12. REGULATION OF COLLECTIVE MANAGEMENT ORGANISATIONS IN SOUTH AFRICA

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ABSTRACT

In 2011, the Copyright Review Commission (South Africa) found cases of impropriety in the dealings of collective management organisations (CMOs) in the South African copyright-based industry and the inadequacy of the extant regulation regimes to tackle such irregularities. These findings, among others, prompted the copyright law reform process in South Africa, which has reached a very advanced stage with the Copyright Amendment Bill, 2017 now awaiting presidential assent. Undertaken as a desk research, this paper examines the extant, and proposed, regulation regimes for CMOs in South Africa. The goal is to identify the existing gaps in the extant regulation and determine whether, and how, the proposed legal framework has addressed these lacunae in order to ensure accountability, transparency and efficiency of CMOs in South Africa.

Keywords: ***c****opyright, CMOs, needletime, non-needletime, regulation, South Africa*

1. INTRODUCTION[1]

Generally, collective management organisations (CMOs) are organisations involved in the negotiation of copyright licenses, collection of royalties, distribution of such royalties to copyright owners who are usually (but not always) their members, monitoring uses of copyright works, and in deserving cases, enforcement of copyright infringement. In this connection, CMOs help bridge the gap between copyright owners and users of copyrighted works in terms of copyright licensing and enforcement, and thus help solve transaction cost problems in the copyright industry, even in the digital era. CMOs also carry out incidental functions, which are socio-cultural in nature, such as orientation and anti-piracy programs, activities that promote the copyright and creative industry, and support for copyright owners in the form of pension schemes and charity for indigent copyright owners.[2]

The importance of CMOs as core features of the economic activity within the copyright-based industries has been recognised globally, in Africa and within the South African

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[1] This paper is adapted from the author's PhD Thesis: Desmond O Oriakhogba, 'Strengthening the Regulation Regimes for Collecting Societies in South Africa and Nigeria: Any Room for Competition Law' (Cape Town: University of Cape, 2018) <https://open.uct.ac.za/bitstream/handle/11427/29998/thesis_law_2018_oriakhogba_desmond_osaretin.pdf?sequence=1&isAllowed=y> accessed 5 October 2019.

[2] Mihaly Ficsor, *Collective Management of Copyright and Related Rights* (WIPO, Geneva 2002); Ulrich Uchtenhagen, *Copyright Collective Management in Music* (WIPO, Geneva 2011); Daniel Gervais, *Collective Management of Copyright and Related Rights* 3rd edn (Wolters Kluwer, Netherlands 2015); Joel Baloyi, 'The Protection and Licensing of Music Rights in Sub-Saharan Africa: Challenges and Opportunities' (2014) 14(1) *JMEIEA* 61-87.

(SA) context.[3] Nine CMOs currently operate in SA, and for purpose of this paper, the CMOs are grouped into needletime and non-needletime CMOs. Needletime CMOs are those administering needletime rights, defined as the right of performers and music producers to be remunerated when their sound recording (containing the performers' performance) is broadcast, transmitted in a diffusion service or communicated to the public.[4] Based on the current regulation regime for collective management of copyright and related rights in SA, which is discussed in Section 2 below, SA commentators often distinguish between needletime and non-needletime CMOs.[5] The needletime CMOs are the South African Music Performance Rights Association (SAMPRA) and the Independent Music Performance Rights Association (IMPRA). The non-needletime CMOs are Southern African Music Rights Organisation (SAMRO); the Composers, Authors and Publishers Association (CAPASSO);[6] the Association of Independent Record Companies of South Africa (AIRCO); the Dramatic, Artistic and Literary Rights Organisation (DALRO); the Recording Industry of South Africa's (RISA) Audio-Visual (RAV); the Motion Picture Licencing Company (MPLC); and the Christian Copyright Licencing International (CCLI).[7]

The activities of CMOs and their impact on the copyright and creative industry within the framework of extant copyright law in SA formed a central theme in the investigation of the SA Copyright Review Commission (CRC), which released its report in 2011. Among others, the CRC was established on 18 November 2010 by the Minister of Trade and Industry to assess concerns and allegations about the collective model in place for the distribution of royalties to musicians and composers of music in South Africa. Specifically, the issues considered by the CRC included the structure of CMOs, licensing, royalty collection and distribution. Its findings included, CMOs' inappropriate dealings with the royalties collected on behalf of copyright owners, lack of proper royalty distribution rules leading sometimes to non-distribution of royalty to copyright owners, and other issues relating to significant weakness in internal control; outdated constitutive documents; lack of internal audit; lack of independent directors; lack of issuance of audited financial statements; lack of publication of annual reports, among others, within SAMRO, SAMPRA and the defunct SARRAL; and the inadequacy of the existing regulation regime to address these issues.[8]

The CRC's findings were instrumental to the proposals in the SA Copyright Amendment Bill 2017 (CAB) and the Performers' Protection Amendment Bill, 2016 (PPAB), which currently await presidential assent.[9] The extant regulatory framework for CMOs in SA is found in the Copyright Act, Performers' Protection Act, and the Collecting Societies Regulations (CS

[3] Gervais (n 2); Keitseng N Monyatsi, *Survey on the Status of Collective Management Organizations in ARIPO Member States* (ARIPO, 2015) 16 <https://www.aripo.org/wp-content/uploads/2018/12/ARIPO-CMO-Survey-Mag.pdf> accessed 5 October 2019; Department of Trade and Investment, *Copyright Review Commission Report* (South Africa, 2011) [hereinafter, DTI] <https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf> accessed 5 October 2019.

[4] ibid.

[5] For instance, see Joel Baloyi & Tana Pistorius, 'Collective Management in Africa' in Gervais (n 2) 369-424.

[6] CAPPASO is a product of the merger of between the National Organization of Reproduction Rights in Music in South Africa and SAMRO in 2014. See Sheldon R Leal, 'SA Music Industry Societies' (2019) <https://medium.com/@shelrochaleal/sa-music-industry-societies-e53cdd13c800> accessed 13 July 2020; Daine Coetzer, 'Two of South African Largest Royalty Collection Agencies Join Forces' (2011) <http://www.billboard.com/biz/articles/news/publishing/1178131/two-of-south-africas-largest-royalty-collection-agencies-join> accessed 13 July 2020.

[7] See Oriakhogba (n 1) 99–105; AIRCO <https://www.airco.org.za/> accessed 5 October 2019.

[8] DTI (n 3).

