



A Legal Framework for Global Joint Copyright Management in
Musical Works – Based on Rawls’s Theory of Justice

by

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DECLARATION

I confirm that the thesis is my own work, that is has not been submitted in substantially the same form for the award of a higher degree elsewhere, and that all quotations have been distinguished and the sources of identification specifically acknowledged.

ABSTRACT

The present music market has shown an imbalance of interests in terms of economic, social and cultural interests. The present research has found that joint music copyrights management is responsible for this issue. Joint management organisations (JMOs) are competing with each other in an unfair market worldwide due to the lack of harmonised rules to standardize their behaviours. It is imperative to establish a promising international copyright legal framework for regulating their behaviours, providing a fairer and common arena for both CMOs and IMEs, enabling JMOs to fulfil multiple functions so as to strike a real balance of interests between copyright stakeholders in music industry. It would also facilitate the cross-border flow of musical works in the digital era where copyrighted musical works flow across borders easily.

The proposed theoretical framework is formulated on the basis of Rawls's justice theory which provides powerful and systematic explanation and standards to evaluate and design JMOs' functions. The standard of multi-objective, named economic, social and cultural objectives, is proposed for balancing interests at stake, more precisely, justifying the interests of the least well-off. Therefore, this thesis examines and investigates the issues of unbalanced interests existing in cross-border copyright licensing in musical works and, accordingly, proposes to design a fairer copyright legal framework aiming to fulfil the multi-objective of copyright – economic fairness, social justice and culture diversity.

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List of Abbreviations

CC	Creative Commons
CCM	Collective Copyright Management
CRM	Collective Rights Management
CDPA	Copyright, Designs and Patent Act (United Kingdom)
CISAC	International Confederation of Societies of Authors and Composers
CMO	Collective Management Organisation
DRM	Digital Rights Management
EC	European Commission
EU	European Union
GRD	Global Repertoire Database
ICE	International Copyright Enterprise
IFLA	the International Federation of Library Associations and Institutions
IFPI	International Federation of the Phonographic Industry
IFRRO	International Federation of Reproduction Rights Organization
IMEs	Independent Management Entities
IP	Intellectual Property
IPRs	Intellectual Property Rights
ISP	Internet Service Provider
JCM	Joint Copyrights Management
JMO	Joint Management Organisation
LEs	Limitations and Exceptions
NGO	Non-Governmental Organisation
P2P	Peer-to-peer
PLR	Public Lending Right
TPMs	Technical Protective Measures
TRIPS	Agreement on Trade-Related Aspects of IP Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
WCT	WIPO Copyright Treaty
WTO DRM	WTO Dispute Resolution Mechanism
WIPO	World IP Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Contents

.....	1
A LEGAL FRAMEWORK FOR GLOBAL JOINT COPYRIGHT MANAGEMENT IN MUSICAL WORKS – BASED ON RAWLS’S THEORY OF JUSTICE	1
DECLARATION.....	2
ABSTRACT.....	3
ACKNOWLEDGEMENTS AND DEDICATION	4
LIST OF ABBREVIATIONS.....	5
CONTENTS	7
CHAPTER 1 – INTRODUCTION	12
1.1 OVERARCHING BACKGROUND	12
1.2 THE RESEARCH AIM AND HYPOTHESIS.....	15
1.3 CLARIFICATION OF SOME TERMINOLOGIES IN THIS RESEARCH.....	16
1.4 EXISTING LITERATURES.....	17
<i>1.4.1 Studies on Joint Copyrights Management in Musical Works.....</i>	<i>17</i>
<i>1.4.2 Research on JMOs’ Functions.....</i>	<i>19</i>
<i>1.4.3 Harmonisation of Legislation at the Global Level.....</i>	<i>23</i>
<i>1.4.4 Summary.....</i>	<i>26</i>
1.5 RESEARCH OBJECTIVES.....	28
1.6 METHODOLOGY – MIXED-METHOD APPROACH.....	29
1.7 OVERVIEW OF CHAPTERS	32
CHAPTER 2 – THEORETICAL FRAMEWORK FOR COPYRIGHT LEGAL FRAMEWORK IN MUSICAL WORKS.....	36
2.1 INTRODUCTION.....	36
2.2 EXISTING THEORIES TO COPYRIGHT LAW.....	37

2.3	RETHINKING THE ROLE OF COPYRIGHT	43
2.3.1	<i>Why do Music Creators Create?</i>	43
2.3.2	<i>The Role of Copyright Legal System</i>	46
2.4	RAWLS’S JUSTICE THEORY AND THE COHERENT COPYRIGHT LEGAL FRAMEWORK IN MUSIC WORKS	47
2.5	MULTIPLE VALUES AND OBJECTIVES.....	51
2.5.1	<i>Essential Values of Cultural Goods in General</i>	51
2.5.2	<i>Multiple Values of Musical Goods in Particular</i>	53
2.5.3	<i>Increasing Economic, Social and Cultural Capitals</i>	57
2.5.4	<i>Multi-Objective to Copyright Legal Framework in Musical Works</i>	60
2.6	CONCLUSION	61
 CHAPTER 3 – FUNCTIONALISING JOINT COPYRIGHTS MANAGEMENT		
ORGANISATIONS IN MUSICAL WORKS		
63		
3.1	INTRODUCTION	63
3.2	JOINT COPYRIGHTS MANAGEMENT ORGANISATIONS IN MUSICAL WORKS AT GLOBAL LEVEL..	65
3.2.1	<i>Collective Management Organisations</i>	65
3.2.2	<i>Independent Management Entities</i>	72
3.2.3	<i>Interrelationship between CMOs and IMEs</i>	75
3.2.4	<i>Core Issues of the Unregulated Market of JCM</i>	77
3.3	REGIONAL HARMONISATION OF LEGAL SYSTEM ON JMOs – EU’S EXPERIENCE	81
3.3.1	<i>Social, Cultural and Educational Deductions Related Issues</i>	82
3.3.2	<i>Pros and Cons of the EU’s Measures</i>	84
3.4	FUNCTIONALISING JMOs	85
3.4.1	<i>The Objective of Economic Fairness</i>	85
3.4.1.1	Significance and Drawbacks of Economic Analysis	86
3.4.1.2	Rawls’s Theory and Economic Fairness	88
3.4.1.3	Relevant Unsettled Issues Regarding Economic Fairness	93
3.4.2	<i>The Objective of Social Justice</i>	94
3.4.2.1	Social Function of Copyright Law.....	95

3.4.2.2 Rationales behind the Domestic LEs	100
3.4.2.3 Rawls's Theory and Users' Rights for Education	103
3.4.2.4 Relevant Unsettled Issues Regarding Social Justice	105
3.4.3 The Objective of Cultural Diversity	106
3.4.3.2 Cultural Justification of JMOs	107
3.4.3.1 Rawls's Theory and Cultural Justice	111
3.4.3.3 Relevant Unsettled Issues Regarding Cultural Diversity	112
3.5 CONCLUSIONS	113

CHAPTER 4 – THE OBJECTIVE OF ECONOMIC FUNCTION – INTERNATIONAL

COPYRIGHT CONTRACT ISSUES	116
4.1 INTRODUCTION	116
4.2 A POSITIVE ANALYSIS OF ECONOMIC OBJECTIVE	118
4.2.1 <i>Micro-Economic Function of Copyright</i>	119
4.2.2 <i>Macro-Economic Function of Copyright and Its Implications</i>	122
4.2.3 <i>Is “Winner-take-all” just?</i>	125
4.3 A RAWLSIAN ANALYSIS OF THE ECONOMIC FAIRNESS	128
4.4 INTERNATIONAL COPYRIGHT CONTRACT ISSUES	133
4.4.1 <i>The Relationship between Copyrights and Contracts</i>	133
4.4.2 <i>Distinguishing Features of Copyright Contracts</i>	135
4.4.3 <i>International Copyright Contracts in Musical Works</i>	138
4.4.3.1 Authorship and Initial Ownership Relevant Contractual Issues	140
4.4.3.2 Exploitation Contractual Issue	147
4.4.3.3 Copyright Licensing Contract Issues	153
4.5 DISCUSSION AND CONCLUSION	157

CHAPTER 5 – THE OBJECTIVES OF SOCIAL AND CULTURAL FUNCTION –

INTERNATIONAL PUBLIC INTEREST AND CULTURAL DIVERSITY	160
5.1 INTRODUCTION	160
5.2 LES IN INTERNATIONAL COPYRIGHT LEGAL SYSTEM	162
5.2.1 <i>Overridability of LEs</i>	164

5.2.2	<i>Are Copyright LEs Right, Privilege, Or Permitted Use?</i>	165
5.2.3	<i>Diverse Music Users</i>	170
5.3	A RAWLSIAN ANALYSIS OF THE SOCIAL JUSTICE	172
5.4	USES FOR MUSIC EDUCATION AND PRIVATE STUDY PURPOSES	176
5.4.1	<i>Current Scenario of Library Exception</i>	176
5.4.2	<i>Financial Mechanisms Supporting Public Interest</i>	179
5.4.3	<i>Establishing Global Public Interest for Education and Private Study Purposes</i>	183
5.5	THE CULTURAL OBJECTIVE OF COPYRIGHT LEGAL SYSTEM	185
5.5.1	<i>Incentivise Cultural Diversity</i>	185
5.5.2	<i>The Impacts of Cross-border Flow of Cultural Goods</i>	187
5.5.3	<i>Supporting Cultural Diversity Globally</i>	188
5.5.4	<i>Current Legislative Scenario</i>	189
5.6	CONCLUSION	191

CHAPTER 6 – A GLOBAL REPERTOIRE PLATFORM FOR JOINT COPYRIGHTS

MANAGEMENT IN MUSICAL WORKS	194	
6.1	INTRODUCTION	194
6.2	IS GLOBALLY COLLECTIVE MANAGEMENT OF COPYRIGHTS FEASIBLE AND ESSENTIAL?	195
6.3	NATURE, FEATURES AND BENEFITS OF THE PROPOSED GRP	198
6.4	RAWLS’S THEORY OF JUSTICE AND THE GRP	202
6.5	CORE LEGAL ISSUES TO ESTABLISH GLOBAL COPYRIGHT LICENSING FRAMEWORK	205
6.5.1	<i>The Issue of Prohibition of Formalities</i>	205
6.5.1.1	Registration: Information of Ownership	206
6.5.1.2	Recordation: Record of Transferring Information	207
6.5.1.3	Notice	207
6.5.1.5	Necessity and Feasibility to Reintroduce Formalities to GRD	208
6.5.2	<i>The Issue of Natural Monopoly</i>	213
6.5.2.1	The Way Forward of GRD and Proposed GRP	213
6.5.2.2	The Application of Natural Monopoly Theory	216
6.5.2.3	Common Objectives of Competition Law and Natural Monopoly	221

6.5.2.4 Possible Monopolistic Abuse	223
6.6 CONCLUSION	225
CHAPTER 7 – DISCUSSION AND CONCLUSIONS.....	228
7.1 INTRODUCTION	228
7.2 RECAPITULATION OF PURPOSE AND FINDINGS	228
7.3 IMPLICATIONS OF THE MAIN RESEARCH FINDINGS	231
7.4 RELATIONSHIP WITH PREVIOUS RESEARCH	233
7.5 LIMITATIONS OF THE RESEARCH.....	235
7.6 RECOMMENDATION FOR FUTURE STUDY	236
TABLE OF STATUTES	237
TABLE OF CASES.....	239
BIBLIOGRAPHY	240
APPENDIX.....	255

Chapter 1 – Introduction

1.1 Overarching Background

Do we need copyright law or not? The debate on the copyright question has lasted over decades between protectionism and libertarianism. Protectionism emphasises rightsholders’ “copyright” and advocates harsh copyright law for mitigating illegal file sharing. They believe copyright acts as an incentive to encourage more output of creative works, but free-riders cause the loss of copyright revenues. To enhance the protection of copyright, digital rights management (DRM) is allowed for individual management of exclusive rights¹ and reinforcement of private rights. Also, extension of protective term is another measure adopted by legislators to strengthen rightsholders’ control.² By contrast, libertarianism advocates “copyleft”,³ and emphasises individuals’ rights, eg the rights to development, education, and freedom of expression which are enshrined in the major international and regional instruments for the protection of human rights.⁴ It believes that persons should be free to use expression without governmental restraint, including restraint exercised on behalf of private rightsholders, and that an expansive public domain and broad fair use rights will benefit society by facilitating a more robust public discussion.⁵ Copyright laws seek to achieve a “balance” between the interests of rightsholders and users. It is argued that for considering the interests of the public domain,⁶ the interests of rightsholders and users should be reconciled usually by copyright limitations and exceptions (LEs), such as the common-law doctrines of fair use and fair dealing which are often explained and assessed by judges. However, this so-called “balance” is extremely hard to be defined and struck in practice.⁷

¹ See Marcella Favale and Estelle Derclaye, ‘User Contracts (Demand Side)’ (2010) 18 *Journal of Intellectual Property Law*; Glynn S Lunney Jr, ‘The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act’ (2001) 87 *Virginia Law Review* 813.

² See Ashley Packard, ‘Copyright Term Extensions, the Public Domain and Intertextuality Intertwined’ (2002) 10 *Journal of Intellectual Property Law* 1; Haochen Sun, ‘Copyright Law under Siege: An Inquiry into the Legitimacy of Copyright Protection in The Context of the Global Digital Divide’ (2005) 36 *International Review of Intellectual Property and Competition Law* 192.

³ See Ira V. Heffan, ‘Copyleft: Licensing Collaborative Works in the Digital Age Note’ (1996) 49 *Stanford Law Review* 1487.

⁴ Sun (n 2).

⁵ David McGowan, ‘Copyright Nonconsequentialism’ (2004) 69 *Mo L Rev* 1.

⁶ Edward Samuels, ‘The Public Domain in Copyright Law Part I’ (1993) 41 *J Copyright Soc’y USA* 137.

⁷ Christophe Geiger, ‘The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law’ (2014) Max Planck Institute for Intellectual Property and Competition Law Research Paper

In practice, this so-called balance has been broken from different aspects. For example, the present music market has shown imbalance of interests,⁸ and copyright has been losing its legitimacy⁹ and acceptance by the public. Ownership of musical works is internationally concentrated with three major corporate labels (Universal Music Group, Sony Music Entertainment and the Warner Music Group) controlling most of the world's music market.¹⁰ When musical works are controlled by music companies, digital musical works are still expensive and poor people cannot afford good music.¹¹ The announced balance has been broken by means of copyright licensing activities with the involvement of various intermediaries. These intermediaries join in the music market and keep forging new business models, such as locked cloud (eg iTunes, Google and Amazon) and online streaming services (eg Spotify, Deezer and Pandora). Rightsholders assign or transfer all or some of their rights by means of copyright licensing contracts to these online distributors, or named internet service providers (ISPs), authorising them to exploit their works on an industrial scale. The commercialisation of musical works has led to the “winner-take-all” or superstar model globally.¹² In the music industry, the top 10% of creators receive a disproportionately large share of total income in the creative professions – for composers/songwriters about 80% of total income,¹³ and about two thirds of professional creators need second earnings to maintain their life.¹⁴ So, there is a contradiction in copyright practice in which creators' economic rights

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⁸ See Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot ; Brookfield, USA : Dartmouth 1996); Adolf Dietz, ‘The European Commission’s Proposal for a Directive on Collecting Societies and Cultural Diversity—A Missed Opportunity’ (2014) 3 *International journal of music business research* 7.

⁹ See Christophe Geiger, ‘Fundamental Rights, A Safeguard for the Coherence of Intellectual Property Law?’ (2004) 35 *IIC* 268.

¹⁰ Roger Wallis and others, ‘Contested Collective Administration of Intellectual Property Rights in Music The Challenge to the Principles of Reciprocity and Solidarity’ (1999) 14 *European Journal of Communication* 5.

¹¹ Entertainment and Arts, ‘Music Streaming Services ‘Too Expensive for Many Non-subscribers’ (*BBC*, 19 October 2016) <<http://www.bbc.co.uk/news/entertainment-arts-37694909>> accessed 26 October 2017; Martin Clayton, Trevor Herbert and Richard Middleton, *The Cultural Study of Music: A Critical Introduction* (Psychology Press 2003) 316.

¹² See Martin Kretschmer and others, ‘The Relationship between Copyright and Contract Law’ (2010) *IP office*; *ibid* 57; Peter DiCola, ‘Money from Music: Survey Evidence on Musicians' Revenue and Lessons about Copyright Incentives’ (2013) 55 *Ariz L Rev* 301.

¹³ Kretschmer and others, *ibid*.

¹⁴ *Ibid*.

have suffered on the one hand, but, on the other hand, the public believes that the current copyright legal framework over-protects rightsholders.¹⁵

Although copyright scholars have paid sufficient attention to substantive copyright law, the area of joint copyrights management has been neglected all the time. As a sub-system of copyright law, joint copyrights management (JCM) systems, by means of collective management organisations (CMOs) and Independent Management Entities (IMEs), are committed to fulfilling the objectives of copyright law, ensuring copyright exercise is on the right track. Copyright law leaves copyright licensing activities, by means of CMOs and IMEs, to free copyright contracts. This means the music market, manipulated by intermediaries, decides the distribution of copyright revenues. It is the unregulated licensing market, rather than substantive copyright law, that has led to the imbalance of interests between stakeholders. Therefore, this study focuses on the area of JCM in the context of the copyright legal framework, rather than substantive copyright law itself.

The scope of this research is defined in the music industry. First, music as an industry affects the economy to a large extent.¹⁶ Second, musical creations have no national boundaries since the appreciation of music is universal regardless of the different languages of lyrics. Copyright policy will dramatically affect not only creators' copyright revenues and individual countries' economy, but also affects people's musical and cultural life. With respect to music copyrights, we are all interested parties, either as creators or as consumers. Third, by the very nature of the internet, musical works can be digitised, uploaded, downloaded, streamed, copied and distributed instantly all over the world. Digital files of music are comparatively small, so they easily flow across borders online. Unlike publishing businesses and the film industry which can be managed through individual contracts, it is impractical for musical works to be exercised by creators at individual level.¹⁷ Fourth, the composition of the copyright of musical works is

¹⁵ Justice Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?' (1996) 18 *European Intellectual Property Review* 253.

¹⁶ See IFPI, 'Digital Music Report: Engine of a Digital World' (2013) IFPI; IFPI, 'Digital Music Report: Lighting Up New Markets' (2014) IFPI; IFPI, 'Global Music Report: Charting the Path to Sustainable Growth' (2015) IFPI; IFPI, 'Global Music Report: Music Consumption Exploding Worldwide' (2016) IFPI.

¹⁷ Henry Olsson, *The Importance of Collective Management of Copyright and Related Rights* (2005).

highly complex,¹⁸ especially those technological digital musical works that are popular in the digital era. It is necessary to identify proprietary rights and simplify the licensing process of musical works. Different categories of copyrighted works have distinctive natures, copyright policies should not be equally applied to all of them without specific considerations. As such, this study chooses the music industry as the research subject. Despite the fact that the significance and importance of music licensing have been recognised in some developed countries, the goal of copyright justice would never be fulfilled without a coherent and unified global copyright legal framework. For researching the existing copyright issues and recommending a more balanced copyright legal framework, the aim and hypothesis of this research will be set forth in the following sections.

1.2 The Research Aim and Hypothesis

This project addresses some key preliminary questions as to whether establishing an international legal framework for copyright management of musical works is feasible and rational, and accordingly aims to identify the key issues. Its purpose is not to devise concrete provisions at a global level for regulating global copyright management but, the key aim is to propose a copyright legal framework which based on a more justifiable theoretical framework, to regulate global copyright licensing practice in musical works by means of CMOs and IMEs, for the purpose of balancing interests, in particular for those disadvantaged, and enhancing copyright's legitimacy.

The hypothesis of this study is that it is feasible to establish a global repertoire database as a common infrastructure, which all copyright stakeholders, including rightsholders, users, and the society as a whole, would benefit from. In doing so, the licensing activities by means of CMOs and IMEs are able to be tracked and supervised by internal and external authorities. More importantly, joint management organisations (JMOs)' licensing activities, including both copyright contracts between JMOs with creators and with users, should be regulated by a common global copyright regulatory law. As an important pillar of a copyright legal framework,

¹⁸ See more discussion in section 6.5.1.5.

this copyright regulatory law is feasible and imperative in such a digital era where cross-border dissemination and distribution of musical works happen easily and frequently.

1.3 Clarification of Some Terminologies in This Research

In this research, rightsholder refers to a person or legal entity who owns in whole or in part of the copyrights to a musical work. Copyright is a bundle of rights protected by copyright law, so this research adopts the term of rightsholder rather than rightsholder. Since copyright can be transferred partly or wholly from one holder to another, rightsholders are not necessarily the person(s) who create the musical works. Rightsholders include small and large rightsholders.

Small rightsholders in this study are those individual music creators who receive small amount of royalty payments from JMOs who manage copyrights on their behalf.¹⁹ Some terms referred to small rightsholders are interchangeably used, including small creators, individual creators, infamous music creators. They are weak party in copyright licensing negotiation. 80-90% music creators are small rightsholders. In Rawls's justice theory, they are less well-off group or least advantaged members of a society.

By comparison, large rightsholders are legal entities who receive large amount of royalty payments from JMOs or directly from music business.²⁰ They usually acquire copyrights in part or in whole of a musical work from a former rightsholder or music creator(s) by assigning copyright licensing contracts and very few music superstars. They are not music creators. But, they are the "winners" of music market who receive 80-90% revenues of total income. Large rightsholders include music producers, publishers, other types of music companies and few music superstars who manage music copyrights individually. In copyright licensing negotiation, they are stronger party. In Rawls's justice theory, they are advantaged members or more favoured group.

¹⁹ See PWC, 'An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing' <http://www.alrc.gov.au/sites/default/files/subs/766._org__attachment_2_2011_pwc_final_report.pdf> accessed 28 May 2017

²⁰ *ibid.*

Music creators in this research include all types of musicians, such as composers, songwriters, arrangers, synthesizer programmers, mixers and remixer. They may be famous or infamous music artists or ordinary people who create music. Famous musicians refer to talented or gifted music creators who have been favoured by nature according to Rawls's theory. Music users include both individuals and organisations who exploit musical works for personal use or for business purpose. For simplifying the expression, in this study the research on users' rights refers to individual users' rights.

1.4 Existing Literatures

This section is a survey of publications in the area of global joint management of copyrights in musical works. It, therefore, structures and builds upon these general questions for examining the existing studies to create a map of what has been done and, accordingly, narrowing down the research gaps for the present thesis. This review includes some core literature relating to the discussed issues, especially European Union (EU) and United States (US) studies. This is because, firstly, research in this area at the global level is very limited, and, secondly, the EU covers different jurisdictions that can be a case study for the present research of cross-border copyright licensing.

1.4.1 Studies on Joint Copyrights Management in Musical Works

IMEs have become increasingly prevalent and playing important role in copyright licensing practice. However, research in JCM is insufficient, in particular IMEs and their relations to CMOs. The literature on JMOs is still in its infancy. Only a few studies have established comparative relations between CMOs and IMEs.²¹ Ficsor contends that 'CMOs and such business-type bodies may very well exist and function side by side in "peaceful coexistence", and they may also establish alliances – "coalitions" – in order to pursue common interests or exercise and/or enforce certain rights together'.²² This position is doubtful, as in practice IMEs perform better than CMOs in terms of satisfying member rightsholders' economic interests and

²¹ See Mihály Ficsor, *Collective Management of Copyright and Related Rights*, vol 855 (WIPO 2002)

²² *Ibid*, 23.

have threatened the existence of CMOs.²³ With the emergence of various new models of IMEs and online music distributors, a comprehensive study on JMOs is needed for comparing their roles with CMOs and redefining their functions in the context of online copyright licensing in music works.

Unlike CMOs, too little attention has been paid to IMEs by academia. There is not a universally accepted term to them. In some studies, IMEs have been referred to as large-scale users, business-type bodies, business-type rights clearance, business-type managers, private for-profit online platforms, for-profit joint rights management organisations, profit-maximizing independent supplier, or profit-maximizing firms.²⁴ The EU Directive 2014²⁵ has firstly named them as IMEs, and this thesis adopts this name. Ficsor states that IME is one of the two basic systems of the joint exercise of rights.²⁶ He suggests that the only or nearly exclusive task of IMEs is the collection and transfer of royalties as quickly, precisely, cheaply and as much in proportion with the value and actual use of the productions involved as possible.²⁷ Different from CMOs which are mostly not-for-profit organisations, the main feature of IMEs is the nature of for-profit. Another important feature of IMEs, such as publishers and record companies who manage copyright as well, is that they do not play a role in social and cultural activities.²⁸

Whether IMEs or CMOs perform better in terms of social welfare maximization, so far there is no consensus. For example, Besen, Kirby and Salop²⁹ and Watt³⁰ believe that a monopolistic rational CMO unrestricted by regulation and with imperfect price discrimination among new

²³ This issue will be discussed in detail in Chapter 3.

²⁴ See generally Ficsor (n 21); Christian Handke, 'Joint Copyrights Management by Collecting Societies and Online Platforms: An Economic Analysis' (2016) <<http://www.serci.org/2015/Handke.pdf>> accessed 3 March 2018.

²⁵ Directive 2014/26/EU of The European Parliament and of The Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

²⁶ Ficsor (n 21).

²⁷ *ibid.*

²⁸ Nérison (n 48).

²⁹ Stanley M Besen, Sheila N Kirby and Steven C Salop, 'An Economic Analysis of Copyright Collectives' (1992) 78 *Virginia Law Review* 383.

³⁰ See Richard Watt, *Copyright and Economic Theory: Friends Or Foes?* (E. Elgar 2000).

members will limit membership, and thus the supply of works available under JCM. They argue that an independent, profit-maximizing JMO will perform better by including a socially optimal number of works into its license.³¹ On the contrary, Handke argues that the superior performance of IMEs in approximating the optimal repertoire size available under a joint licence does not necessarily translate into a superior performance regarding social welfare.³² In the absence of a unified legal framework, Mazziotti suggests that reform plans like that undertaken by the EU Commission in the online music sector are likely to fail if EU lawmakers do not create a common playing field for CMOs.³³ Thus, it is necessary to investigate and compare the social and cultural functions between both CMOs and IMEs and to identify which model is performing its social function better. Also, it is necessary to examine carefully the different types of IMEs and their nature, features and how they function in the music market, and more importantly, to research the question of how to locate IMEs on the same market with CMOs under the premise that they do perform the same obligations as CMOs and do not harm CMOs' activities.

1.4.2 Research on JMOs' Functions

Economic justification of copyright covers a wide range of topics with various arguments either through, eg a law and economics approach or a political economy one, the effect of copyright and its doctrines on markets and the administration of copyright.³⁴ Study on the economics of copyright only really started to develop in the 1980s, yet it has been of increasing importance and a substantial amount of literature has appeared in recent years. The economics of copying deals with impacts on the economy that derive from technical means of reproduction, whereas the economics of copyright focuses on impacts of the legal framework. In this study, CMOs' economic function refers to financial aspects of copyright and the impact of copyrights on societal economy.³⁵ For defining the scope of the present thesis, this study divides the literature

³¹ Ibid.

³² Handke (n 24).

³³ Giuseppe Mazziotti, 'Managing online music rights in the European Digital Single Market: current scenarios and future prospects' in Jan Rosén (ed), *Intellectual Property at the Crossroads of Trade* (EE 2012) 142.

³⁴ Handke (n 24).

³⁵ More Discussion About the Investigation of Economics and Copyright, See Ruth Towse, Christian Handke and Paul Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5 *Review of Economic Research on Copyright*.

of economics of copyrights into two main branches – the study of copyright markets and the study of copyright law from an economic perspective. This thesis mainly discusses the first branch of issues, and more specifically, the market of joint management of copyrights in the music industry.

CCM has attracted a lot of attention to economists. As to the economic justification of CMOs, economic literature discusses collective copyright management (CCM) as a response to relatively high transaction costs in complex markets for copyright works.³⁶ CCM reduces the average transaction costs per transaction and the total number of transactions under a broad range of conditions.³⁷ Economists argue that CMOs reduce transaction costs for authors, rightsholders, and particularly in favour of users. Moreover, Richard Watt adds another justification of CCM. He points out that having copyrights managed as an aggregate repertory, rather than individually, is based on risk-pooling and risk-sharing through the contracts between the members themselves.³⁸ Similarly, based on the theory of syndicates, CMOs themselves should exist because they offer a blanket license of an entire repertoire which have aggregation benefits of licensing, but smaller sub-sets do not have such benefits.³⁹

Ariel Katz criticises that the case for performing rights organisations (PROs) is not as straightforward as it is assumed to be, because many of the underlying cost efficiencies that are attributed to PROs, are usually simply assumed and, in many cases, could be equally achieved under less restrictive arrangements.⁴⁰ He argues that the rationale of costs-reduction for CMOs no longer holds, and the productive inefficiency of CMOs is inevitable.⁴¹ Members should not

³⁶ Christian Handke, 'Collective Administration' (2014) Chapters 179; KEA 2012 KEA, Licensing Music Works and Transaction Costs in Europe (2012) Vrije Universiteit Brussel; Ruth Towse and Christian Handke, 'Regulating Copyright Collecting Societies: Current Policy in Europe' (2007) Society for Economic Research on Copyright Issues (SERCI) Annual Congress SERCI; Gerd Hansen and Albrecht Bischoffshausen, 'Economic Functions of Collecting Societies-Collective Rights Management in the Light of Transaction Cost-and Information Economics' (2007) 6 GRUR 17.

³⁷ Handke (n 24).

³⁸ Richard Watt, 'The Efficiencies of Aggregation: An Economic Theory Perspective on Collective Management of Copyright' (2015) 12 Review of Economic Research on Copyright Issues 26.

³⁹ Ibid.

⁴⁰ Ariel Katz, 'Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?' (2007) <<http://ssrn.com/abstract=1001954>> accessed 28 May 2017.

⁴¹ Ibid.

be restricted from exiting of CMOs. He believes the advancements in information technology can render CMOs unnecessary.⁴² Whether this view has exaggerated the function of technology needs further research. All the above contradictory arguments have indicated that CMOs' function needs to be justified from a new perspective rather than economic analysis, particularly in digital era.

The existing research of the social function of copyright law is not systematic, but fragmented. Generally, scholars adopt different methodologies on the discussion of this topic, including economic analysis, positive analysis and doctrinal analysis. In the context of copyright law, there is not a unified term for its social function.⁴³ Literature discusses social function of copyright law on the basis of a range of broad relevant topics, eg balance of interests, social welfare, LEs, public domain, user's rights, or consumer's rights, compulsory licences, and social-cultural deductions.⁴⁴ From the survey of existing literature on social function of copyright law, most are positive analysis which mainly focuses on the discussion of the Berne "three-step test".⁴⁵ Economic justification of social function is based on the reduction of transaction costs that benefits rights-users. From doctrinal analysis perspective, social function is usually interpreted as LEs to copyright. In common law jurisdiction, social function is justified by the "fair use" and "fair dealing" doctrine. Recently, the concept of users' rights as the component part of rightsholders has been proposed in Canada,⁴⁶ but not fully developed either recognised at international level. Particularly at global level, research of social function is very limited. Most studies of this topic stay at national level. There is not such a concept of international general interest. Due to the fact that musical works flow in a borderless internet world, the research of international public interest is necessary and has to be done. Relevant

⁴² *ibid.*

⁴³ Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law'; *ibid.*

⁴⁴ See generally Geiger *ibid.*; Hugh Breakey, 'User's Rights and the Public Domain' (2010) 3 *Intellectual Property Quarterly* 312; Jessica Litman, 'The Public Domain' (1990) 39 *Emory Lj* 965; Sylvie Nérissou, 'Social Functions of Collective Management Societies (CMS)-Provisory Conclusions' (2007); Kathleen K Olson, 'Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims' (2006) 11 *Communication Law and Policy* 83; Myra Tawfik, 'International Copyright Law and 'Fair Dealing' As a "User Right"' (2005) *E-Copyright Bulletin*; Edward Samuels, 'The Public Domain Revisited' (2002) 36 *Loy LAL Rev* 389.

⁴⁵ The Berne Convention for the Protection of Literary and Artistic Works (9 September 1886), Article 9(2).

⁴⁶ See more discussion in section 5.2.2.

literature of social function of copyright law remains scattered and can hardly provide convincing explanation to copyright LEs. Library exceptions play an important role in the social function of copyright in digital era. In the legal research area, however, library exceptions which represent public interest, have not drawn the attention of legal researchers. Generally, there is a lack of systematic analysis of social function of copyright legal system.

Musical works as a type of cultural goods have cultural features. However, research of copyright licensing in musical works has hardly been done from the perspective of cultural goods. Most IP studies regard musical works as economic goods rather than exploring their cultural function. CMOs' cultural function, even not all CMOs have, should be one of the most important features which differ from other types of intermediaries such as IMEs. It has been argued that the goals of protecting authors' rights go hand in hand with the promotion of cultural diversity.⁴⁷ The significance of the cultural value of copyrighted works has been realised. However, the study on the enforcement of JMOs' cultural function at global level is not enough. In practice, the fulfilment of cultural function at national level is usually in forms of deductions that are made from collected royalties for cultural and social purposes.⁴⁸ It is questionable whether the cultural function of musical goods is affiliated to the protection of creators' copyrights. Cultural values of musical works should be examined from an independent value judgement.

Generally, most scholars discuss copyright issues from the economic perspective, but neglect to justify the cultural value of cultural goods, and to analyse its relation to other functions. They have also neglected to examine the international copyright policy which aims to maintain and promote cultural diversity, and to research which concrete provisions, rather than being written as a strategical recital, can be legislated to fulfil this goal. Another important question is, in the global context, how to foster worldwide cultural diversity through enforceable and feasible

⁴⁷ Thierry Desurmont, 'Considerations on the Relationship between the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Protection of Authors' Rights' (2006) 208 *Revue Internationale du Droit d'Auteur*.

⁴⁸ See Sylvie Nérison, 'Social Functions of Collective Management Societies (CMS) Provisory Conclusions' (2007) <<http://hdl.handle.net/11858/00-001M-0000-000F-A4E8-9>> accessed 1 June 2017.

strategies. Some scholars have proposed to protect small rightsholders' interests and preserve the smallest CMOs from small countries. However, they have not conducted any theoretical discussion to justify small rightsholders' and small CMOs' interests from the perspective of legal theories rather than political research. In a nutshell, the existing literature usually justifies JMOs' role from the perspective of economic justification, especially in terms of collection and distribution of earnings to their members. They neglect studies from other perspectives, such as social and cultural ones, to evaluate CMOs' roles. They are also neglected in the general literature on the music industry, and that which focuses on the specific effects of digitalisation.

11.4.3 Harmonisation of Legislation at the Global Level

The topic of harmonisation of copyright law at the global level has hardly been touched, either the regulation of JCM in the music market. There is not a consensus among academics to this issue. The debate among academics on whether CCM should be regulated by legislation has never stopped. Globally, in practice, some CMOs are supervised and regulated by national regulation, but some are not.⁴⁹ National arrangements differ and range from direct political control or continuous scrutiny by specialised supervisory bodies to a simple application of competition and contract law.⁵⁰ In the EU, there was a lengthy debate as to the question whether it is appropriate to harmonise EU copyright law to regulate CMOs. EU scholars have distinct opinions. Some support a hard-law approach, eg Kretschmer in favour a scenario in which CMOs would be unequivocally treated as regulatory instruments;⁵¹ Matulionyte argues that diverging requirements from national law makes cross-border collective management in some cases impossible, and highly burdensome in others;⁵² Towse and Hanke contend that a pan-European monopoly might be the most efficient solution, if properly regulated;⁵³ Watt believes

⁴⁹ Adolf Dietz, 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe' (2001) 49 J Copyright Soc'y USA 897.

⁵⁰ Fabrice Rochelandet, 'Are Copyright Collecting Societies Efficient Organisations? An Evaluation of Collective Administration of Copyright in Europe' (2003) *The economics of copyright: Developments in research and analysis* 176; Stanley M Besen and Sheila Nataraj Kirby, 'Private Copying, Appropriability, and Optimal Copying Royalties' (1989) 32 *The Journal of Law and Economics* 255; Besen, Kirby and Salop (n 29).

⁵¹ Martin Kretschmer, 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments' (2002) 24 *European Intellectual Property Review* 126.

⁵² Rita Matulionytė, 'Cross-Border Collective Management and Principle of Territoriality: Problems and Possible Solutions in the EU' (2008) 11 *The Journal of World Intellectual Property* 467.

⁵³ Towse and Handke (n 36).

that, when the CMO is a natural monopoly, public supervision and regulation would promote efficiency;⁵⁴ Matulionyte points out that CMOs protect social-cultural values rather than mere economic interests, so they should not be subject to free competition.⁵⁵ Some partly support a hard-law approach, eg Dietz agrees the legislative initiative on certain aspects of collective management and good governance of CMOs;⁵⁶ Tuma concludes four areas need to be harmonised by law:⁵⁷ CMOs' legal status, the issue of relationships between CMOs and rightsholders, between CMOs and users, and the issue of small users, and relationships among the CMOs. Merges doubts the hard-law initiative and argues that the legislature or judiciary is inherently inferior to industry insiders in shaping a proper framework for the commercialisation of copyrights.⁵⁸ To him, spontaneously founded CMOs illustrate the ability of the industry to create its own solutions on the basis of property rights.

As to whether it is necessary to regulate copyright licensing activities by IMEs at the global level, the research in this area is extremely insufficient. None of the prior research has touched on this issue yet due to the fact that these related areas of the law remain to a large extent nationally determined, influenced by the legal tradition of each country, where significant differences appear between common law and civil law systems.⁵⁹ In practice, most copyright licensing and copyrights assignment⁶⁰ happen by means of copyright contracts. Also, IMEs have been playing an increasingly important role in copyright contractual activities. However, this part has been constantly neglected by policy-makers and academia. Recently, some regulatory proposals point out the necessity to establish an international IP contract law,⁶¹ since

⁵⁴ Richard Watt, *Handbook on the Economics of Copyright: A Guide for Students and Teachers* (Edward Elgar Publishing 2014).

⁵⁵ Matulionyte (n 52).

⁵⁶ Adolf Dietz, 'European Parliament versus Commission: How to Deal With Collecting Societies?' (2005) *Auteurs & media* 205.

⁵⁷ Pavel Tuma, 'Pitfalls and Challenges of the EC Directive on the Collective Management of Copyright and Related Rights' (2006) 4 *EIPR* 220 at 220.

⁵⁸ Robert P Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organisations' (1996) 84 *California Law Review* 1293.

⁵⁹ Lucie Guibault, 'Book Review: Jacques de Werra (ed.), *Research Handbook on Intellectual Property Licensing*' (2013) 4 *JIPITEC* 249.

⁶⁰ Assignment means copyrights of a work being transferred from one right-holder(s) to the other in which the right-holder(s) lose part or whole of the copyrights.

⁶¹ See Jacques De Werra, 'Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transaction: A Comparative Analysis Between US Law and European Law' (2003) 25 *Colum JL & Arts* 239; James Griffin, 'The Interface Between Copyright

there are no uniform international private rules to deal with copyright contractual disputes at the international level.⁶² However, it is still questionable whether a separate copyright contract law is needed. It can hardly find any systematic study on copyright legal framework by which to regulate copyright licensing contracts by both CMOs and IMEs at international level in a consistent way.

Regionally, the EU has published Directive 2014⁶³ to harmonise collective management and multi-territorial licensing of copyrights in musical works for online uses. For the first time, JCM by means of CMOs and IMEs has been regulated by an integrated piece of legislation at the regional level. Some literature has commented on this Directive for the benefit of the EU.⁶⁴ The debate, indeed, helps to improve the evolvement of the Directive. This thesis will draw on this debate, taking the EU as a case study of regional harmonisation for drawing lessons from its experience to design the legal framework of JCM at the global level.

Apart from hard-law approaches, there are some alternative proposals, eg a soft-law approach,⁶⁵ national supervised arrangements for dispute settlement between CMOs and their members.⁶⁶ Some scholars are in favour of the requirements of transparency and efficiency and supervision of CMOs' operation in order to ensure good functioning of CMOs.⁶⁷ Different forms and extents of supervision and public control on the operation of CMOs exist in countries

and Contract: Suggestions for the Future' (2011) University Of Exeter; Brennan Lorin and Dodd Jeff, 'A Concept Proposal for a Model Intellectual Property Commercial Law' in Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (EE 2013) ch11.

⁶² See De Werra (n 61).

⁶³ Directive 2014/26/EU (n 25).

⁶⁴ See generally eg Josef Drexl and others, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372' (Berlin/Heidelberg) 44 IIC 322; João Pedro Quintais, 'Proposal for a Directive on Collective Rights Management and (Some) Multi-Territorial Licensing' (2013) 35 EIPR 65; Emanuela Arezzo, 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU' (2015) 46 IIC 534.

⁶⁵ Lucie Guibault and Stef van Gompel, 'Collective Management in the European Union' in Daniel Gervias (ed), *Collective Management of Copyright and Related Rights* (2nd edn, Kluwer Law International 2012) ChIV, 117. (Guidelines which eventually is transposed into a code of conduct, has been recommended.)

⁶⁶ Towse and Handke (n 36).

⁶⁷ Maria Mercedes Frabboni, 'A Difficult Future for Reforms on Collective Management of Rights' (2005) 16 Entertainment Law Review 144.

around the world – for example, supervision of the establishment by a public authority: the Ministry of Culture in France and Spain; the Ministry of Justice or the Patent Office in Germany; the self-regulatory framework approach in UK; civil courts supervision over all disputes in Italy, Netherlands, Portugal and Spain; specialist copyright tribunals in Australia; and Government department supervision in Canada and Denmark, supervised by the general law of competition and the powers of the competition authorities.⁶⁸ However, hardly any in depth analysis can be found on these different approaches – either on the legitimacy and competence of institutional supervision on CMOs at the international level, or the comparison of the effectiveness of these supervisory approaches.

