs.

3.1 Nature of collective management organization

3.1.1 Historical models

2. Historically the legal form of the CMO, whether it is a private, voluntary CMO, whether it is a statutorily-regulated CMO, or whether it is an entity forming part of the state administration, has had implications on the tariff levels set by the CMO concerned. Tariff levels have also been influenced by whether the CMO is a single-work or multi-work CMO or whether it is a uni-disciplinary or multidisciplinary CMO. In other words, with respect to the bundle of rights relating to the work administered by the CMO, does the CMO administer only one of the rights – e.g. mechanical rights – or does it also administer other rights – e.g. performing rights or other rights within the bundle of rights in a musical work? In the case of audio-visual works, is the CMO concerned with only broadcast rights, or does it also administer other rights, such as mechanical rights, rental rights, private copy? Does it only

⁹⁵ It is of course easier to adopt a legalistic approach and argue that users are *obliged* to procure licenses from the CMOs. While this may be technically correct, a poorly-researched tariff may create impediments for the CMO in its licensing endeavors (e.g. resistance from users, protracted court cases, waning public support etc.).

administer the rights of a certain category of rights holders or does it do so on behalf of several rights holders?

3. User requirements have also necessitated a certain degree of co-operation between separate CMOs (where these exist) administering different bundles of rights.

3.1.2 More recent developments in user markets

4. One of the effects of recent developments in user markets having an impact on tariff development is the phenomenon of convergence of rights and works used in the digital environment (see Unit 1). Parallel to this is the existence of new, market-driven online and other new media user models which have resulted in a variety of multimedia offerings that have created further licensing challenges. This is because the various components of these offerings are owned or controlled by a diverse number of rights holders while some of it is user-generated content which often gives rise to legal problems of unauthorized use of sound recordings. There is also the difficulty in determining the party liable for copyright infringement or where infringing acts took place, both of which are important considerations when thinking of instituting infringement action since copyright largely remains a territorial system.⁹⁶ The territorial nature of copyright and neighboring rights has created difficulties in the effort to enforce the protection of these rights in the online and new media environment.

3.1.3 Cross-border arrangements

5. The tariff structure used by a CMO will also be influenced by the unique conditions that exist within the economic market in which it operates.⁹⁷ A response to the digital revolution has led to increased efforts to license rights on a *multi-territorial basis* within major economic markets. This has been notably so in the EU since the promulgation of the EU Information Society Directive.⁹⁸ Nevertheless, on a world-wide basis the question of territoriality in copyright and neighboring right law remains a complicating factor in efforts to implement multi-territorial licensing schemes. This has led

⁹⁶ The European Union, which is seen as a single community of countries, is an obvious exception in this regard.

⁹⁷ Some major economic markets include the EU, North America, Mercosur, ASEAN etc.

⁹⁸ Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, available at <http://www.wipo.int/wipolex/en/details.jsp?id=1453> (Accessed 03/02/2015). See further in this regard the provisions relating to the multi-territorial licensing of musical works in the recently-promulgated EU Directive on Collective Management of Copyright and Related Rights, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026> (accessed 01/12/2015).



to the conception of a number of models aimed at dealing with this problem, amongst them the so-called '*spoke-hub*' model of copyright licensing. An example of this is the model proposed in the 'Hooper study' in the UK, which proposed the creation of a UK-based 'Copyright Hub', having as its spokes 'the growing national and international network of private and public sector digital copyright exchanges, rights registries and other copyright-related databases' and 'using agreed cross-sectorial and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-competitive principles'. The Hub would serve copyright licensors on the supply side and copyright licensees and users on the demand side and would focus on the 'very high volume of automatable, low monetary value transactions coming mostly from the long tail of smaller users – the small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube', rather than the 'low volume of customized, high monetary value licensing transactions at the top of the market (for example Universal Music Group's licensing of Spotify)'.⁹⁹

3.2 Bundle of rights administered

6. Another consideration to make when developing a CMO's tariffs is the nature of the bundle of rights administered by the CMO and the scope of each right. In the case of neighboring rights the bundle of rights will be dependent on whether the CMO concerned administers both primary or first generation uses and secondary or second generation uses, or if it is only concerned with second generation uses.¹⁰⁰ As indicated in Unit 1, first generation uses are those relating to the rights of fixation, reproduction and distribution. Second generation uses are those relating to the exploitation of a sound recording and the embodied performance in secondary markets (i.e. markets outside the direct distribution and sales of the sound recording), such as uses in the sound track of films, making a sound track album, and using the sound recording in an advertisement, and the remuneration rights provided for in international treaties and some national legislations.¹⁰¹ In the case of neighboring rights, collective management is more prevalent in respect of remuneration rights, although dependent on either the development of the recording industry or the law applicable in the jurisdiction concerned it is

⁹⁹ See the Hooper Study at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase2.pdf>, paras 7 – 8. (Accessed 03/02/2015).

¹⁰⁰ See Unit 1 for a full discussion of this.

¹⁰¹ As noted earlier, remuneration rights would include both (i) the rights of broadcasting, public performance and other communication to the public and (ii) the private copy levy, where this is available.

at least theoretically possible for a CMO to also administer or at least be authorized to license primary uses.

7. The trend by rights holders to demand more say in the administration of their rights in the digital environment also needs to be noted. Because of this, the development of tariffs for digital uses may no longer be the exclusive domain of CMOs as more rights holder groups get actively involved in the process. The ‘making available’ right has become very important in the digital environment as it enables rights holders to license the use of their works whenever they are made available to the public, whether by wire or wireless means, ‘in such a way that members of the public may access them from a place and a time individually chosen by them’.¹⁰² This relates to on-demand access of sound recordings through both streaming and downloads.¹⁰³ In regimes which recognize private copy, levies and royalties tariffs are often developed and issued by designated government bodies (e.g. the Copyright board in Canada).

3.3 Rights representation and acquisition of rights

8. Tariff development will also be influenced by the manner in which a particular regime deals with the issue of ownership of rights. For example, the choice of user markets that must form the subject of tariffs will be determined by the rights represented by the CMO concerned, and by extension the holders of these rights. In the case of neighboring rights it is generally left to national law to determine if exclusive rights are granted or if the relief given is merely ‘a possibility to prevent unauthorized exploitation’, in the language of the Rome Convention. In many common law jurisdictions the producer of sound recordings is often granted full copyright in respect of his sound recordings while the performer is granted exclusive rights to authorize the recording, public performance and broadcast of his performance. In some jurisdictions (e.g. Canada) performers are granted copyright in respect of their performances. The recording contract between the record producer and the performer enables the record producer to exploit the performer’s performance embodied in the sound recording. Depending on the applicable legislation the record producer, the performer or both are entitled to receive remuneration for the broadcast and public performance and communication to the public of the sound recording and the embodied performance. Where a private copying system exists the parties would also be entitled to receive

¹⁰² See articles 10 and 14 of the WPPT.

¹⁰³ This can be done by having a stand-alone exclusive right of making available, or by making such a right part of the communication right (in the case of streaming) or the distribution right (in the case of downloads).



remuneration for the private copying of the sound recording embodying the performance.

9. While, for example, in the case of musical works it is possible to create further markets of exploitation through the making of adaptations or derivative works from the original work, this is not so prevalent in the case of sound recordings except in a limited sense. This is because, while in the case of musical works the creation of any new form or version of a musical work without the authorization of the copyright owner constitutes an infringement of copyright, in the case of a sound recording it is the adaptation or reproduction of the original sound recording that constitutes infringement. Any new version of the sound recording in which the person making such sound recording recreates or adapts the original sound recording using his own recording facilities, does not infringe the copyright of the original sound recording.¹⁰⁴ It is for this reason that in so-called cover versions it is the authors of the musical works used that are compensated and not the owner of the copyright in a sound recording. Nevertheless, where a person actually 'lifts' the whole or a substantial part of the sound recording in order to use it in a different setting as in the case of *sampling* or where the sound recording is used in the soundtrack of a movie or reproduced as part of a sound track album, a new market for the sound recording is created and the owner of the copyright of the sound recording must give authorization and be compensated for such use.
10. The acquisition and representation of rights may have an impact on the level at which tariffs are to be set. This is because the rights controlled or represented by a CMO will influence the CMO's decision on market segmentation. Thus where the CMO controls or represents the rights of major rights holders or rights holders representing the most exploited works, this is likely to give the CMO leverage to prioritize major users of music in the domestic market. The CMO would of course control these rights either through assignments, licenses or agency arrangements. In the case of international rights is usually achieved through bilateral reciprocal agreements with foreign CMOs, through agreements with domestic representatives of foreign rights holders or through direct representation of foreign rights holders.

¹⁰⁴ Barrett M *Intellectual Property* (2 edn.) (Aspen Publishers Austin 2008) 142 observes, in respect of US law, '... [T]he right to adapt a sound recording, like the right to reproduce it, is only infringed when the defendant actually mechanically recaptures, or 'lifts', sounds from the copyrighted recording and then alters them or mixes them with other sounds. It is not an infringement of either the right to reproduce or the right to adapt to make a separate sound recording of independently fixed sounds, no matter how the sounds may simulate the plaintiff's copyrighted sound recording.'

3.4 Value of rights, establishing a hierarchy and best practices

3.4.1 Value of rights

11. The attachment of value to copyright and neighboring right works and protected performances is an important consideration in the development of a CMO's tariffs. It is true that neighboring rights are rights afforded by law and that, on this basis, users of copyright works are obliged to pay rights holders when using sound recordings and performances. Nevertheless it is important not to use a heavy-handed approach towards users and expect them to unquestionably accept any license fee that the CMO conceives. The CMO must be able to prove that its tariffs were not lightly arrived at and that a scientific approach was used to arrive at each tariff in respect of all uses. This of course is based on the premise that sound recordings and their embodied performances have a determinable value, which, in many cases, is of an economic nature (i.e. it leads to the improvement of the economic position of users of these works).¹⁰⁵ The point of departure therefore is that users must pay for their use of sound recordings and performances because these constitute someone else's property; however, the level of payment will be dependent on the value to be attached to the particular use, as determined through the tariff development process. As is common cause, economic exploitation gives rise to the establishment of pricing systems.
12. The historic view is that the pricing value to be attached to the exploitation of a cultural product is the ability to participate by way of a proportion of the economic proceeds derived from such exploitation.¹⁰⁶ On a legal basis the standard that has often been used by courts and tribunals is that of a 'reasonable royalty'.¹⁰⁷ The rights holder must prove that the royalty is reasonable under the circumstances. In order to satisfy the requirement of reasonableness it becomes necessary to employ more scientific methods of valuation in the process of tariff development. If the CMO has not taken care to employ credible methods in arriving at its tariffs (where possible through

¹⁰⁵ Care should be taken not to place too much emphasis on economic value, as users are generally also required to pay for the use of sound recordings and performances even when the purpose of such use is non-profit. Unless a particular national regime exempts such non-profit users from liability, the uses would normally also require authorization, and at times, payment. This is because although the user may not be deriving economic value from the use of the sound recordings, some other value will be derived from the exploitation of the works, whether experiential value or some other form of sentimental value.

¹⁰⁶ See Petri G *The Composer's Right a History of the Value of Music* (Atlantis Stockholm 2002).

¹⁰⁷ Also termed a 'license analogy' or 'fictitious license' in some civil law jurisdictions. See in this regard WIPO 'Intellectual Property Litigation Under the Civil Law Legal System: Experience in Germany', available at http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_2/wipo_ace_2_3.doc, at paras 53 – 57.



negotiation with users), the matter may be left to courts and tribunals to determine, at times giving rise to skewed outcomes that are 'inconsistent and lack robustness'.¹⁰⁸ It has been argued that the systematic analysis of legal determinations does not always provide a good estimate of true value and that better estimates of value are therefore needed. The following have been identified as some of the options that can be considered when attaching value to the use of recorded music.¹⁰⁹

3.4.1.1. The use of economic analysis

13. The use of economic analysis is commended for providing a paradigm that sets out a logic lacking in legal analysis, and which aligns with the economic policy underlining copyright (and, by extension, neighboring rights) law. Furthermore, economic analysis assists in identifying relevant facts and in dispelling preconceived and subjective assumptions.

3.4.1.2. The use of comparable market prices

14. This has to do with the use of 'benchmark studies', where tariffs and royalty rates that are the outcome of tariff negotiations in comparable markets are considered. An analysis of this nature is useful in that it enables the CMO to analyze various uses and to determine how value was attached to such uses. There will likely be a cost implication for a CMO in procuring independent studies published in this regard. Much of the information may also not be publicly available and the CMO may have to depend on its relationships with the target CMOs in order to have access to such information. It would also be important to carefully identify appropriate comparator market environments, something that may not be easy in view of the uniqueness of each market. For example, it is not enough to use as a comparator market another developing country where the CMO concerned is from a developing country, since there may be very significant differences in the manner in which rights are administered in the two markets. Of particular importance is a consideration of the issue of freedom to negotiate. Were the tariffs in the comparator market determined through willing negotiations, or were they as a result of the abuse of a dominant position by the target CMO or government influence in the negotiations? It is clear therefore that what

¹⁰⁸ See PricewaterhouseCoopers (PWC) 'Valuing the Use of Recorded Music' July 2008, at 2. Available at http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf (Accessed 6 February 2015).

¹⁰⁹ See PWC study, *ibid.* Although the options dealt with in this study are seen as options that would be used when determining the reasonableness of a royalty at a tribunal or court hearing, it is submitted that taking these considerations into account when developing tariffs will place a CMO in a better position to prove the reasonableness of a tariff, which is often a review of the steps that were taken by the CMO concerned when developing the tariff.

the comparative analysis must do is that it must, as much as is possible, 'compare apples with apples'. Furthermore, it is important to ensure that the data that is being compared is still relevant and up-to-date. It is practice with international federations and bodies such as IFPI and SCAPR to make available details of their members' tariff charges.

3.4.1.3. Analyzing the value that the sound recording adds to businesses

15. One of the ways in which the value of copyright and neighboring right works can be determined is through analyzing how the use of a sound recording by a business adds to its turnover. This can be done through the use of data that is capable of supporting this notion. It can be demonstrated how music aids to the growth of business income and financial analysis can be conducted to show increased income in various situations within a particular territory. It may also be possible to show a correlation between revenues earned and use of the sound recording. The comparison can then also be extended or converted to alternative or substitute scenarios such as considering what the situation is if the music used was royalty-free music (considering that such music is in many cases not well-known by the public), as well as considering what the situation is where no music was used at all. A number of CMOs have undertaken research and published these on their individual websites. See for example in this regard the PPL (UK) and SENA (Netherlands) websites.

3.4.1.4. Impact of music usage on behavior and preferences of consumers

16. The value of music can also be determined by assessing the impact of music use on the behavior and preferences of consumers. This can be done by analyzing studies relating to the use of different types of music and the resultant economic benefit to the user.¹¹⁰

3.4.1.5. Adopting a specific value approach

17. In the end it is important to choose a specific value approach that the CMO will use in particular circumstances. As an example a flow chart can be used in the tariff development process to determine what approach to use in respect of a particular music use. The comparable market outcomes approach can be used in respect of all industries, if such comparison exists, and the use analysis and financial analysis is used in respect of radio and television uses, etc.¹¹¹

¹¹⁰ Some of the studies that have been conducted in this regard in the UK may be read at <http://www.musicworksforyou.com/about/musicworks>.

¹¹¹ See PWC study *ibid* at 48 – 50.



3.4.1.6. Establishing a hierarchy of values

18. In determining the value to be attached to a particular use of rights, and thus what the applicable tariff is, it is often important to do so using a hierarchy of value attribution and allocation. The notion of differentiating the allocation of value is one that is used on the basis of the type of the product or service concerned and the degree of the use of rights. Market precedents of price discrimination between various types of goods and services can also be used in the allocation of value in respect of such goods and services. Hierarchy can be determined in the following manner in relation to the following aspects and areas.

3.4.1.7. Business

19. In respect of business a hierarchy can be established based on: (i) essential use (attracting the highest value allocation), (ii) necessary use (attracting moderate value allocation), and (iii) incidental use (attracting lower value allocation).

3.4.1.8. Rights

20. Hierarchy-based value attribution can also be done from the perspective of the rights themselves, where the categorization is based on: (i) featured use, which attracts a higher value allocation;¹¹² (ii) semi-featured use, which attracts a moderate value allocation;¹¹³ and (iii) background use, which attracts a lower value allocation.¹¹⁴

3.4.1.9. Operations

21. A hierarchy can also be determined on the basis of the particular operations of the user concerned, e.g. whether the operations are: (i) music intensive; or (ii) where music forms the focus of a general entertainment operation; or (iii) where music only forms a secondary role of a general entertainment

¹¹² For example, where the use is predominantly in respect of a particular set of rights (whether in respect of musical works, audio-visual works, or sound recordings) the use of the rights concerned would be a featured use. This is not only important in determining which rights holders to pay in respect of a particular use but also important for purposes of determining which value to attach to the use. For example, a higher value is usually attached to the live performance of music, which is predominantly concerned with the use of music (featured use), vis-à-vis the public performance of a sound recording embodied in the soundtrack of a film [background use], since the performance is predominantly that of the film.

¹¹³ A radio show featuring both music and phone-in talk formats may, for example, be seen as a semi-featured use of the music.

¹¹⁴ An example of background use is in the case where a restaurant plays music in the background to create ambience. The restaurant's business is not concerned with the playing of music but with the selling of food. The restaurant's business can therefore, continue without the playing of music, although customers may prefer to go to another restaurant using music because of the ambience that the music creates.

operation;¹¹⁵ or (iv) where the operations are not directly concerned with music and music is only used occasionally.

3.4.2 Best practice

22. Generally many medium to small market CMOs do not give sufficient attention to the *science* of value attribution in the formulation of the CMOs' tariffs. Instead, the formulation of tariffs is often determined within the general rubric of 'best practice', taking into account such considerations as: (i) estimates of market size (i.e. comparing the market size of one CMO with that of another); (ii) the initial research conducted and the start-up capital available; (iii) the legacy of the particular CMO (i.e. 'how things have always been done'); and (iv) domestic and regional precedents.
23. CMOs should devote time, care and attention in establishing the value and hierarchy principles dealt with above when developing tariffs. Thus, to arrive at a more justifiable or 'reasonable' tariff it is important to make use of a combination of 'value determinants' based on economic science, tribunal and other judicial precedents, the value added to the user business and undertaking and comparable market prices (i.e. best practice). To be sufficient, the best practice exercise needs to take into account all these various value determinants. The use of a best practice template is of assistance in this regard. The best practice template is used as a comparative tool to assist with identifying the degree of correlation between like markets based on CMOs in the region and those in other regions of the world. It is a broad market assessment tool based on the use of a table with columns for the tariff in question, the jurisdiction being considered and the law applicable in such jurisdiction (what could be termed a TJL column), with another column reflecting any precedents (tariffs, licensing policies etc.) available from such jurisdictions. This will assist in the process of the choice of those jurisdictions that are appropriate market comparators for the CMO carrying out the exercise, with an emphasis on choosing only those markets that have like characteristics to those of the CMO concerned.

¹¹⁵ For example a music retail store can be said to be a music-intensive operation, because its sole aim is the *sale* of music (just as a DJ's business is music-intensive because it is solely based on the performance of music; and the rental of videos is an intensive operation for a video-rental shop). On the other hand, the playing of live music in a restaurant club can be seen as general entertainment, as the playing of music is generally not the main aim of the club.



3.5 Pricing parameters, types of pricing and practices

24. Tariffs are generally set on the basis of certain parameters or measures and criteria of assessment. In general tariffs are based on one or a combination of the following:

3.5.1 Pricing models

3.5.1.1. Revenue or expenditure-based models

25. This normally applies in respect of essential or featured uses. In this case the tariff will be a percentage of a user's revenue, expenditure, operating budget, price-to-consumer and ancillary revenues, or any combination of these. Clear definitions must be devised to explain what is meant by revenue and expenditure in respect of gross, wholesale, retail or dealer prices. For example, 'revenue' may be defined to exclude agents' fees and promotional fees, or a certain percentage thereof. In such models, most CMOs reserve the right to insist on a certificate of revenue, expenditure or operating budget, duly certified as correct by an acceptable authority, while in others some insist on the right of 'audit' as a standard term.

3.5.1.2. Fixed-fee models

26. Fixed-fee based models are normally used in respect of necessary or non-featured uses and possibly some semi-featured uses. These are used with reference to certain fixed or ascertainable parameters, e.g. in the case of public performance the parameters would include measured areas, number of employees, seating and dancing capacity, frequency of events (hours per day, days per annum etc.) and number of subscribers and viewers and listeners, number of downloads etc. In most fixed-fee models the stated monetary amounts are usually linked to movements in retail and consumer price indices. This is to ensure that rights holders are compensated adequately for any loss of and gain in the value of money over time.

3.5.2 Parameter practices

27. The detail of the parameter definitions and terms which both models may take into consideration, as well as the complexity or simplicity to administer them, is largely dependent on local conditions. These conditions include domestic market conditions and negotiations with users or representative associations of user groups. Such conditions ultimately influence the pricing parameters contained in a CMO's tariffs. As a result, pricing parameters often vary from country to country. For reasons of simplicity, CMOs

try where possible to limit the number of parameters in their tariffs. In some countries it is also practice to harmonize tariff parameters between neighboring rights CMOs and authors' rights CMOs.

3.6 Tariff-setting and license scheme essentials

3.6.1 Tariff-setting

28. We have looked above at some of the theoretical considerations that need to be taken when developing a tariff. On a practical level, developing (or setting) a tariff generally involves three steps, namely:

3.6.1.1. Overall market analysis, segmentation and estimation¹¹⁶

29. In relation to this issue it is important to have a clear understanding of the rights applicable, the application of the rights (i.e. the manner in which they are used) and the user's actual business model. For example, is the use a simple (or single), 'once-off' use, or does it lead or give rise to other uses, e.g. the so-called *upstream v downstream* uses.¹¹⁷ In this regard it needs to be noted that a copyright and neighboring rights work intended for one market has the potential of being used in other secondary markets, as highlighted earlier. Thus a sound recording is not limited to use in its primary market – record distribution – but also in a number of other secondary markets such as use in a music video, use in the soundtrack of a film, use in an advert and use in a sound track album. It is important to take these considerations into account when developing tariffs and when issuing licenses, especially where the neighboring rights CMO is required to deal with more than just the remuneration rights in sound recordings.

3.6.1.2. Formation of a rights market use view

30. Uses need to be reduced into 'use essentials', i.e. breaking down a particular use into its basic elements, in order to understand fully what the use entails. Failure to do so may result in the issuing of a license that does not adequately reflect the use, thus resulting in lower income for the CMO.

¹¹⁶ See Unit 5.

¹¹⁷ For example, a performer who enters into a recording deal is entitled to receiving royalties not only from record sales (upstream use) but also, where legislation permits, from the broadcast and subsequent public performance of the sound recording (downstream use). Another scenario relates to the so-called broadcast mechanicals (in jurisdictions where this is recognized): the rights holders (i.e. record producer and performer) would be entitled to earn income both when the sound recording is converted into broadcast format (upstream use) and whenever it is later used in a broadcast (downstream use). See further regarding broadcast mechanicals Thall PM *What They'll Never Tell You About the Music Business – The Myths, the Secrets, the Lies and a Few Truths* (Watson-Guptill Publications United States 2006) 234 – 235.



Those formulating tariffs need to confirm that their understanding of what the use entails is correct by, for example, consulting with user groups or trade associations including for example, retired executives from the industry concerned, who may no longer feel obligated to keep secrets. Seeking legal counsel in order to understand the legal categorization of the particular use is also often crucial, particularly with regard to understanding the various layers, types or bundles of rights involved.

3.6.1.3. Location of tariff

31. Having undertaken the above actions, it is now easy to 'locate' a particular tariff within the overall hierarchy of other existing tariffs. That is, it would, for example, be possible to determine if the tariff relates to *essential use*, *necessary use* or *incidental use* and thus what price level should be allocated to the particular use. In the end the CMO will have an arsenal of tariffs ranging from those that relate to high-value uses, medium-value uses or lower-value uses. This will also assist in the licensing strategy implemented by the CMO.

3.6.2 Private copy rate setting arrangements

32. The determination of rates of charge or fees payable varies from country to country and also with regard to which products are levied. It has been noted that there are some four common practices of rate setting¹¹⁸, namely:
 - a. Direct state intervention;
 - b. Negotiation between industries and CMOs;
 - c. Special government appointed body; and
 - d. Set by law after rights holder representations and negotiations.