[9] Copyright Amendment Bill, B13B 2017 (South Africa) [hereinafter CAB] <https://libguides.wits.ac.za/ld.php?content_id=45613747> accessed 5 October 2019; Performers Protection Amendment Bill, B24B 2016 (South Africa) (PPAB) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/b_24_-_2016_performers_protection.pdf> accessed 5 October 2019.

Regulations).[10] The Companies Act[11] also applies in this regard, especially as it relates to the incorporation, corporate governance, winding-up of CMOs, and the establishment of the Companies and Intellectual Property Commission (CIPC), which is saddled with the duty of supervising CMOs in SA.

To be effective, a regulation regime for CMOs should promote accountability, transparency and efficiency in the activities of CMOs. In this connection, the regulations regime should govern the relationship between CMOs and copyright owners, and between CMOs and users of works, among others. In particular, the regulations framework should address specific issues relating to membership of CMOs, the collection and distribution of royalty, royalty tariffs, licensing and corporate governance, among others.[12] Against this backdrop, this paper examines the extant regulations framework for CMOs in SA to determine its effectiveness in promoting accountability, transparency and efficiency in collective management in SA. The paper will identify existing gaps in the extant regulation and determine whether the proposals in the CAB relating to regulation of CMOs in SA sufficiently address the identified gaps. The paper is divided into four parts with the introduction being the first. The second part involves an in-depth examination of the extant regulation of CMOs in SA. The third part discusses the proposed regulatory framework for CMOs under the CAB, while the conclusion forms the fourth part.

2. CURRENT REGULATION OF CMOS IN SOUTH AFRICA

The discussion in this part is divided into four sub-parts. The first, second and third respectively discuss the accreditation of CMOs; the relationship between CMOs and copyright owners (their members); and the relationship between CMOs and users of copyright works in SA. Here, the provisions of the regulation regime as applicable to needletime and non-needletime CMOs are discussed. The fourth sub-part then examines provisions relating to the internal management, transparency and accountability of CMOs. It is important to state from the outset that the Copyright Act, the Performers' Protection Act, the CS Regulations and the Companies Act are silent on the issue of legal forms that CMOs (needletime and non-needletime) must take. However, CMOs are generally non-profit organisations and, unless required by law they can be incorporated in any legal form, such as limited liability companies or partnerships, amongst others.[13] Indeed, apart from DALRO and MPLC, which are private companies, other CMOs in SA are non-profit companies (NPCs). Therefore, any organisation intending to act as a needletime or non-needletime CMO would be at liberty to choose any legal form. However, such organisation would need to comply with the provisions of the Companies Act relating to formation of companies generally.[14]

A. ACCREDITATION TO OPERATE AS CMO

The CS Regulations empower the Registrar, who is also the Commissioner of the CIPC, to accredit any person or licensing body interested in functioning as a CMO on behalf of fifty or more music producers (or an organisation representing them), or fifty or more performers (or an organisation representing them), either jointly or separately.[15] This requirement is not novel. It finds precedence in the Nigerian regulatory framework. A combined reading of sections 17 and

[10] Copyright Act, 1978 (South Africa) [hereinafter Copyright Act]; Performers' Protection Act, 1967 (South Africa) [hereinafter Performers' Protection Act]; Regulations on the Establishment of Collecting Societies in the Music Industry GN 517 in *GG* 28894 of 1 June 2006 (South Africa) [hereinafter CS Regulation].

[11] Companies Act, 2008 (South Africa) [hereinafter Companies Act].

[12] Josef Drexl, *Copyright, Competition and Development* (Geneva: WIPO, 2013) <https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf> accessed 5 October 2019; Ifeoluwa A Olubiyi and Kayode I Adams, 'An Examination of the Adequacy of the Regulation of Collecting Societies in Nigeria' (2017) 5 South African Intellectual Property Law Journal 89; Chijioke I Okorie, 'Corporate Governance of Collecting Societies in Nigeria: Powers of the Copyright Sector Regulator' (2018) 6 South African Intellectual Property Law Journal 24.

[13] Tarja Koskinen-Olsson & Nicholas Lowe, *General Aspects of Collective Management* (WIPO, Geneva, 2012) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf> accessed 5 October 2019.

[14] Companies Act (South Africa) (n 11), ss 8 and 10 and Schedule 1.

[15] CS Regulations (South Africa) (n 10), Regulation 3(1).

39 of the Nigerian Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004 requires CMOs representing fifty or more copyright owners to be approved by the Nigerian Copyright Commission before they can operate as such.

The requirements for the grant of accreditation in South Africa, under the CS Regulations, are:[16]

- the applicant must be capable of ensuring adequate, efficient and effective administration of the rights to be entrusted to it;
- the applicant's membership must be open to all rights owners (or their association) of the class of rights the applicant intends to administer;
- the applicant affords its members the right and opportunity to take part in the decision-making process relating to the applicant's affairs, the administration of rights and distribution of royalties;
- the applicant must be capable of complying with its obligations under the CS Regulations;
- the managers and members of the governing body must be largely South African citizens or permanent residents and be fit and proper persons to act in the capacity;
- the applicant's place of business must be situated in SA; and
- the accreditation will not undermine or diminish the adequate, efficient and effective administration of rights by an already established and accredited needletime CMO.

If the above requirements are satisfied, the Registrar is enjoined to grant the accreditation.[17] Otherwise, and in deserving cases, the Registrar is empowered to modify or refuse the application and, within 30 days of the modification or refusal, to furnish the applicant with reasons thereof, in writing.[18]

The Registrar has exercised the accreditation powers in the past. The defunct South African Recording Rights Association Limited (SARRAL) was the first CMO to be accredited under the CS Regulations. SARRAL was accredited in March 2007.[19] SARRAL's accreditation was questionable because it came at a time when there was a pending winding-up petition against it.[20] SARRAL 'used the accreditation to persuade the court not to liquidate it.'[21] In fact, SARRAL's counsel had contended in court that 'accreditation could not have been granted unless the Registrar was satisfied that [SARRAL] was able to ensure adequate, efficient and effective administration of the rights entrusted to it.'[22] Even so, the court held that, not being a needletime CMO, the Registrar had no powers or rights to regulate or seek to regulate SARRAL in terms of the CS Regulation.[23] However, this does not preclude the Registrar from regulating non-needletime CMOs (and indeed all CMOs) in terms of the Copyright Act, Performers' Protection Act and the Companies Act. Overall, the court found instances of mismanagement, lack of transparency, accountability and probity in the dealings of SARRAL regarding the administration of its members' mechanical rights.[24] Consequently, SARRAL was wound-up and its application for leave to appeal against the winding-up order was refused.[25] The Registrar eventually withdrew SARRAL's accreditation in 2010.[26]

[16] ibid, Regulation 3(3).