1.4.4 Summary

The existing literature shows an unbalanced research trend within the area of copyright, in particular JCM. Literature on the CCM in musical works is often at the national and EU level. Little attention is given to JCM at the international level. A range of excellent research studies from the perspective of economic analysis have been done; and along with the development of new models of copyright licensing in practice, economic analysis has been developing further to study the economic functions of IMEs. However, hardly any literature on the social and cultural functions played by JMOs can be found.

In the literature on innovation and the music industry very little attention is given to the role of CMOs beyond the distribution of royalties to artists. Although the social-cultural role of CMOs have been overlooked in music studies, it has attracted the attention of legal scholars and economists. Some scholars have emphasised the importance of CMOs' social-cultural functions. However, they have not proven how important social-cultural functions are and how these functions interact with the economic function. There is a lack of normative analysis of

⁶⁸ CISAC, 'The Supervision of Collective Management Organisations' <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjXz40j-pzUAhWrB8AKHTxKDwEQFgggMAA&url=http%3A%2F%2Fwww.cisac.org%2Fcontent%2Fdownload%2F1760%2F23864%2Ffile%2FCISACUniversity_The_Supervision_of_CMOs_FINAL.pdf&usg=AFQjCNGqC3zpU9SMJ3GSPLJ0a6O8P0QSA> accessed 30 May 2017.

the economic, social and cultural functions of copyright legal system. A systematic analysis of these three main interactive functions in the music industry is needed since copyrights in musical works, in particular in the internet world, are even more complex than other areas.

Yet, the literature on the role of IMEs is even less. Thus, as the joint management model on the current music market is more popular, a deep research on IMEs as well as their relations with CMOs is imperative. CCM in musical works has caught the notice of European policy makers, in particular those who regulate competition. However, some core issues still exist that need further convincing evidence. For example, the one-stop-shop cross-border licensing model is deemed a violation to competition law, so it has been negated by EU policy makers.⁶⁹ Moreover, due to the rapid development of technology, the means of copyright licensing activities have changed dramatically in the environment of borderless internet world. Literature in private international law and copyright contracts has been out-dated to balance the interests between licensors and licensees.⁷⁰ A more balanced private international law system to protect rightsholders' interests, in particular individual creators' interests, has to be explored.

As to the regulation of JCM in the music market, there is not a consensus among academics. Although EU policy makers have published Directive 2014 to harmonise collective management of copyrights and multi-territorial licensing of rights in musical works at the minimum level, the debates have never stopped. At the global level, this tough topic has not drawn scholars' attention yet. Based on the identified research gaps discussed above, a range of objectives have motivated the present study to research these issues further – for better protecting individual creators' economic interests; for promoting free cross-border flow of musical works between developed and developing countries; for balancing the public interest at international level and enhancing the public acceptance of copyright law; and for maintaining cultural diversity for the whole society.

⁶⁹ See more discussion in section 6.5.2.

⁷⁰ This issue will be analysed in detail in chapter 4.

1.5 Research Objectives

To achieve the aim above, with the consideration of the main legal issues within the area of copyright licensing of musical works at a global level, the present research objectives are set forth as follows:

(1) Establishing the theoretical framework

Establishing a theoretical framework based on the Rawls's theory of justice to underpin a copyright legal framework. As an important part of copyright law, the regulation for commercial copyright law has to rely on a philosophical theory for law and policy goals towards which the new policy is directed.

(2) Functionalising JMOs

- a. Establishing a systematic framework of multi-objectives of copyright law based on Rawls's justice theory, to functionalise JMOs and standardise their management activities in a just way;
- b. Assessing the performance of traditional CMOs and their international cooperation;
- c. Examining the functions of IMEs and the current copyright licensing of the music market;
- d. Investigating the pros and cons of the EU's approach to cross-border copyright licensing.

(3) Evaluating economic fairness

- a. Assessing the existing copyright legal framework to investigate whether it fulfils the objective of economic fairness;
- b. Justifying copyright's economic function of fairness in terms of Rawls's justice theory;
- c. Examining legal issues related to copyright contracts in the context of choice of law rules; Evaluating how exploitation contracts override small rightsholders' legitimate rights, whether or not it is necessary to regulate the first ownership rule;
- d. Assessing how to improve the bargaining outcome of small creators in international copyright contracts.
- e. Analysing how to enable JMOs to fulfil their economic objective by applying a Rawlsian analysis.

(4) Evaluating social justice and cultural diversity

- a. Assessing the social function of current copyright law by the objective of social justice;
- b. Examining the jurisdictional rationales of copyright LEs, and evaluating to what extent the current LEs have been respected by national laws;
- c. Justifying users' rights in a defined scope and public interest at the international level;
- d. Justifying the LEs for the purposes of study, research and education at the international level;
- e. Evaluating the values of cultural diversity in musical works; investigating the interactions between copyright law and maintenance of cultural diversity.

(5) Recommending a global repertoire platform

- a. Justifying the establishment of a new model of global repertoire platform (GRP) as a common infrastructure to facilitate cross-border copyright management in musical works, and remove the hurdles to the cross-border flow of musical works;
- b. Assessing the justness of CMOs and IMEs by the proposed theoretical framework;
- c. Examining legal obstacles to set up GRP and assess how to overcome such legal barriers;
- d. Evaluating the governance and supervision on CMOs internally and externally for enhancing their abilities to attract more rightsholders to join in and expand the international music repertoire.

71

1.6 Methodology – Mixed-method Approach

Legal research may be carried out for varied reasons. The aim of this research is to explore an appropriate theoretical and legal framework for JCM in musical works. In order to attain it, this thesis will identify the sources of copyright law applicable to understanding the legal problems in this area, and then recommend a solution to the problems that have been identified. The

⁷¹ The regulatory constraints relating to the collective management for the online distribution of musical works are hurdles for cross-border flow of intellectual assets. See Jacques de Werra, 'What Legal Framework for Promoting the Cross-Border Flow of Intellectual Assets (Trade Secrets and Music)? A View from Europe Towards Asia (China and Japan)' (2009) 1 *Intellectual Property Quarterly* 27.

research will investigate economic, social and cultural implications of the current and suggested copyright law. This section will identify the appropriate methodology which will guide the present thesis along with a justification of why this particular methodology has been chosen. It starts with a brief introduction of the existing methodologies of legal research with the explanation of their advantages and disadvantages. Then it discusses the methodology of the present thesis and demonstrates why this mixed-methods approach has been chosen and how it will help the current research process.

The methodologies nowadays being employed to study issues in copyright law have covered both doctrinal and non-doctrinal approaches. Some are purely theoretical research on the nature of copyrights; some relate legal research to other disciplines, eg economic analysis of copyrights, copyright and human rights, historical analysis of copyrights, and other empirical studies. The goal of this thesis is to explore a balanced legal framework for global JCM in musical works. For justifying this legal framework, Rawls's theory of justice is applied as a theoretical framework to underpin the proposed legal framework, which is, at the same time, used to analyse and assess the fairness of the relevant existing principles and rules. By doing so, a functionalised model of JMO will be proposed. Due to the multi-purpose project objectives, a mixed methods approach would be an appropriate methodology to deal with different issues for a specific purpose in a more effective way. Following this section, a brief introduction of the mixed methods methodology approach, will be addressed prior to justifying its choice for the present thesis, which consists of a combination of both doctrinal and non-doctrinal approaches using a comparative legal method.

The mixed method approach, also called 'multi-methodology' is a methodology for conducting research that involves collecting, analysing, integrating and mixing quantitative and qualitative research (and data) in a single study or a longitudinal program of inquiry.⁷² The advantages of this form of research is that both qualitative and quantitative research, in combination, provides

⁷² Caroline Bulsara, 'Using a Mixed Methods Approach to Enhance and Validate Your Research' (2015) Brightwater Group Research Centre.

a better understanding of a research problem or issue than either research approach alone.⁷³ The convergence of the data collected by all methods in a study, as well as the answers to research questions from a number of perspectives, can enhance the credibility of the research findings, and ultimately fortifies and enriches a study's conclusions.⁷⁴ A study's findings may raise questions or contradictions that will require clarification. The desired effect of the multi-methodology would be to add new insights to existing theories on the phenomenon under examination. All of these reasons provide strong arguments for considering a mixed-methods approach for this study.

As discussed above, doctrinal analysis is a basic and fundamental legal research method to identify issues and to examine the current state of legal doctrine. Socio-legal analysis is law-in-context that helps to reform the present law. Research into the current state of legal doctrine can hardly be pursued through the methods of socio-legal studies, whilst the strictly doctrinal approach of the black-letter methodology is incapable of analysing policy and moral questions effectively.⁷⁵ Political researchers have too often focused on outcomes and ignored doctrine. Legal researchers have studied doctrine as pure legal reasoning, without recognizing its political component.⁷⁶ A researcher who performs socio-legal research critiques and comments on legal doctrine and practices from the perspective of different sciences like economics, politics and sociology.⁷⁷ Thus, this thesis will choose different methods where it is appropriate to the research questions.

At a macro level, this thesis will start with legal theory research according to the theoretical framework of copyright and its sub-system – JCM law, aiming to establish a fundamental underpinning for the proposed legal framework. Specifically, it will apply Rawls's justice principles as an explanation for assessing and justifying *per se* rules that favour the minority or weaker party's interests. At the micro level, black-letter analysis will be adopted throughout

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction And Guide To The Conduct Of Legal Research* (Pearson Education 2007) 43.

⁷⁶ Emerson H Tiller and Frank B Cross, 'What is Legal Doctrine' (2006) 100 Nw UL Rev 517.

⁷⁷ Adilah Abd Razak, 'Understanding Legal Research' (2009) 4 Integration & Dissemination 19.

the chapters to examine the issues existing nationally, regionally and globally within the current legal framework of copyright licensing. In addition, since the main topic is concerned with the management of copyrights in musical works which will, theoretically, influence all social people's interests (whether they are creators or consumers of musical works), a socio-legal approach will be an ideal method to evaluate the social impact of legislation. For justifying the multiple-functions of CMOs, the socio-legal research of law and economics will be used to discuss the CMOs' economic function; law and cultural diversity will be used to discuss CMOs' cultural function; and the CMOs' social function will involve the discussion of law and human rights. Moreover, since this study will be conducted from an international perspective, comparative methods will also be utilised to compare different legal measures between national laws; and as EU law covers different jurisdictions, this regional harmonisation will also be a case study for the present study of global regulation of global JCM. This approach is expected to yield a more sensible solution than if more national laws were taken into consideration.

To sum up, this thesis adopts mixed method approach of multi-methodology to systematically discuss the due functions of copyright law and JCM organisations. This will be achieved by intensively evaluating the adequacy of existing rules based on black-letter analysis; and to recommend changes to the existing legislation found to be requiring reform, which is based on socio-legal analysis; and all of the evaluating research and recommendations will be based on the doctrinal analysis – jurisprudence of justice – to assess and evaluate the due functions of copyright law and its sub-legal-system; meanwhile, 1 between different jurisdictions will also be used to explore a more justifiable legal framework.

1.7 Overview of Chapters

This thesis begins with a brief introduction of the overarching background and context and motivation in Chapter 1. It puts forward the core general issues of the imbalance in copyright law, which is then followed by the research aim of establishing a more balanced copyright legal framework, and the hypothesis that it is possible and feasible to establish a global JCM framework in musical works. In order to achieve this aim, it specifies several objectives to design a just copyright legal system. Some core terminologies used in the study which may be

slightly different in the meaning used in other papers, are clarified in section 1.3. Then, section 1.4 examines what has been done in the area of global joint copyrights management in musical works for the purpose of identifying relevant legal issues and narrowing down research gaps. To avoid overlapping research, and bridge the gaps which are important but neglected in this area, section 1.4 reviews the core literature related to copyright theories, the roles of CCM and other JCM organisations, as well as the regulatory scenario of copyright licensing activities. A truly comprehensive review is probably impossible and unnecessary for this thesis; therefore, literature has been chosen according to the defined scope of this thesis. The main research objectives of this thesis are described in section 1.5. Section 1.6 demonstrates the methodology adopted in this study. Generally, this study adopts a multi-methodology to systematically analyse the due functions of copyright law and its sub-systems of joint management copyright law. Since the project is carried out in the context of cross-border JCM, it will, unavoidably, need to examine and compare national laws on the related legal issues between different jurisdictions.

Chapter 2 examines the existing copyright theories and assesses if they have fulfilled the objectives of balancing interests at stake, and then proposes a nuanced theoretical framework to reconstruct the copyright legal framework, aiming to restore the balance between stakeholders and fulfil the ultimate goals of justice in the distribution of copyrighted works. Rawls's theory of justice has been chosen to underpin the proposed theoretical framework, by which the current copyright legal framework will be examined and assessed. In this chapter, it will also demonstrate why Rawls's theory is better for justifying the interests of the disadvantaged and the public interest, and how to apply it to design the multi-objective system to the copyright legal framework, particularly to the multifunction of JMOs.

Chapter 3 researches deeper into the topic of the theoretical framework, aiming to establish a concrete multi-objective system based on Rawls's theory for the purpose of functionalising the current JMOs. It starts with the investigation of the music licensing market by different models of CMOs and IMEs. It aims to compare their different natures, features, obligations and identify some core legal issues within the unregulated licensing market. Then it takes the EU's hard-

law approach as a case study to evaluate its pros and cons to regulate cross-border copyrights management at an international level. Then, the nuanced theoretical framework will be adopted to assess the functions of JMOs with the aim of standardising their licensing activities in the digital era. To identify the specific issues of the current copyright legal framework in the chosen area, a multi-objective system based on Rawls's theory, will be established to assess the economic, social and cultural objectives of copyright law and its sub-systems.

Chapter 4 and Chapter 5 explore the relevant legal issues in detail, respectively. Chapter 4 focuses on the discussion of economic fairness. It examines the existing international copyright legal framework to ascertain whether current copyright law fulfils economic fairness. Then it adopts the objective of economic fairness to justify small rightsholders' as well as potential creators' economic interests. Then it assesses the fairness of JMOs' copyright licensing activities by means of various copyright contracts. Since cross-border copyright licensing involves choice of law rules, the discussion of copyright contract issues will be carried out in the context of private international law. Chapter 5 mainly studies the legal issues related to social and cultural objectives of copyright law. Due to some misperceptions as regards to the social function of copyright, this chapter starts with the definition of social function and then examines to what extent the current copyright LEs system in copyright treaties has been respected by national law. Then it defines the scope of the public and users' interests and justifies some users' legitimate rights based on Rawls's theory. In doing so, the LEs for the purposes of study, research and education, will be justified as a users' right which should be granted the equal legal position as to copyrights. At the end of this chapter, the interaction between cultural diversity and copyright law will be discussed. Copyright law impacts on cultural diversity, and flourished cultural works will incentivise re-creation. Since music is one of the most potent forces shaping culture, entertainment and technology,⁷⁸ the impact of copyright law on cultural values of musical works is also assessed in Chapter 5.

⁷⁸ IFPI, 'Global Music Report: Music Consumption Exploding Worldwide' (n 16).

For standardising and facilitating global copyrights management, Chapter 6 justifies the legitimacy of a GRP as a common social infrastructure which will benefit all stakeholders and the society as a whole. In order to overcome some core legal obstacles, it clarifies the nature of CMOs and the GRP which is different from the traditional perceptions of CMOs. Apart from a hard-law approach, the internal and external supervision at international level on CMOs has also been proposed at the end of this chapter.

The study will draw conclusions and discussions in Chapter 7. It examines whether the objectives put out in the beginning have been achieved, summarises the core research findings, contributions and limitations of this thesis, and presents the recommendations for future study.

Chapter 2 – Theoretical Framework for Copyright Legal Framework in

Musical Works

2.1 Introduction

The role of copyright law is to strike a balance between different interests at stake. Although existing classic theories attempt to explain copyright in a moral way, in practice the distribution of revenues of present music market has shown a considerable imbalance of interests at stake.⁷⁹ The copyright practice of music market has deviated from the widely-accepted principle of balancing interests at stake. Copyright has been losing its legitimacy and acceptance by the public.⁸⁰ The classic theories are not able to guide copyright law to strike a fine balance between different interests. Hence, it is the time to restore the balance of copyright law. Currently, there is, however, no widely accepted theoretical approach among theorists on copyright law, and the debates on the justifications of copyright law have been ongoing for centuries between scholars all over the world. Legal scholarship has submitted various recommendations in response to balancing the failure of copyright law, but none of them has proved to be effective. So, it is necessary to explore a sounder theoretical framework by which to underpin copyright legal framework, for shaping copyright law fairer, particularly in the area of global JCM in musical works; for balancing interests at stake, especially in such a changing digital era when copyright has changed to a large extent compared to a decade ago; and for enhancing legitimacy of copyright and improving acceptance by the public.

This chapter applies Rawls's theory of justice to design a more balanced copyright legal system for JCM practice in music works, in particular for regulating JCM in musical works. This copyright legal framework is supposed to strike a real balance between interests at stake in

⁷⁹ Empirical research has shown that music industry is a “winner-take-all” market which is prevalent all over the world. The term of “winner-take-all” was coined by Frank and Cook, 1995. See Martin Kretschmer, ‘Music Artists’ Earnings and Digitisation: A Review of Empirical Data from Britain and Germany’ (2005) Bournemouth University Eprints; Joost Smiers and Marieke van Schijndel, *Imagine There is No Copyright and No Cultural Conglomerates Too: An Essay*, vol 4 (Lulu. com 2009); Drahos (n 8); Dietz (n 8).

⁸⁰ See Geiger (n 9).

music industry, especially for the interests of the least well-off, such as small rightsholders and individual musicians, individual music users and small music repertoires. In order to do so, this chapter starts by examining the inadequacies of several classic theories on copyright law. It is followed by an analysis of the nature of creative activities by people from a social science perspective. And then a nuanced theoretical framework is proposed, based on Rawls's theory of justice through which contested copyright issues may be resolved and upon which the international copyright legal system could be based. In the last section, copyright law's multiple functions as three main objectives of the copyright legal system will be proposed as a part of the underpinning theoretical framework.

2.2 Existing Theories to Copyright Law

A group of literature has emphasised the importance of copyright theory by analysing the philosophy of IP, and examined, concluded and expounded several classic theories of copyright. As Fisher demonstrates that theories surely have a practical use and retain considerable value: while IP laws have failed to make good on their promises to provide comprehensive prescriptions concerning the ideal shape of IP law, theories can help identify non-obvious attractive resolutions of particular problems.⁸¹ Zemer also claims that copyright law must recognise the great value of theoretical approaches to copyright, because copyright theories are specifically designed to criticise the moral and ethical flaws inherent in present copyright legislation.⁸² The copyright community must recognise the invaluable contribution of theories to clarifying controversial conceptual gaps in the way we understand copyright and its limits.⁸³ Menell recognises the important role theories play in providing fresh insights 'for the evolution of new privately and socially constructed institutions to develop effective governance structures'.⁸⁴ As one of the core missions, therefore, this study starts by exploring a more just copyright theory and develops it into a copyright theoretical framework by which to assess and guide the designation of a more balanced copyright legal framework, in particular for guiding

⁸¹ William Fisher, 'Theories of intellectual Property' in Stephen R Munzer (ed), *New essays in the legal and political theory of property*, vol 168 (CUP 2001).

⁸² Lior Zemer, 'On The Value of Copyright Theory' (2006) 1 IPQ 55.

⁸³ Ibid.

⁸⁴ Peter Menell, 'Intellectual Property: General Theories' in Gerrit de Geest Boudewijn Bouckaert (ed), *Encyclopedia of Law and Economics* (Edward Elgar 2000) 129.

the evolution of JMOs in musical works in digital era. In doing so, a just and acceptable copyright theory would improve conversation among the various participants, such as scholars, legislators, judges, litigants, lobbyists, and the public at large, in the law-making process. Accordingly, it would impact upon the reformulation of social principles and provide ethical resolution to issues that court cannot predict alone.⁸⁵

To have an overlook of IP theories, there are many different approaches to copyright theory.⁸⁶ The classic theories of copyright can be categorized as four streams: utilitarianism, natural rights such as Locke's labour theory and personality theory, social planning, and economic analysis.⁸⁷ Each of them tends to provide support for, or shed influence on, the jurisprudence and general objectives of copyright law. Although the emphasis of these approaches is distinct, some of the arguments tend to overlap with each other. The different choice of theoretical considerations of copyright in different territories would indirectly, as an ultimate goal, be reflected in their national copyright law. This goal as a general guideline affects the designation of the specific rules by which each stakeholder's interests are entrenched and influenced.

Natural law believes that property right exists pre-societally and pre-institutionally, and this unalienable right is granted by god mixed with creator's labour or personality which is against decision making.⁸⁸ The consequence is the function of copyright law is over-emphasised to serve creators and/or right-owners, but it tends to ignore the public interest.⁸⁹ The social planning approach⁹⁰ is too ideal in that it requires all citizens to share a certain degree of consensus and this ideal concept of civil society can hardly become true.⁹¹ Utilitarianism⁹²

⁸⁵ Fisher (n 81).

⁸⁶ On the philosophy of IP, in particular copyright, see generally Fisher (n 81).; Menell (n 84) 2, 129; Drahos (n 8); James Boyle, *Shamans, Software, and Spleens* (Harvard University Press 1996); Tom G Palmer, 'Are Patents and Copyrights Morally Justified-the Philosophy of Property Rights and Ideal Objects' (1990) 13 Harv JL & Pub Pol'y 817; Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo LJ 287.

⁸⁷ Fisher, *ibid*; Chidi Oguamanam, 'Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy' (2009) 9 Wake Forest Intellectual Property Law Journal 104; Zemer (n 82).

⁸⁸ Fisher (n 81).

⁸⁹ See Fisher (n 81); Alfred C. Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' (1990) 51 Ohio State Law Journal 517.

⁹⁰ This approach is proposed by William Fisher, see *ibid*.

⁹¹ Oguamanam (n87).

⁹² See Zemer (n 82); Fisher (n 81).

depicts a general social welfare and does not recognise the legitimate rights of the public at large. In addition to these four classic theories, another influential theory is economic analysis of copyrights. It focuses on the investment of creators and right-owners and their financial revenues from consumers, and relies on a market setting to promote the efficient allocation of resources.⁹³ The central role of copyright law, according to economic analysis approach, is to strike a correct balance between access and incentives. For promoting economic efficiency, the principal legal doctrines of copyright law must, at least approximately, ‘maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection’.⁹⁴ Landes and Posner, as the pioneers of economic analysis, believe that once creative works have been put in the public domain, they are vulnerable to free circulation by free-riders.⁹⁵ The consequence is the creator’s total revenues will not be sufficient to cover the cost of creating the work because of the loss of revenues from free-riders. Thus, economists believe the user’s access to copyrighted works must be limited. To some extent the economic analysis approach provides aspiration to understand the values of copyright but the problem is economic analysis does not deal with the issue of fairness. Economists are so interested in power that they regard market power as a universal principle. They believe that everything can be priced and economically measured, and problems can be solved via the market power principle.⁹⁶ This approach is too concerned with efficiency and cost-reduction as well as socio economic development. They believe the protection of the public interest serves this goal.

Incentive theory, as one of the economic approaches that emerged in the 1940s and 1950s, proposes that behaviour is motivated by the “pull” force of external goals, such as rewards, money, or recognition. According to incentive theory, individuals are motivated to do things by external rewards that helps activate particular behaviours, such as a promotion at work, amount of monetary rewards, an opportunity to win a competition.⁹⁷ It believes that we are

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ Fisher (n 81).

⁹⁶ William M Landes and Richard A Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *The Journal of Legal Studies* 325.

⁹⁷ Douglas Bernstein, *Essentials of Psychology* (Cengage Learning 2013).

living in a knowledge-based economy, and we need copyright to operate as an incentive to reward creators' efforts and to drive that economy, and copyright law can be explained as a means for promoting efficient allocation of resources.⁹⁸ Copyright monetary rewards are in diverse forms including copyright royalties, licensing fees and various rents, and certain contractual profits. These various monetary rewards as an exclusive right conferred to original creators are deemed as positive incentives for fostering more creativity and to ensure a robust public domain or common pool of valuable information and knowledge.⁹⁹ This approach has widespread theoretical justification and has been recognised in most copyright legislation from different jurisdictions.¹⁰⁰

Incentive theory believes re-creation of literary and artistic works is dependent, in many instances, on economic rewards. It regards economic rewards as the fundamental function of copyright, but rejects independent values of non-economic arguments. As Breyer asserts that 'none of the noneconomic goals served by copyright law seems an adequate justification for a copyright system. If we are to justify copyright protection, we must turn to its economic objectives'.¹⁰¹ The main problem of this theory, however, is no empirical evidence shows economic reward is the determinant factor for creative activities, especially in the copyright area.¹⁰² Some other economists standing at the opposite side believe that non-monetary rewards – such as profits attributable to lead time, inventors' opportunities to speculate in markets that will be affected by the revelation of their inventions, the prestige enjoyed by artistic and scientific innovators, academic tenure, and the love of art – would be sufficient to sustain the current levels of production even in the absence of IP protection.¹⁰³ This non-monetary

⁹⁸ See *ibid*; Edith Tilton Penrose, *The Economics of the International Patent System* (Baltimore, Md.: Johns Hopkins Press 1951); A Samuel Oddi, 'Beyond Obviousness: Invention Protection in the Twenty-First Century' (1988) 38 *Am UL Rev* 1097; Oguamanam (n 87).

⁹⁹ Landes and Posner (n 96).

¹⁰⁰ See Preamble of WCT; Copyright Act of 1976, US; Copyright Law of China, 2010; Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth: an Independent Report' (2011) 1.

¹⁰¹ Boyle (n 86) 291; See Barry W. Tyerman, 'The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer' (1971) 18 *UCLA Law Review* 1100; And Stephen Breyer, 'Copyright: A Rejoinder' (1972) 20 *UCLA L Rev* 75.

¹⁰² Empirical study suggests that, in certain industries, patent relies more on economic incentives than copyright area; see Fisher (n 81).

¹⁰³ See for Example, Joan Robinson, *The Economics of Imperfect Competition* (Springer 1969); Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 *Economica* 167; Jack Hirshleifer, 'The Private and Social Value of Information and the Reward to Inventive Activity' (1971) 61 *The American Economic Review*

incentive theory is also doubtful. The continuous production and supply of artistic works should not only rely on some prestige artists' inner desire of arts. Copyright law is the origin of legal protection. Without this legal protection, creators and right-owners' economic interests as well as moral interests cannot be ensured.

Some scholars believe that incentive theory can also be perceived as a way to improve social welfare, since this philosophy focuses on promoting the general public good rather than on placing the individual creator as an independent object entitled to a right.¹⁰⁴ They believe that copyright protection provides incentives to re-creations, which benefits the social welfare and economic development, and then the public. Although this theory recognises the public good aspect and regards it as a distinguishing characteristic of IP,¹⁰⁵ the economic analysis is still essentially utilitarian in nature and emphasises the general public domain without considering individuals' legitimate interests, since it focuses partly on the access to public goods rather than an individual's rights of accessibility. It focuses on general welfare but ignores the issues of fairness.¹⁰⁶ The problem in utilitarian justifications for copyright, as Boyle rightly remarks, is that they emphasise the property component of the prerequisites of information production and not the role of the public domain.¹⁰⁷ Most of economists and legal scholars regard the issue as the extent of property necessary to motivate and reward the creative spirit, rather than the extent of the public domain necessary to give the magpie genius raw material she needs.¹⁰⁸ Put simply, it does not admit the independent virtue of public interest but regards it as the by-product of the promotion of the social economy.

There is, generally, not a consensus on the philosophical clarity to the purpose of copyright. Scholars have a debate on the application of an appropriate theory to underpin copyright law. Menell claims that IP theory should be divided into utilitarian and non-utilitarian theories

561; Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) *Harvard Law Review* 281.

¹⁰⁴ See Fisher (n 81).

¹⁰⁵ *ibid.*

¹⁰⁶ This is distinct to the Rawls's theory of justice which will be discussed in section 4.

¹⁰⁷ Boyle (n 86).

¹⁰⁸ *ibid.*, 244.

(includes natural right/labour theory; unjust enrichment; personhood theory; libertarian theories; distributive justice; democratic theories; radical/socialist theories; and ecological theories).¹⁰⁹ Hughes discusses labour theory and Hegelian personality justification to justify IP, and utilises two civil rights, the privacy right argument and the freedom of expression argument, to support the personality justification.¹¹⁰ He argues that the ‘Hegelian personality theory applies more easily because intellectual products, even the most technical seem to result from the individual’s mental processes. Intellectual properties are comparatively more acceptable for personality’.¹¹¹ Merges adds to his influential body of scholarship by adopting foundational principles that focus on the author, the creator, and the designer to support the legal institution of IP.¹¹² Drahos differs and observes the paradox of IP rights in that they create an incentive to generate new information by restricting access to the information created, but the distribution of information is in the public interest.¹¹³ He contends that it is essential to strike a fine balance between the incentive function and the distributive function of IP laws, between the public and the private interest.

The existing theories focus more either on rightsholders’ copyright or incentivising outputs for the society. They poke holes easily in other positions, but none of them have made an affirmative and instrumental theory for today’s copyright law. These existing theories have all proved inadequate to be applied to copyright.¹¹⁴ Scholars suggest that there is no unitary convincing justification for copyright, and a pluralistic approach¹¹⁵ should be adopted to different categories of copyright works. There are many different categories of copyright works, and a variety of incommensurable values play a role in the justification of copyright. The best approach to copyright is to assess and balance competing moral values in light of the particular facts and circumstances of different types of copyright works. Accordingly, this chapter focuses on exploring an appropriate theory to copyrights management in musical works.

¹⁰⁹ Menell (n 84).

¹¹⁰ Hughes (n 86).

¹¹¹ Ibid.

¹¹² Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011).

¹¹³ Drahos (n 8).

¹¹⁴ Fisher (n 81).

¹¹⁵ See *ibid*; Zemer (n 82); David B Resnik, ‘A Pluralistic Account of Intellectual Property’ (2003) 46 *Journal of Business Ethics* 319.

Copyright licensing, rather than the authorisation of copyright per se, is the factor that affects the interests at stake,¹¹⁶ eg musicians' interests, the interest of the public and the society. With the goal of copyright justice in mind, this thesis will explore a more just theory for assessing JMOs' copyright licensing activities in musical works, consequently shaping a truly balanced copyright legal framework. Inspired by a different application of Rawls's theory to copyright area,¹¹⁷ this thesis will apply the theory to the area of JCM, in particular CMOs and IMEs. Rawls's perspective on justice offers a better justification for copyright licensing and would potentially induce better copyright justice.¹¹⁸ Before justifying the choice of Rawls's justice theory, some key preliminary questions of why people create, and what the role of copyright law is will be discussed.

2.3 Rethinking the Role of Copyright

Based on the discussion above, none of the classic theories can adequately justify a balanced copyright law in digital era. For exploring a more appropriate theory to justify the modern copyright law system, here, it is necessary to inspect the nature of human being's creative activities and the purpose of copyright by which musicians or rightsholders are able to exclusively dispose their works. This section starts with the discussion of the nature of human being's creative activities which are deemed as social behaviour.¹¹⁹ Then it analyses the ultimate goal of the copyright law system.

2.3.1 Why do Music Creators Create?

The motivation in human being's creative activities is related to complex psychological processes. Sometimes, music creators' behaviours are motivated by a desire for monetary or other extrinsic rewards. This is the position of incentive theory which suggests that individuals are motivated to do things by extrinsic rewards.¹²⁰ According to this view, people are pulled toward behaviours that offer positive incentives and pushed away from behaviours associated with negative incentives. In reality, however, it is always found that the differences about how

¹¹⁶ This issue will be discussed in detail in chapter 4 and 5.

¹¹⁷ Deming Liu, 'Copyright and the Pursuit of Justice: A Rawlsian Analysis' (2012) 32 *Legal Studies* 600.

¹¹⁸ See section 4.3, 5.3, and 6.4.

¹¹⁹ Drahos (n 8).

¹²⁰ Bernstein (n 97).

people value incentives are presented from one to another and from one situation to another. For most musicians, copyright does not provide much of a direct financial reward for what they are producing currently. Empirical research findings are instead consistent with a winner-take-all or superstar model in which copyright motivates musicians through the promise of large rewards in the future in the rare event of wide popularity.¹²¹ Many music creators have to hold a second source of income to live their life. In many other occasions, people are motivated to create because of intrinsic desires and wishes. And these innate driven motivations are believed to play more important roles than pecuniary rewards.¹²² The intrinsic motives for all voluntary human actions, including creative activity, is to experience pleasure or to avoid pain.¹²³ It is not for economic return that all musicians create. Some authors even pay to publish to ‘satisfy other desires than direct economic remuneration’ such as ‘the propagation of partisan ideas; notions of altruism, as in the case of religious and moral tracts; desire for recognition; and enhancement of one’s reputation’.¹²⁴ In psychology research area, a growing number of empirical works believe that intrinsic motivation is beneficial to creativity.¹²⁵ The power of intrinsic motivation is very strong to boost creativity for challenging tasks, and creative people tend to have higher-level intrinsic motivations.¹²⁶ Creative activities may also happen without any motivation which is purely an unconscious conduct. Research has found that unconscious thought is “liberal” and leads to the generation of items or ideas that are less obvious, less accessible and more creative.¹²⁷ According to psychologists, creative process starts with conscious thought, followed by unconscious work that eventually results in ‘inspiration’.¹²⁸ Some psychologist divides a creativity process into four stages and this model involves both conscious and unconscious thoughts.¹²⁹

¹²¹ DiCola (n 12).

¹²² Diane Leenheer Zimmerman, ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Inquiries in Law* 29.

¹²³ Joshua May, ‘Psychological Egoism’ *Internet Encyclopedia of Philosophy* <<http://www.iep.utm.edu>> .

¹²⁴ Robert M Hurt and Robert M Schuchman, ‘The Economic Rationale of Copyright’ (1966) 56 *The American Economic Review* 421.

¹²⁵ Robert J Sternberg, *Handbook of Creativity* (Cambridge University Press 1999) 300.

¹²⁶ *ibid.*

¹²⁷ Ap Dijksterhuis and Teun Meurs, ‘Where Creativity Resides: the Generative Power of Unconscious Thought’ (2006) 15 *Consciousness and cognition* 135.

¹²⁸ Simone M Ritter and Ap Dijksterhuis, ‘Creativity—the Unconscious Foundations of the Incubation Period’ (2014) 8 *Frontiers in human neuroscience*.

¹²⁹ *ibid*

Evidences can also be easily found in practice. Lohmann suggests that ‘99% of copyrighted works today are not incentivized by copyright’.¹³⁰ The common example is that most internet-users who share personal photography works, writings, thoughts, as well as the phenomenon of fan fiction and fan art derived by fans on social networking websites, do not expect commercialisation of their creative works. They even rarely need to be incentivized to create such expression either. It is also not difficult to understand why Van Gogh, Mozart and many other comparable geniuses died in poverty. It is also true that children keep creating without any reward. Numerous music amateurs who create musical demos on sharing sites are merely for fun, or they have the needs to express inner emotions. They might only intend to draw attentions of the others but pay less attention to economic profits. The motivation might also be their willingness to create for their families or leave a memento after his/her death.¹³¹ Judge Simon Rifkind once argued that some creative geniuses will not forbear from inventive activity even when they are confronted with the threat of a jail term as a disincentive to invent.¹³² In many situations, motivation for creating is out of noneconomic considerations.

Motivation of creative activities has very little to do neither with money, nor with the conferment of ownership by copyright law. The popular incentive theory of copyright law is untrue. Without monetary incentives, people will not stop to create. Before the introduction of copyright, or earlier in the ancient world, and even ahead of ancient times, human being did create things, share and accumulate knowledge without any protection of intellectual property system. In fact, all of the factors that serendipity, academic respect, value-realisation, social esteem, peer prestige and other nobler ideals are contributors to incentivise innovation and creation. Non-monetary incentives are not less powerful than monetary incentives in terms of motivating creations of cultural goods.

¹³⁰ Terry Hart, ‘Incentives to Share: Why Copyright Continues to Play A Role Online’ (*Copyhype*, 28 October 2013) <<http://www.copyhype.com/2013/10/incentives-to-share-why-copyright-continues-to-play-a-role-online/>>

¹³¹ *Eldred v. Ashcroft* [2003] 537 US 186, 207 n15 (Supreme Court).

¹³² Judge Simon Rifkind, Co-Chairman of the United States President’s Commission on the Patents System noted that “the really great geniuses of the world would have contributed their inventions even if there were a full penalty for so doing” (Cited in Oguamanam (n 87)).

2.3.2 The Role of Copyright Legal System

As analysed above the authorisation of copyright is not able to motivate creativity, but it does not mean copyright is redundant. Without copyright, either creators could receive revenues for creating more works, nor the public domain would become more flourishing. Indeed, copyright is not an incentive to create, but it is an incentive to authorise exploitation.¹³³ Copyright is of importance to play the role in providing incentives to publish and disseminate musical works by a third party, mostly in a commercial way. Also, intermediaries are incentivised to commercialise musical works.

Theoretically, a musical work might appear to be inexistent like it had never been created if it has never been published or revealed to others. A music creator is not able to receive any revenue or any other reward from his/her unrevealed work, because copyright does not reward the act of creation itself. As Parker claims, ‘authors’ income, if any, arises not from the act of creation but from exploitation of his work; not his own exploitation but from a third party’s; and not copyright itself, but under the terms of a contract’.¹³⁴ It implies that musicians’ economic interests come from a third party’s exploitation which happens by means of licensing or transferring contracts. Copyright law provides creators such exclusive rights against unauthorised exploitation of his work by any intermediary.

The role of a third party is usually played by CMOs, publishers, producers, IMEs, and other organisations. They exist to distribute musical works and collect revenues on behalf of music creators. Some creators may assign their copyrights to producers or publishers through a transferring contract. The substantive copyright law exists as a basis of providing copyrights where the exclusive rights come from. But, only copyright practice, such as licensing and transferring as well as exploitation of musical works, is the key to make revenues for both the third party and creators. Therefore, copyright legal system should play a positive role to

¹³³ Nigel Parker, ‘The Fuel of Interest: The Incentive Powers of Copyright’ (2007) 18 Entertainment Law Review 7.

¹³⁴ *ibid.*

facilitate such copyright practice and promote the transaction of copyrighted works in a just way.

It can be concluded that there are multiple motivations for creativity, which can be classified as monetary, non-monetary, non-incentive creative activities, and a combination of the above motivations. For the copyright licensing activities by intermediaries, their motivation is no more than monetary. Therefore, some essential questions to be drawn here are – what copyright law encourages both monetary and non-monetary motivated creativities, and what copyright licensing law promotes the dissemination and allocation of copyrighted musical works in a just way; and first and foremost, what copyright theory should be chosen to underpin a real balanced copyright legal framework to regulate copyright practice. Substantive copyright law alone is not able to achieve this goal. The copyright legal system, including substantive copyright law, JCM regulation, and enforcement of copyright,¹³⁵ has to be designed in a coherent way to achieve this goal.

2.4 Rawls's Justice Theory and the Coherent Copyright Legal Framework in Music Works

As discussed in the last section, scholars have explained copyright by a number of theories which are all to a certain extent inadequate to consider stakeholders' interests. Rawls's theory of justice is different from those approaches discussed above. The copyright legal framework based on Rawls's justice analysis could truly balance the interests at stake, and particularly improve the protection of disadvantaged groups and provide an ethical perspective to improve the acceptance of copyright legal system. When copyright theory is examined in the light of Rawls's justice theory, the copyright legal framework including copyright licensing law, is better justified and explained than would be the case with other theories. This section will introduce and analyse the proposed theoretical framework based on Rawls's theory of justice

¹³⁵ Arpi Abovyan, *Challenges of Copyright in the Digital Age: Comparison of the Implementation of the EU Legislation in Germany and Armenia*, vol 789 (Herbert Utz Verlag 2014)14. (It points out that there are five pillars to copyright legal framework: substantive copyright law, neighbouring and related rights law, collective management organisations regulation, copyright contract law, and enforcement of copyright. This thesis proposes to integrate CMOs' regulation and copyright contract law into one comprehensive copyright legal framework in a coherent way.)

in a general way, and more importantly demonstrate how this mechanism works to justify copyright licensing and commercial distribution of musical works.

With regard to the question of whether Rawls's theory can be applied to the copyright legal system, Rawls writes that 'the principle applies in the first instance to the main public principles and policies that regulate social and economic inequalities. It is used to adjust the system of entitlements and rewards'.¹³⁶ The difference principle holds, for example, 'for income and property taxation, for fiscal and economic policy; it does not apply to particular transactions or distributions, nor, in general, to small scale and local decisions, but rather to the background against which these take place'.¹³⁷ It is argued, though, that Rawls's principles have the 'capacity to serve as rather abstract, broad-gauged constraints against which test more specific and circumstantially contingent proposals at the constitutional and legislative levels'.¹³⁸ Likewise, Kordana and Tabachnick apply Rawls's theory to contract law with a broad argument that 'all aspects of social living that affect citizens' life prospects constitute the basic structure'.¹³⁹ In this respect, the authorisation of copyrights and the distribution and dissemination of copyrighted goods and revenues affect citizens' life, thus copyright falls into the scope of basic structure. Additionally, Liu applies Rawls's theory of justice to copyright law to justify an author's copyrights and their limitations, and advises specific doctrinal questions in copyright.¹⁴⁰

This thesis differs in the way that it applies a unified theory to the five pillars¹⁴¹ of copyright legal framework, in particular for regulating JCM practice and JMOs. In this coherent copyright legal framework, the supposed function of JMOs is to strike a real balance between interests at stake, in particular for fairly considering the interests of the least well-off such as individual music creators, music users, and small music repertoires. Rawls inferred that justice is believed

¹³⁶ John Rawls, 'A Kantian Conception of Equality' (1974) Cambridge Review 97 (cited in Manuel Velasquez, *Philosophy: A Text with Readings* (13 edn, Cengage Learning 2015) 260).