3.6.3 License scheme essentials

33. Having now developed various tariffs for the CMO in respect of different uses, it becomes necessary to convert the tariff into a license or licensing scheme (i.e. the manner or framework in which the tariff will be implemented). A license scheme takes into account the various essential terms that must be included in a license agreement entered into between

¹¹⁸ See an extensive study published by Stichting de ThuisKopie (Netherlands Private copy collection organization) and the World Intellectual Property Organization (WIPO) in 2013 at http://www.wipo.int/freepublications/en/fulltext_pubdocs.jsp?q=private+copy (last accessed 16 February 2015)

the CMO and a user. The following are some of the more essential aspects of a license scheme.

3.6.3.1. Scope of rights covered

34. The license scheme needs to clearly indicate the scope of the rights that the tariff is based on, i.e. whether this relates only to one set of rights in the bundle of rights relating to the sound recording and the embodied performance (whether the tariff relates to broadcasting, public performance, digital exploitation) or whether more than one category of rights (whether a private copy levy or other forms of primary or secondary uses are included), as would sometimes be the case with multi-purpose societies. There needs to be a clear delineation and the rights involved need to be clearly identified in the license. It also needs to be clearly indicated whether the tariff relates to a transactional license or whether it is concerned with a blanket license, where permission is given to use all or most of the rights within the CMO's repertoire.

3.6.3.2. Period and term of license

35. The term of the license needs to be clearly stated. This is true in all cases but particularly so in the case of an interim and introductory or experimental scheme, where certain aspects of the use may not be clear, requiring the CMO to investigate the matter further before finalizing the scheme. Under such circumstances it is better to offer a shorter, interim license term (say over one or two years) to avoid giving away too much over a longer period. This would also be the case where the CMO gives special rebates or a reduced license fee to a user that is struggling financially. Such an arrangement enables the user to 'get back to its feet' without the further financial strain of paying higher copyright license fees (especially in respect of businesses whose operations are dependent on the use of sound recordings), while at the same time not prolonging this arrangement which is clearly disadvantageous to rights holders. Having said this, it needs to be mentioned that there is a danger that the interim license scheme can somehow morph into a final or more permanent scheme, setting a bad precedent in the licensing of the rights concerned. This is for example likely to be the case where the CMO does not strictly enforce the terms of the interim license, such as by continuing to accept the interim license fee even after the end of the experimental period, or generally continuing with the current arrangement without demanding the renegotiation of terms when the term of the interim license expires. Having indicated this, in some jurisdictions CMOs only enter into formal contractual arrangements with major users; with standard public performance users being issued with an



invoice from the CMO on the reverse of which appear the CMO's standard terms and conditions.

3.6.3.3. Territory

36. It is also important to clearly indicate the territory covered by the license scheme and whether it is in respect of a particular town, city or province, or is it in respect of the whole country as in the case of a user that is a national establishment. The license fee would of course vary depending on whether only one user is licensed or whether all users in a national establishment are covered by the license. Because of the territorial nature of copyright and neighboring rights the license scheme is likely to cover only uses within the country in which the CMO operates, although it is possible through arrangements to extend the license beyond the CMO's national territory.¹¹⁹

3.6.3.4. The nature of the scheme

37. The scheme may be fixed for a period of time or subject to review at regular intervals. It needs to be clear who must give notice of termination or renewal as failure to do so may have disastrous effects. For example, failure to give notice of termination by the CMO may result in the licensing terms continuing for another period under current, unfavorable conditions.

3.6.3.5. Specific exclusions

38. Any specific uses or other matters that the CMO wishes to exclude from the license scheme need to be clearly indicated. For example, except in the rare cases where this is permissible, a neighboring rights CMO will normally only administer remuneration rights, with the rights holders directly administering other primary and secondary uses. Another example is where a background music license specifically excludes live performances. The CMO can only license those rights that it has been authorized to represent by rights holders.

3.6.3.6. Price and terms of payment

39. The fee payable may be a single fee or comprise of comprehensive payments based on certain applicable modalities in respect of a variety of users, uses, premises, size, extent of use, and area in which performances

¹¹⁹ For example, where a user's operations extend to neighboring countries the CMO in the user's home country may license uses in the other countries if (i) no CMOs exist in these countries, (ii) the CMO in a neighboring country is not functional, and an agreement has been entered into with the licensing CMO to license uses in the neighboring country and to pay over the portion arising from such uses, to the CMO or rights holders in such neighboring country, etc. In the European Union cross-border licensing is required by law in certain cases.

are audible. It may also be necessary to require the payment of certain guarantees, deposits or minimum payments. Furthermore, where the fee is a nominated amount in currency it is usually linked to cost of living and CPI adjustments, with upward or downward adjustments dependent on the movements in such indices, necessitating either an increase or decrease in the license fee. In the event of a default in payment an interest or penalty may be charged for each period in which the default persists.

3.6.3.7. Reporting requirements

40. Provisions relating to reporting requirements are crucial in any licensing scheme. The lack of reporting on music use by users is one of the most-common reasons why CMOs are not always able to distribute all license fees received from users. It is not enough that a user regularly pays its license fees, if the user does not also provide the CMO with information, using forms or formats supplied to it or approved by the CMO, on the music it has actually used. Use reporting also enables the CMO to see if the user's use of copyright and neighboring rights works may have increased since the previous period. In view of this the reporting requirement needs to be treated as a material term of the license agreement with users, with specific remedies available to the CMO in the event of default by the user such as charging a penalty payment or requiring specific performance. Often users feel that such a requirement is cumbersome and at times costly, and CMOs must thus work with users to alleviate the burden or obligation of reporting on uses.

3.6.3.8. Important definitions

41. Both the business of a CMO and the field of intellectual property rights are specialized fields which are not very well-known. Certain terms used will be completely new and unconventional to users and thus it will be necessary to define them clearly. This includes the use of such technical parlance as 'broadcast mechanicals', 'synchronization rights', 'communication to the public' and other words or expressions which, though common, may be used in a different sense in the license scheme.

3.6.3.9. Other important contractual terms and conditions

42. The license scheme will also deal with other crucial matters such as the CMO's right to audit the user's books in order to determine the accuracy of the user's reporting.



3.7 Existing license schemes and tariffs and hierarchy

43. Tariff development is a critical aspect of a CMO's operations and of its success and so it is important that a CMO's approach to tariff development is carried out with focused attention rather than haphazardly. Thus if the CMO does not have a tariff development function this should be created and a line responsibility position be allocated. It is also important to create a tariff library or database in which tariff precedents and other related documents (including the history of tariff and licensing negotiations) are securely preserved. The library should be divided into: (i) domestic tariffs, where the CMO's current and legacy tariffs as well as tariffs that are still in development are kept; (ii) regional tariffs, where the CMO keeps tariff precedents from similar CMO markets; and (iii) international precedents which can be referred to when necessary in order to make comparisons and correlations.¹²⁰ A domestic general hierarchy of tariffs also needs to be established based on the value measures chosen by the CMO.

3.8 Drafting of tariffs

44. In order to develop tariffs a CMO needs to have some degree of representation of the rights of rights holders in its area of operation. This is particularly so in the case of voluntary systems.¹²¹ Where the CMO represents by far the majority of rights in a particular area its representation of the rights can be said to be *overwhelmingly significant*. Where it represents over 50% of the rights its representation of the rights can be said to be *significant*, and where its representation of rights is modest it can be said to be still building its representation profile.
45. Having ascertained its representative level the CMO then needs to develop a value proposition which will be influenced by the level of its representation of rights. The value proposition is premised on members' interests and users' perspectives, and what the market is able to bear. The CMO must develop a statement of justification for its choice of the tariff pricing model used. This justification can be based on a number of considerations, such as (i) existing tariffs in related areas of use (for example, comparing the tariff for use of a sound recording in a restaurant vis-à-vis use in a similarly-sized retail store); (ii) the degree of similarity or dissimilarity with existing tariffs (in this regard any assumptions made need to be confirmed or verified and

¹²⁰ CMOs generally function as a fraternity and many CMOs would be willing to share their information with other CMOs.

¹²¹ In the case of statutory CMOs or those forming part of the state administration state, support can result in a CMO being able to license uses even where the rights the CMO represents are not very significant.

where a comparison with precedents in other markets and countries was made, the degree of any correlation needs to be noted); and (iii) the decision whether the tariff concerned is seen as being of an interim, experimental or introductory nature (in which case the CMO may be willing to compromise on certain aspects), or whether it is seen as being final (in which case the CMO will try its best efforts to ensure that its required terms are included in the licensing scheme).

3.9 Pre-implementation tariff considerations

46. Once the tariffs have been finalized there are a number of questions that need to be asked before implementing them. We list below some of these questions:

1. Have members and rights holders' interests been adequately addressed in the tariffs?
2. Has the rights market and the use model of users been correctly understood?
3. Has the tariff been drafted in such a manner that it is easy to understand and implement it, thus easing administrative burdens on the part of both CMO officials and users?
4. Is the tariff legally sound?
5. Have all assumptions been correctly interpreted?
6. Have the tariffs (and the values or price attached to them) been ranked correctly in terms of the system of tariff hierarchy?
7. Have all arithmetic computations and formulae been confirmed?
8. Have 'dry-run' tests or samples been undertaken with respect to mean and extreme examples, to test the viability of the tariffs?
9. Where applicable, have consultations been made with members and rights holders and user groups? Being able to prove to a court or tribunal that such consultations (especially with users) did take place may assist a CMO in proving that a tariff is reasonable where disputes arise.
10. Where this is required, have the tariffs been submitted to and confirmed by the regulator? and
11. Has a marketing and communications plan in respect of the tariff been devised?



3.10 Post-implementation tariff considerations

47. After the new tariff has been introduced and implemented it is important to review its impact on the user market soon after its introduction and over a period of time. It would also be important to review the impact or performance of the tariff in comparison with existing tariffs. After doing the review the CMO must then take steps to respond and attend to any genuine concerns raised by users.

B. LICENSING PRACTICES

3.11 Market analysis and research

48. CMOs are *de facto* monopolies and markets and regulators do not generally favor monopolies. For this and other reasons it is important to ensure that the CMO takes into account sound licensing practices. With an established tariff policy and development section, a CMO is in a better position to address its market of users and uses as well as covering some of the key pillars of licensing policies and practices. In devising a comprehensive sales or licensing marketing strategy there are still a number of other factors to be taken into account, some of which are detailed hereunder. It would also be helpful to read this section on licensing practices together with the discussion on management reporting in the finance section of Unit 4 and the marketing section of Unit 5.
49. CMOs are no different to any other business. In some cases however some CMOs may feel that they do not need to adopt a scientific approach to Market Analysis and Research, to the possible detriment of their members and rights holders. It is for this reason that we devote this section to dealing with the matter in order to present an approach that CMOs (especially new or intermediate ones) can use in this regard. In the case of a CMO, market analysis and research would entail a consideration of the following aspects:

3.11.1 Segmentation of user markets

50. Segmentation of a CMO's market refers to a strategy which involves the separation of the broad market of prospective or actual licensees or users into various categories, groups and sub-groups which can be identified as having similar or common use attributes. Proceeding from its market segmentation, a CMO would then prioritize actions and devise strategies and tactics to address the licensing requirements of each respective market segment. Segmentation of user markets should in the least be done on the basis of: (i) type of rights; (ii) categories of users; (iii) nature of uses or

premises; (iv) types of licensing schemes; (v) geographical location; and (vi) permutations, combinations and subsets of the above.

3.11.2 Differentiation in licensing schemes

3.11.2.1. Justification for general discrimination

51. The terms of licensing schemes (including duration and price and fee payable) may, under certain circumstances differ, based on considerations such as size, and income range. However, this cannot be done haphazardly and there must be justification for doing so. This justification can be achieved through the categorization and classification of users. CMOs attempt to address the licensing requirements of users by grouping similar users and their like uses in general categories (broadcasters; hoteliers; eateries; retailers; conveyancers). It is acknowledged that such broad categorization, while helpful, needs to respond to more specificities within each category of users – broadcasters could be radio or television channels; hotels could be those which sell alcohol and those which do not, or the prices of meals. Thus what is needed is not only the categorization of users but their classification also.

3.11.2.2. Adjustments within a scheme

52. It may become necessary to adjust a licensing scheme with respect to certain users included in the scheme, or sections and groups of such users. However, this should only be done as a result of the CMO's response to user justification for sectorial differentiation or the motivation or need for the creation of a special arrangement or scheme based on objective factors. This can be done by way of inserting a subsection in a licensing scheme to reflect the new aspects, or creating a completely new scheme to deal with the sectorial differentiation issue.

3.11.3 Market penetration

53. Market penetration strategy in collective management is in some aspects similar to that in ordinary business. Although there are often no competitors to a society's operations in view of the general monopoly position of many CMOs, they do face challenges such as instances where users prefer not to use any music, or where they use music that is out of copyright or royalty-free. Market penetration for CMOs is thus an important growth strategy relating to the marketing mix, that is how one can adjust and blend the various elements or components in or of the marketing mix (Price, Promotion, Placement, Product, People, Process and Physical evidence) to gain more licensees, whether existing unlicensed users or new users,



from the market. The question that the CMO needs to ask is what the level of licensed users is, in comparison with the total estimated or theoretical user market in each category and class of users. In doing so the potential for increased license revenue, as well as the implications for high or low penetration become obvious and, subject to a cost benefit analysis, appropriate action can be taken to achieve a desired result.

3.12 Sales data and analyses

3.12.1 Sales data

54. The importance of managing sales and licensing data cannot be overemphasised. Management of information is crucial for the success of any CMO. Furthermore, in view of the non-profit status of many CMOs there is a further obligation to operate in a cost-effective manner while also generating growing streams of income for members and rights holders. The ability to effectively track data is a core CMO activity which should be carried out both in respect of sales and licensing reporting and rights reporting. Licensing databases are an essential tool to store and track information relative to users and uses. Some examples of sales and licensing data are: (i) a classification of rights by types of users; (ii) a classification of rights by type of licensing scheme; and (iii) sales and licensing performance based on various other measures such as areas and regions, officials, agents, other platforms, and permutations and combinations of these. For more detailed commentary on sales reporting see Unit 4 on management reporting and the marketing section in Unit 5.

3.12.2 Sales analyses

55. Sales and licensing analysis and trends by CMOs can be undertaken on the basis of licensed rights and works, weekly and monthly and quarterly or seasonal periods, geographic performance, and comparisons with other periods. The analysis of a CMO's licensing activities can further be broken down into licenses renewed, licenses cancelled and new licenses issued. Sales analysis is often used as a management tool to bring about remedial action, to take advantage of market opportunities and to provide support for the CMO's fiscal planning and its optimal use of scarce resources.

3.13 Review of complementary, alternative or competing CMO services

56. It is important for a CMO to constantly recall the underlying principles of collective management and their impact on its daily operations. Collective

management involves the exercise of copyright and neighboring rights by organizations acting in the interest and on behalf of a group or class of rights holders. CMOs are an important link between rights holders and consumers of their copyright and neighboring rights works as they ensure that the rights holders receive payment for the use of their works. An effective licensing strategy in which tariffs and licensing schemes are correctly deployed to achieve the best benefit for rights holders is thus crucial. This is important for the success of any CMO, especially in the digital age. Although individual licensing of exclusive rights by rights holders themselves can be difficult to exercise, developments in the technological environment have made it possible to have other models of rights administration outside the need to use the system of collective management. In view of this, it behooves CMOs to focus on delivery of mandates and to guard against pseudo-monopolistic market power presumptions.

57. The collective management of rights has evolved to a level where several services traditionally undertaken by CMOs are now being effectively shared by or outsourced to other CMOs or third party service providers. The shared or outsourced services can include licensing, use tracking, ICT services or the general areas of finance and legal services. In some markets where more than one CMO exists Memoranda of Understanding¹²² (MoUs) have been signed to jointly license or administer common and shared users and user groups, or to provide other services. This undoubtedly results in shared efficiencies and benefits to members and rights holders of the collaborating CMOs. In the same vein, the involvement of third party service providers in the fields of licensing and other services may be complementary to CMO operations. Nevertheless, if these CMO operations are themselves weak or below acceptable standards there is a danger that the third party service providers can eventually become an alternative to the CMOs, venturing into space traditionally regarded as CMO territory. For this reason it is crucial for CMOs to focus on the delivery of their core mandate, in particular effective and efficient income generation and distribution.
58. The possibility of competing CMO services is another reason why a CMO needs to be diligent in carrying out its core mandate. Members and rights holders have at times, either out of preference and dissatisfaction (because of less than acceptable service standards and delivery), supported the establishment of alternative or competing CMOs, with the result of more than one CMO operating in the same area or field of rights administration. To avoid confusion in the market the competing CMOs can agree to enter into joint licensing arrangements in respect of common users, and to only

¹²² Memorandum of Understanding in the singular.



carry out separate licensing where the repertoires of the two CMOs can be clearly distinguished. Even so, it is important that the tariffs of the competing CMOs are justifiable to ensure that users receive a fair service and that rights holders are remunerated accordingly.

3.14 Review and choice of licensing channels or structures

59. There has been and still will be a variety of channels used by CMOs to license their customers. The choice of channel is dependent on local market conditions, ICT and the logistics available to the CMO concerned (e.g. postal and telecommunication services, bandwidth, transport infrastructure and the like). Over time, market conditions change and the channels of licensing used need to be reviewed accordingly. Traditionally CMOs have employed licensing officers and inspectors, field representatives, agents and similar licensing professionals to service certain user markets. Many CMOs structure their sales and marketing efforts according to local circumstances, logistics and the channels of sales and licensing chosen. The channels of sales and licensing may include:
 - a. The direct sales force (which comprises of both the general sales force and key account executives assigned to specific key customers);
 - b. Tele- marketing;
 - c. Direct mail;
 - d. Phone-in call centers;
 - e. Walk-in customer centers;
 - f. CMO Website sales (e-commerce), including the use of social media platforms;
 - g. Independent agents; and
 - h. Outsourcing (e.g. to firms of attorneys in respect of particular uses).
60. Where the licensing market to be serviced covers a large geographic area the question of centralized or decentralized modes of operations is often considered. In this regard a choice needs to be made as which sales and licensing channels to retain as part of centralized operations, and which channels to use in the decentralized operations. Decentralization may involve the establishment of regional and, at times, sub-regional offices. Other considerations to make include deciding on how management controls and reporting shall be implemented and cost effectiveness maintained.

3.15 Domestic, regional and global markets

61. A CMO's primary concern and main focus is normally its domestic market. However, depending on the profile and popularity of its works and members and rights holders, it may become necessary to address or consider strategies to respond to any growth of the use of the CMO's rights beyond the domestic market into regional and even international markets. This is not to say that the CMO needs to start full licensing operations or to open branches in markets beyond its domestic market. The system of reciprocal representation of rights among CMOs should ensure that the use of the rights of the members of one CMO in a foreign territory can be represented by a CMO that is native to such territory and thus knows the user market better. There may also be regulatory and cultural impediments to setting up shop in foreign markets. Growth in the digital market resulting from an increase and explosion in the availability of user channels means that there is a greater potential for a CMO's repertoire to be used in international markets. CMOs that are able to solicit the services of use monitoring companies without significantly affecting payment of royalties to rights holders can more effectively follow-up on the use of their members' works in foreign territories. Some CMOs support and undertake steps to promote the use of the works of their members in foreign markets and to monitor such uses, thus ensuring that their members' works are used or that use is more accurately monitored in such foreign markets. A CMO may for example participate or support participation in cultural shows such as music festivals in foreign markets which showcase the rights of their members as a way of developing interests in such rights. Where foreign markets in which a CMO's repertoire is active have no local CMO, or the CMO is ineffective, there are a number of possibilities facing the management of a society. In any event, the CMO's fiduciary responsibilities dictate that cost effective measures should be explored to ensure appropriate protection and administration of its members' and rights holders' rights world-wide.

3.16 Licensing team strategies and policy

62. It is often said that a failure to plan is a plan to fail. This is a simple but very real fact. The CMO needs to develop a sales and licensing plan in line with its strategic plan, which must be approved by its board and management and executive committee. The plan must describe the planning and monitoring of sales and licensing activities and incorporate broad sales team objectives and targets. The plan must clearly indicate the person responsible for the overall sales and licensing function, as well as those responsible for specifically-chosen sales and licensing channels. In this regard there must be an



allocation of broad market and sector and area responsibilities, which can be done on the basis of different rights or different uses. There must also be a setting and communication of sales objectives and targets in respect of each sales or licensing channel. See the following simple table as an example of a Works/Rights/Channel deliverables matrix:

SALES-LICENSING CHANNEL DELIVERABLES MATRIX

Works (Musical, Audio-visual, Sound recordings):

Channel	Broadcast		Public Performance		Communication to Public		Reproduction/ 'Mechanicals'		
	Radio	TV	Major	Minor	Telecom	ISPs/ DSPs	Broad-Cast	Private Copy	New Media
Sales Force – General									
Sales Force – Key Account									
Tele-marketing									
Direct Mail									
Phone-in Centers									
Walk-in Centers									
E-Commerce – Website									
Independent – Agents									
Outsourcing									
Other									

63. Responsibilities and areas of accountability need to be clearly allocated and indicated based on channels of sales and licensing and both general and key accounts. It is also important to establish a strict Management and Performance reporting system (see also Unit 4 on Management Reporting) for the sales and licensing function, which is able to clearly measure sales results. This can be achieved by (i) identifying key data to be included in reports, (ii) consultations between the Sales and Licensing, Finance and ICT departments or functions and (iii) the review of existing (or creation of new) reports. Timely and appropriate reports must be extracted from sales and licensing databases based on the specific CMO’s requirements and mandate/s but should at least include:
- a. Rights and works;
 - b. Major income streams;
 - c. Channels;

- d. Economic centers;
 - e. Various user categories;
 - f. Geographic regions and provinces; and
 - g. Other established and identified market criteria.
64. The sales and licensing plan should also include regular meetings of the sales and licensing staff, such as those focusing on regional issues, national issues and divisional (or channel-based) issues. Furthermore, sales and licensing results need to be carefully evaluated and responded to. The sales and licensing team needs to be able to understand and interpret reports and statistical outcomes and to implement relevant action in this regard. Such action may involve possible improvements, changes in methodology or channel-specific delivery, changes to the sales and licensing plan, or changes to the overall sales and licensing strategy. Certain sales and licensing team staff should have specific 'proximity' to the user markets and any possible changes therein. This important element of market intelligence should not be ignored by management and it behooves a CMO to ensure that it has in place reporting systems and policies which are such that any significant trends (including non-financial; qualitative and technological trends) or developments in the user market are reported on.

3.17 Staffing of the licensing function

65. The recruitment and selection of appropriately trained and skilled staff is an important aspect of the CMO's operations. In the sales and licensing area, this must be based on the choice or identification of various channels or delivery modes, where each channel must be appropriately staffed in line with the responsibilities allocated to such channel. Some of the profiles and characteristics of good sales and licensing staff include the following:
- a. Drive;
 - b. Conscientiousness;
 - c. Modesty and empathy;
 - d. Curiosity;
 - e. Confidence; and
 - f. Discipline.
66. Staff induction, coaching and retention programs as well as regular reviews and one-on-one feedback sessions within channel structures, should be implemented. Sales and licensing staff should also be constantly motivated



through the use of clear communication, equitable treatment of all team members, regular feedback, public recognition and the use of public symbols of recognition (e.g. the giving of awards to the best performers). It is also important to ensure the existence of a fair remuneration and reward scheme for sales and licensing staff. Traditionally staff, including sales and licensing staff, were rewarded on a fixed remuneration basis. There is, however, justification for creating other incentives such as commissions, bonuses and prizes for sales and licensing staff, since they play a pivotal role in helping the CMO to achieve its core mandate of timeously paying members the royalties due to them. It is thus clear that the successful staffing of the CMO's sales and licensing function has a direct impact on the welfare of rights holders.

3.18 Training and equipping of sales and licensing officials

67. The licensing of users in respect of copyright and neighboring rights works is not unlike the sale of a commodity or a service. Best commercial practices are therefore important as they ensure that sales and licensing staff are well equipped and that they are regularly updated about licensing information. The extent to which sales and licensing staff need to be equipped and trained varies depending on the nature of collective management in a country (i.e. whether it is voluntary or compulsory); the general awareness by the user community of their obligations to procure a CMO's license; the level of compliance by the public with local laws and regulations and other environmental factors. There is, however, a need for ongoing equipping and training of sales and licensing staff. This means that apart from the initial induction program, ongoing skills development programs need to be implemented or introduced where these do not exist. Relevant training material and manuals on licensing and sales techniques need to be developed to equip staff to deliver the outcomes required in carrying out their duties. This can include the use of scenarios that the sales and licensing staff are likely to encounter when approaching users and an indication of how they can deal with such situations.¹²³ The staff should also be armed with CMO information brochures dealing with facts about the CMO, statistics and history, which the staff can give to prospective users. The training of staff should also include basic training on copyright and neighboring rights law, and relevant sections of the copyright and neighboring rights law and regulations. Extracts from leading and appropriate cases should be included in the training manual as a quick source of reference for staff whenever needed.