[17] CS Regulations (South Africa) (n 10), Regulation 3(4)(a).

[18] ibid, Regulation 3(4)(c).

[19] Baloyi & Pistorius (n 5) 396.

[20] *Shapiro v South African Recording Rights Association Limited* (SARRAL) Unreported Case No. 14698/04 (2009).

[21] Baloyi & Pistorius (n 5) 390.

[22] *Shapiro v SARRAL* (n 20) 12.

[23] ibid 15.

[24] ibid 33–45.

[25] Graeme Gilfillan, 'Clarifying the History, Roles, Responsibilities and Regulatory Environment Concerning Collecting Societies in South Africa' (2010) 17 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2010/101020clarifying.pdf> accessed 5 October 2019.

[26] DTI (n 3) 43.

The implication of the SARRAL judgment is twofold. First, non-needletime CMOs do not require accreditation under the CS Regulation to operate in SA. Second, although the Registrar is not empowered to accredit non-needletime CMOs in terms of the CS Regulation, they can regulate their royalty collections, among others, for instance by issuing a notice under the Companies Act requiring the non-needletime CMO to comply with the terms of its constitutive documents. The Registrar may then apply for winding up if the grounds contemplated in the Companies Act occur.[27] Thus, as will become apparent as discussion progresses below, although non-needletime CMOs do not require accreditation to operate, the Registrar (or Commissioner) of the CIPC can regulate their activities by virtue of relevant provisions of the Companies Act, the Copyright Act and the Performers' Protection Act.

SAMPRA was the second CMO to be accredited under the CS Regulations. It was accredited in June 2007.[28] However, it appears SAMPRA applied for renewal in 2012, which was provisionally refused in July of the same year.[29] This may be connected to the then raging controversy on the distribution of royalties between music producers (represented by SAMPRA) and performers (represented by SAMRO).[30] The main issue concerned the exact share of the royalties for music producers and performers, and who could collect the performers' share. SAMRO's stand was that the share should be equal (50/50) between the performers and music producers.[31] SAMRO also contended that it is entitled to collect the performers' share from SAMPRA and distribute accordingly.[32] On the other hand, SAMPRA held the position that it was obligated to pay the needletime royalties to music producers who would determine the performers' share and pay them the royalty less any advances paid to them in terms of their recording agreement.[33] The Registrar shared SAMRO's view and indeed refused to approve the distribution plan submitted by SAMPRA. The issue led the Registrar into 'threatening to terminate SAMPRA's accreditation as a CMO, prompting SAMPRA to institute legal proceedings against the Registrar and SAMRO to have the Registrar's decision reversed.'[34] SAMPRA was eventually accredited in October 2012, and again in 2014.[35]

The next CMO to be accredited was SAMRO, in 2008.[36] Its performer members that comprised the Performers Organisation of South Africa (POSA) Trust, is now part of SAMPRA.[37] In effect, the accreditation granted to SAMRO has become ineffective. Following this, IMPRA was accredited in August 2015.[38]

The CS Regulations empower the Registrar to withdraw an accreditation granted earlier. However, the Registrar must

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[27] Companies Act (South Africa) (n 11), s 81(1)(f).

[28] Baloyi & Pistorius (n 5) 396.

[29] See Companies and Intellectual Property Commission (CIPC), 'Notice in Terms of Regulation 3 (7) of the Regulations on Collecting Societies' GN No. 577, *GG* No. 35530 of 19 July 2012.

[30] Nick Matzukis, 'The Great South African Needletime Debacle' (2014) <https://www.musicinafrica.net/magazine/great-south-african-needletime-debacle> accessed 5 October 2019.

[31] ibid.

[32] ibid.

[33] ibid.

[34] Baloyi & Pistorius (n 5) 381. See *South African Music Performance Rights Association (SAMPRA) v Kadi Petje & Ors.* Unreported Case No. 9085/2010. The case was eventually withdrawn prompting SAMRO to institute *Southern African Music Rights Organisation (SAMRO) v South African Music Performance Rights Association (SAMPRA) & Ors.* Unreported Case No. 42008/2013 for an interim interdict to prevent SAMPRA from distributing its royalties. This case was also withdrawn following agreement between SAMPRA and SAMRO to end the conflict.

[35] See 'Notice in Terms of Regulation 3 (7) of the Regulations on Collecting Societies' Companies and Intellectual Property Commission (CIPC), GN No. R. 848, *GG* No. 35791 of 19 October 2012; 'Notice in Terms of Regulation 3 (7) of the Regulations on Collecting Societies' Companies and Intellectual Property Commission (CIPC), GN Nos. 1068 and 1069, *GG* No. 38232 of 28 November 2014.

[36] Baloyi & Pistorius (n 5) 396.

[37] SAMPRA, 'Background' <https://www.sampra.org.za/> accessed 13 July 2020.

[38] See 'Notice in Terms of Regulation 3 (7) of the Regulations on Collecting Societies,' Companies and Intellectual Property Commission (CIPC), GN No. 680, *GG* No. 39066 of 7 August 2015.

notify the CMO and state reasons for such withdrawal. The situations that can lead to withdrawal of accreditation are:[39]

- failure to disclose material facts at the point of application that may lead refusal of the application;
- the Registrar becoming aware of unknown facts at the time of accreditation or subsequent occurrences, which would have constituted a ground for refusal of the application and which could have been irremediable;
- in the Registrar's opinion, the CMO fails to comply with its obligations under the CS Regulations and ignores directions by the Registrar regarding the infractions; and
- a liquidation order has been issued against the CMO.[40]

To prevent arbitrariness, the Registrar's powers to grant, renew and withdraw accreditation under the CS Regulations are subject to judicial review.[41]

B. RELATIONSHIP BETWEEN CMOS AND COPYRIGHT OWNERS

(i) Membership of Needletime CMOs

The relationship between non-needletime CMOs and their members are defined by their constitutive documents such as a memorandum of incorporation (MOI) and other company rules.[42] The same is true in relation to needletime CMOs. While the MOI of needletime CMOs must comply with the CS Regulation and relevant provisions of the Companies Act, that of non-needletime CMOs need only conform to relevant provisions of the Companies Act.

