

**COLLECTIVE MANAGEMENT OF MUSIC COPYRIGHT IN CHINA:
INSIGHTS FOR THE REGULATION OF THE MONOPOLISTIC AND
MONOPSONISTIC POWER OF THE MUSIC COPYRIGHT SOCIETY OF
CHINA FROM A COMPARATIVE LEGAL APPROACH**

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ABSTRACT. This paper discusses the regulations which limit the monopolistic and monopsonistic power of the Music Copyright Society of China (MCSC) in the context of the broader legal framework for the collective management of music copyright in China. The paper identifies “inadequate regulation” as a major cause of the misuse of such market power by the MCSC. Using a comparative approach, the paper analyses the regulatory regime that addresses the abuse of the market power of the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the two oldest performing rights organisations (PROs) in the United States. Drawing lessons from the United States experience, this paper challenges the notion that establishing more musical collective management organisations (CMOs) in China would decrease the monopolistic and/or monopsonistic power of the MCSC. While the Chinese Anti-Monopoly Law cannot be applied to regulate the market power of the MCSC, this paper advocates for improving the current Regulations on Copyright Collective Administration (RCCA) as an alternative option for preventing the misuse of power by the MCSC.

1. INTRODUCTION

An intermediary, such as a collective management organisation (CMO), provides a way for managing the fragmented copyrights held by large numbers of individual music creators (see, for example, Drexler, 2007). Under the current international and domestic intellectual property regimes, copyright is an individual right and gives authors exclusive rights to their works (Schovsbo, 2012, pg. 167). The sub-rights that authors have, including those related to reproduction, broadcasting and communication through information networks are known as “right fragments” (see Gervais, 2017, pg. 11). The right fragments on a piece

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of music are usually owned by different composers and lyricists, making it difficult and expensive for authors to directly manage these rights (Giblin and Weatherall, 2017, pg. 154). Collective management of copyright provides a solution which reduces transaction costs and improves the efficiency of dealing with right fragmentation (see, for example, Watt, 2014, pg. 169).

CMOs facilitate the efficient management of copyright for the benefit of their members, yet simultaneously, these organisations are also placed in a monopsonistic position that could be detrimental to the interests of their members (Katz, 2005, pg. 545). The collective nature of CMOs allows them to abuse¹ this monopolistic position by impairing members' rights and to abuse their monopolistic position by harming licensees through increasing royalties above effectively competitive levels. Thus, adequate regulation is necessary to reduce the risk of CMOs misusing their market power (Gervais, 2010, 605). This paper argues that the regulatory framework for collective management in China² has been ineffective in preventing the Music Copyright Society of China (MCSC) from misusing its monopoly position, and that the regulatory framework should be amended to limit this market power of the MCSC to better serve individual composers and lyricists, who are the 'real' music creators.

The remainder of this paper is comprised of four sections. First, section 2 introduces the legal framework for the collective management of music copyright in China, and identifies why it has been ineffective at limiting the monopoly of the MCSC. Considering that China is a relative newcomer in the field of copyright, section 3 introduces a comparative examination of the United States, which has a longer history of copyright law and where antitrust rules have been applied to Performing Rights Organizations (PROs) to regulate their operations. Drawing lessons from the United States' experience, Section 4.1 then evaluates whether China could prevent the misuse of the MCSC's monopolistic power by establishing more musical CMOs. Section 4.2 discusses the possibility of using antitrust

¹A singular collective management organisation has "monopoly" (seller-side) power that it can exercise when interacting with *licensees*. When a singular collective management organisation interacts with its *members*, it can exercise its "monopsonistic" (buyer-side) power. This article refers to these powers collectively as "market power" or the "singular" power of a collective management organisation, and refers to these powers separately, when appropriate.

²'China' here and elsewhere in this paper refers to the People's Republic of China mainland unless otherwise stated.

rules to regulate the MCSC's operations, and argues that it would be more suitable to oversee the MCSC's activities by improving the current regulatory rules. Finally, section 5 offers some conclusions.

2. COLLECTIVE MANAGEMENT OF MUSIC COPYRIGHT IN CHINA

2.1. The Regulatory Framework for Collective Management of Copyright. Collective management has a short history in China, of less than thirty years. The first modern Chinese copyright law was passed in 1990 and went into effect on 1 June 1991.³ However, the *Chinese Copyright Law* (1990) did not regulate collective management. It only contained preliminary rules and was mainly considered as a legislative instrument for attracting foreign investments (Wu, 2016, pg. 218). The *Implementing Regulations of the Copyright Law of the People's Republic of China* (the IRCL, 1991) issued the following year, briefly included collective management in two Articles.⁴ The IRCL (1991) stipulated that copyright owners may exercise their copyright by way of collective management.⁵ In addition, the IRCL (1991) established a national copyright administration department, the National Copyright Administration of the People's Republic of China (NCAC), which was to be in charge of approving the establishment of CMOs.⁶ During the period between 1990 and 2001, these were the only two rules about collective management of copyright in China.

The lack of systematic legal rules on the collective management of copyright in China was caused in part by how the system was socially structured. At that time, the government managed and controlled the majority of the industry under a planned economy

³Copyright Law of the People's Republic of China, National People's Congress, 7 September 1990 (here-in-after, *Chinese Copyright Law* (1990)).

⁴Regulations for the Implementation of the Copyright Law of the People's Republic of China, National Copyright Administration of the People's Republic of China, 30 May 1991 (IRCL (1991)). The IRCL (1991) was abolished in 2002 when the IRCL (2002) was enacted, which was revised in 2011 and 2013 respectively. More details see Regulations for the Implementation of the Copyright Law of the People's Republic of China, State Council, 2 August 2002; Regulations for the Implementation of the Copyright Law of the People's Republic of China, State Council, 8 January 2011; Regulations for the Implementation of the Copyright Law of the People's Republic of China, State Council, 30 January 2013.

⁵IRCL (1991), art 54.

⁶IRCL art 7.

model.⁷ After China Central Television was established in the 1950s, most of the system's players, like publishers and broadcasters, as well as copyright owners, were public institutions or worked for public entities.⁸ Copyright transactions were not completed within a market-economy framework, and any disputes that arose were resolved by the departments which supervised those public institutions (Xiong, 2016b, pg. 104). As such, issuing legal rules for the operations of CMOs in a market economy was not a priority (Li and Cheng, 2015, pg. 79).

Once China began to make changes to transform its planned economy into a market economy, the music industry did not move to an open market immediately.⁹ In the 1990s, if radio stations or television stations broadcast a published sound recording for non-commercial purposes, they did not need permission from the copyright owners, performers or producers, and there was no need to pay any remuneration to stakeholders.¹⁰

In addition to the domestic background of the transition from a planned economy to a market economy the development of the modern intellectual property regime in China was also driven by international pressure. As part of its process of accession to the World Trade Organization (WTO), China implemented a fast and aggressive modernisation of its intellectual property laws to meet the WTO's standards and requirements. For example, China had to amend various articles of its copyright law to satisfy the requirements of the TRIPS Agreement.¹¹ This led to the enactment of the Chinese *Copyright Law* (2001)¹²

⁷For a discussion of China's transformation from a planned economy to a market economy, see Ching Kwan Lee (2014). Also see Brandt and Rawski (2008).