¹²³ For example the manual can deal with how to approach hostile users, and also contain answers to questions frequently asked by users (FAQs).

68. A typical sales and licensing tools package would thus include: (i) standard presentations; (ii) complex presentations;¹²⁴ (iii) common objections from users and corresponding answers; (iv) standard negotiation skills and techniques; and (v) the CMO's Licensing policies with reference to licensing conditions, credit terms and related matters. A glossary of standard CMO terminology would also be useful. In view of the 'representative' nature of licensing staff in particular, it is expected that the training program for the CMO's general staff would also cover personal tools such as deportment, conduct, dress, time management and other behavioral issues, some of which are found in a customer service charter which all CMO staff undertake to abide by when employed by a CMO.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 3

CMO value of rights policy – board views and practice notes.

Internal tariff hierarchy, single and pluri-works and rights models.

Best practice evaluation template – tariff and licensing schemes.

Schedule of CMO's tariffs.

CMO licensing schemes – standard terms and conditions.

Sales and licensing channel deliverables matrix.

National sales and licensing plan.

Sales and licensing management reports (depending on market).

Sales and licensing staff resources (induction program and tools package).

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¹²⁴ For example where the presentation relates to a single work it would be said to be standard, but it relates to multiple works it would be complex.



UNIT 4 FINANCE AND LEGAL MATTERS FOR CMOs

A. FINANCE AND ADMINISTRATION MATTERS

4.1 Introduction

1. The treatment of Finance and Administration matters in this Unit is not intended to be an exhaustive presentation on what is an important subject for CMOs, but rather a discourse on the few key practical areas which may be of use to CMOs in addressing important financial and administrative matters within the society.

4.2 CMO accounting and finance for non-financial managers

2. There are a number of branches of accounting which serve different purposes and two will be addressed in this chapter, namely financial and management accounting and reporting. Both have an important place in addressing matters relating to the recording and measurement of the financial data relating to a CMO's activities. The distinction between the two disciplines and some of the basic differences between financial accounting and reporting, on the one hand, and management accounting and reporting on the other, follow.

4.2.1 Financial accounting and reporting

3. Financial accounting and reports are prepared and presented largely for the external stakeholders of the CMO on a historical basis with the focus on statutory or legal obligations. The financial accounting of a CMO usually conforms to national and international accounting standards (either the Generally Accepted Accounting Principles – GAAP – or International Financial Reporting Standards – IFRS). Typical financial reports produced are a *Statement of Financial Position (Balance Sheet)*, a *Statement of Comprehensive Income (Income and Expenditure Account)*, a *Cash Flow Statement* and a *Statement of Changes in Members' and Rights' Holders' Funds or Reserves*. Financial reports created from financial accounting are retrospective for a past financial period, most often a year or possibly six months. The audiences for financial reports tend to be the CMO's members and rights holders, its board of directors, the regulator or oversight office, government departments, bankers and other secondary stakeholders.

4.2.2 Management accounting and reporting

4. Management accounting and reports are largely intended for people working within the CMO. There is generally no statutory or legal requirement for a CMO to produce any management accounting reports.¹²⁵ These accounts and reports are not necessarily based only on past performance but also on current and forecasted trends and are largely used by a CMO's management to control and plan its operations and to assist with present and future decision making. Management accounting tends to involve not only quantitative but often also qualitative aspects.¹²⁶ The reports often focus only on certain selected areas of the CMO as decided on by management. The time period covered by such reports is not fixed and may vary from regular weekly to monthly or bi-monthly reports.

4.2.3 Modern trends

5. There is a growing tendency amongst CMOs to not only use historic financial accounting in the measurement, management and administration of a CMO's members' interests, but also to introduce principles of management accounting and reporting to assist in running of its core functions. As has been mentioned throughout this Tool Kit, a CMO's core functions are regarded as the documentation of information about members and rights holders and their works, the licensing of the mandated rights, the collection of fees due and the subsequent distribution of net income available.
6. To maximize benefits to a CMO it is important for all managers within it, irrespective of function or responsibility, to have a basic working understanding of the role of financial and management reporting and their place and value in decision making. We will now consider the two branches of accounting and reporting in some detail.

4.3 CMO financial management

7. Many CMOs address their obligations to manage the financial aspects of their operations by establishing a formal financial management policy – a policy in fact derived from the mission of the society. This policy normally covers the overall planning, directing and controlling of all the monetary and other assets of the CMO, taking into account the CMO's fiduciary nature

¹²⁵ Except perhaps within the domain of good corporate governance, where management accounts and reports would be required to demonstrate management and the board's vigilance and discharge of their fiduciary duties.

¹²⁶ For example: use can be made of the CMO's past actual Cost to Income ratio to forecast a future cost to income ratio or a review of the CMO's immediate past actual license fees collected can be used to forecast the forthcoming year's collections etc.



and the best interests of the members and rights holders. Individual financial management policies vary from CMO to CMO but some of the more important financial management issues which should be addressed by any CMO are dealt with below.

4.3.1 Understanding the CMO's financial reports and results

8. Macro projections and planning of a CMO's finances are components of an overall financial management policy. Approved CMO strategies as expressed in financial terms need to be evaluated in relation to results actually delivered. For this reason, a CMO's senior management should not only address the basics of income and expenditure but also matters relating to amortization and depreciation charges on assets, deferred income and expenditure, unappropriated and undistributed fees and amounts, movements in funds and reserves (where such exist) and the overall management of the financial position of the CMO as reflected in the assets and liabilities of the society.
9. In many countries today the focus in annual financial reporting is on the sustainability of the CMO as a going concern. It therefore behoves a CMO's management and board to ensure that all financial and other risks are taken into account, quantified and reflected in the annual financial statements. The consequences of a failed CMO which does not meet members' and rights holders' reasonable expectations have been seen in a number of countries with resultant losses for the members and rights holders. The understanding by a CMO of business ratios and measurement practices as applied in the interpretation of a CMO's financial reports have an important bearing on the medium-term sustainability of a CMO. For this reason there is increasing pressure on the management and board of a CMO to not only report on the immediate financial results but also to be able to appreciate and report on qualitative issues around the prospects of the CMO to deliver value in the future (sustainability) as well as the impact of the CMO on society and the environment at large. This is termed integrated reporting or integrated sustainability reporting.¹²⁷

4.3.2 Calculating and processing the surplus and distributable income

10. It is generally acknowledged that collective management of rights is not always an exact science but rather an equitable activity ensuring a fair distribution of income to the CMO's members and rights holders. Once the financial results of a CMO's activities for a specific financial period have been established, the question of appropriation of distributable income arises.

¹²⁷ See <http://www.theirc.org/> on Integrated Reporting (accessed on 22 February 2015).

When doing this, cognizance must be taken of the CMO's overall mission, its distribution rules, policies and practices. Many CMOs' distribution rules are written in wide and general terms delegating authority to the board to amplify these, taking into consideration the practical administration of the rights. In this regard many CMOs have policies, practices and methods which supplement their rules relating to the distribution of income. The pooling of certain similar income streams together is a common practice arising out of decades of experience in collective management by CMOs and their federations across the world in the field of performing rights administration. In the same manner, the use of verifiable Statistical Analysis in making assumptions, sampling methods, analogy, and a concept which has been called 'follow the dollar',¹²⁸ balanced with cost effectiveness and efficiency and equity are also common practices. Part of the financial management function is to document and codify these policies, practices and other methods associated with the final computation and appropriation of a CMO's distributable income and to ensure that they are in accordance with the CMO's distribution rules.

4.3.3 Time value of money

11. The basic concept is that the value of money varies over time or that the value of a single currency unit to be received at some future time may be worth less than that same currency unit is worth today. Subjects such as present value, future value and rates of interest are part of this topic. It is important for a CMO to appreciate and understand the effect of the time value of money on its operations generally and more specifically on:

Income generation – The influence of inflation and deflation on the CMO's income can be marked in periods of rapid price increases or decreases. In this regard many CMOs around the world include adjustments (often annually but in some cases more frequently) to their fixed price tariffs so as to respond to the loss of value in their fees over time. Many of these CMOs make such an adjustment by reference to movements in their respective countries' cost of living and consumer price indices. A common CMO best practice is to periodically make adjustments to their tariffs by reference to an independent and representative published national Index such as a Consumer Price Index.

Expenditure – CMO Expenditure budgets need to take cognizance of the same principles. In some countries it is the practice of service providers to include in their contracts an adjustment regulator, usually once per annum,

¹²⁸ Also termed 'materiality', meaning the size or significance of certain income streams may also lead these income streams being grouped together in arriving at a CMO's surplus for distribution.



although where inflation is high the adjustment may be more frequent. In some dispensations, one of the largest items of a CMO's expenditure budget is human resources. The salaries or wages bill of a CMO may be generally under strain, in the light of any increases and decreases in consumer prices and inflation generally, adjustments in salaries and wages of staff may be required. If the time value of money is not factored into a CMO's expenses budget its operations may become impaired.

4.3.4 Foreign exchange rates

12. Both the CMO's income and expenditure may be affected by fluctuations in foreign exchange rates, where significant income or expenditure is linked with licensing of rights by affiliated CMOs in other countries or the provision and obtaining of services and goods from these countries. Foreign royalties receivable may be affected by a drop or increase in rates of exchange between the CMO's country and that of the music 'importing' countries which use its repertoire. In the same manner where certain of the CMO's expenses are related to 'services and goods' provided from countries with a different currency of exchange, this may also affect the expenditures of the CMO, either positively or negatively.

4.3.5 Taxation matters

13. From the writers' own experiences, the issue of taxation is an important matter which all CMOs need to address, and which some CMOs seem to have struggled with. Taxation obligations and the special legal nature and status of CMOs have led to complexity around the relationship with local tax authorities. Formal national tax directives dealing with CMOs and their taxation seem to be few and what is more prevalent is the issuing of taxation practice notes subject to change by national tax offices. Some of the more common tax matters which a CMO needs to deal with include:

Pay As You Earn tax (PAYE) – the tax on CMO staff earnings. This is a common tax in many jurisdictions and the CMO has to contend with having to conform to the obligation to deduct, pay over and report on the tax on a regular basis.

Value Added Tax (VAT) – In many jurisdictions VAT is levied on license fees invoiced and billed and collected as well as the distribution to members and rights holders of royalties. Generally around the world there has been a move from General Sales taxes (GST) to VAT levied on goods and services. Most national tax authorities regard the license fees billed to users of rights as a ratable service on which VAT must be charged, collected and paid over to

the authorities. The VAT element on operating expenses is regarded as a 'recoverable input' against VAT payable. The quantification of VAT liabilities, completion of statutory returns and the paying over of net amounts collected and due to tax authorities needs to be attended to regularly. The problem often confronted by CMOs in this regard is the fact that it is not always well understood by members and rights holders that a CMO's distribution of royalties is regarded as 'inclusive' of VAT. This is the case where the member concerned is an individual and end user and not a registered VAT vendor. Those members and rights holders who are registered for VAT with tax authorities may approach the CMO for a formal tax invoice in respect of their distributions received.

Withholding Taxes (royalty tax) – the treatment of withholding taxes applicable to distributions made by CMOs vary from country to country. The administration thereof is generally split into two sections, namely distributions to members of the CMO and distributions to affiliated CMOs in foreign countries.

a. Distributions to members of the CMO

In some countries royalty taxes are the responsibility of the CMO and these need to be deducted from members' and rights holders' earnings and paid over to the authorities. In other countries the tax obligations lies with the individual members and rights holders of the CMO to disclose their income from a CMO to tax authorities. In both cases, the CMO frequently has the legal obligation to disclose to the tax authorities details of members and rights holders, amounts distributed and other personal information.

b. Distributions to affiliated CMOs

Often the obligation lies with the CMO to deduct a withholding tax from the distributions made to its affiliated CMOs. In such cases reference should be made to any double taxation agreements between the tax authorities in the royalty distributing and royalty receiving countries. These agreements usually stipulate the applicable rates of taxation to be deducted, if any.

Corporate and companies tax. Generally non-profit entities are exempted from paying tax. This is however not an automatic position for CMOs which would often have to apply for a directive regarding their tax status – specifically for any exemption. The authorities may treat the CMO as an entity that does not qualify for tax exemption. In some dispensations, where the CMO has the legal nature of a company, foundation, non-



profit organization, trust or similar institution there may be a tax practice to charge tax on any undistributed sums transferred to reserves or with respect to the retained income of the CMO.

In line with being a good corporate citizen, each CMO is encouraged to engage their domestic tax authorities on all the above and any other tax matters about which they do not have clarity and to ensure that they are tax compliant.

4.3.6 Decisions on major projects and capital expenditure

14. CMOs are human resource- and systems-intensive operations. For this reason, apart from the investment in human capital, it becomes important for the CMO to ensure that its management information and IT systems and processes of whatever type operate at optimum levels. The financial implications of spending CMO members' funds on major projects or capital-intensive assets must be capable of being substantiated on the basis of objective facts and sound financial reason. The justification for a particular project, asset or system needs to be assessed on the basis of cost, benefit, lost opportunity to use the funds in respect of another project and asset, the effect on the overall financial wellbeing of the CMO and any prospective increased future cost for the same project and asset and system.
15. Depending on the scale and nature of the project or asset to be invested in or acquired, there are various accepted methods for addressing the financial implications of project and capital expenditure. In the end the project to be undertaken or the assets to be acquired have to be assessed on the basis of financial viability and implications on the current and future cash flows of the CMO, including funds set aside through any amortization charge. One of the alternatives a CMO may take into consideration is whether to interact with other existing CMOs so as to ascertain what systems can be rented, licensed or purchased from them. For this reason, it is important that the financial management policy of the CMO addresses the manner in which major projects or assets are invested in or acquired.

4.3.7 Managing liquidity of the CMO

16. In an ordinary business it is accepted practice to manage the working capital of the undertaking. With CMOs this relates to the careful management of the short-term assets (largely accounts receivable, funds on deposit or call and similar assets) and short-term liabilities (royalties and accounts payable, current portion of leases and hire purchase of assets and similar creditor accounts).

17. The CMO would normally have a stated general credit policy relating to accounts payable by users of music and sometimes this may be reflected in the terms and conditions under which a music license is issued by the CMO. In any event with multitudes of users it is common for a CMO to have many debtors. For this reason it becomes important for CMOs to have a formal Debtors system which provides regular and current information on the profile of amounts due to the CMO by users. The treatment of this debt by the CMO, its ageing, what to do with bad debts and the question of litigation on amounts due to the society, need to be taken into consideration.

4.3.8 Investment of short-term funds

18. Since it is in the nature of CMO operations to have a surplus of funds, it is important to have a policy which deals with the management of these temporary surpluses. In most cases, due to the time value of money (see above), CMO boards have introduced policies which authorize management to invest these temporary surplus funds for limited periods at ‘approved’ institutions, normally highly rated banks and financial institutions, subject to capital and rates of return being guaranteed and secured.

4.3.9 Investment of longterm funds and reserves

19. A CMO may create a reserve fund for specific purposes where some funds will be placed until the time arrives for them to be used. Typically this time period may be longer than that between collection of license fees and distribution of the same. The CMO’s financial management policy should address the question of prudence in the treatment of these funds whilst lying idle, until required. For example, the board of a CMO may resolve to use some of these funds or reserves to address certain anticipated exceptional expense items. Any decision in this regard needs to conform to the CMO’s Reserve policy.
20. The management of accounts payable is also an important matter which has a significant influence on the management of cash flow within the society. CMOs should have a formal procurement policy which sets out the norms and standards relating to the tendering for or purchase of goods and services during the course of the CMO’s business, and the levels of authority and amounts and values up to which a CMO manager may authorize and purchase such goods and services. The formal system of accounts payable in operation would reflect the duly authorized suppliers of goods and services, their standard conditions of payment and credit terms.



21. Some CMOs operate with assets or systems which are leased or are the subject of a hire purchase agreement. These are often treated separately in the books of a CMO as longer term liabilities but the current portion of the instalments should nevertheless appear on the regular accounts payable control schedule of the finance department.
22. Lastly there are certain legal and statutory obligations and liabilities associated with tax deductions, social and medical contributions, unemployment charges and pension or other savings contributions related to a CMO's human resources remuneration. These are also liabilities featuring as specific accounts payable by the CMO, due to the respective creditor institutions by a specified date but having an impact on the society's cash flow.
23. The prudent management of a CMO's short-term assets and liabilities will be welcomed by the membership and rights holder community as well as the regulator and may provide further financial benefit to the CMO.

4.3.10 Financial budgeting and variance reporting

24. The discipline of financial budgeting is commonplace in CMOs and is used as a tool of management and control. The board-approved strategic and long-term plans provide the CMO management with high level financial estimates. From this plan, management creates annual budgets (both operating and capital expenditure) which it submits to the board for approval and on which it provides regular financial reports about the resultant outcomes and variances. The creation of the annual CMO budget is normally a regular and collaborative matter coordinated and produced by the finance department, with managers providing various inputs – especially their forecasted income, expenditure and capital expenditure requirements. This budget is normally prepared well in advance of the forthcoming year so as to give the board of Directors sufficient time to consider and approve the final version before commencement of the new year. To address the matter of available data whilst undertaking the budgeting exercise as well as timing matters, some CMOs choose to work on a reforecast or rolling budget often with a time horizon of up to 18 months.
25. The CMO board has oversight responsibility for the external financial reporting and related activities of a CMO. Some CMOs produce financial results internally more frequently than once per annum as is required by statute or regulation in many countries. Typically some CMOs produce unaudited financial accounts and reports once a quarter for the board to review against approved budgets. To obtain assurance of fiduciary conduct

many CMOs have systems of internal control and risk management which are there to provide further qualitative information on budgeting and variances to the budgets. A CMO board and management may also require periodic internal audits and evaluations of the CMO's control systems. To provide this assurance, some CMOs have a dedicated in-house internal audit function while other CMOs choose to outsource this function.

26. The impact and the consequences of not taking into account some of the listed subjects and items above can be significant. The eventual effect, whether positive or negative, will be found in the net amount available for distribution to members and rights holders being either over-stated or under-stated, also reflected in the annual statement of financial position (balance sheet) of the CMO.

4.4 Management report writing for CMOs

27. The purpose of management accounting and reports has been mentioned above. These reports are really to assist and guide the CMO's management in the discharge of their fiduciary duties to members and rights holders by providing important financial, quantitative and qualitative information relating to the day to day operations of the CMO. This enables management to 'respond' to developments in the CMO's business environment rather than waiting for the production of Annual Financial Statements. Management Reports on a CMO's activities are traditionally considered within the themes of scope, frequency, period and content.
28. The **scope** and nature of management reporting varies between CMOs and is dependent on the nature of the bundle of rights which a CMO administers, the user market profile, and the extent of centralization or decentralization of the CMO's activities. As was alluded to earlier, the income and expenditure of a CMO can be broken down into various divisions, sections and segments of the CMO's business, in addition to a further analysis and reporting on the appropriation of the distributable income. Other core subjects which are frequently reported on internally by CMOs relate to user market statistics, membership, documentation and distribution activities.
29. The **frequency** of the production of management reports varies depending on the subject-matter being monitored or measured. Some CMOs monitor and report on their income and expenditure and the divisional, branch or segmental activities on a daily basis, while others do so weekly or bi-weekly – but all CMOs should produce management reports on their income and expenditure at least monthly. Reports relating to movements in CMO membership, rights holder affiliation and international representation and



affiliation agreements may be produced less frequently but at least monthly. Similarly reports on works declarations and the documentation thereof are often produced at least monthly. Reports on distribution activities are frequently divided into pre- and post-distribution reporting with the frequency of production often correlating to the frequency of distributions as provided for in the CMO's distribution rules.

- 30. **Periods** of measurement covered in the management reports traditionally deals with information in the current period, the immediate previous reporting period, the current financial year to date period and the same reporting period for the previous year.
- 31. **Content** of the management reports usually revolves around the CMO's core business processes.

4.4.1 Licensing income

- 32. A CMO's licensing income is dependent on the bundle of rights administered. In the case of neighboring rights CMOs, this would extend to reporting on the **broadcast** of the sound recordings, often broken down into the broad categories of radio, television, cable and satellite services with possible further segmentation into public, commercial and private and community services.¹²⁹
- 33. In the case of the **public performance** income stream, management reports are frequently broken down into the major sources of income (depending on each CMO's market conditions). Typically, public performance income is measured by the contribution of the various sectors of users such as the accommodation industry, hospitality business, the large retail sector, departmental and specialty stores, the transportation sector and other major public performance user groups as determined by each CMO's business.
- 34. With the prevalence of rapid Internet applications and business models, the **communication to the public** using online and new media exploitations is a special focus of CMOs. Reporting should include use by ISP and DSP companies, telecommunications operators, various hybrid services such as audio or video streaming with download possibilities, DVB-H¹³⁰ and other mobile services. Income (dependent on the extent of legislative protection) is also reported in categories such as webcasting and other streaming services, digital downloads, and ringtones.

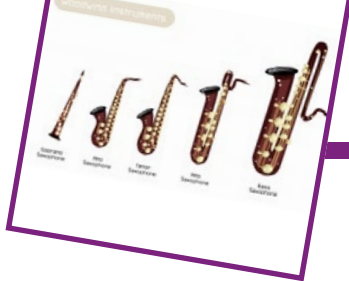
¹²⁹ Some national legislations may exempt certain or all community services from the need to procure a license.

¹³⁰ Digital Video Broadcasting (Handheld) – a form of mobile broadcast to mobile phones

35. **Private copy or blank media** levy systems. In some jurisdictions where this provision exists, rights holders have mandated CMOs to collect and distribute on their behalf performers and producers shares of this income. Typical income categories are CD-R and DVD, audio and video players, external HDs, set-top boxes, smart phones, HD and other recorders. The specific categories will vary between countries depending on the scope of legislation and regulation.
36. **International income** – the use of a CMO’s repertoire in foreign countries and regions is of significant interest to its members and rights holders. Similar categories are followed as with domestic license income with the added feature of type of uses and source by country and region.

4.4.2 Expenditure

37. Reports on **operating expenditures** are frequently monitored in general categories usually associated with the specific organizational and structural profile of a CMO. The expense categories frequently seen in some CMOs are licensing expenses, distribution expenses, member services expenses, IT costs, administration and finance costs. In other CMOs management reports follow a functional line and categories such as human resources costs, accommodation expenses, technology expenses, legal and professional services, marketing, international and other costs. In addition to the categories above, many CMOs report on expenditure related to the various regional and or branch offices they operate from.
38. Management Reports on **membership and rights holder** representation may cover such matters as new domestic elections and additions to the CMO’s membership; transfers from the CMO to other CMOs; deaths of members and rights holders; disposal, closure, dissolutions or liquidation of corporate producer members and rights holders; disposal of individual catalogues and labels and signing of new international representation agreements with CMOs or rights holders. Other subjects covered would include various activities undertaken in respect of member recruitment initiatives, information workshops and similar member outreach.
39. Reports dealing with management oversight of **works documentation** normally cover such matters as the number of works on the documentation data base; additions of new works declared by members and rights holders; works where the neighboring right has expired; data relating to the actual (or proportion of the) database of works which are active and those which are inactive; Disputed works as to authorship or a division of fees between rights holders; the extent of unidentified works or unidentified rights holders;



the proportion of works which are undocumented as compared to the total number of works on the CMO database and possibly information relating to overall domestic works and foreign works.

40. **Distribution** management reports may be separated into pre- and post-distribution activities. Qualitative pre-distribution reports cover a number of areas. With regard to the activity monitoring of significant or important users and the processing of their licensed activities, it is customary for CMOs to have a report which provides management with information on the progress of processing such activity and use. Typically such reports would cover the names of major licensed users, whether the users' data are the subject of a census or sampling practices in terms of the CMOs' internal distribution policies, the actual use data received, the integrity of the data received, the progress being made internally with the processing or research associated with the data, resolution of any queries arising out of the data and the degree of progress with these processes towards final inclusion of the data in the distribution. The report may also cover the extent and degree to which rights holders and owners of works about to participate in a distribution have been identified and if so, whether the full documentation (share splits between rights holders) of the said participating works is available. Post-distribution reports include works and shares identified as un-distributable at the time of distribution and the management of queries arising after the distribution has been made. The quantitative aspects of the distribution would provide information relating to the actual categories and amounts of collections included for the named distribution, the value of distributable amounts broken down into members and rights holders and affiliated CMOs or other foreign rights holders. The Undistributable amounts may be separated further into sub-categories depending on the CMO's member requirements.
41. **Other management reports** may cover subjects such as legal and litigation (number of court cases being handled; contractual debt or infringement of rights; lobbying on matters of legislation or regulation, corporate legal matters); ICT Activities relating to computerization, networking, automated systems, telecommunications and similar; and public affairs and marketing (matters relating to the external image of the CMO, communication and information sessions with government departments, representative associations of users of rights).
42. Where various functions, departments and operations of a CMO are decentralized, many of the above reports may be produced by region or branch with consolidations taking place at the CMO's head office so as to obtain a macro or national view of all its licensing, membership, documentation, distribution and related operations

43. Many CMOs' internal operations are structured in such a manner that the leadership team meets regularly (at least once per month) with line, function and regional managers to receive, consider and respond to actual results and information presented. Any revision of plans, actions or tactics deemed necessary are dealt with so as to be able to respond quickly to such matters as the management reports highlight as requiring attention. Good CMOs ensure that their management reporting is organized in such a manner as to synergize with and enhance the operations of the CMO.