As indicated above, most CMOs in South Africa are NPCs, while some are private companies. Generally, a private company is allowed to have one or more shareholder(s). A discussion of shareholders' rights is beyond the scope of this work.[43] It suffices to state now that where a private company has only one shareholder, as in DALRO's case, 'that shareholder may exercise any or all of the voting rights pertaining to that company on any matter without notice or compliance with any other internal formalities' except as otherwise stipulated by the company's MOI.[44] CMOs that are NPCs are generally not required to have members, except where their MOI provides otherwise.[45] However, if their MOI requires them to have members, membership shall not be restricted or regulated in such a way as to amount to unfair discrimination on grounds of sex, ethnic or social origin, colour, sexual orientation, religion, among others.[46] Indeed, all members must be treated equally in terms of rights administration. Moreover, the MOI may allow membership to be held by juristic persons, including for-profit companies.[47] Such juristic persons or for- profit companies should be those representing the class of right holders falling within the repertoire of the CMOs.

The CS Regulations specifically require membership of needletime CMOs to be open to persons falling within the class of rights holders they represent, either directly or through an organisation of the class of rights holders.[48] An additional equality standard is provided for needletime CMOs composed of music producers and performers. The CS Regulations require the governing structure of such CMOs to provide for equal representation of the music producers and performers in the decision-making process of their highest executive organ and their general assembly.[49] Further, the CS Regulations preserve the rights, remedies and reliefs that members of needletime CMOs are entitled to under their

[39] CS Regulation (South Africa) (n 10), Regulation 3(6).

[40] SARRAL's accreditation was withdrawn in 2010 owing to the liquidation order issued against it in *Shapiro v SARRAL* (n 20).

[41] CS Regulation (South Africa) (n 10), Regulation 4(8); *Foschini Retail Group (Pty) Ltd v South African Music Performance Rights Association (SAMPRA)* [2013] ZAGPPHC 304 (Copyright Tribunal) para 3.

[42] *Shapiro v SARRAL* (n 20).

[43] Companies Act (South Africa) (n 11), ss 57-65.

[44] ibid, s 57.

[45] ibid, Schedule 1 para 4(1)

[46] ibid, Schedule 1 para 4(2)(a); The Constitution of the Republic of South Africa 1996, s 9.

[47] Companies Act (South Africa) (n 11), Schedule 1 para 4(2)(c).

[48] CS Regulation (South Africa) (n 10), Regulation 5(1).

[49] ibid, Regulation 5(2).

membership agreement, common law or their constitutive documents.[50]

The implication of the absence of such mandate in relation to non-needletime CMOs is that they are free to structure their governing board as they deem fit. However, it appears that such non-needletime CMOs are already structuring their governing boards along the lines of the CS Regulation, even though the regulations do not apply to them. For instance, clause 16.1 of CAPASSO's Memorandum of Incorporation stipulates that its governing board shall be constituted of a minimum of 8 directors: the independent chairman/non-executive director, the chief executive officer, and 3 members each of SAMRO and the National Organisation of Reproduction Rights (NORM).[51] In this connection, it should be recalled that CAPASSO was formed by a merger of SAMRO's mechanical rights administration arm and NORM, following recommendation by the CRC. Thus, it was fitting that equal numbers of the representatives of SAMRO and NORM constituted CAPASSO's governing board.[52]

Even so, the MOI of CMOs that are NPCs (needletime and non-needletime) may provide for two classes of members – voting and non-voting members – and must stipulate the qualifications for membership; the grounds on which membership may cease or be suspended; and the rights and obligations of membership in any class, among others.[53] Each voting member of CMOs are entitled to one vote, and except otherwise provided by the MOI, the vote of every member is equal in value on any matter to be determined by vote in the CMO.[54] Specific to needletime CMOs, the CS Regulations is silent on whether they may have voting and non-voting members. Instead, it confers voting rights on each member of needletime CMOs.[55] However, the CS Regulation must be read subject to the provisions of the Companies Act, which is the specific legislation that defines the form, and the content of MOIs of legal entities. In effect, the voting rights referred to in the CS Regulation would be exercisable by a voting member where the needletime CMO has two classes of members in terms of the Companies Act. Where the needletime CMO does not classify its membership, then the voting rights are exercisable by all members.

Further, CMOs that are NPCs (needletime and non-needletime) are prohibited from, presuming the membership of any person; regarding any person as their member; or providing automatic membership to any person on any basis other than lifetime membership awarded to a person for service to the CMO and with the consent of such person.[56] Finally, CMOs that are NPCs (needletime and non-needletime) are required to maintain a membership register, while private companies are required to maintain securities registers.[57]

(ii) Royalty Distribution of CMOs

As stated in section 1 above, one of the main roles of CMOs is distribution of royalties among its members. Indeed, the effectiveness and efficiency of CMOs in South Africa have been gauged based on the frequency, size and pattern of their royalty distribution, among others.[58] The CS Regulations specifically govern royalty distribution of needletime CMOs. That is not to say needletime CMOs, like their non-needletime counterparts, are not subject to relevant rules in the Companies Act that relate to royalty distribution. Indeed, all CMOs will be subject to the relevant rules stipulated in their constitutive documents, as approved by their members and governed by the Companies Act.[59]

[50] ibid, Regulation 5(5); *Shapiro v SARRAL* (n 20) 14-15.

[51] CAPASSO's Memorandum of Association <https://846a02d5-b1ca-41ef-9571-2ce5ce8cd06a.filesusr.com/ugd/a0bce1_cb34fea139e54d978569c3f7107ede62.pdf> accessed 29 April 2020.

[52] DTI (n 3) 46.

[53] Companies Act (South Africa) (n 11), Schedule 1 para 4(d) and (e).

[54] ibid, Schedule 1 para 1(7) and (8).

[55] CS Regulation (South Africa) (n 10), Regulation 5(3).

[56] Companies Act (South Africa) (n 11), Schedule 1 para 4(2).

[57] ibid, s 24(4) and Schedule 1 para 1(9).

[58] DTI (n 3) 69-77; Charl Blignaut, 'Gospel Shocker: How Black Musicians Got Screwed' (South Africa: City Press, 1 April 2018) <https://city-press.news24.com/News/gospel-shocker-how-black-musicians-got-screwed-20180401> accessed 5 October 2019.

[59] *Shapiro v SARRAL* (n 20).

