

Collective Management of Music Copyright in China
-- A Comparative Analysis of Limiting Monopolistic Power of Musical
Collective Management Organisations in China and the United States

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Abstract

This paper discusses regulations limiting the monopolistic power of the Music Copyright Society of China (MCSC) in the context of the legal framework of the collective management of music copyright in China.² The paper identifies weak regulations as the core problem of misusing monopolistic power of the MCSC. Using a comparative approach, the paper analyses United States regulations on the monopoly of musical collective management organisations (CMOs). This paper challenges the notion of decreasing the monopolistic power of the MCSC by establishing more musical CMOs in China. This paper advocates that whilst the Chinese *Antitrust Law* cannot be applied to regulate the monopoly of the MCSC, improving the current *Regulations on Copyright Collective Administration (RCCA)* is an alternative option.

A Introduction

An intermediary, which works as a collective management organisation (CMO), provides a way for managing fragmented copyright of large numbers of individual music creators.³ Under current international and domestic regulations, copyright is based on individualistic grounds and gives authors exclusive rights to their works.⁴ The sub-rights that authors have, including those related to reproduction, broadcasting

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² 'China' in this paper is limited to mainland China.

³ Josef Drexel, 'Competition in the Field of Collective Management: Preferring 'Creative Competition' to Allocative Efficiency in European Copyright Law' in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2007) 255.

⁴ Jens Schovsbo, 'the Necessity to Collectivise Copyright - and Dangers thereof' in Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (Edward Elgar Publishing, 2012) 166, 167.

and communication through information networks are known as ‘right fragments’.⁵ The right fragments on a piece of music are usually owned by different composers and lyricists, making it difficult and expensive for authors to directly manage these rights.⁶ Collective management of copyright is a mechanism to reduce transaction costs and improve the efficiency of dealing with right fragmentation.⁷

Most experts agree that CMOs facilitates the efficient management of copyright for the benefit of their members but paradoxically, these organisations are also placed in a monopolistic position that could be detrimental to the interests of members.⁸ Without appropriate legal devices, CMOs could abuse their monopolistic position and impair members’ rights. Thus, regulations are necessary to reduce the risk of CMOs misusing their monopolistic power.⁹ This paper argues that the regulatory framework on collective management in China does not prevent the misuse of the monopoly of the MCSC and should be amended to attain this goal.

This paper aims to address the regulations on limiting the monopolistic power of the MCSC to better serve individual composers and lyricists, who are the ‘real’ music creators. Weak regulatory supervision of the MCSC is one of the most important reasons resulting in problems of the MCSC’s work. Considering that China is a relative newcomer in the field of copyright, this research will use a comparative law approach in order to contrast China with the United States, which has a longer history in copyright law and where antitrust rules play a significant role in limiting CMOs’ monopolistic power, in contrast to the situation in China.¹⁰

This paper is comprised of five sections. The first part provides an introduction. The

⁵ Daniel Gervais calls this ‘fragmentation’, which means the lack of cohesion, standardisation and effective organisation of both copyright law and collective management. For more details, see Daniel Gervais, ‘the Evolving Role(s) of Copyright Collectives’ in Christoph Beat Graber et al (eds), *Digital Rights Management: the End of Collecting Societies?* (Staempfli Publisher Ltd., Juris Publishing, Inc., Bruylant Ltd. Brussels, Ant. N. Sakkoulas Athens, 2005), 27.

⁶ Rebecca Giblin and Kimberlee Weatherall, *What if we could reimagine copyright?* (Australian National University Press, 2017) 154.

⁷ Richard Watt, ‘Copyright Collectives: Some Basic Economic Theory’ in Richard Watt (ed), *Handbook on the Economics of Copyright : a Guide for Students and Teachers* (Cheltenham, UK ; Northampton, MA, USA : Edward Elgar, 2014) 167, 169.

⁸ Ariel Katz, ‘The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights’ (2005) 1(3) *Journal of Competition Law and Economics* 541, 545.

⁹ Daniel Gervais, ‘Keynote: The Landscape of Collective Management Schemes’ (2010) 34 *Columbia Journal of Law & the Arts* 591, 605.

¹⁰ See Part C of this paper.

second part analyses the legal framework of the Chinese collective management system, and identifies weak regulations on limiting the monopoly of the CMOs. The third part illustrates how the United States regulates the monopolistic power of musical CMOs via consent decrees. In the fourth part, using a comparative approach, this paper evaluates whether China can regulate the MCSC by establishing more musical CMOs, and discusses the possibility of using antitrust rules to regulate the MCSC's monopoly. In addition, this part identifies the lessons that China could learn from the United States to improve its own regulations. The final part is the conclusion.

B Collective Management of Music Copyright in China

1 Legal Framework on Collective Management of Copyright

China has a short history of less than three decades of copyright legislation.¹¹ The first Chinese *Copyright Law* (1990)¹² did not regulate collective management. The *Implementing Regulations of the Copyright Law of the People's Republic of China* (*IRCL* (1991)) in the following year provided an option of collective management.¹³ The *IRCL* (1991) regulated that copyright owners could exercise their copyright through collective management,¹⁴ and the National Copyright Administration of the P.R.C (the NCAC) is in charge of approving the establishment of CMOs.¹⁵ Before 2001 when the Chinese *Copyright Law* was amended, only these two articles of the *IRCL* (1991) pertained to collective management of copyright.

The collective management system was not structured from the economic aspect of copyright. After the China Central Television was established in 1950s, most of the system's players like publishers and broadcasters as well as copyright owners were

¹¹ The legal development of intellectual property in China dates from 1900s. More information about the intellectual property in China see Ken Shao, 'Legal Orientalism? The Poor Chinese Culture and US-China Intellectual Property Disputes since the Late Qing Dynasty' (2019) 9(2) *Queen Mary Journal of Intellectual Property* 134. After 1970s' economic reform, China started the legal reforms.