4.5 External and annual reporting

44. There has been debate in professional circles including amongst external auditors about the future direction of annual financial reporting. There appears to be a sense amongst stakeholders that financial reporting based on IFRS is 'becoming less fit for purpose'.¹³¹ For CMOs this is an even more pressing issue considering the need and importance to communicate meaningfully the society's results and future prospects to a wide and varied audience. One observation from the international auditing profession is to deal in future with corporate reporting content in three parts or sections, namely the story, the numbers and the detail. When preparing external annual financial statements, many CMOs already adopt a similar model to this approach. Whilst the debate continues it is vitally important that CMOs see their annual financial statements and annual reports as an opportunity to communicate to their constituencies. Currently, depending on the legal nature and type of CMO (i.e. whether private, public or government department), there are still a variety of approaches to the treatment and contents of annual financial statements and reports of CMOs.
45. In recent years many CMOs have moved towards annual financial statements and reports which address the so-called triple bottom line issues, namely 'people, profit and planet' or to be more technical the social, financial and environmental impact of a CMO's operations. Today a good CMO's annual financial statements and report will contain a number of elements depending on local considerations.

¹³¹ See www.accountancylive.com – The future of Financial Reporting – Accountancy May 2012.

EXAMPLE OF AUDITED ANNUAL REPORT CONTENTS

- The Nature and Scope of the CMO's Mandate
- The CMO's Broad Strategy in executing its mandate
- Highlights of the Year under Review
- A Report by the board Chairman
- Reports by the Chief Executive and Chief Financial Officer
- Reports on Governance of the CMO, including:
 - Profiles of board members, board composition, responsibilities, committees, attendance at meetings, education and remuneration, Treatment of Risk and Sustainability, Human Resources and Capital, Code of Ethics or board Charter, Corporate Social Responsibility (where applicable), and environmental impact*
- Statement on Responsibilities of Directors
- A Formal Directors' Report
- Main Financial Reports including:
 - Report of the Independent Auditors (where applicable), Statement of Financial Position (Balance Sheet), Statement of Comprehensive Income (Income and Expenditure Statement), Statement of Changes in Funds and Reserves or Equity, Cash Flow Statement and Notes to the Financial Statements*

46. The publication of the audited annual financial statements and report should be timely and generally available within a few months after the financial year end. To achieve this, the CMO has to work in consultation with the external auditors for the conduct of any interim and final audits. Depending on the legal persona of the CMO, it is customary to communicate the audited annual financial statements and report to members and rights holders. In many dispensations, CMOs are required by law to present their audited annual financial statements to a general meeting of members and rights holders of the CMO. The general meeting is then afforded an opportunity to ask questions of the CMO board relating to the year or period under review.
47. In addition to making their audited annual financial statements and report available to primary stakeholders, CMOs may have a statutory and regulatory obligation to submit the report to a regulator, the Companies and Intellectual Property Office, or a government department such as the Department of Trade and Industry or Justice. Other stakeholders to which CMOs frequently transmit their reports are affiliated CMOs in other countries. In view of the interest that CMOs have in matters relating to culture and cultural development, many CMOs also make their audited annual report available to the relevant national ministry responsible for culture. Generally, many CMOs also make their audited annual financial statements (with any supporting reports) available on their websites. Other users of a CMO's audited annual

report are bankers, suppliers of credit (short- and long-term), and other crucial suppliers of services.

48. It often happens that CMOs are required to submit financial figures or reports on a special or ad hoc basis for parties outside those mentioned above. This may include submitting the financial reports to parliament, government commissions, international federations to which the CMO may be affiliated (e.g. SCAPR, IFPI), and similar external audiences.

4.6 Analysis and interpretation of CMO financial reports

49. Generally the format and uses of CMO financial reports are twofold, namely those internal unaudited Financial Reports for management use and the external audited annual financial reports. Under the section dealing with management accounting and reporting, mention was made of the preparation of reports for internal use by management in their efforts to plan and control the operations of the CMO. Whether financial reports are prepared for internal or external use, the common purpose of reporting remains the need to understand and analyze a CMO's performance, as well as marketing trends, on its operations so that the CMO may be managed effectively and efficiently. Apart from the society's board and management, the CMO's members and rights holders are music business professionals dependent on the CMO for a part of their annual earnings. As with shareholders in an ordinary business enterprise, they have a material interest in the CMO's past and current financial performance as well as its future prospects. It is important therefore for a CMO to ensure that it regularly reviews, analyses and interprets its financial results
50. Different analyses are conducted by readers of a CMO's financial reports but inevitably most quantitative measures involve comparisons of figures contained in the various reports from one accounting period or financial year to another. Some of these analyses are to measure and assess performance or trends and may include some of the following:

Composition of gross income. It is important to understand the sources of a CMO's income in order to ensure that the rights it is mandated to administer are effectively managed. Most CMOs would divide the reporting of income into segments related to major and minor users. It may be that a CMO is having greater success in administering certain sectors of rights users than others. Where a CMO is mandated to administer the rights of broadcasting and only the public broadcaster is reported as paying fees, there may be unlicensed fee income potential in respect of any existing commercial or community broadcasters. The same would apply with public performance and



communication to the public or private copy (where this exists). This analysis is often extended to reporting on a geographic basis. Some sectors or regions of music users may be more difficult or incur more costs to license than others. It may be that the CMO is having significant success in its licensing endeavors in some regions or provinces of the country but not in others. Questions could then be addressed as to when the unlicensed regions would receive attention.

Overall cost to income ratio. The cost of doing business is important in any enterprise. One of the most common measures is the ratio of a CMO's total administration cost to its overall income. This ratio indicates the efficiency of the CMO in controlling these costs, which would result in maximizing its distributable income to members and rights holders. The establishment and importance of this ratio is found not only in reflecting the efficiency of the CMO in execution of its fiduciary mandate but also in highlighting any trends that may appear from one accounting period to the next. This overall ratio may be further broken down into sub-ratios correlating to spread of the society's gross income.

Domestic cost to income ratio. Where a CMO has a repertoire which is used in other countries and consequently receives foreign income, this foreign income arrives in a processed form with the major licensing and administrative costs having been deducted in the country of origin of the income. Thus modest costs are incurred in distributing these royalties to the CMO's members and rights holders. Some CMOs remove this foreign income and associated domestic expenditure from their computation of cost to income ratio so as to establish a domestic cost to income ratio. This specific ratio has some relevance when seeking to compare CMOs from different countries and their respective cost to income ratios. This domestic ratio may also be broken down into sub-ratios as mentioned above.

'Real' total income and expenditure. In times of generally sustained increases in prices of goods and services (inflation), the value of money is diminished. This phenomenon also impacts the royalties distributed by a CMO. It thus becomes important to establish whether there has been an actual increase in license income or whether the increase is only as a consequence of the fact that the CMO's tariffs may be linked to movements in a cost of living index. The same would apply to the CMO's expenditure and the growth or reduction in the total expenditure.

Net amounts available for distribution. This ratio is used to compare net amounts available for distribution from a current accounting period with that of a previous accounting periods. It is common place in all businesses for

stakeholders to have a regular interest in the bottom line and the improvement therein from one accounting period to the next. If the CMO's statement of comprehensive income reflects a regular increase in gross income but the amounts available for distributions do not reflect similar movements, members and rights holders would have a direct interest in the reasons for such discrepancies.

Cash flow movements as compared to the movements in comprehensive income. Since CMOs tend to be organizations which may have at their disposal large sums of money for short periods of time, the society cash flow statement is a report to which readers should pay close attention. It is important to note that where comprehensive income increases or decreases from one accounting period to the next, the resultant cash flow movements from operations should reflect a degree of correlation.

Movements in income as compared to accounts receivable. Any increase or decrease in a CMO's income may be mirrored by a similar increase or decrease in accounts receivable. Where movements between the two do not correlate this could reflect an improvement – or deterioration – in the time it takes to collect income from licensees and consequently the 'ageing' of the accounts receivable.

Level of undistributed income in relation to distributable income. In the management reporting section above, reference was made to reports on the state of the works documentation data base. One of the reasons for there being undistributed income in a CMO (apart from specifically authorized amounts set aside, such as the reserve fund) is the level of unidentified works or rights holders at the time of making a distribution. The detail of a CMO's undistributed income is normally found in its statement of financial position (balance sheet) under current liabilities. Increases or decreases in the amounts undistributed compared to distributable income from one accounting period to the next may reflect on a number of factors including the level of unidentified works or rights holders on the CMO's data base.

Movements in funds and reserves. CMOs should always be cognizant of any amounts not distributed to members and rights holders. During the normal course of business the society may decide to set aside funds out of amounts collected for a particular purpose. These figures are normally reflected in the statement of financial position (balance sheet) of the CMO and movements reflected in the statement of changes in funds and reserves. The purpose of these funds or reserves, their value and movements therein should be regularly considered by the CMO, its board and members and rights holders.

4.7 Administration systems addressing finance and risk issues

4.7.1 Finance-related issues

51. Administration systems established to address other finance related issues may include the creation and documentation of standard principles, policies and practices manuals for the CMO's different operating functions. Such manuals would contain the financial implications for various CMO's operating functions. The responsibility for the creation, generation and maintenance of standard management accounting and financial accounting reports normally lies within the finance function. Within the finance department itself the use of a standard chart of accounts should be in place and also implemented across any decentralized operations, thus ensuring timely and accurate capture of all accounting entries and their ultimate consolidation within the books of account of the CMO. The responsibility for the financial aspects of various support functions within the CMO such as legal and compliance, human resources, information technology, rental and accommodation, public affairs and marketing, procurement should not be omitted when looking at finance matters for CMOs. Particular attention needs to be given to outsourced services, as these may have a significant financial implication for the CMO. Thus in addition to registers of internal CMO assets, a register of all outsourced services, the periods covered involved in such arrangements and the financial terms relating thereto need to be kept.

4.7.2 Risk-related issues

52. In the section above dealing with CMO financial management the question of risk was mentioned. Uncertainty is a part of our human existence and CMOs are not an exception in this regard. Negative uncertainty is often termed risk.¹³² Normally it is the CMO board which has overall responsibility for the internal control framework and the oversight of risk identification and risk management, in line with the society's strategic objectives. Boards often establish a Risk and Audit Committee to assist the board in fulfilling these responsibilities. The mandate of this committee is to ensure that the CMO management establishes and implements appropriate systems and policies to identify, monitor, and mitigate significant risks to the CMO. These systems and policies normally include the setting of appropriate *internal controls* and *risk limits*. They should be reviewed regularly to reflect any changes in the market environment in which the CMO operates. Many CMOs comment on risk in their annual reports. The general approach of CMO management has

¹³² See Wixley T and Everingham G *Corporate Governance – A Practical Guide for Effective Implementation* (SiberInk Claremont 2005) at page 84

been to create an internal risk assessment policy and process so that any significant risks and interrelated incidents are timeously identified, analyzed, documented, decisions made on possible action, reported on and monitored in a structured manner. The response to risk has in some CMOs (as in many other businesses) been addressed by the introduction of an internal audit function. This function may reside in-house or outsourced to an independent service provider. Risk management involves not only the existence of an internal audit function but also fraud awareness and prevention and detection programs and other quality assurance initiatives.

Example of RISK management Process

Risk Matter → Origin of issue → Possible and Probable Consequences → Monitoring and Mitigating action

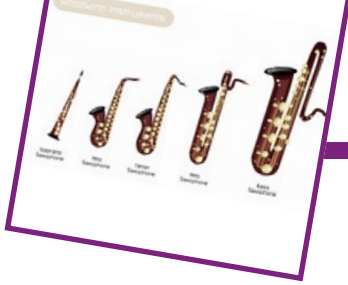
53. In view of a CMO business frequently being a 'single channel supplier' and its intensive reliance on information systems and related technology, a CMO's risk exposure to IT is often high on the list of areas of risk for some CMOs. It is essential for CMO management to ensure that both a formal IT disaster recovery plan and appropriate backup systems are in place. As a part of addressing management's responsibility for appropriate systems and policies some CMOs have also introduced as part of their risk management, a crisis and disaster management plan.¹³³ Main elements of such a plan normally include: (i) definition of what constitutes a crisis and disaster; (ii) the members of the Crisis and Disaster Team (including a list of external professional advisors); (iii) the clarity of each person's role; (iv) the CMO's general policy on dealing with crises or disaster incidents and events (including internal CMO standards and practices as well as the health and safety of people); (v) protocols for crisis communications; (vi) guidelines for the initial assessment and investigation of the crisis and disaster; (vii) business continuity issues and (viii) post-crisis and disaster management. It is suggested that where a CMO embarked on the establishment of such a plan, some external input needs to be obtained as each CMO's environmental circumstances may differ.

B. LEGISLATIVE, REGULATORY AND LEGAL MATTERS

4.8 Introduction

54. Neighboring rights are essentially a creature of statute and the scope and level of protection of rights holders interests' thus lies with national legislation, which sets out the works and rights protected and the extent

¹³³ See Unit 5 for communications aspects around a CMO Crisis / Disaster Plan.



of the protection afforded. In many jurisdictions case law (i.e. judicial interpretation of law) also plays a pivotal role in this regard. Relationships in the neighboring rights industries are generally based on contractual agreements and arrangements, and thus the law of contract is also an important area of law for CMOs. The law of contract is also particularly important with regard to the licensing agreements entered into between a CMO and rights holders and users of neighboring rights. The actual enforcement of rights against infringers is generally based on tort and delictual principles and at times, criminal sanctions, and the law of evidence and procedure play an important role in this regard. The rights, which are either exclusive or rights of remuneration, may be individually managed but some of the rights (such as performing rights in sound recordings) are best administered collectively managed through a CMO. For a more detailed commentary on rights administered by CMOs see the Unit 1 section on the legislative and regulatory environment.

55. In general the legal department or section of a CMO would, subject to each CMO's peculiarities, have significant responsibility or input into the following key areas: statutory and other legal compliance, litigation management, relations with external legal counsel, contract management, legal risk management, general legal advisory services, corporate governance, and government relations. This part of the tool kit is not intended to address the full scope of the responsibilities of a CMO's legal department, but rather to serve as a brief treatment of some of the more important focus areas. The main responsibility of a CMO's Legal department and function is to align the department and function's activities and work with the overall strategy and direction of the CMO.

4.9 Legislative improvements and reform

4.9.1 Accession to international treaties

56. There are a number of international treaties and conventions which governments have acceded to and ratified. Two of the more important international treaties addressing the interests of neighboring rights owners and rights holders are the Rome Convention and the WPPT. The Rome Convention was incorporated into the TRIPs Agreement of the WTO by reference. These treaties commit the signatories to certain minimum legislative arrangements in their countries. It is important for CMOs to have a working knowledge of these two treaties and to encourage their governments to accede to them. More importantly, CMOs need to determine if national legislation has fully incorporated the standards embodied in these

treaties. As noted in Unit 1, rights holders may, in their lobbying efforts, appeal to arguments relating to the protection of human rights, especially the provisions of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights which elevates the rights of authors to the level of human rights.¹³⁴

4.9.2 Relevance of national legislation

57. Accession to international treaties is not enough if national legislation does not fully incorporate the protection provided for in the treaties. In this regard it is important for rights owners and holders that national neighboring rights legislation should be a modern instrument relevant to its time. The past 20 or so years have seen rapid developments in the information, communications and technological fields (especially with respect to digitization and online media), resulting in new ways of creating and exploiting copyright works, and the emergence of new business models. In view of this, national legislation needs to at least reflect the principles and standards provided for under the WPPT to ensure better protection for rights holders. To deal with complications arising from the enforcement of neighboring rights in the digital environment, including the question of liability for online infringement of rights, some jurisdictions have introduced mechanisms such as take-down notices which are issued to ISPs and DSPs by rights holders instructing the ISPs and DSPs to remove material that allegedly infringes the rights holders' neighboring rights. Some countries (e.g. France, UK, South Korea) have introduced the so-called graduated response (or 'three strikes') system, in terms of which a series of notices are sent to consumers warning them of alleged infringement and giving them an opportunity to stop the infringement, failing which measures such as bandwidth reduction, protocol blocking or account suspension may be implemented.
58. Measures implemented must of course ensure better protection of members and rights holders in the modern environment. It is thus clear that effective and efficient collective management on behalf of members and rights holders is in part dependent on the extent to which a country's constitution and its national neighboring rights laws are categorized and reflective of the current environmental circumstances faced by rights holders. Where legislation is not up-to-date or reflective of the circumstances faced by the country's performers and producers, it is important to persuade government to improve, revise or amend such legislation. In order to effectively lobby

¹³⁴ Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights provides that everyone has the right 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'



legislators it is important for rights holders to organize themselves in order to lodge a united front. This may require the CMO to solicit the support of other interested parties, such as rights holder associations and the broader body of neighboring rights holders (even if these are not directly concerned with the rights administered by the CMO). It would also be important for members and rights holders to lend whatever support they can to their CMO in its lobbying efforts, and not to think that the CMO management and board has to carry this work out on their own. As indicated in Unit 1, the involvement of rights holders in the lobbying process can lend more credence to the process and is likely to assist in persuading legislators to heed the call for legislative reforms and new laws.

4.9.3 Law reform commissions, advisory boards and working groups

59. In many countries governments have set up formal structures such as law commissions to address the efficiency of laws, to deal with necessary developments and to propose legislative changes. These structures are often of a statutory nature but are ostensibly there to carry out independent research and make recommendations to improve a nation's laws. Other entities and bodies specific to certain areas of law may also exist to support this activity. Some of these entities and bodies have formal state recognition and may play an advisory role to government on prospective legislative reform. In this regard national neighboring rights legislation often provides for a Copyright/Neighboring Rights Advisory Board (or its equivalent), whose membership is comprised of representatives from the broader copyright and neighboring rights fields, often also including judges and prominent lawyers. The CMO needs to take advantage of such entities and bodies and to endeavor to have representation in them or at least to seek to influence discussions taking place in such entities and bodies.
60. Many CMOs have at their disposal a legal department which, in collaboration with rights holders and with the assistance of external counsel, may undertake research and associated work relating to the impact of proposed reforms in laws. In some dispensations it is practice to establish a *Working Group* made up of CMO officials, rights holder representatives and representatives from rights holder associations, external legal counsel and any other directly-interested parties. Governments are sometimes loathe to consider new legislation and amendments to legislation where there is little evidence of the need to change existing laws. At the outset, it is important for a CMO working group to be able to demonstrate to a law commission, Copyright Advisory Board, government department or legislature that the CMO is a bona fide representative of the rights concerned and that it carries

out its duty in a conscientious manner and in the best interest of members and rights holders. Whether the reform proposals relate to the introduction of new legislation or the correction of existing legislation which impedes on or is a hindrance to the effective administration of rights, with resultant prejudice and economic hardship to rights holders, the working group's research and proposals must provide adequate evidence and information in support of the CMO's case. Once draft proposals are available from the CMO working group, these is submitted to the CMO's management and board and ideally also to a wider audience of rights holders and rights holder associations, so as to ensure that the consultations are as inclusive as possible and to receive all relevant inputs on the proposed reforms. Part of the consultation and input-gathering process may be to obtain views, experiences and information from other external institutions or groups as well as examples from other countries. Such broader, additional consultation may include receiving input from other domestic institutions and groups affected by the legislative reform initiative, receiving input from Institutions and groups from countries within the same region or economic community, obtaining examples of good legislation from the same region or economic community and receiving input and examples from other groups having an interest in and displaying support for the reform initiative.

4.9.4 Lobbying activities and reform proposals

61. In many countries the activity of lobbying¹³⁵ is progressively being used to ensure that rights holders' interests are protected and enhanced. Lobbying is thus an important aspect of the role of the modern CMO. Having indicated this, it needs to be noted that lobbying is not an easy activity and the CMO concerned may not have the expertise to engage in lobbying activities. In this regard the following has been noted about lobbying:

Although lobbying as a whole serves as a checks-and-balances safeguard on the legislative process, individual lobbyists are not necessarily equal. Unlike voters, who each get one vote, lobbyists vary in their degree of influence. The level of influence a lobbyist has over the legislative process is often proportional to the resources – time and money – the lobbyist can spend to achieve its legislative goal.¹³⁶

62. In view of this the CMO needs to think seriously about its lobbying strategy. Does the CMO have the capacity on its own, to lodge a successful lobbying

¹³⁵ Defined as involving 'the advocacy of an interest that is affected, actually or potentially, by the decisions of government leaders'. See in this regard <http://legal-dictionary.thefreedictionary.com/Lobbying> (Accessed 18 Mar 15).

¹³⁶ Ibid.



strategy? The formation of the CMO Working Group referred to above can greatly assist the CMO on its lobbying endeavors. Joining forces with others can also enhance the CMO's chances of succeeding, rather than being a 'lone ranger' that is seen as pursuing its own, secluded interests. The CMO could also solicit support for the lobbying activity from high profile members, particular member associations and even user groups (where appropriate). Furthermore, if the CMO constantly conducts isolated lobbying (without being part of a broader interest group), legislators may treat its submissions as self-serving and in time develop apathy towards them. Forming a CMO Working Group and also working with other interested parties can assist the CMO in lodging a successful lobbying strategy. The CMO's role in lobbying must of course, itself, be approved at board level. The CMO Working Group should ideally prepare the reform proposals under the guidance of the CMO's legal department, so as to ensure moderation or sensitivity in respect of any controversial aspects of the proposals or any possible opposition from other groups. Under such circumstances the legal department may, as part of the reform strategy, assist in formulating alternative positions, in the event that the first option is not accepted. The lobbying strategy must clearly identify primary and secondary targets of the lobbying activities (e.g. the Law Commission, members of the Copyright Advisory Committee, particular government departments and officials, members of the relevant parliamentary portfolio, other important members of parliament, members of political parties).

63. In some jurisdictions collective lobbying in respect of issues affecting members of a broader industry is carried out by a separate representative body that focuses on lobbying initiatives. In the UK for example, *UK Music* (formerly British Music Rights) was formed as a representative body of various music industry entities (PPL, PRS for Music, BPI, the Musicians' Union, Music Publishers Association) to, *inter alia*, '[engage] in high level political lobbying to ensure any new legislation benefits its members'.¹³⁷ Where such an industry body exists the CMO Working Group can augment its lobbying strategy by working with such a body, thus obtaining a stronger voice on the issues raised. It is important to note however that the strategy adopted by the broader industry representative may not fully represent the issues that the CMO wishes to bring to the attention of the legislator, in particular because the broader industry body often represents divergent interests. In view of this, it may be necessary for the CMO not to solely rely on the submissions made by the broader industry body but to lodge its own parallel lobbying strategy that focuses on its own unique issues. For

¹³⁷ See further <http://www.ukmusic.org/about-us> (Accessed on 17 Mar 15).

example, both *UK Music* (of which PRS for Music is a member) and PRS for Music itself, made separate submissions in relation to the Hargreaves Review in the UK.¹³⁸

4.9.5 Lobbying package and communication

64. The CMO Working Group needs to devise a proper lobbying package involving a convincing communication strategy. Because the lobbying is directed at legislators and other officials who generally have busy schedules and often do not have the time to research the issues raised, the communication needs to be concise and to the point. It needs to clearly highlight the legal, economic and business arguments relating to the issue raised and, where appropriate, provide essential statistical information in support of the arguments raised. It has been said that a good lobbying communication strategy needs to clearly reflect *who* the communication is intended for (e.g. is it parliament, government officials, members of the Law Commission); *when* the communication is to take place (e.g. just before general elections); *what* message is being communicated,¹³⁹ and *how* the message is to be communicated (e.g. writing, visits and meetings, committee hearings, one-on-one meetings with politicians).¹⁴⁰ The CMO may also solicit the assistance of external professionals, consultants and the media at large in devising its communication strategy (e.g. through the use of press statements). Nevertheless it is important that the CMO does remain actively involved in the lobbying process to ensure that the message it wishes to communicate is not diluted.