Generally, the Companies Act requires all CMOs that are NPCs (needletime and non-needletime) to apply all their assets and income to advancing their objectives. They are prohibited from directly or indirectly paying any portion of their income to their members, except as payment of royalty in respect of the rights of that person administered by the CMO, among others.[60] Arguably, this provision may be regarded as the foundation for the distribution rules of those CMOs that are NPCs, a discussion of which is beyond the scope of the present paper.[61] Nonetheless, royalty is expected to be distributed fairly among members based on the actual usage of works,[62] determined by usage data supplied by users or by sampling, as the case may be. In addition, CMOs are not expected to distribute all their income as royalties to their members. This is so because CMOs are entitled to retain certain percentage of royalties collected as administrative cost. Depending on the level of development of collective management in a jurisdiction, the ideal situation is to retain not more than 30% of royalties collected.[63] This percentage may be fixed, either by law or by members' mandate.[64] However, the percentage is expected to reduce as the CMOs develop and become more efficient.[65]

Specifically, Section 9A of the Copyright Act and Section 5 of the Performers' Protection Act guide royalty distribution of needletime CMOs.[66] By a combined reading of the sections, a music producer who has been authorised by a performer to embody his performance in a sound recording is entitled to collect needletime royalties for such performance. However, the royalty collected must be shared between the music producer and the performer. The performer's share is to be determined by an agreement between the music producer and the performer or between their respective CMOs. Failing such agreement, the music producer or performer may refer the matter to the Copyright Tribunal under the Copyright Act or they may agree to submit to arbitration in terms of the Arbitration Act, 1965.[67]

Section 9A of the Copyright Act and section 5 of the Performers' Protection Act were in the heart of the needletime royalty crises alluded to in (A) above. The crises would have been averted if the Copyright Act and Performers' Protection Act had provided the percentage share for performers. It appears the CS Regulations attempted to fill this lacuna. One of the grounds for approval of a needletime CMO's distribution plan is that the plan should state an equal share of collected royalties between music producers and performers. However, this provision applies only where a needletime CMO represents both music producers and performers and in the absence of a sharing agreement to the contrary.[68] Further, needletime CMOs are obligated to distribute annually at least 80% of collected royalty equitably among their members.[69] The distribution must be done based on a plan approved by the Registrar,[70] which shall be applied 'based on information publicly available, trade information available to [the CMOs'] members and on information to be furnished by individual user groups.'[71] Needletime CMOs are

[60] Companies Act (South Africa) (n 11), Schedule 1 para 3.

[61] For instance, see South African Music Performance Rights Association's Memorandum of Incorporation, art 25. <https://www.sampra.org.za/pdf/moi/SAMPRA%20Memorandum%20of%20Incorporation.pdf> accessed 5 October 2019; SAMRO's Performing Rights Distribution Rules <http://www.samro.org.za/sites/default/files/SAMRO%20Performing%20Rights%20Royalty%20Distribution%20Rules.pdf> accessed 5 October 2019; Composers, Authors and Publishers Association's Membership Rules (South Africa), art 6 <http://www.capasso.co.za/index.php/company-documents.html?download=23:capasso-membership-rules-2015> accessed 5 October 2019.

[62] See the specific provision for needletime CMOs in CS Regulations (South Africa) (n 9), Regulation 8(3).

[63] Ficsor (n 2); Uchtenhagen (n 2)

[64] ibid.

[65] ibid.

[66] CS Regulation (South Africa) (n 10), Regulation 6(1).

[67] Arbitration Act 1965 (South Africa).

[68] CS Regulation (South Africa) (n 10), Regulation 8(5)(c).

[69] ibid, Regulations 6(2) and 8(1).

[70] ibid, Regulation 8(5).

[71] ibid, Regulation 8(4).

allowed to retain not more than 20% of collected royalty to defray administrative costs.[72]

The foregoing being said, it should be noted that the CS Regulations do not stipulate the consequences of non-compliance with its provisions on royalty distribution by needletime CMOs. However, non-compliance by both needletime and non-needletime CMOs with the provisions of the Companies Act relating to royalty distribution may lead to the winding up of such a CMO.[73]

Finally, it should be pointed out that the Copyright Act, the Performers' Protection Act and the CS Regulations do not stipulate how CMOs may handle the royalties collected for works belonging to non-members. However, CMOs in SA have formed the practice of tracing non-members and, when found, asked to become members before giving them their share of the collected royalties. However, where the royalties are unclaimed after three years, it is 'written back to the income of the CMO' and 'distributed to the members based on the normal distribution criteria.'[74] Nevertheless, CMOs cannot legally make membership a criterion for payment of royalties to non-members who are successfully traced. They are within their rights to deduct prescribed administration costs from such royalties before remitting it to the non-members. Money collected as royalties belongs to the copyright owners (irrespective of whether they are members or not) and not to the CMOs.[75] Apart from this, the treatment of royalties unclaimed after the three-year period seems justified. However, as recommended by the CRC,[76] there is need for legislative intervention in this regard. Such regulation should prescribe the minimum retention period for unclaimed royalties, after which it 'should only be used for social-related activities and cultural projects that will benefit local artists.'[77]

C. RELATIONSHIP BETWEEN CMOS AND USERS

Discussions here focus on how licensing practices and tariff setting of needletime CMOs are regulated. The Companies Act does not cover these issues. They are dealt with by the Copyright Act, the Performers' Protection Act and largely by the CS Regulations. It is already established that the CS Regulations do not apply to non-needletime CMOs. However, it would not be correct to say that the licensing practice and tariff setting of non-needletime CMOs are without legal basis. Non-needletime CMOs may enter into licensing contracts with users.[78] Section 22 of the Copyright Act and Section 13 of the Performers' Protection Act govern such contracts. In terms of Section 13 of the Performers' Protection Act, performers may contract with any user interested in using their performance. Such a contract will be valid even if done through the performer's CMO. Similarly, Section 22 of the Copyright Act provides for the transfer of copyright, either wholly or in part, by way of assignment, exclusive license, and non-exclusive license, among others. To be valid, assignments and exclusive licenses must be in writing and signed by the assignor or exclusive licensor,[79] while non-exclusive licenses may be written, oral or implied.[80] Specifically, the exploitation of copyright in a work by a user pursuant to a license issued by a CMO that has been mandated by the owner of the rights in the work would not be an infringement of copyright.[81] Further, the licensing practice and tariff setting of non-needletime CMOs are subject to the supervision of the Copyright Tribunal under Chapter 3 of the Copyright Act.

Concerning needletime CMOs, the Copyright Act and the Performers' Protection Act lay the foundation for their licensing practices. Under these laws, users of sound recordings have an option to negotiate needletime royalties with CMOs representing music producers and performers, either, jointly or separately; or with the music producers

[72] ibid, Regulation 6(2); *Foschini v SAMPRA* (n 41) para 6.

[73] *Shapiro v SARRAL* (n 20).

[74] DTI (n 3) 77.