¹² 《中华人民共和国著作权法》 [Copyright Law of the People's Republic of China](People's Republic of China) National People's Congress, 7 September 1991.

¹³ 《中华人民共和国著作权法实施条例》 [Regulations for the Implementation of the Copyright Law of the People's Republic of China](People's Republic of China) National Copyright Administration of the People's Republic of China, 30 May 1991. The *IRCL* (1991) was abolished in 2002 when the *IRCL* (2002) was published. The *IRCL* (2002) was revised in 2011 and 2013 respectively.

¹⁴ Article 54 of the *IRCL* (1991)

¹⁵ Article 7 of the *IRCL* (1991).

public institutions or they worked for public entities.¹⁶ Copyright transactions were not completed within a market-economy framework, and government departments which supervised those public institutions would solve the problems if there were disputes.¹⁷ The government managed and controlled the majority of the industry under a planned-economy model.¹⁸ Collective management was not in huge demand at that time.¹⁹ In addition, issues about administrative regulations for the operation of CMOs are not high on the agenda of the country's overall development.²⁰

In order to facilitate rapid economic development, China made changes to transform its planned economy into a market economy.²¹ These changes were also accompanied with legal reforms. Since 2001, there have been rapid development of the collective management of copyright. The Chinese *Copyright Law* (2001)²² included the notion of collective management.²³ The law introduced three points about collective management of copyright: Firstly, copyright owners could authorise a CMO to exercise their copyright; secondly, these organisations claimed copyright on their own name; thirdly, CMOs were non-profit organisations.²⁴ This limited regulation of collective management did not provide a clear guidance to CMOs or copyright

¹⁶ The China Central Television, which is one of the biggest TV stations in China, is a public institution. Article 2 of Interim Regulation on the Registration of Public Institutions (2004) 《事业单位登记管理暂行条例》 defines 'public institutions' as the public service organisations that are established by the state organs or other organisations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene.'

¹⁷ 熊琦 [Xiong Qi], '《著作权集体管理制度本土价值重塑》 [Examining the Original Value of Collective Management Rules]' (2016) 3 *法制与社会发展 Law and Social Development* 96, 104.

¹⁸ For a discussion of China's transformation from a planned economy to a market economy see Xiaoming Huang, *Modern Economic Development in Japan and China: Developmentalism, Capitalism, and the World Economic System* (Palgrave Macmillan, 2013). Also see Ching Kwan Lee, 'A Chinese Developmental State: Miracle or Mirage?' in Michelle Williams (ed), *The End of the Developmental State?* (Routledge, 2014).

¹⁹ 熊琦 [Xiong Qi], above n 17, 103.

²⁰ Zonghui Li and Wenting Cheng, 'Practices of Collective Management of Copyright on Musical Works and Related Rights on Audio-Video Products in China' (2015) 8 *International Journal of Intellectual Property Management* 78, 79.

²¹ See Alvin Y. So and Yin-wah Chu, *The Global Rise of China* (Polity Press, 2016).

²² 《中华人民共和国著作权法》 [Copyright Law of the People's Republic of China] (People's Republic of China) National People's Congress, 27 October 2001. The main goal of the 2001 amendment was to comply with the requirements to join the WTO, which replaced GATT.

²³ The legislation was amended in 2010. The Chinese *Copyright Law* (2010) did not make any changes on the regulations of collective management.

²⁴ Article 8 of the Chinese *Copyright Law* (2001). Then collective management of copyright was deleted in the *IRCL* (2002).

owners.²⁵ However, it was a good start and at least the legislation included collective management for the first time. Specific legal rules on collective management of copyright in China were not enacted until 2004 - the Regulations on Copyright Collective Administration (*RCCA*).²⁶

There are two main models of collective management, depending on the number of CMOs in a country or area. The first one is the monopolistic model, which allows the establishment of a single CMO in each field (for example, one music CMO).²⁷ The other option is the competitive model with more than one CMO in each field.²⁸ There are profound differences in the regulatory models between Anglo-Saxon countries (common law system) and Continental European countries (civil law system).²⁹ Generally, Anglo-Saxon countries have no systematic regulations governing the CMOs' work.³⁰ On the contrary, most CMOs in Continental European countries are under permanent governmental supervision.³¹ In the monopolistic model, the establishment and maintenance of the monopolistic status of the CMO are granted by law, and the supervision aims at avoiding the CMOs misusing their monopolistic power.³² China followed the civil law system and chose to have only one CMO in every field (i.e. music, movies, etc.).

The Music Copyright Society of China (MCSC), established in 1992, is the only CMO

²⁵ All details about establishment of a CMO, its rights and obligations, collection and distribution of copyright licensing fees and supervision and management over a CMO shall be separately established by the State Council, see Article 8 of the Chinese *Copyright Law* (2001). State Council is the Central People's Government, of the People's Republic of China is the executive body of the supreme organ of state power; it is the supreme organ of State administration.

²⁶ 《著作权集体管理条例》 [Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 28 December 2004. As the first specific legal instrument, the *RCCA* (2004) established the legal framework of collective management of copyright, which regulates the establishment and structure of a CMO, activities of copyright collective management and supervision over copyright CMOs. The *RCCA* (2004) was revised in 2011 and 2013 respectively.

²⁷ Germany is an example, see Stanley M Besen, Sheila N Kirby and Steven C Salop, 'An Economic Analysis of Copyright Collectives' (1992) *Virginia Law Review* 383, 398.