4.10 Regulatory affairs

The regulatory affairs role of the CMO can be divided into the following components:

4.10.1 CMO oversight

65. It is important to maintain good relations with the oversight ministry responsible for ensuring compliance with the terms and conditions of the CMO's operating license (where this exists). The CMO's oversight role must also ensure that the CMO's operating license is renewed on time and that all terms and conditions relating to the renewal are strictly adhered

¹³⁸ See in this regard <http://musically.com/2011/08/03/uk-govt-to-respond-to-hargreaves-review-today-but-music-biz-gets-reaction-in-early/> (Accessed 18 Mar 15).

¹³⁹ It has been said that a clear message must contain a (i) statement of the issue, (ii) evidence, (iii) an example and (iv) an invitation to action. See <http://www.making-prsp-inclusive.org/en/8-advocacy-and-lobbying-influencing-policies/82-basic-techniques/822-convincing-and-strategic-communication.html> (Accessed on 18 Mar 15).

¹⁴⁰ See *ibid.*



to. The oversight role may be given to a Business Affairs Manager, Chief Operating Officer (COO), Legal Manager, or Company Secretary. The responsible person must also ensure the timely filing or submission of any compliance reports required by the oversight ministry and regulator. It may also be importantly to constantly engage with the oversight ministry or regulator with regard to the interpretation and practical implementation of any regulations relating to the operations of the CMO, so as to attain a similar understanding of the regulations. The CMO could also make a case for exemption from some of the regulatory requirements until certain thresholds have been achieved (e.g. exemption from requirements relating to the level of administration costs permissible until such time as the CMO has reached 'break even' levels). The department responsible for regulatory affairs at the CMO must be available to provide constant advice and assistance to other CMO staff with regard to the CMO's relations with the regulator. The CMO's legal department should be able to provide assistance and advice with regard to matters relating to licensing scheme disputes and the referral of matters to the Tribunal and Rate Court and Arbitration Courts.

4.10.2 Compliance with laws, policies and regulations

66. Regulatory affairs are not only limited to matters directly relating to the administration of neighboring rights but extend to other areas such as compliance with various laws affecting the CMO as a corporate entity. This may include:
- (i) Requirements relating to corporate (or other organizational) law, such as the need to file annual returns, annual financial statements;
 - (ii) Requirements relating to labor and employment law, including the involvement of the legal department in providing support to the HR department regarding various corporate policies and procedures, issues relating to disciplinary procedures for employees, trade union relations and recognition agreements;
 - (iii) Requirements relating to tax laws, supporting the finance department in the interpretation and application of various aspects of national taxation law (VAT, income tax, withholding taxes, PAYE) as well as any regional tax matters (see the discussion on taxation above under the section on CMO financial management);
 - (iv) Requirements relating to property and lease law. The CMO may be renting property or having property of its own that it leases out. The relevant department should be able to advise CMO management on issues arising from this; and

- (v) Requirements relating to national and federal, provincial and state or municipal and local regulations and by-laws, especially where the CMO's operations are decentralized with offices in various parts of the country.
67. The responsibility for such broader compliance issues may lie with the Company Secretary, Compliance Officer or the Legal Manager (or a combination of these roles or either of the roles with the support of the other). This compliance role extends to ensuring compliance with the CMO's own constitutional documents, rules, policies and procedures, and includes providing advisory support to the board on various matters relating to its governance of the CMO, rights and duties of board members, adherence to the board charter and code of conduct.

4.10.3 General government and related relations

68. The department designated with dealing with regulatory affairs may also have been assigned responsibility for formal relations with government departments or agencies whose actions or decisions have an impact on the CMO's operations and is administration of rights. These departments and agencies include the following Government departments and ministries:
- (i) Department of Trade and Industry and Economic Affairs. In several jurisdictions this is the department responsible for trade laws and policies (including intellectual property laws) and is thus in many cases the most-important department that CMOs have to relate to. In the case of regulated CMOs this would most probably be the department that provides the supervisory role to the CMOs (either through the office of the registrar of copyright or neighboring rights or another unit of the department designated for this purposes).
 - (ii) Departments of Justice, Police, Customs and Excise. These departments are important in that they provide the necessary enforcement mechanism with regard to copyright and neighboring rights protection. They administer the court system, the policing function, and customs and are instrumental in dealing with matters relating to the combat of piracy and the prevention of illegal importation of copyright works. In some jurisdictions (e.g. Germany) the Department of Justice also acts as an oversight department in respect of CMOs.
 - (iii) Department of Arts and Culture. In many jurisdictions the Department of Arts and Culture acts as the national custodian of the interests of national performers, producers of music and other artists. It provides an enabling environment for the promotion and development of arts industries by providing funding, support for arts initiatives, provision



of archival and research services and working with the ministry responsible for intellectual property laws to ensure that the interests of arts professionals are taken into account. In certain jurisdictions such as France the Ministry of Culture is responsible for matters relating to the administration of copyright and neighboring rights and the approval of CMOs.

- (iv) Department of Broadcasting and Communications. This is an important department because it regulates matters relating to the licensing of broadcasters, cable operators, telecommunication companies, ISPs and DSPs. It is also often responsible for the regulation of local content quotas with respect to the use of neighboring rights works such as sound recordings. It is important that the CMO maintains a good relationship with this department as the department may be of assistance to the CMO when the CMO experiences difficulties in its endeavors to license certain broadcasters, telecommunication companies. Under such circumstances the department might, for example, be persuaded to include as a condition for the renewal of a broadcast license, proof that the broadcaster, ISP and DSP concerned has a valid neighboring rights license from the CMO.
- (v) Department of Tourism. In countries where tourism is a significant contributor to GDP and employment forging good relations with this department and supporting the department in its efforts to develop and protect the tourism industry is important. This is because a successful tourism industry can immensely benefit rights holders whose musical works and audio-visual works and sound recordings are used in the Accommodation and Hospitality industry and other musical tourism initiatives.

4.10.4 Other agencies of state

- 69. The CMO needs to also maintain good relations with other relevant agencies of state, including the broadcasting communications commission and regulator; the copyright and neighboring rights board, the competitions authority, the price controller, the law commission.

4.11 Dispute resolution

4.11.1 Introduction – alternative dispute resolution (ADR)

- 70. Conflicts or disputes arise in relationships between individuals, groups or businesses in general. Often due to the requirement for continuing relations

between disputing parties, there is a growing view around the world and within the judiciary that many of the cases that reach a country's courts may have well been settled earlier if there had been other or earlier intervention measures. Many countries now support policies or programs which require evidence of attempts at resolution of these conflicts or disputes before resorting to litigation. This is also a growing practice in a number of regions of the world (e.g. the EU ADR Directive).

71. This situation has particular application for CMOs which are largely non-profit organizations operating frequently as single channel suppliers of a particular service. Given the variety of conflicts or disputes which could arise whilst administering the interests of their members and rights holders, some CMOs have set up policies that address conflicts and disputes among members and rights holders. Some of these policies provide for a particular route and process of conciliation and mediation that disputing parties need to follow in an attempt to arrive at an amicable or mutually agreeable solution that ensures that business or working relationships are maintained. Where the conflict or dispute is of such a nature that conciliation and mediation is of no assistance the introduction of arbitration to forestall any litigation (and the time, cost and procedural hassles often associated with it), is often a preferred course of action. The CMO's legal department is often called on to assist with the formulation and development, facilitation and implementation of such policies. The legal department section would also frequently be the custodian of many of the underlying policies and documents involved in such conflicts disputes. In the table below this subject is addressed by identifying common parties to conflicts or disputes within CMOs, separating the parties into those that are regarded as internal to the CMO and those which are regarded as external.

4.11.2 Internal dispute resolution mechanisms

72. The table below sets out some suggested mechanisms which should be revised and supplemented in light of the local environmental factors applicable in each CMO in relation to the governance instruments, regulations and policies used.



INTERNAL DISPUTES

PARTY IDENTIFIED	DOCUMENTS RELIED ON	RESOLUTION THROUGH
Members of board of Directors	CMO Constitution; board Charter and /or board Code of Conduct; board Minutes (Decisions); Decisions of CMO AGM (Minutes) and other governance documents	Board Sub or Ad-hoc Committee; External Facilitator and Mediator, e.g. from the local Institute of Directors; Special General Meeting of members
CEO, Senior management	Service contracts and Letters of appointment; CMO Business Plans and performance agreement; Labor and employment Law; Public service terms and conditions of employment (in the case of CMOs that are part of the state administration)	Performance contracts and evaluations and assessments; board Finance committee
General Staff	Employment contracts, Labor and Employment Law, Union recognition agreements, performance agreements, Public service terms and conditions of employment (in the case of CMOs that are part of the state administration)	Human resources department; Performance evaluations and assessments; grievance procedures; Conciliation and mediation meetings; Union representative meetings; disciplinary hearings
Members and Right Holders	CMO Constitution, Membership and Distribution rules; Member affiliation agreements; Decisions of CMO AGM (Minutes), board Minutes (Decisions); Customer Service Charter; Complaints and Claims procedures	Membership department; Relationship management unit; CMO management; Dispute Resolution committee; board of Directors; Technical and Musicological advisory committee; Member and Rights Holder professional Associations, Unions or Guilds
Affiliated CMO and foreign Rights Holders	Agreements of Representation; Decisions of respective CMO boards; International Codes of Conduct for CMOs	International department; communications between CMOs; Referral to respective CMO's internal Legal Counsels; Mediation and arbitration in terms of Codes of Conduct for CMOs
International CMO associations	Governance documents of Multilaterals, Membership rules – IFPI, SCAPR, FIM, CISAC, CIAM, BIEM, SSA, Writers Directors worldwide.	Special 3rd Party facilitated Conciliation, Mediation and Arbitration Panels (e.g. WIPO Mediation and Arbitration Centre); Other International Arbitration Organizations

4.11.3 External dispute resolution mechanisms

73. Since the nature of the relationship between a CMO and other external parties that are ‘stakeholders’ of the CMO generally varies from CMO to CMO it is incumbent on each CMO to identify or devise its own mechanism for dealing with Conflicts and Disputes that arise in its own environment The

table below should thus be amended to suit the unique circumstances and local environmental factors applicable to a particular CMO.

EXTERNAL DISPUTES

PARTY IDENTIFIED	DOCUMENTS RELIED ON	RESOLUTION THROUGH
Users Holding a valid license from CMO	CMO License and contract terms; General CMO Credit control policy; Memoranda of Understanding and Undertaking with User Trade Associations; Special arrangements for Members of Group licenses	Credit Control department; negotiation Meetings with License Debtors; amended settlement terms and compromise agreements.
Users – Not Holding a license from CMO	Information brochures, letters and pamphlets; CMO FAQs; National legislation;	Licensing department visits and other communications; Workshops ; relations and open days for User Trade associations
Oversight Ministry	CMO Regulations; License to operate; CMO Constitution; Decisions of CMO AGM (Minutes); Annual Report and other ad hoc information	Board/Management; Public Affairs section; Rights holder associations; invitation to visit CMO
Other Government Departments than Oversight ministry	Board Charter and board Code of Conduct; board Minutes (Decisions); Decisions of CMO AGM (Minutes); Annual Report and other statistical information	Legal department; Public Affairs section, board Lobby and Advocacy Group; Oversight ministry; Invitation to visit CMO
Wider Music and Audio- Visual business community	Information brochures; letters and pamphlets; CMO FAQs; Annual Report and other statistical information	Public affairs section; Workshops, seminars
Wider community at large	Information brochures, letters and pamphlets; CMO FAQs; National and regional media and communications plan	Public affairs section; Advocacy Groups

4.12 Litigation management

74. As was mentioned under dispute resolution there are a number of alternative dispute resolution mechanisms that can be implemented prior to instituting litigation. Since litigation is usually a lengthy and costly process and also gives rise to problems such as reputational risk (i.e. the diminishing of the reputation of, or loss of trust in the CMO because of the allegations levelled, even though the CMO may ultimately win the case), the CMO’s legal department needs to take steps to mitigate the risks associated with litigation. From a management perspective this responsibility lies with the head of the legal department or section. Some CMOs make use of insurance schemes to ameliorate or mitigate a society’s potential expenses associated with litigation. Where the mechanisms to forestall litigation have all been explored and the only solution is litigation, it becomes important for the CMO’s legal department to effectively, efficiently and vigilantly manage



the litigation process. Litigation may either be *contractual* or based on the *infringement* of the CMO's (or its members' and rights holders') rights.

4.12.1 Contractual litigation

75. Significant areas of contractual litigation where much of the legal process is based on documentation available internally to a CMO tend to include:
- (i) Licensee and user associated litigation
Litigation in this case is based on default of the license terms arising from the license agreement between a licensee and the CMO (e.g. failure to pay license fees; late payment of license fees; failure to submit music use information). Seeing that a medium-sized CMO will have thousands of licensed users of music at any given time, litigation based on default of license terms cannot be undertaken with regard to every default and should only be resorted to where the mechanisms mentioned above have not yielded any results. In view of this, the CMO may have to target those defaulters whose default would cause the most harm to the CMO and its operations (e.g. major users) or those that the CMO wants to target as exemplary cases to warn similar defaulters against continued default of the licensing terms (e.g. where a group of similar users elects not to pay license fees).
 - (ii) Member and rights holder litigation
This relates to the membership agreements entered into between the CMO and its members and rights holders, empowering the CMO to administer rights on behalf of the members. Such litigation usually arises from disputes relating to claims of non-payment of royalties, inaccurate payment of royalties, inaccurate accounting for royalties, payment of royalties to an incorrect party, failure to adhere to the provisions of the CMO's constitutive documents. Litigation between the CMO and its members and rights holders should be avoided as much as possible and the CMO should attempt to resolve all disputes with members and rights holders promptly and before they assume a litigious nature. Member and rights holder-CMO litigation can have a damning effect on the CMO's standing and reputation in the market and before regulators, even if it is later proved that the claim of the member instituting litigation had no basis.
 - (iii) Litigation relating to staff disputes
Sometimes a CMO faces disgruntled staff members who may wish to institute litigation against the CMO. As indicated earlier, a CMO's business is to a great extent dependent on its human resources and thus

it is in the interest of the CMO to maintain good relations with its staff members as much as is possible and to try to resolve problems before they assume a litigious nature. The internal disciplinary process should be fair and transparent to avoid an adverse ruling against the CMO when a staff member lodges an appeal against an internal disciplinary hearing to an outside body or a labor court. Having indicated this, a CMO stands in a fiduciary position on behalf of the members it represents and must thus not tolerate any acts of fraud or corruption which may negatively affect its representation of members (e.g. where such acts relate to financial loss, theft, tampering with member records, works documentation), but also those relating to the CMO's interests and standing generally.

(iv) General business contracts

Other contractual disputes may arise from non-performance by suppliers of goods and services in terms of service-level and other supply agreements. Litigation may also be instituted against the CMO where these suppliers feel that the CMO has defaulted in terms of such agreements. It is crucial for the CMO to implement an effective and efficient contract management system to ensure that it does not default on any terms arising from supplier contracts, that it does not allow a contract to lapse which it should have renewed, that it does not permit an undesirable contract to be renewed automatically by failing to give notice of termination. This may for example occur in respect of property and accommodation agreements, where the CMO may fail to renew a lease or fail to cancel it, resulting in serious ramifications for the CMO. The CMO may also get into trouble by not implementing a proper contract authorization limit policy which indicates the levels of management authorized to enter into particular contracts and the monetary limits related to that. If an unauthorized manager enters into a contract with a supplier by giving the impression to the supplier that he or she was authorized to enter into such a contract this can create risks for the CMO and a liability to perform under such a contract, depending on the law applicable in each country.

4.12.2 Infringement of neighboring rights and other non-contractual litigation

4.12.2.1. Infringement of neighboring rights

76. Infringement of neighboring rights takes place when users continue to use expressions of neighboring rights without procuring a license or



obtaining some other form of authorization from the CMO or rights holders. Infringement has traditionally been categorized into primary or direct infringement and secondary or indirect infringement. Primary infringement takes place where a user performs acts that can only be exclusively performed or authorized by the rights owner, without obtaining such authorization. The acts referred to relate to the bundle of rights that the neighboring rights owner has in respect of the neighboring right expression concerned, e.g. broadcasting the work, communicating the work to the public. Secondary infringement takes place when a user performs certain identified acts (e.g. permitting the place of public entertainment to be used to infringe the neighboring right). The essential difference between primary and secondary infringement is that in the case of primary infringement the user does not need to know or be aware of the fact that the act concerned constitutes infringement in order for infringement to take place, while in the case of secondary infringement the infringement only takes place if the user knew that the act concerned constituted infringement.

77. Remedies for infringement can either be of a civil or criminal nature, although in the majority of cases parties have used civil remedies (e.g. an interdict and injunction against the infringing party; the payment of a reasonable royalty; the payment of damages). We outline below some of the practical steps that may be taken when preparing for the institution of civil proceedings in relation to the infringement of neighboring rights.
 - (i) A choice needs to be made of an appropriate 'target' for infringement proceedings. In some countries it is not always possible to institute infringement proceedings against all recalcitrant users and a choice has to be made as to which infringer the CMO will 'go for'. Some of the considerations to be made in this regard include the income generated by the user; the flagrant manner in which the user infringes on the rights; and the precedent-setting nature of the case against the infringer;
 - (ii) Co-ordination and Liaison with various CMO departments (e.g. the legal department, the sales and licensing department);
 - (iii) Compilation of past written and other communications (reports by CMO representatives and agents) with and to the infringing parties;

- (iv) Actual evidence of restricted acts being undertaken and the detailed flagrant and repeated nature thereof. These acts need to be documented through physical evidence (e.g. audio or video recordings made of the infringing acts), affidavits from witnesses, agents and others procuring the evidence (as well as other supporting affidavits), chain-of-title affidavits (from performers, producers, CMOs, foreign rights holders and affiliated CMOs);
- (v) Listing of identified recordings being infringed;
- (vi) Identification of the CMO's legal chain of title (where rights were assigned), which involves obtaining chain-of-title affidavits (domestic or foreign) from performers, producers, a representative of the CMO instituting the infringement action, foreign rights holders and affiliated CMOs (where foreign rights are involved);
- (vii) Copies of affiliation contracts and deeds of assignment and exclusive or non-exclusive licenses, relating to the works concerned; Powers of attorney and locus standi to sue, obtaining assistance from original rights holders where no assignment or exclusive license was given (e.g. asking the rights holders to join the action as co-plaintiffs);
- (viii) Correct identification and citation of the infringing parties (natural person, legal person, nomine officio and official capacity), and their responsible officials, and addresses for delivery of court process;
- (ix) Analysis of infringement evidence and recordings by experts (e.g. musicological experts), to verify if these relate to the works controlled by the CMO;
- (x) Securing all the CMO's original evidence;
- (xi) Briefing of local witnesses and members and rights holder involved;
- (xii) Formulation of the letter of demand to the infringing parties
- (xiii) Choice of external law firm and counsel;
- (xiv) Communication with management and CMO board on pending action;
and



- (xv) Preparation of the Particulars of Claim including all associated documentation;¹⁴¹ and Regular Reports and Updates to management and board on progress of litigation.¹⁴²

4.12.2.2. Other non-contractual litigation

- 78. Some areas of non-contractual litigation where further work is generally required in obtaining evidence for the legal process include disputes between members and rights holders amongst themselves as to the documentation and legal chain of title to works and catalogues in the absence of written agreements – a situation which affects the CMO’s documentation database; and disputes between members and rights holders amongst themselves as to the authorship or ownership of works and catalogues, again affecting the CMO’s documentation database.

4.13 Other legal matters

4.13.1 Contract negotiations, drafting and review and vetting

- 79. It is generally the duty of members of the CMO’s legal department or section to assist with the negotiation of CMO contracts (including licensing contracts with music users and contracts with suppliers), especially where legal issues and arguments are being raised. The legal department’s duty however does not only end with the negotiation of contracts. Members of the CMO’s legal department must also draft the CMO’s core business contracts (sometimes with the assistance of outside attorney firms) and must also review and vet contracts proposed to the CMO by third parties. Some of the contracts that members of the legal department must assist in drafting and reviewing include members’ and rights holders’ affiliation and membership agreements in respect of the various rights administered by the CMO; international affiliation and representation agreements with other CMOs, which must also clearly indicate the bundle of rights administered and the territories covered in such agreements; other agreements of a bilateral or unilateral representation (indicating the bundle of rights and the territory of representation); standard blanket licenses and user agreements, which must clearly indicate the bundle of rights covered by the license; special blanket license agreements relating to online and new media uses,

¹⁴¹ It may be advisable for the CMO’s internal Legal Counsel to make the first draft of the Particulars of Claim because of his or her understanding of the CMO’s business and the contribution he or she can make to this process.

¹⁴² Comprehensive, regular reports to management and the board should be prepared in relation to the total number of infringement cases being undertaken, clearly reflecting what stage in the litigation process any of the cases are in.

which would cover the national territory; any special blanket cross-border and multi-territorial agreements, which may appear in hybrid form and relates to specific repertoire; blanket once-off transactional license agreements dealing with limited repertoire; fixed-term agreements (agreements that terminate at a certain designated period); indefinite agreements (continuing automatically and renewed or cancelled on the giving of a notice), and various other business and third-party agreements, including service level agreements.

4.13.2 Contract and document management

80. Apart from contract drafting and reviewing, the legal department (or other CMO function such as the Office of the Company Secretary) is also usually also involved with implementing a system of contract and other document management, as highlighted above. Often this involves the use of software that notifies staff members when a certain milestone has been reached in the life of the contract (e.g. when the contract is due for renewal, when a notice needs to be issued, when payment needs to be made). This is to minimize risk arising from contractual default and to maximize the benefits arising from contracts concluded by the CMO with third parties.

4.13.3 Repository activities

81. The Office of the Company Secretary (which may also be the legal department or section) also acts as a repository for important documents relating to board and company activities, such as the certificate of incorporation; the CMO's constitutive documents (including its memorandum and articles of association, membership and distribution rules); membership and affiliation and representation agreements; the CMO's license to operate, where applicable; a repository of important legislation relating to the CMO's operations (including various intellectual property legislation and regulations); precedents of important court cases; the schedule of countries that have given a mandate of representation to the CMO, or to which the CMO has given a mandate, including the CMOs concerned and general information about the rights and catalogues involved; history files of CMO negotiations, important terms or 'deal points'. and other important legacy files that would need to be referred to occasionally for particular purposes (including the provision of evidence in court).

4.13.4 Internal general counsel to CMO

82. The legal department also serves as a source of general legal advice to all sections of the CMO, as well as being involved in general legal risk management and sometimes also acting as the office of the Company



Secretary dealing with statutory and other corporate governance compliance. Some of the in-house legal counsel roles of the legal department include:

4.13.5 General counsel to CMO

83. The legal department works with all line control functions ensuring Compliance risk mitigation, in particular the licensing department, credit control, finance department (in respect of taxation matters) and the CEO's office, to ensure that achievement of the CMOs objectives.

4.13.6 General legal and business affairs

84. This involves providing the CMO's management and various business units with legal advice and guidance on all matters relating to the general business environment. It also includes providing legal advice relating to the general laws of the country, e.g. corporate law, contract law, employment law, property and leases, taxation, debt collection, intellectual property law (trademarks, neighboring rights) and others. The legal department is also responsible for maintaining and managing relationships with specific local general and corporate law firms and external counsel.

4.13.7 Specialist legal matters

85. The legal department is the first point of contact in respect of information and advice on neighboring rights law and counsel on technical legal issues and the interpretation of legal concepts and cases. This specialist role of the CMO includes maintaining relationships with specialist local neighboring rights law firms and external neighboring rights counsel and maintaining contact with legal counsel at affiliated CMOs (in particular those foreign CMOs whose repertoire is active in the territory of the CMO in question). The legal department is also responsible for soliciting external legal advice and opinions on behalf of the CMO, often based on an approved list and panel of law firms

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 4

Finance and Administration matters:

- Financial management policy
- Standard financial and management reports
- CMO budgeting templates (operating and capital expenditure)
- Distributable revenue computation and allocation template
- Cash flow management template
- Key departmental performance measures (quantitative and qualitative)
- Risk management policies and procedures

Legislative and Regulatory and Legal Matters:

- Copy of neighboring rights legislation
- Copy of CMO regulations
- Copies of international treaties (Rome, WPPT, TRIPS)
- Compendium of most important national laws
- Alternative Dispute Resolution procedures (Internal and External)
- CMO litigation policy (contractual and infringement)
- Draft particulars of claim
- List of approved external Law firms and counsel

LIST OF REFERENCES

- Wixley T and Everingham G *Corporate Governance – A Practical Guide for Effective Implementation* (SiberInk Claremont 2005)



UNIT 5 COMMUNICATIONS AND MARKETING PLANS FOR CMOs

5.1 Introduction

1. Business in general has been advancing through what some term the 'post-information age', especially in relation to the evolution and impact of the digital environment. The Emeritus Chairman of the Media Laboratory of the Massachusetts Institute of Technology, Nicholas Negroponte, wrote twenty years ago in his book *Being Digital* about the changes being experienced by humanity and some of his views of the future.¹⁴³ In relation to CMOs, it is also evident that the music business has seen dramatic transformation in these past twenty years especially in regard to how digitization has affected the way in which music is being personalized and consumed. Nevertheless it has only been over the past decade or fairly recently that some CMOs have come to recognize the role of communications and public affairs and marketing in their strategic planning processes. In formulating and addressing its communications and marketing plans, much of the information assembled in the strategic review processes and the environmental scans is of relevance and importance to a CMO. Further to this, the licensing practice section in Unit 3 should also be read in conjunction with the communications and marketing sections below. It needs to be also understood that there is often an overlap between the concepts of communications and marketing and it is important to bear this in mind when reading the two modules. Furthermore, the two modules relate closely to all sections in the tool kit and in a sense act as a 'delivery mechanism' for the CMO's goals and outputs.