⁸The China Central Television, one of the biggest TV stations in China, is a public institution, see China Central Television, Introduction to China Central Television (17 November 2017), available at <http://www.cctv.cn/2017/11/17/ARTIt8ZGt9MNebBmr5DHAMcd171117.shtml>. 'Public institutions' in China are defined 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. See Interim Regulation on the Registration of Public Institutions, People's Republic of China, State Council, 27 June 2004, art 2.

⁹The discussion of the economic reforms implemented by the Chinese government between 1970s and 2000s is beyond the limits of this paper. For a general discussion of these reforms, see So and Chu (2016).

¹⁰Chinese *Copyright Law* (1990), art 43.

¹¹Communication from China – Revision of China's Laws in Conformity with the WTO Agreement, WTO Doc WT/ACC/CHN/40 (9 November 2000) 6.

¹²Copyright Law of the People's Republic of China, National People's Congress, 27 October 2001.

at the beginning of the Millennium. Most of the changes relating to copyright rules were motivated by the requirements of the WTO rather than domestic needs.¹³

The Chinese *Copyright Law* (2001) introduced the notion of collective management, which was at least a start toward providing a regulatory framework for CMOs.¹⁴ This was the first time that collective management had been specifically included in legislation, although the *Law* contained only three aspects related to collective management of copyright. Firstly, that copyright owners could authorise a CMO to exercise their copyright; secondly, that CMOs could claim copyright under their own name; and thirdly, that CMOs were to be non-profit organisations (in art. 8). This brief framework clearly identified that the CMOs work under their own name when they license copyright for members, and that all CMOs in China should only take the form of non-profit organisations rather than companies or other types of entities. However, these three articles were not enough to provide clear guidance for the operation of CMOs to help copyright owners with rights management.

According to the Chinese legal tradition, general legislation is generally followed by detailed rules from the State Council, which is the most important administrative organ within the Chinese government structure. This principle was applied to the regulation of collective management. The *Copyright Law* (2001) stated that all details about establishing a CMO, its rights and obligations, the collection and distribution of copyright licensing fees and regulatory supervision and management would be separately established by the State Council.

More specific legal rules for the collective management of copyright in China were not enacted until 2004, in the *Regulations on Copyright Collective Administration* (the RCCA) (2004).¹⁵ As the first specific legal instrument on this topic, the RCCA (2004) established

¹³For instance, the Chinese *Copyright Law* (2001) expanded the objects of copyright protection and narrowed the scope of fair use. For more analysis, see Gao (2002).

¹⁴Chinese *Copyright Law* (2001), art 8. After collective management was included in the Chinese *Copyright Law* (2001), it was deleted in the IRCL (2002). The *Copyright Law* (2001) was then amended in 2010, but the Chinese *Copyright Law* (2010) did not make any changes to the regulations of collective management in the 2001 version. After this paper was finalised, the third amendment of the Chinese *Copyright Law* was recently passed in November 2020 and will enter into force in June 2021. Articles of the Chinese *Copyright Law* cited in this paper refer to the version which is in force at the time of writing, the Chinese *Copyright Law* (2010), unless otherwise stated.

¹⁵Regulations on Copyright Collective Administration, People's Republic of China, State Council, 28 December 2004. The RCCA (2004) has been amended in 2011 and 2013 respectively, and the current version was enacted

the legal framework for the collective management of copyright, and governs the establishment and structure of a CMO, the activities of copyright collective management and provides for supervision of copyright CMOs.

2.2. Inadequate Regulation of the Market Power of Music Copyright Collective Management Organisations. There are generally two main models of collective management, depending on the number of CMOs in a country or area. The first one is the single CMO model, which allows for the establishment of one monopolistic/monopsonistic CMO in each field, for example, one CMO for the music industry, as is the case, for example in Germany (Besen, Kirby and Salop, 1992, pg. 398). The other option is the competitive model, which allows for more than one CMO in each field, such as USA which has more than two CMOs working for public performance rights. The single CMO model was usually adopted in continental European countries following the civil law system, where the singular status of the CMO is established and maintained by law, and supervision of the CMO aims to prevent misuse of their market power.¹⁶ Legal rules not only create the singular market power of CMOs in continental countries, they also establish a permanent supervision system to avoid potential misuses of the CMOs' government-granted market power (Jiang and Gervais, 2016). In contrast with the continental legal tradition, there is no systematic regulation of CMOs' activity in common law systems (Dietz, 2002, pg. 900).

China followed the civil law system when establishing its collective management system, and has only one CMO in every field. A pragmatic reason for this approach is that having a single statutory CMO for each field is well-suited to China's style of government, in which the state maintains control of many aspects of the economy even though the country has transformed from a planned economy to a market one (Wu, 2016, pp. 229-30).

From a legislative perspective, the RCCA (2013) contains rules for both maintaining and limiting the market power of CMOs. The next three sections (1, 2 and 3) introduce

in 2013. See Regulations on Copyright Collective Administration, People's Republic of China, State Council, 8 January 2011; Regulations on Copyright Collective Administration, People's Republic of China, State Council, 7 December 2013 (RCCA (2013)).

¹⁶See Jiang and Gervais (2016, pp. 431-2). Historically, China adopted the continental legal system as a model in the early 20th century when transforming into a democratic regime. For more information see Wu (2016, pg. 229).

how the RCCA facilitates the MCSC's singular position whilst the sections that follow (4, 5 and 6) illustrate the rules that are designed to prevent any abuses of this position.

- (1) **Supervisory authority.** The copyright administration department of the State Council is responsible for the nationwide oversight of copyright collective management.¹⁷ While the relevant legislative provision itself does not clarify exactly which department has been designated this role, the NCAC appears to have taken on this role according to the structure of the State Council.¹⁸ The NCAC is in charge of both drafting policies about copyright management and protection and putting these into practice.
- (2) **Establishment requirements.** There are strict requirements to become a CMO in China. Initially, the business scope of the new CMO must not overlap with that of any existing CMOs.¹⁹ That means there can only be one CMO in each field. For example, the MCSC is the only CMO in the field of musical works, and the China Audio-video Copyright Association (CAVCA) is the only CMO for the field of sound recordings. Thus, it is illegal to establish a new CMO for the music industry because of the existence of the MCSC. Furthermore, an application for establishing a CMO needs to be submitted to the NCAC for assessment and approval.²⁰ If the application is approved, the applicant must register the organisation with the Civil Affairs Department of the State Council in accordance with administrative regulations, within 30 days after receiving the permission of the NCAC.²¹ Securing these double administrative approvals is difficult, making it hard for individuals to establish a new CMO. Whilst it is possible from a legal perspective, none of the current CMOs in China were established by individuals. In addition, a new CMO

¹⁷RCCA (2013), art 5.