²⁸ The United States is an example with more than two CMOs in public performing rights.

²⁹ Fuxiao Jiang and Daniel Gervais, 'Collective Management in China' in Daniel J. Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International, 3rd ed, 2016) 425, 431.

³⁰ Adolf Dietz, 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe' (2002) *Journal of the Copyright Society of the U.S.A* 897, 900.

³¹ Jiang and Gervais, above n 29, 431.

³² Ibid 431-2.

in music copyright in China.³³ From a legal perspective, the MCSC is a non-profit social organisation.³⁴ In practice, the collective management is more akin to collective 'administration'.³⁵ The MCSC operates more like an administrative agency rather than a 'real' CMO that advocates the interests of music copyright holders.³⁶ One of the reasons might be that the government tends to have administrative supervision on public management rather than rights protection, and monopoly plays a significant role after 1949.³⁷ Except for the monopolistic status granted by legislation, the MCSC has a strong monopolistic power in practice since the MCSC represents individual members on almost all economic sub copyright.³⁸

The combination of the MCSC's monopolistic position and inappropriate regulations has resulted in a sub-optimal protection of members' interests. For example, the MCSC sets unreasonable blanket licensing and conditions when the members try to withdraw from the organisation.³⁹ Furthermore, the MCSC has already extended collective management to non-members even though there have not been any

³³ Information about the MCSC can be accessed via <http://www.mcsc.com.cn/mL-5.html>. The MCSC works under the Article 8 of the Chinese *Copyright Law* (2010) and the *RCCA* (2013), and it is under the guidance and supervision of the NCAC.

³⁴ Article 8 of the Chinese *Copyright Law* (2001) regulates that a CMO is a non-profit organisation. Article 3 of the *RCCA* (2013): 'The term 'copyright collective administration organisation' in these regulations means an association which is established according to law for the benefit of right owners and which, with the right owners' authorisation, collectively administers their copyright or rights related to copyright.' Also see Article 2 of *Regulation on Registration and Administration of Social Organisations*: 'In these regulations 'social organization' means voluntary groups formed by Chinese citizens in order to realise a shared objective, according to their rules and to develop non-profit making activities.' Specifically, CMOs in China are social associations that meet the requirements to be considered a legal person and are created to achieve non-profit purposes or the common interests of members, see 《中华人民共和国民法总则》 [General Provisions of the Civil Law of the People's Republic of China] (People's Republic of China) National People's Congress, 15 March 2017.

³⁵ 熊琦 [Xiong Qi], above n 17, 104.

³⁶ Jiang Ye, 'Changing Tides of Collective Licensing in China' (2013) 21:3 *Michigan State International Law Review*, 744. For 'administrative' agency, it means that the MCSC focuses most of its efforts on administering matters that do not necessary translate in pecuniary benefits for members.

³⁷ 王慧 [Wang Hui], '《我国音乐作品著作权维权困境的制度反思 以著作权集体管理制度为视角》 [Examination on Difficulties of Protecting Music Copyright in China from the Pointview of Copyright Collective Management System]' (2015)(4) *电子知识产权 Electronic Intellectual Property* 41, 45.

³⁸ Including the right of reproduction, the right of public performance, right of broadcasting, the right of information network dissemination and other rights suitable for collective management, see Article 9 of the rules of the association via <http://www.mcsc.com.cn/infom-21-1.html>. This rule covers almost every right in the MCSC's power since this organisation does not clarify what rights are 'suitable for collective management'.

³⁹ 崔国斌 [Cui Guobin], '《著作权集体管理组织的反垄断控制》 [Antitrust Control on Copyright Collective Management Organisations]' (2005)(2) *清华法学 Tsinghua University Law Journal* 110, 124-33.

legislations on extended collective management in China.⁴⁰

2 Inadequate Regulation on Monopolistic Power of Music Copyright Collective Management

From a legislative perspective, the monopolistic power of the MCSC in China mainly comes from the *RCCA* (2013).⁴¹ The *RCCA* (2013) has rules for both maintaining and limiting the monopoly of CMOs. The following three sections (1, 2 and 3) will focus on how the *RCCA* facilitates the MCSC's monopolistic position whilst the sections that follow (4, 5 and 6) will discuss the rules designed to prevent any abuse of such position.

(1) **Supervisory authority.** The Copyright Administration Department of the State Council is responsible nationwide for supervising the work of copyright collective management.⁴² The NCAC is the department mandated to do the work according to the structure of the State Council.⁴³ Unfortunately, the *RCCA* (2013) does not clarify what the supervisory role of the NCAC should be in the field of collective management.

(2) **Establishment requirements.** There are strict conditions to establish a CMO in China. The business scope of the organisation cannot overlap or coincide with any of existing CMOs.⁴⁴ Thus, it is illegal to establish a new musical CMO because of the existence of the MCSC. In addition, an application for establishing a CMO needs to be submitted to the NCAC that will assess and approve it.⁴⁵ If the application is approved, the applicant must register the organisation in the Civil Affairs Department of the State Council in accordance with administrative regulations, within 30 days after getting the

⁴⁰ The MCSC claimed in Article 16 of its Association Rule: 'For the purpose of collective management, the association will collect and allocate licensing fees for music copyright holders who are not the members', which can be accessed via <http://www.mcsc.com.cn/infom-21-1.html>.

⁴¹ 《著作权集体管理条例》[Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013.

⁴² Ibid Article 5.

⁴³ See The State Council the People's Republic of China, *国务院组织机构 Ministries and Offices of the State Council, the P.R.C.* <<http://www.gov.cn/guowuyuan/zuzhi.htm>>. The NCAC is in charge of drafting policies about copyright management and protection and put it into practice in general.

