COPYRIGHT COLLECTIVE MANAGEMENT AS COMPULSORY LICENSING IN TAIWAN

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I. INTRODUCTION

"Copyright collective management" is handled by an organization that "license[s] the use of protected works on behalf of rights holders."[1] The organization monitors the use of works, negotiates licensing terms with users, grants licenses, collects remunerations, distributes collected remunerations to rights holders, and represents rights holders to enforce their copyright.[2] One of the leading copyright collective management organizations ("CMO") in the United States is the American Society of Composers, Authors, and Publishers ("ASCAP"), which licenses performing rights.[3]

Taiwan established the Copyright Agency Organization Act ("CAOA") to regulate "CMOs". The CAOA was introduced to the Legislative Yuan in 1994[4] and took effect in 1997.[5] The CAOA was later amended and given a new title "Copyright Collective Management Organization Act" ("CMOA"), which took effect in 2010.[6]

Under the CMOA, a CMO is an association where its members can be legal persons or natural persons.[7] There are four constituents within a CMO: the general meeting of the members, the board of directors, the supervisors, and the petition committee.[8] The highest authority of a CMO lies within the general meeting of the members.[9] The board of directors is the executive body[10] and must consist of at least three members to be elected from among members at the general meeting of the CMO.[11] Supervisors of a CMO must also be elected

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[1] Nicholas Lowe & Tarja Koskinen-Olsson, *General Aspects of Collective Management*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Aug. 31, 2012), *https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf.*

[2] *Id.* at p. 19.

[3] *See* C. Scott Hemphill, *Competition and the Collective Management of Copyright*, 34 COLUM. J.L. & ARTS 645, 646-647 (2011).

[4] *See* Legislative Yuan Bill-Related Document Yuan-Zong No. 553. *See also* GOVERNMENTAL PROPOSAL NO. 5043 (2d term, 4th season, 7th meeting) at 0119, http://lis.ly.gov.tw/lgcgi/lgmeetimage?cfcdcfcbcfc9cfcfc5cecec6d2cec8c7 (last visited on Feb. 21, 2018).

[5] *See* Elaine Chen Tr, *On the Regulations of Copyright Intermediary Organizations in Japan from the Perspective of "Copyright Management Business Lawi* (作權仲介團體條例, *zhe-zuo-quan zhong-jie tuan-ti tiao-li*), 15 SCIENCE & TECH. L. REV. (2003), http://dx.doi.org/10.7062/STLR.200303.0052.

[6] COPYRIGHT COLLECTIVE MANAGEMENT ORGANIZATION ACT (著作權集體管理團體條例, *zhe-zuo-quan ji-ti guan-li tuan-ti tiao-li*), (Feb. 02, 2010) (Taiwan) hereinafter CMOA].

[7] *Id*. arts. 3.2, 4.1.

[8] *Id.* arts. 15, 20.

[9] *Id.* art. 15.

[10] *Id.*

[11] *Id.* art. 17.

from among its members of the general meeting.[12] The role of the supervisor is, *inter alia*, to review the operational and financial status of the CMO.[13] The supervisor must also audit the CMO's books and documents, which may be done personally or by retaining an attorney or certified public accountant.[14] The petition committee is composed of at least five persons selected from members and non-members at the general meeting of the CMO's members.[15] The petition committee adjudicates disputes between a member and the CMO in accordance with the CMO's bylaws.[16]

To be a member of a CMO, one is required to be the owner of a copyright.[17] A CMO cannot deny membership to any copyright owner who meets the membership requirements stated in the CMO's bylaws.[18] Conversely, a member is free to withdraw from the CMO at any time, albeit the withdrawal will not take effect until after the fiscal year or the end of the pre-notice period.[19] Additionally, if a member is dead, broke, or dissolute, or if a member no longer meets the membership requirements, the membership is deemed to be withdrawn.[20] Furthermore, a CMO shall not reject a non-member who asks the CMO to administer their copyright, even though the member will not join the CMO;[21] in this circumstance, the non-member is treated as if they were a member.[22]

A CMO has three main managerial functions: licensing, royalty distribution, and litigation.[23] A CMO may start self-designed licensing programs, accept user-initiated licensing programs, or adopt licensing programs demanded by the Taiwan Intellectual Property Office ("TIPO"), a governmental agency responsible for intellectual property affairs.[25] A CMO is required to distribute royalties to its members at least once a year.[26] Lastly, a CMO can act on its own to handle matters concerning litigation or non-litigation pertaining to the interests of its members.[27] Regarding litigation matters, a CMO can bring a civil, administrative, or criminal lawsuit.[28] However, a CMO must acquire an exclusive license from a copyright owner, or become a trustee of such copyright owner, to initiate a

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[12] *Id.* art. 15.
[13] *Id.* art. 18
[14] *Id.*
[15] *Id.* art. 20.
[16] *Id.*
[17] *Id.* art. 11.
[18] *Id.* art. 12.
[19] *Id.*
[20] *Id.* art. 13.
[21] *See Id.* art. 32 (stating that this approach for dealing with a non-member's work is different from the traditional extended collective license, where non-members are by law automatically represented by an assigned CMO to license their copyright). *See also* Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, 31 BERKELEY TECH. L. J. 1461, 1471-72 (2016) (discussing the ECL model adopted by Nordic countries).
[22] CMOA, *supra* note 6, art. 33.
[23] *Id.*
[25] *Id.* arts. 23-24, 34.
[26] *Id.* art. 39.
[27] *Id.*
[28] *Id.*

criminal proceeding.[29] Regarding non-litigation matters, a CMO can file a petition to administrative agencies or handle other matters in their respective ways.[30]

Currently, there are four registered CMOs.[31] The largest CMO is the Music Copyright Society of Chinese Taipei ("MÜST"),[32] which was approved on January 20, 1999 and registered on May 17, 1999.[33] MÜST manages the rights of public broadcasting,[34] public performance,[35] and public transmission[36] with respect to musical works of about 1,550 members.[37] MÜST is affiliated with the International Confederation of Societies of Authors and Composers.[38] The royalty revenue in 2016 was 373,963,673 New Taiwan dollar ("NTD") with a profile of 19% in public broadcasting, 56% in public performance, and 25% in public transmission.[39]

The Association of Recording Copyright Owners ("ARCO")[40] was founded in September 1989. ARCO was approved and registered as a CMO on January 20 and May 31 of 1999 respectively.[41] In December 2010, ARCO merged with the Audiovisual Music Copyright Owner Association ("AMCO").[42] ARCO manages sound-recording and audiovisual works.[43] Regarding sound-recordings, ARCO collects "remunerations from public performance"[44] and represents rights of public broadcasting and public transmission, including temporary reproduction by uploading a licensed work to a server.[45]

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[29] *Id.*

[30] *Id.*

[31] *See generally Taiwan-Protecting Intellectual Property*, EXPORT (Oct. 10, 2018), https://www.export.gov/article?id=Taiwan-Protecting-Intellectual-Property.