¹⁸See State Council of the People's Republic of China, Ministries and Offices of the State Council, available at <http://www.gov.cn/guowuyuan/zuzhi.htm>. A brief history and development of the NCAC can be accessed via National Copyright Administration of the People's Republic of China, History of the National Copyright Administration of the People's Republic of China, available at <http://www.ncac.gov.cn/chinacopyright/channels/476.html>.

¹⁹RCCA (2013), art 7.

²⁰Art 9.

²¹Art 10. Since the CMOs are defined as 'social organisations', the procedures to register the CMO should follow the Regulations on the Registration and Management of Social Organisations, People's Republic of China, State Council, 6 February 2016.

should have no less than 50 sponsoring right holders.²² The potential new CMO must be able to represent the interests of relevant right owners nationwide.

- (3) **Exclusive licences from copyright owners to CMOs.** Copyright owners have to exclusively license their rights to join a CMO. After copyright owners sign an exclusive licensing agreement with a CMO, the copyright owners shall not exercise, or authorise another person to exercise, the rights managed by the CMO in order to remain in compliance with the agreement during the period of the contract.²³ Therefore, after copyright owners become members of the MCSC, they can no longer directly license their copyright to music users, as any such authorisation has to take place through the MCSC.²⁴ In other words, if non-CMOs participate in the work of collective management in China, they will be in violation of the regulations.
- (4) **Non-exclusive licences from CMOs to users.** A CMO should not conclude exclusive licensing contracts with users, but rather should enter into only non-exclusive licensing contracts.²⁵ Different music users have equal rights to obtain licences from the CMO. The CMO should also not refuse any reasonable application from a copyright user. This rule may appear to limit the MCSC's market power and be good for music users. However, this provision can only be properly considered in the context of the limited membership of the MCSC, which only had 10,031 members at the end of 2019.²⁶ The non-exclusive licence does not work well since music users can only access limited musical works from the MCSC.
- (5) **Licensing fees.** A CMO should follow the standard licensing fee rates published by the NCAC, and negotiate the appropriate amount of licensing fees with a user,

²²Art 7.

²³Art 20.

²⁴The MCSC was established in 1992, while the RCCA was enacted in 2004. In practice, some agreements between the MCSC and copyright owners were made earlier before the promulgation of the RCCA. Under such a circumstance, a court explained that article 20 of the RCCA would not apply to the case considering that regulation cannot be retrospective, and rejected the MCSC's claims that a company played the music without the MCSC's permission. See *Music Copyright Society of China v Beijing October Days Media Co Ltd* — Case of Copyright Infringement, Basic People's Court of Haidian, Beijing, People's Republic of China, Intellectual Property No 1195, 24 April 2013.

²⁵Art 23.

²⁶Music Copyright Society of China, 2019 Annual Report (2020), pg. 8.

except where the fees are to be paid in accordance with Chinese *Copyright Law*.²⁷ Although the NCAC should publish standards for licensing fees, unfortunately, in practice the NCAC appears to only announce the copyright licensing rates that the MCSC submits to it, making no changes or further comments.²⁸ In taking this approach, the NCAC effectively limits its regulatory role in the setting of licensing fees.

- (6) **Supervision.** The CMOs operate under the supervision of the copyright administration department and the civil affairs department of the State Council.²⁹ As the MCSC is a non-profit social organisation that works for music copyright collective management, there is supervision from both copyright administrative authorities and the civil departments that supervise social organisations in China. Despite this, with the exception of the required approval for the establishment of a new CMO, in practice there is little oversight on the MCSC's operations from the civil departments.

The RCCA has rules for both maintaining and limiting the market power of CMOs. The first three sections mentioned above, which reflect Articles 5, 7 and 20 of the RCCA, are designed to maintain the singular position of a CMO through setting strict requirements for the establishment of a CMO and exclusive licensing of rights from copyright owners to the CMO. These regulations provide legislative support for the monopolistic/monopsonistic status of CMOs in China. The resulting effect is that it is legally impossible to establish two or more CMOs in one field. In addition, it is also impractical for individuals to establish new CMOs, as a result of these complex administrative procedures and the necessity of obtaining double permission from both the NCAC and the relevant civil departments.

²⁷RCCA (2013), art 25. Article 8 of the Chinese *Copyright Law* (2020) requires that the standards of licensing fees are to be determined by negotiations between CMOs and user representatives.

²⁸The National Copyright Administration of the People's Republic of China (NCAC) states on its website that it is publishing the rates that the MCSC had submitted to it. The rates that the NCAC published are identical to those listed by the MCSC on its website. National Copyright Administration of the People's Republic of China, Announcement of the National Copyright Administration of the People's Republic of China: No 3 in 2011 (27 October 2011), available at <http://www.ncac.gov.cn/chinacopyright/contents/483/17695.html>. See also Music Copyright Society of China, Standards of Licensing Fees of Performing Musical Works (27 October 2011) <http://zhan.mcsc.com.cn/im-57-333.html>.

²⁹RCCA (2013), articles 31, 37 and 38.

In contrast, the latter three sections mentioned, which are reflective of Articles 23, 25, 31, 37 and 38 of the RCCA, are designed to prevent any abuse of the CMOs' singular position by requiring supervision of the operation of the CMOs. However, it is arguable that these supervision provisions are too vague for the NCAC to effectively oversee the operations of Chinese CMOs.

In effect, the rules supporting the market power of CMOs in China are stronger than those which constrain the exercise of that power. When China set up its model, it went too far in maintaining the singular status of CMOs, instead of providing a balance between the benefits and risks of the natural monopolistic/monopsonistic status of CMOs. The regulations tend towards protection of the CMOs' single-entity power and a further limiting of competition.

The RCCA clearly illustrates the monopsony status of Chinese CMOs, while it poorly explains how this can be effectively limited or appropriately regulated to ensure protection of individual authors' interests with regard to, for example, the allocation of license fees among creators. With regard to the Chinese CMO's monopoly status, the RCCA does not provide detailed rules for licensing terms or standards on the fairness of licensing fees. All of these aspects of collective management are decided by the CMO itself.³⁰ In essence therefore, there are currently no clear legislative limits on the MCSC's monopolistic and monopsonistic operation in China. As a result, in its current form the RCCA does not adequately prevent CMOs from abusing of their market power.