¹³⁷ John Rawls, *A Theory of Justice* (Harvard University Press 1971).

¹³⁸ Frank I Michelman, 'Welfare Rights in a Constitutional Democracy' (1979) 3 Wash ULQ 659; See Liu (n 117).

¹³⁹ Kevin A Kordana and David H Tabachnick, 'Rawls and Contract Law' (2004) 73 Geo Wash L Rev 598.

¹⁴⁰ Liu (n 117).

¹⁴¹ See the explanation of five pillars in (n 135).

as the first virtue to assess laws and institutions, and ‘if they are unjust, no matter how efficient and well-arranged they must be reformed or abolished.’¹⁴² Copyright law, of course, can be assessed and should be in accordance with justice. Due to the fact that the concept of justice is perceived distinct in different culture, and there is no unified measure of agreement on justice, Rawls worked out a theory of justice with two principles to solve the problem of distributive justice and structure a well-organised society.

The first principle of Rawls’s theory, also called the principle of equal liberty, requires equality in the assignment of basic rights and duties. According to this theory, the basic rights and duties indicated by the first principle are the political-social rights that every rational person is presumed to want, and these basic citizenship rights, such as the right to vote, freedom of speech, right to hold property and so on, have to be equally distributed.¹⁴³ Likewise, music creators’ rights to be protected by copyrights and music users’ rights to freely exploit musical works also have to be equally distributed among all citizens. According to the first principle, each person in a society is to have an equal right to the most extensive basic liberty consistent with a similar liberty for others.¹⁴⁴ The main distinction between Rawlsian and utilitarianism is that the latter believes ‘a state cannot grow rich except by an inviolable respect for property’, but it is justifiable to invade property rights of wealthy individuals for distributional purposes if this results in an overall increase in happiness.¹⁴⁵ It indicates that a government can arrange copyright policy to benefit the general economy while sacrificing a minority’s interests. This proposition is fundamentally contrary to Rawls’s theory. Rawls’s principles demonstrate that it is unjust to allow that the sacrifices are imposed on a few for general improvement.¹⁴⁶ Inequality is only acceptable when everyone’s well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, so the life of those who are less well situated, is thereby improved.¹⁴⁷

¹⁴² Rawls (n 137) 3.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*, 14, 62.

¹⁴⁵ Jeremy Bentham, *Theory of Legislation* (Trübner & Company 1887) 41-48.

¹⁴⁶ Rawls (n 137) 4.

¹⁴⁷ *ibid.*

The second principle, normally named difference principle, emphasizes that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.¹⁴⁸ When this principle is applied to the copyright system, the main argument can be explained as copyright legal system does not promote justice to grant creators ever-increasing protection and reward as if his/her talent were his/her desert; rather, justice is promoted only if creators put their talent into full exploitation to benefit the least talented.¹⁴⁹ Rawls does not deny the use of incentives. For Rawls rewarding talent or the efforts of talented people to develop their inborn abilities is justifiable ‘only on instrumental grounds’, rather than on the grounds of desert.¹⁵⁰ This is fundamentally different from natural rights theories which believe that creative works are deserved since labourers have added their labour or personality into it.

For Rawls, what is relevant is justice and what is not relevant is desert.¹⁵¹ The law crystallized by Rawls’s theory of justice is not so much concerned with the reward or desert of the talented person, but with the achievement of justice for all in the manner of social cooperation.¹⁵² When the difference principle is applied to copyright area, JMOs’ commercial activities are actually encouraged although it will generate economic inequalities. So, Rawls formulated the condition to economic inequalities that only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society. Inequalities in the distribution of wealth can only be accepted when everyone in a society, including those less well situated, would be better off.¹⁵³ The commercially distribution of musical works incentivises music intermediaries to participate in copyright licensing. The generated economic interests should benefit not only intermediaries, but also more importantly they should benefit all other stakeholders, with priority to benefit the least well-off of society. Thus, JMOs’ copyright commercial activities should be regulated by a coherent copyright legal system.

¹⁴⁸ *ibid*, 15.

¹⁴⁹ Liu (n 117).

¹⁵⁰ Stewart E Sterk, ‘Rhetoric and Reality in Copyright Law’ (1996) 94 *Michigan Law Review* 1197.

¹⁵¹ See more discussion in section 4.4.2.

¹⁵² Rawls (n 137).

¹⁵³ *ibid*, 15.

2.5 Multiple Values and Objectives

The copyright legal framework functions to protect and promote the production, dissemination and consumption of cultural goods. Cultural goods, in particular musical works, have three essential values: economic, social and cultural values, which benefit individuals, communities and societies.¹⁵⁴ As a social institution, copyright legal system should function to preserve and increase these values of cultural goods. Thus, the discussion of the functionality of JMOs can be conducted from three main aspects: economic function, social function and cultural function, for the purpose of preserving and fortifying the multiple values of musical goods. The analysis of this section starts with the discussion on the multiple values of cultural goods, in particular musical works, elaborating their distinct characteristic nature. It concludes with a proposal of the multi-objective role of JMOs. It has to be noted that in this theoretical framework, Rawls's theory of justice is adopted to assess these multiple objectives of musical works and ensure JMOs' role is consistent with the ultimate goal of the copyright legal system.

2.5.1 Essential Values of Cultural Goods in General

Although cultural goods may be bought and sold like other commodities and served as investments and sources of revenue, they are more than commodities.¹⁵⁵ The inherent characteristic of cultural goods is that their cultural values are more apparent than that of ordinary goods. In addition to economic and social values, cultural goods have the connotations of spiritual, sacred, symbolic, aesthetic, and artistic values.¹⁵⁶ For instance, a house as a tangible good, functions more in terms of its economic and social values so its price is valorised and usually decided by the market. The evaluation of a common good is easier to understand. However, a piece of music, for example, embodies more cultural values that they may represent and convey some cultural spiritual, aesthetic and symbolic values, and its valuation may be more difficult to be decided. Economic values are measurable, but not social and cultural values. It is difficult to evaluate and measure the explicit values of cultural goods. This is distinct from

¹⁵⁴ Arjo Klamer, 'Social, Cultural and Economic Values of Cultural Goods' (2003) 3 文化経済学 17.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

that of material goods whose value can be easily measured and evaluated as a form of market prices. Cultural goods can be transacted at quite different prices.

Cultural goods convey, represent, or serve to realise economic, social and cultural values.¹⁵⁷ Usually, economic value refers to the prices of things, or their exchange value.¹⁵⁸ When economists discuss about valuing a good, they mean the pricing of the good. Economic value focuses on the moment of exchange.¹⁵⁹ When the exchange does not really take place, the economic value of a cultural good is what people are willing to pay for it.¹⁶⁰ However, the price of cultural goods does not really reflect their real value. Economic values of cultural goods are very subjective and hardly ever decisive. In economic exchange of cultural goods, people's positioning is problematic and at time inconceivable. Sometimes, people are willing to pay for cultural goods far more than their real economic value. It is untrue to say that some cultural goods only have economic value since it is only temporarily reflected at some stage or some point of the life cycle of the cultural goods.¹⁶¹ Economic value is a part of the value system of cultural goods.

Cultural goods have many other values which are not economic values per se. They cannot be priced that they are better to be grouped in the separate category of social values. Social values are the values of works in the context of interpersonal relationships, groups, communities and societies.¹⁶² Social values cover a wide range and comprise the values of belonging, being member of a group, identity, social distinction, freedom, solidarity, trust, tolerance, responsibility, love, friendship and so on.¹⁶³ In the case of cultural goods the satisfaction comes more from what they mean socially than economically.¹⁶⁴ For example, music helps people in many ways apart from the aspect of generating economic profits for rightsholders. Unlike common goods, such as houses, food, and clothes, the value of music is non-material; it can be

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ This statement will be further proved in the discussion of the phases of musical works.

¹⁶² Klamer (n 154).

¹⁶³ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 2008) Ch2.

¹⁶⁴ Klamer (n 154).

used for entertainment, personal appreciation and pleasure, medical therapy, expressing and evoking emotions, communicating to people and society, inspiring creativity, increasing knowledge. People cannot eat or drink a piece of music but music is indispensable in many people's daily lives. The reflected social value of music is almost as subjective financially as it is aesthetically.

Cultural values are the values that evoke a quality over and beyond the economic and the social values, including aesthetic, spiritual, social, historical, symbolic and authenticity values.¹⁶⁵ Cultural goods are not because they are so different from common goods that they have intrinsic natures. Rather, they are called cultural because the way they being consumed is cultural.¹⁶⁶ According to Kant the quintessential cultural value of a good is its ability to evoke an experience of the sublime.¹⁶⁷ It is the quality that causes awe and stirs the soul.¹⁶⁸ Kant purports that this quality is disinterested; it does not serve a social or economic goal.¹⁶⁹ Goods have cultural value in that people treat them in a cultural way. So, any goods have cultural values. However, cultural goods mainly served in a cultural way and their cultural values can be realised more often.

2.5.2 Multiple Values of Musical Goods in Particular

Being a type of cultural goods, musical goods have economic, social and cultural values. They may be realised or unrealised by participants in different space and time. Throughout history music was not considered merely an entertainment but rather was associated, in fact, interlocked with religious and philosophical beliefs, thus possessed axiological connotations.¹⁷⁰ Music is more specific about what it expresses than words written about those expressions could ever be.¹⁷¹ Music has the power to express, convey and illicit powerful

¹⁶⁵ David Throsby, *Economics and Culture* (Cambridge University Press 2001) 28.

¹⁶⁶ Klamer (n 154).

¹⁶⁷ Immanuel Kant, 'Universal Natural History and Theory of the Heavens' (1755).

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ David Eaton, 'The Influence of Music on Self and Society - Values in Music in Eastern and Western Cultures' (July, 2003) <http://www.tparents.org/UNews/Unws0307/eaton_Influence.htm>

¹⁷¹ *ibid.*

emotions. The unspoken but highly evocative language of music has moral and ethical power that affects individuals and societies alike.¹⁷² It has been concluded that active engagement with music in forms of creation or consumption, may also influence participants' other activities, e.g. perceptual activities, language and literacy skills, numeracy, intellectual development, general attainment and creativity, personal and social development, physical development, health and wellbeing.¹⁷³ Taking pop music for example, it is believed that the reason of consumption of pop music is because people want to express who they are, to which group they belong, what their identity is.¹⁷⁴ Since the late 1950s and early 1960s pop music has become an important way for many people to distinguish themselves from others.¹⁷⁵ People's identity is not strictly individual, but highly social and draws on the socio-cultural values in society – values that become 'objectified' or institutionalised and may thus be communicated to others.¹⁷⁶ To explain a phenomenon such as the advent of pop music, it has to conceptualise the institutionalised socio-cultural values, and understand how institutions work in signalling people's identity.¹⁷⁷

The multiple values of musical goods are differently involved, realised, sustained, evaluated, or functioned in the different phases from production to consumption. A music good whose value being realised by means of a market exchange, will be a different good from the case in which its value has been realised in the form of a gift or as part of a collective program. During the producing stage of musical works, creators such as composers and songwriters perceive more social and cultural values of their creations than economic values. On the contrary, producers and publishers are mainly concerned about whether it is worth their investment for marketing later on. Some goods may stop at the stage of production so that they may never

¹⁷² *ibid.*

¹⁷³ See Susan Hallam, 'The Power of Music: Its Impact on the Intellectual, Social and Personal Development of Children and Young People' (2010) 28 *International Journal of Music Education* 269.

¹⁷⁴ Wilfred Dolfsma, 'The Consumption of Music and the Expression of Values' (1999) 58 *American Journal of Economics and Sociology* 1019.

¹⁷⁵ Simon Frith, 'Sound Effects; Youth, Leisure, and the Politics of Rock'n'roll' (1981) *Sound effects; youth, leisure, and the politics of rock'n'roll*; Simon Frith, 'Towards an Aesthetic of Popular Music' (1987) *Music and society: The politics of composition, performance and reception* 133.

¹⁷⁶ Dolfsma (n 174).

¹⁷⁷ *ibid.*

enter into the phase of exchange. For example, some individuals create and retain the works to themselves rather than release to the public.

When goods become candidates for exchange, they become commodities.¹⁷⁸ In this phase their economic value is being realised, and the price of musical works will be the major subject. Creators may transfer their copyrights to producers/publishers for some economic gains. Producers/publishers would be only concerned about the business potential of a music demo, assessing how much, if applicable, they should invest in the production of a particular musical work. An assignment agreement of copyrights is indeed a marketing contract between creators and producers/publishers that both parties may capture different values of the cultural goods.

The consumption is an entirely different matter and subject of different conversations than its economic valuation.¹⁷⁹ Human beings invest music with value and meaning and use it as a way of defining themselves socially and binding themselves into groups.¹⁸⁰ At consuming stage of musical goods, the social and cultural values, including appreciating, entertaining, enriching social life, are the main considerations to individual consumers. For commercial users, however, the economic values will be more considered since commercial users exploit musical works for the purpose of generating profits. They are not consumers themselves. Generally, at different phases of musical goods, different values of cultural goods will dominate and be realised in the multi-value system.

The economic values of musical works have been over emphasised, whereas their social-cultural values have been neglected by the music market. Ancient cultures held strong beliefs in the moral and ethical power of music.¹⁸¹ In the light of the current climate of Western popular culture, art music has become increasingly marginalised.¹⁸² It is asserted that “art” has been

¹⁷⁸ Arjun Appadurai, *The Social Life of Things: Commodities in Cultural Perspective* (Cambridge University Press 1988).

¹⁷⁹ Klamer (n 154).

¹⁸⁰ John Paul Edward Harper-Scott and Jim Samson, *An introduction to Music Studies* (Cambridge University Press 2009).

¹⁸¹ Eaton (n 170).

¹⁸² *ibid.*

greatly trivialised nowadays, and the lines between trend and tradition, the profound and the superficial, art and cliché have become indistinct in popular culture.¹⁸³ Some musical works pervasive in society are hardly considered as high-quality art. Their pervasiveness and the values they engendered may have an adverse effect on our societies. For example, some musical works labelled as negative or angry would negatively impact on societies. Social and cultural values have their independent significance. Unlike material goods, the satisfaction or usefulness of cultural goods comes more from what they mean socially than economically.¹⁸⁴ Their social values, that is, what it does for issues of identity, culture, connection to society and so on, will be far more important.¹⁸⁵ Socio-cultural values play a critical role in economic processes in people's daily life.¹⁸⁶ Even in a globalised culture and a supposedly classless society, musical preference still indicates a lot about social identity and status.¹⁸⁷ Different groups of people value different musical genres and styles.¹⁸⁸ Within each occupational group, choices are inflected by ethnicity.¹⁸⁹

From the perspective of consumption, people consume certain kinds of music because the music expresses certain kinds of basic socio-cultural values they are attracted to and want to express.¹⁹⁰ In what people consume, they express who they are or want to be; consumption, partly at least, creates identity, and it is a way of communicating messages to the relevant 'audience'.¹⁹¹ Demographic research show that the typical heavy metal fan, almost world-wide, is male, white, aged around twelve to twenty-two, and working-class.¹⁹² In respect of youth cultures and popular music, the results of statistic studies show that central musical traditions are in cementing a sense of individual and group identity as children reach adulthood.¹⁹³ One's

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

¹⁸⁶ Dolfma (n 174).

¹⁸⁷ Harper-Scott and Samson (n 180) 53.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*, 53.

¹⁹⁰ Dolfma (n 174).

¹⁹¹ Metin M Coşgel, 'Rhetoric in the Economy: Consumption and Audience' (1992) 21 *The Journal of Socio-Economics* 363; Metin M Coşgel, 'Audience Effects in Consumption' (1994) 10 *Economics and Philosophy* 19.

¹⁹² See Harper-Scott and Samson (n 180); Deena Weinstein, *Heavy Metal: A Cultural Sociology* (Lexington books 1991).

¹⁹³ Harper-Scott and Samson (n 180).

liking for particular kinds of music is a very powerful way of communicating one's basic, socio-cultural values for almost all people.¹⁹⁴ For example, Jay Chou¹⁹⁵ is the symbol of Chinese style music for many –especially 80s and 90s – people in Taiwan, mainland China and other societies. By buying his records, listening to his music and subsequently talking about his music with friends, audiences indicate they are such a traditional Chinese style person, and show the embodied values that mattered. Another example is the teenager consumes conspicuously – particularly pop music is a means of expressing identity, of the socio-cultural values or beliefs they adhered to.¹⁹⁶

2.5.3 Increasing Economic, Social and Cultural Capitals

Economic capital is a stock of resources that will generate a flow of economic values.¹⁹⁷ The amount of economic capitals of cultural goods is influenced by many factors, e.g. creators' talents, artistic quality, marketing, and social capitals. It has to observe that each musical work has different amount of economic capitals that generate varied economic gains. So, musical works have different popularities. Economic capital plays a fundamental role in financing social and cultural capitals. The capacity to deal with social values and adhere to social norms is called social capital.¹⁹⁸ Social capital is actual and potential resources linked to the possession of a durable network of institutionalised relationships of mutual acquaintance and recognition.¹⁹⁹ It is a person's education (knowledge and intellectual skills) that provides advantage in achieving a higher social-status in society.²⁰⁰ Cultural capital is the ability to deal with cultural values, regardless of the possible economic returns.²⁰¹ Musicians usually build up and increase cultural capital by participating in musical activities which may require music education, study and all kinds of sacrifice in order to achieve insights, wisdom, enlightenment,

¹⁹⁴ Dolfsma (n 174).

¹⁹⁵ Jay Chou is a Taiwanese musician, who leads a new trend of music which combines Western musical elements and Chinese literature terms. See Wikipedia, 'Jay Chou' <https://en.wikipedia.org/wiki/Jay_Chou>

¹⁹⁶ Frith (n 175) 183.

¹⁹⁷ Pierre Bourdieu, 'The Forms of Capital' in John G. Richardson (ed), *Handbook of Theory of Research for the Sociology of Education* (Greenwood 2011) 56.

¹⁹⁸ Ibid.

¹⁹⁹ ibid.

²⁰⁰ ibid.

²⁰¹ Klamer (n 154).

piety, or the ability to experience the sublime, in which the essential activity is to access to existing musical goods. The amount of cultural capital in music is not only influenced by inborn talents and abilities,²⁰² but also, more importantly, the surrounding environment which provides accessible musical resources and participative musical activities.

Economic, social and cultural capitals interact with each other. It has to increase the three types of capital simultaneously. Talents and artistic quality are not the determinant of the increase of economic capital although they are important. The investment in social-cultural capital will be good for economic growth and profit.²⁰³ Some people, organizations or societies have more of it than others. Some creators or performers have prestige and fame by which their musical works may be identified widely since these works contain more social capitals. This phenomenon particularly reflects the theory of “superstar effect”.²⁰⁴ Superstars reap so many more rewards than peers who are only slightly less talented. This is also the case of different categories of music. Some categories of music, e.g. pop music or western music, possessed by some groups or societies enjoy more popularities than minority music. Creativity is by no means an autistic activity.²⁰⁵ Even the most prominent creative genius operates within a social context.²⁰⁶ Cultural capital is the power to inspire or to be inspired.²⁰⁷ It is not only the fuel to increase economic capital, but also the capacity to experience a meaningful life beyond the economic and social dimensions.

From the perspective of creators, revenues brought by musical goods provide material support for individuals to communicate their works to audiences and the society. And this material support is important for musicians and potential creators to access to copyrighted works, which will be internalised as necessary cultural capital in a conscious or unconscious way to accumulate their creative capacity. As such, theorists argue that economic function of cultural goods is instrumental at most, and the generated income and profits serve the ultimate

²⁰² Rawls calls these inborn talents as natural contingencies. See Rawls (n 137) 72.

²⁰³ Klamer (n 154).

²⁰⁴ Sherwin Rosen, ‘The Economics of Superstars’ (1981) 71 *The American Economic Review* 845.

²⁰⁵ Sternberg (n 125) 124.

²⁰⁶ *ibid.*

²⁰⁷ Klamer (n 154).

objectives, e.g. to increase social and cultural capitals.²⁰⁸ In this regard, economic function is fundamental and instrumental in terms of increasing personal capital. However, the motive of the involvement of intermediaries is no more than monetary purposes. For them, economic values of cultural goods are the main justification for their investment. From this aspect, economic values have independent justification in terms of commercialising and benefiting societal economic growth.

Social and cultural values of musical goods have impacts on the economic capitals. Cultural goods with low social or cultural qualities will generate less economic capitals. Profits derived from membership (social capital) which are proportionately greater for those who are lower down the social hierarchy or, more precisely, more threatened by economic and social decline.²⁰⁹ For example, a club build social identity that would generate economic profits. Copyright's social function ensuring accessibility to copyrighted goods, will promote creations and enlarge the repertoire of cultural goods and enrich cultural sources. Ultimately, it will enhance the economic capitals by means of increasing the exchange of copyrighted goods. The possessions of social values increase economic capitals.

Cultural capital is good for economic values, but may also be bad for economic values.²¹⁰ The amount of economic capital that people have appears to be positively related to their cultural capital. This is because economic capitals can be invested in education, study and social experience which is, despite of natural contingencies, an important condition for increasing individuals' cultural capitals. Economic capital is positively related to the level of accessibility to cultural goods. However, cultural capital may have nothing to do with economic capital – it may add to it, but it may also depreciate it.²¹¹ For example, Peking Opera is fighting for survival in modern world, because it is losing out in the battle for the attention of the younger

²⁰⁸ *ibid.*

²⁰⁹ Bourdieu (n 197).

²¹⁰ Klamer (n 154).

²¹¹ For Example, A Religious Community for Maintaining Cultural Values May Principally Oppose to The Application of Modern Techniques Which Would Be Economically Beneficial. See Klamer (n 154).

generation.²¹² Some artists argue that ‘the use of modern techniques in Peking Opera to satisfy contemporary audiences alone could undermine the traditional performing arts, and is definitely not the way out’.²¹³ For maintaining the traditional culture of Peking Opera, its economic capitals reduce dramatically. Another example is when people invest in cultural capitals for the purpose of economic gain, the efficacy of their investment will be less than if the investment had only a cultural purpose.²¹⁴ The consideration of economic capital impairs the thrift of cultural capital. When economic motives surface, credibility is lost.²¹⁵ This is exactly the case in art music. When individuals create musical goods for the purpose of economic gain, the aesthetic value would be less than those works created purely with cultural purposes. It is also common in music industry that musical works with great aesthetic values do not have great popularity or generate proportionate economic values; great musicians who have invested more cultural capitals do not necessarily receive more economic capitals. This is why some classical music lacks economic capital but has plenty of cultural capital.²¹⁶ Thus, it can be concluded that the influence between economic and cultural values is mutual, but not determinant.

2.5.4 Multi-Objective to Copyright Legal Framework in Musical Works

The copyright legal system has to function to fortify the multi-value of musical works, enabling the realisation of values in the different phases from production to consumption. Therefore, this thesis proposes a multi-objective theoretical framework in musical works to achieve these goals: economic fairness,²¹⁷ social justice and cultural diversity.²¹⁸ The argument in this section is that the multiple values of musical goods play an equally important role for embodying their explicit value, although different values may be perceived at different phases. This equal significance of legal position indicates that the copyright legal system should consider how to

212 Graham Earnshaw, ‘Peking Opera Fights for Survival in Modern World’ (*Earnshaw.com*) <<http://www.earnshaw.com/other-writings/peking-opera-fights-survival-modern-world>>

213 ChinaDaily, ‘Opinion Divided over Peking Opera Reforms’ (5 August 2015) <http://www.chinadaily.com.cn/opinion/2015-08/05/content_21509115.htm>

²¹⁴ Klamer (n 154).

²¹⁵ *ibid.*

²¹⁶ Harper-Scott and Samson (n 175) 53.

²¹⁷ See further discussion in chapter 4.

²¹⁸ See further discussion in chapter 5.

increase economic, social and cultural capitals for enhancing the multi-value of musical works, and should function to balance interests between stakeholders across music industry in a way to fulfil the multiple objectives.

Indeed, the pursuit of economic profits is not the singular objective of copyright. The explanation of social values needs the cultural context. The possession of certain social and cultural capital can inspire people's creation which will boost their economic value. Musical works are economic goods and they are also cultural goods. They are able to be evaluated on a market price. Some artistic music, however, may be wrongly evaluated by market price. The motivation of artistic music is non-economic but is social-cultural value related. As argued 'good pop music is the expression of something of a person, an idea, a feeling, a shared experience, or a *Zeitgeist*'.²¹⁹ In this sense, social-cultural values are independent from economic values. Unlike economic values, social and cultural values increase by usage. The influence of economic values on social and cultural capital is indirect, instrumental and not determinant.

In brief, the multiple values of musical goods are separate, independent but also impact on each other. Hence, the copyright legal framework in musical works should have multiple instead of singular objectives. This multi-objective copyright legal system exists to preserve and increase the multiple values of musical works, for optimising the allocation of copyright resources and dissemination of musical works in a just way. In order to accomplish this mission to increase the multi-value of musical goods, the functionality of JMOs has to be redesigned for correcting the unbalanced situation of music copyright practice. Policy makers should take social-cultural values into account in a realistic way and propose a conceptual framework for doing so.

2.6 Conclusion

Based on an analysis from a social science perspective, the authorisation of copyrights or monetary rewards are not the motivation of re-creation of musical works, rather innate non-

²¹⁹ Frith 1987 (n 130) 136.

monetary motivation drives people to create music. The role of copyright is to serve as a base to receive revenues, and to promote the exploitation of musical works, usually in a commercial way. Therefore, the copyright legal framework in musical works has to be designed to facilitate such copyright transactions in a just way. However, the current practice in music industry has proved the imbalance between interests at stake. The classic theories do not provide a morally acceptable justification for copyright law. In consideration of the inadequacies of existing theories to explain modern copyright law, the present research proposes to apply Rawls's theory of justice to underpin the copyright legal framework.

Rawls's theory of justice is different from those approaches, eg utilitarianism, natural rights such as Locke's labour theory and personality theory, social planning, and economic analysis, economic analysis and incentive theory. It offers better explanations to justify the copyright legal system, especially for balancing individual music creators' interests who are in a weak position in copyright licensing agreements. The law crystallised by Rawls's theory of justice is not so much concerned with the reward or desert of the talented person, but with the achievement of justice for all, in particular to benefit the worst well-off. So, Rawls's analysis of copyright may potentially improve the protection and balance of interests at stake across music industry, and provide an ethical perspective on copyright law. To fulfil the proposed copyright justice, at the end of this chapter, a multi-objective copyright legal framework in musical works is proposed as a part of this theoretical framework. Because multiple values of musical goods interact with and impact on each other, their legal position should also be equally paid attention by policy makers. Under the guidance of Rawls's theory, it can be concluded that the multiple objectives: economic fairness, social justice and cultural diversity, should be codified into the copyright legal framework. Copyright law has a mission to increase and fortify the multiple values of musical goods. The aim of the proposed theoretical framework is to fairly protect all stakeholders' rights across music industry and then achieve the goal of justice. JMOs are the main organisations playing this role. The next chapter will investigate the various existing JMOs worldwide which are managing copyrights in musical works, aiming to improve their roles of fulfilling copyright justice.

Chapter 3 – Functionalising Joint Copyrights Management Organisations in Musical Works

3.1 Introduction

The initial CMOs were called authors' societies which were not fully-fledged in the sense of the present CMOs.²²⁰ Their main tasks were to fight for full recognition and respect for authors' economic and moral rights recognised by law.²²¹ This function still exists today as authors' negotiation weight remains weak to ensure a fair negotiation. Similarly, World Intellectual Property Organisation (WIPO) states that CCM is the exercise of copyright and related rights by organizations acting in the interest and on behalf of the owners of rights.²²² It further indicates that 'traditional CMOs acting on behalf of their members negotiate rates and terms of use with users, issuing licenses authorising uses, collecting and distributing royalties. The individual owners of rights do not become directly involved in any of these steps'.²²³ The Statutes of International Confederation of Societies of Authors and Composers (CISAC)²²⁴ provide that authors' societies are more than just 'efficient machinery for the collection and distribution of copyright royalties'. Their tasks extend to 'the advancement of the moral interests of authors and the defence of their material interests'.²²⁵ The traditional belief of CMOs' function is that they mainly focus on the economic revenues and are regarded as the representatives of rightsholders.

²²⁰ Ficsor (n 24).

²²¹ *ibid.*, para 32.

²²² WIPO, 'Collective Management of Copyright and Related Rights' <<http://www.wipo.int/copyright/en/management/>> accessed 30 May 2017.

²²³ *ibid.*

²²⁴ It was in June 1926 that the delegates from 18 societies set up the CISAC. The purpose of such an international body is to coordinate CMOs' activities and contribute to a more efficient protection of authors' rights throughout the world.

²²⁵ Ficsor (n 24) para 32.

However, the arguments of this thesis will extend further the concept of CMOs as not the rightsholders' societies to defend their material and moral interests, but independent organisations who have the obligations to fulfil economic, social and cultural objectives and ultimately achieve justice in terms of balancing different interests at stake. CMOs are not representatives of rightsholders but are independent organisations with multiple missions. Moreover, this thesis argues that IMEs, as an increasingly important and popular type of JMOs, should also perform social-cultural obligations, particularly in digital era.²²⁶ The regulatory legislation of JMOs, as one of the fundamental pillars to the copyright legal framework, has to implement the spirit of copyright law – fulfilling justice – to balance economic revenues between different rightsholders, to ensure users' rights of access to copyrighted works, and to maintain cultural diversity for the whole society.

Social-cultural objectives are in line with the spirit of copyright law 'to balance interests between authors and the public at large, particularly education, research and access to information, as reflected in the Berne Convention'.²²⁷ In practice, most countries all over the world have developed mature models of CMOs. However, *only* in a few countries CMOs' cultural and social functions have been recognised as a legal obligation.²²⁸ This chapter will discuss the justification and rationale of JMOs from three aspects, namely economic fairness, social justice and cultural diversity, to outline a more functioning JMO, and establish a standard based on Rawls's theory of justice by which to assess the justness of JMOs' performance.

This chapter is a comprehensive systematic analysis about the multifunction of JMOs' aims to explore the multi-objective of the copyright legal system in digital era. Based on Rawls's justice theory, copyright's economic, social and cultural objectives are of fundamental importance in terms of balancing interests at stake, more precisely, justifying the interests of the least well-off. In order to attain this goal, this chapter starts with a comparative analysis of the different models of JMOs and detangles the interrelationship between CMOs and IMEs. In

²²⁶ EU Directive 2014 is indicative of this opinion.

²²⁷ WIPO Copyright Treaty, Preamble.

²²⁸ This legal obligation can usually be found in continental legal system countries, German for example.

doing so, some core legal issues caused by the unregulated licensing market will be disclosed in the first section. The EU has made the attempt to internationally harmonise collective management and multi-territorial licensing of copyrights in musical works for online uses. So, section two will review the pros and cons of the solutions adopted by the EU in this area and draw lessons from the EU's experience to the present research. Section three will systematically analyse the multi-objectives of the copyright legal system under the lens of the theoretical framework formulated in chapter 4. Then some new unsettled issues regarding JMOs' multifunction will be pointed out. These issues will be studied further in a detailed way in the following chapters.

3.2 Joint Copyrights Management Organisations in Musical Works at Global Level

In this research, joint copyright management (JCM) refers to any models of non-individual management and distribution of copyrighted works. It includes the collective management system by CMOs and all business-type management system by IMEs. CMOs are called collecting societies in some countries. However, this thesis follows the WIPO's way to call them CMOs,²²⁹ although there is not a uniform definition. Since CMOs and IMEs actually play similar roles in terms of management of copyrights, their nature and legal status needs to be investigated, and their differences compared. The following section will detangle the interrelation between the two systems, aiming to evaluate the significance of and impact upon music copyrights management. It starts with the examination of various existing models worldwide and analyses the issues raised by the lack of an appropriate hard-law to regulate JMOs.

3.2.1 Collective Management Organisations

Due to the different legal systems and traditions, there are various models of CMOs worldwide, whose nature and legal status vary from one another. Because of the principle of territoriality, each CMO can only operate in an exclusive national territory, which means a CMO has to adhere to their national law by which they are legally established. But, the status of CMOs

²²⁹ WIPO (n 222).

varies quite a bit across borders. One country's piracy may be another's 'fair use'.²³⁰ There is a significant disparity between the regulatory systems applicable to CMOs among countries worldwide, and accordingly they demonstrate large disparities in the level of copyright protection.

Since there is no international treaty to harmonise CMOs' operation, their nature and legal status are regulated by domestic law. There is no easy answer to or unanimity of views on the question of which model is more effective or efficient,²³¹ eg voluntary, compulsory, extended or non-voluntary model;²³² strict, intermediate or *De minimis* supervision²³³ by means of a separate piece of legislation. The legal status of CMOs is one of the main factors to influence the efficiency of their performance.²³⁴ So, first and foremost, the impact of institutional supervision upon CMOs' performances has to be evaluated. Supporters of legal supervision believe that laws or policies regulating CMOs have indeed become an important part of modern copyright legislation.²³⁵ As Ficsor states:

Government supervision of the establishment and operation of joint management organizations seems desirable. Such supervision may guarantee, *inter alia*, that only those organizations which can provide the legal, professional and material conditions necessary for an appropriate and efficient management of rights may operate; that the joint management system be made available to all rights owners who need it; that the terms of membership of the organizations be reasonable and, in general, that the basic principles of an adequate joint management (for example, the principle of equal treatment of rights owners), be fully respected.²³⁶

²³⁰ For example, national copyright law holds different attitudes to parody, in the US parody can be protected from claims by the copyright owner of the original work under the fair use doctrine, which is codified in 17 U.S.C. § 107. However, under, for example, Canadian copyright law, Chinese copyright law, there is no explicit protection for parody. Before 1 October, 2014 in the UK, parody was deemed copyright infringement; See Towse and Handke (n 36).

²³¹ Gervais (n 65).

²³² *ibid.*

²³³ See Guibault and Gompel (n 65).

²³⁴ See Rochelandet (n 50).

²³⁵ Dietz (n56); Adolf Dietz, *The Five Pillars of Modern European Copyright (Authors' Rights) Protection* (The European Writers' Congress 2003).

²³⁶ Ficsor (n 24)162, 432(15) (Emphasis added).

A degree of supervision and public control of the operations of CMOs exists in different forms from various countries around the world. In practice, CMOs in some countries are private entities, the US and Singapore for example; while they are public authorities in others, China for example. Under Chinese statutory rules, a CMO should be a not-for-profit social organisation. Germany adopts very strict supervision, Belgium adopts *De minimis* supervision, and France uses an intermediate supervision model. By contrast, Canada does not definitely stipulate the legal form of CMOs.²³⁷ Because the legal control is not simply *all-or-nothing* status, it is more appropriate to discuss the impact upon CMOs' performance according to the different extent of legal supervision. The following table 5.1 shows the different degrees of supervision on CMOs in selected countries worldwide.

As the sources provided by Fabrice Rochelandet in the table are from 1990s in the EU, and the samples only include European countries, data has been added from some selected countries as research subjects: eg US, Australia, Brazil, Canada, Japan, China, Singapore, South Korea and Nigeria.²³⁸ The data has also been updated since during the past two decades some countries have amended their policies. As shown in the table, the degree of supervision of CMOs has been assessed from five aspects: no control, resolution mechanism control, control of establishment, control of activities, and organisation control. No control means that there is not statute or government affiliation to supervise CMOs, and they operate as private entities and they may be non-profit or entirely commercial, for-profit entities, such as Singapore and Greece. Resolution mechanism control means a particular copyright tribunal or panel has been established for solving copyright disputes. Control of establishment means the establishment of a CMO needs to meet certain legal requirements and approval from a public authority. Control of activities denotes that CMOs' operation is under the particular regulation control. Organisation control indicates that a particular government department will, less commonly, control the practice of CMOs²³⁹.

²³⁷ Wenqi Liu, 'Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance' (2012) 17 JIPR 46.

²³⁸ The data of CMOs' legal status is collected from the relevant national legal documents.

²³⁹ CISAC (n 68).

Table 5.1: Legal supervision systems in international countries (adapted from Fabrice Rochelandet's data.²⁴⁰)

Types of control countries	No control or self- regulation	Resolution mechanism control	Control of establishment	Control of activities	Organisational control
Germany			+	+	
Austria			+	+	
Spain			+	+	
France		+	+	+	
Italy					+
Netherlands			+	+	
Greece	+				
United Kingdom	+	+			
Australia	+	+			
Swiss ²⁴¹			+	+	+
United States	+				
Brazil ²⁴²		+	+	+	
Canada					+
Japan					+
China			+	+	
Singapore	+				
South Korea					+
Nigeria		+	+	+	

+ means the existence of relevant control status

Each country has their own supervision model, and these different models have impacted upon the efficiency of CMOs' performances. After a careful comparison of the different control models between European CMOs via the Data envelopment analysis (DEA) method,²⁴³

²⁴⁰ Rochelandet (n 50).

²⁴¹ Currently the Swiss CMOs are under double supervision. The provided table data has been modified from the data collected by Rochelandet (n 50).

²⁴² Brazilian Copyright Act is under amending that it focuses on CMO regulations, and the process would not finish before August 2015, see Allan Rocha de Souza, Brazilian Copyright Act Amended: Focus on Collective Management Organization (CMO) Regulations (21 August 2013) <<http://infojustice.org/archives/30527>> accessed 28 May 2017.

²⁴³ This approach is frequently applied in the field of non-profit organisations such as hospitals and schools. See

Rochelandet concluded that ‘there is no general positive correlation between the intensity of supervision and the results of CMOs’;²⁴⁴ and an ‘intermediary level of supervision appears to be imperfect and a source of inefficiencies that even low supervision is better than setting up intermediary control’.²⁴⁵ He suggested further that ‘a strong internal control is sufficient to overcome the potential failure inherent in limited institutional constraints’²⁴⁶. These conclusions are of great importance to some extent to the research at present.

It also has to be noted that the policy change in some countries over the years could shed some light on trends of supervision models. For instance, historically the establishment of UK CMOs and their performances were not controlled by any public authority. As an implementation of the Hargreaves Review²⁴⁷, the UK IP Office appointed BOP Consulting²⁴⁸ to collaborate with Australian experts to conduct a comparative study of the regulations of collecting societies between Australia, the UK and EU countries for the purpose of finding an appropriate model for the UK²⁴⁹ (Hereafter BOP report). They demonstrated in the final report that a voluntary code of conduct has little effect on improving the weak bargaining power of the majority of users, and therefore, a statutory code of conduct could serve as a mechanism to increase transparency and governance for those CMOs with less strong internal mechanisms.²⁵⁰ Eventually, the UK adopted the self-regulation approach in 2012 in which the government published minimum standards for UK CMOs as a guide to support a self-regulatory framework for such organisations.²⁵¹

The UK’s experience has reflected another issue about the possibility of internal supervision. According to the BOP report, ‘a strong internal governance mechanism may generate more efficient results than strong external regulation’. But Rochelandet indicates that ‘[i]f the

Rochelandet (n 50).

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ Hargreaves (n 100).

²⁴⁸ BOP Consulting is a culture and creativity consultancy. See < <http://bop.co.uk> > accessed 15 February 2017.

²⁴⁹ The UK IP Office, *Collecting Societies Codes of Conduct* (2012) Ch5.

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

internal governance mechanism fails then there is room to strengthen government legal supervision'.²⁵² The BOP report has another important conclusion that a strict external control does ensure a better service for users.²⁵³ Any consideration of how regulation can improve the performance of CMOs needs to focus far more on addressing the concerns of users rather members.²⁵⁴ The present research agrees that users' interests have to be paid more attention when considering how to improve CMOs' performance. In practice, however, users' legitimate rights have not been fully taken into account.²⁵⁵

CMOs worldwide may not only take different forms, but can also vary greatly in nature, depending on the legislative requirements that the national lawmakers attach to them. Whatever the CMO's form is, there are two most common inherent features of CMOs worldwide. That is most CMOs are not-for-profit organisations and incorporated for rightsholders.²⁵⁶ To say they are not-for-profit is because the remuneration they collect is not for CMOs themselves, but they are held in trust for rights-holders.²⁵⁷ In practice, however, it shows that most CMOs are not real not-for-profit organisations as they announced. Even in developed countries music artists have been frustrated by CMOs' performance.²⁵⁸ EU musicians criticised CMOs for targeting file-sharers in the name of protecting artistic works, but, *de facto*, make profits for themselves.²⁵⁹ US musicians also have urged the authority to reform the current copyright act in order to strengthen the music economy and create a stable music ecosystem for upcoming singers, songwriters and musicians.²⁶⁰ In practice, CMOs have also gained substantial market

²⁵² *ibid*, ch1, 12.

²⁵³ See the UK IP Office (n 249) 3; "Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction."

²⁵⁴ The UK IP Office (n 249).

²⁵⁵ See Chapter 6.

²⁵⁶ *ibid*, 25.

²⁵⁷ *ibid*.