[32] *See* Music Copyright Society of Chinese Taipei, (社團法人中華音樂著作權協會, she-*tuan fa-ren zhong-hua yin-le zhe-zuo-quan xie-hui*), MÜST, https://www.must.org.tw/ (last visited Dec. 7, 2018).

[33] *See generally* EXPORT, *supra* note 31.

[34] *See* TAIWAN COPYRIGHT ACT (Nov. 30, 2016), https://www.tipo.gov.tw/public/Attachment/71417531682.pdf ("[P]ublic broadcasting [means] for purposes of the public's direct listening or watching, using sounds or images to communicate to the public the content of a work through a method for transmitting information with a broadcasting system, such as cables, wireless transmission, or other equipment").

[35] *Id.* art. 3.9 ("[P]ublic performance as "*live* communicating to the public the content of a work through acting, dancing, singing, instrument-playing, or . . . . communicating to the public sounds or images of the original broadcasting through a loudspeaker or other equipment.").

[36] *Id.* art. 3.10 ("[P]ublic transmission as "providing or communicating to the public the content of a work through cables, wireless networks, or other communication methods, where at least the public can choose their own time or place to receive the content of such work through the above-mentioned methods.").

[37] *See Association Introduction*, MÜST, https://www.must.org.tw/tw/about/index.aspx (last visited Dec.7, 2018).

[38] *Id.*

[39] *Id.*

[40] *See The Synopsis of Association of Recording Copyright Owners*, ASS'N OF RECORDING COPYRIGHT OWNERS (Jan. 16, 2018), www.arco.org.tw/profile/intoduce_eg.htm [hereinafter ARCO Introduction].

[41] *Introduction of the RIT (IFPI TAIWAN)*, RECORDING INDUSTRY FOUNDATION TAIWAN, www.ifpi.org.tw/record/about/english.htm (last visited Dec. 7, 2018).

[42] *See* EXPORT, *supra* note 31.

[43] *Id.*

[44] *See* TAIWAN COPYRIGHT ACT, *supra* note 34, art. 26 ("Where a sound-recording work is publicly performed, the author may ask the person who did the performance to pay remuneration for the use of such work.").

[45] *See* EXPORT, *supra* note 31.

For audiovisual works, such as music videos, ARCO manages rights of public broadcasting, public presentation,[46] and public transmission, which includes temporary reproduction in the form of uploading.[47] The membership is composed of 33 record companies and 7 persons.[48] ACRO is a member of the International Federation of the Phonographic Industry.[49] In 2015, ACRO collected the royalty of 106,452,424 NTD with a profile of 62.26% in public broadcasting, 36.68% in public performance, and 1.7% in public presentation.[50]

The Recording Copyright and Publications Administrative Society of Chinese Taipei ("RPAT")[51] was approved on October 22, 2010 and registered on February 7, 2011.[52] RPAT represents owners of sound-recording works to license a right of public broadcasting and to collect remunerations from public performance.[53] In 2016, the profile of the royalty revenue was 98.45% in public broadcasting and 1.55% in public performance.[54]

Last, the newest CMO, "Asian-Pacific Music Collective Management Association" ("ACMA"),[55] was approved on September 25, 2017 and registered on November 29, 2017.[56] ACMA represents owners of musical works to license their rights of public broadcasting, public performance, and public transmission.[57] ACMA had 152 initial members, with leading members of record companies that licensed copyright to karaoke machine manufacturers for years.[58]

The system for CCM in Taiwan is designated almost exclusively for musical or sound-recording works.[59] However, the practices of the CMOA made CCM in Taiwan a system of compulsory licensing, most notably for musical works.[60] The intention of this article is to discuss problems caused by such compulsory-licensing approach to CCM. Next, part II analyzes the provisions of the CMOA concerning how a licensing program of a CMO is created and how users may challenge or initiate a new licensing program. Part III explains

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[46] *See* TAIWAN COPYRIGHT ACT, *supra* note 34, art. 3, ("[P]ublic presentation" means "communicating the content of a work to the public live, or to the public in a certain place outside the live scene, at the same time through a single or multiple audiovisual machines or other image-transmitting methods").

[47] *See* EXPORT, *supra* note 31.

[48] *See* ARCO Introduction, *supra* note 40.

[49] *Id.*

[50] *Id.*

[51] CMOA, *supra* note 6, art. 39.

[52] *See* EXPORT, *supra* note 31.

[53] *Id.*

[54] *See Announcement: Description of 2016 Royalty Distribution*, RPAT, http://www.rpat.org.tw/ (clicking 2017/11/20 Announcement) (last visited Feb. 25, 2018) (China).

[55] *Announcements and* Events (社團法人亞太音樂集體管理協會, *she-tuan fa-ren ya-tai yin-le ji-ti guan-li xie-hui*), ACMA, https://www.acma.org.tw/ (last visited Oct. 3, 2018).

[56] *See* EXPORT, *supra* note 31.

[57] *Id.*

[58] *See* Zhang Yuying, Deputy Director, MINISTRY OF ECONOMIC AFFAIRS INTELLECTUAL PROPERTY OFFICE, at pp. 8-10 (May 16, 2017), https://www.tipo.gov.tw/dl.asp?fileName=7668572154.pdf.

[59] *See* Jingjibu Zhihui Caichanji, *Introduction of the Collective Management System of Copyright Between the Two Sides of the Strait*, TIPO (Oct. 2, 2012), https://www.TIPO.gov.tw./public/epaper/TIPO_Epaper/ch/News_NewsContentf163.html?NewsID=6243.

[60] *See generally Methodology for the Development of National Intellectual Property Strategies,* WORLD INTELLECTUAL PROPERTY ORGANIZATION (2016), https://www.wTIPO.int/edocs/pubdocs/en/wTIPO_pub_958_3.pdf

why the CMOA actually adopts a compulsory-licensing approach. In addition, part III introduces compulsory licensing under the Taiwan Copyright Act ("TCA") to define the concept of compulsory licensing. Part IV discusses why Taiwan's approach to copyright collective management may violate Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").[61] Taiwan is a member of the World Trade Organization ("WTO") and must follow the TRIPS Agreement.[62] Any legislation that may limit or restrain copyright must be examined under the three-step test vested in Article 13 of the TRIPS Agreement.[63] In addition, part IV proposes some thoughts on reform of the CMOA.

II. COPYRIGHT LICENSING UNDER THE COPYRIGHT COLLECTIVE MANAGEMENT ORGANIZATION ACT

A. Licensing Programs

The CMOA divides copyright licensing into two categories.[64] The first category is individual licensing where a right of each work is licensed independently.[65] The second category is general licensing where the right of each work managed by a CMO is licensed to a user who may use the work for unlimited times during a specific period.[66]

Article 24 of the CMOA mandates a CMO considers five factors for determining licensing fees.[67] The five factors include: (1) the result of the negotiation with a user or the opinion of such user; (2) such user's economic benefits generated from using copyrighted works; (3) the amount of copyrighted works the CMO manages; (4) the quality and quantity of the use; and, (5) other considerations required by the TIPO.[68]

If the purposes of use are related to culture, education, or other public interests, Article 24 requires a CMO to offer a discount to the user.[69] If such use is also non-profit, Article 24 further demands a CMO to offer further discounts.[70] Lastly, Article 34 mandates a CMO to offer the same licensing program to all users for the same use.[71]

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[61] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[62] *Id.* art. 13. *See* Ping-Hsun Chen, *A Fake Right of Priority Under the Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation*, 20 MARQ. INTELL. PROP. L. REV. 213, 214-218 (2016).