2.3. Misuses of the MCSC's Market Power without Effective Regulatory Rules.

The MCSC, established in 1992, is the only CMO in music copyright in China. From a

³⁰Article 8 of the Chinese *Copyright Law* (2020) includes some transparency rules for CMOs to publicly disclose the collection and distribution of royalties and establish an inquiry system; however, this law will not enter into force until June 2021. It will take time for the MCSC and other Chinese CMOs to fully implement the new rules. That means members of the MCSC may still not be able to immediately access the information on the CMO's operations.

legal perspective, the MCSC is a non-profit social organisation.³¹ In practice, the collective management is more akin to collective ‘administration’ (Xiong, 2016b, pg. 104). This is partially because government tends to have administrative supervision of public management rather than rights protection, and monopoly played a significant role after 1949 (Wang, 2015, pg. 45). The MCSC operates more like an administrative agency than a ‘real’ CMO that advocates the interests of music copyright holders.³² In addition to the singular status granted by legislation, the MCSC has strong power in practice since the organisation administers almost all economic sub-rights under copyright on behalf of its members.³³

Strong singular status paired with a weak regulatory system in China results in the MCSC misusing its power over copyright licensing activities. One of the biggest problems is that the MCSC decides nearly all of the licensing terms and standards on its own. For instance, the MCSC publishes licensing fees on its website.³⁴ However, the MCSC does not explain how the rates are calculated, or otherwise explain the fairness and reasonableness of those licensing fees. It is also unclear whether members are able to participate in decisions regarding licensing terms such as price setting, thus combining the monopsonistic power of the MCSC over its members with its monopolistic power vis-à-vis licensees.

Although it publishes all the licensing rates, the MCSC does not provide transparency with respect to the allocation of licensing fees. Taking distribution rules as an example,

³¹ Copyright Law of the People’s Republic of China, National People’s Congress, 26 February 2010, art 8. (*‘Copyright Law (2010)’*). A ‘social organisation’ 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’, see Regulations on the Registration and Management of Social Organisations, People’s Republic of China, State Council, 6 February 2016, art 2. 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 General Provisions of the Civil Law of the People’s Republic of China, National People’s Congress, 15 March 2017, art 90. This General Provisions will be replaced by the Civil Code of the People’s Republic of China on 1 January 2021. See Civil Code of the People’s Republic of China, National People’s Congress, 28 May 2020, art 1260.

³² Ye (2013, pg. 744). ‘Administrative’ agency is taken to mean that the MCSC focuses most of its efforts on administering matters that do not necessary translate in pecuniary benefits for members.

³³ The rights that the MCSC manages include 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 Music Copyright Society of China, Articles of Association of the Music Copyright Society of China, art 9, available at <http://www.mcsc.com.cn/about/regulations.html>. This rule enables the MCSC to cover almost every economic copyright since this organisation does not clarify what rights are ‘suitable for collective management’.

³⁴ See <http://zhan.mcsc.com.cn/mUA-40.html>.

there is no detailed information on how the MCSC allocates royalties to its members.³⁵ The allocation method for royalties is not publicly available on the website of the MCSC. The website only states that fees are allocated every three months and that details are sent to the members.³⁶ As a result, potential copyright owners and licensees are unlikely to understand how the organisation works and how their rights are (or are not) being protected. When members and potential members do not know how the royalties are allocated, they may not trust the CMO, because the CMO could be failing to fully distribute its revenues.

Another example of abuse of the MCSC's monopsony is its extended collective management in practice. There are currently no legislative rules allowing protection of non-members' works through CMOs, especially in relation to orphan works. Despite the lack of legislative support for this practice, the MCSC has already extended collective management to the works of non-members, which further strengthens the organisation's economic power.³⁷ The MCSC collects fees and publishes lists of songs and authors' name on its website with the presumed expectation that the authors will come forward to claim their fee.³⁸ It is not clear whether non-member authors know how to do so, or in fact how many non-member copyright owners have contacted the MCSC to collect their revenues to date using this system.

The potential and actual abuses of the MCSC's market power call for legislative reform to improve the MCSC's work and ensure benefits for individual creators (Jiang and Gervais, 2016, pg. 441). The current singular status of the MCSC is supported by law rather than being simply the result of developments within the music market. Under such circumstances, safeguards are needed to protect individual creators against abuse of power by the CMO (see Chin, 2014, pg. 280). Only well designed legal rules can help to prevent the MCSC from misusing its economic power. The following sections introduce how the

³⁵See Li Xin, "MCSC Sets out the Standard Royalty Fees Alleged Monopoly?", available at <http://ip.people.com.cn/GB/8573431.html>.

³⁶See MCSC, Notice of Allocation (28 December 2020), available at <http://www.mcsc.com.cn/publicity/notice.html>.

³⁷The MCSC claimed that 'For the purpose of collective management, the association will collect and allocate licensing fees for music copyright holders who are not the members', see Music Copyright Society of China, Articles of Association of the Music Copyright Society of China, available at <http://www.mcsc.com.cn/about/regulations.html>.

³⁸See <http://www.mcsc.com.cn/publicity/bulletin.html>.

United States regulates musical CMOs' market power issues, which may provide useful references for improving the Chinese model.

3. REGULATIONS ON PERFORMING RIGHTS ORGANISATIONS IN THE UNITED STATES

3.1. Emergence of Antitrust Concerns regarding PROs. Unlike the single CMO managing nearly all the economic sub-rights of copyright for the Chinese music industry, the United States has multiple CMOs working for its music industry. Two PROs, ASCAP and BMI, manage a majority of the public performance rights in the United States, but other musical CMOs also operate in the country. These two PROs were not established through the support of government authorities, but rather through private industry members. The competition between ASCAP and BMI is considered to benefit songwriters for two reasons. Firstly, competition brings benefits in the form of better deals for artists; secondly, a single organisation may not cover all categories of works (Merges, 2008). For example, the comparatively newer BMI embraced jazz and country music – two categories that ASCAP did not include in its work in the 1940s and 1950s (see Ryan, 1985).

In the beginning, ASCAP was the only organisation managing public performance licences for musical compositions (see Lunney, 2016, pg. 319, 328). There were no other PROs or similar entities to compete with ASCAP on price and licensing terms. Copyright owners could only assign their public performance rights to ASCAP, and ASCAP set all the licensing conditions collectively. With the growing popularity of broadcast radio, the revenues that ASCAP collected grew sharply in the 1920s (Einhorn, 2001, pg. 354). Around this time, ASCAP combined a number of music composition copyrights, and ultimately had licensed 80 percent of all music performed on the radio, a process that attracted antitrust scrutiny to their activities, with a resulting suit from the Antitrust Division of the Department of Justice (DOJ) in 1934.³⁹

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

³⁹ *United States v American Society of Composers Authors and Publishers*, Equity No 78-388 (SD NY, filed 30 Aug 1934).

DOJ (plaintiff) and ASCAP (defendant) in 1941.⁴⁰ The reasons given by the DOJ for concluding its first action against ASCAP via the consent order approach are still valid today. These reasons were that PROs are free to act in the market as long as their behaviour is consistent with antitrust doctrines, the boundaries of which are more specifically defined by consent decrees.⁴¹ Later, the same strategy was applied to the second PRO - BMI.⁴²

The efficiencies of scale inherent in PROs tend to create an oligopolistic market structure in which these organisations operate - a status which is subject to close scrutiny in the United States, as there is the danger of their misuse of the market power that may be generated by this oligopolistic structure (Chin, 2014). In contrast to China, there is no specific scheme for the supervision of collective management organisations in the United States, and the American *Copyright Act* does not regulate the activities of ASCAP or BMI. The regulatory oversight of these PROs mainly relies on the operation of antitrust oversight by the federal government, and litigation when antitrust authorities determine that there is inadequate market competition.