²⁵⁸ Julia Reda, 'Artists Discuss Frustration with EU Collecting Societies' (*TBO*, 2015) <http://www.trademarksandbrandsonline.com/news/artists-discuss-frustration-with-copyright-enforcement-4349?utm_source=World+IP+Review&utm_campaign=07a64e69a1-TBO_Digital_Newsletter_22_04_2015&utm_medium=email&utm_term=0_d76dcadc01-07a64e69a1-27370025> accessed 30 May 2017.

²⁵⁹ *ibid*.

²⁶⁰ *TBO*, 'DMCA Reform Needed, Say Artists' (*TBO*, 4 April 2016) <<http://www.trademarksandbrandsonline.com/news/dmca-reform-needed-say-artists-4669>> accessed 30 May 2017.

power.²⁶¹ From artists' perspective, they claim that CMOs steal their works to make profits for themselves.²⁶² So, it is not surprising to hear that musicians disagree with the claim that CMOs are “not-for-profit” organisations.

Another issue is whether or not a CMO is owned by rightsholders. Historically, rightsholders established the first CMO to look after their works. Traditionally, it is believed that CMOs operate on behalf of all rightsholders they represent and have to behave in the best interests of them. Even nowadays, it is still believed that the main function of a CMO is rights management, that is, to license the use of protected works on behalf of rights-holders.²⁶³ By licensing, they offer legal access to copyrighted works and make it easy for users to get the necessary permission from one source.²⁶⁴ Consequently, the obligation of facilitating users' access has not been fully taken into consideration as it only falls into an affiliation with the central obligation of protecting rightsholders' interests. This is why in some countries CMOs are deemed as private in nature and run only for rightsholders. However, this position is not true when looking into the process of copyright licensing practice performed by CMOs. CMOs provide services to both the rightsholders and the users. Accordingly, their market-dominant position exists in two markets, namely, in the market for collective rights management services to rightsholders and the market for the grant of licences to users.²⁶⁵ The main task of a CMO, in fact, should be to provide a link between rights-holders and users, and thus facilitate the exploitation of works. The larger a repertoire is, the better it can serve the users and grant licenses for all types of works that are exploited. By providing a link between rightsholders and right-users, CMOs serve their constituencies – creators, performers, producers and publishers – and secure legal access for users. This is what CMOs truly should do.

²⁶¹ Simon Frith and Lee Marshall, *Music and cCopyright* (Theatre Arts Books 2004).

²⁶² Reda (n 258).

²⁶³ Tarja Koskinen-Olsson and Nicholas Lowe, 'Educational Material on Collective Management of Copyright and Related Rights, Module 1: General aspects of collective management' (2012) WIPO <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf> accessed 30 May 2017.

²⁶⁴ *ibid.*

²⁶⁵ Drexel and others (n 64).

However, more attention has been paid to the market for rightsholders and users' rights have been ignored.²⁶⁶ The policy of CMOs normally does not contain any rule under which a CMO would operate with an obligation to grant licences to all users who request. One of CMOs' roles is they should look into the real market needs, and offer viable solutions and grant meaningful licences to users. The licensing activities should really serve both rightsholders and right-users. Thus, CMOs are not fully private, rather they serve both rightsholders and right-users and the public interest of the whole society as well, and this should not be ignored.

3.2.2 Independent Management Entities

IMEs, being a more common type of intermediary nowadays, manage music copyrights in a business way nationally and internationally. They are motivated by profits maximising for both rightsholders and themselves.²⁶⁷ It is necessary to examine and compare the diverse business models of the music industry to explore their common features. Online copyrights management distributors in musical works can be classified into three main categories: first, *cloud-based closed platforms* that either provide online streaming accounts or downloading services, eg iTunes store, Amazon, Google and Microsoft; second, *open platforms*, eg Common Creative (CC), advertising-based licensing; and third, *integrated model* or subscription services that combine both closed and open platform service. Most commercialised ISPs take this form, eg Spotify, Deezer and Kugou²⁶⁸. Through different internet terminals, such as computers, mobile phones and tablets, consumers are able to access music with or without a cost.

Specifically, with respect to the *closed platforms* operated by ISPs, they have been running successful businesses selling music online. For example, iTunes store has achieved a great success in the music business since it began selling music online in 2003.²⁶⁹ Now it has 500 million users worldwide who spend approximately \$40 a year on content, according to an

²⁶⁶ See the discussion on the importance of users' rights in section 5.2.

²⁶⁷ Rochelandet (n 50).

²⁶⁸ Kugou is a Chinese music streaming and download service established in 2004 and owned by China Music Corporation since 2014. It is the largest music streaming service in the world, with more than 450 million monthly active users.

²⁶⁹ Kevin Bostic, 'Apple's iTunes Store Sells 25 Billionth Song' (February 06, 2013) <<http://appleinsider.com/articles/13/02/06/apples-itunes-store-sells-25-billionth-song>> accessed 30 May 2017.

analysis produced by Horace Dediu of Asymco.²⁷⁰ Their success has inspired many other music businesses like Google and Amazon. The combined model which is commonly adopted way, integrates download service, online streaming, free sources and subscription services into their music business. According to the IFPI report 2013, subscription services are the fastest growth area in digital music, with subscriber numbers up 44 percent in 2012 and revenues up 59 percent in the first half of 2012.²⁷¹

In addition to revenues collected from end users, advertising revenue has become the primary source of income generated from digital music services.²⁷² Advertising is one of the highest-profile business models on the internet. Many ISPs combine the advertising model with other forms of revenues, and advertising remains a critically important component of internet cross-subsidisation business models.²⁷³ Ad-based revenues are so attractive to ISPs that almost all have launched this business model.²⁷⁴ Intermediaries are always free to develop new business models to commercialise musical works as long as they have been authorised to do so.

Among the numerous licensing models based on Open Content, the most successful application so far is the *Creative Commons* (CC) initiative, which is now rapidly spreading across the globe. CC has developed a series of standardised licences that allow authors of, for example, musical works to permit wide dissemination and transformative uses of their works, without completely forfeiting copyright protection. The licences grant users the freedom to use, reproduce, modify the work, and distribute or re-distribute the work.²⁷⁵ The CC licence scheme is an important model to manage copyrights. First, it is beneficial to both authors and users. It protects creative works while encouraging certain uses of them. It facilitates the dissemination of musical works

²⁷⁰ Jennifer Lane, 'The Key to iTunes' Success' (*Audio4cast*, July 2, 2013) <<https://audio4cast.com/2013/07/02/the-key-to-itunes-success/>> accessed 30 May 2017.

²⁷¹ IFPI (n 78) 14.

²⁷² Maurizio Borghi and others, 'Determinants in the Online Distribution of Digital Content: an Exploratory Analysis' (2012) 3 *European Journal for Law and Technology*.

²⁷³ Eric Schlachter, 'The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet Symposium: Digital Content: New Products and New Business Models' (1997) 12 *Berkeley Tech LJ* 15.

²⁷⁴ *Ibid.*

²⁷⁵ Creative Commons, 'About The Licenses: What Our Licenses Do' <<https://creativecommons.org/licenses/>> accessed 28 May, 2017.

for creators and the creation of derivative works. Second, it provides a platform for music conversation between musicians and helps potential users become musicians, because it allows other musicians to remix or build upon original music. Third, it is a new way to balance copyright, and the global porting project ensures it can be exercised on an international level. It also helps to increase the global copyright commons of easily accessible content.²⁷⁶ The CC model is one of many valuable ways a musician can authorise music in a way that can reap rewards, both immediate and long-term.²⁷⁷ This model is an ideal music community for young musicians who do not have enough financial support and are looking to build a fan base. The open licensing models are thriving in that they conform to the nature of the internet – they can facilitate a wider dissemination of works without infringing copyright and without depriving rightsholders from control over all possible uses of their works.

However, due to the tailored licensing terms and conditions of granting some permission in advance, the development of the licences over the years has made the system increasingly complex.²⁷⁸ The risk of licence proliferation has been identified by many scholars and users, including the founder of the movement.²⁷⁹ Not all works available by one of the CC licences can be combined without further negotiation because not all licence options are compatible and this is ‘an unsolvable dilemma’.²⁸⁰ The multiplicity of CC licensing options increases confusion and information costs as well as frustrating internal incompatibilities. These issues need to be regulated by predictable legislation.

Nowadays, IME models have become the main choice of JCM by rightsholders so it enjoys a dominant market share.²⁸¹ Intermediaries have been developing new business models to make

²⁷⁶ Catharina Maracke, ‘Creative Commons International. the International License Porting Project-Origins, Experiences, and Challenges’ (2010) 4 JIPITEC 4.

²⁷⁷ Meryl Mohan, ‘Innerviews! Anil Prasad – Music Without Border’ (*Creative Commons*, October 14, 2013) <<https://creativecommons.org/2013/10/14/innerviews-anil-prasad-music-without-borders/>> accessed 30 May 2017.

²⁷⁸ Melanie Dulong De Rosnay, ‘Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions’ (2009) CC-NLCC-NL; Lawrence Lessig, ‘Re-Crafting a Public Domain’ (2006) 18 Yale JL & Human 56.

²⁷⁹ Lessig, *ibid.*

²⁸⁰ De Rosnay (n 278); Severine Dusollier, ‘Sharing access to Intellectual Property through Private Ordering’ (2007) 82 Chicago-Kent Law Review 1391.

²⁸¹ Music and Copyright’s Blog, ‘WGM Makes Biggest Recorded Music Market Share Gains of 2015; Indies Cement Publishing Lead’ (*Ovum*, APRIL 28, 2016)

profits and seize music market share. IMEs, including both traditional business-type management and the new open-licensing models, are in nature for-profit organisations. Their licensing activities are currently governed by fragmented legislation, such as contract law, commercial law, competition law, anti-trust law. Copyright treaties are silent on IMEs. Their role of distribution and collection of revenues is to some extent similar to the role of CMOs. For researching the compatibility of both systems, the interrelationship between the two systems has to be examined.

3.2.3 Interrelationship between CMOs and IMEs

The joint task of IMEs is to collect and distribute royalties as quickly and as precisely as possible, and keep transaction costs as low as possible.²⁸² Within this system, the tariffs and licensing conditions are also individualised, and the only joint element of the system is that one single licensing source is offered with a significant reduction of transaction costs for both rights-owners and users. This benefit is in line with the main economic function of CMOs.²⁸³ The exercise of copyrights of musical works by IMEs have generated huge economic profits for music companies and small part of famous musicians. Their professional ability to commercialise musical works has contributed to the economic growth of societies. However, IMEs are not required to distribute revenues between different rightsholders in a just way. Certainly, IMEs concern more about their own economic interests.

CMOs and IMEs have existed and functioned side by side domestically and internationally,²⁸⁴ and they may also establish alliances in order to pursue common interests or exercise and/or enforce certain rights together.²⁸⁵ However, some of the economic, social and cultural benefits contributed by CMOs will never be fulfilled by IMEs. Owing to the two systems based on

<<https://musicandcopyright.wordpress.com/2016/04/28/wmg-makes-biggest-recorded-music-market-share-gains-of-2015-indies-cement-publishing-lead/>> accessed 30 May 2017. It has been reported that the music market is now dominated by three major music companies which have a worldwide share of 70 percent of the market for distribution.

²⁸² Ficsor (n 24).

²⁸³ See Chapter 4.

²⁸⁴ Ficsor (n 24).

²⁸⁵ *ibid.*

different philosophical and strategic concepts, fulfilling more or less different objectives, existing IMEs are not required to perform the obligation of social-cultural functions.²⁸⁶ The following table 5.2 has compared the fundamental differences of the two systems.

Table 5.2: The Main Differences between CMOs and IMEs

	CMOs	IMEs
Nature	Most are not-for-profit organisations	For-profit JCM entities;
Forms	Strict supervision, Intermediate supervision, and <i>De minimis</i> supervision; Voluntary, compulsory, extended and non-voluntary licensing models	Flexible business models, eg closed, open and, combined licensing models; Ad-based licensing and Creative Commons
Revenues	Collecting on behalf of rightsholders	Making own profits
Tariff to members	Set up by national law	Negotiable via agreements
Decided Royalty Rates	One single price for whole repertoire	Depends on market
Relationship to Rightsholders	Membership agreements; incomplete control by rightsholders/members	Contractual relationship; independent intermediaries (not owned or controlled by rightsholders)
Social and cultural function	Yes	No
Governed by legislations	Copyright law	Fragmented legislations, such as contract law, commercial law, competition law, anti-trust law
Activity area	Nationally	Internationally

Because IMEs offer music creators a chance to become a superstar although there is little chance, IMEs are more attractive to rightsholders than a true collective system.²⁸⁷ This trend will break the balance in the field of protection, exercise and enforcement of copyright.

²⁸⁶ *ibid*; Matulionyte (n 52).

²⁸⁷ Ficsor (n 24).

Christian Handke²⁸⁸ demonstrates in an economic analysis that rights management by a profit-maximizing independent supplier may not perform better than CMOs.

Currently, CMOs and IMEs are competing with each other in an unfair music licensing market, since IMEs' licensing activities are less restricted by copyright laws. This is jeopardising CMOs' performances further. Meanwhile, new models of online distribution, such as Creative Commons (CC)²⁸⁹ and advertisement-based platforms,²⁹⁰ have been continually developed, and copyright law keep silent on these new models. This phenomenon leads the modern copyright licensing market to be more chaotic and problematic. The coexistence of CMOs and IMEs has raised various issues. The interrelation between the two systems is intermingled and complicated. The interrelations between the two systems needs to be detangled, and a justified common legal environment needs to be set up for non-individual management of copyrights in musical works for facilitating cross-border licensing activities and a fairer legal environment for different licensing models.

3.2.4 Core Issues of the Unregulated Market of JCM

The coexistence of CMOs and IMEs has raised various issues. For corporate rights-owners, eg producers and publishers, with the desire to exercise their exclusive rights, or a simple right to remuneration, they join an organisation that could take care of their rights. Although some of them are members of CMOs and accept the traditions and rules thereof, most others prefer to choose some other forms of exercising rights with as few collectivised elements as possible.²⁹¹ This is simply because IMEs make more profits for them;²⁹² and, more attractively, with the investment from IMEs there is an unrealistic chance to become a superstar. However, IMEs also reduce the appropriability of rightsholders.²⁹³ In theory, unauthorised digital copies can be seen as cheap, imperfect substitutes for purchases of authorised copies, which reduce the

²⁸⁸ Handke (n 24).

²⁸⁹ Borghi (n 272).

²⁹⁰ *ibid.*

²⁹¹ Ficsor (n 24).

²⁹² Handke (n 24).

²⁹³ Christian Handke, 'Digitization and Competition in Copyright Industries: One Step Forward and Two Steps Back?' (2015) 32 *Homo Oeconomus*.

appropriability of suppliers of copyright works.²⁹⁴ Due to high economic rewards from IMEs²⁹⁵ along with the poor performance of CMOs,²⁹⁶ CMOs are under threat that members might withdraw their copyrighted works from the traditional CMOs and transfer the power in managing some of the rights to IMEs.²⁹⁷ Especially, if CMOs are voluntary entities rightsholders can freely opt-out. The research on the licensing model of IMEs of musical works is very limited, although it has been a concern that the unregulated for-profit providers would replace highly regulated non-profit CMOs.²⁹⁸

Another issue is dual licensing and relicensing which means licensing a work under two different licences to two or more organisations concurrently. Due to the unregulated licensing market and asymmetric information, there is a possibility that right-owners who are members of CMOs, to some extent manage and remain in control of their rights, and thus in the exploitation of their works.²⁹⁹ For instance, as a CMO member, a right-owner might simultaneously take part in an open content licence, CC for example, allowing free exploitation of the work for gaining fame. When CC licences are enforceable, this situation will cause chaotic problems to CMOs' management. In fact, CC licences are now, in some jurisdictions, enforceable in court under copyright law.³⁰⁰ When the dual licensing happens, it will confuse users when making a decision about using licence and they may consequently infringe copyrights.³⁰¹

More importantly, the unregulated music business models have led to unfair treatment to individual creators and some types of users. It has been reported that the music market is now dominated by three major music companies which have a worldwide share of 70 percent of the

²⁹⁴ *ibid.*

²⁹⁵ IMEs have economically dominated the music market. See section 3.2.2.

²⁹⁶ With respect of the issues of improving CMOs' performance, see section 3.2.1

²⁹⁷ Violaine Dehin, 'The Future of Legal Online Music Services in the European Union: A Review of the EU Commission's Recent Initiatives in Cross-Border Copyright Management' (2010) 32 *European Intellectual Property Review* 220.

²⁹⁸ Towse and Handke (n 36) 15.

²⁹⁹ See Séverine Dusollier and Others, *Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States* (European Union 2014) 94; Rosnay (n 278).

³⁰⁰ *Adam Curry c.s. v Audax c.s.* [2006] 334492 / KG 06-176 SR (District Court of Amsterdam)

³⁰¹ *SGAE v. Luis* [2005] Case No 3008/2005 (CIVIL).

market for distribution.³⁰² The music companies either own the copyrights of most works, or they co-own the copyrights with individual creators through contracts so that, undoubtedly, most revenues have gone to large right holders rather than the original musicians. When IMEs who did not create works, get involved in the music business, they must be motivated by economic concerns. They select certain musicians who have commercial potential, to collaborate with, and take advantage of them to agree to unfavourable licensing terms and conditions. Most artists would agree with those contractual conditions because of their weak negotiation power.³⁰³

Moreover, copyright-users' interests cannot be appropriately protected without codified provisions by which users' rights are entrenched explicitly. Since there is a lack of concrete provisions to protect users' rights, IMEs can always escape from their social-cultural obligations. Vulnerable consumers can only resort to other laws, such as consumer law or commercial law, if they have been unfairly treated. Some disabled persons' interests have caught the legislators' concerns.³⁰⁴ For instance, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was adopted on 7 June, 2013, aiming to create a set of mandatory LEs for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs) to make and supply accessible copies of works for the use of disabled persons, without infringing copyright.³⁰⁵ However, LEs for other purposes, for education purpose for example,³⁰⁶ which are highly important for the development of social-cultural values,³⁰⁷ has not been paid enough attention yet by policy

³⁰² In 1998, the dominated music companies were six. After EMI Group was sold to Universal Music and Sony in November 2011, the three major companies are Universal Music Group, Sony Music Entertainment and Warner Music Group. See KEA (n 36) 23.

³⁰³ As to the issue of weak negotiation power, see section 4.2.

³⁰⁴ In 2006, the WIPO conducted a study on different national approaches to copyright exception for persons with disabilities. Over 60 countries have an exception in their copyright laws permitting conversion of works into accessible formats for the benefit of persons who cannot read print. The scope of the exception varies, in terms of the beneficiaries covered, formats permitted, restrictions on who can convert, in 2013, the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, was signed by 51 countries, to facilitate the creation of accessible versions of books and other copyrighted works for visually impaired persons.

³⁰⁵ WIPO, 'Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled', <<http://www.wipo.int/treaties/en/ip/marrakesh/>> accessed 15 February 2017.

³⁰⁶ The issue of public interests, libraries in particular, will be analysed in chapter 5.

³⁰⁷ See the relevant discussion in section 5.4.

makers. The current fragmented provisions can hardly balance the interests of the public at large. Unlike the domestic copyright regime where a social-cultural scheme might exist, there is not such a mechanism to support online public uses.

This thesis argues that the international online licensing of musical works through both CMOs and IMEs has to be regulated under a harmonised copyright licensing regulation with the objective of fulfilling justice for different stakeholders.³⁰⁸ Indeed, without institutional intervention, large music companies will play their dominant place globally, and prefer IMEs for the pursuit of more profits and escape from the social-cultural obligations. The present copyright legal system, if not completely, keeps silence on the requirement of social-cultural goals on IMEs. If CMOs and IMEs are expected to compete with one another on a reasonably fair arena, they should preferably enjoy a uniform legal treatment and be subject to similar administrative duties and burdens, for example, the pursuit of solidarity and social-cultural goals.³⁰⁹ The establishment of a common playing field for JCM through a proper legislative harmonisation initiative is indispensable.³¹⁰

By being required to admit all eligible rightsholders as members, national CMOs operate similarly to an insurer that is regulated in order to provide an essential service for everyone in the market it serves. It has been argued that CMOs provide greater benefits for smaller market participants with many works that are not highly valued than for the larger ones or those with more valuable works.³¹¹ This position reflects an ideal theoretical prospect that CMOs treat large and small right-owners equally. But in practice, CMOs' ability to attract and hold large market participants, usually producers and publishing companies, has been overestimated. IMEs, as discussed in the previous chapter, are strong competitors that produce more profits without the forced burden of social-cultural deductions.³¹² Nonetheless, most CMOs' revenues mainly come from large players. If they switch the mandate to IMEs, CMOs' operation would

³⁰⁸ An international music repertoire will be proposed as a practical solution to this issue in Chapter 6.

³⁰⁹ Giuseppe Mazziotti, 'Copyright in the EU Digital Single Market' (2013) Centre for European Policy Studies Brussels.

³¹⁰ *ibid.*

³¹¹ Towse and Handke (n 36).

³¹² As to the social and cultural deduction, usually called 10% rule, see section 5.4.

be more difficult. Therefore, JMOs have to undertake the same social-cultural obligations, competing with each other in a fair and common field.

3.3 Regional Harmonisation of Legal System on JMOs – EU’s Experience

The EU, as the first region, has made the attempt to internationally harmonise collective management and multi-territorial licensing of copyrights in musical works for online uses. This section reviews the pros and cons of the solutions adopted by EU in this area, and intends to draw lessons from EU’s experience. The EU Commission and Parliament have made efforts for two decades on the harmonisation of collective management and multi-territorial licensing of copyrights in musical works for online uses. In 2005, the European Commission issued a Recommendation³¹³ on collective cross-border management of copyright and related rights for legitimate online music services and suggested abolishing the network of reciprocal agreements within the EU, allowing the right holders to choose freely which society to join to and to what extent to grant rights, and allowing the users to choose freely from which society to license rights.³¹⁴ This recommendation was a soft-law without binding effect. Economists point out that the proposals made in the Commission Recommendation will predictably lead to comparably high (additional) search and information costs.³¹⁵ Eventually, the EU Council launched a hard-law approach, approving a new *Directive on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*³¹⁶, which came into force on 26 February 2014 (hereafter, the Directive 2014).³¹⁷

After a long period of debate among academic and policy-makers on the feasibility of the hard law measures, this initiative has been finally approved. And this Directive has started to be implemented by member countries’ legislations.³¹⁸ The hard-law approach has also been

³¹³ Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, O.J. L 276/54, 21 October 2005.

³¹⁴ Matulionyte (n 52).

³¹⁵ See Drexl and others (n 64).

³¹⁶ Directive 2014/26/EU (n 25).

³¹⁷ *ibid.*

³¹⁸ The UK Regulation Implementing the Collective Rights Management (CRM) Directive has been published in April, 2016.

acknowledged by the European Commission that a proper legislative measure creating a common playing field for collective management should have been done, although some provisions need to be improved. For the first time, national laws on collecting management and multi-territorial licensing of copyrights are harmonised at the regional level. This legislative experience could shed some light on the present research.

The Directive has been welcomed by most stakeholders including CMOs and the digital industry as a whole.³¹⁹ One of the most significant modifications is that it has included IMEs into the Directive for the first time, and acknowledged their legal status. They enjoy an equal legal position to jointly manage copyrighted works that the provisions of Directive 2014 apply equally to these organisations, and rightsholders have the freedom to choose between CMOs and IMEs to manage their rights. Apart from this, the researcher believes that the Directive will provide a more efficient service to rightsholders and service providers, involving better collection and redistribution of revenue, accurate invoicing, and more grants of multi-territorial licences for aggregated repertoire.³²⁰ The Directive recognises the need to improve the functioning of CMOs, and the transparency and accountability to their members and rightsholders, by enhancing the role of right owners in their supervision and management, and to facilitate the multi-territorial licensing of an author's rights in musical works through CMOs.³²¹

3.3.1 Social, Cultural and Educational Deductions Related Issues

There is another significant improvement in that the aims of EU Directive 2014 have a broader agenda than simply economic efficiency. Para 3 of the Directive provides that:

³¹⁹ Daniel J Gervais, *Collective Management of Copyright and Related Rights* (Kluwer Law International 2010) Ch5.

³²⁰ *ibid.*

³²¹ Directive 2014/26/EU of The European Parliament and of The Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, preamble (3)(5).

Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightsholders and the public.³²²

For the first time, the objectives of social, cultural and educational services have been explicitly written into copyright law.

As to the effectiveness of this improvement, however, scholars argue that the Directive is not even-handed in its treatment of the goals it sets itself.³²³ According to Graber, the cultural agenda is marginalised, and indeed compromised, by the economic efficiency agenda.³²⁴ Dietz points out that the Commission's line on the CMOs' social and cultural role has been softened during the passage of the Directive.³²⁵ He remains convinced that the European Parliament better expresses or represents the cultural interests of the European Community; the Commission, on the contrary, is still 'aimed primarily towards the internal market and the European economy as a whole'.³²⁶ Indeed, this point is reflected in the preamble 18 that 'in order to ensure that holders of copyright and related rights can benefit fully from the internal market when their rights are being managed collectively and that their freedom to exercise their rights is not unduly affected...'.³²⁷ Article 4 of the Directive emphasises that 'CMOs act in the best interests of the rightsholders whose rights they represent...'³²⁸ Therefore, the preference of the Directive is to favour rightsholders' interests over users', and facilitate the EU internal market.

³²² Ibid, preamble (3).

³²³ Christoph B Graber, 'Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at A Crossroads' (2012) 4 The WIPO Journal 35.

³²⁴ *ibid.*

³²⁵ Dietz (n 8).

³²⁶ *ibid.*

³²⁷ Preamble 18, Directive 2014/26/EU (n 25).

³²⁸ Article 4, *ibid.*

As to users' interests, Directive 2014 has provided general requirements of providing information³²⁹ to users and the public and simplified licensing procedures to users,³³⁰ but it specifies that 'a deduction for social, cultural or educational purposes, should be decided by the members of the CMOs'.³³¹ That means the public interest is left in rightsholders' hands. Users are not authorised any statutory rights. In addition, Article 14 states that the purpose of deductions is '...used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of rightsholders'. The social-cultural deductions do not have any independent rationale but they are established for the benefits of rightsholders. Moreover, the Directive 2014 does not have any minimum requirement as to the social-cultural deductions but leaves the decision power to national copyright law.³³² Thus, the so-called social, cultural and educational objectives are not ensured, and users do not enjoy equal legal status as rightsholders under Directive 2014.

3.3.2 Pros and Cons of the EU's Measures

Whether the EU authority had made a promising choice to regulate the existence of and activities of JMOs by appropriate provisions is still under debate. According to the EU's experience, it can be concluded its hard-law approach on CCM and cross-border licensing of copyrights in musical works have shifted from the wish to harmonise rules on the good governance of CMOs to the need to solve the more pressing multi-territorial licensing issues.³³³ The most significant improvement is that social, cultural and educational uses have been codified, although they are not perfectly designed. The effectiveness and efficiency of CMOs' performance for social and cultural benefits need further investigation.

The current Directive, however, would be unlikely strike a proper balance between interests at stake, if some respects are not amended. All the issues put forward above are worth further

³²⁹ Preamble 6, *ibid.*

³³⁰ Preamble 11, *ibid.*

³³¹ Preamble 28, *ibid.*

³³² Preamble 28, *ibid.* "Any social, cultural or educational service funded through such deductions. This Directive should not affect deductions under national law."

³³³ Guibault and Gompel (n 65).

study when designing a global JCM legal system. The foreseeable issues generated by global JCM are even more complicated than those that exist in the regional licensing, since a wider range of developed and developing countries will be involved.

3.4 Functionalising JMOs

From the EU's experience, it has been learned that a hard-law approach is feasible and necessary to regulate cross-border licensing of copyrights. The social, cultural and educational uses have been codified. Now the challenge is how to fulfil these objectives. This issue is important since it affects the balance drawn between different interests. For searching for an optimal model of JCM at the global level, this section studies the multifunction of JMOs in the context of the proposed theoretical framework³³⁴ to replace the current unregulated copyright licensing market. The analysis of the multifunction of JMOs is based on Rawls's theory of justice which is adopted to assess whether JMOs have appropriately fulfilled the fairness economically, socially and culturally.

3.4.1 The Objective of Economic Fairness

The question as to the economic justification of JMOs is the question of their economic purpose, thus the reasons for their genesis and the roles they play in economic life.³³⁵ A range of varied economic studies have shown that copyright is of great economic significance.³³⁶ This thesis, however, argues that the economic objective of JMOs not only means economic revenues for rightsholders and the society as a whole are generated, but more importantly, economic interests at stake are balanced with the aim to build up a just society. This section mainly deals with the questions such as what JMOs' economic objective is, and how they perform to fulfil economic objective in a way consistent with Rawls's justice principles.

³³⁴ See the theoretical framework in Chapter 2.

³³⁵ Hansen and Bischoffshausen (n 36).

³³⁶ See section 1.4.2.

3.4.1.1 Significance and Drawbacks of Economic Analysis

In today's debates, copyright is most often justified in economic terms.³³⁷ It is believed that we are living in a knowledge-based economy, and we need copyright to operate as incentive to drive that economy.³³⁸ As demonstrated in chapter 2, economic analysis of copyright has paid sufficient attention to its economic justification. Economic analysis shows that CMO reflects the economic advantages in terms of saving transaction costs.³³⁹ By exploiting the economies of scale in the management of copyrights, a CMO can reduce transaction costs substantially and make markets more efficient and even enable new ones to develop, and, more importantly, increase economies of scale to the benefit of online music ISPs, copyright holders, commercials users and consumers.³⁴⁰ Economic analysis justifies one-stop-shop, clearinghouse and collective management of copyrights for the following reasons:³⁴¹ a large reduction of average transaction costs, information costs, identification costs, search costs, time costs, contract costs, governance costs, for authors, rightsholders, and particularly in favour of users; joint management has the benefit of risk-pooling and risk-sharing through the contracts between the members themselves by an aggregate repertoire.³⁴² Economists have seen the importance of economy not only for financing rightsholders, but also, more significantly, for raising funds for the social welfare purposes.³⁴³ This position is of significance to copyright's economic objective in that they also note CMOs acting as social insurance or common carrier particularly benefits smaller creators. Indeed, the deduction from national revenues is of utmost importance for creativity and social-cultural development of a society.³⁴⁴

³³⁷ See Penrose (n 98); Oguamanam (n 87), reward can serve as an incentive, whereas an incentive can be delivered as a form of reward.

³³⁸ See the analysis of incentive theory in Chapter 2.

³³⁹ See Handke (n 24); PWC.

³⁴⁰ See Besen, Kirby and Salop (n 29); Merges (n 58); Hansen and Bischoffshausen (n 36); Towse and Handke (n 36); Mazziotti (n 430); Roya Ghafele and Benjamin Gibert, 'Counting the Costs of Collective Rights Management of Music Copyright in Europe' (2011) MPRA Paper No 34646; Handke, 'Collective Administration' (n 36).

³⁴¹ See generally Hansen and Schmidt-Bischoffshausen (n 36); Daniel Gervais and Alana Maurushat, 'Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management' (2003) 2 Canadian Journal of Law and Technology 15, "...solution is the creation of 'mega-collectives' that will function as one-stop-shop vis-à-vis the user and distribute the royalties that they collect among the relevant copyright collectives; Ariel Katz, 'The Potential Demise of another Natural Monopoly: Rethinking the Collective Administration of Performing Rights' (2005) 1 Journal of competition law and economics 541.

³⁴² Watt argues that 'there are significant efficiency benefits from having copyrights managed as an aggregate repertory, rather than individually, based on risk-pooling and risk-sharing through the contracts between the members themselves'. See Watt (n 38).

³⁴³ Towse and Handke (n 36).

³⁴⁴ See Chapter 5.4.

Additionally, information economics is another important economic function of CMOs.³⁴⁵ Due to authors' inexperience in terms of concluding licensing contracts on the market, it is usually the disadvantageous who are the less well-informed party. Without the digital identification system, the searching and negotiating time and costs would increase significantly. Since both contractual parties are situated on different "information levels", there is an asymmetric distribution of information amongst potential contractual partners. Under the management of CMOs which is information advantageous, this asymmetric distribution of information would be reduced dramatically. CMOs are more likely to act on the basis of their experience and specialisation of transaction knowledge than the individual authors, and accordingly, reduce the information asymmetries. Both transaction cost economics and information economics should be drawn on in order to explain the CMO's economic functions.³⁴⁶

Copyright framework constitutes the appropriability system, named substantive copyright law which authorises a bundle of rights to creators; and the licensing system operated by different joint management models such as CCM and for-profit copyrights management by IMEs. Indeed, copyright is of great economic significance to rightsholders, especially for large rightsholders, eg publishers and producers; for a given country, especially those developed countries which are mainly the export countries of these cultural products; and for the whole society as well. JMOs' economic functions impact on rightsholders' economic interests, users' economic interests, and social and creative development; and at macro level impact on the economy of society.

Economic analysis is concerned with reducing transaction costs and generating more social revenues which are believed will benefit all stakeholders for sure. This position comes from the assumption that the economic interests of different types of rightsholders are in line with each other. When large rightsholders' interests are better off, small rightsholders' interests will surely automatically better off. Whereas, this is not the case. Rightsholders, whether they are

³⁴⁵ Hansen and Bischoffshausen (n 36).

³⁴⁶ *ibid.*

large, small, or in the middle are not an economic community. There is an important issue that economic analysis does not really deal with – distributive justice. The current institution of copyright framework, more specifically the copyright licensing framework, is not just and have caused dramatic economic inequalities. The issues such as how JMOs’ economic function affects the fairness and how to maintain the balance between different stakeholders, need further study. Thus, for searching for a functional JMO in terms of fulfilling economic fairness, the rest of this section will deal with this issue. Rawls’s theory will be applied to assess economic fairness as the economic objective of JMOs.

3.4.1.2 Rawls’s Theory and Economic Fairness

The second principle of Rawls’s theory is that social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³⁴⁷ Rawls interpreted this principle as democratic equality which is arrived at by combining the principle of fair equality of opportunity with the difference principle. This second principle is composed of two parts 2 (a) and 2 (b), and 2(b) has two parts ‘offices and positions open to all’ and ‘fair equality of opportunity’.³⁴⁸ According to Rawls, natural talents are arbitrarily distributed and morally undeserved. Such initial inequality caused by social and natural contingencies, factually exist and cannot be removed, and they influence people’s life prospects. In order to treat all persons equally and to provide genuine equality of opportunity, the principle of redress requires society to give more attention to those with fewer native assets and to those born into the less favourable social positions.³⁴⁹ The idea is to redress the bias of contingencies in the direction of equality.³⁵⁰ In pursuit of this principle greater resources might be spent on the education of the less rather than the more intelligent, at least over a certain time of life, the earlier years of school.³⁵¹

³⁴⁷ Rawls (n 137) 83

³⁴⁸ *ibid.*

³⁴⁹ *ibid.*, 100-101.

³⁵⁰ *ibid.*

³⁵¹ *ibid.*, 101.

The difference principle, with a different aim to the principle of redress, would mean resources in education would be allocated so as to improve the long-term expectation of the least favoured.³⁵² And in making this decision, the value of education should not be assessed solely in terms of economic efficiency and social welfare. Equally, is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of their own worth.³⁵³ This aim can be understood as a positive scheme to deal with the issue of social and natural contingencies. Thus, not only is the intent of the principle of redress achieved, but also the aim of the difference principle is to transform the basic structure so that the total scheme of institutions no longer emphasises social efficiency and technocratic values.³⁵⁴

In justice, a fair society is interpreted as a cooperative venture for mutual advantage.³⁵⁵ The difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be.³⁵⁶ More gifted creators who have been favoured by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. They are naturally advantaged and need to use their endowments in ways to cover the costs of training and education and help the less fortunate. More gifted creators do not deserve the greater natural capacity or merit a more favourable starting place in society, but it does not mean the undeserved distributions should be eliminated. These social and natural contingencies can work for the good of the least fortunate.³⁵⁷ And this is how the basic structure is arranged under the difference principle. In this structure, the social system is to be set up in which no one gains or loses from their arbitrary places in the distribution of natural assets or his/her initial position in society without giving or receiving compensating advantages in return.³⁵⁸ The difference principle is formulated to benefit everybody in an institution.

³⁵² *ibid.*

³⁵³ *ibid.*

³⁵⁴ *ibid.*, 102.

³⁵⁵ *ibid.*, 84.

³⁵⁶ *ibid.*, 101.

³⁵⁷ *ibid.*

³⁵⁸ *ibid.*, 102.

Rawls's theory can be perfectly applied to assess the justness of CMOs as well. A scheme is just when the difference principle is satisfied where everyone benefits.³⁵⁹ Supposedly, the first principle and principle of equality of fair opportunity has been satisfied. That is all members are given equal copyrights generally and enjoy the equal exclusive rights to their own copyrighted works; and all members sign up to an equal management agreement under the same terms and conditions with a CMO. CMOs must not refuse entry to any creators wishing to join the organisation. That is to say all members are given equal fair opportunity in a same CMO and principle 2 (b) is satisfied. When the musical works are licensed as an aggregated bundle, royalties collected from licensees are mixed together. Because of the influences of either social contingencies or natural chance on the determination of distributive shares, as discussed above, the two are arbitrary, each musical work gains different popularity. This, as one factor will lead to economic inequalities in a free market. These immoral inequalities can and have to be regulated according to the difference principle.

Assuming the JMO framework satisfies the principles of equal liberty and fair equality of opportunity, the higher expectations of those better situated, in this case larger rightsholders, are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.³⁶⁰ In the scheme of CCM, the revenue inequalities generated by popular musical works are allowed only if they contribute to improve the expectations of the small members of the CMO. This is the case of CMOs' scheme of distribution of copyright revenues; and the idea of social-cultural deductions being raised to cover the cost of training and education for potential creators. According to the chain connection theory,³⁶¹ if an advantage has the effect of raising the expectations of the lowest position, this arrangement will also raise the expectations of all positions in between. Eventually, everyone benefits from this scheme when the difference principle is satisfied.

³⁵⁹ *ibid.*

³⁶⁰ Rawls (n 137) 75.

³⁶¹ *ibid.*, 81.

There is also a standard to assess the injustice of a scheme. According to Rawls, a scheme is unjust when the higher expectations, one or more of them, are excessive.³⁶² If these expectations were decreased, the situation of the least favoured would be improved.³⁶³ That how unjust an arrangement is depends on how excessive the higher expectations are and to what extent they depend upon the violation of the other principles of justice, for example, fair equality of opportunity.³⁶⁴ Now let us turn to assess the justness of the scheme of IMEs. IMEs pick up creators, whose works are popular or have the potential of popularity, to sign an exploitation contract. Motivated by business purposes, only a small part of the works will be attractive to IMEs. Not every rightsholders would be given equal opportunity to be invested in the commercial market. This violates the principle 2 (b), the principle of “fair equality of opportunity”.³⁶⁵ Each music artist should be given fair equality of opportunity of investment from an intermediary, since those with similar abilities and skills should have similar life chances. The expectations of those with the same abilities and aspirations should not be affected by their social class.³⁶⁶ This is how the principle of “fair equality of opportunity”³⁶⁷ was formulated. The unequal distribution of opportunities in forms of investment by publishers /producers will certainly cause economic inequalities. When the expectations of the large rightsholders are raised, it will certainly result in lowering the expectations of small rightsholders. This is because the market share is dominated by large rightsholders. And more importantly IMEs do not operate for least advantage since they, at least, do not perform the social-cultural obligations. Therefore, the scheme of IMEs has to a large extent violated the principle of fair equality of opportunity and the difference principle.

Rawls has also demonstrated that the difference principle is compatible with the principle of efficiency.³⁶⁸ The principle of efficiency is originally intended to apply to particular configurations of economic system. So, it can be applied to assess the efficiency of the distribution of musical works by JMOs. This principle holds that a configuration is efficient

³⁶² *ibid*, 79.

³⁶³ *ibid*.

³⁶⁴ *ibid*, 79.

³⁶⁵ *Ibid*, 83.

³⁶⁶ *ibid*.

³⁶⁷ Rawls (n 137).

³⁶⁸ *ibid*, 79.

whenever it is impossible to change it so as to make some persons (at least one) better off without at the same time making other persons (at least one) worse off.³⁶⁹ Under this principle, any resulting efficient distribution is accepted as just.

The principle of efficiency is constantly used by economic studies, and in the analysis of the efficiency of JMOs.³⁷⁰ Actually, the difference principle also has such an effect to represent efficient distribution. According to Rawls, when the difference principle is fully satisfied, it is indeed impossible to make any one representative man better off without making another worse off, namely, the least advantaged representative man whose expectations we are to maximise.³⁷¹ Thus, justice is defined so that it is consistent with efficiency, at least when the two principles are perfectly fulfilled.³⁷² What is different is, however, in justice as fairness the principles of justice are prior to considerations of efficiency.³⁷³ Rawls emphasised that if the basic structure is unjust, these principles will authorise changes that may lower the expectations of some of those better off; and therefore the democratic concept is not consistent with the principle of efficiency if this principle is taken to mean that only changes which improve everyone's prospects are allowed.³⁷⁴ The principles of justice correct the initial contingencies. When a scheme is not just, justice requires some changes even it is efficient in this sense. So, the standard of efficiency under the meaning of Rawls's theory is higher and stricter than the principle of efficiency of economic analysis.

In brief, to assess whether the social institution of JMOs is just or not, it has to be seen whether the economic inequalities caused by copyright practice are 'to the greatest benefit of the least advantaged, consistent with the just savings principle, and attached to offices and positions open to all under conditions of fair equality of opportunity'.³⁷⁵ While the distribution of wealth and income need not be equal, it must be to everyone's advantage and at the same time members of a just society are to have the same basic rights.³⁷⁶ A sound regime with a sound structure of rules should be put in place to determine the allocation of the benefits which the talented are to gain from the fruits of their creation because natural assets are 'social, rather

³⁶⁹ *ibid.*, 70.