[63] Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 COLUM. J.L. & ARTS 119, 134-36 (2002).

[64] *See generally* Chien-Chih LU, *Evolutions In Copyright And Licensing Models: Snapshots From The U.S. And Mandarin Music Markets*, CONTEMPORARY ASIAN STUDY SERIES (2015), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1234&context=mscas.

[65] CMOA, *supra* note 6 art. 3.

[66] *Id.*

[67] *Id.* art. 25.

[68] CMOA, *supra* note 6 art. 24.

[69] *Id.*

[70] *Id.*

[71] *Id.*

Under Article 24, a licensing fee must be announced by a CMO before it becomes effective.[72] Once the fee has been announced, the fee will not take effect for thirty days, starting the day after the announcement.[73] The announcement requirement also applies to any amendments of a licensing fee.[74] All announcements must include the explanation and basis of the fee,[75] and must be open to the public for review.[76]

Pursuant to Article 24, a user may ask a CMO to create a licensing program for a certain type of use. A user has the right to request a CMO to determine a licensing fee for uses that have not been included in a CMO's licensing program.[77] After such request is delivered in writing to a CMO, the CMO is obligated to make a new licensing fee for the requested use.[78] Before the decision is made, the requesting user is not subject to any criminal liabilities for violating copyright under Chapter 7 of the TCA.[79]

Lastly, Article 37 provides a specific condition where a licensing program may be terminated.[80] A licensing program may ask a user to regularly provide a list of previously used works.[81] A CMO may terminate the licensing program of a specific user if such user fails to provide the requested list or falsifies information concerning the requested list in a malicious manner.[82]

Article 30 of the CMOA allows the TIPO to appoint multiple CMOs to initiate a joint licensing program for a certain type of use.[83] The appointed CMOs must negotiate a joint license fee, determine how to share the income from such fee, and designate one CMO to collect the joint license fee.[84] But, if the negotiation fails to reach a solution of joint licensing, any of those appointed CMOs may request the TIPO to determine a joint licensing program.[85]

B. Complaints Under Article 25 and Article 30

1. Proceedings

CMO's licensing fees are challengeable.[86] Article 25 of the CMOA allows a user to file a complaint to challenge a licensing fee with the TIPO.[87] The written complaint must

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[72] *Id.*
[73] CMOA, *supra* note 6, art. 24.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] CMOA, *supra* note 6, art. 24.
[78] *Id.*
[79] *Id*.
[80] CMOA, *supra* note 6, art. 37.
[81] *Id.*
[82] *Id.*
[83] CMOA, *supra* note 6, art. 30.
[84] *Id.*
[85] *Id.*
[86] *See* Robert Hooijer et al., C*ollective Management Organizations – Tool Kit Musical Works and Audio-Visual Works*, WORL INTELLECTUAL PROPERTY ORGANIZATION (Feb. 2016), https://www.wTIPO.int/edocs/pubdocs/en/wTIPO_pub_emat_2016_1.pdf.

embody reasoning and evidence for supporting the allegations concerning unreasonableness of the challenged fee.[88] Under Article 25, the TIPO is required to publish the complaint, which is then available for the publicreview.[89] This publication process enables other users to understand the issues, and for those who face similar circumstances, it may help in determining whether they want to go forward with the review proceeding.[90] If other users want to join the original complainant, they are required to file a written complaint.[91] Meanwhile, upon request by the TIPO, Article 25 mandates the challenged CMO to present information in relation to the five factors under Article 24, the licensing conditions, and other relevant matters.[92]

Pursuant to Article 25, the TIPO has to establish a Copyright Review and Mediation Committee ("CRMC").[93] The CRMC should include TIPO's representatives, scholars, experts, right owners, and users.[94] When reviewing a challenged license fee, the TIPO should consult with the CRMC.[95] A

fter reviewing an Article 25 complaint, the TIPO may make three decisions on the challenged licensing program.[96] First, the TIPO may deny the complaint, if it finds the complaint groundless, or if the complainant fails to provide additional information required by the TIPO.[97] Second, the TIPO may change the fee calculation standard, loyalty rate, or fee amount.[98] The TIPO may also decide a new licensing fee if the effective date is retroactive to the filing date of the original complaint.[99] Last, the TIPO may ban the challenged licensing program if it finds that the program in not supported by law.[100]

A decision related to the challenged licensing program must be made within four months of the date the document submission is complete.[101] Once the review is completed, the TIPO is then required to publish the decision on its website.[102]

If the TIPO amends a CMO's licensing program, the CMO cannot change the amended program again until three years from the effective date of the amended program.[103] On the other hand, a user challenging a fee cannot file a complaint for an issue that has

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[87] CMOA, *supra* note 6, art. 25.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] CMOA, *supra* note 6, art. 25.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] CMOA, *supra* note 6, art. 25.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] CMOA, *supra* note 6, art. 25.
[103] *Id.*

already been resolved.[104] However, if there is a dramatic change, for example, in the market of licensed works) in respect to such issue then the filing restriction will be lifted.[105]

After a CMO's licensing program is amended by the TIPO, a user may request a modification to their licensing contract so that it complies with the named licensing program.[106] Conversely, if a CMO's licensing program is banned by the TIPO, the CMO must return all licensing fees to users who are contracted under the banned licensing program.[107]

Similarly, joint licensing programs are challengeable pursuant to Article 30.[108] The procedure for reviewing a joint licensing program is the same as the proceeding for reviewing a licensing program offered by a single CMO.[109] When adjudicating an Article 30 complaint about a joint licensing program, the TIPO must consult with users and the CRMC.[110] The TIPO is also required to publish a decision regarding an Article 30 complaint.[111] Lastly, a resolved joint licensing program is not amendable for three years from the effective date of such resolved program, while any latter complaints about the same resolved program are not permitted during that three-year period.[112] But, if some dramatic situation occurs, the resolved program may be amended again.[113]

2. Temporary Licensing Fees

Before the TIPO resolves an Article 25 complaint, Article 26 of the CMOA permits a user to pay a temporary licensing fee for his use.[114] There are two types of temporary licensing fees.[115] The first type requires the user to pay the CMO a temporary licensing fee, prior to using the works of the CMO, when a challenged license fee or licensing program based on such fee has become effective.[116]

The second type is utilized when a challenged license fee or a corresponding licensing program has not become effective and a user asks the TIPO to determine a temporary license fee.[117] The TIPO may consult with the CRMC when determining this type of temporary licensing fee.[118] After this temporary licensing fee is decided, the TIPO has to announce such fee on its website.[119] Other users may adopt such fee for the same kind of