One of the main antitrust concerns about ASCAP and BMI lies in the “artist withdrawal” issue, due to the question of whether a CMO can only represent a rights owner under a strict all-in or all-out policy (Miernicki, 2017; Einhorn, 2014). The answer potentially appears to lie in the concept of ‘partial withdrawals’. In 2011, ASCAP changed its Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association (‘compendium’) to allow members to partially withdraw their rights to new media entities.⁴³ BMI did the same in 2013.⁴⁴ As a result, several publishers, including Sony/ATV and some EMI Music Publishing companies, withdrew from ASCAP and BMI to license their copyrighted compositions to new media outlets such as Pandora and Spotify while allowing these two CMOs to retain the right to license those same musical works

⁴⁰ *United States v American Society of Composers, Authors and Publishers*, 1940-43 Trade Cas (CCH) ¶ 56,104 (SD NY, 1941).

⁴¹ See Miernicki (2017, pg 79). Because consent decrees are incorporated into a judicial order, this form of settlement defends the defendant from further antitrust actions when its behaviour is covered by the consent decrees (Miernicki, pg. 78). Details of the consent decrees are specified in the following section.

⁴² *United States v Broadcast Music Inc*, 1940-43 Trade Cas (CCH) ¶ 56, 096, 381 (ED Wis, 1941).

⁴³ *In Re Pandora, Inc v American Society of Composers, Authors, and Publishers*, 6 F Supp 3d 317 s VI (SD NY, 2014).

⁴⁴ *Broadcast Music, Inc v Pandora Media, Inc*, 13 Civ 4037 (LLS); 64 Civ 3787 (LLS), 6-7 (SD NY, 2013).

to other outlets.⁴⁵ In this way, these publisher members expected to benefit from both direct licensing with new media entities, as well as musical CMOs' management of the rest of the rights.

On the other hand, the partial withdrawals allowed by ASCAP and BMI resulted in new media entities paying more in licensing fees than previously paid to the CMOs. In response, Pandora brought a suit against ASCAP and claimed that permitting publishers' partial withdrawal was in breach of the consent decrees.⁴⁶ The court ruled that the definition of 'ASCAP repertory' and other provisions under the consent decrees of ASCAP required ASCAP to license all performance rights of musical works that are licensed to it. Therefore, ASCAP could not withhold specific works from Pandora while continuing to license them to other users. The consent decree for ASCAP indicates that publishers cannot allow ASCAP to license certain rights to eligible users and withhold those rights for the same works selectively.⁴⁷ Similarly, BMI was required to provide licences to perform 'all of compositions in its repertory' under its consent decree.⁴⁸ The principle of members' direct licensing is that licences from ASCAP and BMI are on a 'take-it-or-leave-it' basis.

These examples indicate that copyright holders do not easily benefit from the CMOs' management of certain rights and simultaneous individual direct licensing of other rights of the same work (Miernicki, 2017, pg. 129). As a result, the only option for publishers is to withdraw their works entirely from the CMO to license new media rights directly. From the CMOs' perspective, they wish to prevent publishers from completely withdrawing their rights. This was evidenced by ASCAP trying to modify its internal compendium of rules to avoid the complete withdrawal of publishers.⁴⁹ Furthermore, ASCAP and BMI have previously asked for the modification of the partial withdrawal rules when they applied for

⁴⁵*In Re Petition of Pandora Media, Inc v American Society of Composers, Authors and Publishers*, 12 Civ 8035 (DLC), 3–4 (SD NY, 2013). See also *Broadcast Music, Inc v Pandora Media, Inc*, 13 Civ 4037 (LLS); 64 Civ 3787 (LLS), 8 (SD NY, 2013).

⁴⁶*In Re Petition of Pandora Media, Inc v American Society of Composers, Authors and Publishers*, 12 Civ 8035 (DLC) (SD NY, 2013).

⁴⁷The Court of Appeals for the Second Circuit agreed with the district court's determination, see *Pandora Media, Inc v American Society of Composers, Authors and Publishers*, 785 F 3d 73, 77–8 (2d Cir, 2015).

⁴⁸*Broadcast Music, Inc v Pandora Media, Inc*, 13 Civ 4037 (LLS); 64 Civ 3787 (LLS), 2, 12–5 (SD NY, 2013).

⁴⁹*Pandora Media, Inc v American Society of Composers, Authors and Publishers*, 785 F 3d 73, 76 (2d Cir, 2015).

the DOJ to amend the current consent decrees.⁵⁰ The DOJ, however, refused to modify the content of partial withdrawal of rights while remaining open to considering these modifications later.⁵¹

Since ASCAP and BMI, if considered together, control a substantial share of the market for the licensing of musical works, creating the risk that these PROs may abuse their market power, their practices have been challenged under United States antitrust laws over the years (Fujitani, 1984, pg 103). In practice, antitrust investigations and enforcement actions against these two PROs generally end with consent decrees, rather than traditional antitrust violation penalties such as fines.⁵² These consent decrees between the DOJ and the two PROs have governed their operations for decades.

Generally, antitrust rules in the United States are used to protect consumers by regulating the abuse (or potential abuse) of the monopoly power of organisations, and antitrust legislation is part of the market economic model adopted by the United States (Posner, 2000, pg. 141). The *Sherman Act*⁵³ applies to “every person” who engages in prohibited practices which results in a “restraint of trade or commerce among the several states, or with foreign nations” either by combining with competitors, attempting to monopolise or conspiring to monopolise (§§ 1-2). For more analysis, see Chin, above n 62, 269-70.. It is easy to spot a key antitrust issue in relation to PROs - the limitations on price competition among rights holders (Hemphill, 2011, pg. 646). In addition, the Clayton Act forbids the acquisitions of assets or stocks the effect of which “may be substantially to lessen competition, or to tend to create a monopoly” (§ 18; see also Chin, 2014, 269-70). Violation of these rules may allow for misuses of an organisations’ monopolistic power.

⁵⁰ASCAP, Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees (6 August 2014), 18-22, available at <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf>. See also BMI, Public Comments of Broadcast Music, Inc.: U.S. Department of Justice, Antitrust Division Review of Consent Decree in *United States v. Broadcast Music, Inc.* (6 August 2014), 11-6, available at <https://www.justice.gov/atr/page/file/1086751/download>.

⁵¹See <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>. In 2019, the DOJ restarted reviewing the consent decrees. See <https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019>.

⁵²The definition and explanation of consent decrees will be introduced in the following section. For an explanation of consent decrees, see Epstein (2007).

⁵³15 USC §§ 1-7, usually referred to as ‘the Sherman Act’.