³⁷⁰ See section 1.4.

³⁷¹ Rawls, 79.

³⁷² *ibid.*, 79.

³⁷³ *ibid.*, 69, 302.

³⁷⁴ *ibid.*, 69.

³⁷⁵ *Ibid.*, 302. See section 6.3 and 7.2.

³⁷⁶ Rawls, 61.

than personal, resources'.³⁷⁷ As pointed out in chapter 4 what Rawls approves of is that 'the benefits people gain from exercising their talents are determined by a structure of rules that makes that distribution of talents work to everyone's advantage, with priority given to those who are worse off'.³⁷⁸ The aim of the difference principle is not for redressing the least advantaged, although it has such an effect of redress; it is not merely for attaining social economic efficiency, although the institution is efficient when at least the two principles are perfectly satisfied, but this configuration is a social cooperation. The difference principle aims to set up a cooperative venture for mutual advantage between all members of the society.

3.4.1.3 Relevant Unsettled Issues Regarding Economic Fairness

Indeed, JMOs as a professional and high-specialised intermediary are vital institutions to reduce transaction and information costs for the two parties as well as the whole society. In this regard, JMO is justified on the ground of the increase of aggregate revenues of the whole society. However, the economic discussion has neglected, or, by the nature of economic analysis, is not able to tackle the issue of fairness. Alternatively, Rawls's justice theory, as analysed above, provides an optimal justification to copyright's economic objective – to fulfil economic fairness between interests at stake. Based on the analysis of the difference principle it finds that the model of CMOs can pass the assessment test of difference principle, while IMEs do not. The scheme of JMOs need to pay more attention to economic fairness rather than economic efficiency.

Neglect of economic fairness has led to the legitimate crisis of copyright law in that the public and some scholars has claimed that copyright law favours rightsholders' private rights.³⁷⁹ Economic discussion is from a macro economy perspective that generally divides stakeholders of licensing agreements into two parties, licensors and licensees. But the increase of aggregate revenues does not necessarily mean original creators are able to benefit. At the micro economy level, which includes not only individual creators but also heirs, transferred individuals or companies, publishers and record producers, the composition of rightsholders is complex. Not all JMOs recognise such difference. It has been demonstrated above that the objective of

³⁷⁷ *ibid.*

³⁷⁸ Norman Daniels, 'Democratic Equality: Rawls's Complex Egalitarianism' in Samuel Richard Freeman (ed), *The Cambridge Companion to Rawls*, vol 241 (Cambridge University Press 2003).

³⁷⁹ Geiger (n 9).

economic fairness requires the social scheme of JMOs to balance the economic interests of small rightsholders and potential creators. Even though the general transaction costs have been reduced by JMOs, not each individual creator has been given their due by this framework. In fact, as has been discussed, only a small portion of creators take most revenues, known as the winner-take-all phenomenon.³⁸⁰

As Rawls's theory provides justification in a general way to justify the economic objective, the issue of unbalanced economic distribution has not been touched on yet. How revenues can be fairly distributed is a pressing issue to the current music market. For dealing with this issue, there are some questions that need further study, such as what causes the unbalanced distribution; how to deal with the unfairness of economic interests between different types of rightsholders; and how to justify the solution. These issues will be analysed further in chapter 6.

3.4.2 The Objective of Social Justice

A body of literature has emphasised the social function of the copyright legal framework.³⁸¹ Social function can have very practical implications. In particular, it can be used to restrain the excessive tendencies of current copyright legislation and to limit it when it moves away from its function.³⁸² Copyright has been criticised by the public for a long time because the exponential growth of exclusive rights is reinforced by technical protective measures (TPMs) jeopardising the legitimacy of copyright which favours rightsholders' private rights.³⁸³ In recent years, IP scholars have described a number of fascinating trades and pursuits where people get along quite well without the protection of enforceable IP rights, and some have taken to calling these areas, collectively, IP's 'negative spaces'.³⁸⁴ For one thing, along with the social development the subject matter of copyright has been constantly added with new

³⁸⁰ Kretschmer and others (n 12).

³⁸¹ See Geiger (n 43); Nérissou (n 44); Rita Matulionyte, 'Copyright on the Internet: Does a User Still Have Any Rights at All' (2005) 1 *Hanse L Rev* 177; Martin Kretschmer, 'Private Copying and Fair Compensation: an Empirical Study of Copyright Levies in Europe' (2011) IPO.

³⁸² *ibid.*

³⁸³ Geiger (n 9).

³⁸⁴ Robert P Merges, 'Economics of Intellectual Property Law' in Francesco Parisi (ed), *Oxford Handbook of Law and Economics* (OUP 2014).

exclusive rights, such as the right to one's own image³⁸⁵ or the rights of sports events organisers.³⁸⁶ Some rightsholders abuse their proprietary rights, playing their dominant place on the market to prevent competitors from developing new creative works. These issues have led to more difficulty in the acceptance of copyright by the public. It has been argued that in recent years a veritable protest movement aiming at containing the protectionist excesses of IP, has developed.³⁸⁷ The reason behind this is because the social function embodied in copyright law as LEs has not fulfilled the value of balancing public interest. As an alternative justification for the debate in the face of a serious crisis of legitimacy to copyright, it is imperative to restore CMO's social function.³⁸⁸

3.4.2.1 Social Function of Copyright Law

The theory of social function of private law began at the end of 19th century in Germany, and then become a fundamental principle of German private law. According to this theory it believes that all private rights are not absolutely exclusive and have to be limited by social constraints,³⁸⁹ and there should be a balance between private rights and public interest. When this balance is disturbed, it is the basic function of the law to re-establish it.³⁹⁰ Therefore, one of the functions of the legal system is to find a compromise between the interests of the individual and the interests of the community.³⁹¹ The theory was extended to the social function of copyright,³⁹² and it developed further to claim that society has a need for intellectual production in order to ensure its development and cultural, economic, technological and social progress, and therefore the creator is granted a reward in the form of a copyright, which enables the person to exploit their own work and to draw benefits from it. In return, the creator, by rendering his creation accessible to the public, enriches the community.³⁹³

³⁸⁵ Tatiana Synodinou, 'Image Right and Copyright Law in Europe: Divergences and Convergences' (2014) 3 *Laws* 181

³⁸⁶ Ben Van Rompuy and Thomas Margoni, 'Study on Sports Organisers' Rights in the European Union' (2014) *IViR*.

³⁸⁷ See William Kingston, 'Intellectual Property Problems: How Far is the US Constitution to Blame?' (2002) *Intellectual Property Quarterly* 315; De Werra (n 61).

³⁸⁸ Geiger (n 43).

³⁸⁹ *ibid.*

³⁹⁰ *ibid.*

³⁹¹ *ibid.*

³⁹² *ibid.*

³⁹³ *ibid.*

This spirit of social benefits has, indeed, been reflected in some early copyright legislation. For example, the preamble of the Statute of Anne, 1710, indicates its purpose - to bring order to the book trade - that ‘for the encouragement of learned men to compose and write useful books’. Likewise, US constitutional provision regarding copyright clause empowers the congress ‘to promote the progress of science and the useful arts’.³⁹⁴ Also, the French decree of 1793 was not just motivated by authors’ personal claims of rights in their intellectual works.³⁹⁵ These statutes show a common trend that copyright law started from the purpose of stimulating recreation to the public at large far more than for protecting proprietary rights only. The rights and interests of creators were to be established in accordance with those of the public domain.³⁹⁶ Generally, this justification puts social interests at the first place, indicating that public interest is above private proprietary rights.³⁹⁷

The spirit of social function can also be found in international copyright treaties. Article 9 (2), of the Berne Convention, provides three criteria of the so-called three-step test for member countries by which they can alternatively legislate domestic copyright exceptions, identifying LEs. Whether or not a national copyright exception authorising reproduction is lawful has to be measured according to this three-step test. “... (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”³⁹⁸ Also, a range of international copyright treaties have inherited and adopted the test without any alteration to allow domestic LEs – Article 10 of the WIPO Copyright Treaty (WCT),³⁹⁹ Article 16(2) of

³⁹⁴ US Constitution, Article 1, Section 8, Clause 8 that “Congress shall have the power ... to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors the exclusive right to their respective Writings and Discoveries”.

³⁹⁵ Geiger (n 43).

³⁹⁶ Stef Van Gompel, *Formalities in Copyright Law: An analysis of their history, rationales and possible future*, vol 23 (Kluwer Law International 2011) 79.

³⁹⁷ *ibid.*

³⁹⁸ Berne Convention, Art 9 (2).

³⁹⁹ WIPO Copyright Treaty, Article 10 LEs (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”).

WIPO Performances and Phonograms Treaty (WPPT),⁴⁰⁰ and Article 13 of the Agreement On Trade-Related Aspects of IP Rights (TRIPS).⁴⁰¹ All these provisions explicitly formulate that the first step – LEs should only be allowed in “certain special cases”; the second step – the allowed LEs should not “conflict with a normal exploitation”; and third – the allowed LEs should not ‘unreasonably prejudice the author’s legitimate interests’.

Under the criteria of the three-step test, national LEs vary according to their particular social, economic and historical conditions. International treaties acknowledge this diversity by providing general conditions for the application of LEs and leaving national legislators space to decide if a particular LE is consistently applied and, if it is the case, to determine its exact scope. Basically, the national LEs can be classified into two main categories: open-ended LEs and closed-listed LEs. The common law fair use doctrine⁴⁰², originated from the United States, is deemed an *open-ended* system which mainly relies on judicial development. The fair use doctrine is a *general* limit that applies to all copyrights, including those rights that also are subject to more specific exceptions. The fair use doctrine began as a judge-made limitation to the rights of copyright owners. Thus, it leaves more discretion to courts to interpret the general principles in light of the social function, and excuse acts that would normally amount to infringement. The US Copyright Act also contains a specific list of exceptions in §108-§122.⁴⁰³ It has been argued that fair use is deliberately open-ended to accommodate use in a variety of contexts.⁴⁰⁴ There are different opinions about this flexible rule. Supporters believe that the fair use doctrine based on a case-by-case approach is more flexible and better for fulfilling fairness when determining whether an infringement occurred.⁴⁰⁵ However, Bartow describes fair use as

⁴⁰⁰ WPPT, Article 16 LEs (“(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.”).

⁴⁰¹ TRIPS, Article 13 LEs (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”).

⁴⁰² Copyright Law of the United States of America, Sec. 107.

⁴⁰³ They can be divided into the following categories: limitations to support freedom of information; limitations for a specific social action or purpose; limitations for private use; limitations concerning activities that are necessary accessories to other permitted actions and economically reasonable.

⁴⁰⁴ Tawfik (n 44).

⁴⁰⁵ Sam Ricketson and Victorian Bar Barrister, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (Centre for Copyright Studies 2002).

‘an elastic and evolving concept that perplexes even those charged with applying the doctrine’.⁴⁰⁶ Crews calls fair use simultaneously the most important and most misunderstood aspect of copyright law.⁴⁰⁷ Judges can also recourse to external mechanisms, whether originating from general principles of civil law, competition law or fundamental rights.⁴⁰⁸ Okediji claimed that the breadth of the fair use doctrine violates the Berne Convention standard for permissible exceptions to authors’ rights. With particular reference to the TRIPS Agreement, the fair use doctrine may be challenged as a nullification and impairment of the expected benefits that trading partners reasonably should expect under the TRIPS Agreement.⁴⁰⁹ Indeed, the primary difficulty is the potential incompatibility with the international obligations stipulated in the first part of three-step test – only be allowed in “certain special cases”. It is unlikely that the fair use exception will comply with this standard since there will no longer be reference to specific cases but rather to a potentially broad range of cases.⁴¹⁰ This leads to unpredictability and uncertainty.

Another parallel common law doctrine of fair dealing exception is deemed as evolving out of the British common law copyright system and now exists in most common-law jurisdictions. Fair dealing is designed to permit reasonable access to copyright works for purposes deemed to be in the public interest, such as research or study.⁴¹¹ Unlike fair use, fair dealing is a closed system that a full list of exceptions formulated into the copyright act beforehand. Only those actions falling within these categories are able to apply this doctrine. This is consistent with the criterion of “certain cases” of the three-step test. Fair dealing has been criticised since permitted uses ought to be defined with great specificity and for very limited purposes.⁴¹² The defined scope may render fair dealing under threat within an international copyright context

⁴⁰⁶ William M Cross, ‘Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship’ (2012) 104 *Law Libr J* 195.

⁴⁰⁷ See Kenneth D Crews, ‘Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?’ (1998) *Indiana Journal of Global Legal Studies* 117.

⁴⁰⁸ Geiger (n 42).

⁴⁰⁹ Ruth Okediji, ‘Toward an International Fair Use Doctrine’ (2000) 39 *Colum J Transnat'l L* 75.

⁴¹⁰ Haynes Jason, ‘Critically Reconceptualizing the United Kingdom's Fair Dealing Exception to Copyright Infringement in Light of the Government's Most Recent Proposals for Reform and Lessons Learnt from Civil Law Countries’ (2012) 34 *European Intellectual Property Review* 811.

⁴¹¹ Tawfik (n 44).

⁴¹² *ibid*.

because copyright law today has greatly increased in both breadth and complexity with the rapid development of the digital environment.

In addition to the two common law doctrines of exceptions, most civil law countries adopt *closed exceptions* which have been listed in national copyright law. Most countries recognise a need for LEs to copyright owners' exclusive rights. But, they historically have not used a doctrine like fair use to help define those limits. Instead, they designate specific types of uses that are to define privileged uses of copyrighted works. Continental European countries, such as France, Germany, and Belgium, provide only narrow, specific limitations to exclusive rights. Japan has a reference to "fair practice" as a copyright limitation.⁴¹³ In this Continental European approach, courts rarely, if ever, depart from these statutes to find limitations of their own for other types of conduct not envisioned *ex ante* by the legislature. The closed exception method is also problematic. It becomes an obstacle to the harmonisation of copyright norms at the global level. More importantly, foreign creators' interests might be prejudiced under this method because of the rigidly stipulated limited exceptions.

The Canadian Supreme Court is one of the most active debaters to the nature of copyright law. They explicitly expressed the view that copyright law is about balancing competing interests: those of rights-holders, on the one hand, and those of 'users' of copyright works, on the other.⁴¹⁴ The LEs system of Canadian copyright has experienced a dramatic change from closed exceptions to an open approach. This shift can be found from the decision of *CCH Canadian Ltd v. Law Society of Upper Canada*.⁴¹⁵ The court stated that 'user rights are not just loopholes. Both owners' rights and users' rights should, therefore, be given the fair and balanced reading that befits remedial legislation'.⁴¹⁶ This decision is absolutely different from a former decision in *Michelin v CAW Canada* which held that 'exceptions to copyright infringement should be strictly interpreted'.⁴¹⁷ Hence, 'fair dealing' in Canadian copyright law is interpreted in a broad

⁴¹³ See Japanese Copyright Act, article 32(1).

⁴¹⁴ *ibid.*

⁴¹⁵ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] SCR 1 (Supreme Court).

⁴¹⁶ *ibid.*, para 48.

⁴¹⁷ *Michelin & CIE v. CAW Canada* [1996] 71 CPR (3d) 348.

and expansive manner now in light of a balance between the owner's copyrights and user's rights.⁴¹⁸

It is, however, an absolute challenge to take equal treatment of both rightsholders and users in which neither interest is over the other. Although the doctrine of users' rights has been recognised by Canadian copyright act, it is still a challenge to practise users' rights in reality.⁴¹⁹ As demonstrated above, the implementation of the three-step test has led to broad categories of LEs by signatories. International copyright treaties, indeed, leave member countries considerable discretion to determine where to draw the line of balance between copyrights and public interest within the domestic copyright system. It is important to attain a balance, but this balance is extremely difficult to strike. Due to the considerable flexibility of application of the criteria, however, it seems that policy makers have employed varied approaches to copyright LEs. The reason behind the different attitudes towards LEs is mainly because the embodied rationales underpinning national copyright LEs are different. Consequently, there are many different categories of LEs. The legitimacy of copyright LEs needs to be explored and accordingly a balanced copyright LEs system established. In order to do this, the next section will examine the different rationales behind the various existing national LEs, and compare them to Rawls's theory based LEs system.

3.4.2.2 Rationales behind the Domestic LEs

Due to different national political, social, economic and cultural needs, national policy-makers conclude different rationales to copyright LEs. Domestic copyright law in some countries only stipulates such LEs without providing a proper justification for them.⁴²⁰ Some of them may provide the LEs based on political considerations or national policy.⁴²¹ Some only express in a copyright act that the LEs to copyright are just a part of national policy for social goals. Some researchers claim that the concept of public interest is not sufficient to protect users' interests, and recommend adopting the concept of fundamental rights as a defence of the public

⁴¹⁸ This issue will be discussed in the next section of User's Rights.

⁴¹⁹ Tawfik (n 44).

⁴²⁰ *ibid.*

⁴²¹ This rationale is based on the social planning theory; See Fisher (n 81).

interest.⁴²² Others argue that copyrights should be protected as a human right⁴²³ which has been explicitly provided by the Universal Declaration of Human Rights (UDHR). Meanwhile, some scholars believe that copyright LEs should be recognised as ‘user rights’⁴²⁴ which, in fact, have in some jurisdictions received an explicit supreme court imprimatur.⁴²⁵ It has been argued that users’ rights should be weighed against copyrights, sharing with equal values and with collective interests.⁴²⁶

The debate in academia on the nature of copyright LEs is also extensive.⁴²⁷ Generally, the various arguments about the rationale can be categorised in the following way. First, scholars assert that the rationale behind the exceptions, such as for the purposes of parody, citation, criticism, and news reporting, is based on fundamental rights like freedom of expression.⁴²⁸ Second, Buydens and Dusollier claimed that exceptions for public lending, disabled people, teaching, libraries and archives should be imperative as well as the exception for normal use, as these exceptions are based on the general interest.⁴²⁹ Third, other economic limitations (eg the first-sale principle) and some exceptions (eg private copying) are based on market failures. The first-sale doctrine is based on the impossibility to control the following uses of a purchased copyright work, but it also allows great access to the work by the public, thus enhancing the circulation of culture.⁴³⁰

Nonetheless, none of the asserted rationales can cover and underpin all categories of copyright LEs. Also, the LEs system is dynamic and has kept developing new forms of exceptions in practice along with the ever-changing technologies. The exceptions founded on market failure are bound to disappear in the digital environment,⁴³¹ since copyright owners can enforce their

⁴²² Geiger (n 7); Christoph B Graber, ‘Copyright and Access-a Human Rights Perspective’ in *Digital Rights Management: the End of Collecting Societies* (Stämpfli Publishers, Berne, Juris Publishers 2005) 71.

⁴²³ Laurence R Helfer, ‘Toward a Human Rights framework for Intellectual Property’ (2006) 40 UC Davis L Rev 971.

⁴²⁴ Tawfik (n 44).

⁴²⁵ See *CCH Canadian Ltd v. Law Society of Upper Canada*; Breakey (n 44).

⁴²⁶ Geiger (n 43).

⁴²⁷ Derclaye and Favale (n 1).

⁴²⁸ *ibid.*, 73.

⁴²⁹ *ibid.*

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

rights through digital rights management (DRM) devices, preventing the private copying of works. They have also developed equipment, such as Kindle and Kobo, for reading e-books; and utilise cloud computing services or software to lock off copyrighted works against resale of the digital works.

Additionally, there is not a clear boundary between different underpinnings of the open-listed copyright exceptions. Exception based on freedom of expression can have implications for the fundamental right to learn, to access to information, to freedom of thought, opinion and expression, to receive and impart information and ideas through any media, regardless of frontiers.⁴³² It is hard to distinguish which type of underpinnings a right belongs to. These fundamental rights announced by the Universal Declaration of Human Rights (UDHR) interact with each other. One category of exception might be based on two or more fundamental rights.

Moreover, fundamental rights conflict with each other. Copyright has been internationally recognised as a human right - the right to IP can be found in Article 27(1) and (2) of the UDHR and Article 15(1) of the International Covenant of Economic Social and Cultural Rights. Copyright law requires a balance between exclusive rights and other fundamental rights. However, there is never such a situation that one right completely triumphs the other. Since all rights, even the most basic human rights, have substantial limitations arising both from internal theoretical constraints (eg universalisability) and external pressures (eg the scope of others' rights).⁴³³ It is completely consistent to assert individuals' freedom of speech while at the same time to admit this fundamental right is limited by another's right to protect the work of which he/she is the creator. The evaluation of rights is not a choice between two substantive rules so that a status necessarily makes the entitlement of a right "all or nothing". But the fact is both the conflicting rights exist throughout the whole process of evaluation.

To have an overview of copyright legislation worldwide, there is not yet a consensus on the justification of copyright LEs. Some national policies may be too protective to rightsholders,

⁴³² These human rights have been entrusted by the Universal Declaration of Human Rights, Article 19.

⁴³³ Breakey (n 44).

while others may be concerned too much about users' rights without providing proper justification for them. The various approaches employed by national copyright law have caused discrimination to foreign works when cross-border licensing happens. Based on the analysis of LEs above in the international context, there is not yet an answer to which approach, eg closed or open, is better to balance the competing interests. Indeed, it is impossible to conclude all the LEs into a specific nature. But, it is possible and feasible to partly harmonise copyright LEs in some aspects in the context of global JCM. Scholars observe that LEs are not overly broad,⁴³⁴ they can be classified and entrenched with normative principles by international copyright law. Hugh Breakey demonstrates that users' rights is not justified in every instance it is used. The evaluations of users' rights must be made on a case-by-case basis.⁴³⁵ It has to be noted that different types of rationale determine the scope and detailed design of the LE provisions.

3.4.2.3 Rawls's Theory and Users' Rights for Education

In this section, Rawls's theory is applied to justify users' rights. According to Rawls, the difference principle would allocate resources in education so as to improve the long-term expectation of the least favoured. Initial assets such as talents and abilities are arbitrarily distributed. The difference principle represents an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be.⁴³⁶ Those who have been favoured by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.⁴³⁷ In doing this, social justice will be fulfilled by social cooperation between the better off and worse off. It has to be observed that the value of education under the difference principle should not be assessed solely in terms of economic efficiency and social welfare.⁴³⁸ Its role is to equally enable a person to enjoy the culture of their society and to take part in its affairs, and in this way to provide for each individual a secure sense of their own worth.⁴³⁹ The justification of the

⁴³⁴ PB Hugenholz and RL Okediji, 'Conceiving an International Instrument on Exceptions and Limitations to Copyright' (2008) Institute for Information Law University at Amsterdam and University of Minnesota Law School.

⁴³⁵ Breakey (n 44).

⁴³⁶ Rawls (n 137) 101.

⁴³⁷ *ibid.*

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*

provision of education should not be explained as social welfare by means of a redress scheme. Rather, users' rights to access educational resources are to improve the long-term expectation of the least well off, since they equally have the rights to enjoy the culture of society and take part in its affairs.

The term users' rights do not have the identical meaning as public interest. To balance the interests between rightsholders and public interest, there is an essential question that what constitutes public interest or how to define the scope of public interests? This question is important in that different understandings of the public interest will lead to divergent conclusions of the social function, and thus influence the shape, use and enforcement of copyrights. Some literature refers to user's rights and public interest as one and the same thing. In fact, these two terms have different meanings and scopes. Public interest is an aggregate concept which includes a range of interpenetrated rights. No one single right can explain and justify the contours of the public domain. The public domain is as muddled and interpenetrated as the property regime that forms its silhouette.⁴⁴⁰ However, user's rights have the equal value as to the rightsholders' copyrights. There is not a weaker category between the two rights.⁴⁴¹ Both the rights are based on the rights-based discourse, justified by Rawls's theory.⁴⁴²

As a general objective of social function, users' rights should not be paid lip service without specific targets. It has to specify which groups of people fall within the meaning of users' rights. Indeed, some researchers disagree with entrenching copyright LEs as users' rights, but either as users' interests or liberties or as a 'claim to the application of a rule of objective rights'.⁴⁴³ Others claim there are rights of users, and there should be a clear definition and protection for them in copyright law.⁴⁴⁴ In reality, users' rights in some jurisdictions have received explicit

⁴⁴⁰ Breakey (n 44).

⁴⁴¹ See Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002). She argues that user's entitlements are weaker than IP rights.

⁴⁴² See section 5.2.2.

⁴⁴³ Derclaye and Favale (n 1).

⁴⁴⁴ F Willem Grosheide, 'Copyright Law from A User's Perspective: Access Rights for Users' (2001) 23 *European Intellectual Property Review* 321.

Supreme Court imprimatur in Canada,⁴⁴⁵ and recent First Amendment decisions in the United States have a substantial users' right tenor. The Supreme Court cited with approval, Professor David Vaver's statement that 'user rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation'.⁴⁴⁶

The purpose here is not to join the debate, but there is an essential question that needs to be considered: to ensure copyright law to be more balanced, is it appropriate to entitle users a general right as a conflicting fundamental right against owners' copyright? In the broad sense, the difference principle of Rawls's theory sets out to arrange the basic structure to enable undeserved inequalities to 'work for the good of the less talented'.⁴⁴⁷ The less talented people are, in this context, small creators and the users who are also potential creators. In doing so, everybody in the society will benefit through this social cooperation.⁴⁴⁸ The undeserved economic inequalities have to cover the costs for training and education for re-creation and the sustainable development of creative works.⁴⁴⁹ Thus, it has to be observed that not all uses are qualified for this purpose. Therefore, those users who are potential creators have to be distinguished from those general users who are purely exploiters and/or potential users. The scope and types of users is broad but not all of them enjoy the equal legal position as to copyright LEs.

3.4.2.4 Relevant Unsettled Issues Regarding Social Justice

Based on what has been found it is appropriate to employ social justice to justify and design copyright LEs, there are remaining issues that need further study for designing concrete enforceable provisions. First, the overridability of LEs has to be explored. If they are not overridable, to what extent have they been respected in practice? if this is not the case, is it necessary to reform the current LE system. Second, it needs to be discussed whether it is

⁴⁴⁵ CCH Canadian Ltd v. Law Society of Upper Canada, (n 415). "The fair dealing exception, like other exceptions in the copyright act, is a user's right."

⁴⁴⁶ David Vaver, *Copyright Law* (Irwin Law 2000) 171, cited in CCH v. Law Society at para 48.

⁴⁴⁷ Rawls (n 137) 101-102.

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*, 73.

appropriate to codify users' rights into copyright law as a justification of LEs. To answer this question, it is necessary to investigate the nature of users' rights. Although the doctrine of users' rights has been recognised by some copyright law, there is no normative analysis as to their nature; and, more importantly, it is necessary to define the scope of users' rights since users are numerous but not all copyright-users enjoy the same legal position. Users' specific rights have to be discussed according to their different nature. Third, as a vitally important area, LEs for education and research purposes will affect creative activities and social objectives so this needs detailed research. However, international treaties do not address this LEs directly, but only generally mentioned in the preamble of WCT⁴⁵⁰ and WPPT⁴⁵¹, and in the Appendix of Berne Convention it says "the copies are to be used only for the purpose of teaching, scholarship or research"⁴⁵² as a special exception to developing countries. LEs for education and research purposes, rights for libraries in particular, as an instance, will be reviewed in the context of global public interest in chapter VII. For fulfilling the social objective at the global level, the balance of interests between developed and developing countries needs to be considered. This issue has been neglected by academia and policy-makers.

3.4.3 The Objective of Cultural Diversity

As discussed in the theoretical framework in chapter 2, the cultural function as one multifunction of the copyright legal system, is another important function that JMOs are supposed to perform. The objective of cultural diversity is of equal value as the objectives of economic fairness and social justice.⁴⁵³ This topic has been rarely discussed in academia. The definition of culture is notoriously difficult to ascertain as it can refer to two disparate concepts – cultural expression (centred in art and literature) and sociological and anthropological issues (centred in lifestyles, basic human rights, value systems, traditions and beliefs).⁴⁵⁴ This thesis

⁴⁵⁰ Preamble, WIPO Copyright Treaty (WCT) (March 6, 2002).

⁴⁵¹ Preamble, Summary of the WIPO Performances and Phonograms Treaty (WPPT) (May 20, 2002).

⁴⁵² Article IV, Appendix, Berne Convention.

⁴⁵³ See the discussion in chapter 2.

⁴⁵⁴ Johnlee Scelba Curtis, 'Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity' (2006) 13 International Journal of Cultural Property 59.

will focus on cultural expression – musical works – to discuss the preservation and promotion of cultural diversity.

3.4.3.2 Cultural Justification of JMOs

Culture is the essential condition for genuine development, since the widest possible dissemination of ideas and knowledge on the basis of cultural exchanges and encounters is essential to humankind's creative activities and to the full development of the individual and of society.⁴⁵⁵ With respect to the designation of a preferable legislative tool, only if the goal of promoting cultural diversity takes a heightened role can a true balancing of interests be reached.⁴⁵⁶ The maintenance of cultural diversity among cultural industry goods is of fundamental importance for long term sustainability of cultural markets and human rights.⁴⁵⁷ Cultural conditions must be established which will facilitate, stimulate and guarantee artistic copyright creation without political, ideological, economic or social discrimination.⁴⁵⁸ These are social contingencies.

When assessing the justness of the copyright legal system to nurture cultural diversity, it has been found that free market competition of the music industry has eliminated small rightsholders and threatened small repertoires, especially ones from developing countries. To fulfil the cultural function means to maintain the cultural diversity achieved directly by enriching the sources, and indirectly by the copyright industries.⁴⁵⁹ In other words the promotion of creativity by copyright is the promotion of culture.⁴⁶⁰ A wave of scholars has demonstrated the importance of culture and the maintenance of the diversity of cultural products,⁴⁶¹ and criticised the current international copyright regime as not sufficient to support

⁴⁵⁵ UNESCO, Mexico City Declaration on Cultural Policies World Conference on Cultural Policies Mexico City, 26 July - 6 August 1982.

⁴⁵⁶ Curtis (n 454).

⁴⁵⁷ *ibid.*

⁴⁵⁸ UNESCO (n 455).

⁴⁵⁹ Dietz (n 8).

⁴⁶⁰ *ibid.*

⁴⁶¹ See Dietz (n 8); Adolf Dietz, 'Cultural Functions of Collecting Societies' (2010) Japan Council of Performers' Organisations; Thomas Hoeren and others, 'Collecting Societies and Cultural Diversity in the Music Sector' (2009); Curtis (n 454).

the diversity in cultural goods.⁴⁶² However, cultural function has not been explicitly acknowledged by the international copyright regime. In the EU, CMOs' cultural function has been emphasised by means of recitals of the copyright Directive, but without any hard-law provisions to enforce it. This thesis will appreciate the full cultural purpose of CMOs with an international angle from a manifold way – within a repertoire, between repertoires within and between developing and developed countries – for balancing small rightsholders' interests within CMOs; taking small repertoires' interests into account; and supporting small CMOs in developing countries.

International copyright treaties do not recognise cultural objectives. The discretion of copyright law for cultural development has been left to national policy-makers. Interestingly, outside copyright treaties the requirement of cultural diversity is emphasised by the United Nations Educational, Scientific and Cultural Organisation (UNESCO). In 2001, UNESCO issued the Universal Declaration on Cultural Diversity which is without legal binding effect. Article 7 provides that “creation draws on the roots of cultural tradition, but flourishes in contact with other cultures”, and “heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity”.⁴⁶³ In 2005, Article 1, objectives of the UNESCO Convention 2005 (often referred to as *the Convention on Cultural Diversity*) provides that “to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning”.⁴⁶⁴ This legal document is a binding international legal instrument. It makes cultural diversity a necessary condition of other principles, most notably freedom of expression and communication. Proponents and human rights supporters believe that the adoption of this international treaty will offset the negative effects of economic globalisation.⁴⁶⁵

⁴⁶² Curtis (n 454); Thomas and others, *ibid*.

⁴⁶³ UNESCO, Universal Declaration on Cultural Diversity (2 November 2001) 41 I.L.M. 57 (2002) <<http://unesdoc.unesco.org/images/0012/001271/127162e.pdf>> accessed 15 February 2017.

⁴⁶⁴ UNESCO, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

⁴⁶⁵ Mira Burri, ‘Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects’ (2010) 2 Diversity 1059.

The later binding Convention on Cultural Diversity⁴⁶⁶ has reflected the spirit of cultural justice. The preamble states that “taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development”.⁴⁶⁷ In addition, Article 1,⁴⁶⁸ principle of respect for human rights and fundamental freedoms, indicates the equality of cultural expression; and Article 3,⁴⁶⁹ principle of equal dignity of and respect for all cultures, emphasise the rights of recognition of cultural assets. Article 7,⁴⁷⁰ principle of equitable access to ensure equal access to all cultural assets, requires the accessibility of all cultural assets. Article 8,⁴⁷¹ principle of openness and balance, requires all repertoires and cultural supportive mechanisms to be open to all right-users, and this can be done via the internet in the digital environment. Article 4,⁴⁷² principle of international solidarity and cooperation, ensures national CMOs’ cooperation. The Convention on Cultural Diversity has set out the general principles of cultural justice that can well serve the cultural objective of the copyright legal system.

The EU has increasingly placed more emphasis on the cultural objective of copyright policies by means of the EU Directive 2014 which recognises the role of CMOs in contributing “to the development and maintenance of creativity”,⁴⁷³ and that “CMOs play, and should continue to

⁴⁶⁶ UNESCO (n 455).

⁴⁶⁷ Preamble, *ibid.*

⁴⁶⁸ Article 1, *ibid.*: “Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

⁴⁶⁹ Article 3, *ibid.*: “The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.”

⁴⁷⁰ Article 7, *ibid.*: “equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.”

⁴⁷¹ Article 8, *ibid.*: “when states adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention”.

⁴⁷² Article 4, *ibid.*: “international cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels”.

⁴⁷³ Directive 2014/26/EU (n 25), preamble para 1.

play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightsholders and the public”.⁴⁷⁴ European legislators are clearly in favour of the promotion of culture and creativity as well as cultural diversity via copyright law. This can be found in a range of European Directive recitals.⁴⁷⁵

These bodies’ concerns with cultural diversity might be regarded as a response to the processes of globalisation and McDonaldisation, each seen as containing a threat to national or ethnic identities and cultures.⁴⁷⁶ However, none of the international treaties have provided concrete or explicit provisions to maintain cultural diversity. The Convention on Cultural Diversity by UNESCO is the only international treaty that requires countries to respect cultural diversity as a human right. However, it is not a copyright specialised treaty and lacks professional and specific protection of interests within the copyright area.

As to the roles JMOs playing to promote cultural diversity, national copyright policies have their own attitudes. Many, if not all CMOs are committed to promoting cultural value by national copyright laws. They are charged with contributing to the quality of the music culture of their territory. This is what Kretschmer has called “solidarity rationale” – which means supporting domestic creators, the cross-subsidising of small rights-holders by larger ones, and “discrimination between genres”.⁴⁷⁷ It can also take the form of a commitment to cultural diversity. The principle of state sovereignty allows for states to protect the diversity of cultures

⁴⁷⁴ *ibid*, preamble para 3.

⁴⁷⁵ Directive 2001/29/EC, recital 9: “Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. ...” Recital 11: “A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.” Recital 12: “Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint.”

⁴⁷⁶ Kate Nash, *Contemporary Political Sociology: Globalization, Politics and Power* (John Wiley & Sons 2009); John Street, Dave Laing and Simone Schroff, ‘Regulating For Creativity and Cultural Diversity: the Case of Collective Management Organisations and the Music Industry’ (2016) *International Journal of Cultural Policy* 1.

⁴⁷⁷ Martin Kretschmer, ‘The Aims of European Competition Policy towards Copyright Collecting Societies’ (2005) Paper for the Society for Economic Research on Copyright Issues, Montreal, July 7.

within the nation.⁴⁷⁸ Usually, the cultural diversity objective is compared to CMOs. IMEs are less restrained by such cultural objectives.

3.4.3.1 Rawls's Theory and Cultural Justice

Rawls's theory provides a different perspective to justify copyright's cultural objective. Its first principle sets out equal political rights between all people which requires equality in the assignment of basic rights and duties. When this principle is applied in this context, it indicates that people in a society enjoy cultural justice which includes at least equality of cultural expression, equitable access, and more importantly, equal recognition of the dignity of and respect for all cultures.⁴⁷⁹ All people, whether famous musicians or small creators, enjoy equal political rights of cultural expression, and the rights of equal recognition of the dignity of and respect for their cultural expression. All creators equally enjoy the rights to join a JMO regardless of their cultural background and social and political status. All musical creations, regardless of their origins, should not be rejected from a JMO. Right-users, whether common users or potential creators or users with disabilities, have equal rights of access to all cultural assets if their purpose is under the justification of the education and research purpose. These are fundamental rights and cannot be traded-off for economic purposes. As Rawls pointed out that the two 'principles are to be arranged in a serial order with the first principle prior to the second'.⁴⁸⁰ This ordering means that 'a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, greater social and economic advantages'.⁴⁸¹ Thus, as a political liberty, rights of cultural expression and access to cultural goods have to be ensured and protected by copyright provisions.

When this theory is applied to the digital environment where all cultural assets are able to freely flow across-borders and copyrights can be easily managed, licensed, and exploited internationally, net-users enjoy universal cultural justice by means of the internet. To fulfil the

⁴⁷⁸ Street (n 476).

⁴⁷⁹ See the Preamble, UNESCO, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

⁴⁸⁰ Rawls (n 137) 61.

⁴⁸¹ *ibid.*

objective of cultural diversity, JMOs should play their roles to embrace as many as possible musical works from all over the world into the repertoire, and at the same time ensure the end-users' rights to access all the musical works.

3.4.3.3 Relevant Unsettled Issues Regarding Cultural Diversity

Since the cultural objective of copyright law cannot stay as a general goal without specified provisions and mechanisms, some remaining issues need further research. First, the scope of the meaning of cultural diversity has to be defined in practice and the standards for measuring the effectiveness of cultural function played by copyright intermediaries need to be set out. In this context these intermediaries are JMOs, whose performance will impact on music cultural diversity. More importantly, the scope has to be defined of the less well-off of copyrighted assets in different contexts, eg cultural expression and equal access to cultural assets. What is needed is a more systematic overview of the role played by JMOs and assessment of their roles in promoting cultural diversity. UNESCO uses the concepts of variety, balance and disparity to analyse levels or quantities of diversity. However, the copyright legal system has to entrench more specified goals and mechanisms to enforce the cultural objective.

A wave of scholars has criticised the current international copyright regime as obstacles to cultural diversity, but few reform suggestions have been provided.⁴⁸² The existing discussions are conducted mainly through the lenses of preservation and protection of global musical diversity and the diversity of cultural expressions, and emphasised the significance of the cultural goods to people; but less discussion has been conducted on the cultural objective by concrete provisions and supportive mechanisms, especially the cultural function played by JMOs. The international copyright regime should explicitly entrench the cultural diversity goals, and moreover, appropriate provisions and effective enforcement measures should also be provided and ensured. These issues will be further researched in chapter 7.

⁴⁸² See Dietz (n 8); Curtis (n 454); Tzen Wong, Molly Torsen and Claudia Fernandini, 'Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law' (2011) IP and Human Development.

3.5 Conclusions

A promising international legal framework is imperative for facilitating cross-border flow of musical works. In order to achieve this goal, some essential questions need to be taken into consideration, such as how JCM of musical works is performing and evolving in the light of the changes brought about by the growth of the internet, digitisation, and an increasingly globalised market for digital content, and how the theoretical underpinnings of copyright law should be evolved due to these developments and changes in practice. In licensing practice, it was supposed that CMOs and IMEs are acting side-by-side in peaceful coexist.⁴⁸³ After the investigation of different copyright licensing models worldwide – both CMOs and IMEs, it was found that unregulated licensing activities by means of either CMOs or IMEs, have raised many issues. The interrelation between the two systems is intermingled and the model of IMEs dramatically influence the performance of CMOs. The current music licensing market is unregulated and unfair due to the lack of harmonised rules, and it is in need of standardisation. If CMOs are established by a voluntary model, they would eventually be completely replaced by IMEs. There is not a uniform definition to CMOs and the models of CMOs vary dramatically worldwide. But the common problem as to CMOs is they are constantly criticised by rightsholders due to their poor performance, partly because CMOs and IMEs are competing with each other in an unfair market. This is jeopardising CMOs' performances further, since copyright laws do not regulate licensing activities via IMEs. In addition, IMEs do not have the obligations and burdens to fulfil social-cultural functions required by copyright law, usually through different social and cultural schemes. In such an unfair licensing market, CMOs are facing the threat of being out competed by IMEs. A harmonised copyright framework is needed to regulate both CMOs' and IMEs' licensing in musical works, by which to facilitate a fairer and common arena for all kinds of copyright licensing organisations.

According to the EU's experience of cross-border licensing in musical works, it can be concluded that the European legal framework for CCM and cross-border licensing of copyrights have shifted from the wish to harmonise rules on the good governance of CMOs to

⁴⁸³ Ficsor (n 24) 23 Para 39.

the need to solve the more pressing multi-territorial licensing issues.⁴⁸⁴ The most significant improvement is that social, cultural and educational uses have been codified, although they are not perfectly designed. The Directive, however, is unlikely to strike a proper balance between interests at stake. The economic objective of the Directive has focused too much on the internal market without considering the issue of economic fairness; and it lacks concrete rules to enforce social-cultural benefits.