A. COMMUNICATIONS

5.2 Role of communications for CMOs

2. As business management communication is a relatively young science compared to some other business disciplines in existence today, there are times when a CMO's communications function is seen as a support or ancillary activity with limited focus placed on its relevance. This is of course no longer the case. In today's world of instantaneous communication of data, information, ideas, news, events via electronic, social and other media platforms, the role and prominence of a communications function within a CMO has been re-evaluated by many societies. The importance of communications becomes relevant even if a CMO were only to focus on

¹⁴³ See Negroponte N *Being Digital* (Hodder & Stoughton London 1995) pages 227-231

each of its core constituencies of members and rights holders and licensees and users. It is common cause that today even small CMOs sometimes have a membership that is comprised of several thousand national members or rights holders. When one adds to this the representation of foreign rights holders and the large numbers of licensees and users of the rights of members (many times reaching to the thousands), one gets a glimpse of the internal and external communications challenges faced by CMOs. Irrespective of the communications challenge faced by a particular CMO, a CMO's communications policy and practice needs to line up with the organization's mission and values and any other codes of business conduct to which the CMO subscribes.

3. Corporate communication in CMOs has taken its place alongside other key management functions including licensing, documentation, distribution, legal, finance and related activities. Put simply, a CMO's communications department and function is a management function within the society which, like any other department, needs to be aligned with the strategic goals and objectives of the CMO. The special focus of the communications department and function is the distribution of information to various primary and secondary stakeholders and other key 'constituencies' of the society. The *Financial Times* provides a short but interesting definition of corporate communications, which is defined as including the preparation of 'messages' created for a variety of internal and external audiences and parties and the communication and transmission of those messages to such audiences and parties.¹⁴⁴ This definition provides insight on how a CMO should view its communication function.
4. The role of a CMO's communications function is one of assisting and supporting the achievement of the society's overall business goals and objectives as well as managing its image and reputation. In view of the *de facto* monopolistic models of collective licensing of rights around the world, it is essential that a CMO is able to address its constituencies at the correct levels and in a clear, succinct and appropriate manner. A CMO's members and rights holders are music business entities and professionals dependent on the CMO for a part of their annual earnings. As with shareholders in an ordinary business enterprise, these members and rights holders have a material interest in the CMO's performance, its prospects of success and its general undertakings. It is therefore important for a CMO to address the information needs, views, perceptions and expectations of its members and rights holders. The licensees and users of rights usually do not have a choice

¹⁴⁴ See <http://lexicon.ft.com/Term?term=corporate-communication> (accessed 9 February 2015)



of alternative suppliers and licensors of rights and at times therefore have particular views towards CMOs as single channel suppliers of rights. The experiences, views and perceptions of CMO members and rights holders and their licensees are very important for the good standing and reputation of a CMO. In writing about the handling of communications around the illness of the late President Mandela, Tshepo Matseba (former President of the Public Relations Institute of Southern Africa (PRISA)) wrote 'corporate communication and reputation management are inseparable'.¹⁴⁵

5.3 Levels of communication

5. Without going into any detail regarding communications theory, it is important for a CMO to consider the different levels, forms and directions that business communications can take. This will help to ensure clarity and good understanding in the development of the communications plan. Whether a CMO and its management are aware of it or not, communication occurs all the time. A communications plan is however necessary to ensure proper implementation of the organization's communications strategy. If not managed carefully, objectives and outcomes will not be as predicted or planned for in the communications plan. Communication can be verbal or oral, such as where CMO staff undertake to carry out certain work and communicate verbally to ensure that the work is carried out as planned and that its objectives and outcomes are understood. Non-verbal communication refers to cues taken from or meaning attached to body language, attitudes, deportment, and attire by listeners, observers or members of an audience. The cues are important as they may reinforce, contradict or confuse the message which a communicator is trying to deliver. Staff whose responsibility it is to be involved in regular communication within or outside a CMO should have a good understanding or appreciation of the impact of such cues and messages in order to communicate effectively.
6. To ensure good communication, an understanding of the direction or flows which communication can take is also important. Traditionally three forms of organizational communication flows have been recognized, namely vertical (downward or upward), horizontal or lateral and diagonal. Often this relates to the type of organizational structure adopted by a CMO, how authority and responsibility is devolved within the society, the CMO's 'corporate culture' and how information is generally transmitted. What is important is to understand is that good communications flow is influenced by different

¹⁴⁵ See PRISA at: <http://www.prisa.co.za/news-and-media-center/feature-articles/55-communicika/368-corporate-communication-and-reputation-management-are-inseparable> (accessed 9 February 2015)

circumstances and suitable attention thus needs to be given to the manner in which a CMO communicates, depending on the prevailing circumstances.

5.4 Consideration of delivery 'channels and mediums' to be used

7. The choice of a specific or appropriate delivery channel or medium for various messages from a CMO to internal or external stakeholders is a matter which is often determined by local environmental circumstances. There are some general rules in the choice and appropriateness of channels or mediums but each CMO is usually the best judge of its own environmental situation and how to communicate with its stakeholders, whether they are primary or secondary, internal or external. We provide below some of the more common CMO delivery channels for messages to its stakeholders from which choices can be made when developing the communications plan.
 - a. *One on one meetings* – for internal CMO meetings between staff inter se or with a supervisor; possible member interactions with CMO customer support to address queries and claims; licensing key account managers and staff interface with existing or potential licensees regarding rights obligations.
 - b. *Mailbox and suggestion box* – use is still made of traditional CMO suggestions boxes, whether physical or electronic; these are strategically located for staff, members and rights holders or even for inputs from licensees.
 - c. *Team meetings* – between members of staff working in a particular department; regular cross-departmental meetings to review CMO progress; formal meetings of CMO management to fulfil organizational reporting, control and risk responsibilities.
 - d. *Intranet and internal email* – the linkage of CMO staff via dedicated internal electronic office mail systems.
 - e. *Tele-marketing* – activities associated with telephone operations in the areas of member recruitment, telesales licensing activities, call center operations.
 - f. *Traditional mail* – use of what is sometimes termed 'snail mail' – a service offered through regional, national, public or private postal authorities.
 - g. *Short Message Service and text messaging* – in the world of electronic commerce and instant communication, some CMOs find the SMS system quite advantageous for short notices to members and rights



holders on a number of matters which involve large numbers of members; other CMOs use the SMS system to follow up on outstanding license fees.

- h. *Newsletters* – although the traditional form of newsletter may be becoming obsolete, the concept of a communication providing short but informative news items about the CMO and its activities to staff, members and rights holders and licensees and users is still very much part of a communication plan.
- i. *Email* – by and large email appears to have overtaken the role of traditional mail except to a certain extent, in the more formal and legal situations.
- j. *Magazine and e-zine* – many traditional CMO magazines have moved to the E-zine format and much of what has been said about newsletters would apply here, in respect of both members and rights holders as well as licensees and users.
- k. *Help desk and center* – use is made of call-in or walk-in centers to disseminate assistance and information to members, rights holders, licensees and users.
- l. *Workshops and seminars* – whether the event is focused on CMO staff, members and rights holders or licensees and users, this delivery medium does not seem to have lost its place in the delivery of more detailed and technical information where the objective is more of an educational and developmental nature.
- m. *AGM and SGM* – this channel for formal communication with members and rights holders of a CMO to address statutory and related matters is once again gaining interest and popularity. The expansion of the broadband applications of sound recordings in many countries has resulted in dramatic increases in use of sound recordings. In view of this CMOs have reported significant improvement in attendances at society Annual General Meetings as well as at Special General Meetings by concerned members and rights holders.
- n. *Board advocacy and ambassador groups* – the existence and use of a group of CMO board members or rights holders with communication and lobbying skills to address various subjects of neighboring rights and collective management (including in respect of lobbying) has proven invaluable for the society at special times.

- o. *CMO media spokespersons* – in today's fast moving world there are often times when a CMO is required to make public announcements and to respond timeously to events, inquiries or media articles. Many CMOs designate certain senior members of staff or employ specialist persons to speak on behalf of the society. Irrespective of who are designated as media spokespersons, special media training for CMO executives and senior management officials is advisable to ensure better communication and readiness to deal with such situations.
- p. *Traditional print media (general, business, arts and culture)* – although there is much ongoing debate about the future of the print media in general, many publications, broadsheets and their smaller competitors still remain vibrant and key opinion makers.
- q. *Roadshows and campaigns* – the use of roadshows or campaigns in drawing attention to serious matters relating to a CMO's business, and often involving leading members and rights holders, is still a delivery medium used by quite a number of CMOs, in particular in developing regions of the world.
- r. *Outdoor media* – billboards, the interior and exterior of vehicles or other forms of transport and related outdoor signs have been used by some CMOs in mass media campaigns where the objective has been to attract the attention of the general public.
- s. *Broadcast media* – Radio and TV – in spite of the perception that relations between CMOs and the broadcast media are less than what they could be. CMOs do use radio and television to communicate with core stakeholders.
- t. *Social and web media* – many CMOs have a presence on various web and social network sites and platforms as part of their communications activity. Tech Target Inc. provides a short but clear definition of 'social media', as '... the collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration'.¹⁴⁶ Web or social media sites take a variety of forms. Some of the more popular sites on which many CMOs have a presence include: *Facebook, Instagram, LinkedIn, Twitter, Wikipedia* and *YouTube*.
- u. *CMO Website* – All CMOs today should have an Internet website presence. The sophistication of such CMO sites varies from a modest number of static pages providing basic information on the CMO and its activities, listing further alternative contact details to a fully interactive

¹⁴⁶ See <http://whatis.techtarget.com/definition/social-media> (accessed on 22 February 2015)



site which permits visitors to transact with the CMO (whether the visitor is a casual inquirer, a member or a licensee and user). A good CMO site should – be easy or user friendly to navigate, reflect accurate and current CMO content, have an acceptable response time in navigating pages, be able to facilitate e-commerce with stakeholders, provide a strong search facility and contain a site menu and map.

5.5 Developing a communications plan

8. The objective of a communications plan is to give expression to the high level overall strategic plan of the CMO. Good communication with key stakeholders and constituencies will enhance the brand or image of a CMO and perceptions about it as it seeks to deliver on its mandates and build balanced business and industry relationships. A CMO's communications plan needs to be developed around the same time as the CMO's other planning. Put differently, when a CMO undertakes its ordinary long- and medium-term planning activities, the communications strategy should form part of the CMO's overall long-term strategic outlook. Similarly, the short-to-medium-term objectives for the communications function should form part of the annual planning and review sessions. Depending on the CMO concerned, the communication plan may form part of an overall marketing plan or be a stand-alone plan.
9. One of the first steps in devising a Communications Plan or improving on any existing plan is to undertake a review or audit of the CMO's current communications activities, including its capacity and capabilities to disseminate information to its stakeholders (constituencies or audiences) – both within the society as well without. Such a review or audit could be undertaken by an external communications specialist or it could be done by the CMO itself. In any event, the objectives of the review is to: (i) make an assessment as to the relative strengths and weaknesses in the CMO's current Communications Plan (or communications processes, where no Plan exists); (ii) identify any gaps which may exist; and (iii) arrive at a set of conclusions and recommendations, with the goal of building on the existing strengths and addressing any existing weaknesses. If the review process is not undertaken at the same time as the CMO's strategy development activity, reference should be made to the CMO's Strategic Plan¹⁴⁷ and the parties identified in the stakeholder review. It will be recalled that two categories of stakeholders, namely primary and secondary are to be identified and each could be further subdivided into those stakeholders that are internal to the CMO and those that are external. The stakeholder review

¹⁴⁷ See Unit 2 for more on Strategy Development and its elements.

also lists the respective expectations and requirements which the identified stakeholders have from the society. The identified stakeholder list should provide a fairly comprehensive audience listing, highlighting persons and entities that the CMO is or should be communicating with.

10. When developing a communications plan, a number of elements in the communications process which need to be addressed are often identified. For CMOs these elements would include: (i) the identified stakeholders; (ii) the key messages or subject-matter to be communicated to these stakeholders; (iii) the communications materials and tools to be used; (iv) the communications channel or medium in delivering the messages; (v) levels or types of communication; (vi) the feedback from or responses to the audience to whom the communication is addressed; and (viii) spokespersons or communications specialists, who are responsible for conveying the communication. Each CMO will have unique circumstances and environmental factors which it faces. In view of this, when developing its communications plan a CMO will choose and use those elements which particularly suit its circumstances in a combination or permutation which meets its strategic objectives. For this reason, we table below a breakdown of examples of some of the abovementioned elements and how these are dealt with in a CMO's Communications Plan:

5.5.1 CMO's stakeholders or audiences

11. Primary stakeholders and audiences may include:

CMO Staff – Individual staff members of the CMO from all levels and regions of its operations, including staff-member associations or unions representing CMO staff;

Members and rights holders of the CMO – both resident and non-resident national members and rights holders as well as international affiliated CMOs or foreign rights holder groups represented by the CMO;

Board of directors – the board as a whole and its various board sub-committees as well as individual board members, whether they are executive directors, non-executive directors, government representatives or independent directors;

Member associations and industry organizations – this list may vary between CMOs but where such associations and organizations have a right to appoint a board member this may include performers' associations, producers associations and musicians' unions. In addition, international federations of



CMOs or rights holder associations representing foreign CMOs would also be included;

CMO repertoire licensees and users – specific users that hold license agreements and contracts with the CMO, other users who are not yet licensed and prospective licensees of the CMO’s repertoire;

Representative trade and industry bodies – these would include national and other associations of broadcasters; associations representing telecoms companies, ISPs and DSPs; Federations of Chambers of Commerce; hotel and accommodation associations; provincial and local government associations and other representative associations of users (where such bodies undertake certain contractual arrangements with CMOs).

12. Secondary stakeholders and audiences may include:

National copyright office or regulator – where the legal dispensation provides for a system of regulation or licensing of CMOs, the government department or agency responsible for oversight or regulation of CMOs is an important stakeholder;

Representative trade and industry bodies – these were mentioned above, however where such bodies do not undertake any contractual arrangements with CMOs but merely facilitate communication with their members, these is seen as secondary stakeholders. As in the case above, these include national and other associations of broadcasters; associations representing telecoms companies, ISPs and DSPs; Federations of Chambers of Commerce; hotel and accommodation associations; provincial and local government associations and other representative associations of users;

Public sector services and agencies – the communications authority (i.e. the national organization responsible for allocation of transmission frequencies and oversight of the wider tele-communications industry, by whatever name it may be known); police and justice departments (responsible for law and order – relating to criminality on infringement of copyright and neighboring rights); customs and excise (with reference to control and oversight of importation of sound and visual carriers, excise duties payable); National Tourism boards;

Government decision makers – these could be subdivided into national and federal and state and provincial and local government. In any event the legislature (with members of parliament and special parliamentary portfolio committees); the executive (with a focus on the various senior officials in specific departments including trade and industry, arts and culture, communications and broadcasting, justice and Attorney General) and the

judiciary (with its magistrates' associations, judicial services commissions, Bar Councils and attorneys' associations) are convenient groupings;

Bankers and suppliers of credit – parties with which the CMO transacts financially on a daily basis;

Media and journalists – involving the national general press, the business and trade press, consumer publications, broadcast media, on-line media, bloggers;

Academia and places of learning – selected tertiary institutions and academics with interests in collective management, neighboring rights and copyright, music education;

General Public – as a business, a CMO operates in society and cannot be divorced from its wider environment or issues.

5.5.2 Core message and subject-matter development

13. In executing its role a CMO communications department is responsible for the distribution of news and information on current developments or events, programs and related information associated with or affecting the CMO. While working on the implementation of its communications strategy a CMO's communications plan has to address a number of important questions, including the following: (i) what do its stakeholders actually know about the CMO? (ii) what are the issues, matters or subjects which concern stakeholders? (iii) what are the current stakeholders' views of the CMO? (iv) what issues, matters or subjects does the CMO wish its stakeholders to know? and (v) how does the CMO wish its stakeholders to view the society? In summary a CMO should be focusing on core messages or subjects to be communicated to its stakeholders, how these relate back to the CMO's mission and values and the deployment of the communications function in addressing stakeholders on such matters. Different messages are developed to address stakeholders' awareness and knowledge about the CMO. Nevertheless, all the CMO's messages must consider the diversity and demographics of the stakeholder groups, be founded on verified information and facts, preferably be short, and be simple to comprehend.

The following highlights some simple examples of core messages for primary stakeholders

5.5.2.1. Members and rights holders or potential members and rights holders

- a. There is significant benefit for individual rights holders in the collective management of (named bundle) rights,



- b. XYZ CMO is a (name of country) collective management organization administering the following bundle of rights...
- c. XYZ CMO collects royalties for the use of sound recordings and recorded performances and aims to timeously distribute these to members and rights holders and affiliates,
- d. The neighboring rights interests of XYZ CMO's members and rights holders are effectively and efficiently promoted and protected,
- e. XYZ CMO is one of the best organizations in (name of country) to work for.

5.5.2.2. Licensees or users and potential users

- a. Rights in sound recordings have value,
 - b. Research indicates that the use of these rights translates into improved business for licensees and users,
 - c. XYZ CMO is a reputable and accredited service organization representing the (named bundle) rights and the owners thereof,
 - d. Licensees and users in a particular market segments need to procure XYZ CMO's license to authorize specific rights uses,
 - e. XYZ CMO has equitable licensing schemes and relatively reasonable prices for nearly all types of uses.
14. CMOs are often monopolies. In view of this, public confidence, image and reputation are important issues for a CMO. For this reason certain messages must be developed to address issues concerning a CMO's brand, image or reputation in addition to its normal operations. In some instances it is insufficient for the CMO to be only delivering messages without assessing feedback or responses from stakeholders. In such cases the communications plan has to address the various methodologies to be employed to solicit such feedback.

5.5.3 Communications resources and tools

15. CMO communications departments are required from time to time to develop or write standard communication and information resources or tools, each of which is designed to address particular stakeholders and cover certain subjects, questions or items of information which require to be communicated. Some resources or tools for special situations may be written by or commissioned from other departments in the CMO or

specialists such as researchers, legal experts, financial experts, while used by the communications function in delivering plan results. Certain of these resources or tools may be used in addressing primary stakeholders whilst others are used to address secondary stakeholders, or used for both.

SAMPLE TABLE OF TYPICAL COMMUNICATIONS RESOURCES OR TOOLS

Advertisements – print/radio/television	News Stories
Audio-visual or PowerPoint presentations	Notices
Briefing papers	Pamphlets
Brochures on Collective management of rights	Podcast information
CMO Annual Report	Presentations (standard and special) on work of CMO
CMO Customer Service Charter	Press Kit on CMO
CMO Facts sheets	Press Releases
CMO Statistical Report/News	Research Papers
FAQ (frequently asked questions)	Special Surveys
Members/rights holders	Internally generated Survey data
Licensees/Users	Externally commissioned Surveys
Interviews – various media	Speeches/Addresses
Licensing information Tool kit	Staff Policies
New licensee/user	Induction programs
Existing licensee/user	Training and development materials
Common objections	
Member/rights holder information kits	Special Recognition/Awards
Performer	Staff
Producer	Member/Rights Holder
	Licensee/User
Newsletters	Standard Letters
Staff	Staff
Member/rights holder	Members/rights holders
Licensee/User	Licensee/User

16. The creation of a communications plan would combine the various elements as identified above, resulting in a formal communications Plan. An outline of such a plan may, in tabular form, look as follows:



PRIMARY STAKEHOLDERS 1: MEMBERS AND RIGHTS HOLDERS AND CMO STAFF

Strategic Goal	Target Audience	Message	Channels	Type of Resource or Tool	Priority
Obtain Rights	Rights holders	Value to Join/ Affiliate with CMO	Direct mail, Email, Website, Help desk/center	Member Info Kits	High
			Radio and Television	Advertisement	Medium
			Recruitment Campaign	Member Info Kits	Medium
			1 on 1 meetings	Conduct meetings	Ad hoc
		Reports on past activities and future prospects	AGMsGM	Audited Annual/ Special Reports	High
	Foreign Affiliates	Sign Representation agreements	Direct mail, Email, 1 on 1 meetings	Affiliation/ Representation agreements	High
Effective Operations	CMO Staff	Great place to work for	1 on 1/Team meetings, Intranet, Mail suggestion box	Notices, Staff News-letters, Information updates	High

PRIMARY STAKEHOLDERS 2: LICENSEES AND USERS

Strategic Goal	Target Audience	Message	Channels	Type of Resource or Tool	Priority
Generate Income	Licensees/Users (Major – Broadcast)	Obtain CMO’s License, Value of rights	1 on 1 meetings – key accounts managers	Licensing information Tool Kit	High
	Licensees/Users (Major – public performance)	- ditto -	- ditto -	Licensing information Tool Kit, Brochures, pamphlets	High
	Licensees/Users (Major – Reproduction)	- ditto -	- ditto -	Licensing information Tool Kit, Brochures, pamphlets	High
	Licensees/Users (Mid-sized – General)	- ditto -	1 on 1 – Licensing officers, Direct mail, email, Tele-marketing	ditto - electronic versions of above	Medium
	Representative Trade/Industry bodies	Equitable Licensing Scheme of CMO	Direct mail, email, Workshops	Annual Report, Research Papers, Surveys	Medium

5.6 Creation of plan timetable

17. The actual choice of communications plan activities is dependent on each CMO's strategic plan. The long-term goals of such plans usually have a 3 to 5 year time horizon which is often broken down into annual plans. The choice of key result areas and indicators of success for a communications plan depend very much on the CMO's chosen strategy, the type of CMO, the stage of development of the CMO and the bundle of rights actually administered. Some of the objectives have medium-term deadlines (e.g. for final results which may extend over a single year). In view of this, time-based milestones need to be set for measurement of progress within the period covered in the plan. In all cases the timetable or calendar of activities is prioritized according to each CMO's strategic objectives.
18. CMO Strategic objectives vary from CMO to CMO. For example, to a relatively new voluntary CMO, measures of the communications activities involving the representation of repertoire from domestic and international rights holders is a priority. Such a CMO would need to devise its communications plan and strategy at a very early stage. Such a plan needs to have a clear categorization of rights holders that the CMO wishes to target for membership recruitment to ensure that support is obtained from rights holders with very active repertoire and the associations and unions representing them. For such a CMO, fairly short-term objectives such as monthly, quarterly and annual targets for member affiliation could be set. Communications activity measures addressing support for changes in or amendments to national neighboring rights legislation will be different and may stretch beyond a single year or even two years in view of the time involved in legislative reform processes. Nevertheless, regular monthly and quarterly follow-up activities and update meetings with the relevant government departments, members of parliament and the members of the appropriate parliamentary portfolio committees, stakeholder groups and other supporters will have to be undertaken. Communication activities in support of sales and licensing operations will be dependent on the exigencies of each market segment. In some mature user markets knowledge about the obligation to procure a neighboring rights license for rights use may be a fait accompli, with compliance and related issues being the norm and modest communications support activities required. In other very large but more 'green-fields' markets awareness about neighboring rights licensing may be low or even negligible. Consequently, frequent communications and awareness programs is required, using different channels to deliver the CMO's messages.



19. The Communications Plan timetable or calendar is a subset of the Communications Plan linked to timing and frequency of the prioritized activities.

**EXAMPLE OF COMMUNICATIONS PLAN
TIMETABLE AND CALENDAR**

Month:.....