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[104] *Id.*
[105] *Id*
[106] *Id.*
[107] *Id.*
[108] CMOA, *supra* note 6, art. 30.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] CMOA, *supra* note 6, art. 26.
[115] *See* Hooijer, *supra* note 83.
[116] CMOA, *supra* note 6, art. 26.
[117] CMOA, *supra* note 6.
[118] *Id.*
[119] *Id.*

use.[120] If the user has notified the CMO that such payment is merely a temporary licensing fee, then paying a temporary licensing fee can exempt a user from civil and criminal liabilities under the TCA.[121]

Under Article 26, a temporary licensing fee may be adjusted after the TIPO makes a decision about an Article 25 complaint.[122] First, if a challenged licensing fee is amended by the TIPO, the CMO should change the temporary license fee to the amended licensing fee.[123] If the CMO had an agreement with the user indicating that the temporary licensing fee is not required to be changed, such temporary license fee remains valid even when the amended licensing fee becomes effective.[124] Second, if an Article 25 complaint is denied by the TIPO, a user will pay the challenged license fee.[125] Finally, if a challenged license fee is banned by the TIPO, the CMO will return to users the temporary license fee they had paid.[126]

C. Unauthorized User's Right to Reserve an Article 25 Complaint

Under Article 34 of the CMOA, when a user cannot reach an agreement with a CMO or a CMO rejects a user's request for copyright licensing, the user may decide to offer a payment based on the CMO's existing licensing fee or certain fee requested by the CMO, or deposit such payment in an account designated by court .[127] With that, the user is considered licensed by the CMO.[128] The user may also notify the CMO that it reserves a right to file an Article 25 complaint.[129]

D. Continuous Licensing After a Member Leaves the CMO

After a member leaves her CMO, the license of his or her works may still remain.[130] Article 31 of the CMOA mandates a CMO to terminate a management contract with a member who leaves the CMO and to stop managing such member's copyright.[131] A user may continue the licensed use of a former member's works until the licensing expires.[132] In that case, Article 31 grants to such former member a right to request the CMO to share the royalty income.[133] If the former member joins another CMO that has a licensing contract with the same user, he or she cannot request his or her previous CMO to share the royalty income for the use of his or her works.[134] Moreover, if the licensing program states that a user cannot use

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[120] *Id.*
[121] *Id.*
[122] CMOA, *supra* note 6, art. 26.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] CMOA, *supra* note 6.
[127] *Id.* art. 34.
[128] *Id.*
[129] *Id.*
[130] CMOA, *supra* note 6, art. 31.
[131] CMOA, *supra* note 6, art. 26.
[132] *Id.*
[133] *Id.*
[134] CMOA, *supra* note 6, art 31.

a former member's works, Article 31 requires a CMO to inform the user when such former member cancels his or her membership.[135] Then, the licensed use must stop.[136]

III. COPYRIGHT COLLECTIVE MANAGEMENT AS COMPULSORY LICENSING

Taiwan's approach to CCM is a form of compulsory licensing in four aspects.

A. Compulsory-Licensing-Like Nature

The CMOA establishes a mechanism for controlling licensing programs of a CMO. The mechanism makes CCM in Taiwan similar to compulsory licensing under the TCA.

Article 69 of the TCA allows the TIPO to grant compulsory licensing to a user who can produce and sell copies of a sound-recording based on a musical work that has been published as a for-sale sound-recording work for at least six months.[137] To implement the compulsory licensing provision, the TIPO has promulgated the Regulations Governing Application for Approval of Compulsory License of Musical Works and Royalties for Use ("Compulsory Licensing Regulations").[138]

The compulsory licensing under Article 69 of the TCA is almost mandatory according to the Compulsory Licensing Regulations.[139] An application for compulsory licensing should be submitted with the required information, such as the applicant's personal information, targeted musical work, and personal information of the songwriter and copyright owner.[140] Although Article 7 of the Compulsory Licensing Regulations allows a copyright owner to submit a written statement to the TIPO concerning the application, the TIPO is not obligated to respond to such statement.[141] Therefore, so long as the required information filed is considered true and the statutory requirements are met, the TIPO will approve the application.[142] Subsequently, a licensed user has to pay a licensing fee that is determined by an equation vested in Article 12 of the Compulsory Licensing Regulations, where the license fee is equal to: ([the price of a copy] × 5.4 percent × [the number of copies])/[the number of licensed songs].[143] Article 12 also sets a minimal fee of 20,000 NTD.[144]

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135 *Id.*

136 *Id.*

137 *See* TAIWAN COPYRIGHT ACT, *supra* note 31, art. 69. *See also* 17 U.S.C § 115 (illustrating the American counterpart). *See, e.g.*, Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. 967, 1018-19 (2016) (discussing statutory licensing); Yolanda M. King, *The Inadvisability of Nonuniformity in the Licensing of Cover Songs*, 3 BELMONT L. REV. 51, 56-59 (2016) (describing the legislation of 17 U.S.C § 115).

138 *See* Yinyue Zhuzou Qiangzhi shou-quan Shouquan Shengqiung Xuke Ji Shiyong Baochou Banfa (音樂著作強制授權申請許可及使用報酬辦法), Regulations Governing Application for Approval of Compulsory License of Musical Works and Royalties for Use Thereof, (promulgated June 10, 1992, effective June 10, 1992), *translated in* Regulations Governing Application for Approval of Compulsory License of Musical Works and Royalties for Use Thereof [hereinafter Compulsory Licensing Regulations] (Feb. 20, 2002).

139 *See supra* Part III.A.

140 *See* Compulsory Licensing Regulations, *supra* note 138, arts. 2-3, 6.

141 *Id.* art. 7.

142 *Id.* art. 9.

143 *Id.* art. 12.

There are two key aspects of the compulsory licensing under the TCA.[145] First, compulsory licensing is always granted.[146] Second, the TIPO controls a license fee by promulgating a regulation prescribing a license fee equation.[147] Meanwhile, the CMOA creates a similar practice.[148] After a CMO has established a licensing program for certain use, it cannot reject a licensing request from an applicant for such use.[149] If a user disagrees with a licensing program and refuses to accept such licensing program, he is still considered licensed by depositing a required license fee in a court or by merely offering a license fee payment to the CMO, while the complaint against such licensing program in the TIPO continues. Because a user may challenge a licensing program in the TIPO, the TIPO can have a chance to determine the license fee of the program.[150] Ultimately, the TIPO controls a CMO's licensing programs.[151]

B. Article 37 of the Taiwan Copyright Act

While a copyright owner may choose not to join a CMO, it is quite unlikely to do so.[152] To enjoy full protection under the TCA, a copyright owner must join a CMO. The TCA creates a system to encourage copyright owners to form or join a CMO.[154] Article 37 of the TCA discriminates against copyright owners who do not join a CMO.[155] For a copyrighted work not managed by a CMO, Article 37, Paragraph 6 relieves four types of unauthorized users from being subject to criminal liabilities under Chapter 7.[156] The first user is one who publicly performs a musical work through a computer karaoke machine that is under a copyright license of such musical work.[157] This includes a user who is usually one that uses a karaoke machine in a commercial environment, such as a restaurant, while such karaoke machine is only under a copyright license for home use.[158] The second user is one who publicly broadcasts a work again through the original broadcast of such work, and typically includes a store owner who shows television programs to his or her customers.[159] The third user is one who uses a loudspeaker or other equipment to communicate a sound or image from the original broadcast to the public.[160] This is usually a store owner who plays

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[144] *Id.*

[145] *See supra* Part III.A.