In the last section, the optimal multifunction of JMOs is analysed and proposed. The analysis of the multifunctional objectives of the copyright legal framework are founded on Rawls's justice theory, which has been adopted to assess whether JMOs have appropriately fulfilled the requirement of fairness economically, socially and culturally. It finds that firstly, Rawls's theory of justice provides an optimal justification to copyright's economic objective compared to economic analysis justification. Economics analysis cannot sufficiently justify JMOs by analysing the reduction of various costs. The scheme of JMOs need to pay more attention on economic fairness rather than economic efficiency. Based on the analysis of the difference principle it finds that the model of CMOs can pass the assessment test of difference principle if they meet some conditions such as mandatory licensing and social-cultural obligations, while IMEs do not. Copyright regime should re-establish the balance between different rightsholders, and this goal of economic fairness can only be achieved under the Rawls's difference principle.

Secondly, Rawls's theory can perfectly justify users' rights as one of the social objective of copyright. A social deduction from JMOs' revenues is not merely for the purpose of social welfare by means of a society scheme for redressing the public interest. Rather, users, as the least advantaged, are equally entitled to the rights to enjoy the culture of their his/her society and take part in its affairs. The deduction for the purpose of education is to improve the long-term expectation of the lease off. This justification optimally solves the problem of inconsistency of the rationales of LEs existing across member countries. After the Rawlsian analysis of social objective and the investigation of issues existing in the current LEs system,

⁴⁸⁴ Guibault and Gompel (n 65).

some unsettled issues, eg LEs for education and research purposes and libraries' rights, need further detailed study.⁴⁸⁵

Thirdly, the current business model of IMEs violates Rawls's principles. JMOs should be committed to promoting and protecting the diversity of musical works. However, such an obligation has not been written into copyright treaties. Since cultural value has equal position to economic and social values in cultural products, cultural function has to be explicitly provided by copyright law. In doing so, small rightsholders' musical works and small repertoires have to be included rather than left to the free market.

This chapter has extended the study of the proposed theoretical framework of copyright law discussed in Chapter IV to the concrete discussion of multi-objectives of JMOs. In doing so, a more functionalised JMOs model founded on the multi-objective copyright legal system has been developed to justify and assess JMOs worldwide. This chapter has discussed the justification of the multi-objectives of JMOs from a general perspective. The following two chapters will research further the multifunction of JMOs, studying the core legal issues in depth related to economic fairness, social justice and cultural diversity.

⁴⁸⁵ This issue will be discussed further in section 5.4.

Chapter 4 – The Objective of Economic Function – International

Copyright Contract Issues

4.1 Introduction

This chapter studies in depth the core legal issues regarding the objective of economic fairness of the international copyright legal framework. This will be done under the multi-objective theoretical framework established in chapter 2. As demonstrated in chapter 3, economic fairness is of fundamental importance in terms of balancing economic interests between different interests at stake, especially for those less better-off. This aspect is currently neglected by academic discourse. This chapter intends to fill this research gap. Since this study is from the perspective of the international level, the discussed issues will mainly focus on balancing interests of the less advantaged group in the context of international copyright contracts.

Substantive copyright law authorises creators to exclusively control their creative works. Copyright itself does not generate economic interests for creators. Copyright contracts do. Copyright commercial activities through contracts allow an incentive mechanism function by which rightsholders get their economic returns.⁴⁸⁶ At first glance, it is the case that the more commercial exploitation of copyrighted works, the more economic interests the creators will receive. In practice, however, this is not necessarily true. The core problem here is that the two terms of creators and rightsholders have been misconceived. Musicians and performers are the people who create musical works. But they usually transfer some or all of their copyrights to an intermediary (eg publishers/producers, distributors, adaptors, agents, and CMOs) through agreements (exploitation contracts) for managing their musical works and making profits. As pointed out by researchers, under copyright law the first owner of a work is usually the creator(s). In practice, however, most works are owned by a third-party specialising in commercial exploitation, such as a publisher or producer.⁴⁸⁷ As a result, the stronger party of a

⁴⁸⁶ Kretschmer and others (n 12).

⁴⁸⁷ *ibid*, 55.

commercial agreement gains more part of the revenues. It has been argued that there exists a disparity between the parties' negotiation power to a copyright contract that leads to unfair terms and conditions being present in the contracts.⁴⁸⁸ Creators and intermediaries are not a community of interest.⁴⁸⁹ Empirical research has shown that the music industry is a winner-take-all market prevalent all over the world.⁴⁹⁰

The reasons behind this phenomenon are multifaceted. First, modern copyright law is not especially in favour of individual music creators. Instead, it concentrates power in the hands of the intermediaries who control most works which block-up the conduit between creators and their audiences. When such gatekeepers control the music market, copyright law cannot play its role to balance interests at stake. Second, international copyright contracts have not been regulated by a predictable system of choice of law. In practice, creators usually transfer copyrights to a third party, authorising them to exploit the works in a commercial way. Too many investors are involved in the business chain of the production of musical works. Investors take away most of the profits by licensing contracts although they are not the person who creates the works.⁴⁹¹ Third, there are some critical hurdles to the cross-border exploitation and licensing of musical works resulting from the private international law and regulation of the collective management of musical works in the online environment.⁴⁹² To identify appropriate choice of law rules, the only solutions would be the creation of a special convention or special contract choice of law rules for contracts relating to the international exploitation of copyrights.⁴⁹³

So far the research on copyright contracts is less explored, in particular in the context of a global copyright legal framework.⁴⁹⁴ Also, doctrinal discourse on the nature of copyright

⁴⁸⁸ *ibid*, 28.

⁴⁸⁹ See section 4.2.1.

⁴⁹⁰ The term of "winner-take-all" was coined by Frank and Cook, 1995. See Kretschmer (n 79); Smiers and van Schijndel (n 79).

⁴⁹¹ See Kretschmer *ibid*; Peter Tschmuck, 'Copyright, Contracts and Music Production' (2009) 12 *Information, Communication & Society* 251; Griffin (n 61).

⁴⁹² De Werra (n 71).

⁴⁹³ James J Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press 2011) 592.

⁴⁹⁴ Jacques De Werra, *Research Handbook on Intellectual Property Licensing* (Edward Elgar Publishing 2013).

licences and explanation on the justification of a separate copyright licensing contract law are extremely insufficient.⁴⁹⁵ To bridge this gap and explore a balanced legal framework to enhance creators' interests, this chapter starts with a positive analysis of the economic function of copyright law to investigate what the current legal framework is and why it is in that way, and how the law affects the music industry. In section 3, Rawlsian analysis is adopted to discuss what the copyright legal system ought to be, and to explore the best, right and justifiable copyright legal framework to achieve the objective of economic fairness. After theoretical discussion about the general issues existing in the current international copyright licensing area, the main issues existing in the two specific areas – practising and enforcing copyrights – will be examined in section 4. Copyright practising activities are mainly through various copyright contracts in the form of commercial licensing and collective management of copyrights. With regard to the enforcement of copyrights, section 4 focuses on the analysis of private international law in search of balanced and harmonised rules for cross-border copyright licensing.

4.2 A Positive Analysis of Economic Objective

Although there is not a unified definition of the economic function of the copyright legal system, the economic objective has been widely recognised by most copyright legislation. Basically, this economic objective can be understood from micro and macro levels. The micro-economics of copyright emphasise how much of a right-holder's total income is generated from copyright products, to see how creativity itself is affected. At a macro-economic level, copyright law has also provided the foundation for many of the great business fortunes, and has been used rather effectively to promote economic power and wealth for a given society.⁴⁹⁶ This section mainly examines the present copyright policies from both micro- and macro-economic perspectives, investigates the winner-take-all copyright practice of music industry, to demonstrate what the present copyright's economic objective is, what the relevant legal issues are, and why we need to regulate copyright contractual activities.

⁴⁹⁵ *ibid.*

⁴⁹⁶ See De Werra (n 71).

4.2.1 Micro-Economic Function of Copyright

The principal justification for IP laws in the Anglo-American tradition is economic.⁴⁹⁷ The influence of economics in shaping the copyright regime has hardly been questioned.⁴⁹⁸ This idea is conceptually simple. The rights conferred by copyright law are designed to assure contributors to the store of knowledge a fair return for their labours, and been legally entrenched as economic interests of rightsholders. Herein, the micro-economic function of copyright specifically means the financial aspects of the proprietary rights granted by copyright laws. These rights have been recognised in one form or the other since the fifteenth century, internationally protected by the oldest and most important international treaty – the Berne Convention.⁴⁹⁹ In addition, the latest international instruments in the field of copyright and related rights, the WCT⁵⁰⁰ and the WPPT⁵⁰¹, the so-called “WIPO Internet Treaties”, have also explicitly entrenched authors’ economic rights.

Theoretically, creators can rely on copyrights to control their works and gain proper financial revenues. This term is used in a very wide sense to include songwriters, composers and performers. In general, the creator is the person whose creativity leads to the protected work being created, although the exact definition varies from country to country. Composers and songwriters have a recognised set of economic rights on their compositions and lyrics. Performers and record producers are also entitled to some economic rights, the so-called related or neighbouring rights,⁵⁰² respectively on the fixations of their performances and on the first fixation of the sound recording. Since economic copyrights can be transferred partly or wholly from creators to a third party, in practice, mostly copyright licences are issued by intermediaries instead of creators, to end users. Although composers and performers are the people who create

⁴⁹⁷ See eg Pamela Samuelson, ‘Should Economics Play a Role in Copyright Law and Policy?’ (2004) 1 U OTTAWA L & TECH J 1; Paul Goldstein and Christine McCarroll, *Copyright's Highway: from Gutenberg to the Celestial Jukebox* (Recording for the Blind & Dyslexic 2004); Mark A Lemley, ‘Economics of Improvement in Intellectual Property Law’ (1996) 75 Tex L Rev 989.

⁴⁹⁸ See eg Samuelson (n 600); Landes And Posner (n 96); Tyeyer (n 101); Breyer, ‘Copyright: A Rejoinder’ (n 101); Hurt and Schumann (n 124); Plant (n 103).

⁴⁹⁹ Article 8 - 9, 11 - 12, Berne Convention.

⁵⁰⁰ Article 6-8, WCT.

⁵⁰¹ Article 6 - 10, WPPT.

⁵⁰² In this research, they have been called in a joint name of creators’ copyrights.

music, they usually assign their economic rights to intermediaries, such as publishers and producers through exploitation agreements⁵⁰³ - copyright licences, because they need investment to produce and commercialise their musical works. As a result, the stronger party of commercial agreement would arguably benefit more than the actual creators.⁵⁰⁴ It has been argued that a disparity of power between the parties to a copyright contract exists that leads to unfair terms and conditions being present in the contracts.⁵⁰⁵ This is due to creators' inexperience and unspecialised and/or lack of information during the contractual negotiation progress. In the music industry, successful musicians derive the bulk of their incomes from live performances and merchandising⁵⁰⁶ which are commercialised by means of investment from intermediaries – IMEs. Only a few creators live their life by revenues from copyright royalties.⁵⁰⁷ The most frequent point of view is that contracts between creators and intermediaries that make the works available publicly, are unfair to the creators who actually create the works.⁵⁰⁸

Free marketing of musical works would worsen this situation. When authors are divested of the copyrights of their musical works due to the transferring of rights to intermediaries, the issue of unbalanced copyright revenues has arisen. According to economic analysis of copyright, intermediaries are essential entities in terms of increase of revenues. By creating a market for musical works, they both provide the money that acts as an incentive for creators to make new works, and move copies or performances of those works to where users can enjoy them. Although intermediaries' economic interests, mostly the entertainment industry, are in

⁵⁰³ See Sylvia Von Lewinski, 'EC Proposal for A Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights' (1992) 23 IIC 785; Nadine Klass and others, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law Concerning the Commission's Plans to Prolong the Protection Period for Performing Artists and Sound Recordings' (2008) 39 IIC-international review of intellectual property and competition law 586; Roger Brownsword, 'Copyright Assignment, Fair Dealing, and Unconscionable Contracts' (1998) 3 Intellectual Property Quarterly 311; ARNOLD Vahrenwald, 'From Copyright Licences to Risk Bargains: New Technical Uses and Old Contracts' (1996) 7 Entertain Law Rev 332.

⁵⁰⁴ Ana Ramalho, 'Copyright Law-Making in the EU: What Lies under the 'Internal Market' mask?' (2014) 9 Journal of Intellectual Property Law & Practice 242; Mireille MM van Eechoud, *Harmonizing European Copyright Law: the Challenges of Better Lawmaking* (Kluwer Law International 2009) 213; Andrew Gowers, *Gowers Review of Intellectual Property* (The Stationery Office 2006) 51.

⁵⁰⁵ Kretschmer and others (n 12) 28.

⁵⁰⁶ Curtis (n 454); Raymond Shih Ray Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' (2002) 69 The University of Chicago Law Review 263.

⁵⁰⁷ Jessica Litman, 'Real Copyright Reform' (2010) 96 Iowa Law Review 1.

⁵⁰⁸ Kretschmer and others (n 12) 28; see more discussion in section 4.2.3.

alignment with authors', their participation in the copyright system is fuelled primarily by self-interest whereas authors' motivation regarding creative activities is not necessarily associated with economic interests.⁵⁰⁹ Apparently, the incentives of creators and intermediaries are not aligned. Although JCM is justified on the ground of the increase of aggregate revenues of copyright, in practice there is a huge unbalance in the distribution of copyright revenues between small and large rightsholders. The issue of fair distribution of revenues is more pressing to the current music market. Neglect of fairness has led to the legitimate crisis of copyright law that the public and some scholars have criticised as favouring rightsholders' private rights.⁵¹⁰

Copyright contracts should be regulated. In most jurisdictions, no specific legal framework exists at national, regional or international level to regulate copyright licences.⁵¹¹ In practice, the formation, contractual content and interpretation of copyright licensing contract apply to a range of relevant norms, eg copyright law, general principles of contract law, competition law, and commercial law. The investigation of the legal framework of European countries in this area has shown a rather fragmented situation in terms of the extent and means of protection of the authors who are in a weak position.⁵¹²

The existing research has widely investigated the issues of copyright licensing contracts⁵¹³ and the measures to enhance small rightsholders' bargaining power during licensing contract negotiation. However, the conclusions obtained are inconclusive or even contradictory. The first strand of literature finds that "IP commercial law" has to be designed to support commerce in intangible IP as the world moves to an information economy.⁵¹⁴ They argue further that this IP commercial law should not be a regulatory law but an "enabling" law to support commerce by validating common practices, while allowing parties autonomy to tailor specific approaches

⁵⁰⁹ See section 2.3.

⁵¹⁰ Geiger (n 9).

⁵¹¹ Dusollier (n 299) 7.

⁵¹² *ibid.*

⁵¹³ De Werra (n 494).

⁵¹⁴ Lorin Brennan and Jeff Dodd., 'A Concept Proposal for a Model IP Contracting Law' in De Werra (n 494).

in different situations.⁵¹⁵ On the contrary, another strand of literature claims to adopt a global regulatory framework on IP contract law which shall regulate the relationship between IP rights and contracts'.⁵¹⁶ To fulfil fairness, copyright contracts have to take further action, in the legislative field, to regulate commercial transfer of contracts in order to better protect authors' interests.⁵¹⁷ The existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions.⁵¹⁸ The lack of regulation of the contractual relationship between authors and intermediaries is a factor that influences the protection of authors even where rights are originally granted to them. As a result, the aims of protecting individual creators can hardly be attained.

4.2.2 Macro-Economic Function of Copyright and Its Implications

The free cross-border flow of informational commodity depends on an effective legal framework for promoting the cross-border flow on copyrighted goods. The legal framework governing cross-border trade of copyrighted content is basically governed by private international law and TRIPS. This section will mainly deal with the legal issues within the area of international music trade, to examine from a macro-economic perspective whether the current copyright legal framework is fair enough to balance copyright interests between developed and developing countries.

Copyright can generate economic benefits not only for rightsholders but also for the economy of a given society. If we look at income generated from copyright royalties more generally from a macro-economic level, we will find that copyright law has provided the foundation for many of the great business fortunes, and has been used rather effectively to promote economic growth and innovation for societies. As the Hargreaves' Report⁵¹⁹ has pointed out that 'it is widely accepted that the most important driver of long term economic growth is improved

⁵¹⁵ *ibid.*

⁵¹⁶ *ibid.*

⁵¹⁷ Dusollier (n 299) 13.

⁵¹⁸ *ibid.*

⁵¹⁹ Hargreaves (n 100).

productivity. Over the last decade, the majority of productivity growth and job creation has come from innovation'. As Article 7 of TRIPS says: 'The protection and enforcement of IP rights should contribute to the promotion of technological innovation... in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. The TRIPS encompasses a section on enforcement of IP rights, and issues largely untouched by the WIPO conventions.

The importance of the macro-economic function of IP law has been highly recognised by most countries, especially developed ones. The objective of economic growth can be easily found in most copyright legislation.⁵²⁰ In the internet age, it is obvious that music flows across borders and is intensively exchanged on a global scale legally or illegally. In any case, in today's interdependent global economy, all countries have an interest in understanding and assessing the policy issues which can affect the cross-border exchange of musical assets, either for import or for export purposes. Therefore, it is important to design a balanced and fair policy framework to promote the cross-border flow of copyrighted commodities. Legal hurdles to the cross-border flow of music are, firstly, the potential differences in the substantive level of protection of music (as resulting from the substantive copyright laws) which may exist between national or regional copyright regimes; and secondly, more importantly, from other fields such as private international law and the regulation regarding the CCM.⁵²¹ The cross-border exchange of copyrighted goods is particularly critical for smaller countries which have no or limited natural and/or cultural resources and which thus rely on the import or export of copyrighted assets for their continuing economic development and social and cultural welfare. For instance, Switzerland is not a major producer of cultural products such as music and films.⁵²² As a result, Switzerland largely imports foreign cultural products for its local population and would thus have an interest in creating a legal framework under which the import of music should be promoted.

⁵²⁰ See European Commission, A Single Market for IP Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in Europe. Copyright Law of the United States.

⁵²¹ De Werra (n 71).

⁵²² *ibid*, 29.

It is also of great significance for developed countries to promote cross-border flow of musical works to developing countries for the following reasons. First, the copyright regime of developing countries is comparatively weak. The promotion of legitimate exploitation of musical works in developing countries would be helpful to nurture the awareness of copyrights protection among the general public. Secondly, it is also able to curtail online piracy which nowadays continues to be a widespread problem in developing countries.⁵²³ It has been proven that the anti-piracy campaigns can hardly be successful alone due to the uncontrollable dissemination of information goods by digital technologies. The best way is to encourage new business models and legitimate exploitation of musical works.⁵²⁴ Accordingly, relevant JCM law is needed. Moreover, developing countries are opposed to the proposal of stopping piracy because they claim they have the right of free access to technology and scientific developments in order to be able to develop.⁵²⁵ In 1994, the TRIPS agreement was introduced, aiming at reducing those distortions and impediments to international trade of IP assets. This pressure, led to the expeditious enactments and reforms of IP laws in developing countries and subsequent setting of enforcement measures before allowing enough time prior to enforcement during which these countries can adapt their political, economic, social and cultural situations for such enforcement. That is one of the reasons why developing countries are still facing many critical problems which hamper the promotion and protection of IP rights such as enforcement of their laws, although they have enacted laws for IP protection which include enforcement provisions.

The law regulating cross-border trade of copyrighted works has been basically harmonised at the global level by TRIPS even though differences in the substantive scope of protection may exist between the relevant national regulations in particular with respect to new technological developments. However, since TRIPS came into force, it has been subject to criticism from developing countries and academics. Many advocates of trade liberalisation regard TRIPS as

⁵²³ See IFPI Global Music Report (n 16).

⁵²⁴ As discussed in section 2.3.2, the role of copyright is an incentive to exploit rather than to create.

⁵²⁵ Roger Wallis and Zeljka Kozul-Wright, 'Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries' (2001) Report for WIPO-UNCTAD Geneva: WIPO-UNCTAD 1.

poor policy.⁵²⁶ As the needs of the global exchange of musical works increase, issues within international licensing contracts have become another concern which law-makers have to pay more attention to. One critical element and difficulty in this assessment is to adopt a balanced approach between the protection of local interests and meeting global needs. Even though globalisation is a phenomenon which cannot be avoided, local interests must not be sacrificed at all costs for the purpose of removing barriers to the free flow and exchange of copyright assets.⁵²⁷ A global regulatory framework could be considered, as such a balanced approach which ensure an appropriate protection of copyright works and promote the cross-border transfer and use of copyright assets, without threatening the cross-border flow of human resources and technology for the benefit of creative entrepreneurs and of industries, and for the society as a whole.

4.2.3 Is “Winner-take-all” just?

Empirical research has shown that roughly 10% of copyright related income goes to 90% of artists and, vice versa, 90% goes to 10%.⁵²⁸ For the payments of CMOs, the top 10% of authors receive 60-90% of total income.⁵²⁹ Such “winner-take-all” markets are prevalent in most cultural industries. Interestingly, some researchers believe that this does not conflict with the aims of copyright law.⁵³⁰ Throsby asserts that the arts market shows an oversupply of creative ambitions.⁵³¹ This is because more products want to enter the market than can be consumed.⁵³² So they believe it is important to ensure high quality products enter into the market, and this role is performed by IMEs acting as selectors or gatekeepers. In the music industry, publishers, producers, various online ISPs, and broadcasters can play this role for different markets. Most musicians would like to get into the market, but only famous celebrities with a track record, about one in ten releases, will win the chance to get repaid their initial investment.⁵³³

⁵²⁶ Martine De Koning, ‘Why the Coercion-Based GATT Approach Is Not the Only Answer to International Piracy in the Asia-Pacific Region’ (1997) 19 *European Intellectual Property Review* 59.

⁵²⁷ De Werra (n 71).

⁵²⁸ Kretschmer and others (n 12).

⁵²⁹ *ibid.*

⁵³⁰ *ibid.*

⁵³¹ Throsby (n 165) 121.

⁵³² Kretschmer and others (n 12).

⁵³³ *ibid.*; DiCola (n 12).

There are three main assumptions underlying the belief that the winner-take-all distribution of copyright earnings is just and does not conflict with the objective of copyright law to maintain sustainable development of cultural goods. The first assumption is that it is just for the market to pick the winner⁵³⁴ and that copyright law must not presume cultural judgement. Based on this argument, ‘best’ means bestselling, and bestselling titles are indeed the only ones that copyright law is meant to incentivise and reward. The second is that creators are risk takers⁵³⁵ and without the prospects of potential superstar earnings, nobody would become an author or artist. However, it is unlikely that artistic production by lower earning creators would cease without the incentive of copyright royalties from a possible bestseller. The oversupply of creators, and the resulting failure of many authors and artists to make a sustainable living, may be simply due to an overestimation of their chances of financial success. The third assumption is that oversupply leads to gatekeepers⁵³⁶ Who perform a valuable function by weeding out lower quality works in favour of “the best”. A gatekeeper’s objective is to find the works that have the best chance of being commercially successful.

The arguments above reflect the position of enabling law to support commercialisation of musical works in a free market, while allowing parties’ autonomy to tailor specific approaches in different situations. It believes that the free market is the most efficient model for the distribution of wealth in an economic entity, and is accordingly efficient for creation and distribution of copyrighted resources. The falseness of this view is apparent in that it fails to distinguish the difference between copyright creative activity from copyright practice. The former is a social behaviour conducted by people consciously or unconsciously, whereas the latter is a commercial activity aimed at pursuing profits. They are different in nature. Based on the recognition of this difference, this thesis will argue against the position above from three main aspects as follows.

⁵³⁴ Kretschmer and others (n 12) 57.

⁵³⁵ *ibid.*

⁵³⁶ *ibid.*

First, creators are not risk takers. Intermediaries are. The creative activities are not for the purpose of marketing.⁵³⁷ There will never be oversupply of cultural creations or creators.⁵³⁸ For one thing, cultural expression is one of the universal human rights of each person which has been recognised by the UDHR, whether they are creators or potential creators. Each person has the freedom of creativity. For the other thing, creative activities are one of the human social and communicated behaviours which benefit the conservation and development of cultural goods. The basic idea is that the bigger the repertoire of cultural products, the better for re-creation. More cultural products will enrich the storage of resources for recreation.⁵³⁹ Hence, creativities should be supported and encouraged. Not every artist wants their work to become commercial. Some of them would like their works to be enjoyed freely by as many people around the world as possible.⁵⁴⁰ The intermediaries take the risk to choose to invest in some works, which are actually a tiny part of the whole repertoire. The purpose of such commercial investment is obvious in that they see the potential commercial values and hope to make profits from the works. Some musical works do make huge revenues for intermediaries while some do not. Intermediaries take this risk.

Second, intermediaries do not create. Intermediaries' contribution to a musical work is purely investment and commercial activities, not creation. Two of the largest music publishers, EMI and Warner, are owned or controlled by investment firms.⁵⁴¹ The role of marketing is commercially important, but is quite different from making a creative contribution. The erroneous belief that copyright law is the engine of creativity in the popular sense is based on a misperception of the role of copyright in the marketplace. In any commodity business, the most benefits flow to gatekeepers because they have most leverage in contracts for the purchase and sale of the commodity.⁵⁴² Even the winner has to pay different fees and cannot get too much at the end. Intermediaries get most commercial profits.⁵⁴³

⁵³⁷ See section 2.3.

⁵³⁸ *ibid.*

⁵³⁹ See section 2.5.

⁵⁴⁰ This is common among young creators who are willing to accumulate fame for themselves.

⁵⁴¹ William Patry, *How to Fix Copyright* (OUP USA 2011) 21.

⁵⁴² Litman (n 507).

⁵⁴³ *ibid.*

Third, one of the objectives of the copyright legal framework is to balance economic interests and fulfil economic fairness. However, in practice, most commercial profits generated by the creative works go into the intermediaries' pockets, not creators. This has always been done by various means of commercial contracts between creators and gatekeepers. Authors with weak bargaining power have not received their due. Modern copyright law is not especially in favour of either creators or users; instead, it concentrates power in the hands of the intermediaries who have controlled most works which block-up the conduit between creators and their audiences.⁵⁴⁴ Acting as gatekeepers, those intermediaries use their influence and their proprietary rights to obstruct one another's exploitation of copyrighted works.⁵⁴⁵ When gatekeepers commercially control the market of cultural products, copyright law is not able to play its role to balance interests at stake.

This section adopts a positive analysis to examine the economic objective in the present copyright legal system from micro- and macro-economic perspectives. It finds that the economic objective based on the principle of efficiency leads to "winner-take-all" in the free music market. Then it argues against the position of approving "winner-take-all" by analysing three assumptions of this argument. To further prove the unjustness of "winner-take-all", the following section will analyse the issue by a normative Rawlsian analysis.

4.3 A Rawlsian Analysis of the Economic Fairness

The aim of this section is to conduct a Rawlsian analysis to demonstrate why JMC should be regulated to fulfil economic fairness. As discussed above, the traditional belief as to the rationale of JMC is their economic value⁵⁴⁶ due to the fact that economics is elementary to copyright practice. This section is not going to contest the economic values brought by copyright practice or the potential benefit of the opportunity for creators to reap profits from their works. Rather, its purpose is to examine the inappropriateness of the principle of

⁵⁴⁴ *ibid.*

⁵⁴⁵ *ibid.*

⁵⁴⁶ See section 3.4.1.

efficiency to underpin copyright's economic function, aiming at searching for a more reasonable principle to justify JMC's economic objective.

The relation between the economic concept of efficiency and the principle of fairness is usually cast as an adversarial one. Economic efficiency is a broad term that implies an economic state in which every resource is optimally allocated to serve each person in the best way while minimising waste and inefficiency.⁵⁴⁷ The principle of efficiency is originally intended to apply to particular configurations of the economic system. So, it is also usually applied by economic studies to assess the efficiency of the distribution of musical works by JMOs.⁵⁴⁸ Under this principle, the resulting efficient distribution is accepted as just. According to the dominant economic analysis, copyright attempts to achieve the optimal allocation of scarce resource in order to enhance social welfare, roughly interpreted as the maximum production of wealth at macro level.⁵⁴⁹ The only distributive principle in economics is that a given resource should be allocated by the most efficient use, regardless of other individuals or fairness.⁵⁵⁰ Economic theory trusts in the power of the market to produce efficient outcomes, completely disregarding the consideration of distributive fairness. Some economic analysis believes that there is a trade-off between efficiency and fairness – as Landes and Posner contend, ‘striking the correct balance between access and incentives is the central problem in copyright law’.⁵⁵¹ An optimal level of copyright protection must trade off the benefits in terms of dynamic efficiency of creating incentives to supply information goods against the costs in terms of the allocative efficiency of restricted access. Economists’ usual attitude is that copyright law should be shaped by efficiency concerns, and fairness can be achieved through taxing and spending policies.⁵⁵²

⁵⁴⁷ See Richard O Zerbe, *Economic Efficiency in Law and Economics* (Edward Elgar Publishing 2002) 65.

⁵⁴⁸ See section 1.4.

⁵⁴⁹ See Zerbe (n 659).

⁵⁵⁰ Giovanni Battista Ramello, ‘Access to vs. exclusion from knowledge: Intellectual property, efficiency and social justice’ in *Intellectual property and theories of justice* (Springer 2008).

⁵⁵¹ Landes And Posner (n 96).

⁵⁵² Rawls (n 137) 67.

Rawls's justice as fairness is often concerned with the distribution of wealth. This is highly relevant to the distribution of copyright resources. Rawls pointed out that the difference principle is compatible with the principle of efficiency,⁵⁵³ that it also has such an effect to represent efficient distribution. According to Rawls, when the difference principle is fully satisfied, it is indeed impossible to make any one representative man better off without making another worse off, namely, the least advantaged representative man whose expectations we are to maximise.⁵⁵⁴ So, the defined justice is consistent with the principle of efficiency, at least when Rawls's principles are perfectly fulfilled.⁵⁵⁵

For considering designing a just social and economic process which would be compatible with the two principles, Rawls has outlined a set of political and legal institutions that would ensure a just basic structure, Firstly, Rawls assumes three background conditions – a just constitution that secure equal liberties of citizenship;⁵⁵⁶ fair equality of opportunity that all are assured equal chances for education;⁵⁵⁷ and government actively enforces free choice of occupation by “policing conduct of firms.⁵⁵⁸ Secondly, Rawls specifies further background institutions to ensure the basic structure is just –four branches of government, namely an allocation branch, a stabilization branch, a transfer branch, and a distribution branch.⁵⁵⁹ The allocation branch is to keep the price system workably competitive and to prevent the formation of unreasonable market power.⁵⁶⁰ The stabilization branch strives to bring about reasonably full employment” so that whoever wants to work can find it, and the free choice of occupation and the deployment of finance are supported by strong effective demand.⁵⁶¹ These two branches together are to maintain the efficiency of the market economy generally.⁵⁶² The essential idea of a transfer branch is that ‘it takes needs into account and assigns them their appropriate weight’, since Rawls believes ‘competitive price system gives no consideration to needs and therefore it

⁵⁵³ *ibid.*, 79.

⁵⁵⁴ *ibid.*

⁵⁵⁵ *ibid.*

⁵⁵⁶ *ibid.*

⁵⁵⁷ *ibid.*

⁵⁵⁸ *ibid.*

⁵⁵⁹ *ibid.*, 276-277.

⁵⁶⁰ *ibid.*

⁵⁶¹ *ibid.*

⁵⁶² *ibid.*, 276.

cannot be the sole device of distribution'.⁵⁶³ The distributive branch aims 'to preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property'.⁵⁶⁴ The distribution branch has two aspects. First, it imposes a number of inheritance and gift taxes, which 'gradually and continually...correct the distribution of wealth and...prevent concentrations of power detrimental to the fair value of political liberty and opportunity'. The second part 'is a scheme of taxation to raise the revenues that justice requires': to pay for public goods and make the transfer payments necessary to satisfy the difference principle.⁵⁶⁵ When these institutions meet all the requirements, the distribution resulting from the designed social system is just, however things turn out.

Rawls's theory embraces the principle of efficiency of the free market, by the allocation branch and stabilization branch, and at the same time to maintain social justice by the transfer branch and distributive branch. The notable feature is, however, in Rawls's justice as fairness the principles of justice are prior to the consideration of efficiency.⁵⁶⁶ Rawls suggests that justice has priority over efficiency and liberty over social and economic advantages, and that fairness is an independent normative criterion to assess whether a law is just or unjust.⁵⁶⁷ He believes that 'justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.⁵⁶⁸ When a scheme is not just, justice requires some changes even it is efficient in this sense. So, the standard of fairness under the meaning of Rawls's theory is higher and stricter than the principle of efficiency.

When Rawls's theory is applied to ensure distributive justice in copyright revenues, the requirements of background conditions are explained like this. First, each stakeholder, including creators, intermediators and users, is to have an equal right to the most extensive

⁵⁶³ *ibid.*

⁵⁶⁴ *ibid.*, 277.

⁵⁶⁵ *ibid.*, 278.

⁵⁶⁶ *ibid.*, 69.

⁵⁶⁷ *ibid.*

⁵⁶⁸ *ibid.*, 3.

basic liberties compatible with a similar system of liberty for all. As to the supply side of copyrights, they expect to be authorised the same bundles of copyrights and equally protected by copyright law, and equally enjoy economic and moral benefits generated from their creative works. However, in practice, small rightsholders usually are not able to enjoy the same proprietary rights as large rightsholders due to the fact that small rightsholders possess less business resource. For increasing copyright revenues, rightsholders authorise the exploitation of their works through licensing contracts. Due to asymmetry of information and inexperience of negotiation, individual creators are usually in a weaker position in licensing contracts negotiation.⁵⁶⁹ Second, all rightsholders have to be ensured fair equality of opportunity in the commercial activities. Rawls demonstrated that the meaning of fair equality of opportunity is ‘to be not only open in a formal sense, but that all should have a fair chance to attain them’.⁵⁷⁰ Rightsholders have to be given equal opportunity in economic activities, such as to join or withdraw from a JMO, receive investment from an intermediary, and sign a copyright licensing contract in an equal negotiating position. This is impossible in practice since intermediaries are gatekeepers who only select to invest in business potential works. Also, since each person is born with different talents and abilities, and these contingencies are accumulated over a period of time, one of the schemes is to allocate resources in education so as to improve the long-term expectation of the least favoured.⁵⁷¹ Thus, musicians and potential musicians should be assured equal chances for education (either through public education or subsidized private schools). Third, musicians have equal opportunity in free choice of occupation. This is achieved by policing the conduct of JMOs, including both CMOs and IMEs, and by preventing the establishment of monopolistic restrictions and barriers to the more desirable positions.⁵⁷² In addition, the government should function to establish these background institutions, to ensure the efficiency of the music market economy generally, and takes small creators’ needs into account and assign them their appropriate weight, to preserve an approximate justice in distributive shares.

⁵⁶⁹ William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2009); Kretschmer and others (n 12) 6.

⁵⁷⁰ *ibid*, 73.

⁵⁷¹ Rawls (n 137) 101.

⁵⁷² *ibid*, 275.

According to the principle of fairness, business models of copyright licensing have to be regulated by just governmental and legal institutions. No free market is perfect to spontaneously fulfil distributive justice.⁵⁷³ The social system has to be designed so that the resulting distribution of copyright revenues is just. To achieve this goal, it is necessary to set the social and economic process within the surroundings of suitable political and legal institutions. Without the proper arrangement of these background institutions the outcome of the distributive process will not be just. Thus, this study adopts Rawls's principle of fairness, rather than economic efficiency, to assess and evaluate copyright's economic objective.

4.4 International Copyright Contract Issues

As discussed above, copyright contracts need to be regulated since they affect the balance of economic interests between different rightsholders. The discussion of copyright contract is not new. However, the topic of international copyright and global contracts is a tough one.⁵⁷⁴ Legal scholars do not endorse any international legislation concerning copyright and contracts due to the natural inflexibility of international conventions, so it is a global consensus of the absence of copyright contract law.⁵⁷⁵ Contractual provisions in the context of copyright transactions appear to be overreaching which would harm users' interests.⁵⁷⁶ Thus, the main task of this section is to analyse international copyright contract rules under the copyright legal system in accordance with the objective of economic fairness.

4.4.1 The Relationship between Copyrights and Contracts

In the music industry, contract negotiation occurs within each stage of the commercial process of musical works. The value chain of producing music works involves many investors. Contracts can be used to help a rightsholder to exercise copyright, but contracts may also be used to prejudice creators' interests, due to their weak bargaining power. The use of contracts can influence copyright balance in a number of ways, affecting the proprietary process and the

⁵⁷³ Kretschmer and others (n 12).

⁵⁷⁴ Michael Anthony C Dizon, 'The Symbiotic Relationship between Global Contracts and the International IP Regime' (2009) 4 *Journal of Intellectual Property Law & Practice* 559.

⁵⁷⁵ *ibid.*

⁵⁷⁶ Werra (n 61).

relationship between creators and publishers/producers; right-owners and users. As Halbert observes, ‘authors transfer their bundles of sticks to the publisher then holds sole proprietary interest over the work and continues to profit with very little going back to the authors’.⁵⁷⁷ It is not surprising, then, that in practice the creators’ rights did not remain with creators for long, as creators continue to assign their works outright for lump sum payments. Copyright law emerged as a publisher’s but not an author’s right.⁵⁷⁸

Contracting is important to copyright enforcement. Copyright law provides proprietary rights to creators for creative works that meet certain criteria, but copyright by itself does not generate revenues for creators. Contracts enforcing copyright law do and allow an incentive mechanism to operate.⁵⁷⁹ The main difference between a copyright legal relationship and contractual relationship is that a contract only binds those who are a party to the contract, whereas a copyright binds the entire world. Nonetheless, this distinction in the sense that a contract is between individuals and copyright is against the world, is, in the digital context, breaking down. The acceptance of a standard licensing contract before using a copyrighted work by individual users has become prevalent in practice. For example, when an online music subscriber registers as a member of iTunes, Spotify or Kugou, he/she has to agree a standard agreement with all the default terms and conditions before using the music services.

As we know, copyright exploitation has become increasingly global in nature in the digital era,⁵⁸⁰ since copyright products, musical works particularly, flow beyond borders easily and frequently. However, copyright laws remain national or territorial. There is a mismatch between the patch-work of national protection on the one hand and the single global exploitation of copyright, with the accompanying needs in the enforcement field, on the other.⁵⁸¹ There is a growing need to develop common legal rules to guide and support

⁵⁷⁷ Debora J Halbert, *Intellectual Property In the Information Age: the Politics of Expanding Ownership Rights* (Greenwood Publishing Group Inc. 2000) 18.

⁵⁷⁸ Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar Publishing 2010) 49.

⁵⁷⁹ Griffin (n 491).

⁵⁸⁰ Irini A Stamatoudi, *Copyright Enforcement and the Internet*, vol 21 (Kluwer Law International 2010) 63.

⁵⁸¹ *ibid.*

international commercial contracting practices involving copyright. The regulation of cross-border copyright contracts could also enhance authors' contractual position, protecting their legitimate economic rights authorised by law.

Copyright issues usually involve two aspects under international private law in that certain issues can be qualified as being part of the copyright as such, while other issues should rather be qualified as contractual ones.⁵⁸² The distinction between issues concerned with copyright itself and issues concerned with copyright contracts is not always obvious.⁵⁸³ It has to be noted that it is important to distinguish issues between the two aspects to decide what is negotiable and what is not. Copyright issues are regulated by national or territorial copyright laws which have been minimally harmonised by some international copyright treaties. When dealing with a relevant case in practice, both the elements of copyrights and contracts as such would be involved. For example, the court has to distinguish between, on the one hand, the question whether and under which circumstances the copyright could be assigned or transferred that are governed by the law of the protecting country; and, on the other hand, the interpretation of the contract and the determination of the rights and duties of the parties that are decided under the law of contract. In the context of cross-border copyright contracts, this issue would become more complex due to the involvement of choice of law.

4.4.2 Distinguishing Features of Copyright Contracts

In most jurisdictions, copyright contracts are most often of a hybrid nature of both copyright and contract, for which no specific legal framework exists at national, regional or international level.⁵⁸⁴ De Werra states that a copyright contract is a blended contractual covenant in that it blends features of contract and copyright. As such, breach of a licence condition covenant can trigger copyright infringement, not merely breach of contract.⁵⁸⁵ The main difference between copyright contracts and other common contracts is that a central element of copyright is

⁵⁸² Fawcett and Torremans (n 493) 545.

⁵⁸³ Stamatoudi (n 580) 44.

⁵⁸⁴ Guibault (n 59).

⁵⁸⁵ De Werra (n 494) 84.

involved. Copyright contract mainly contains two elements. First, there is the determination of the rights and duties of the parties and, secondly, there is the transfer of proprietary rights, i.e. all or part of the copyrights.⁵⁸⁶ A contract is supposed to be a key element and a powerful instrument by which rightsholders bargain for and preserve their interests. Proprietary entitlements cannot be effectively used or implemented without the involvement of contracts. The right to decide how their work is used, exploited, transferred, assigned, licensed, or distributed, either for commercial or non-commercial purposes, is in the hands of rightsholders. This central principle and feature has been authorised by international copyright regime and national copyright law.

The principle of freedom of contract is of importance in the context of international trade. This principle allows right-owners to decide freely to whom they will offer their goods and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions. These are the cornerstones of an open, market-oriented and competitive international economic order. However, the principle of freedom of contract also has drawbacks, especially when the contractual parties are at different negotiating positions. There is an unbalanced negotiation power between copyright contractual parties. Freedom of contract suggests that parties should be allowed to bargain freely over their rights. The initial endowment of rights and obligations under the international copyright regime may be subsequently modified, transferred, limited, suppressed, waived, disposed of, or bargained away by contracts or through voluntary agreements between parties following the principle of freedom of contract.⁵⁸⁷ It assumes that assenting parties who voluntarily enter a private exchange have reached a bargain that makes them both better off, or else they would not have entered into it.⁵⁸⁸ This conclusion holds true only in the absence of any market failure that would undermine the fundamental proposition that both parties acted voluntarily or that they

⁵⁸⁶ Fawcett and Torremans (n 493) 547.