⁴⁴ 《著作权集体管理条例》[Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013 Article 7. That means CMOs are monopolistic in numbers in each field. For example, the MCSC is the only CMO in music works, and the China Audio-video Copyright Association (the CAVCA) is the only CMO in recordings.

⁴⁵ Article 9 of the *RCCA* (2013).

permission licensed by the NCAC.⁴⁶ Securing double administrative approvals is difficult, making it hard for individuals to establish a new CMO. Whilst it is possible from a legal perspective, no current CMOs in China were established by individuals.

(3) Exclusive license from copyright owners to CMOs. Once a copyright owner agrees that a CMO manages their copyright, they are prevented to directly exercise those rights or authorise a third party to manage the rights stipulated in the agreement.⁴⁷ In other words, after copyright owners become members of the MCSC, they cannot directly license their copyright to music users, and all the authorisation has to be given via the MCSC. In addition, no other organisations or individuals can carry out activities of copyright collective management other than the CMOs established in accordance with the *RCCA* (2013).⁴⁸ In reality, part of the MCSC's work is conducted by a separate company, not the MCSC.⁴⁹ In other words, non-CMOs participate in the work of collective management in China, which infringes the regulation.

(4) Non-exclusive license from CMOs to users. A CMO should not conclude exclusive licensing contracts with users.⁵⁰ This rule may appear to limit the MCSC's market power and is good for music users. However, this provision has to be reconsidered in the context of the limited participation of copyright owners in the MCSC, which only has about 9,000 members.⁵¹ The non-exclusive license does not work well since music users can only get limited use of music from the MCSC.

(5) Licensing fees. A CMO must follow the licensing fee rates published by the NCAC

⁴⁶ Article 10 of the *RCCA* (2013). Since the CMOs are defined as 'social organisations', the procedures to register the CMO should follow 《社会团体登记管理条例》 [Regulations on the Registration and Management of Social Organisations] the State Council, 6 February 2016.

⁴⁷ 《著作权集体管理条例》 [Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013 Article 20.

⁴⁸ Article 6 of the *RCCA* 2013. Similar prohibition has been published by the NCAC in 2005, see <http://www.ncac.gov.cn/chinacopyright/contents/483/17636.html>

⁴⁹ See http://morp.mcsc.com.cn/www_new/s11.php

⁵⁰ 《著作权集体管理条例》 [Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013 Article 23.

⁵¹ In comparison with the musical CMOs in the United States, the MCSC in China has a smaller scale compared to the American musical CMOs. In 2017, the MCSC only has 8907 members compared with nearly 650,000 members in ASCAP in the United States. Data comes from the 2017 annual report of the MCSC and 2017 annual report of the ASCAP.

and negotiate with a user upon the accurate amount of licensing fees.⁵² Unfortunately, what the NCAC does is merely to announce the licensing rates of copyright submitted to it by the MCSC with no changes or comments.⁵³ The NCAC does not play the role of setting prices and supervising the licence.

(6) **Supervision.** Operations of a CMO are under the supervision of the NCAC and the civil affairs department of the State Council.⁵⁴ Regrettably, the supervision provisions are too vague for the NCAC to effectively limit the monopolistic power of the CMOs. In addition, in practice, there are limited instances of civil supervision on the MCSC's work.⁵⁵

Overall, the regulations tend to limit competition rather than prevent abuses of the monopoly from happening. They seem not only to limit but also to prevent competition entirely. In addition, the third amendment of the Chinese *Copyright Law*⁵⁶ is trying to expand the monopolistic power of CMOs by establishing extended collective management to stand for more copyright owners,⁵⁷ which makes the situation worse. The current situation and potential abuses of the MCSC's monopoly call for improvements of efficient supervisory system to protect individual creators' benefits.⁵⁸

C Regulations on Musical CMOs in the United States

Different from China which only has a single CMO for music works, the United States has the largest music industry and the highest music copyright revenues in the world with a competitive model of collective management. The American Society of

⁵² 《著作权集体管理条例》[Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013 Article 25.

⁵³ The rates that the NCAC are the totally same as the MCSC published on its website, see the NCAC's website via <http://www.ncac.gov.cn/chinacopyright/contents/483/17695.html> and the MCSC's website via <http://www.mcsc.com.cn/im-57-333.html>.

⁵⁴ 《著作权集体管理条例》[Regulations on Copyright Collective Administration](People's Republic of China) the State Council, 7 December 2013. The Articles include Article 31, Article 37 and Article 38.

⁵⁵ There have not been any intervention from the Civil Affairs Department in operation of the MCSC and other CMOs in China, so this paper will only focus on administrative supervision from the NCAC.

⁵⁶ See 中华人民共和国国家版权局 [National Copyright Administration of the People's Republic of China], '《关于〈中华人民共和国著作权法〉(修改草案)的简要说明》[*Brief Explanation about the Amendment of the Copyright Law of the People's Republic of China*]' (2012) <<http://www.ncac.gov.cn/chinacopyright/contents/483/17745.html>>.

⁵⁷ 熊琦 [Xiong Qi], above n 17, 97. Also see 汤兆志 [Tang Yaozhi], '中国著作权集体管理法律制度的理论与实践[Theory and Practice of Copyright Collective Management Legal System in China]' (2014)(3) *中国出版 China Publishing Journal* 21, 22.

⁵⁸ Jiang and Gervais, above n 29, 441.