[75] *Shapiro v SARRAL* (n 20) 32.

[76] DTI (n 3) 80.

[77] ibid.

[78] Sharon Chahale, 'An Overview on the Role of Contracts in Copyright Management' (2018) 26 KECOBO CopyrightNews 3.

[79] Copyright Act (South Africa) (n 10), s 22(3).

[80] Copyright Act (South Africa) (n 10), s 22(3).

[81] Copyright Act (South Africa) (n 10), s 22(8).

and/or performers directly. Whatever the case may be, payment of needletime royalties to the music producers' CMO discharges users of the obligation to pay to performers' CMO. In the same vein, payment of needletime royalty to performers' CMO discharges users of the obligation to pay to music producers' CMO.[82] In essence, the amount payable as royalty must be determined by agreement between the parties.[83] Failing such agreement, the user or CMO involved may refer the matter to the Copyright Tribunal or both parties may agree to submit the matter to arbitration.[84]

For the purpose of such negotiations, needletime CMOs are obligated to make their complete repertoire available on non-discriminatory terms to prospective users.[85] This may not be interpreted to mean that needletime CMOs cannot negotiate different licensing terms with different user groups. Rather, it means that they cannot discriminate among users of the same group.[86] This is because, needletime CMOs may enter into different framework agreements with different user groups for the use of works in their repertoire by potential users. They may also enter into non-exclusive licensing agreements with individual users or user groups.[87] To prevent arbitrariness, the CS Regulations further enjoin needletime CMOs to negotiate tariffs as part of framework agreements with user groups, or non-exclusive license with individual users, as the case may be. Tariffs serve as the basis for determining the amount and manner of payment of royalty for particular use of a work.[88] Tariffs negotiated between needletime CMOs and any user group are expected to be jointly submitted to the Registrar for publication.[89]

Needletime CMOs are also obligated to grant a license to individual users, within a user group, who assume responsibility to pay royalties in terms of the published tariff.[90] However, user groups or individual users who dispute the applicability of a tariff proposed by a needletime CMO may make an appropriate application to the Copyright Tribunal. Another option is for both parties to refer the matter to arbitration.[91] Pending determination of such application or referral, user groups or individual users have the option of paying the royalty amount proposed by the needletime CMO into an escrow account and furnish the CMO with the usage information for later distribution of the funds in the escrow to rights owners. Such a user will then be entitled to use the work in issue pending determination of the application.[92] This option is enforceable by needletime CMOs through an application to the Copyright Tribunal for a ruling in that regard.[93]

The Supreme Court of Appeal (SCA) has considered tariff setting by needletime CMOs in two cases. The first case, *National Association of Broadcasters (NAB) v South African Music Performance Rights Association (SAMPRA)*,[94] was an appeal (by NAB) and cross appeal (by SAMPRA) from the Copyright Tribunal. For our present discussion, the focus is on the issue of reasonable royalty and how it was determined by the SCA. The facts of the case have been stated extensively elsewhere.[95] It suffices to note that in determining the appeal and cross appeal, the SCA proffered a simple formula for the tariff setting, which is not 'complex and susceptible to disputes.'[96] In this connection, the SCA rejected audience reach and profitability of a broadcaster as factors when determining royalty rates. The SCA took the view that, although broadcasters' audience is desirable, as a factor for consideration, the difficulty of valuing an audience in terms of

[82] ibid, ss 9A(1) and (2)(d); Performers' Protection Act (n 9), ss 5(3) and (5).

[83] *Foschini v SAMPRA* (n 41) para 62-63.

[84] ibid.

[85] CS Regulation (South Africa) (n 10), Regulation 7(1).

[86] This argument flows from the provisions of CS Regulation (South Africa) (n 10), Regulation 7(2).

[87] CS Regulation (South Africa) (n 10), Regulation 1 and 7(2).

[88] ibid, Regulation 7(3).

[89] ibid, Regulation 7(4).

[90] ibid.

[91] ibid, Regulation 7(5).

[92] ibid.

[93] ibid, Regulation 7(6).

[94] *National Association of Broadcasters (NAB) v South African Music Performance Rights Association (SAMPRA)* [2014] ZASCA 10.

[95] See Oriakhogba (n 1) 125–132.

[96] *NAB v SAMPRA* (n 94) para 75.

money should be kept in mind.[97] Further, the SCA held that the Copyright Tribunal's determination of reasonable royalty was done without reference to crucial evidence and relevant factors.[98] The SCA then stipulated several factors that should be considered when determining needletime royalty rates for broadcasters. These included,

- the revenue of the broadcaster as contained in the broadcaster's financial statement and the extensive regulation of the broadcasting industry;[99]
- the editorial content including programme promotions and other contents such as charity drives or competition, but excluding advertisement;[100]
- the royalty rate for music composers;[101]
- the financial implication of needletime royalty rates in SA;[102] and
- the royalty rates in countries, such as India, at similar developmental level as SA without losing sight of local circumstances.[103]

The second case, *South African Music Performance Rights Association (SAMPRA) v Foschini Retail Group (Pty) Ltd*,[104] was also an appeal from the Copyright Tribunal.[105] Again, the facts of this case have been discussed elsewhere.[106] For now, the issues for determination by the SCA related to, among others, what a reasonable tariff was in the circumstance of the case.[107] In this connection, the SCA deduced three possible methods for determining royalty tariffs. First is the determination of the Rand value that playing the sound recording adds to Foschini's revenue. The SCA rejected this method since a study of the value of music to retail stores was never undertaken owing to the difficulties such as huge costs, time consumption and confidentiality implications on Foschini's business.[108] The other method is the market-based solution, which means leaving tariff to be determined by the forces of demand and supply that would eventually push the tariff to an optimum rate. This method was also rejected because the Copyright Act and the Performers' Protection Act preclude market forces in the determination of tariff rates.[109] The last method is the comparison of proposed tariffs with those from foreign jurisdictions. The SCA had no difficulty in accepting this method because this method prevents economic arbitrariness in tariff setting and because it had earlier accepted such method in *NAB v SAMPRA*.[110] Further, the SCA held that in carrying out such comparison, the purchasing power parity (PPP) comparison of the Rand with the currency of the foreign jurisdiction is more appropriate, as it accords more with local income levels, is fair and would better maximise the welfare of local consumers.[111] Finally and although insignificant in determining reasonableness of needletime tariff, the SCA took cognizance of the promotional benefit to music producers of having their music played in retailers' stores.[112]

In his review of the above cases, Karjiker rightly compared the above cases. According to him,

> In the Foschini case, the Copyright Tribunal agreed with SAMPRA that the royalty should simply be determined on the total area of a retail store (and not simply the area to which customers had access). It rejected factors such as the economic value which the background music added to retailers' businesses when played in their stores, or the

[97] ibid para 68.