Strategic Goal	Audience	Plan activity	Messages	Desired Frequency	Dates of Activities				
Obtain Rights	Rights Holders (Major)	1 on 1 meetings	Value to Join/ Affiliate with CMO	Based on number of rights holders					
	Rights Holders (Other)	Invitation letters, direct mail/ email	- ditto -	Daily batch runs					
	Rights holders (national)	Radio/TV ads	- ditto -	Based on numbers and budget					
Generate Income	Major Users (Various)	1 on 1 meetings	Obtain CMO license, value of rights	Based on number of accounts					
	Medium Users	1 on 1 Licensing officers, Direct and email, Tele market	- ditto -	- ditto -					
Legislative Reform	Oversight Dept. (government)	Board/Advocacy group, 1 on 1 meetings, direct and email	Need for changes in law, prejudice to rights holders	Regular, dependent on progress					
	Parliamentary Portfolio	- ditto -	- ditto -	Committee meeting days					
	Members of Parliament	1 on 1 meetings, rights holders, direct and email	- ditto -	Based on number of meetings					

5.7 Regular evaluation and reporting

5.7.1 Outputs and outcomes

20. From the strategic long-term plan, annual objectives would have been established with the communications department identifying corresponding actions and tactics with indicators of performance required, which now need evaluation and measurement on a regular basis. Such an evaluation and measurement would need to take place at least once a quarter but often on a monthly basis. Reporting on planned activities should be both quantitative and qualitative. In customizing reporting for a particular CMO regard should not only be had to quantitative activities (e.g. the undertaking of activities,

events or actions and the frequency of such activities or outputs) but also to qualitative activities. A distinction between these two types of measures is made by Mills-Scofield when commenting on non-profits, when she observes that outputs involve the undertaking of such activities as programs, workshops, training and similar events or actions – ‘the stuff that is produced’ (quantitative); whereas outcomes relate more to – ‘the difference the produced stuff makes’¹⁴⁸ (qualitative). In the CMO’s communications plan outputs, once identified, are frequently evaluated in terms of the description of activities, events or actions to be conducted as well as the number to be undertaken. The evaluation of outcomes tends to be the measurement of stakeholders’ responses to the said activities, events or actions. For example, was any knowledge transferred to the recipients of information or were their views or behaviors towards the CMO changed in any way? Here often there is significant convergence between communications and marketing plans and care should be taken to address any overlap.

21. As part of the evaluation of and reporting on a communications plan, outputs are probably measured more easily in the short-term whereas outcomes – although still part of the reporting process – may take a more medium-term or longer period to evaluate. It is common for communications departments and functions to report on both measures to CMO management on at least a monthly basis. Communications departments and functions may measure their own performance more frequently. Various indicators customized to each CMO’s circumstances can be developed to assess and evaluate the overall results of the communications strategy in support of the overall Marketing objectives of the CMO. To illustrate the evaluation of a plan using the above measures, the table below, when completed and expanded to cover the full communications strategy, could be used to report on and monitor the results of the plan. Using three of the examples in the outline of communications plan above, the evaluation table could look like the following:

¹⁴⁸ See Harvard Business Review at <https://hbr.org/2012/11/its-not-just-semantic-managing-outcomes> (accessed on 15 February 2015)



COMMUNICATIONS PLAN – EVALUATION AND REPORTING

MONTH:

Target Audience	Message	Channels	Type of Information	Outputs (Quantitative)	Outcomes (Qualitative)
Rights holders	Value to Join/Affiliate with CMO	Direct mail, Email, Website, Help desk/center, Radio and TV, Campaigns, 1 on 1 meetings	Member Info Kits, Advertisements, Presentations	Number of new Members/ ; Attendance at Campaigns/ Meetings?	To what extent did the members/ prospective members fully understand the rights they granted to CMO?
CMO Staff	Great place to work for	One-on-one/Team meetings, Intranet, Mail suggestion box	Notices, Staff News-letters, Information updates	Staff turnover rate?	How well motivated and productive is the staff; what is quality of participation and feedback?
Licensees/ Users (Major)	Obtain CMO's License, value of rights	Senior executive/ Key account manager	Licensing information Tool Kit	Number of Major Users signed?	Have views about CMO been influenced – positively? If so, how?

5.8 Special crisis and disaster section

5.8.1 Risk and crises and disasters

22. In its strategy development a CMO will have considered the issues around the governance, risk and sustainability of the society. Furthermore most CMO boards have a dedicated sub-committee whose responsibility is the oversight for risk identification and management and the CMO's sustainability. It should therefore be possible to list certain potential negative events or circumstances which might occur during a CMO's operations, and to devise plans to mitigate against such events and circumstances. However, by virtue of their nature, crises and disasters are often unpredictable. It may be helpful to try and provide a working definition of both a crisis and a disaster. There is no universally accepted definition for either crisis or disaster.¹⁴⁹ It is however possible to define a crisis as a period or time of risk, vulnerability or threat which may have significant implications leading to material loss for the CMO. A disaster on the other hand may be defined

¹⁴⁹ See Shaluf IM, Ahmadun F and Said AM 'A review of disaster and crisis' (2003) Disaster Prevention and Management: An International Journal, Vol. 12(1) pp.24 – 32

as a sudden event or occurrence which has disrupted or caused serious impediment to the operations, infrastructure or staff of a CMO and which may possibly lead to the CMO’s failure.¹⁵⁰

23. It is important to appreciate that a CMO communications function will not normally be responsible for the full crisis or disaster plan but rather only for the communication aspects around the occurrence of the unpredicted event. The master crisis and disaster plan would cover such issues as: (i) a definition of what would constitute a crisis or disaster; (ii) the list of staff members who constitute the CMO’s crisis and disaster management team, and their contact details; (iii) procedures and processes around the immediate management of the crisis and disaster; (iv) real time response guidelines; (v) incident or event assessment; (vi) overall management of the incident; (vii) crisis communication; and (viii) post crisis review. All CMO communications plans should contain a section on the role and activities of the communications department in the event of a crisis or disaster. Detailed hereunder are some of the more common elements contained in a crisis or disaster communications plan:

SOME ELEMENTS OF A CRISIS AND DISASTER COMMUNICATION PLAN

CMO policies on crises and disasters (including security of staff and assets)	Press kit on CMO (Including both standard and technical issues)
CMO communications policies and procedures	CMO official spokespersons
Key crisis team member list	Media and other inquiry logs
Standard messages list	Communications team internal meetings
Crisis/disaster communications team list	Stakeholder communications (board, staff, rights holders)
Preferred communications channels	Crisis/disaster team updates
Media statements	Post crisis/disaster communications review

B. MARKETING

5.9 Marketing for the CMO environment

24. Throughout this tool kit the writers have alerted readers to the practical but sensitive issues faced by CMOs, in particular the fact that those societies which administer rights on a collective management basis tend, in many countries, to be *de facto* or sometimes *de jure* single channel suppliers of a particular bundle of rights licensing services – or put simply, they tend to be monopolies. This presents a number of challenges which have to be

¹⁵⁰ See further in this regard *Ibid.*



addressed by CMOs with reference to their overall activities but especially their membership and licensing operations.

25. What then is the role of marketing in CMOs? It is actually quite similar to the role of marketing in any organization but with some added complexities and variations. It is important to first agree on what marketing is and what marketing concepts involve. There are clearly many definitions but Dr Philip Kotter in answering the question, states that 'marketing is the science and art of exploring, creating, and delivering value to satisfy the needs of a target market (at a profit)'.¹⁵¹ Dr Kotter further indicates that some of the important concepts in marketing include 'segmentation, targeting, positioning, needs, wants, demand, offerings, brands, value and satisfaction, exchange, transactions, relationships and networks, marketing channels, supply chain, competition, the marketing environment, and marketing programs'.¹⁵² From this we can deduce that quite a number of the principles and concepts in marketing have relevance to the operations of a CMO and have also been addressed in some measure in the section on communication above.
26. Whatever the structure or size of a CMO, the science of marketing has relevance to a CMO, whether this concerns its relations with the rights holders (suppliers) of the bundle of rights which it administers, or the licensees and users of these rights. In this section we shall restrict the marketing discussion to that applicable to the sales and licensing function of CMOs only. It is however important to note that marketing principles and concepts also apply to the relationship between a CMO and its members and rights holders. This is because in many countries, if rights holders wish to have their works licensed for certain uses on a collective basis they are also faced with limited options but to approach a CMO.
27. While the function and operations of a marketing department is viewed by many CMOs as being wider than just dealing with sales and licensing operations, many CMOs do appear to locate the marketing function close to their sales and licensing function. This may be due to the fact that the marketing function often contributes significantly to the development of a CMO's sales and licensing initiatives in a number of ways. These include: (i) undertaking licensing and user market research; (ii) creating awareness about the CMO's operations; (iii) investigating new approaches to persuading users to obtain licenses; (iv) identifying new user and licensee markets; (v) generating leads or prospects; (vi) supporting the development of new

¹⁵¹ See –'Dr Philip Kotter answers your questions on Marketing', in response to question 3, available at http://www.kotlermarketing.com/phil_questions.shtml. (last accessed on 22 February 2015), emphasis added.

¹⁵² Ibid. [ibid means same as the one just mentioned].

licensing tariffs; (vii) investigating cost effectiveness in growing licensing income segments; (viii) developing the CMO's image and branding; and (ix) in some cases, involvement with or overseeing the functions of communications and public relations. Nevertheless, wherever the marketing function of a CMO is located, it is significantly involved in providing services in support of the activities of the sales and licensing function. Readers may refer to Unit 2 of this tool kit where the traditional marketing mix in services industries is briefly mentioned, i.e. the seven key elements of: *product (service), price, place, promotion, people, processes and physical evidence*. Given the need for CMOs to maximize limited resources as well as their non-profit status, the support of applicable marketing science principles and techniques is very important in matching the delivery of rights licensing services to users of rights with the optimization of distributable revenue to a CMO's members and rights holders. While the application within CMOs of certain concepts may vary, the principles of marketing in a society remain applicable and should be read together with the section on communications under A. above, as well as the section on licensing practices in Unit 3.

5.10 Developing a marketing plan

5.10.1 Planning

28. Like all other operational plans, marketing plans have their origin in a CMO's long-term strategy and its mission and values which set the landscape for all departmental goals and objectives. The time horizon of a CMO's strategic plan is very much dependent on local circumstances but is typically a period of three to five years. As the CMO's overall goals and objectives are set each department's role and plans are developed and rolled out. Thus the marketing department's planning would usually take place at the same time as the strategic planning session (including communications planning) and then translated into time based (usually annual) plans. The information from environmental scans, the SWOT analysis and related materials generated in the CMO's strategy planning sessions would also inform the marketing plan development. Should the marketing plan cycle not coincide with the CMO's regular planning session, a separate planning exercise would have to be undertaken generating similar (but current) inputs. As with many planning exercises, marketing planning is process driven and can be divided into three discrete stages, namely (i) the previous strategy review with a corresponding audit of past marketing plans, including consideration of outcomes of the traditional SWOT matrix structured analysis, environmental scan (including past economic and financial outcomes) results and an assessment of the validity of earlier assumptions made; (ii) current strategy formulation where



the outcomes and results of the strategy re or over-view (both quantitative and qualitative) of the previous plans are used as inputs in the creation of the new strategy formulation by bundle of rights market segments and services, addressing any identified gaps in the review, documenting current assumptions and generating forecasts; and (iii) strategy execution where an approved marketing plan is implemented, monitored and evaluated with any subsequent remedial actions to be undertaken.

5.10.2 Typical process steps in a CMO marketing plan

5.10.2.1. Strategy Review

a. Historic Review – Quantitative

29. A review and analysis is undertaken of the consolidated financial results summary as reflected in audited annual reports covered by the previous plan. This is further broken down into the segmental financial results of income generated in relation to the previous marketing plan (usually sourced from the CMO's management accounts) which is then considered by:
 - (i) (Bundle of rights administered – (performing rights, reproduction rights and private copy), which will be further analyzed into
 - (ii) Major divisions of rights bundles, divided into – broadcasting, public performance, new media; broadcast mechanicals; synchronization (where applicable) and private copy (blank media and recording equipment); new media (making available and communication to public) – in currency amounts and numbers of licensed users, which are then segmented into
 - (iii) Major categories of divisions such as broadcasting (radio, television, cable and satellite); public performance (major user types and minor user types); new media (major ringtone operators, streaming services, subscription services and other content aggregators); broadcast mechanicals (radio and television, beyond ephemeral use, catch up services; synchronization (radio and television); private copy (blank media); recording equipment; and international income (performing rights, reproduction rights and private copy and sub-sections thereof).
 - (iv) Sections (i) to (iii) above are often further reviewed into various economic zones and regions, with trends observed in the major divisions, categories, zones and regions.
30. The CMO review would cover the national licensing market potential including market research on potential income and numbers of licensees and users by bundle of rights administered, segmented further into the above

major divisions, categories, zones and regions and gaps identified between results actually achieved and the market potential. Trend analysis would form part of the review.

31. To ensure cost effective operations the financial results of expenditure incurred in the delivery of the previous plans (usually sourced from the CMO's management accounts) are reviewed in consultation with the finance department. The assessment would involve the major categories of expenditure relating to the generation of income in the above divisions and categories (where practicable) and the distribution of income to members and rights holders in the various distribution categories as set out in the CMO's distribution rules.

b. Historic Review – Qualitative

32. The marketing review and analysis would also involve an assessment of the positioning of the CMO in the market place, the status of its relationships and engagements with various major user and licensee sectors (possibly also with the associations representing users) based on the bundle of rights administered as well as the stated divisions, categorizations and zones or regions mentioned above. This could involve a further summation and review of the CMO's various marketing initiatives in the assessment of its:
 - (i) awareness campaigns, promotions, public relations, advertising and related initiatives undertaken and their efficacies; and
 - (ii) effectiveness of licensing schemes and tariffs offered to major and minor users in the major divisions, categorizations and economic zones or regions.

The gaps or weaknesses which may exist in customer relations and engagements with major user and licensee sectors should be identified. These could also be filtered by marketing channels¹⁵³ and human resources used to deliver the licensing services in the major divisions, categorizations and economic zones or regions.

5.10.3 Strategy formulation

5.10.3.1. Commentary

33. Care should be taken in approaching the marketing strategy formulation to guard against such phenomena as strategic myopia and group think. With the macro goals and objectives set in the CMO's overall strategy, the marketing

¹⁵³ See in general McDonald M and Payne A *Marketing Planning for Services* (Butterworth-Heinemann Oxford 2003),



function should set broad objectives (both quantitative and qualitative) for the major user and licensee sectors in the major divisions, categorizations and economic zones or regions for the various sales and licensing channels or departments. Depending on the outcomes of the review, analysis, market research, financial results, trends and results of the gap analysis taken together with the CMO SWOT, decisions will be made on which income divisions, categories and zones or regions should be further developed, maintained, cut back, or totally abandoned. It is common cause that certain traditional income streams on the sales and licensing of physical product are in decline.¹⁵⁴ The decisions made will also take into account the major operating expenses per division, category and zone or region, together with the forecast end result for each of the final net income distributions categories. There will be a number of assumptions and estimations made in developing these objectives and projections and it is important to document these carefully. Resource deployment will be based on the prioritized list of objectives within income divisions, categories and zones and regions.

5.10.3.2. Formulating quantitative forecasts

34. Hereafter follows the actual forecasting of income for the CMO in the classifications detailed under the historical review – quantitative section above, including bundle of rights, divisions, categories, zones or regions. In the same manner the CMO forecasts associated expenditure on activities delivering the income generation above and the distribution of net income to members and rights holders.

5.10.3.3. Formulating qualitative outcomes

35. The marketing plan includes such qualitative objectives to address the identified gaps or weaknesses which exist in the CMO's customer relations and engagements with major user and licensee sectors in the classifications together with deployment of appropriate marketing channels and human resources. This can be accomplished by setting objectives on market position, rights awareness by users, user and CMO relationships, and other stakeholder engagements through aligning the communications activities mentioned in section A above with the marketing plans and then:

¹⁵⁴ See IFPI report 2014 under Editors notes – world market revenues by format at <http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets>. See further 2014 CISAC Collections report under Downloads, release appendix – Types of Rights Highlights at <http://www.cisac.org/Newsroom/News-Releases/CISAC-Releases-2015-Global-Collections-Report>. (last accessed 15 February 2015)

- a. Scheduling awareness campaigns, promotions, public relations, advertising and related initiatives within the various licensee and user sector groups in co-operation with representative trade associations;
- b. Arranging focus group meetings (with evaluation) on CMO relationships with major licensees or licensee representative associations, followed by appropriate response programs;
- c. Exploring technology channels and platforms to launch new initiatives in reaching formerly unlicensed or underserved users;
- d. Introducing revised or new licensing schemes and tariffs (if any) tailor-made to the constantly evolving new media and other sectors;
- e. Initiating new engagements with government and regulators through reports, surveys and supply of statistical or technical data on collective management; and
- f. Revising existing or introducing new marketing channels and human resources to deliver the Marketing Plan.

5.10.4 Strategy execution

36. After having obtained sign-off of the final marketing plan reflecting the various strategic goals, objectives and tactics to be employed, the CMO should proceed with implementation of the plan. Resources (including any capital expenditure) would have been allocated based on the overall strategic plan and the marketing department's share of the CMO's overall budget. It will be clear from the prioritized objectives in the plan which market segments have been identified as requiring to be further developed, maintained, cut back or abandoned.
37. Implementation of the plan will involve the application of various elements of the marketing mix (product, price, place, promotion, people, processes and physical evidence) where needed and striking a balance in the appropriate application of each depending on income division, category or economic zone or region. For example, if any tariffs are to change, this would in all likelihood necessitate engagement of the licensees and users (or their trade associations) to obtain buy in, which would also affect the elements of promotion and process in the marketing mix. If, on the other hand, the marketing plan earmarks an economic zone or region which has received modest licensing attention, deployment of 'mix' elements such as promotion (workshops, advertising campaigns and meetings), people (additional staff, both field and administrative), processes and physical evidence becomes essential.



38. The actual monitoring and evaluation of implementation is critical to the success of any plan. The CMO's Marketing Plan will have included certain assumptions which, in the execution phase, may either prove to be accurate or inaccurate and thus affect the planned results. The roll-out of a CMO's new sales and licensing services in the market with its accompanying outputs and outcomes need to be reported on and evaluated regularly so as to make any timely adjustments to the marketing plan. In this regard close co-operation and communication is important between various CMO management disciplines. It is not possible to review, evaluate and respond to actual financial results against forecasts in comparison to previous period results if management reports reflecting the required information are not promptly available. See also the section on management report writing in Unit 4. For further commentary on strategy execution see the section under budgets, schedules and plan monitoring below.

5.11 CMO image

39. It is generally argued that monopolies are not good for markets or wider society. For this reason, in many countries monopolies are frequently the subject of government regulation. We shall not go into any detail about the arguments for or against the current *de facto* or *de jure* monopoly situation of many CMOs, or the *raison d'être* for the phenomenon of monopolistic CMOs. It should suffice to indicate that CMO management needs to understand that if the society is a monopolistic service provider, it is faced with certain public perceptions and images that business and the community in general associates with monopolies – whether these perceptions or images are correct or not.
40. Management of CMOs have to concern themselves with the public image of their societies. There are various definitions of what constitutes an organization's corporate image. In general a CMO's corporate image is not necessarily one particular image or view but rather constitutes an aggregation of the various images and views held – at any point in time – by the CMO's various publics or audiences. This image may change over time and vary, depending on audience and on other factors. It would include views held by the internal and external stakeholders of the CMO and embrace images or views obtained from any number and combinations or permutations of experiences from different sources, including from the CMO's:
- a. Mission, vision and values;
 - b. Published strategic plans;
 - c. Past audited annual financial statements and reports;

- d. Governance and management track record;
- e. Internal reports;
- f. Staff policies and practices;
- g. Customer services charter;
- h. Other public documents;
- i. Conduct and relationships with stakeholders;
- j. Track record in the enforcement of rights; and
- k. Coverage by the media.

It is common cause that all of the above inevitably impacts on a CMO's internal and external stakeholder audiences.

41. Most organizations regard their corporate image as an asset to be maintained, protected and invested in. In the face of globalization, dramatic changes in markets due to digitization, demands for good governance and accountability, major financial scandals and emergence of social media, increasing focus and attention is placed on the value of a CMO's reputation. More recently, CMOs have begun to invest time, effort and resources so as to ensure that the society's brand value or reputation is maintained and even extended. As part of their overall strategy development, some CMOs conduct a review or audit of their corporate image on a regular basis – the frequency of which is determined by the environmental circumstances faced by each individual CMO.

5.12 Support for CMO income generation

42. To address the role of a marketing department's support for CMO income generation consideration must be given to activities and tactics which relate to both the internal and external operations of the society as well as to the current and future market of rights administration.

5.12.1 Internal activities and tactics

43. Marketing departments often facilitate the supply and creation of resources and tools which can be used by the sales and licensing staff in the execution of their daily activities. For a sample list of typical resources or tools which are often developed, see the table in communications in section A.
44. In view of its understanding of markets, customers, relations with stakeholders and the need for resource maximization, a CMO's marketing department is often tasked with the responsibility of coordinating cross-departmental communications and collaboration within the society, especially as it relates to co-ordination of the use of shared data.



45. A variety of research activities or studies are undertaken or commissioned by CMOs to gain a clearer understanding of the user market, its demographics, current and future trends, attitudes and behaviors of licensees and users, the value of certain bundles of rights in business, different models of value assessment and attribution. In some cases due to overlapping common interests, it does occur that CMOs administering different bundles of rights may collaborate in research projects so as to maximize benefits and cost savings to each other.¹⁵⁵
46. In view of the rapidly changing licensee and user market, it is important for a CMO to be able to optimize the delivery platforms or channels of its licensing services. The rapid development of technologies, the impact of web 2.0 and other communication tools have implications for CMOs and the manner in which they are able to reach and offer licensing services to licensees and users. To ensure that CMOs remain constantly relevant, also with regard to the pricing and positioning of licensing schemes, the research unit responsible for platform and channel delivery and license scheme and tariff development frequently falls under the ambit of the marketing department.

5.12.2 External activities and tactics

47. In view of the nature of CMO operations and licensees and users having limited choice as to where to obtain a license, it is of great importance that a CMO closely considers its relationships with various categories and groups of rights users. Marketing departments are responsible for the overall development of relationships with licensees and users through the use of various marketing, public relations and communications platforms or channels, as well as other techniques. For a list reflecting some of the platforms or channels used in maintaining and developing these relationships, see list in communications section A.

5.13 New and developing usage models

New technologies

48. With the rapid advance of technology in general and digitization in particular, emphasis on and business models operating in the new media or digital Internet space is growing. Although from a relatively low base, CMO income from new media and on-line uses has been growing exponentially. According

¹⁵⁵ See the example in the United Kingdom of collaboration between CMOs, PPL and PRS for Music, in research and related activities at <http://www.musicworksforyou.com/about/musicworks>

to reports published by both the IFPI¹⁵⁶ and CISAC,¹⁵⁷ digital use income to members and rights holders continues to grow at a rate greater than that of traditional sources of incomes, be they managed collectively or individually. Of course the continued growth of new media income for members and rights holders is also dependent on sufficiency of legislation in some countries, viable business models (i.e. not built on free neighboring rights), improved bandwidth and connectivity (for countries where infrastructure roll-out is still at an early stage), advances made by mobile technologies, and the change and movement in patterns of advertising from traditional media to the new media and on-line platforms.

5.13.1 New and evolving markets

49. Taken as a whole many of the developed markets are well served by CMOs and the extent of market penetration is high in most of the traditional income segments. It is however a fact that there are still markets with no or ineffectual collective management of rights. In quite a number of developing markets CMOs are at an early stage of evolution and the market penetration of licensing activities as well as the value attribution of rights in certain user segments is modest. This is of course a pointer to the future prospects of CMOs in those markets and possibilities for significantly improved growth rates in income. The de-regulation of frequency and telecoms spectra leading to growth in traditional uses such as broadcasts, cable and satellite operations and new media uses holds significant potential for members and rights holders in those markets. Thus in markets where there is no and ineffectual collective management there is conversely potential for the establishment or improvement in the operations of CMOs.
50. Part of the research and analysis undertaken by a CMO's marketing function is to clearly identify prospects of both such new technology and evolving market prospects.

5.14 Leverage of any social and cultural activities

5.14.1 Context

51. The evolution of what has been termed social and cultural activities as a symbol of solidarity between CMOs – particularly in the authors' rights fields

¹⁵⁶ See IFPI 2014 report at <http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets>. (last accessed 22 February 2015).