Composers, Authors, and Publishers (ASCAP) and the Broadcast Music, Inc. (BMI) manage a majority of the music copyright in the country.⁵⁹ Copyright owners are able to choose different CMOs.⁶⁰ The competition between ASCAP and BMI, two musical CMOs in the United States, has benefitted songwriters for two reasons: Firstly, competition brings benefits of transactions.⁶¹ Secondly, a single organisation may not cover everything.⁶² For example, the comparatively newer BMI embraced jazz and country music – two categories that the ASCAP did not include in the 1940s and 1950s.⁶³ However, the CMOs tend to create a monopoly - a conduct which is under close scrutiny in the United States, as there is the danger of misusing the monopoly.⁶⁴ Different from China, there is no a specific scheme for the supervision of collective management of copyright in the United States, and limitations to the monopolistic power of musical CMOs have been established via antitrust legislation.⁶⁵ Since the ASCAP and the BMI together maintain a monopoly over the licensing of musical performance rights, their practices have been challenged under United States antitrust laws over years.⁶⁶

1 Antitrust Enforcement in Collective Management of Music Copyright in the United States

The antitrust rules in the United States cover almost everything in the country, including regulating the musical CMOs' operations. The *Sherman Act*,⁶⁷ on a fundamental level, applies to “every person” who engages in prohibited practices which lead to a “restraint of trade or commerce among the several states, or with

⁵⁹ The ASCAP and the BMI are performing rights organisations (PROs) that manage public performing rights for songwriters and publishers, similar to the MCSC in China. This paper will call them as ‘Collective Management Organisations (CMOs)’ in case of confusion. There are other organisations and companies playing similar roles of collective management of music copyright in the United States. Because of limited space, this paper will only analyse the ASCAP and the BMI, two musical CMOs that work under consent decrees.

⁶⁰ 崔国斌 [Cui Guobin], above n 39, 114.

⁶¹ The elementary theory indicates that party A will get a better deal with party B if A has a possible alternative trading partner C.

⁶² Robert P Merges, 'The Continuing Vitality of Music Performance Rights Organizations' (2008), 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870>.

⁶³ More information can be found in John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy* (University Press of America, 1985).

⁶⁴ See Yee Wah Chin, 'Copyright Collective Management in the twenty-first Century from a Competition Law Perspective' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press, 2014) 269.

⁶⁵ The following part introduces how the United States regulate the monopolistic power of musical CMOs.

⁶⁶ Jay M Fujitani, 'Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation' (1984) 72 *California Law Review* 103, 103.

⁶⁷ 15 USC §§ 1-7. This is usually named as ‘the Sherman Act’.

foreign nations” either by combining with competitors or attempting to monopolise or conspiring to monopolise.⁶⁸ If a musical CMO acts as a joint selling agent for its members, it falls within the scope of § 1 of the *Sherman Act*.⁶⁹ In addition, Section 7 of the *Clayton Act*⁷⁰ prohibits acquisitions of stock that may substantially lessen competition or tend to create a monopoly.⁷¹ The collectiveness of CMOs would lessen competition and those CMOs could, in principle, infringe antitrust law.⁷²

From a historical perspective, the development of musical CMOs in the United States has been associated with antitrust complaints from the Department of Justice (DOJ).⁷³ The Antitrust Division within the DOJ is responsible for the enforcement of antitrust legislation in the United States.⁷⁴ Exercising its power, the DOJ has dealt with the anti-competitive behaviour from CMOs.

In the early stage of collective management in the United States, it was doubted that copyright owners could be allowed to join an entity and grant that entity rights to manage their copyright, and many were hostile to this idea.⁷⁵ Although members of the ASCAP were granted a monopoly to their copyrighted work by the copyright law, it was unlawful for those copyright holders to combine their rights by any agreement or arrangement, even if it was for better preserving their property rights.⁷⁶ The basic concern is that rights holders may charge higher prices to broadcasters when they acted collectively, compared to setting prices independently.⁷⁷ In addition, being as monopolists, CMOs often set different prices with discriminations to different classes of music users.⁷⁸ The DOJ took the position that the ASCAP’s activities infringed

⁶⁸ 15 USC §§ 1-2.

⁶⁹ 15 USC § 1.

⁷⁰ 15 USC §§ 12–27.

⁷¹ 15 USC § 18.

⁷² Chin, above n 64, 269-70.

⁷³ See Joseph P Escalante, 'ASCAP, BMI, and the Sherman Act: Are Today's Top-Stars in Bed with the Blanket License' (1994) 22 *Western State University Law Review* 75, 76-8.

⁷⁴ Major function of the Antitrust Division can be accessed via <https://www.justice.gov/jmd/organization-mission-and-functions-manual-antitrust-division>

⁷⁵ Martin Miernicki, *Collective Management of Copyrights between Competition, Regulation, and Monopolism: A Comparison of European and U.S. Approaches to Collective Management Organizations* (Nomos Verlagsgesellschaft, 2017) 96.

⁷⁶ See, eg, *Alden-Rochelle, Inc., et al. v. American Society of Composers, Authors and Publishers et al.*, 80 F. Supp. 888 (SD NY, 1948).

⁷⁷ C.Scott Hemphill, 'Competition and the Collective Management of Copyright' (2011) *Columbia Journal of Law and the Arts* 645, 646.