[146] *See* Compulsory Licensing Regulations, *supra* note 138, art. 12.

[147] *Id.*

[148] *See supra* Part II.

[149] *See* CMOA*, supra* note 6, art. 34. *See also supra* Part II.C.

[150] *See supra* Part II.B.

[151] *See supra* Part II.A; Part II.B.

[152] *See supra* Part III.B.

[154] *See Id.*

[155] *See Id.*

[156] TAIWAN COPYRIGHT ACT, *supra* note 31, art. 37.

[157] *Id.*

[158] *See generally* Copyright 2019 Taiwan, ICLG (Feb. 10, 2018), https://iclg.com/practice-areas/copyright-laws-and-regulations/taiwan (last visited Dec. 7, 2018).

[159] *Id.*

[160] *Id.*

radio programs to his or her customers.[161] The fourth user is one who communicates by publicly broadcasting or transmitting an advertisement that includes reproduction of such work, such as someone who shows advertisements in either TV or radio programs to others.[162]

While a copyright owner may initiate civil litigation against these four types of unauthorized users, it is not easy to collect evidence through a civil procedure in Taiwan.[168] A copyright owner has a better chance of success through a criminal investigation.[169] A criminal prosecutor has authority to discover evidence held by accused copyright infringers.[170] Without assistance of criminal prosecutors, it is hard for a copyright owner to enforce their rights. Therefore, Article 37, Paragraph 6 of the TCA actually forces copyright owners to form or join a CMO to avoid infringement by the above-mentioned unauthorized users.[171] Pursuant to Paragraph 6, a criminal prosecutor may then help charge any users of criminal liabilities under Chapter 7.[172]

C. Collective Management of Copyright Owners

After joining a CMO, a copyright owner is locked into such CMO without the ability to license relevant rights on his or her own.[173]

First, Article 11 of the CMOA bans a copyright owner from joining more than one CMO that manages the same right.[174] For instance, after a copyright owner joined a CMO that manages a license of public performance rights, he or she cannot join another CMO that also manages a license of public performance rights.[175] In addition, if the owner joins more than two CMOs at different times, his or her membership of the latter CMO will be considered void.[176] If the owner joins more than two CMOs on the same day, the owner must

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161 *Id.*

162 *Id.*

168 *See* Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 232 (2007) ("Taiwanese Civil Procedure lacks a discovery procedure comparable to the U.S. approach").

169 *See* Kung-Chung Liu Uday et, al, *Innovation and IPRs in China and India Myths, Realities and Opportunities*, 4 CHINE EU LAW SERIES (2016), https://www.researchgate.net/profile/Kenneth_Huang4/publication/303375506_Introduction_China_and_India_as_Contrast_Pair_in_Innovation_and_IP/links/5a46ecc7aca272d2945ed1d2/Introduction-China-and-India-as-Contrast-Pair-in-Innovation-and-IP.pdf.

170 *See* Year 104 *xing zhi shang su zi* No. 50 Criminal Judgment (Intellectual Property Court, Mar. 25, 2016) (describing how the prosecutor interrogated witnesses that were employees of the defendant), http://jirs.judicial.gov.tw/FJUD/index_1_S.aspx?p=SyItR5kbasfntn5rpe4spDy6F6nTupgd3OjsZvlhQCrSWgX08JsShw%3d%3d (last visited Dec. 7, 2018) (in Mandarin).

171 *See* TAIWAN COPYRIGHT ACT, *supra* note 31, art. 37.

172 *Id*. art. 11.

173 *Id.*

174 CMOA, *supra* note 6, art. 11.

175 *Id.*

176 *Id.*

choose only one CMO in thirty days, starting from the day after joining of these CMOs.[177] Otherwise, the owner will be considered not joining any of these CMOs.[178]

Second, every CMO requires an exclusive license from a copyright owner.[179] Under Article 37, Paragraph 4 of the TCA, a copyright owner is forbidden to exercise his or her exclusively listed copyright.[180] On the other hand, an exclusive licensee acts like a copyright owner and deals with transactions or litigation.[181] Although the TCA limits the right of an exclusive licensee to the scope of licensing defined in the exclusive licensing agreement,[182] every CMO acquires the full scope of public broadcasting rights, public transmission rights, and public performance rights through their copyright management agreement.

This exclusive-licensing practice is a necessity for a CMO because such CMO then has standing to initiate a criminal proceeding.[183] The TCA lists several copyright crimes that require a victim, either a copyright owner or his or her exclusive licensee, to petition to a prosecutor's office to initiate a criminal investigation.[184] Otherwise, a criminal lawsuit will be deemed unlawful, which will ultimately result in dismissal of the case.[185] Because a CMO can use a criminal proceeding to force unauthorized users to pay a licensing fee, getting an exclusive license from its members becomes a better practice for the CMO.

As a result, a copyright owner as a CMO member can no longer control his or her right of public broadcasting, public transmission, or public performance. It is like the compulsory licensing scheme under the TCA.[186] A copyright owner of a musical work cannot control the licensing of his or her work after the work has been published as a for-sale sound-recording work.[187] This is even worse for a CMO member. A CMO member cannot license their work individually, while an ordinary copyright owner subject to compulsory licensing under the TCA may still initiate his or her own licensing program to other users.

D. Lack of Diversity in Copyright Collective Management Organizations

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[177] *Id.*

[178] *Id.*

[179] *See, e.g.*, MÜST's Copyright Management Agreement, art. 2; ARCO Copyright Management Agreement art. 1; RPAT's Copyright Management Agreement; Article 1 of ACMA's Copyright Management Agreement, art. 1. (the Copyright Management Agreement of MÜST, ARCO, and ACMA, all in Mandarin, are archived at https://drive.google.com/drive/folders/1EKy5XqOUQk8b408BjF10Vfe37syegis7?usp=sharing; some provisions of RPAT's Copyright Management Agreement can be found at RPAT, Announcement: revision of the Membership Management Agreement, http://www.rpat.org.tw/) (last visited Mar. 30, 2018) (in Mandarin); MÜST's documents concerning membership can be found at https://www.must.org.tw/tw/members/04.aspx. ARCO's documents concerning membership can be found at http://www.arco.org.tw/member/join.htm; ACMA's documents concerning membership can be found at https://www.acma.org.tw/blank-5.

[180] *See* TAIWAN COPYRIGHT ACT, *supra* note 31, art. 37.

[181] *Id.*

[182] *Id.*

[183] *See supra* Part III.C.