[98] ibid para 72-74.

[99] ibid, para 60-62.

[100] ibid para 69.

[101] ibid para 35 and 63.

[102] ibid para 65-66.

[103] ibid para 70 and 52.

[104] *South African Music Performance Rights Association (SAMPRA) v Foschini Retail Group (Pty) Ltd* [2015] ZASCA 188.

[105] *Foschini v SAMPRA* (n 42).

[106] Sadulla Karjiker, 'Needletime Royalties' (2015) Without Prejudice 55.

[107] *SAMPRA v Foschini* (n 104) para 11.

[108] ibid para 37-38.

[109] ibid para 38-39.

[110] ibid para 42.

[111] ibid paras 47, 49 and 51.

[112] ibid.

> number of consumers attending the retailers' stores, for calculating royalty. Similarly, the Supreme Court of Appeal in the NAB case rejected the notion that, in the context of radio broadcasting, audience reach should be used to determine the royalty or that royalty rates should differ for the different times of the day because of the difficulties of valuation. It held that the royalty should be determined on a flat rate based on a broadcaster's actual revenue and its fraction of editorial content, rather than on notional revenue.[113]

Indeed, the SCA's approach in the foregoing cases cannot be faulted. It finds support in a decision of the Court of Justice of the European Union (CJEU).[114] The CJEU's decision was based on a referral from the administrative division of the Supreme Court of Latvia flowing from a decision of its Competition Council (LCC), which imposed a fine on the Consulting Agency on Copyright and Communications/Latvian Authors' Association, Latvia (AKKA/LAA)[115] for abuse of dominant position. AKKA/LAA is the only CMO administering rights in musical, dramatic, literary, artistic and audio-visual works in Latvia.[116] The fine relates to the royalty rate being collected by AKKA/LAA for public performance of music in shops and other service areas among others. The LCC regarded the rate as excessively high. The referral was based on Article 102 of the Treaty on the Functioning of the European Union, 2012/C 326/01 (TFEU). One of the issues determined by the CJEU was how to determine fairness of price under Article 102 TFEU and whether it is appropriate to make comparison with foreign countries for this purpose. Although the case was decided on the principles of competition law applicable to CMOs, a discussion of which is beyond the scope of this paper, the CJEU's decision on the issue is relevant here since it gives some insights on how royalty rates in circumstances similar to the above South African cases may be determined. According to the CJEU,

> […] for the purposes of examining whether a [CMO] applies unfair prices … it is appropriate to compare its rates with those applicable in neighbouring [countries] as well as with those applicable in other [countries] adjusted in accordance with the PPP index, provided that the reference [countries] have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.[117]

In the CJEU's view, 'objective, appropriate and verifiable criteria' may include 'consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage.'[118]

D. INTERNAL MANAGEMENT, TRANSPARENCY AND ACCOUNTABILITY

As stated in 1 above, the CRC found issues relating to significant weakness in internal control; outdated constitutive documents; lack of internal audit; lack of independent directors; lack of issuance of audited financial statements; and lack of publication of annual reports, among others, within SAMRO, SAMPRA and the defunct SARRAL.[119] These informed the CRC's recommendation that the CS Regulations be extended to all CMOs and that the CIPC be empowered to take-over the administration of a CMO conducting its affairs in a manner detrimental to the interests of copyright owners.[120]

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[113] Karjiker (n 106) 57.

[114] *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, unreported Case C-177/16 (14 September 2017).

[115] Acronym for *Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība*.

[116] CISAC 'AKKA-LAA (LATVIA)' <https://members.cisac.org/CisacPortal/directorySociety.do?method=detail&societyId=20> accessed 13 July 2020.

[117] Case C-177/16 (n 114) para 51.

[118] ibid para 42.

[119] DTI (n 3) 52-53.

[120] ibid.

Provisions of the CS Regulations aimed at ensuring good governance only apply to needletime CMOs. Specifically, needletime CMOs are always required to inform the Registrar, in writing, of changes in their organisational structure, operational features, and legal representatives within 30 days of such change. In particular, they are obligated to furnish the Registrar with copies of their constitutive documents; any reciprocal agreements with foreign CMOs; changes to such documents and report stating the reason for such changes; and particulars of their auditors.[121] Such CMOs are also bound to furnish the Registrar with their tariffs and any amendments thereto; annual and updated list of members and agreements with foreign CMOs; annual audited financial statements; and any document or report the Registrar may reasonably require.[122] The Registrar is empowered to withdraw the needletime CMO's accreditation or apply for an appropriate relief, including an order placing the CMO under judicial administration, winding-up or dissolution, in the event of failure by the CMO to furnish the Registrar with the required documents.[123]

The foregoing does not preclude needletime CMOs from complying with relevant provisions of the Companies Act relating to internal management, transparency and accountability, especially where the CS Regulations are silent. In the same vein, non-needletime CMOs are subject to the principles of good governance under the Companies Act.[124] Overall, as private companies and NPCs, needletime and non-needletime CMOs are bound by the good governance codes contained in the KING IV Report on Corporate Governance for South Africa 2016.[125]

3. PROPOSED REGULATORY FRAMEWORK FOR CMOS IN SOUTH AFRICA

The CRC's recommendations, based on identified gaps in the current copyright regime, informed the amendments proposed in the Copyright Amendment Bill, 2017 (CAB). In relation to CMOs, the CRC's recommendations include creating a regulatory framework that brings all CMOs under the control of the CIPC; and addresses specific concerns relating to CMOs' membership, royalty distribution, licensing practices, and corporate governance, among others. This part examines the proposed regulatory framework for CMOs in the CAB, as contained in clause 25 thereof, to determine if it addresses the existing gaps in the current regulatory mechanism. Clause 25 of the CAB contains proposed sections 22B to 22F.[126]

In terms of the proposed section 22B,[127] all persons intending to function as CMOs in SA will be required to obtain accreditation from the CIPC. The CIPC will be empowered to grant accreditation only when it is satisfied that the applicant is able to adequately, effectively and efficiently administer royalty collection; comply with any conditions for accreditation, provisions of the Companies Act and other applicable legislation; and has adopted a constitution that meets the prescribed requirements.[128] Furthermore, the proposed amendments would enable the CIPC to provide necessary assistance for the formation of CMOs in respect of rights for which no CMO exists. The proposed section 22B also stipulates a five-year life span for accreditation granted by the

[121] CS Regulation (South Africa) (n 10), Regulation 4(3).