⁷⁸ Katz, above n 8, 548-9.

antitrust law.⁷⁹

The ASCAP, as the single organisation for managing public performance licenses, covered the majority of musical compositions.⁸⁰ The ASCAP's license revenues grew notably in the 1920s when music made its way to broadcast radio.⁸¹ In 1934, increasing market power resulted in the first antitrust legal action by the DOJ's Antitrust Division against the ASCAP for violation of the *Sherman Act*.⁸² The litigation ended when the District Court for the Southern District of New York approved the first consent decree agreed between the United States, represented by the DOJ (plaintiff) and the ASCAP (defendant) in 1941.⁸³ The reasons used by the DOJ to terminate the first litigation against the ASCAP via consent orders are still valid today. This is, CMOs are free to act on the market as long as their practices are justifiable under antitrust law, the boundaries of which are more specifically defined by consent decrees.⁸⁴ Later, the same strategy was applied to the second CMO - the BMI.⁸⁵

2 Consent Decrees between the DOJ and Musical CMOs

A consent decree (or consent judgment) is an agreement or settlement between two or more parties to solve disputes between them and incorporated into a final judgement.⁸⁶ The settlement stops the defendant from the government's antitrust claims based on conduct covered by the decree.⁸⁷ The majority of cases of the two main musical CMOs in the United States, the ASCAP and the BMI, are settled by

⁷⁹ See Glynn Lunney, 'Copyright Collectives and Collecting Societies: the United States Experience' in Daniel J. Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International, 3rd ed, 2016), 328-43.

⁸⁰ Ibid 328.

⁸¹ Michael A. Einhorn, 'Intellectual Property and Antitrust: Music Performing Rights in Broadcasting' (2001) *Columbia-VLA Journal of Law & The Arts* 349, 354.

⁸² *United States v. American Society of Composers Authors and Publishers*, Equity No. 78-388 (SD NY, filed 30 Aug. 1934).

⁸³ *United States v. American Society of Composers, Authors and Publishers*, 1941 Trade Cas. (CCH) P56,104 (SN DY, 1941). The definition and explanation of consent decrees will be introduced in the following section.

⁸⁴ Miernicki, above n 75, 79.

⁸⁵ *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. (CCH) ¶ 56, 096, 381 (ED Wis, 1941).

⁸⁶ Miernicki, above n 75, 78.

⁸⁷ More information about consent decrees see Richard Allen Epstein, *Antitrust Consent Decrees in Theory and Practice: Why Less is More* (the American Enterprise Institute Press, 2007).

consent decrees,⁸⁸ with federal courts serving as rate courts.⁸⁹ These consent decrees derive from lawsuits filed by the DOJ Antitrust Division, the federal authority in charge of enforcing the *Sherman Act*.⁹⁰ In the United States music field, only the ASCAP and the BMI have been made subject to consent decrees, and these two musical CMOs have operated under antitrust consent decrees for more than 70 years.⁹¹ Alongside the development in the music industry and advances in technology, the consent decrees have been repeatedly revised and adapted over the years.⁹²

In the context of collective management, regarding the ASCAP and the BMI, the consent decrees address questions relating to licensing, tariffs and membership.⁹³ The provisions of the consent decrees usually include the following core characteristics: firstly, members of the ASCAP and the BMI keep the rights to license directly.⁹⁴ Secondly, the ASCAP and the BMI should treat licensees similarly situated equally in license fees and other terms.⁹⁵ Thirdly, the ASCAP and the BMI have to follow transparent rules towards both right owners and users, and information about members and the repertoire must be publically available to users.⁹⁶

There are detailed requirements of musical CMOs' work in the consent decrees. For example in the original 1941 consent decree, the ASCAP was required to allow rights

⁸⁸ See Douglas Ginsburg and Joshua Wright, 'Antitrust Settlements: the Culture of Consent' (2013) *George Mason Law & Economics Research Paper No. 13-18*. Available at SSRN: <https://ssrn.com/abstract=2225894>; Farrell Malone and J Gregory Sidak, 'Should Antitrust Consent Decrees Regulate Post-Merger Pricing?' (2007) 3(3) *Journal of Competition Law and Economics* 471. The later one focuses on the merger context.

⁸⁹ *United States v. American Society of Composers, Authors and Publishers*, No. 41-1395, 2001; *United States v. Broadcast Music, Inc.*, No. 64-Civ-3787, 1966, modified by 1994 (discussing rate courts in the United States). Academic discussion see Gervais, 'Keynote: The Landscape of Collective Management Schemes', above n 9, 606. In the United States, both consent decrees and private antitrust enforcement work to ensure the application of the antitrust laws. In the absence of regulation set up by consent decrees, private antitrust enforcement plays an important role in the regulation of CMOs. Since this section will only focus on the consent decrees between the DOJ and the CMOs, information about the private antitrust enforcement can be found in Miernicki, above n 75.

⁹⁰ 15 USC § 4. 28 CFR §§ 0.40-0.41.

⁹¹ *United States v. American Society of Composers, Authors & Publishers*, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (SD NY, 1950); *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. (CCH) ¶ 56, 096 (ED Wis, 1941).

⁹² See United States Copyright Office, 'Copyright and the Music Marketplace' (2015), 146-50. The current version of the ASCAP Consent Decree dates from 2001, which is also referred to as "Second Amended Final Judgement (AFJ2)", and the current BMI consent decree dates from 1994. See The United States Department of Justice, *ASCAP and BMI Consent Decree Review Request for Public Comments 2015* <<https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015>>.

⁹³ Lunney, above n 79, 328-343.

⁹⁴ The ASCAP consent decree IV (B), and the BMI consent decree IV (A).

⁹⁵ The ASCAP consent decree IV (C), and the BMI consent decree VIII (A).