[184] *See* TAIWAN COPYRIGHT ACT, *supra* note 31 art. 100. *See also* THE CODE OF CRIMINAL PROCEDURE 2007, art. 232 (Dec. 12, 2007) https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0010001.

[185] *See* Year 104 *xing zhi shang su zi* no. 2 (Intellectual Property Court, Sept. 7, 2017) (describing why the petitioner there was legal), http://jirs.judicial.gov.tw/FJUD/index_1_S.aspx?p=SyItR5kbasfntn5rpe4spJNYMbLQ6S9EcOnrLoBdUHZVLDXQtOsWeA%3d%3d (last visited Apr. 5, 2018) (in Mandarin).

[186] *See supra* Part III.C.

[187] *See supra* Part III.A.

A copyright owner may find a CMO that meets his or her needs, but the owner has limited options.[188] There are only four CMOs now. Lack of diversity in collective management organizations results from two provisions of the CMOA.[189] Article 4 of the CMOA authorizes the TIPO to impose a minimal number of members on a CMO. Thus, the TIPO promulgates "the Minimal Number Requirement of a CMO's Initial Members for Approval of a Formation Application with Respect to Different Types of Work"[190] that became effective on February 20, 2010.[191] The Minimal Number Requirement specifically requires a CMO of musical works to start with 120 initial members instead of thirty initial members for a general association.[192] It is not easy to assemble 120 people to form a group; this is why it is very difficult to form a CMO.[193]

Unfortunately, the TIPO has dissolved two CMOs in the past two years.[194] On February 24, 2016, the TIPO dissolved the Music Copyright Association of Taiwan ("MCAT").[195] The MCAT did not manage its accounting record well, and therefore, the royalties' collection was not duly distributed to songwriters.[196] Later on October 27, 2017, the TIPO dissolved another CMO, Taiwan Music Copyright Association ("TMCS"),[197] due to the inaccuracy of the list of musical works for licensing, mismanagement of accounting and royalty distribution, as well as unlawful agency relationship with others for purposes of collecting royalties.[198]

After the MCAT was dissolved, it took about one and a half years to form ACMA.[199] Before ACMA was approved, the TIPO actually hosted two suspicious events,

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188 *See infra* Part III.D.

189 *Id.*

190 *See generally* CMOA, *supra* note 6, art. 3; 著作權集體管理團體之申請設立許可各類著作發起人最低人數, *zhe-zuo-quan ji-ti guan-li tuan-ti zhi shen-qing she-li xu-ke ge-lei zhe-zuo fa-qi-ren zui-di ren-shu*, ("Minimal Number Requirement").

191 *Proceedings of the 6th Meeting of the 7th Session of the Legislative Yuan*, MINISTRY OF ECONOMIC AFFAIRS (Oct. 27, 1999), https://translate.google.com/translate?hl=en&sl=zh-TW&u=http://lci.ly.gov.tw/LyLCEW/agenda/02/pdf/07/06/06/LCEWA01_070606_00061.pdf&prev=search.

192 *See* CIVIL ASSOCIATIONS ACT, arts. 1, 8 (the Mandarin text of the CAA found at http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=D0050091; the English text found at http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0050091).

193 *See infra* Part III.D (describing the formation of the ACMA).

194 *See id*.

195 *See* Announcement of Decision *zhi-zhe-zi* No. 10516001450 (社團法人台灣音樂著作權人聯合總會, *she-tuan fa-ren tai-wan yin-yue zhe-zuo-quan-ren lian-he zong-hui*), TIPO (Feb. 24, 2016), https://www.tipo.gov.tw/mp.asp?mp=2.

196 *See* Decision *zhi-zhe-zi* No. 10516001450, TIPO (Feb. 24, 2016), https://www.TIPO.gov.tw/dl.asp?fileName=622514513222.pdf.

197 *See* Revocation of TMCS' CMO Permit and Dissolution of the TMCS (社團法人台灣音樂著作權協會, *she-tuan fa-ren tai-wan yin-yue zhe-zuo-quan xie-hui*), TIPO, https://www.TIPO.gov.tw/ct.asp?xItem=646738&ctNode=7127&mp=3 (last visited Mar. 30, 2018).

198 *See* Decision *zhi-zhe-zi* No. 10616004910, TIPO (Oct. 27, 2017), *available at* https://www.TIPO.gov.tw/dl.asp?filename=710319361476.pdf (last visited Mar. 30, 2018).

199 There is a pending CMO application for creating Taiwan Original Music Copyright Association (社團法人台灣原創音樂著作權聯合總會, *she-tuan fa-ren tai-wan yuan-chuang yin-le zhe-zuo-quan lian-he zong-hui*, also known as "AOMT") filed on August 2, 2016 by the former leader of MCAT. *See* Zhang Yuying, *supra* note 58, at 3-4.

indicating TIPO's disfavor for approving new CMOs.[200] On May 16, 2017, TIPO held a public hearing on whether to permit ACMA and another CMO applicant.[201] The hearing invited user groups as participants, but some user groups were merely given a chance to oppose the formation of new CMOs.[202] The second public event was held on June 5, 2017 to introduce some existing CMOs,[203] which implies TIPO's intent to divert some potential or initial members of two new CMO applicants to existing CMOs.[204]

IV. POSSIBLE VIOLATION OF ARTICLE 13 OF THE TRIPS AGREEMENT

A. Article 13 Analysis

Article 13 of the TRIPS Agreement provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right-holder."[205] The analysis under Article 13 is a three-step test.[206] The first step is to examine whether an alleged limitation falls within "certain special cases."[207] The second step is to determine whether the alleged limitation conflicts with a normal exploitation of the work.[208] The third and final step is to determine whether the alleged limitation unreasonably prejudices the legitimate interests of the copyright owner.[209]

Copyright collective management may be considered a limitation on copyright owners in some circumstances.[210] Some scholarsand have described two types of collective management which erode copyright owners' freedom of contract.[211] The first type is mandatory collective management imposed by law.[212] The second type is called "extended collected licensing" ("ECL").[213] Here, the law mandates a CMO to represent a non-member if such non-member's work falls within a designated class of works or rights.[214] Taiwan's approach may be a third type of collective management.[215] On one hand, the practice of

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[200] *See infra* Part III.D.

[201] Yuying, *supra* note 58 at 1.

[202] *Id.* at 9-13, app. 1 (showing some user groups opposing approval of new CMOs and other groups supporting the approval).

[203] *See The 2018 APEC Workshop on the Best Licensing Practices of Collective Management Organizations to MSMEs Comes to a Satisfying* End, TIPO (Nov. 26, 2018), https://www.tipo.gov.tw/ct.asp?xItem=687902&ctNode=6687&mp=2.

[204] *See supra* Part III.D.

[205] TRIPS Agreement, *supra* note 58, art. 13.

[206] *See generally* Helen A. Christakos, *WTO Panel Report on Section 110(5)* of the U.S. Copyright Act, 17 BERKLEY TECH. L. J. 34 (2002).

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] Séverine Dusollier & Caroline Colin, *Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?* 34 COLUM. J.L. & ARTS 809, 818 (2011).