On the other side of the PRO business – its economic relations with members – the status of ASCAP and BMI as the dominant PROs makes them not monopsonists, but rather oligopsonists, still with substantial market power. Copyright owners need to assign their public performance rights to ASCAP in order to become members. This assignment means that the copyright holders extinguish their right to negotiate unique remuneration for a public performance of their specific creation, and this can arguably place them in a weaker position during the period of membership. As a result, ASCAP or BMI may have the power to deter entry of competitors. Such power could be detrimental to the PRO members, foreclosing their ability to engage in price competition (as sellers/assignors of their right) by seeking to sell/assign their rights to another PRO on more competitive terms.

Antitrust laws in the United States hypothetically can reach any sector of economic activity in the country and therefore, regulating the market power of PROs naturally comes within the remit of the Antitrust Division of the DOJ or the Federal Trade Commission. With PROs each representing a significant number of copyright owners, if and when a PRO acts as a joint selling agent for its members, it may engage in conduct that calls into question whether it has exercised monopoly or monopsony power that violates § 1 of the *Sherman Act*. Furthermore, because collective management is by its very nature the practice of collecting (“merging”) rights together, it weakens competition between copyright owners in a manner analogous to the economic harm which the *Clayton Act* is intended to prevent.

3.2. Consent Decrees of ASCAP and BMI. A consent decree is an agreement negotiated between the parties with the approval of a court (Mierniki, 2017, pg. 71). Before entering these consent judgments, the court must determine that such a judgment is in the public interest.⁵⁴ In addition, the court must take into account the impact of the judgment on relevant markets.⁵⁵

⁵⁴15 USC § 16(e)(f).

⁵⁵15 USC § 16(e)(1).

In practice, among all musical CMOs in the United States, only ASCAP and BMI have been made subject to consent decrees. These two PROs have operated under antitrust consent decrees for more than 70 years.⁵⁶ Alongside the development of the music industry and advances in technology, the consent decrees have been repeatedly revised and adapted over the years.⁵⁷ The current consent decree for ASCAP dates from 2001, and is referred as the “Second Amended Final Judgement (AFJ2)”.⁵⁸ The current consent decree for BMI dates back to 1994.⁵⁹

The provisions of the consent decrees governing ASCAP and BMI include the following core characteristics: firstly, members of ASCAP and BMI maintain the right to license directly. In the original 1941 consent decree, ASCAP was required to allow right holders to individually negotiate with music users. The current consent decree also requires ASCAP to provide more types of licences, such as per-program and per-segment licences.⁶⁰ The antitrust objective is that providing music users with more licensing options may act to limit ASCAP’s monopolistic market power.⁶¹ This indicates that the consent decrees support greater licensing choices as alternatives for users who may not need full blanket licences (Hemphill, 2011, pg. 647). Secondly, ASCAP and BMI must treat licensees who are similarly situated equally in relation to license fees and other terms. Thirdly, ASCAP and BMI have to provide transparency towards both right owners and users. For example, information about members and their repertoires needs to be publicly available to users. ASCAP also needs to provide details of how a member’s payment is calculated upon written request by that member.

⁵⁶The original consent decree of ASCAP was entered in 1941, see *United States v American Society of Composers, Authors and Publishers*, 1940-43 Trade Cas (CCH) ¶ 56,104 (SD NY, 1941). The same settlement also applied to the BMI, see *United States v Broadcast Music Inc*, 1940-43 Trade Cas (CCH) ¶ 56, 096 (ED Wis, 1941).

⁵⁷See United States Copyright Office (2015, pp. 146-50). Also see <https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015>.

⁵⁸*United States v American Society of Composers, Authors and Publishers*, 2001-2 Trade Cas (CCH) ¶ 73, 474 (SD NY, 2001).

⁵⁹*United States v Broadcast Music, Inc*, 1996-1 Trade Cas (CCH) ¶ 71, 378 (SD NY, 1994).

⁶⁰Part II (J) of the ASCAP consent decree illustrates that ‘Per-program licence’ means “a non-exclusive licence 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.” ‘Per-segment licence’ means “a non-exclusive licence that authorizes a music user to perform any or all works in ASCAP repertory in all segments of the music users’ activities in a single industry, the fee for which varies depending upon which segments contain ASCAP music not otherwise licensed for public performance.”

⁶¹See <https://www.justice.gov/atr/case-document/memorandum-united-states-support-joint-motion-enter-second-amended-final-judgment>.

Over the past seven decades, the consent decrees have been revised and adapted to respond to technological advances across the music industry (United States Copyright Office, 2015, pg. 146-50). With the current respective consent decrees regulating ASCAP and BMI having been in place for more than 20 years, in 2014 the DOJ announced a review on potential modifications to the consent decrees that would take into account public comments.⁶² However, two years later in 2016, the DOJ issued a closing statement and indicated that no changes to the current consent decrees would be made.⁶³ In the latter document, the DOJ concluded that “the industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should remain in place.” Instead of reforming the consent decrees, the DOJ encouraged a legislative solution that would ensure the marketplace would remain competitive. There has yet to be any action on the suggested ‘legislative solution’, and this has resulted in substantial criticism of the decision by the DOJ to abandon its reform process.⁶⁴ More recently in 2019, under a new administration, the DOJ reopened a forum for public comments on modifying the consent decrees, and the discussion is ongoing.⁶⁵

Although antitrust rules have governed ASCAP and BMI for decades, there remains criticism that American antitrust law cannot effectively restrain abuses of the PROs’ bargaining power (Fujitani, 1984, pp. 121-9). The nature of ASCAP and BMI consent decrees shows that the antitrust rules are not wholly effective as regulatory instruments for PROs (Gervais, 2010, pg. 603). A consent decree normally serves as the resolution of an antitrust action that corrects a specific problem, and then parties continue working. However, the consent decrees between the DOJ and the two PROs are updated instead of ending, which is different from general consent decrees.⁶⁶ In addition, the potential obsolescence of long-term consent decrees remains a problem as the decrees may work in the short-term, but fail to adapt over time to meet changes in the industry (DeBow, 1987,

⁶²See <https://www.justice.gov/atr/ascap-bmi-decree-review>.

⁶³<https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>.

⁶⁴The DOJ does not allow fractional licences. For BMI’s criticism of the DOJ, see https://www.bmi.com/news/entry/bmi_ascap_join_forces_to_fight_the_department_of_justices_interpretation_of. (pursuing a judicial solution). Similarly, For ASCAP’s criticism, see <https://www.ascap.com/help/advocacy/doj-strategy>. (pursuing a legislative solution).

⁶⁵See <https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees>.

⁶⁶There are arguments that claim that consent decrees have been a failure, see Hillman (1998, pg. 770).

pp. 357-8). This is especially significant in the music industry which is highly affected by technological progress. This issue is clearly apparent in the fact that the United States announced two rounds of review of the existing consent decrees only five years apart.