⁹⁶ The ASCAP consent decree X, and the BMI consent decree VII (A).

holders to negotiate with users individually.⁹⁷ More licensing types are formally available over time, and those small bundles like per-program licenses⁹⁸ offer a genuine choice to the full blanket license.⁹⁹ The approaches of the consent decrees insist that the bundle or rights must be divided into smaller increments so that more licensing options would be available to music users who may not need blanket license, which are competitive constraint on the ASCAP's ability to exercise market power of collected license fees.¹⁰⁰ On the other hand, alternative per-program or per-segment licenses are competitive alternatives to a portion of blanket licensing only if a number of users can realistically support or switch to such licenses.¹⁰¹

D Comparative Analysis on Regulating the Monopoly of the Musical CMOs in China and the United States

1 Impact of the Numbers of CMOs in Limiting the Monopoly of the MCSC in China

One of the most popular arguments in China to reduce the risks of CMOs misusing monopolistic power is to move to a competitive model and allow the establishment of several organisations to manage copyright in the same field.¹⁰² This camp agrees that establishing more CMOs in one field will push the CMOs to compete with each other and thus promote licensing.¹⁰³ Multiple CMOs also meet different copyright holders' needs.¹⁰⁴ Members of the CMOs should be able to decide the types and scope of the 'collectivised elements' that they wish to include in their agreements with CMOs.¹⁰⁵

⁹⁷ *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1940-1943 Trade Cas. (CCH) ¶ 56,104, at 404-05 (SD NY, 1941). The copyright owners' right to manage their copyright in a musical CMO will be analysed in the following chapter.

⁹⁸ The ASCAP consent decree II (J) illustrates 'Per-program license' means a non-exclusive license that authorises a broadcaster to perform ASCAP music in all of the broadcaster's programs, the fee for which varies depending upon which programs contain ASCAP music not otherwise licensed for public performance.'

⁹⁹ Hemphill, above n 77, 647.

¹⁰⁰ Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. The American Society of Composers, Authors and Publishers*, Civil Action No. 41-1395 (WCC), 32 (SD NY, 2000). Academic discussion see Einhorn, above n .

¹⁰¹ *United States v. The American Society of Composers, Authors and Publishers*, Civil Action No. 41-1395 (WCC), 32 (SD NY, 2000).

¹⁰² 王慧[Wang Hui], above n 37, 47.

¹⁰³ 卢海君 [Lu Haijun], '《论我国著作权集体管理组织的法律地位》 [The Legal Status of Collective Management Organisation in China]' (2007)(2) *政治与法律 Political Science and Law* 69, 70.

¹⁰⁴ 熊琦 [Xiong Qi], above n 17, 107.

¹⁰⁵ Gervais, 'Keynote: The Landscape of Collective Management Schemes', above n 9, 613. This is related to the role of musical CMOs in a digital environment since the digital technology can help individual creators to track the use of their work.

Some songwriters and composers also support this approach.¹⁰⁶ Since the monopoly of the MCSC supported by administrative power would damage copyright owners' benefits, to move to a competitive model will require abandoning the administrative requirements of establishing a CMO.¹⁰⁷ Only avoiding the misuse of monopoly power from the legislation can ensure the efficiency in transaction.¹⁰⁸

On the other hand, the work of CMOs can be in conflict with competition laws regardless of the numbers of CMOs for several reasons. CMOs are essentially monopolistic, and multiple CMOs cannot reduce transaction costs.¹⁰⁹ There will be repeated work for music users to get the permission to use music works because they need to ask for licence from several CMOs.¹¹⁰ There might be destructive competition among the CMOs, and free competition will cause a number of transaction costs and is not suitable to digital environment transactions.¹¹¹ Even though the United States has the typical competitive model with more than two musical CMOs, the CMOs are not real competing with each other. Actually, they share the monopolistic market in America. Furthermore, there is no direct evidence to support that more numbers of CMOs in China, especially those established by individuals can compete with those supported by the government side.

Establishing more CMOs may not end the problems in China. The goal of both monopolistic and competitive models is to promote copyright protection and protect copyright holders. Only effective regulations that limit the monopoly of the CMOs can ensure the organisations work as they are designed to do. One of the lessons that China can learn from the United States experience is that a competitive model in which various CMOs coexist does not avoid the formation of monopolies. Instead, the

¹⁰⁶ 新浪娱乐[Xinlang Yule], 《宋柯刘欢提著作权法修改意见 打破音著协垄断》 [Songke and Liuhan Provide Suggestions on the Amendment of the Copyright Law Break the Monopoly of the MCSC] <<http://ent.sina.com.cn/c/2012-04-16/17563607059.shtml>>.

¹⁰⁷ 熊琦 [Xiong Qi], '《著作权集体管理中的集中许可强制规则》 [Prohibition Rules for Copyright Collective Management]' (2016)(4) *比较法研究 Journal of Comparative Law* 46, 55.

¹⁰⁸ 熊琦 [Xiong Qi], '《著作权集中许可机制的正当性与立法完善》 [Justification and Improvement of Legislation in Collective Licensing of Copyright]' (2011)(8) *法学 Legal Science* 101, 101..

¹⁰⁹ 常青 [Chang Qing], '《论著作权集体管理制度: 法经济学的视角》 [On Collective Management System of Copyright: From Economic Viewpoint]' (2006) 27(6) *法学杂志 Legal Science Magazine* 103, 104.

¹¹⁰ Ibid.

¹¹¹ 林秀芹, 黄钱欣 [Lin Xiuqin and Huang Qianxin], '《我国著作权集体管理组织的模式选择》 [The Choices of the Models of the Collective Management Organisations in China]' (2016)(9) *知识产权 Intellectual Property* 53, 57.

number of CMOs in the music field is not the main cause of problems of music copyright management in China. Ineffective regulations to avoid misuse are at the root of those problems. Strengthening the supervision on CMOs can always play an important role in making the CMOs work effectively.