[211] *Id.*

[212] *Id.*

[213] *Id*.

[214] *Id.*

[215] *See infra* Part IV.A.

copyright collective management in Taiwan has a compulsory nature. On the other hand, a CMO is mandated to represent a non-member upon a request from such non-member.

The Taiwan's approach to CCM may violate Article 13 of the TRIPS Agreement.[216] The WTO Panel Report in *United States—Article 110(5) of the U.S. Copyright Act* ("Section 110(5) Panel Report") states that the first step of the tree-step test requires that a limitation "in national legislation should be clearly defined and should be narrow in its scope and reach."[217] This first step is met even if a limitation "pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned."[218] Ultimately, the first step asks two questions: (1) whether the limitation has been "clearly defined" and (2) whether the limitation is "narrow in scope, *inter alia*, with respect to their reach."[219] Taiwan's approach to copyright collective management may pass the first step, because the compulsory licensing scheme created by the CMOA is limited to a copyright owner who joins a CMO.[220]

Regarding the second step, the Section 110(5) Panel Report considers "exploitation" of musical works as "the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works."[221] But, "normal exploitation" means "something less than full use of an exclusive right."[222] The two-step analysis must "determine whether a particular use constitutes a normal exploitation of the exclusive rights."[223] Then, the question becomes whether an alleged limitation "enter[s] into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprives them of significant or tangible commercial gains."[224]

Here, the second step is hardly satisfied because of the licensing practice induced by the CMOA. The statute concerning a CMO's ability to enforce copyright results in a practice where all CMOs demand an exclusive license from copyright owners.[225] That makes the copyright licensing practice inflexible for both copyright owners and users.[226] For instance, a normal exploitation of a work occurs when a user and a copyright owner negotiate licensing terms concerning different uses.[227] However, if a film director wants to use a song in his movie, he cannot directly negotiate a licensing contract with a songwriter to cover all uses during the exploitation of the film.[228] Under the CMOA regime, the songwriter may only

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216 *Id.*

217 *See* Christakos, *supra* note 206.

218 *Id.*

219 *Id.*

220 *See supra* Part II.

221 Helen A. Christakos, *supra* note 206.

222 *Id*.

223 *Id.*

224 *See* Christakos, *supra* note 206. *See also* Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 295 (2007) ("[A] violation of the second prong of the three-step test will be triggered if any given limitation on copyright causes the right holder to suffer 'significant or tangible' commercial losses in either the current or potential market.").

225 *See* CMOA, *supra* note 6, art. 39.

226 *See infra* Part IV.A.

227 *See* Tyler Allen, *5 Steps to Music Licensing Success*, SONIC BID Blog, http://blog.sonicbids.com/5-steps-to-music-licensing-success (last visited Dec. 13, 2018) (discussing music licensing practices).

228 *See Netflix Announces A Taiwanese Tale of Two* Cities, NETFLIX, https://media.netflix.com/en/press-releases/netflix-announces-a-taiwanese-tale-of-two-cities (last visited Dec. 8, 2018).

license a right of reproduction or a right to make a derivative work. Regarding public performance, public transmission, and public broadcasting, the film director must get a license from the songwriter's CMO.[229] However, the royalty income from such license will be shared by the CMO through an administrative fee. If such license is based on general licensing, the income will be shared with other members through the annual royalty distribution.

Another normal exploitation is that a copyright owner may use his or her work unless the owner exclusively licenses his or her work to another entity.[230] For instance, under Article 26 of the TCA, a songwriter who is not a member of any CMO can perform his or her song publicly.[231] But, if the songwriter has an exclusive recording contract with a record company that happens to be a member of a CMO, the songwriter cannot sing the song in public without acquiring a license of public performance from such CMO.[232] Due to the exclusive-licensing practice, the CMO considers itself as the only entity that can exercise a right of public performance of a member's work. The CMO also considers the exclusive recording contract equivalent to an exclusive license of the songwriter's work to the record company.[233] Therefore, the songwriter unintentionally licenses his or her copyright exclusively to the CMO through the record company.[234] The songwriter is therefore barred from distributing his or her work.

Regarding the third step, whether "prejudice to the legitimate interests of right holders reaches an unreasonable level" depends on whether a limitation "causes or has the potential to cause an unreasonable loss of income to the copyright owner."[235] Again, the third step is hardly met.[236] To enjoy full copyright protection, a copyright owner has to join a CMO.[237] But, the TIPO sets a high bar for the creation of a CMO; therefore, there are only four choices.[238] Without a chance of forming a new CMO, copyright owners join those existing CMOs so the number of members of each existing CMO grows continuously.[239] This may result in the lowering of each member's average share of annual royalty income if the

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229 *See* Alden-Rochelle, Inc., v. Am. Soc. of Composers, Authors & Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948) (describing a film maker who asked a musical composer, a member of a CMO, to create or license her music for the film, but the musical composer could only license the recording right to the film maker; the musical composer's performing right had been assigned to the CMO, so she could not license the performing right to the film maker, thus, the film could only be exhibited in theatres that acquire a performing right license from the CMO).

230 TAIWAN COPYRIGHT ACT, *supra* note 31, art. 37.

231 *Id.* art. 26.

232 *See* Editors, *Eleven Big Musical Incidents in 2017 that Must be Discussed*, BLOW, (Feb. 6, 2018) https://blow.streetvoice.com/38441-2017%E5%B9%B4%E5%88%BA%E6%BF%80%E6%88%91%E5%80%91%E8%A8%8E%E8%AB%96%E9%9F%B3%E6%A8%82%E7%9A%84%E5%8D%81%E4%B8%80%E4%BB%B6%E5%A4%A7%E4%BA%8B/ (last visited Apr. 14, 2018) ("In the story, one songwriter's record company was a CMO's member. So, the CMO asked the songwriter to pay a licensing fee for public performance of his songs used in his concert. The CMO asserted that the fee may be waived if the songwriter also joins the CMO").

233 *Id*.

234 *Id*.

235 *See* Christakos, *supra* note206.

236 *See supra* Part IV.A.

237 *See supra* Part III.B.

238 *See supra* Part III.D.

239 *Id*.

income does not increase sufficiently to cover additional shares of new members.[240] In addition, when a user group challenges a CMO's license fee, the TIPO usually decides to reduce the fee.[241] Lastly, due to the exclusive-licensing practice, a CMO member is not able to make a profit from their own licensing of public transmission, public broadcasting, and public performance.[242] Thus, under the CMOA regime, a copyright owner loses an unreasonable amount of loyalty income expected from normal exploitation.[243]

B. Call For a Reform

Taiwan's approach to CCM ignores antitrust concerns about the exclusive-licensing practice of CMOs.[244] Unlike Taiwan, the United States considers such exclusive-licensing practices as an antitrust violation.[245] Section 1 of the Sherman Act criminalizes an act of unreasonable restraint of trade or commerce.[246] A CMO violates Section 1 by prohibiting its members from licensing their works directly to users, because such prohibition prevents competition among its members.[247] Section 2 of the Sherman Act criminalizes an act of monopolization or an attempt to monopolize.[248] A CMO violates Section 2 by requiring its members to sign an exclusive license because the combination of different owners' copyrights granted by the copyright laws as a monopoly is unlawful.[249] Taiwan's Fair Trade Act (公平

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[240] For example, if the annual royalty income is 1000 NTD and there are 10 members, each member will earn 100 NTD. If the income is unchanged and the number of the members grows to 20, each member will earn 50 NTD.