Despite these doubts, the antitrust regime and consent decrees in the United States do still provide a level of scrutiny over the operations of ASCAP and BMI. In particular, the consent decrees' requirements regarding licensing terms and conditions has created greater possibilities for individual licensing and provides a wider choice to music users.⁶⁷

4. IMPROVEMENT OF THE REGULATORY REGIME ON COLLECTIVE MANAGEMENT OF MUSIC COPYRIGHT IN CHINA

A CMO will often develop a monopoly/monopsony-like structure, due to its collective nature and representation of a large number of authors. However, the natural monopoly/monopsony-like characteristic itself is not the problem. The real problem is the actual (or potential) *abuse* of the MCSC's market power, which was discussed previously in Section 2. The question of how to design effective rules to prevent the misuse of such monopolistic power has long been debated.

4.1. The Impact of the Numbers of CMOs in Limiting their Monopoly. Simply establishing more musical CMOs cannot effectively limit the market power of the MCSC in China. It is arguable that if there are several CMOs in an industry, there will be extra work for music users to get permission to use musical works because they would need to ask several CMOs.⁶⁸ The singular nature of a CMO is necessary for it to reach the goal of promoting the spread of works (Li, 2015, pg. 40). More importantly, there is no direct evidence to support the conclusion that having more CMOs in China would decrease the MCSC's market power, as it would be extremely difficult for those fledgling CMOs to gain entry and compete with an established entity which is supported by the authorities. As such, it would be more prudent to constrain the MCSC's market power with effective

⁶⁷The ongoing and modified consent decrees are in the nature of 'regulation' as opposed to antitrust enforcement. In 2019, the DOJ reopened a forum for public comments on modifying the consent decrees, and the discussion is ongoing. See <https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees>.

⁶⁸Free competition among CMOs may cause huge transaction costs, and also is not suitable for massive distribution of copyright material on the internet. See Lin and Huang (2016, pg. 57).

regulations rather than simply establish more CMOs to purportedly create greater market competition.

Despite the arguments described above, there are criticisms of the status of monopolistic CMOs which are focused on increasing the number of organisations operating in a field. A popular argument is that a singular CMO will inevitably misuse its market power, damaging the interests of copyright owners (Lin and Huang, 2016, pg. 57). According to Merges (2008, pg. 26-7), a single CMO may exercise too much unilateral power because of the lack of competition from outside sources, and additionally, a single CMO may develop slowly and fail to adapt to changing circumstances, as it has no immediate impetus to adapt to a changing marketplace without the threat of outside competition. In practice, some songwriters and composers have worried that the monopsony held by the MCSC could undermine copyright owners' benefits, and they have supported the argument that China should adopt a model of positive competition among CMOs.⁶⁹

Supporters of the competitive model have suggested that China should establish more CMOs in each field to address the issues that can arise from a monopoly. These studies note that in comparison to a single CMO, competition amongst multiple CMOs encourages organisations to set more reasonable licensing fees (see Lu, 2007, pg. 70). The relative competitive position of creators will be strengthened when multiple CMOs compete with each other (Xiong, 2011, pg. 109). Multiple CMOs in the music industry could ideally compete for songwriters' business through various aspects of their operations, which would provide more options to copyright owners (United States Copyright Office, 2016, pg. 26). The United States is a good illustration of the typical competitive model of having multiple CMOs in the music industry. In practice, the competition between ASCAP and BMI has benefitted songwriters. After BMI was founded, some composers who had been snubbed by ASCAP chose to join BMI (see Myers, 2013, pg. 119). Relatively new to the market at the time, BMI provided composers with more choices (Ryan, 1985, pg. 5). Thus there is precedent for the argument that within a system of more than one CMO, copyright

⁶⁹See the discussion by Xinlangyule (2012), available at <http://ent.sina.com.cn/c/2012-04-16/17563607059.shtml>

owners will be able to choose the organisation they feel is better suited to protecting their rights (Wang, 2015, pg. 47).

Having said this, the question remains as to how to establish more successful CMOs, especially in competition with a pre-existing singular CMO. For example, to promote a competitive environment it is generally recommended to privatise any CMOs that had been formed under government supervision (see Chin, 2014, pg. 281). Another recommendation is that China should allow for-profit entities to participate in collective management, with both for-profit and non-profit organisations co-existing in the industry (Wu, 2016, pp. 214, 228). Finally, to avoid the intervention of administrative authorities, the complex administrative requirements for establishing a CMO should be abandoned to allow other entities to operate as CMOs as long as they are qualified (see Xiong, 2016a, pg. 55). Supporters of this argument usually claim that profitable businesses can bring more competition to the market and provide better options for copyright owners.

Despite this, establishing more CMOs will not necessarily end the problems which have arisen with the MCSC. Since CMOs mainly operate on a domestic scale, they share the market, regardless of the number of CMOs in one field. As such, these organisations are regarded as oligopolies (Chin, 2014, pg. 279). The examples of ASCAP and BMI prove this point. Considering that ASCAP and BMI represent the public performance rights of different right owners, broadcasters may still have to obtain licences from all of the PROs (Loren, 2014, pp. 561-5). From the perspective of those music users, having several PROs may mean more authorisations are needed instead of more options are available. Although there are multiple CMOs in the United States, they still share the oligopolistic market, rather than really competing with each other. The actual practices of ASCAP and BMI are frequently under antitrust scrutiny from the American authorities for anti-competitive conduct (Fujitani, 1984, pg. 103).

Compared to establishing more CMOs to simply enter the market, it is more important to strengthen regulatory systems to provide an adequate safeguard against misuses of a CMO's market power. The goal of either a singular or competitive model of CMOs

is to promote copyright protection and protect copyright holders. Due to the monopoly/monopsony characteristics arising from the nature of the collective licence, CMOs can violate competition laws regardless of the numbers of organisations due to the nature of collective licence. If each CMO's repertoire is a "must-have" for a licensee, then increasing the number of "must have" CMOs will actually worsen the outcome in terms of efficiency, compared even with monopoly.

Only with an effective regulatory system overseeing the operation of a singular CMO's licensing terms can musical CMOs work effectively and protect creators' interests. Designing a better legislative framework to overcome the issues caused by CMOs' monopoly/monopsony characteristics will promote efficient transactions efficiency in collective licensing (Xiong, 2011, pg. 101). To achieve this goal in China, there must therefore be adequate regulatory rules to clarify the MCSC's obligations and discipline its operations.

4.2. Applicability of Antitrust Rules to Regulate the MCSC is not Desirable.

It is not suggested that China should employ the Chinese *Anti-Monopoly Law*⁷⁰ to regulate the MCSC. Although antitrust rules in the United States regulate ASCAP and BMI, this does not mean that China should follow the same rules. There are differences within the justification and approaches of antitrust rules in these two countries. First of all, the United States promotes market competition among CMOs. Only when markets are uncompetitive can antitrust rules step in as the second-best approach, and even then only in limited circumstances. There is also a significant difference between the attitudes towards collective management held in China and the United States. The United States allows more freedom for ASCAP and BMI in the market, as long as they operate under the outlines set by the existing consent decrees. In contrast, China legislative support for the MCSC's singular status, and the MCSC, play an administrative role instead of being a member-focused organisation.