⁵⁸⁷ Dizon (n 574).

⁵⁸⁸ Niva Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (1997) *Berkeley Technology Law Journal* 93.

were fully informed. In the absence of a perfect market, limitations on the parties' abilities to engage freely in transactions may be a more preferable way.⁵⁸⁹

Creators lose control when subsequent contractual parties participate in the exploitation of copyrights. Copyright contracts concluded between creators and transferees will govern their relation from the negotiation of the contract to its execution and termination. Protection of creators is necessary at each stage of contract – during the negotiation to counterbalance the weaker position and lack of information; during the exploitation of works to guarantee the creators' fair remuneration and control over the enforcement of the contract, if needed; in the termination of contract to enable the creators to escape from an unfair deal.⁵⁹⁰ That the creator effectively gets a fair share of the revenues of her work along the whole value chain will strongly depend on elements other than the first contract.⁵⁹¹ The first transferee of the copyright will enter into contractual relationships with subsequent exploiters (broadcasters, retailers, online platforms, video-on-demand providers), in which authors will have no say.⁵⁹²

In the context of international copyright law, cross-border copyright contracts involve foreign elements and consequently the issue of conflict of laws. Contracts in relation to the international exploitation of copyrights have always given rise to complex private international law problems. These problems have, in recent years, been aggravated by the growing importance of this international exploitation. Increasing numbers of copyrighted works are exploited internationally and many of the contracts now cover the worldwide exploitation of the copyrights concerned. Neither the Berne Convention nor the Rome Convention 1980 has solved these problems conclusively yet. Basically, the formation, contractual content and interpretation of copyright contract apply to a range of relevant norms, specifically copyright law, general principles of contract law, competition law, and commercial law. The investigation of the legal framework of EU Member States in this area has shown a rather fragmented situation in terms of the extent and means of protection of the authors who are in a

⁵⁸⁹ *ibid.*, 108.

⁵⁹⁰ Dusollier (n 299).

⁵⁹¹ *ibid.*

⁵⁹² *ibid.*

weak position.⁵⁹³ Many difficulties arise when national choice of law rules are applied to international contracts for the exploitation of copyrights. This issue of choice of law rules will be discussed further according to the specific type of copyright contracts.

4.4.3 International Copyright Contracts in Musical Works

This section examines copyright contract issues in the music sector, recommending the harmonisation of international private law rules in this area and provision of predictable rules for cross-border copyright licensing. The flow of rights and royalties in the music industry shows a complicated process in practice, especially when different licensing models, eg business-type licensing and CCM in musical works, are mingled together in practice. In business-type licensing, authors tend to join a publisher which can take care of their copyrights more efficiently than CMOs, and potentially bring more royalties and pay more quickly. Others may choose to join a society due to their weak negotiation to gain an advanced transferring contract with publishers. At the same time, publishers can also join a CMO through which worldwide licensing could be performed by means of a reciprocal agreement with their sister CMOs. Then CMOs will collect royalties on behalf of their members and distribute them to their members. In addition, some recording labels develop musicians, working with producers, paying for and arrange studio time, mixing, mastering, designing graphics, packaging, distributing, and marketing.⁵⁹⁴ All these services are performed based on copyright contracts between the recording label and authors/performers. As illustrated by the following diagram, the copyright licensing of musical works in the UK is very sophisticated (diagram 6.1). When put in the larger environment of global copyright licensing, the relationship between different stakeholders would be even more complicated. Thus, a classification of the different copyright contracts beforehand would be apropos for clarifying the contractual relationships and defining the scope of the discussion.

⁵⁹³ Séverine Dusollier and others (n 299).

⁵⁹⁴ John Kennedy and Alison WenHAM, ‘Investing in Music: How Music Companies Discover, Develop and Promote Talent’ (2010) IFPI <<http://www.ifpi.cz/wp-content/uploads/2013/03/Investing-in-Music-2010.pdf>> accessed 28 May 2017.

Diagram 6.1 The Flow of Rights and Royalties in the UK⁵⁹⁵

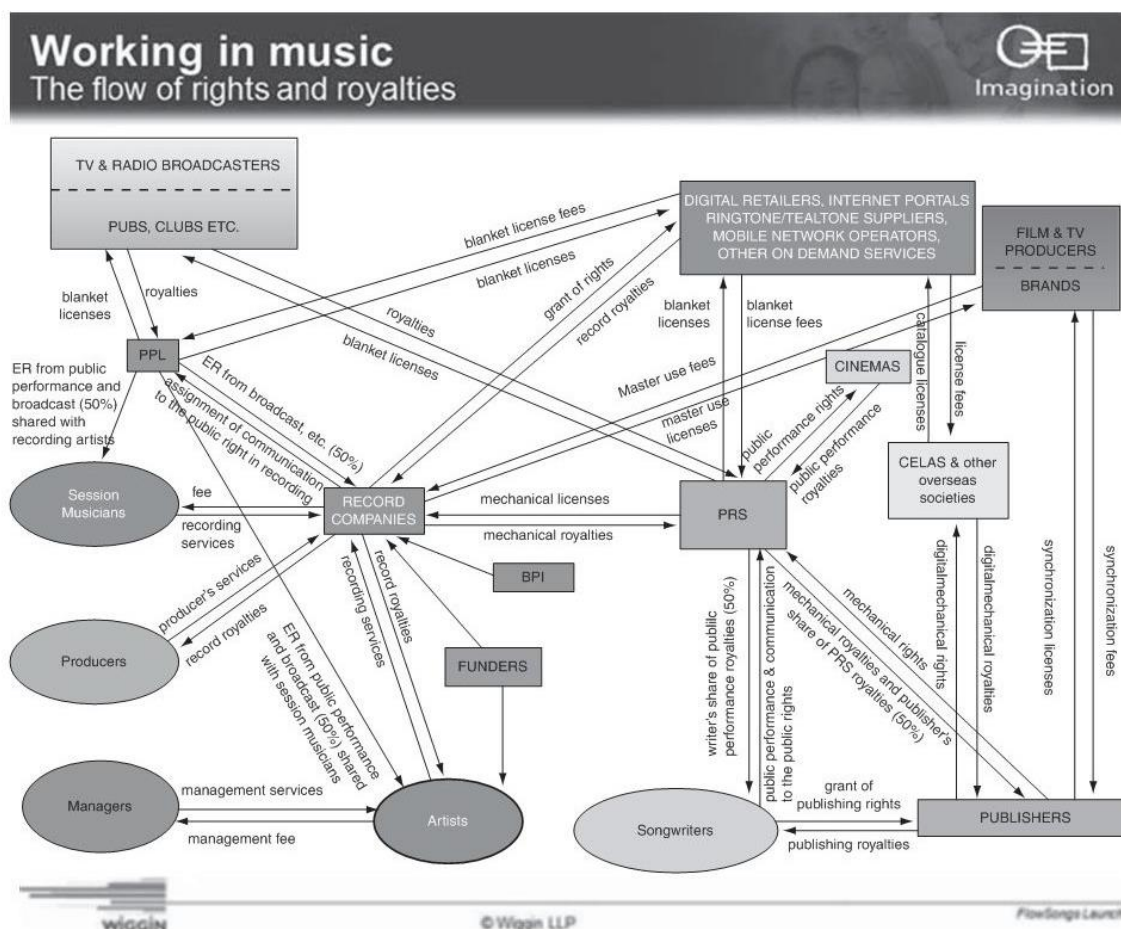


FIGURE 7.1 The Flow of Rights and Royalties in the United Kingdom. Modeled on a diagram included in the slide presentation *FlowSongs Launch*, © Wiggins LLP.

According to the different stages of the flow of copyrights, this study classifies copyright contracts into three main categories: contracts of copyright ownership, exploitation contracts and licensing contracts. The exploitation contracts, from the supply side, are between creators/rightsholders and intermediaries; whereas licensing contracts, from the demanding side, are between right owners and end-users (including commercial and non-commercial users), normally launched by large rightsholders. This section will focus on discussing the issues of international copyright contracts.⁵⁹⁶ First it will analyse the issues of initial ownership.

⁵⁹⁵ Mike Masnick, 'The Insanity of Music Licensing: In One Single Graphic' (*Tech Dirt*, 16 August 2010) <<https://www.techdirt.com/articles/20100813/17380410623.shtml>> accessed 28 May 2017.

⁵⁹⁶ This discussion focuses on copyright contract only and does not touch upon issues such as copyright infringement. For more on this topic, see, eg Rita Matulionyte, 'Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules' (2015) JIPITEC.

Then, it will move on to discuss the issues of exploitation contracts and, finally, the issues of licensing contracts between right-owners and users.

4.4.3.1 Authorship and Initial Ownership Relevant Contractual Issues

The initial ownership can be a copyright contract issue because initial ownership can be negotiable in some countries but not in others. The drawback of treating initial ownership as an issue accessory to a contract is that in contract law there is a measure of freedom of disposition to choose the applicable law. Since authors are usually in a weak position in contractual negotiation, the terms of an employer-friendly copyright law are easily made. So, initial ownership issues can influence the copyright balance, affecting the interests of the original creators. It is, therefore, important to identify who owns the factual authorship rather than ownership. This is the first step to balance real creators' interests.

However, the Berne Convention and the Universal Copyright Convention are virtually silent on this economically salient question⁵⁹⁷ - who qualifies as the author and original owner of rights in a literary or artistic work? Indeed, there is not a universal legal definition of "author" of a work so they substantially differ between national laws. International treaties do not specify the issue of beneficiaries of protection. The preamble of the Berne Convention refers to the 'rights of authors in their literary and artistic works', whilst Article 2(6) lays down that protection under the convention is to operate for the benefit of the 'author and his successors in title'; but the Convention neither designates who is an author, nor establishes general rules concerning the transfer of title. It is not clear whether the convention limits authorship to natural persons or individuals or whether authorship can be vested in a legal entity. The absence of clarification leads to different implementations of the Convention and legal traditions between member countries.

Also, the importance of acquirement of authorship or initial ownership should not be overlooked since these are preliminary issues needed to be determined before copyright

⁵⁹⁷ Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, USA 2001) 203.

enforcement and this would also influence authors' economic interests. If a person wants to enforce copyright, he/she must have the ownership first. So, the ownership of a copyrighted work becomes the basis of any follow-up activities, for example licensing or transferring the ownership of the work. In the international law context, it is of fundamental importance to identify the factual authors when a multi-national authorship happens, especially when more than two natural persons jointly own a copyrighted work. But this has not been paid enough attention yet by policy-makers.

It has to be noted that initial ownership is not exactly the same as authorship even though the term often coincides with it, or denotes the actual creator. Indeed, in most jurisdictions, whether common law or civil law, the individual ownership of copyright is usually vested initially in the flesh-and-blood author of the work, that is, the natural person who creates the work. But, in some countries initial ownership of works is not necessarily authorised to the factual authors who created it. For example, in some circumstances before starting to produce copyrighted products, creators might contract with certain entities, usually in forms of employment contracts, commission contracts or other bilateral agreements for the supply of services to acknowledge the initial ownership of the promising works. In this situation, the initial ownership can be vested to employers or commissioners under some national copyright laws. This is the case in many common-law countries, the US, UK and Netherlands for example, that authorship is vested *ab initio* in employers who can be legal persons.⁵⁹⁸ Other countries, Germany for example, strictly stipulate a general rule that an employee is the owner and author of the copyrighted work produced under the course of his employment,⁵⁹⁹ and the author must of necessity be a natural person.⁶⁰⁰ Under the French code, the right to ownership of a copyright

⁵⁹⁸ See eg s11(2) UK Copyright, Designs and Patents Act: 'Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary'; 17 U.S. Code § 201 (b), 'in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright'; Netherlands Copyright Law, art.7, 'where labour which is carried out in the service of another consists in the making of certain literary, scientific or artistic works, the person in whose service the works were created is taken to be the maker, unless the parties have agreed otherwise'.

⁵⁹⁹ Article 43 German Copyright Act. (Whereas Article 69b German Copyright Act stipulates that where a computer program is created...the employer exclusively shall be entitled to exercise all economic rights...)

⁶⁰⁰ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar Publishing 2008) 84.

work is given to the natural person who creates the work, irrespective of his/her status.⁶⁰¹ Thus, the issue of authorship and initial ownership is something totally dependent on national laws or regional laws with a distinct divergence between the civil law and common law approaches.⁶⁰² International law does not regulate the authorship within employment either. As a result, it generally leaves the determination of authorship, ownership to national law but those national rules often diverge.

Where two or more authors have collaborated in creating a single work, legislation in most countries will treat them as co-authors and co-owners and will measure the work's term of protection from the death of the last surviving co-author.⁶⁰³ Choice of law does not solve the problem of multi authorship. The position of the commissioned work in civil law countries is simple – the author is usually the owner of copyright in the work, with very rare exceptions such as commissioned advertising work under French copyright law.⁶⁰⁴ Under UK law, where a work is commissioned, the ownership of copyright usually belongs to the creator of the work, but in certain circumstances, the court may find that the commissioner of a work has implied licence to exploit the work in a limited manner, or that the commissioner of the work has equitable title to the copyright in the work.⁶⁰⁵ Under US copyright law, the category of 'works made for hire' comprises not only employee works, but nine categories of specially commissioned works.⁶⁰⁶

In the music industry employment contracts and commission contracts have been widely used nationally and transnationally between songwriters/performers and producer/publishers.⁶⁰⁷ However, there is no private international law that offers a uniform choice of law rule for the identification of factual authorship. Neither the copyright conventions nor the TRIPS

⁶⁰¹ *ibid.*, 86.

⁶⁰² *ibid.*, 84.

⁶⁰³ Goldstein (n 597) 207.

⁶⁰⁴ Dutfield and Suthersanen (n 600) 86.

⁶⁰⁵ *ibid.*

⁶⁰⁶ *ibid.*

⁶⁰⁷ See Jean Vincent, '10 Music Contracts' (2009) UNESCO <http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/10Music_en.pdf> accessed 28 May 2017; See also iMusician, 'Licensing Agreements in the Music Business' <<https://www.imusicandigital.com/en/licensing-agreements/>> accessed 28 May 2017.

agreement contain a minimum standard or choice-of-law rule for establishing who is a work's author or, apart from Article 14bis (2) of the Berne Paris Act dealing with rights in cinematographic works, for determining who is the work's initial owner. Case law on this issue is sparse.⁶⁰⁸ The absence of supranational norms of authorship and ownership means that claimants may encounter varying outcomes depending on which domestic rules a court finds competent to resolve a conflict of authorship or ownership.⁶⁰⁹ While the facts of many cases present a question of what law should be applied to determine authorship and ownership, courts rarely address the question directly; choice of law is typically implicit in the results of these cases.⁶¹⁰

4.4.3.1.1 Lex Loci Protectionis

There is a position that believes that issues of authorship and initial ownership of literary and artistic works are as a rule to be determined under the law of protecting country.⁶¹¹ Traditionally, the choice of law rule of *lex loci protectionis* (the law of protecting country) governs non-copyright issues.⁶¹² Article 5(2) of the Berne Convention provides the law of the protecting country that '... apart from the provisions of this convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed by the laws of the country where protection is claimed'.⁶¹³ This law of the protecting country is the law of the country in which the work is being used, in which the exploitation of the work takes place.⁶¹⁴ Under this approach, if A, a US national, creates and first publishes a work in the US under circumstances in which A's employer B, as the work's author and first owner. If A's works are being used in France then the protecting country's law, French law, will be

⁶⁰⁸ Goldstein (n 597) 136.

⁶⁰⁹ Jane C Ginsburg and Édouard Treppoz, *International Copyright Law: US and EU Perspectives: Text and Cases* (Edward Elgar Publishing 2015) 532.

⁶¹⁰ Goldstein and Hugenholtz (n 721) 136.

⁶¹¹ See, eg, Fawcett and Torremans (n 493) 481. ("All convention provisions must be interpreted as adhering to the general rule that the law of the protecting country is the applicable law Any alternative interpretation favouring the application of the law of the country of origin or the law of the forum as a general rule is no longer acceptable."); William Patry, 'Choice of Law and International Copyright' (2000) 48 Am J Comp L 383. ("It follows from the principle of territoriality that the creation, scope and termination of copyrights are to be governed by the law of the protecting country").

⁶¹² Fawcett and Torremans (n 493) Ch2.

⁶¹³ Article 5(2), Berne Convention.

⁶¹⁴ Fawcett and Torremans (n 493) 467.

applied so that A will, nonetheless, be considered the work's author and first owner because in France the usual case is that only flesh-and-blood creators are recognised as a work's author. Thus, the *lex protectionis* is a problem because it demands the question of who initially owns a work to the laws of all the countries where the work is protected. If one were to let the *lex protectionis* govern issues of initial ownership, the result would be legal uncertainty as to who qualifies as initial right owner.⁶¹⁵ And the potential worse situation is foreign rightsholders' legitimate interests would be discriminated by local institutions. The law of *lex protectionis* does not necessarily give the creator the best protection available vis-a-vis other potential right-owners such as a producer, employer or investor.⁶¹⁶

4.4.3.1.2 Country of Origin

Another position believes that authorship and initial ownership are to be determined according to the law of the work's country of origin rather than the law of the protecting country.⁶¹⁷ In the preceding example, where the United States was the work's country of origin, this approach would require treating the corporate employer B, and not the creative employee A, as the work's author and initial copyright owner in all protecting countries. Ricketson seems to suggest that it is for the provisions of the private international law of each individual country to determine freely which rule on jurisdiction it will operate in relation to the creation and the validity of copyright.⁶¹⁸ He clearly rejects an overlap between the country whose law is applicable and exclusive jurisdiction of the courts of that country.

Both the *lex protectionis* and *lex fori* rules do not contribute to legal certainty in the context of private international law. Even if copyright laws were very different, the *lex protectionis* still is not the obvious choice if one favours a truly pro-author conflict rule (author in the sense of actual creator). The multiplicity of laws that govern ownership questions not only creates legal uncertainty for the actual creator as to his or her position but applying the *lex protectionis*

⁶¹⁵ Drexl and others (n 64) 296.

⁶¹⁶ *ibid*, 292.

⁶¹⁷ See *Itar-Tass Russian News Agency v. Russian Kurier, Inc* 2d Cir [1998] 152 F3d 82 (Court of Appeals, 2nd Circuit) 11. See also Brussels Convention on the Jurisdiction and Enforcement of Civil and Commercial Matters, art. 16(1) (1968).

⁶¹⁸ Fawcett and Torremans (n 493) 14.

means applying the law of the country where exploitation of the work is taking place. That law does not necessarily give the creator the best protection available vis-a-vis other potential rights-owners such as a producer, employer or investor.

4.4.3.1.3 Proposed Solution

In the digital environment, however, universal ownership of copyrights would be a better solution to the issue of legal uncertainty, since conflicts between coexisting rights in a global medium would vanish.⁶¹⁹ It has to be observed that the legal uncertainty is not derived from the fact that it is unpredictable which law applies, but from the fact that a multitude of laws apply simultaneously.⁶²⁰ Therefore, it is proposed that rather than making ownership subject to the different laws of the different countries in which the work is exploited, which could lead to uncertainty in the exercise of rights, it makes more sense to identify an owner who will, initially, be considered the owner of these copyrights throughout the member countries of the Berne Convention.⁶²¹

Some researchers propose the creator's law based on functional allocation⁶²² as an alternative choice-of-law rule to deal with the issue of legal uncertainty caused by the application of multitude laws of initial ownership. The objective of functional allocation is to protect weaker parties. It is used to guarantee that the "weaker" party is protected according to the laws of the country where the economic or social activities of the party are typically concerned. Functional allocation as a principle with a protective function could also be made the leading principle for issues of initial ownership. Using a creator oriented connecting factor corresponds well with the objective of copyright and related rights law where rights allocation is concerned, namely to reward and stimulate authors – notably the actual creators of works. Given the protective function of the law of copyright and related rights towards the actual creators or performers,

⁶¹⁹ Josef Drexl and Annette Kur, *Intellectual Property and Private International Law: Heading for the Future* (Bloomsbury Publishing 2005) 248.

⁶²⁰ *ibid*, 290.

⁶²¹ For considering non-member countries would not have incentive to join the convention if the protection of copyright is automatically universal throughout the world, it is better to limit the scope of protection within member countries. See Patry (n 611).

⁶²² Drexl and Kur (n 619) 289–294. "Mireille Van Eechoud, alternatives to the *lex protectionis* as the choice-of-law rule for initial ownership of copyright."

who are regarded as the weaker parties compared to other parties involved in the production and dissemination of works (producers, publishers), functional allocation should be the guiding principle for initial ownership.⁶²³

The creator's law, meaning the law of the country where the actual creator has his/her habitual residence, should be the principal candidate to determine who owns copyright.⁶²⁴ This goal is also in accordance with the objectives of most copyright laws which primarily seek to protect and reward actual creators.⁶²⁵ To achieve the objective of addressing legal certainty while giving due respect to the diversity in allocation regimes, the term "author" should be given an autonomous "super-national" interpretation, and a predictable choice-of-rule should be provided.

Generally, if one were to let initial ownership be governed by the author's law, one would first have to determine which law's definition of author should be used. As discussed above international treaties have not given a proper definition of author but only provide that to benefit an "author and his successors in title".⁶²⁶ It has to be specified clearly whether authorship is limited to natural persons or authorship can be vested in a legal entity. If a natural person as the author is a rule, employment contract should be able to opt-out (general rules concerning the transfer of title). What is more, that author's habitual residence has jurisdiction is a better choice of law rule. That means the use of connecting factors linked to the actual creator or performer, notably the habitual residence at the time the work was created or first performed. If the author changes their habitual residence during the creation, the last habitual residence, i.e. the one at the time of completion of the work, rather than the one at the beginning or in between, seems the more appropriate connecting factor.⁶²⁷

⁶²³ *ibid*, 296.

⁶²⁴ *ibid*, 305.

⁶²⁵ *ibid*, 298.

⁶²⁶ Article 2(6), Berne Convention.

⁶²⁷ Drexler and Kur (n 619) 298.

4.4.3.2 Exploitation Contractual Issue

The Berne Convention and WIPO Internet Treaties have also recognised that the author's economic rights can be transferred or assigned to a third party.⁶²⁸ This rule is intended to allow the author or right-owner to profit financially from their creation, and includes the right to authorise the reproduction of the work in any form.⁶²⁹ The performers also have the rights to authorise the public performance of their works.⁶³⁰

Certainly, the owner of a copyright is free to exploit the right himself. "Exploit" in this context means to develop or make use of it. In many cases, however, that exploitation is, at least partially, carried out by third parties. In such cases, a contract for the exploitation of the copyright is concluded between the owner and another party who will exploit the right. A contract for the exploitation of copyrights can take various forms.⁶³¹ The most common forms are assignments and licences.⁶³² A licence allows someone to use the work, for example reproduce it, in a specified way in a specific territory for a limited period of time. But in practice they may also use an assignment to sign away part or all of the rights to another party. An assignment can be registered in scope and in time. A copyright transfer is not necessarily similar to the assignment of the complete right.⁶³³ It is possible to transfer only part of the rights or to stipulate that, at the end of a certain period of time, the transfer will be undone and that all the rights will return to the original owner of the copyright at that time. In practice, however, it can hardly ever happen. Since, after a period of time the ownership of rights might have been transferred to subsequent licensees, or the first licensee cannot be allocated because they cannot be found. Copyright assignment is the complete transfer of all copyrights and is also called sale of copyrighted works.

Exploitation contracts influence copyright balance which is announced to be protected by copyright law. In the music industry, copyright exploitation contracts, basically, happen

⁶²⁸ Article 14, Berne Convention; Article 6, WCT; Article 8, WPPT.

⁶²⁹ Article 9, Berne Convention.

⁶³⁰ Article 11, Berne Convention.

⁶³¹ Fawcett and Torremans (n 493) 74.

⁶³² *ibid.*

⁶³³ Stamatoudi (n 580) 58.

between authors/performers and producers/publishers/CMOs which are also called intermediaries, exploiters, investors or gatekeepers (hereafter intermediaries). All these types of contracts have in common the fact that they involve a transfer of certain rights to do certain acts which would otherwise have constituted an infringement of the copyright in question. When copyright involves a commodity business usually in forms of transferring contracts, authors' interests become secondary.⁶³⁴ In any commodity business, the most benefits flow to gatekeepers because they have most leverage in contracts for the purchase and sale of the commodity. This is particularly true in the case of creative works, where there is a large oversupply of people who want to get through the gate.⁶³⁵ Contracts with such gatekeepers are hardly ever negotiable and are drafted by the gatekeepers for their own benefit. Gatekeepers most often have superior bargaining power. The creators of copyrighted works are not guaranteed to receive substantial or even fair benefits under copyright contracts. The existence of copyright merely means that the creators have something to bargain away, according to whatever leverage they may have, which is most often very little.

In the digital environment contracts are increasingly used by copyright owners to control the use of their works online.⁶³⁶ Three types of contractual clauses can be identified that have potential to undermine the balance protected by copyright law between authors and exploiters – those that inhibit future copyright holders from exploiting their rights; those that extend copyright style controls into new areas; and those that exclude copyright style controls contrary to the rules found in copyright law.⁶³⁷ These three types of contractual clauses affect the ability of right holders to exploit their copyright, for contracts can require both wider and narrower degrees of exploitation.

However, creators' weak position has not been paid enough attention yet, although some countries have formulated some regulatory tools that attempt to balance the bargaining powers of the parties. For example, the provisions relate to ownership, requirements of form, scope of

⁶³⁴ Patry (n 611).

⁶³⁵ *ibid.*, 29.

⁶³⁶ Griffin (n 491).

⁶³⁷ *ibid.*

rights transferred, rights to remuneration, effects on third parties, revision and termination and unfair contracts.⁶³⁸ The evidence to prove the effectiveness of these provisions is very limited.⁶³⁹ For example, the new Dutch copyright contract law aims to strengthen the position of the author and performer in exploitation agreements, and will ideally lead to them receiving a fairer share of the profit from their work.⁶⁴⁰ It remains to be seen, however, whether the changes will have the desired effect.

Increasing numbers of copyrighted works are exploited internationally and many of the contracts now cover the worldwide exploitation of the copyright concerned. Contracts in relation to the international exploitation of copyrights have always given rise to complex choice of law problems. These problems have, in recent years, been aggravated by the growing importance of this international exploitation. However, there is no private international law that offers a uniform choice of law rule for copyright contracts. The comparative analysis of the contractual protection of authors in the legislation of the member states reviewed shows a lack of harmonisation and great disparities in the application of the existing rules, from legal regimes with very detailed provisions to regimes favouring a higher degree of contractual freedom.

4.4.4.2.1 There Is a Choice of Applicable Law

Contractual parties are free to choose the law applicable to the contract. This principle is internationally acknowledged and it applies equally to both copyright licensing and copyright assignments, and thus, also to copyright contracts. In the EU, the Rome I Regulation provides that parties can select the law applicable to all or part of their contract. The choice may be expressed or implied so long as it is ‘demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case’.⁶⁴¹ When the parties make an express or implied choice of law, this choice will be the applicable law that does not need to have a particular

⁶³⁸ Kretschmer and others (n 12).

⁶³⁹ *ibid.*

⁶⁴⁰ Dirk Visser, ‘The Open Access Provision in Dutch Copyright Contract Law’ (2015) *Journal of Intellectual Property Law & Practice* 161.

⁶⁴¹ Art 3, Rome Convention.

connection with the contract.⁶⁴² Likewise, the newly approved Principles on Choice of Law in International Commercial Contracts has also adopted the same principle in Article 2(4) which is applicable to copyright contracts – ‘no connection is required between the law chosen and the parties or their transaction’.⁶⁴³

The freedom of choice of law would lead to practical difficulties to contractual parties, especially for creators. For example, country A’s composer and country B’s producer reached a music production agreement which chooses country C’s copyright law as the applicable law since the law is from a neutral third-party country. However, the national copyright laws of the three countries have stipulated different formal requirements for effecting a copyright assignment. Country A requires the assignment of copyright should be made in a formal writing agreement, but countries B and C do not have such requirements; country C’s copyright law also forces the composer to assign/waive his/her moral rights which is also contrary to country A’s law; in addition, the transferrable economic rights have been listed under country A’s copyright law which, however, do not have such categories under country C’s law. Besides, there might be another practical problem raised by the language barriers. It is not realistic to expect a composer to have command of different languages and comprehend the terms and conditions of the contract written in foreign languages, in either countries’ laws.

Territoriality, the principle that a country’s prescriptive competence ends at its borders, is the dominating norm of international copyright cases.⁶⁴⁴ Due to this principle and the minimum harmonisation of copyright law, national copyright laws usually have set up national copyright rules, such as exemptions and limitations and provisions of mandatory national copyright contract law in the first place. On the one hand, the practical problems mentioned above occur when national mandatory rules have to be respected. That is to say in the context of global

⁶⁴² Stamatoudi (n 580) 55; art 3, Rome I Regulation.

⁶⁴³ HCCH, Principles on Choice of Law in International Commercial Contracts, Art 4. The Hague Principles are not formally binding. They provide a comprehensive blueprint to guide users in the creation, reform, or interpretation of choice of law regimes at the national, regional, or international level.

⁶⁴⁴ Eugen Ulmer, *Intellectual Property Rights and the Conflict of Laws: A Study Carried Out for the Commission of the European Communities, Directorate-General for Internal Market and Industrial Affairs* (Kluwer Academic Publishers 1978) 13-14.

exploitation of copyright works, copyright and copyright contract law still remain national or territorial in nature in the digital era. On the other hand, if the mandatory national copyright rules are allowed to be overridden by copyright contracts,⁶⁴⁵ another problem of unbalanced protection of creators, which is the main concern of this chapter, will occur due to creators' weak negotiating position. Therefore, it can be concluded that there are two problems with the principle of territoriality. First, the grant of copyrights comes from the activity of creation as a universal right rather than an authorisation from a national copyright law, especially in such a digital world where copyrighted works can easily be shared globally. Second, the territorial principle also raises serious problems in private international law. Thus, in the copyright area this principle should be removed.

4.4.4.2 Non-Choice of Applicable Law

Another situation is in the absence of a choice of law where the law of the country of the assignor/licensor shall govern.⁶⁴⁶ For some reasons the parties to an international copyright agreement fail to choose an effective applicable law in the contract. The law that applies to the agreement will be the law with the most significant relationship to the contract.⁶⁴⁷ If the parties omit the choice of law, courts will, if the facts allow, imply the presumably intended choice of law into the agreement. If, however, the parties intentionally omit the choice of law, courts will commonly weigh generalised interests in contract certainty against particularised party interests of efficiency and equity.

In the case of a relatively simple contract of transferring copyright interest in return for payment or an ongoing obligation to pay royalties, it is the *act* of transferring the copyright interest that constitutes the contract's characteristic performance. So, the applicable law is the law of the country where the copyright transferor resides or has its central business office. In the more complex, and far more common, international copyright arrangement, where the licensee

⁶⁴⁵ Copyright contractual terms override national mandatory rules are usually in three forms: exceeds the limitation of copyright law; include clauses which are not protected by copyright law; and inhibit future holders from exploiting. See Pedro Alberto De Miguel Asensio, *The Law Governing International Intellectual Property Licensing Agreements (A Conflict of Laws Analysis)* (Edward Elgar Publishing 2013) 312.

⁶⁴⁶ Drexl and Kur (n 619) 130.

⁶⁴⁷ Ginsburg and Treppoz (n 609) 703.

undertakes not only to pay royalties but also affirmatively to exploit the copyrighted work, the contract's characteristic performance will usually be identified with the licensee. The rationale for this conclusion is evident. The licensee is investing his/her labour and capital in exploiting the copyright, and the contract's economic success, for both licensor and licensee, will depend on this investment. Therefore, it is the investment rather than the assignment that constitutes the characteristic performance. In the case of some complex copyright contracts, the country with the closest connection will be the country where the work is actually exploited – for copyright purposes, the protecting country.

In a nutshell, the drawback of the rule of non-choice of applicable law is that it will not always be clear which choice a court will make. The applicable law in the absence of choice, therefore, has to be conducted on a case-by-case basis. For highly complex IP contracts, recourse will frequently be had to the closest connection escape route.⁶⁴⁸ This will cause extreme uncertainty and unpredictability to contractual parties, especially to authors who are deemed in the weak position.

4.4.4.2.3 National Treatment

Article 5(1) of the Berne Convention stipulates the national treatment, that is, that the same substantial rights are to be granted to foreigners and nationals.⁶⁴⁹ The Rome Convention also obligates member countries to “grant national treatment”.⁶⁵⁰ National treatment is a rule of non-discrimination, promising foreign creators who come within the treaty's protection that they will enjoy the same treatment for their creations in the protecting country as the protecting country gives to its own nationals.⁶⁵¹ This can only be achieved through the application of the law of the protecting country. So, national treatment also embodies a choice of law rule that makes the law of the protecting country govern the scope of protection for a foreign work. Any alternative interpretation favouring the application of the law of the country of origin or the

⁶⁴⁸ Jan Rosén, *Intellectual Property at the Crossroads of Trade* (Edward Elgar Publishing 2012) 28.

⁶⁴⁹ Article 5, Berne Convention.

⁶⁵⁰ Article Rome Convention.

⁶⁵¹ Goldstein (n 597) 72.

law of the forum as a general rule is no longer acceptable as it would be in breach of Article 3 of the TRIPs agreement.

In brief, it is imperative to establish uniform private international law rules to deal with international copyright contract issues in such a digital era where increasing numbers of copyright contracts happen every day. Such choice of law rule should be legislated in accordance with the objective of economic fairness, not only for local small rightsholders but also for foreign rightsholders due to their weak negotiating position. The only solutions would be the creation of a special convention or of special contract choice of law rules for contracts relating to the international exploitation of copyrights.⁶⁵²

4.4.3.3 Copyright Licensing Contract Issues

In the digital era, cross-border licensing happens more frequently and has become the primary trend of exercising copyrights. For example, a foreign musician grants a licence for a copyright which he/she owns in country B to a company in country C. Or another pervasive phenomenon is musicians grant a global licence through the internet. When a foreign element is brought into the licence, private international law and choice of law will get involved and raise both contractual issues and copyright infringement issues.

Although cross-border licensing of copyrights has become so essential, the research in this area is not certain enough that there is not even a standard definition or understanding of the nature and scope of copyright licensing at international level. This is because copyright contracts can be very different in nature. As CLIP (the European Max-Planck Group on Conflict of Laws in IP) commented, ‘the wide variety of contracts relating to IP rights calls for a differentiated solution instead of one strict, clear-cut rule’.⁶⁵³ In the music industry, cross-border licensing is of utmost importance for owners in terms of exercising copyrights. A better use of musical

⁶⁵² Fawcett and Torremans (n 493) 592.

⁶⁵³ CLIP, Comments on The European Commission’s Proposal for A Regulation on The Law Applicable to Contractual Obligations (Rome I) of 15 December 2005 And the European Parliament Committee on Legal Affairs’ Draft Report on The Proposal Of 22 August 2006, 4 January 2007, available at: <<http://www.cl-ip.eu>> accessed 15 February 2017.

works by means of licensing and commercial exploitation is central to successful business models,⁶⁵⁴ and technology opens the music market to the whole world. Accordingly, stakeholders need a certain and predictable legal framework which not only defines and protects copyrights as such but also enables and facilitates copyright transactions and, particularly, copyright licensing transactions. To design a predictable copyright licensing policy, first of all the nature of copyright licensing agreements has to be made clear. Whether a copyright licensing agreement is a contract or not determines what private international law rule would apply.

4.4.4.3.1 The Nature of Copyright Licensing

There is a contested debate about the question whether a copyright licence is a contract or not. Moglen explains the difference between a contract and a licence: a licence is a unilateral permission to use someone else's property; a contract, on the other hand, is an exchange of obligations, either of promises for promises or of promises of future performance for present performance or payment.⁶⁵⁵ Therefore, the distinction between licence and contract is very clear, a copyright licence is a unilateral permission in which no obligations are reciprocally required by the licensor; however, parties of a contract have obligations to perform the contract.

The interesting *Falco* case⁶⁵⁶ in the EU has discussed further about this question. It was decided by the ECJ in April 2009.⁶⁵⁷ The ECJ held that a licence agreement – defined as a contract

⁶⁵⁴ See Brussel, COM (2011) 287 final, Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions. "Single market for IP rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe."

⁶⁵⁵ Eben Moglen, 'Enforcing the GNU GPL' (*GNU Operating System*, 10 September 2001) <<https://www.gnu.org/philosophy/enforcing-gpl.en.html>> accessed 30 May 2017.

⁶⁵⁶ *Falco Privatstiftung v. Weller-Lindhorst* [2009] ECR I C-533/07.

The case concerned the exploitation of rights in the music of Falco. Falco was an Austrian rap, pop, and rock musician who died in 1998. The claimants were both domiciled in Austria: Thomas Rabitsch, a former band member, and Falco Privatstiftung, a foundation established to manage the copyright in Falco's works. The defendant domiciled in Germany was Gisela Weller-Lindhorst, a media seller. The parties entered into a licence agreement under which the defendant was licensed to distribute in Germany, Austria, and Switzerland a video recording of a Falco concert. The defendant did this but also engaged in the allegedly unlicensed distribution of audio recordings of Falco's music in these territories. The claimants brought proceedings against the defendant for the non-payment of royalties in relation to the video recordings, and a copyright infringement claim in relation to the audio recordings.

⁶⁵⁷ For more analysis about this case from a private international law perspective, see Benedetta Carla Angela Ubertazzi, 'License Agreements relating to IP Rights and the EC Regulation on Jurisdiction' (2009) 40 IIC 912.

under which the owner of an IPR grants its contractual partner the right to use that right in return for remuneration – does not constitute a contract for ‘the provision of services’ under Article 5(1)(b) of the Brussels Regulation.⁶⁵⁸ The court answered negatively to this question by stating that ‘the concept of services implies, at the least, that the party who provides the services carries out a particular activity in return for remuneration’.⁶⁵⁹ In the light of this requirement, the court decided that it cannot be inferred from a licence agreement that the licensor provides such a service,⁶⁶⁰ because ‘the owner of an IP right does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to exploit that right freely’.⁶⁶¹ A common sense approach to the concept of ‘services’ implies that the ‘provider’ at least carries out a particular activity in return for remuneration. The ECJ took the view that the owner of an IP right does not perform any particular activity in granting a licence to a third party to use that right, but merely undertakes not to challenge the use of that right by the third party.⁶⁶² Therefore, according to the ECJ’s judgement, a copyright licence, in which a mere payment does not constitute a provision of service, is distinct from a contract which binds both parties to perform their obligations.

Another position describes the obligation of the author or his/her successor in title with a term of “characteristic performance”. This method focuses on the nature of copyright licensing but avoids distinguishing copyright licensing agreements from copyright contracts. Researchers classify copyright licences into four different situations according to whether an obligation of characteristic performance exists between the contractual parties.⁶⁶³ First, the countervailing obligation to pay an agreed sum of money, which is an obligation that is found in a great variety of entirely different types of contract, cannot constitute the characteristic performance of a certain contract. Second, the assignment or transfer of a copyright from one publisher to another is a pure sale in which no characteristic performance is involved. Third, if in a licence

⁶⁵⁸ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶⁵⁹ Falco case (n 656) para. 29.

⁶⁶⁰ *ibid*, Para 30.

⁶⁶¹ *ibid*, Para 31.

⁶⁶² Paul Joseph, ‘ECJ Rules On Jurisdiction For IP Licence Disputes’ (2009) 4 *Journal of Intellectual Property Law & Practice* 616.

⁶⁶³ Stamatoudi (n 580) 58.

a grantee undertakes the obligation to exploit or exercise the rights, then the characteristic performance is performed by the exploiter of the work. This often happens in CCM when CMOs perform the characteristic performance and publication contract. The last situation is the assumed obligation of characteristic performance which is not contained in the copyright contract.

One of the purposes to analyse the nature of a copyright licensing agreement is to apply a proper law. If the terms of a copyright licence are violated, it will be enforced as a violation of copyright law, not contract law. For example, the licence may restrict how the music can be streamed, downloaded or modified. If an exploiter violates the terms of the licence, he/she will lose the licence and may be blocked to use it in the future. If the issue is still not resolved, the right-owner might go to court to sue for infringement of his/her copyright, rather than sue for violation of contract. However, the difference between licence and contract is very subtle, and, under some conditions, a licence can also be deemed as a contract. The principle of “characteristic performance” has, in fact, provided an alternative to solve the question. To decide which law can apply depends on whether there is a characteristic performance obligation rather than defining the agreement if it is a licensing agreement or copyright contract.

4.4.4.3.2 Applicable Law to Copyright Licensing Contracts

Because there is no standard conflict of law rules for cross-border copyright contracts, the current tradition is that the law applicable to contractual obligations will apply. So, the principle of the parties to freely choose the law applicable to the contract applies to copyright licence as well. The parties are free to choose any law that does not need to have a particular connection with the contract. In the absence of a contractual choice of law, the copyright licensing agreement shall be governed by the law of the country with which the contract is most closely connected. The closest connection is usually decided by court.