[241] *See* Wen-Chi Lai & Tseng-Yi Chen, *The Review of the Current Enforcement of Copyright Collective Management Organization Act-Focus on the Process Public Announcements and Review of Tariff*, 155 INTELLECTUAL PROPERTY RIGHT JOURNAL 41, 43-55 (2011) (listing TIPO's decisions concerning complaints against licensing programs of some CMOs), https://www.TIPO.gov.tw/public/AttachmentORG/%E7%8F%BE%E8%A1%8C%E8%91%97%E4%BD%9C%E6%AC%8A%E9%9B%86%E9%AB%94%E7%AE%A1%E7%90%86%E5%9C%98%E9%AB%94%E6%A2%9D%E4%BE%8B%E5%AF%A6%E5%8B%99%E5%9F%B7%E8%A1%8C%E7%9A%84%E6%AA%A2%E8%A8%8E%E8%88%87%E5%BB%BA%E8%AD%B0%E2%80%94%E2%80%94%E4%BB%A5%E4%BD%BF%E7%94%A8%E5%A0%B1%E9%85%AC%E7%8E%87%E5%85%AC%E5%91%8A%E5%8F%8A%E5%AF%A9%E8%AD%B0%E7%82%BA%E4%B8%AD%E5%BF%83.pdf (last visited Dec. 8, 2018); *see also* TIPO's Database of Licensing Fee Decisions, https://www.TIPO.gov.tw/ct.asp?xItem=219684&CtNode=7005&mp=1.

[242] *See supra* Part III.C; see also TAIWAN COPYRIGHT ACT, *supra* note 31 art. 37.

[243] *See supra* Part IV.A.

[244] *See infra* Part IV.B.

[245] *See* Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 197-98 (S.D.N.Y. 2014) (describing the history of the Department of Justice's antitrust enforcement against performing right organizations). *See also* Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers, 620 F.2d 930, 933 (2d Cir. 1980) ("The amended consent decree [resulting from governmental antitrust litigation against ASCAP] permits ASCAP to obtain only non-exclusive rights from its member-composers and enjoins ASCAP from limiting, restricting, or interfering with the right of any member to issue directly to any user a non-exclusive license for performing rights.").

[246] *See* 15 U.S.C. § 1. *See also* William C. Holmes, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 5:1 (Westlaw).

[247] *See* Meredith Corp., *supra* note 245 at 197-98.

[248] *See*15 U.S.C. § 2. *See also* Holmes, *supra* note 246, § 6:1.

[249] *Meredith Corp.*, 1 F., *supra* note at 197-98.

交易法, *gong-ping jiao-yi fa*)[250] has provisions equivalent to the Sherman Act,[251] but CMOs have not been subject to any antitrust scrutiny.

In light of the U.S. approach, the law and policy of the CMOA should be amended in five aspects.[252] First, the CMOA should include a provision that prohibits a CMO from restraining its members from licensing their copyrights to users. Using either an exclusive copyright license or a contractual agreement without such exclusive copyright license to achieve such restraint should be banned. Second, the COMA should protect a copyright owner's right to make a licensing deal with users on his or her own. The first suggestion expressly bans a CMO from becoming a monopoly of collective copyrights, while the second suggestion proactively recognizes a copyright owner's right to make his or her own deal.

Third, Article 39 of the CMOA must be amended to grant to a CMO a standing to initiate a criminal investigation.[253] The exclusive-licensing practice results from a necessity for a CMO to pursue a criminal procedure as a victim of copyright crime.[254] Hence, the CMOA should allow a CMO on behalf of its members to bring a petition to a criminal prosecutor's office to start a criminal investigation concerning a copyright crime that harms member's copyright. This way, a CMO can continue to use criminal law enforcement to help royalty collection.

Fourth, the TIPO should lower the Minimal Number Requirement to the normal standard of 30 initial members to encourage diversity in CMOs.[255] Consequently, songwriters within the same musical category may easily form a CMO of their own category rather than join one existing CMO that includes other songwriters of different musical categories. On the other hand, users interested in a particular musical category can acquire a license from a CMO that administrates musical works of such musical category.[256] Copyright owners can also charge licensing fees based on the true value of their works.

Lastly, the CMOA should permit a songwriter to join different CMOs. For example, if a songwriter can create songs that fall into different categories, such as rock and roll, rhythm and blues, or hip hop, he or she can authorize different CMOs, each of which administers musical works of a particular musical category to represent his or her interests in different types of musical work. But, the same song cannot be administrated by different CMOs to avoid duplication of copyright licensing of such same song. The CMOA regime may be transformed from collective management of copyright owners to true collective management of copyrighted works.[257]

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[250] FAIR TRADE ACT, (Jun. 06, 2014); *Fair Trade Act*, LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA, https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0150002 (last visited Dec.8, 2018) [hereinafter FTA].

[251] *See generally* Dr. Pijan Wu & Caroline Thomas, *Taiwan's Fair Trade Act: Achieving the "Right" Balance?*, 26 NW. J. INT'L L. & BUS. 643, 649-51 (2006). *See also* FTA, *supra* note 250, art. 9, 14.

[252] *See supra* Part IV.B.

[253] CMOA, *supra* note 6, art. 39.

[254] *See supra* Part III.C.

[255] *See* EXPORT, *supra* note 31.

[256] See, e.g., Broad. Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758, 767-68 (1981) (describing a form of music licensing based on a category of music, such as "country and western").

[257] *See supra* Part III.C.

V. CONCLUSION

Taiwan's approach to copyright collective management is compulsory licensing.[258] Copyright owners have to join a CMO to enjoy full copyright protection. But, the TIPO determines CMO's licensing fees ultimately. Because of the exclusive-licensing practice, a CMO member loses her ability to make her own copyright deal. That results in a practical inconvenience for both users and copyright owners if they only want a bilateral agreement.[259] Consequently, the CMOA regime may violate the three-step test under Article 13 of the TRIPS Agreement.[260]

There should be a reform on the CMOA with a change of the TIPO's regulatory scheme. The CMOA should include provisions barring a CMO from limiting its members' right to make their own copyright deal. The amended CMOA should promote diversity of CMOs by allowing formation of CMOs of different musical categories. The Minimal Number Requirement should be abrogated. Copyright owners should be permitted to join different CMOs as long as only one CMO administrates the same work. Eventually, the CCM in Taiwan may become a songwriter-friendly regime.

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[258] *See* EXPORT, *supra* note 31.

[259] *See supra* Part IV.A.

[260] *See* TRIPS AGREEMENT, *supra* note 61.