¹⁵⁷ See CISAC Collections report at <http://www.cisac.org/Newsroom/News-Releases/CISAC-Releases-2015-Global-Collections-Report> with press release appendix (last accessed 22 Feb 15).



of collective management of performing rights – is well known. Traditionally the activities were funded by way of a deduction, not to exceed 10% of a CMO's net domestic collections after expenses. The agreement to the application of such a deduction is found in the bilateral contracts of reciprocal representation between CMOs and is specifically earmarked for the provision of what is termed social and cultural activities. The social activities are widely described in the agreements as: members' pensions, benevolent or provident funds, while cultural activities are described as being the encouragement of the national arts. In some countries regulators, as a condition of the CMO's license to operate, require the society to establish and run social and cultural programs. The important marketing aspect of these social and cultural activities is that CMOs and their members and rights holders have taken on a responsibility to address these two important areas affecting their members and rights holders and the wider community.

52. Since the early 1990s the justification for and level of these deductions has been the subject of much focus and discussion within the authors' rights CMO movement. As a consequence of these discussions the deductions, their level, the programs funded by the deductions, and their governance have been reviewed by CMOs with variations being introduced to the contracts of reciprocal representation. In many countries these social and cultural programs are now being run as separate legal entities or foundations funded in some measure by deductions from net CMO revenues with additional funding being contributed by CMO members themselves and other organizations supporting the laudable objectives of the activities undertaken. In some countries contributions to such foundations are tax deductible allowances. Irrespective of the method of funding, CMOs are investing in the present and future welfare of members and rights holders and programs advancing culture, the production of new music, performers, new sound recordings and the promotion of the arts in general in their respective countries.

5.14.2 Examples of programs run by various CMOs

53. Under the social category, member benevolent funds have been established, involving financial assistance in times of hardship, buying co-operatives, loan schemes, one-off grants, medical assistance, funeral benefits, and pension or retirement funds.
54. Under the cultural category programs encouraging the development and education of members and rights holders, the provision of grants, scholarships and awards or prizes, and funding for programs for contemporary art music, recording, commissioning of publication of books,

attendance at and participation in trade and other important industry fairs, secondary school outreaches and other initiatives in the promotion of neighboring rights and culture have been implemented.

5.15 Promotional activities and advertising

5.15.1 The place of promotional activities and advertising

55. Depending on the constitution of a CMO, its legal nature (private, public or government department), prevailing neighboring rights regulations, the operating license issued to a CMO, and other related factors, a society may have a fairly narrow or broad focus and scope of promotional activities which it undertakes. The overall balance on type, focus and frequency of activities as well as the choice of channels of marketing to deliver these activities is often found in the CMO's strategic plan. This plan would at a high level describe how and what specific promotional events and other support endeavors the CMO will deliver in the mission it undertakes on behalf of members and rights holders and other stakeholders.

5.15.2 Scope and nature of activities

5.15.2.1. B.0.14 Primary stakeholders

56. The scope, nature and frequency of a CMO's promotional activities often revolves around the major stakeholders of the CMO, depending on the stage of development of the CMO and awareness levels of the collective administration of rights. A major focus is activities in support of the core functions of the CMO. Some of the primary stakeholder audiences have been identified in the communications section A, above, together with examples of the types of a few key messages which the CMO may intend to deliver and the channels which it might use to reach these stakeholders. The type of promotions a CMO could undertake would often be determined by the demographics of its members and rights holders and licensee and user market. Typically the objective of promotional activities often involves the undertaking of various meetings, workshops, campaigns and other events to improve the understanding of rights by prospective members and compliance by licensees so as to be able to ensure that the specific bundle of rights are effectively protected and administered.

5.15.2.2. Secondary stakeholders

57. The emphasis on messages may be slightly different when addressing stakeholders which are not directly members and rights holders or licensees



and users. Here the activities and events may be geared more to providing general information, orientation and education about collective management, the particular bundle of rights which the CMO administers, issues around governance, transparency and accountability of the CMO. Key programs of promotional activities often involve the undertaking of various informational and educational workshops, exhibitions, events, trade fairs and similar actions to improve interface between the CMO and its secondary stakeholders.

5.15.3 Advertising

58. As will be noticed from the communications section A. above, marketing departments at CMOs do make use of advertising in various scenarios. In view of the cost involved in advertising in the traditional mass media, a CMO's non-profit status, limited marketing budgets and the absence of traditional competitors, the level of use of advertising by CMOs is often event-focused or targeted short-run campaigns whether they be in the printed media, broadcast media, Internet dedicated media, outdoor media and other advertising or similar channels. Nevertheless CMOs have used to good effect various forms of advertising – often paid for, sometimes a co-operative venture with other CMOs or industry associations, and possibly also trade-offs or barter deals – to communicate messages of importance to the CMO, its stakeholders, the recording industry or wider neighboring rights business.

5.16 Budgets, schedules and plan monitoring

59. As with all plans the marketing plan has to be budgeted for, with projections on income and expenditure justifications, monitoring, reporting on variances to budgets and past performance. As the CMO implements its marketing plan it should report and monitor not only on quantitative objectives of the plan but the qualitative aspects also. Results and outcomes linked to priorities and time frames with set deadlines are important. Where the roll-out of tactics and activities in the marketing plan is not matched and timed with corresponding activities in other functions within the CMO, this may well affect planned results. Historically businesses and CMOs had separated the reporting of their various departmental functions and plan roll-outs from the detailed financial results achieved by the plans, provided the financial results were within forecast or budget. With the growing emphasis on integrated and sustainability reporting, many CMOs are addressing their reporting structures to ensure that close co-ordination of plans – financial (largely quantitative) and qualitative, as well as the reporting on outcomes are reviewed together. In

this way, the scheduling and reporting are combined to ensure that holistic reviews of the progress of the CMO can take place in context.

60. It could be argued that members and rights holders are really only interested in the immediate financial results of a CMO and in particular the amounts available for distribution to them. However, if care is not taken regarding the immediate future sustainability or ‘going concern’ status of the CMO in its plan roll-outs, attention to only short-term quantitative results may be expensive in the longer term. Readers are again referred to the discussion on both financial and management reporting in Unit 4 of this Tool Kit. Non-financial marketing plan outputs and outcomes are just as important as the financial results. For this reason CMOs are encouraged to establish appropriate monitoring and reporting structures and formats at regular time frames. Non-financial marketing plan outcomes should be measured in tandem with management reporting, but no less than once per month.
61. To assist with an understanding of the non-financial measures of a CMO a simple example table (which could be expanded) is provided below.

EXECUTION AND MONITORING OF MARKETING PLAN

Strategic Goal	Objectives	Tactics	Responsibility	Deadlines/Timing	Budgets
Income growth	License all major users	Create matrix of all major users	Licensing executive	Various by week and month	Tba
	Validate amounts owing by major users	Audit returns from major users	Key account managers	Monthly, quarterly and annually	Tba
	Better licensing tool kits	Create new Licensing kits	Marketing staff	Specific dates	Tba
	Improve Image with User bodies	Engage User bodies	PR/Marketing officials	Specific dates	Tba
	Improvement of Income streams	Monitor various market segments	Management accounting and Marketing staff	Weekly, monthly, quarterly, annually	Tba

Once appropriate reporting mechanisms have been created for the CMO, these could be tabled with the monthly management accounts, financial and other results. The joint consideration and evaluation of both the financial and non-financial results will ensure that any responses (corrective, expansionary or down-sizing in nature) will be taken with sufficient information about the market at the CMO’s management’s disposal.



LIST OF SIGNIFICANT TOOLS IN UNIT 5

Communications and Marketing

CMO mission and values

Strategic plan working documents (including environmental scans, SWOT analysis and list of primary and secondary stakeholders)

Previous plans

List of stakeholder audiences

Listing of key messages

Table of standard resources or tools

List of approved delivery channels or mediums

Communications plan timetable

Crisis and disaster communications plan

Summarized financial results (last 3-5 years)

Standard market segmentation table

Segmented financial results (management reports – last 3 years)

Segmented financial forecasts (1 – 3 years)

List of previous major marketing initiatives

Marketing plan execution table

LIST OF REFERENCES

McDonald M and Payne A *Marketing Planning for Services* (Butterworth-Heinemann Oxford 2003)

Negroponte N *Being Digital* (Hodder and Stoughton London 1995) pages 227-231

Shaluf IM, Ahmadun F and Said AM (2003) 'A review of disaster and crisis', *Disaster Prevention and Management: An International Journal*, Vol. 12 (1) pp.24 – 32

Sevinga AG *Before the Start* (IFPI 2014)

UNIT 6 DOCUMENTATION AND DISTRIBUTION – NOTES

INTRODUCTION

1. We have mentioned throughout this tool kit that collective management of neighboring rights by definition involves the processes of rights representation, licensing, documentation and distribution. Key to a CMO's success is the documentation of members' and rights holders' details and information and their recordings or tracks together with the distribution of the net income after payment of expenses, to the members and rights holders whose recordings or tracks have been used. To effectively carry out this mandate, a CMO must know which members and rights holders it represents as well as what sound recordings they have an interest in and what sound recordings they have participated in. The subject of licensing of users has already received treatment in other Units of the tool kit. Below, for contextual understanding of the main elements of this tool kit, we provide a short snapshot of the documentation activities around member details, their tracks and recordings and the distribution of income. It needs to be noted that today's CMO is not only judged on the revenues generated but also on the distribution results.

DOCUMENTATION

2. A CMO has as its primary mandate the advancement of the interests of its members and rights holders and those of its affiliated CMOs. To be able to execute this mandate it is of critical importance for the CMO to have full information (documentation) about those parties whose rights it represents, namely:
 - a. Who these members and rights holders actually are (domestic and international rights holders);
 - b. Which tracks and sound recordings they own, represent or have a neighboring rights interest in;
 - c. Whether the term of their interest in these sound recordings is:
 - For the full term of the rights in the sound recording, or;
 - Only for a determined period of time; and
 - Which particular bundle of rights the CMO administers in these sound recordings.



- d. Which countries the CMO's representation extends to;
- e. Whether there may be parties to whom its members and rights holders have delegated certain rights, possibly nationally or internationally.

It is important for CMOs to document in a systematic manner the details of their own members and rights holders and their sound recordings and where necessary to have access to certain details of those rights holders and sound recordings belonging to affiliated CMOs which they represent. Having indicated this, it needs to be noted that in some jurisdictions a system of mandatory collective management exists.¹⁵⁸ In such jurisdictions, rights holders are automatically represented by a designated CMO in terms of legislation, and are not permitted to license the use of their rights except through the collective management system. In such a system, the requirement to capture all details of a rights holder in order to fully represent such rights holder's rights may be less stringent. What does become important however is that the CMO needs to reserve the monies collected in respect of rights holders who have not yet joined it as members, to ensure that it can ultimately get in contact with such rights holders for purposes of paying them such monies.

6.1 Obligation to register, declare or notify

3. All CMOs, irrespective of the bundle of rights administered, rely on rights holders to register with their respective societies (apply for membership), declare or notify the details of their sound recordings (or a part interest in sound recordings) and disclose their interest in contracts and agreements to their respective societies. In the absence of clear information relating to the above, the subsequent fair and equitable division of distributable income between the different rights holders in the said sound recordings will be very difficult to achieve. Many CMOs today offer the possibility of either manual or electronic affiliation or registration by members and rights holders with their society including the simultaneous declaration of their sound recordings (for both national as well as international declaration).

6.2 Databases

4. To ensure that good administration is effected, each CMO must establish extensive national database operations around the required information highlighted above. It is assumed at this stage that the CMO's mandates for

¹⁵⁸ See further on mandatory collective management Ficsor M 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire', in Gervais D *Collective Management of Copyright and Related Rights* (Kluwer Law International The Netherlands 2010) at 42 – 60.

specific rights (i.e. bundles of rights and recordings) administered in particular sound recordings have been established, for example performing rights only or also reproduction rights in sound recordings, and whether these are full or limited mandates.¹⁵⁹ Each CMO maintains a database of national members and rights holders. In the case of CMOs administering sound recordings, societies which are members of IFPI and SCAPR have created international tools facilitating the provision and exchange of key data regarding their members and rights holders. See the paragraph titled international co-operation below.

5. In establishing the national members' and rights holders' sound recordings documentation database, there may be practically at least three subsidiary data-bases, namely the (i) single tracks and recordings database, (ii) the database of albums¹⁶⁰ and, (iii) the data-base of license agreements and contracts between producers, domestic licensing agreements between labels and licensees as well as foreign licensing agreements.

6.2.1 Member and rights holder and CMO representation database

6. A CMO's membership database would normally contain important business information about the member, rights holder or represented CMO, be they a natural person performer, or producer, an incorporated business (such as a record producer and label), or an international business affiliate. The data elements or information frequently included in this national member, rights holder or represented CMO database are:

- a. *Domestic members and rights holders*

Name of performer, record producer (containing full individual, business or trading names); pseudonym and stage name (if any); national identity number (including date of birth or death) or company registration number; nationality; internal member number; IPN or ISRC number – if issued (see paragraph below on international co-operation); capacity or role of member (lead and main and featured performer, backing group and semi-featured performer, record producer); category of membership (where applicable); status of member (for example – voting or non-voting); date of expiry of membership (where applicable); member's address and contact details (physical, postal, electronic address and email, telephone

¹⁵⁹ For example rights holders may have granted the CMO only the performing rights mandate or possibly also certain reproduction rights mandates. Both of these mandates may be in full or limited, for example reproduction rights in sound recording may only include private copy remuneration.

¹⁶⁰ Some CMOs may not keep separate databases of albums.



numbers); country of residence; representation or management information; payee name (for distributions); payee bank account details.

b. *Affiliated CMOs and international rights holders*

Name of affiliated CMO and international rights holder; company registration number; registered address details (physical, postal, electronic addresses and email, telephone numbers); country of CMO residence; bundle of rights covered by representation agreements and the territory involved; payee name (for distributions); payee bank account details.

6.2.2 Sound recordings databases – tracks and albums

7. Depending on circumstances, CMOs may establish more than one national database involving sound recordings including databases of individual tracks recorded and released and of albums released to the market. Data elements or information frequently included in these two databases are:

a. *Tracks*

Title of track and alternative titles (if any); name of featured artist or band; name of record producer; producer catalogue number; name of label; dates of first affixation, recording and publication; country of recording and publication; number of featured and non-featured performers; ISRC number; duration.

b. *Albums (where applicable)*

Title of Album and alternative titles (if any); name of featured artist or band; name of producer; catalogue number; format type (CD, LP, ELP, Tape); production year; music publisher,.

c. *Foreign sound recordings*

Often data relating to recordings of members and rights holders belonging to affiliated CMOs is supplied either by the local representative producer or label or directly by those CMOs through electronic data exchange or by accessing these details from international databases (see paragraph titled international co-operation below).

6.3 Contracts and agreements

6.3.1 Record producer and performer and label and licensees

8. Licensing agreements between producers, performers and other producers are important. Whether a contract provides for the producer to collect for its contracted performers is relevant, and in the case of agreements between

producers and their licensees, the dates of commencement, expiry, renewal and territory of application are important for the administration of rights and accurate distribution of income.

6.4 Division of fees plan

9. In the event of CMO members and rights holders not setting out in the contract between them their agreed split of fees for specific sound recordings and tracks and rights uses (reflecting performance rights and reproduction rights or private copy, where these are administered) some CMOs have a standard default plan for the division of fees between various recognized rights holders in a track. This division of fees plan frequently forms part of a CMO's distribution rules.

6.5 International cooperation

10. Over many years of the collective administration of rights, and in view of the feasibility of members and rights holders releasing a sound recording or track instantaneously world-wide, federations of CMOs or rights holder groups have developed a number of international standards, tools and databases with the objective of facilitating the seamless exchange of data between their members and affiliates world-wide. In the field of sound recordings and performers' rights details can be accessed on the IFPI¹⁶¹ and SCAPR¹⁶² websites listing the developed Identifiers as well as tools and databases available to CMO members of IFPI and SCAPR.

DISTRIBUTION

6.6 General distribution rules, policies and practices

11. It is accepted that collective management of rights is not an exact science but strives to be an equitable one. With the use of tracking, monitoring and other tools, CMOs have been able to achieve high levels of accuracy in the distribution of income to members and rights holders. Many CMOs provide published guidelines to their constituencies on how the society's net income is allocated across the various distribution categories and classes.
12. The landscape and basis for how the CMO's distributable income is allocated will normally be found in its approved distribution rules. In addition to this the CMO's board may have passed further resolutions to provide clarity and direction on certain distribution policies and practices. Other documents

¹⁶¹ See at <http://isrc.ifpi.org/en/> (accessed on 25 February 2015)

¹⁶² See at <http://www.scapr.org/ipd> (accessed on 25 February 2015)



which will inform a CMO's distribution policies and practices will be the undertakings given in bilateral agreements of representation between CMOs and any international codes of good conduct, standards and rules established by the CMO federation of which each CMO is a member. Lastly, where the CMO is a statutory society or department of a government ministry, there may be some variations or further regulations set out by government relating to the allocation of distributable income. This may be particularly applicable to the distribution of private copy remuneration.

6.7 Distributable income computation

13. The principles around the computation of distributable income are fairly standard. A CMO's net income after expenditure usually contains three elements: net domestic license income; net non-license income (usually interest on moneys pending distribution, and other non-license income); and net foreign income for the CMO's repertoire used in other countries. Generally the net foreign income is sent to a CMO in an already processed state, and is distributed to the domestic rights holders of the sound recordings and tracks reported by foreign CMOs as having been used, less any small additional administration or processing charge. The net non-license income is usually treated in one of two ways: (i) the reduction of the CMO's overall administration costs (and thus passed on proportionately to all members and rights holders participating in the net distributable income); or (ii) a separate non-license income distribution made (usually proportionate to the previous distribution earnings of members and right holders and affiliated CMOs).
14. We now turn to discuss the distribution of net domestic license income. The general formula to arrive at the amount for distribution in respect of domestic license income where there has been no authorization of any reserve transfers (transfer to and from reserve fund) is:
 - a. Gross domestic license income;
 - b. Less: domestic administration costs;
 - c. Less: social and cultural deductions (if any).¹⁶³

Any taxes due on royalty earnings are deducted from actual member or affiliated CMO credits before pay over in accordance with the CMO's local tax laws.

¹⁶³ The practices of deducting social or cultural amounts differ widely between CMOs

15. The net domestic license income allocation process involves an analysis of CMO income segments making up the net distributable domestic income as identified in each CMO's financial reports (see Unit 4 under management report writing) which are apportioned into the various distribution categories and classes in terms of the society's distribution rules. The categories and classes are then matched with use data obtained for the respective distribution categories and classes. In the main CMOs derive their major income from broadcasting, general licensing (public performance), and new media (streaming, web-casting services) sources. Reproduction rights income from new media (download services, where authorized), synchronization (where authorized) and private copy levies.

6.8 Usage data collection, practices and processes

16. The accuracy and equity of any CMO's distribution process is dependent in part on the quality and timeous availability of use data. Distribution data policies and practices of CMOs vary from country to country, but generally there are a number of elements in the process of allocating net income to use data. Some CMO's data collection practices for major broadcast users require only broad use information, whereas other CMO's practices require additional information relating to duration of uses in minutes and seconds as well as time of day of these uses.

6.8.1 Data collection

17. Some of the various data use collection methods used by CMOs are provided below.
 - a. *Full (100%) census*

Broadcasting is often a major segment of distributable income. In today's growing digital world, data relating to broadcast use is becoming increasingly available in digitized reporting format. Where CMOs have the capacity to process large volumes of data, they distribute broadcast income on the basis of a 100% census of the uses.
 - b. *Statistical sampling and income pooling*

Some CMOs consult specialist statisticians to establish a sampling system for collection and processing of use data on the basis of certain objective samples of uses and income streams. Sampling systems may for example involve elements relating to: (i) amount of income in relation to total distributable income; (ii) the grouping of some income streams of users with that of other users; (iii) selected samples of use data (which may be systematic and predetermined or random); (iv) equity between



various categories of uses and rights holders' tracks or recordings used; and (v) other elements.

c. *Use of analogous data and information*

Where, for example in many countries, direct use data is not available from small and medium business licensees (particularly in the public performance field), broadcast logs may be used as analogous data to distribute certain categories of net general license income.

d. *Background music suppliers and market surveys*

Many users outsource the provision of background music to third party operators in this field. In addition to provision of the service to users, these operators also supply track or recording use information. Some CMOs undertake or commission various market surveys (at times in collaboration with other CMOs) to ensure that their use data collection practices remain valid.

6.8.2 Control and review of distribution data collection

18. The questions of fairness, equity, cost effectiveness and risk have to be considered by all CMOs when obtaining and processing use data for distribution. Many CMOs have introduced control systems to ensure that the process of collecting use data is the subject of internal control procedures which are reviewed regularly. As part of their overall data collection systems, many CMOs make use of radio and television monitoring services either as a supplement to or a substitution for their data use collection activities. The extent to which these services are used is dependent on the availability of digitized data of each CMO's repertoire and a number of other important factors. Some CMOs outsource the collection of other use data to third party market research companies. The use of sampling, analogy and related systems is often validated by independent statisticians who, from time to time, review the CMO's precedent data and statistical models so as to provide ongoing assurance as to whether the models continue to be valid and appropriate.

6.9 Distribution practices and methods

6.9.1 Activity and use matching

19. Once valid use data has been sourced by the CMO for the various income pools, this use data is matched against its databases of tracks or albums and respective rights holders. Many CMOs employ special electronic software tools to match the databases of uses with the CMO's master

databases. It does, however, occur that due to various reasons certain track or recording uses may initially be un-matched. For this reason most CMOs have a specialist section whose responsibility it is to research, identify and document tracks or recordings which are listed as un-matched recordings uses.

6.9.2 Value attribution – performance rights

20. The exact nature, practices and methods of value attribution for net income available to captured use data vary between CMOs. Some practices for the distribution of radio income include the allocation of net available income directly proportionate to the number of times each track or recording has been 'played'. Other CMO's radio distribution practices may involve coefficients which include other factors. Practices in the case of television broadcast vary between CMOs but in essence follow the activity principle of captured tracks or recordings.

6.9.3 Value attribution – private copy

21. Generally the value attribution for private copy is based on the distribution rules of each CMO with possible variations to respond to certain government regulations where these stipulate certain division of fees. Net income from private copy levies is usually split at source between audio and video and then value attribution for distribution varies between type of blank media or recording devices. The basis of distribution varies between CMOs but proportionate analogy and market research systems are two more popular methods.

6.9.4 Frequency of distribution

22. Each CMO's distribution rules or policies would normally stipulate the minimum number of distributions for a particular category of income to be undertaken in any single financial year. Determining factors taken into account often include cost effectiveness and level of income of the various categories. CMOs which are members of international federations agree to abide by codes of good practice which such federations set out for the distribution of various categories of income by their members.

6.10 Distribution standards and statements

23. In general federations of CMOs have set out certain best practices which their members should observe when transmitting or delivering distribution statements to their own members and rights holders or affiliated CMOs,



including what minimum information should be provided. The formats for provision of statements accompanying any distributions to members and rights holders or affiliated CMOs vary between societies. The CMO federation best practices normally set out the formats and methods of electronic data exchange when undertaking distributions. All CMOs observe the minimum practice of providing a legend to accompany their distribution of royalties to members and rights holders and affiliated CMOs. The statements to members and rights holders and affiliated CMOs would normally include the following minimum details: (i) rights distributed; (ii) period of collections covered; (iii) categories of income included; and (iv) details of tracks and recordings by title, shares distributed, and any internal or international identification numbers.

6.11 Unidentified and undocumented tracks and recordings uses

24. In the distribution process there will always be a number of tracks or recordings uses which have been captured but for which the CMO has no current data either relating to a rights holder or the track and recording. For such cases, CMO federations have established policies and practices including the circulation of lists of these unidentified or undocumented rights holders or tracks and recordings and a period during which claims may be made.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 6

Documentation and Distribution

CMO's membership rules

Databases of members, recordings and contracts

CMO division of fees plan

International federation documentation best practice, tools and data bases

CMO distribution rules and board resolutions on policies and practices

Distribution usage data collection principles and practices

Distribution data advisors (independent statistician, market research consultants)

International federation distribution best practice, tools and formats

LIST OF REFERENCES

Ficsor M *'Collective management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire'*

Gervais D *Collective management of Copyright and Related Rights* (Kluwer Law International The Netherlands 2010) at 42 – 60.

Sevinga AG *Before the Start* (IFPI 2014)

GENERAL REFERENCE MATERIAL AND PUBLICATIONS

LIST OF OTHER RELATED WIPO PUBLICATIONS

Educational Material on Collective Management of Copyright and Related Rights – Modules 1-2

Copyright and Related Rights Cases in the Field of Music in the Asia-Pacific Region

Collective Management of Copyright and Related Rights – Brochure

LIST OF HYPERLINKS TO CMO REPRESENTATIVE ASSOCIATIONS

International Federation of the Phonographic Industry (IFPI), refer to <http://www.ifpi.org/>

SCAPR (Societies' Council for the Collective Management of Performers' Rights), refer to <http://www.scapr.org/>

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