2 Applicability of Antitrust Laws to the MCSC

Several Chinese academics support the view that the Chinese antitrust rules should be used to regulate the monopoly of the MCSC, and the United States is always regarded as a reference.¹¹² Since economic rights in copyright are private rights, copyright collective management should be regarded as commercial activities covered by commercial and competition laws, and the work of collective management will be regulated by the *Antitrust Law*.¹¹³ To avoid the conflict between the legal nature of the CMOs as a social organisation and the Chinese *Antitrust Law (2007)*¹¹⁴, scholars in this camp provide two suggestions to regulate CMOs with antitrust rules. The first solution is extending the scope of ‘undertaking’ by amending the Chinese *Antitrust Law*, and the second is an expansive interpretation of the Chinese *Antitrust Law* by the Supreme People’s Court to cover CMOs.¹¹⁵ However, these suggestions need to be reconsidered.

In fact, there are differences between the regulations on collective management in the United States and China. Going back to the justification of antitrust rules in China and the United States, a significant difference is that the Chinese *Antitrust Law*¹¹⁶ can only regulate economic undertakings. This means it cannot be directly used to regulate the work of the MCSC, which is defined as a non-profit social organisation.¹¹⁷ In addition, the Chinese *Antitrust Law* just started a few years ago and has a shorter history. The *Antitrust Law* in China is not efficiently applied, which does not work as effectively as the one in the United States.

¹¹² 崔国斌 [Cui Guobin], above n 39, 138.

¹¹³ 王慧[Wang Hui], above n 37, 47.

¹¹⁴ 《中华人民共和国反垄断法》[Anti-Monopoly Law of the People's Republic of China](People's Republic of China) National People's Congress, 30 August 2007.

¹¹⁵ Jiang and Gervais, above n 29, 442.

¹¹⁶ 《中华人民共和国反垄断法》[Anti-Monopoly Law of the People's Republic of China](People's Republic of China) National People's Congress, 30 August 2007.

¹¹⁷ See section B of this paper.

On the contrary, antitrust legislation is part of the market economic model adopted by the US.¹¹⁸ The *Sherman Act*¹¹⁹ in the United States is an important part in antitrust rules, which provides a basis for civil remedies including the work of the musical CMOs.¹²⁰ There is a vast gap between the approaches of the United States and China towards musical CMOs. The ASCAP and the BMI are free in the market as long as they follow the consent decrees, while the administrative role of the MCSC tries to manage the music copyright through administrative power.

In the case of China, regulations seem inadequate to reduce the risks of misuse of the MCSC's monopolistic power.¹²¹ One of the problems with regulations is that they establish a special relationship between CMOs and the competent authorities. This is because CMOs are regarded as being 'affiliated' with these authorities.¹²² The MCSC works more like an 'administrative' agency rather than an actual CMO that advocates on behalf of its members. Because of the special administrative nature of the MCSC, it is difficult to directly use the Chinese *Antitrust Law* (2007) as a regulatory tool.¹²³

Alternatively, China can indeed learn from the United States despite legal and economic differences. The contents of consent decrees between the DOJ and the musical CMOs include various licensing types and limit the musical CMOs' market power. Considering similar requirements have been included in the *RCCA* (2013), China could focus on improving amendments to the *RCCA* (2013), and add more detailed rules rather than directly use the *Antitrust Law* to regulate the MCSC. More types of licence and more flexible agreements between copyright holders and the MCSC can be alternative options.

¹¹⁸ Richard A Posner, 'Antitrust in the New Economy' (2000) 68 *Antitrust Law Journal* 925, 941.

¹¹⁹ 15 USC §§ 1-7. This is usually named as 'the Sherman Act'.

¹²⁰ Miernicki, above n 75, 76. Although antitrust rules have works on regulating CMOs in the United States for decades, some scholars advice that the antitrust rules are not the right regulatory vehicle for musical CMOs. For example, Gervais suggests that consent decrees normally sunset and then parties move on, but the consent decrees between the DOJ and the CMOs are updated instead of an ending. See Gervais, 'Keynote: The Landscape of Collective Management Schemes', above n 9, 603. The consent decrees have been a failure, see Noel L. Hillman, 'Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI [comments]' (1998) 8(3) *Fordham Intellectual Property, Media & Entertainment Law Journal* 733, 770.

¹²¹ Jiang and Gervais, above n 29, 441.

¹²² Ibid 441.

¹²³ 熊琦 [Xiong Qi], '《著作权集体管理组织市场支配力的法律规制》 [Legal Regulation on the Market Power of Copyright Collective Management Organisations]' (2016) *西北政法大学学报 Science of Law - Journal of Northwest University of Political Science and Law* 92, 101.

E Conclusion

It should be considered significant progress that China was able to build a functional copyright collective management system in 30 years.¹²⁴ Problems inevitably arise in the establishment and development of CMOs.¹²⁵ Inadequate regulations result in the current and potential misuse of the monopoly of the MCSC. This paper challenges the notion of decreasing the monopolistic power of the MCSC by establishing more musical CMOs in China. Furthermore, compared with the comprehensive antitrust rules in the United States, Chinese *Antitrust Law* is neither adequate nor suitable for regulating the MCSC's monopoly because of the MCSC's legal nature as a social organisation and the 'administrative' relationship between the MCSC and the NCAC. Alternatively, improving the regulations of the *RCCA* (2013) by providing more types of licence and choices for the CMO's members, such as the contents of the consent decrees, would offer a solution in limiting the monopolistic power of the MCSC.

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¹²⁴ Jiang and Gervais, above n 29, 445.

¹²⁵ 熊琦[Xiong Qi], '《论著作权集体管理中的私人自治——兼评我国集体管理制度立法的谬误》 [Private Autonomy in Collective Management and Discussion on the Legislation of Collective Management System in the Country]' (2013)(1) *法律科学: 西北政法学院学报 Science of Law(Journal of Northwest University of Political Science and Law)* 142, 142.

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