[122] ibid.

[123] CS Regulation (South Africa) (n 10), Regulation 4(4).

[124] Companies Act (South Africa) (n 11), ss 28, 30, 33, Chapter 2, Part f, Schedule 1 para 2 and 5.

[125] *KING IV Report on Corporate Governance for South Africa 2016* (Institute of Directors Southern Africa, 2016) <https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf> accessed 5 October 2019; *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47; Stephanie Luiz and Zuene Taljaard, 'Mass resignation of Board and Social Responsibility of the Company: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*' (2009) 21 South African Mercantile Law Journal 420.

[126] Copyright Amendment Bill, 2017 (South Africa) (n 9).

[127] ibid.

[128] ibid, proposed s 22B(4).

CIPC, subject to renewal every five years.[129] The proposed Section 22B prescribes a transition period for CMOs existing at the time the CAB is enacted and comes into force. Such CMOs will be obligated to apply for accreditation within 18 months from the coming into force of the Act enacted from the CAB.[130] Pending the outcome of such application and subject to such conditions as the CIPC may indicate in writing, the CMOs will be allowed to continue to operate. Operation of a CMO without accreditation by the CIPC will be an offence punishable by a fine or a five-year jail term.[131]

What is certain, however, is that the CIPC will be empowered, in terms of the proposed Sections 22E-F,[132] to suspend and/or cancel an accreditation. The proposed Section 22E will require all CMOs to submit returns and reports as prescribed by the CIPC. Further, it will empower the CIPC to demand any report or record from CMOs to ensure that CMOs are administered according to the conditions of their registration and that royalties are being utilized and distributed in accordance with the Copyright Act. In terms of the proposed Section 22F, the CIPC will be able to issue compliance notices to CMOs or apply to the Copyright Tribunal for an inquiry into their affairs if it is satisfied that they are being mismanaged. Pending such inquiry, the CIPC will be empowered to apply to the Copyright Tribunal for an order suspending the registration of the CMOs. Based on the outcome of the inquiry, the CIPC will be able to apply to the Copyright Tribunal for an order cancelling the registration of the CMO. Where a CMO's registration is suspended or cancelled, the CIPC will be able to take-over the affairs of the CMO. To this end, it may apply to the Copyright Tribunal to appoint any suitable person to assist it.

This being said, the proposed Section 22C of the CAB speaks to the administration of rights by CMOs for which they will be enabled to accept exclusive authorisation from copyright owners, subject to the copyright owners' right to withdraw such authorisation.[133] The proposed Section 22C also itemised major functions of CMOs, which are highlighted 1 above. Further, in terms of the proposed provision, CMOs will be able to deduct a prescribed amount to defray administrative cost from royalties collected, but the drafters of the CAB failed to propose the maximum amount to be deducted.

The proposed Section 22D seeks to bring CMOs entirely under the internal control of copyright owners, subject of course to the overall supervision of the CIPC. Specifically, it seeks to subject the collection and distribution of royalty, and the use of collected royalties to the CMOs' constitution; and to obligate CMOs to provide their members regular, full and detailed information of their activities. Also, the proposed section will require CMOs, as far as may be possible, to distribute collected royalties to copyright owners in proportion to the actual use of their works and as soon as possible but not later than three years from when the royalties were collected. In terms of sub-section (3) of the proposed Section 22D, where a CMO,

> […] for whatever reason, is unable to distribute the royalties within three years from the date on which the royalties were collected, that [CMO] shall— *(a)* invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and *(b)* upon demand by the performer or copyright owner, or their authorised representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph *(a)*.[134]

It is not clear why a three-year period for royalty distribution is proposed. The general practice, which was confirmed by the CRC,[135] is that royalties are distributed at the end of each financial year. The fact that CMOs, as corporate entities, are obligated to file annual returns with the CIPC also lays credence to this position. Nonetheless, the proposals on how

[129] ibid, proposed s 22B(5).

[130] ibid, proposed s 22B(7)(a).

[131] ibid, proposed s 22B(8).

[132] ibid.

[133] Copyright Amendment Bill, 2017 (South Africa) (n 9).

[134] ibid.

[135] DTI (n 3) 71.

to deal with undistributed royalties are commendable. One major flaw in the proposed Section 22D, however, is the failure to make specific proposal on how CMOs are to handle royalties belonging to non-members. Even so, the proposed section may be interpreted broadly to apply to all royalties collected whether belonging to members or non-members of the CMOs with the implication that the three-year rule and the proposal in sub-section (3) applies to royalties belonging to non-members. This interpretation is based on the use of the phrase 'for whatever reason' and the repeated reference to 'performers' and 'copyright owners' and not members of CMOs. Another possible interpretation of the proposed section, a narrow one, is that since the opening paragraph of the section refers to 'performers and copyright owners whose rights [the CMOs] administers', then the presumption is that the provision is meant to apply only to royalties belonging to members of the CMOs. Such conflicting interpretation can be avoided by an insertion of a specific proposal on how CMOs should deal with royalties belonging to non-members copyright owners.

4. CONCLUSIONS

Although CMOs in South Africa are generally under the supervision of the CIPC, only needletime CMOs currently require accreditation to operate. However, this may change once the CAB is signed into law. Even so, the existing (and proposed) rules are silent on the consequences of non-accreditation. Further, the rules do not prescribe any particular type of legal form for CMOs. Depending on the type of legal form chosen, CMOs are subject to relevant provisions of the Companies Act.

Further, CMOs are generally required to distribute royalties among the members whose rights they manage. Specifically, needletime CMOs are required to retain no more than 20% of collected royalties. The regulatory framework is silent in the case of non-needletime CMOs and this gap has not been filled by the proposal in the CAB thus calling to question the adequacy of the proposed regulatory framework under the CAB to cater for the regulation of CMOs in South Africa. However, depending on the developmental stage of the CMO, a maximum of 30% is considered allowable in practice. Also, there is no express provision on the handling of non-member royalties collected by CMOs and there is no specific provision in the CAB to cure this lacuna.

The gaps identified in the existing and proposed regulatory framework for CMOs in SA is not enough to call for withdrawal of the CAB. Such calls will only render worthless the efforts put into bringing copyright law reform in SA to its present state. Indeed, the lacunae identified can be filled by a subsidiary regulation made by the relevant Minister, pursuant to the relevant provision when the CAB is eventually assented to by the President.

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