The United States' antitrust legal regime is also more developed than the *Anti-Monopoly Law* in China. The antitrust rules in the United States have been developed over hundreds

⁷⁰Anti-Monopoly Law of the People's Republic of China, National People's Congress, 30 August 2007.

of years. Significantly, the *Sherman Act*⁷¹ in the United States provides a broad regulatory regime which covers any anti-competitive behaviour, and naturally limits the market power of American CMOs as they fall under its legislative umbrella. In sharp contrast, the Chinese *Anti-Monopoly Law* is very recent, being brought into existence only a few years ago.

Due to the immaturity of the rules contained in the *Anti-Monopoly Law*, it is not clear whether the MCSC, as a non-profit organisation, can be regulated by the *Anti-Monopoly Law*. Going back to the justification provided for antitrust rules in China, the *Anti-Monopoly Law* regulates ‘business operators’, which refers to natural persons, legal persons, and other organisations that engage in production or trade of commodities or the provision of services. These definitions have resulted in ongoing debate about the application of the Chinese *Anti-Monopoly Law* to non-profit entities, and there are divergent judicial decisions on this issue (see Jiao, 2008, pg. 149-50). Although the MCSC is a legal person, it works as a non-profit social organisation. As such, it is doubtful that the Chinese *Anti-Monopoly Law* in its current form could be directly used to regulate the work of the MCSC. The *Anti-Monopoly Guidance of the Anti-Monopoly Commission of the State Council on Misusing Intellectual Property Consultation Paper* did include CMOs,⁷² and it seems that the MCSC and other CMOs in China can be regulated by the *Anti-Monopoly Law*. However, there have not been any updated versions of this document since 2017. Some have argued that even if this draft was adopted in the future, antitrust litigation against CMOs would still not work effectively (Xiong, 2016c, pg. 101).

Despite this, there are still supporters in favour of adapting the Chinese *Anti-Monopoly Law* to regulate the Chinese CMOs. These proponents suggest that because economic rights in copyright are private rights, copyright collective management should be regarded as a commercial activity, which would naturally make the work of collective management fall within the ambit of the Chinese *Anti-Monopoly Law* (see Wang, 2015, pg. 47). However

⁷¹15 USC §§ 1–7.

⁷²Anti-Monopoly Commission of the State Council, Calling for Public Comments on ‘Anti-Monopoly Guidance on Misusing Intellectual Property (Consultation Paper)’ (23 March 2017). See <http://fdj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml>.

to date, there has been little precedent in law supporting this approach. Other scholars (see, for example, Jiang and Gervais, 2016, pg. 442) would argue that there are two options which could truly overcome the conflict between the legal nature of the CMOs and the Chinese *Anti-Monopoly Law*. One option is to extend the scope of ‘business operators’ under the Chinese *Anti-Monopoly Law* to cover CMOs explicitly. Alternatively, the Supreme People’s Court would need to expand the interpretation of the Chinese *Anti-Monopoly Law* to regulate the anti-competitive conduct of CMOs.

Both above arguments have been questioned. As addressed previously, the CMOs in China operate with strong administrative characteristics and are closely affiliated with the existing regulatory authorities. Unlike examples in the United States, it is almost impossible for a government department to file a lawsuit against a Chinese CMO (Xiong, 2016c, pg. 101). Because of the special administrative roles of the MCSC, the Chinese *Anti-Monopoly Law* is not a suitable tool to regulate its market power.

Another justification for not recommending the use of the Chinese *Anti-Monopoly Law* as a tool to regulate CMOs is that the *Anti-Monopoly Law* only provides general guidance to regulate business operators’ activities. Therefore, the *Anti-Monopoly Law* would not effectively oversee CMOs’ operations even if it was applied to them. In its current form, three kinds of ‘monopolistic conduct’ are disciplined by Chinese *Anti-Monopoly Law* (art. 3): (1) monopolistic agreements among business operators; (2) abuses of business operators’ dominant market positions; and (3) elimination or restriction of competition or possible elimination or restriction of competition by business operators. The closest fit a CMO’s anti-competitive behaviour is the second category of conduct – the abuse of a business operators’ dominant market position. Even if the *Anti-Monopoly Law* were to be enforced upon CMOs, there is still a need for more detailed rules and a competition authority to arbitrate disputes.

Relevantly, the conduct which could possibly constitute an abuse of market power under the *Anti-Monopoly Law* has already been addressed in the RCCA. Thus it is redundant to add an additional law to regulate CMOs considering that China already has a specific regulation purportedly achieving that aim. Although antitrust rules in the United

States regulate the competition issues of ASCAP and BMI, these two organisations mainly operate under their consent decrees. The consent decrees have set up the operational conditions with which ASCAP and BMI must comply. In fact, similar rules and requirements have been included in the RCCA, although the contents of those rules are currently too weak in practice to be effective. As such, instead of introducing the vague Chinese *Anti-Monopoly Law* as a method of constraining the misuse of MCSC's market power, it is far more reasonable and realistic to focus on improving the efficacy of the current rules that have been developed with that intention.

In the particular field of copyright collective management, specific rules are more effective compared with the use of a general *Anti-Monopoly Law*. For instance, one important aim of regulating the CMOs' market power is to maintain a balance of bargaining power between CMOs and both licensees and members. The RCCA will do a better job than the *Anti-Monopoly Law* since the RCCA can contain more specific rules that are tailored to the collective management of copyright. While it can take considerable time to amend legislation, it is relatively simple to amend a regulation as less procedures are required (Li, 2016, pg. 68). In order to be effective, the RCCA (2013) should set up more stringent and detailed rules limiting the market power of CMOs.

China can indeed learn from the United States despite legal and economic differences. Currently, the RCCA (2013) does not include detailed rules requiring disclosures regarding MCSC's operations, which has enabled the CMO's lack of transparency. The consent decrees between the DOJ and the PROs include various licensing types. Considering that similar requirements have been included in the RCCA (2013), China can add more detailed rules in the regulation rather than directly use the Ant-Monopoly Law to regulate singular CMOs. More types of licences and more flexible agreements between copyright holders and the MCSC can be alternative options.

5. CONCLUSION

It should be considered significant progress that China was able to build a functional copyright collective management system in 30 years. Yet problems inevitably arise in the

establishment and development of CMOs. Inadequate regulation is one of the main causes of the current (and potential) misuse of the MCSC's market power. Without an effective regulatory system, the misuse problems cannot be solved simply by setting up more CMOs in the Chinese context. Furthermore, compared with the comprehensive antitrust rules in the United States, the Chinese *Anti-Monopoly Law* is neither adequate nor suitable for regulating the MCSC's market power because it is a non-profit social organisation with administrative characteristics. Alternatively, improving the regulations of the RCCA (2013) including providing a wider range of licensing options can offer a solution which can constrain the abuse of the MCSC's market power.

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