The close connection rule, however, still cannot solve the problem of legal uncertainty and unpredictability, and more importantly it will break the balance of interests of small rightsholders. Take the EU Rome I regulation for example, when Article 4 of the Rome I

Regulation is applied, issues can arise by the complex nature of copyright licensing contracts. The closest connection can refer to the country of the author, right-owner, and the country of the publisher, recording company or broadcaster, as well as the protecting country. When considering the characteristic performance of the contract, Article 4(1) refers to the law of the habitual residence of the exploiter or licensee or transferee for distribution contracts, franchise contracts or other exploitation contracts. Article 4(2) then deals with all types of contracts that are not found in the list. It means under the situation where the licensee or transferee does not have the characteristic performance obligation, the law of the habitual residence of the licensor or transferor will apply. But, when a musical work is jointly created by more than two creators who are from different countries, the habitual residence rule cannot lead to a single applicable law. Another situation is when CMOs, as the characteristic performance party of the licensing contract, manage the copyrights on behalf of creators in more than one country, as the country cannot be determined easily when rights are granted in many countries.

In summary, the current conflict of law rules do not provide optimal solutions to deal with the issues concerning international copyright contracts. Cross-border copyright contracts call for independent predictable conflict of law rules. To fulfil economic fairness in cross-border copyright licensing, further action has to be taken in the field of private international law to provide certain and predictable conflict rules for copyright contracts in order to balance creators' interests nationally and internationally.

4.5 Discussion and Conclusion

One copyright law's multifunction is to balance economic interests between stakeholders and to achieve economic fairness. But this balance has been broken by copyright licensing activities, usually, by means of various forms of copyright contracts, which eventually leads to the "winner-take-all" phenomenon. The unbalanced distribution of copyright revenues between rightsholders is mainly caused by ineffectively regulated copyright contracts and collective management of copyright. This chapter primarily deals with the former issue in the context of international copyright law.

After a positive discussion and Rawlsian analysis of economic fairness of the copyright legal system, it has been found that international commercial copyright licensing activities call for independent, uniform and predictable conflict of law rules for balancing small rightsholders' economic interests nationally and internationally, and for facilitating the free cross-border flow of musical works in a just way. To achieve this objective, a harmonised conflict of laws system for dealing with international copyright contract disputes is essential and imperative. The current conflict of law rules cannot deal with the copyright contract issues properly. The uncertain and unpredictable rules have caused economically and timely inefficiency for individual rightsholders, especially for foreign rightsholders.

This chapter has analysed these issues existing in the area of private international law from three main copyright contract perspectives: initial ownership contracts, exploitation contracts and licensing contracts. It finds that either when there is a choice of law between the contractual parties or there is not an effective choice of law, the present rules of conflict of law are not in favour of individual creators. Both the rules of jurisdiction and applicable law are out-of-date and have not properly taken the individual creators' interests into account. The harmonisation of the rules of conflict of laws is necessary because the present network of international conventions does not provide a complete set of tools for resolving such conflicts.⁶⁶⁴ Rightsholders, especially individual creators, need a more certain and predictable conflict law system to rely on for effectively enforcing their economic rights. As discussed above, private international law is one of the hurdles of the free cross-border flow of musical works.⁶⁶⁵ It proposes that with regard to the authorship and ownership, which are relevant contractual issues, the definition of authors has to be harmonised internationally, and that the author's habitual residence has jurisdiction, is a better choice of law rule. It also has to pay attention to balance interests of foreign rightsholders who are in a position in international copyright contractual negotiations. As to licensing contracts, the close connection rule needs to be reformed since it cannot solve the problem of legal uncertainty and unpredictability, and more importantly it will break the balance of interests of small rightsholders.

⁶⁶⁴ François Dessemontet, 'Conflict of Laws for Intellectual Property in Cyberspace' (2001) 18 J Int'l Arb 487.

⁶⁶⁵ See section 4.2.2.

The mission of a balanced copyright law is not only to balance small rightsholders interests, but also to balance users' interests and preserve and develop cultural diversity for the society. Following on from the discussion of the multifunction of copyright law, the next chapter will examine copyright law's social-cultural functions.

Chapter 5 – The Objectives of Social and Cultural Function – International Public Interest and Cultural Diversity

5.1 Introduction

The objective of social function is to take public/general interest into consideration.⁶⁶⁶ The method to achieve this objective is to allow the rights of individuals to be weighed against their competing rights, to balance competing interests. The role of law is to assure the peaceful coexistence of human groups or, as is often said, to harmonise the activity of members of society.⁶⁶⁷ Thus, the role of copyright in disseminating information products and promoting welfare can only be effectively realised when copyright law reflects a real balance between the competing interests of protection and access.⁶⁶⁸ In a word, it is the basis for the social order, which could only be achieved through a balance between opposing interests.⁶⁶⁹ The clause of social function, however, does not appear in any of the EU texts, where it is generally substituted by the notion of general/public interest.⁶⁷⁰ Scholars draw an analogy between general interest and social function.⁶⁷¹ There is a recognition and provision for the public interest goals of copyright at international level.⁶⁷² However, the term “public interest” is a vague concept that needs to be clarified. Public interest should not be a general concept without specific targets. It has to identify the specific types of uses that can benefit from the copyright LEs. Put differently, which groups’ interests fall within the public interest? There are at least three existing justifications claiming public interest,⁶⁷³ but none of them offer a perfect

⁶⁶⁶ Geiger (n 43).

⁶⁶⁷ *ibid.*

⁶⁶⁸ Ruth L Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (International Centre for Trade and Sustainable Development (ICTSD) 2006).

⁶⁶⁹ See Geiger (n 42).

⁶⁷⁰ Roberto Caso and Federica Giovanella, *Balancing Copyright Law in the Digital Age: Comparative Perspectives* (Springer 2014).

⁶⁷¹ *ibid.*

⁶⁷² Preamble of WCT and WPPT.

⁶⁷³ First argues that intellectual commons is jointly owned by the public. The problem is as Nozick questioned “spills a can of tomato sauce in the ocean is not able to be authorised a right over the whole ocean; instead he loses the tomato sauce” (see Lawrence Lessig, ‘The Creative Commons’ (2003) 55 Fla L Rev 763; Robert Nozick, ‘Distributive Justice’ (1973) *Philosophy & Public Affairs* 45); Second argues that intellectual commons is open to

explanation. Although references to an overarching public interest purpose for copyright protection has been made throughout the history of the international copyright system, there has been insufficient attention directed at infusing these public interest ideals with definitive content, scope, and character. Hence, this chapter discusses the nature of copyright users' rights, for the purpose of defining the meaning, scope and character of public interest and copyright's LEs. In order to achieve the goal of establishing a more balanced copyright legal system aiming at fulfilling justice between different interests at stake, a consolidated LEs system for the exercise of copyrights needs to be formulated.

Musical works as cultural goods have cultural values. As demonstrated in chapter 2, cultural values of musical works interact with their economic and social values. However, the study on the cultural objective of copyright law in musical works is extremely insufficient. Thus, this chapter will also discuss the cultural objective of copyright law. This chapter starts with a doctrinal analysis on users' rights in section 5.2. This section examines copyright LEs in international copyright treaties and identify their main issues within the international copyright legal framework. Then, it investigates the existing national LEs worldwide and the trend of recent development of the research in public interest, and argue to codify users' rights for the type of uses for music education and study purposes. Section 5.3 offers a Rawlsian analysis of the social function of copyright legal framework, aiming to provide an ethical justification for codifying users' rights for music education and study purposes. Section 5.4 specifically studies the LEs system for education and research purpose and libraries' rights at the global level, and suggests to codify global public interest and a mandatory LEs system for libraries and explores the feasibility of a compensation scheme for it. However, this chapter will focus on the justification and nature of mandatory LEs for libraries rather than researching the detailed provisions. Section 5.5 navigates to the discussion on cultural function of copyright legal framework. It examines the current legislation regarding cultural diversity and demonstrates

all, which is in essence based on Locke's labour theory (See Samuel Pufendorf, 'De Jure Naturae et Gentium Libri Octo' (1672), the translation of 1688, Charles Henry and William Abbott Oldfather(ed) (New York, London, 1964) 17 (2), IV, 4,5); Third one stands on the ground of social interests, claiming intellectual commons should continue to be enlarged to benefit more individuals, which is based on "social planning theory" that requires people share high standard ethics (See Drahos (n 8) 61).

the justification, desirability and feasibility to incentivise cultural diversity at global level in music sector.

5.2 LEs in International Copyright Legal System

In order to maintain a just balance between the interests of rightsholders and copyright-users, the embodied principle of social justice by means of LEs is used to restrain exclusive rights. Accordingly, the protected works may be used without the authorisation of the right-holder(s), and with or without payment of compensation. As a specific mechanism to implement the goals and objectives of international copyright law, a just international copyright LEs system is a challenging mission for policy-makers in that they have more considerations for designing LEs at the global level. Firstly, at national law level, this appropriate balance between owners/users is a dynamic experiment that is not easily achievable, particularly in an environment where social and economic expectations by users and creators are changing along with the ever-shifting development of technologies. Second, in the global context, determining the appropriate balance is understandably more complex because the following need to be considered: international protection of LEs and the extent of domestic discretion; and the interests between developed and developing countries which have different practical situations.⁶⁷⁴ The second balance can be called the “domestic / international balance.”⁶⁷⁵ In addition, the digital age impels a greater demand for the development of a robust public interest ideology to balance the rights of owners and users, and to preserve the basic building blocks of future innovation and creativity.

The existing international copyright treaties, including the Berne Convention, WCT, WPPT and TRIPS Agreement, have recognised the importance of LEs to secure the promise of knowledge goods to improve the social welfare as a whole by means of a three-step test.⁶⁷⁶ This recognition, however, is only a guidance for legislating national copyright law. International treaties leave enough sovereign discretion to national lawmakers.⁶⁷⁷ No

⁶⁷⁴ Okediji (n 668).

⁶⁷⁵ *ibid.*

⁶⁷⁶ See detailed discussion in section 3.4.2.

⁶⁷⁷ *ibid.*

institutional or doctrinal mechanisms fulfilling social objectives have been explicitly established in these treaties. Therefore, copyright LEs, in fact, remains national. In practice, the actual substance and scope of LEs is determined by courts in the course of adjudication. In some parts of the world, particularly in developing countries, administrative agencies, law enforcement offices, public institutions, such as libraries, and even collecting societies, wield significant authority over the determination of what uses are permissible and the applicability of a specific LEs.⁶⁷⁸ Nevertheless, the actual practice of these enforcement agents – both private and public – indeed gives practical meaning to the statutory provisions that provide for access to knowledge goods through LEs.⁶⁷⁹ National legislature experience and practice are vital for the design of international copyright LEs system. However, the three-step test which has been sufficiently discussed in chapter 5, has attracted criticism from researchers.⁶⁸⁰ The elemental goal of the Berne Convention is to build consensus on basic norms and thus eliminate discrimination against works of foreigners. But apparently, this goal has not been achieved by national copyright laws in that the national implementations are various.⁶⁸¹ Some of them have dramatically changed the scope of LEs provided in the Berne Convention.⁶⁸²

It can be concluded that there are four main issues of the current LEs system of international copyright law. First, due to the open-ended and flexible provisions on LEs, the three-step test has placed a difficulty upon courts to identify use privileges based on the test's abstract criteria.⁶⁸³ Second, due to the flexibility of application of the criteria, however, it seems that policy makers have different understandings on the rationale behind them. And this leads to distinct domestic attitudes towards the issue of overridability of LEs. Third, the evolution of LEs did not take place at the same rate or in a corresponding manner to the evolution of rights for creators. The rights of creators were specifically identified and articulated, while copyright

⁶⁷⁸ Okediji (n 668).

⁶⁷⁹ *ibid*

⁶⁸⁰ See Hugenholtz and Okediji (n 541); Christophe Geiger, Daniel J Gervais and Martin Senfleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2013) 29 *American University International Law Review* 581; Kamiel J Koelman, 'Fixing the Three-Step Test' (2006) *European Intellectual Property Review* 407; Christophe Geiger, 'The Three-Step Test, a Threat to a balanced Copyright Law?' (2006) 37 *IIC* 683.

⁶⁸¹ See section 3.2.

⁶⁸² Okediji (n 668).

⁶⁸³ See Geiger (n 522).

LEs are general and ambiguous. The model is regarded as “mandatory rights” versus “permissive limitations” one dominating all the international treaties,⁶⁸⁴ and the modified three-step test under TRIPS has reinforced the primacy of this approach in modern international copyright relations. The permissive language in the Berne Convention has also been utilized by many member countries in a non-mandatory way.⁶⁸⁵ The minimum copyrights provided under the Berne Convention are mandatory, while LEs are discretionary and without any real force in the absence of state action. Fourth, from a macro perspective to consider domestic/international balance,⁶⁸⁶ the sovereign discretion of enacting LEs radically conflicts with the free trade doctrine. The relationship between copyright LEs and free trade principles has to be dedicatedly considered so as to draw a proper balanced line between international harmonisation and domestic discretion with regard to the designation of a just LEs system.⁶⁸⁷ Following on from this section, these main issues will be analysed in depth.

5.2.1 Overridability of LEs

As discussed above, unlike the identified position of “mandatory copyrights”, copyright LEs are regarded as “permissive exceptions” in all the international treaties. Therefore, the national practice shows different attitudes of domestic copyright towards the issue of overridability of LEs. The doctrinal debate has expressed four different attitudes. Some researchers believe that some or all copyright LEs should be essential to protect public interest.⁶⁸⁸ Public interest is a right for consumers and cannot be overridden by commercial contracts or private agreements.⁶⁸⁹ Another stream believes that freedom of contract is indirectly protected by fundamental human rights.⁶⁹⁰ In order to protect consumers as the weaker party of this bargain, legislators have issued a number of statutory limits to contracts.⁶⁹¹ Therefore, they believe that contracts and TPMs are more efficient than copyright law to protect public interest, and ‘fair

⁶⁸⁴ Okediji (n 668).

⁶⁸⁵ *ibid.*

⁶⁸⁶ See section 3.1.

⁶⁸⁷ See section 3.4.2.4.

⁶⁸⁸ Grosheide (n 444); Jessica Litman, ‘The Exclusive Right to Read’ (1994) 13 *Cardozo Arts & Ent LJ* 29.

⁶⁸⁹ See Derclaye and Favale (n 1).

⁶⁹⁰ Guibault (n 441) 115.

⁶⁹¹ *ibid.*, 118-119.

use’ can be safely replaced by ‘fared use’.⁶⁹² In this case, copyright exceptions can be overridden by contracts. In addition to the supporters of copyright limits and proponents of contracts, there is a third group of scholars who commented that contracts and copyright belong to different but complementary worlds, that act in useful synergy.⁶⁹³ Werra argues that the problem is not the conflict between contract and copyright limits, but the problem of price of access to those copyright works.⁶⁹⁴ Guibault concludes that the limits on freedom of licensing contract, including consumer protection law, competition law, constitutional principles and copyright law, appear insufficient to ensure users’ legitimate interests being respected by copyright licensing agreements.⁶⁹⁵

At the international level, the diverse approaches to copyright LEs make it difficult for negotiators of multilateral treaties to settle on an approach acceptable to all signatories. Therefore, the designation of this LEs system under international copyright law becomes vital and is a challenging mission for policy makers. The nature of each copyright LEs is crucial to determine its overridability by some forms of agreements. In practice, this is currently decided on a case-by-case basis. Therefore, it is necessary to discuss the overridability based on different categories of LEs. The most important aspect of the issue is the access price. It has been widely accepted that fair use does not mean free access.⁶⁹⁶

5.2.2 Are Copyright LEs Right, Privilege, Or Permitted Use?

To further define and determine an appropriate scheme of LEs, the exact nature of different uses has to be examined. In recent years, the concept of users’ rights has been emphasised and entrenched in some countries, Canada and the US for example.⁶⁹⁷ Some have defined copyright limits not as rights but either as interests or liberties⁶⁹⁸ or as a ‘claim to the application of a rule

⁶⁹² Derclaye and Favale (n 1).

⁶⁹³ *ibid.*

⁶⁹⁴ De Werra (n 61).

⁶⁹⁵ Derclaye and Favale (n 1).

⁶⁹⁶ See Tom W Bell, ‘Fair Use vs. Fared Use: the Impact of Automated Rights Management on Copyright’s Fair Use Doctrine’ (1997) 76 NCL Rev 557.

⁶⁹⁷ Canada and the US copyright provisions have expressly recognised “user’s rights”.

⁶⁹⁸ Derclaye and Favale (n 1).

of objective right'.⁶⁹⁹ Others claim they are rights of the user, and there should be a clear definition and protection for them in copyright law. Similarly, in American doctrine the entitlements of the user have been sometimes qualified as rights, and sometimes as a mere remedy against market failures.⁷⁰⁰

There is, however, no consensus as to the question of whether users should be authorised with equal competing rights to right-owners. Before proceeding to discuss further the question of the foundation of LEs, the nature of users' rights has to be delved into, answering why they exist and which interests should they protect. Only in this way can it be determined whether the law has been properly conceived because questioning the justification of a rule also makes it possible to evaluate critically whether it achieves its objective. If this is not the case, then it must be corrected.

The concept of "users' rights" has drawn great attention in discussions of the limits of IP in general, and of copyright in particular. For balancing users' interests, some national copyright laws have entrenched user's rights,⁷⁰¹ but the precise nature of user's rights has not been defined or fully discussed. The nature of LEs has important legal ramifications for consumers and other users and the ambiguous nature of copyright user's rights damages the coherence of copyright law and copyright's legitimacy. Generally, the nature of LEs has been defined as rights, privileges, mere defences, or permitted uses. Sometimes these terminologies have been interchangeably used. Hence, it is necessary to clarify the nature and function of these different concepts for the purpose of defining the precise nature of the so-called users' rights and, accordingly, design a just LEs system.

Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (do not) perform certain actions or (not) be in certain states.⁷⁰² If users

⁶⁹⁹ *ibid.*

⁷⁰⁰ *ibid.*

⁷⁰¹ For example, Canadian copyright law.

⁷⁰² Leif Wenar, 'Rights' (2015) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/archives/fall2015/entries/rights/>> accessed 30 May 2017.

have an equal competing right against copyright owners, they can defend their rights to access copyrighted works, in court; if users have not been given deserved right, they can actively sue and claim for judicial remedy. But, the practice has proved that copyright-users have never been given such defended rights against copyright-owners.⁷⁰³ Privilege is one's freedom from the right or claim of another.⁷⁰⁴ According to Wesley Hohfeld's theory of rights,⁷⁰⁵ there are four basic components of rights: the privilege, the claim⁷⁰⁶, the power and the immunity, and he arranged the four elements as opposites as follows:

If A has a privilege, then A lacks a duty;

if A has a claim, then A lacks a No-claim.

and correlatives

If A has a claim, then some person B has a duty;

if A has a privilege, then some person B has a No-claim.

Whether an exception is a right or privilege depends on the rationale that the exception is based on. As discussed above, there are mainly three different rationales of national LEs that have been formed based on fundamental rights, public interest and market failure.⁷⁰⁷ As to the first category of LEs, based on fundamental rights, eg freedom of expression and parody, citation, criticism, and news reporting, they are *user's rights* in which users' have a claim of freedom of expression; and other persons have a duty to not violate this right. However, the second category of LEs, eg for public lending, disabled people, teaching, libraries and archives, that are underpinned by public interest, should be authorised as *user's privilege*. Such users have a user's privilege, and have no duty/freedom to comply with the copyrights, or to say they have immunity of liability to infringement; then, meanwhile, copyright holders have no-claim to users who have privilege, to take the reliability of copyright infringement.

Another terminology, "permitted use", means the use of a copyrighted work is permitted by

⁷⁰³ This will be discussed further below in the French case, *Warner Music*.

⁷⁰⁴ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *The Yale Law Journal* 16.

⁷⁰⁵ Wenar (n 695).

⁷⁰⁶ Hohfeld defines rights (strictly connoted) are exclusively claims.

⁷⁰⁷ See section 3.4.2.

law as an exception to copyright. So, exceptions whether based on user's rights or user's privilege are permitted uses under copyright law or other rules. If a right-holder claims copyright exclusively, users of this work are under a positive duty to not breach it; likewise, if a user claims user's rights, the right-holder is under the duty of not disturbing the use of the work based on the user's right theory. This is the essence of rights that all rights – even the most basic human rights – have substantial limitations arising both from internal theoretical constraints and from external pressures.⁷⁰⁸ It is fully consistent to assert individuals have rights to free speech while accepting these freedoms will be limited by others' rights not to be slandered.⁷⁰⁹ The permitted uses performed by consumers are a *de facto* infringement to owners' copyright, but they negate infringement because law permits them to do so and prevents their liability when users have a contradictory entitlement which has a liberty-immunity structure.

To further defend the arrangement of rights/privilege to different LEs, the French case *Warner Music*⁷¹⁰ will be cited to illustrate its significance and necessity. The nature of user's rights becomes particularly relevant when TPMs restrict the exercise of an otherwise permitted act. In this case, Christophe bought a CD by Phil Collins, "Testify", to discover later that he could not play it on his laptop, nor could he make copies from the CD because of TPMs in place. The defendants insisted that Christophe had no active legitimation to bring the case to court, that a right to private copying was non-existent, and that the private copying exception would have to be interpreted in the light of the so-called three-step test.⁷¹¹ The Court of Appeals concluded that

TPMs must respect certain exceptions, including the private copying exception; and it is a task of the DRM user, the phonogram producer, to make sure that private copying remains possible, despite the application of TPMs... The complete blocking of any possibilities of making private copies was an impermissible behaviour under French

⁷⁰⁸ Breakey (n 44).

⁷⁰⁹ *ibid.*

⁷¹⁰ *Christophe R., UFC Que Choisir v. Warner Music France, Fnac* [2006] JurisData: 2006-292685.

⁷¹¹ *ibid.*

copyright law.⁷¹²

The difference between a right and privilege is that first, if an exception to copyright is a privilege, it does not impose any duty on copyright holders, such as requiring to facilitate the performance of a permitted act. Second, if the exceptions to copyright infringement are rights, the right-holder has the duty to facilitate the access to the works, and in this case the TPMs have to be removed. Any attempt by copyright holders to restrain the exercise of the exceptions is not enforceable.⁷¹³ That is the substantive part of copyright LEs. However, the Court of Appeal made the decision that the private copyright exception to authors' rights was neither on the ground of rights or privilege, but a defence. Unlike the Canadian *CCH* case⁷¹⁴, the French Court did not specify the precise nature of the user's rights as to whether it was a right or a privilege. But, positively, exceptions have been acknowledged from the perspective of users rather than rightsholders.

Therefore, LEs to copyrights which are based on fundamental rights and thereby represent basic democratic values within copyright law, are substantive rights which are of equal value as the exclusive right, and not mere interests to be taken into account. This hypothesis is also consistent with the Rawls's principles that political liberty together with freedom of speech and freedom of thought, are primary goods⁷¹⁵ that cannot be compromised for any reasons except when it conflicts with another basic right, copyright for example. Therefore, such a category of LEs should be explicitly entrenched as mandatory so that user's exercise of statutory limitations cannot be restricted by contract or prevailed over by TPMs. LEs based on public interest are users' privilege that ensure that users are free from the sanction by copyright law, but it might be subject to some conditions, for example copyright law may set up a compensation condition for legitimate use without rightsholders' permission.

⁷¹² *ibid*, (emphasis added).

⁷¹³ Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 IPJ 29.

⁷¹⁴ *CCH Canadian Ltd v. Law Society of Upper Canada*, (n 415).

⁷¹⁵ Rawls (n 137) 61.

5.2.3 Diverse Music Users

Music users are numerous, but not all users enjoy the same legal position in terms of consuming musical works. The purpose of examining the different users is to explore the meaning of public interest and to define the scope of lawful uses. The idea of users' rights is primary and fundamental; the notion of public interest is secondary and derivative. The nature and boundaries of public interest are where our normative analysis should finish, not where it should begin.⁷¹⁶ It is important to identify what kinds of uses are lawful that fall under the legal exceptions, because only lawful uses have the legitimacy to negate infringement to copyright. That is to say the purpose or the inferred purpose of uses that fall under the enumerated LEs are permitted and negate infringement to copyrights. Some users, in particular music learners, are potential creators. Music creators themselves are often music users and, therefore, themselves are dependent upon a robust public domain.⁷¹⁷ This is how public domain being built up that all authorship is fertilized by the work of prior creators, and the echoes of old work in new work extend beyond ideas and concepts to a wealth of expressive details.⁷¹⁸ In music sector, the public domain has expanded to the whole world due to the development of digital technology.

Because of the different characters, music users can be generally classified as commercial users and non-commercial users. Commercial users are those entities who consume music in businesses related activities (eg sports clubs, dance classes, hotels or motels, eating and drinking establishments, and night clubs); or those sound and audio-visual producers who provide music services. They normally directly interact with rightsholders, negotiating the terms and conditions of licensing agreements to their best advantage. Some organisations and leisure businesses pay blanket licences to CMOs. Commercial users exploit musical works for the purposes of making profits, but hardly for re-creations. Non-commercial users, however, include organisational users and individual consumers, who are normally consumers of music for self-appreciation or for non-profit uses, eg music libraries, research institutions, archives

⁷¹⁶ Breakey (n 44).

⁷¹⁷ Tawfik (n 44).

⁷¹⁸ Jessica Litman, 'Copyright as Myth' (1991) 53 U Pitt L Rev 235.

and museums. They play an important role in terms of promoting the sustainable development of music knowledge and maintaining the diversity of culture.

From the different purpose or inferred purpose of use, individual copyright consumption can be classified as transformative use and non-transformative use;⁷¹⁹ active use and passive use;⁷²⁰ creative use and pure consumption.⁷²¹ Transformative use (or active use; creative use) takes place when the user creates a new musical work incorporating an earlier one into it. The good examples are derivative works, such as caricatures, parodies, and pastiches, as well as uses such as quotations for teaching, criticism and scientific research. Non-transformative use (or passive use; pure consumption) is pure consumptive activity in which the user accesses and uses musical works without embedding it into a new musical work. Non-transformative use includes activities such as reading, watching, listening to, and copying for purposes of entertainment, private study, information and communication. For the former category, individuals' transformative use of music is typically for the purpose of re-creation which is consistent to users' rights discussed in last section.⁷²² But, non-transformative uses cannot pass the assessment of social justification or either be justified as users' rights.

Since there is a big difference between the natures of diverse music-users, it is inappropriate to authorise an aggregated users' rights to all types of users. It has to identify carefully which category of users they are before authorising them relevant LEs. LEs based on defined users' rights, should be mandatory and non-overrideable rights competing against right-holders' copyrights. Those uses based on users' privilege are free from the liability of infringement to copyrights; however, they may be subject to other rules such as the requirement of compensation.

⁷¹⁹ Mazziotti (n 33).

⁷²⁰ Joseph P Liu, 'Copyright Law's Theory of the Consumer' (2002) 44 BcL Rev 397.

⁷²¹ Michael Geist, *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law 2000) 58-59.

⁷²² See the analysis of users' rights in section 3.4.2.

5.3 A Rawlsian Analysis of the Social Justice

The above doctrinal analysis to justify users' rights has clarified the natures of different categories of LEs. It has demonstrated the differentiated legal statuses of different types of music-users. It has also proposed to authorise users for music education and study purposes substantive rights which constitute conflicting rights to exclusive copyrights. This section defends this argument further by a normative legal theory analysis based on Rawls's justice theory, aiming to provide an ethical justification for codifying music-users' rights for education and study purposes. It explores the precise nature and scope of public interest in the light of Rawls's theory, and examines whether this broader concept of public interest can be a general defence against copyrights.

Rawls's theory provides criteria to assess whether a law is just or unjust. To Rawls, social justice is about assuring the protection of equal access to liberties, rights, and opportunities, as well as taking care of the least advantaged members of society.⁷²³ Thus, whether something is just or unjust depends on whether it promotes or hinders equality of access to civil liberties, human rights and opportunities, as well as whether it allocates a fair share of benefits to the least advantaged members of society. Rawls's theory says that when the rules determine a proper balance between competing claims to the advantages of social life and no arbitrary distinctions are made between persons in the assigning of basic rights and duties, institutions are just.⁷²⁴ The law offers the basis of social order, which can be achieved only by a just balance of the different interests.

According to Rawls, all social people are born behind a veil of ignorance in a society, and they are placed in a situation which is called the "origin position".⁷²⁵ People are born with different goals and talents, and they would only agree with principles that govern a just society where all of them ought to have a fair opportunity to develop their talents and to pursue those goals –

⁷²³ Cyndy Caravelis and Matthew B Robinson, *Social Justice, Criminal Justice: The Role of American Law in Effecting and Preventing Social Change* (Routledge 2015) 15.

⁷²⁴ Rawls (n 137) 5.

⁷²⁵ *ibid*, 17.

fair equality of opportunity.⁷²⁶ They choose this society because they agree to cooperate among all so that there may be a reasonable life for everyone. Behind a veil of ignorance, people would not agree to a copyright scheme in which knowledge, information, ideas are in complete privileged private ownership. Alternatively, they would only agree free sharing of those “primary goods”,⁷²⁷ whatsoever their social or economic status or their talents may be. Information is a social primary good, and it may be the most important primary good when we consider its role in political, social, and economic life, especially in the digital era.

Creators are entitled to receive profits from intellectual commons as well as their own talents but the generated economic inequalities are allowed only when these profits are used to serve all, in particular those with fewer opportunities. To Rawls, intelligence, imagination, natural talents, innate creative abilities are natural goods;⁷²⁸ although their possession is influenced by the basic structure, they are not so directly under its control.⁷²⁹ Natural goods are arbitrarily distributed and morally underserved and are social, rather than personal, resources.⁷³⁰ Some people show higher creative ability in music but others do not. According to the second principle,⁷³¹ all artists should have a fair chance to attain fair equality of opportunities. This point is explained based on the social and natural contingencies. Natural contingencies cause enormous economic inequalities, which is unjust. This social injustice is what Rawls’s theory aims to address, and indeed ‘the existence of innate differences in ability makes Rawls’s concept of social justice especially acute and eternally relevant’.⁷³² The natural distribution of musical talents is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that initiations deal with these facts.’⁷³³ For Rawls, rewarding talent or rewarding the efforts of talented people to develop their inborn abilities is justifiable ‘only on instrumental grounds’,

⁷²⁶ *ibid.*, 83.

⁷²⁷ *ibid.*, 62

⁷²⁸ Rawls (n 137) 62.

⁷²⁹ *ibid.*

⁷³⁰ *ibid.*, 72.

⁷³¹ *ibid.*, 83.

⁷³² Steven Pinker, ‘The Blank Slate: the Modern Denial of Human Nature’ (2004) New York, NY, Viking Popper, K(1974) Unended Quest Fontana, London, 58.

⁷³³ Rawls (n 137) 272.

namely for social cooperation, rather than on the grounds of desert.⁷³⁴ Reward in the form of market prices ‘is not so much to reward people for what they have done as to tell them what in their own as well as in general interest they ought to do’.⁷³⁵ Rawls thinks justice should seek to “correct the social inequalities stemming from the arbitrary natural distribution of talents and abilities”.⁷³⁶

Thus, in order to provide genuine equality of opportunity for those who are less-talented in musical creativity and to treat all persons equally, ‘society must give more attention to those with fewer native assets and to those born into the less favourable social positions’.⁷³⁷ In pursuit of this social justice to redress social contingencies, ‘greater resources might be spent on the education of the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school’.⁷³⁸ The less talented people are, in this context, copyright users who are also potential creators. Therefore, Rawls’s theory offers convincing justification for the scheme of social deductions to be provided by JMOs for supporting young musicians’ study and research purposes.

In the broad sense, the difference principle sets out to arrange the basic structure to enable underserved inequalities to ‘work for the good of the least fortunate’.⁷³⁹ This signifies ‘an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be’.⁷⁴⁰ Having intellectual commons freely shared by all not only reflects a fair solution to the arbitrary distribution of talents, but also fulfils the difference principle’s goal of long-term solution in nurturing talents by education schemes and directing them to develop in a way compatible with society.

⁷³⁴ Liu (n 117).

⁷³⁵ *ibid.*

⁷³⁶ Nigel E Simmonds, ‘Central Issues in Jurisprudence: Justice, Laws, and Rights’ (1986) Sweet & Maxwell 62.

⁷³⁷ *ibid.*, 100-101.

⁷³⁸ *ibid.*, 100-101.

⁷³⁹ *ibid.*, 102.

⁷⁴⁰ *ibid.*, 101.

Rawls is concerned with the construction of ‘a just scheme’ whereby each person is given their due or entitlement by the scheme itself.⁷⁴¹ This is different from utilitarianism which focuses on general benefits for general society that it does not take seriously the distinction between persons. Utilitarianism allows the sacrifices imposed on a few to be outweighed by the larger sum of advantages enjoyed by many. For maximising the welfare or benefits of the whole society, individuals’ interests could be sacrificed.⁷⁴² Rawls fully acknowledges such a distinction and aims to achieve justice for each and every member of society – hence the involvement of all based on justice.

Rawls does agree with incentives theory⁷⁴³ but based on different grounds. If incentives are given, they are aimed at the efficient use of the talents, so the legal regime should be designed in a way to promote the best use of talents with the welfare of all. This regime, unlike labour theory,⁷⁴⁴ is not to reward labour *per se*, though a collateral effect may result in that, but this is not the main concern in the design of the regime. Rawls acknowledged that the talented create more works than the less talented. Their natural assets are theirs for them to tap into to create works; they are in the best position to use their assets. The aim of Rawls’s theory is to address the generated economic inequality. In the view of Rawls, the benefits people gain from exercising their talents are determined by a structure of rules that makes that distribution of talents work to everyone’s advantage, with priority given to those who are worse off.⁷⁴⁵ To achieve social justice, a sound regime with a sound structure of rules should be put in place to determine the allocation of copyright resources. Therefore, the copyright legal system should facilitate copyright licensing activities, providing an incentive for copyright practice under the condition that this regime must be designed to benefit everyone, in particular for those who are less-talented. In this case, less-talented people are by no means all copyright users. Rather, they are those users for the purposes of study, education and research. Copyright law fulfils this function in many ways, mainly by LEs to copyrights.

⁷⁴¹ Rawls (n 137) 313.

⁷⁴² Fisher (n 81).

⁷⁴³ See section 4.2.

⁷⁴⁴ *ibid.*

⁷⁴⁵ Liu (n 117).

5.4 Uses for Music Education and Private Study Purposes

As discussed above, LEs for the purposes of music education and private study are an important type of LEs justified as users' rights. They are highly related to re-creative activities and important to the development of public domain for all human being. They are worth detailed research. LEs for some purposes such as for disabled people, personal use, criticism or review, and parody, have attracted academics' and policy-makers' concerns. However, the literature of LEs for education and research purposes, particularly for the rights of libraries, is not sufficient. In practice, library users have not been ensured appropriate rights of access to music library resources.

5.4.1 Current Scenario of Library Exception

The LEs for education and research purposes are highly important for the development of social-cultural values, but legislators have not paid enough attention to this area yet. The public interest for education and research purposes mainly involves two rights – accessibility to copyright resources⁷⁴⁶ and fair use of copyrighted works with or without a compensation system.⁷⁴⁷ Accordingly, accessibility in this study refers to the availability to music resources with or without compensation. Some countries provide LEs without providing authorised organisation to enforce it. For example, disabled people are entitled to copy but which organisation provides the resource? The accessibility to music resources for educational purposes can also be used to assess to what extent the LEs have been respected in practice. The restraint of access to musical works not only impacts on domestic users, but also on foreign users. This is highly relevant for the internet environment where national boundaries have been broken down. So, copyright's social function should also be investigated from the perspective of balancing the interests between different countries.

⁷⁴⁶ See De Werra (n 61), 'access is one of the core tenets of copyright law, and protecting it should be the focus of legislative efforts'; Jane C Ginsburg, 'From Having Copies to Experiencing Works: the Development of An Access Right in Us Copyright Law' (2000) 50 *Journal of the Copyright Society of the USA* 113.

⁷⁴⁷ See section of 4.3.4 Various Financial Mechanisms Supporting Public Interests.

Music libraries are the windows of music-related materials to be licensed to individual users for music education and research purposes. E-libraries are playing a more important role than ever before for promoting the development of the outputs of musical works. Although Article 10(2) of the Berne Convention does provide limitations of some free uses of works: quotations; illustrations for teaching; indication of source and author, which refers to limitation for educational purposes,⁷⁴⁸ the effect of this provision, however, is very limited. Although almost all countries have an exception that preserves the right of libraries, some countries, through the enactment of domestic legislation, have significantly narrowed the scope of this Berne exception.⁷⁴⁹ For example, in the US, librarians with an interest in electronic reserves were, for the most part, disappointed by The Technology, Education, And Copyright Harmonisation (TEACH) Act.⁷⁵⁰ The Act provides classroom instructors with clear guidelines as how they could use music materials in online classes without violating the law; however, it provides no direct guidance for what sort of library musical materials could be placed on the internet.⁷⁵¹ This Berne Convention provision of LEs has been overridden by national legislation.

Moreover, national implementations of library exception vary a lot. In practice, library LEs have been dramatically overridden by TPMs and licensing agreements. The empirical study is not sufficient in this area, but based on some of the empirical study in the UK, where 90% legitimate LEs have been overridden by licensing agreements.⁷⁵² The British Library carried out an empirical study of over 100 library contracts for electronic resources and found that over 90% of contracts had terms that were more restrictive than exceptions in the copyright law, such as lending, reproduction for education, research, and private use, for preservation, and for the benefit of disabled persons, and inter-library loan.⁷⁵³ In addition, they found that the

⁷⁴⁸ Article 10 (2), Berne Convention: “It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”

⁷⁴⁹ Okediji (n 668).

⁷⁵⁰ The Technology, Education, And Copyright Harmonisation (TEACH) Act, 17 U.S.C. §110(2) (2000).

⁷⁵¹ Henry V Carter, ‘Why the Technology, Education and Copyright Harmonization Act matters to librarians: Two cheers for the TEACH Act’ (2008) 18 *Journal of Interlibrary Loan, Document Delivery & Electronic Reserve* 49.

⁷⁵² See Dame Lynne Brindley, *The Knowledge Network: Annual Report and Accounts 2008-2009* (2009) <<http://www.bl.uk/about/annual/2008to2009/ceo/ceo.html>> accessed 28 May 2017.

⁷⁵³ See IFLA, ‘Limitations And Exception For Libraries And Archives: Contract Override’ <http://www.ifla.org/files/assets/clm/position_papers/ifla_position_public_lending_right/contract_override_final

contracts did not make any reference to any exceptions from the UK copyright law or from another jurisdiction.⁷⁵⁴ In the conclusion of this study the British library required the UK Government to take action against this practice of the copyright industry, in order to preserve the national literary heritage.⁷⁵⁵

Technology offers more means and convenience to users for the purpose of education and research, but also technologies can be used in licensing practice to restrain the access of users. Technology is allowing greater access to books and other creative works than ever before for education and research, but the supreme irony is new restrictions threaten to lock away digital content in a way we would never countenance for printed material,⁷⁵⁶ that is ‘the ease of access enabled by the digital age actually leads to greater access restrictions’.⁷⁵⁷ Akester declared that the biggest challenge faced by the British Library is not the technology but the licensing practices.⁷⁵⁸ He indicated that most of the licences imposed on the British Library are more restrictive than copyright law, including restrictions around copyright, such as only copy one percent, copy once, only copy in the same medium or no wholesale copying, which prevent archiving and inter-library loans.⁷⁵⁹

According to the study by the IFLA,⁷⁶⁰ some of the library exceptions are mandatory, others are not. In most countries, these exceptions apply only to resources that exist in traditional formats.⁷⁶¹ In other countries, particularly in Africa and Latin America, there are no exceptions safeguarding the services of libraries and archives at all.⁷⁶² This overridable library exception leads to high difficulty to protect users’ interests, in particular for online users. Current LEs

[.pdf](#)> accessed 15 February 2017.

⁷⁵⁴ *ibid.*

⁷⁵⁵ *ibid.*

⁷⁵⁶ Okediji (n 668).

⁷⁵⁷ *ibid.*

⁷⁵⁸ Patricia Akester, ‘Technological Accommodation of Conflicts between Freedom of Expression and DRM: the First Empirical Assessment’ (2009) CIPIL

⁷⁵⁹ *ibid.*

⁷⁶⁰ IFLA, ‘Copyright Limitations and Exceptions for Libraries & Archives’ (9 May 2017) <<https://www.ifla.org/copyright-tlib>> accessed 30 May 2017.

⁷⁶¹ *ibid.*

⁷⁶² IFLA

system does not accommodate appropriate mechanisms to recognise the role of libraries in a digital environment. There is a need for clearly specified exceptions, especially for libraries.

Libraries are the custodians of public interest as they are the primary access point of copyrighted works for the vast majority of the public.⁷⁶³ Libraries are major purchasers of copyright protected works, both analogue and digital, and make such works available for patrons to browse, read and use. Librarians and information professionals should, where possible and to the best of their ability, protect against copyright abuse of library material in collections. Libraries have the capabilities to reproduce copies, simultaneously lend works to large groups of people, and store such works for an infinite period of time. How libraries display digital works to the public could also involve the public display right, reproduction of excerpts, and even possibly the right of distribution.⁷⁶⁴ In essence, as digitalisation allows an unprecedented level of versatility in using copyrighted works, they will have opportunities to serve the public in new and different ways.⁷⁶⁵ Thus, the rights and obligations of libraries have to be more clearly specified and their limits defined, especially in the digital environment, where words associated with the print age such as “publish” “storage”, or “distribute” have a radically different scope and meaning.⁷⁶⁶ Therefore, libraries should be able to enjoy the widest possible privileges to strengthen their role and capacity to serve as knowledge custodians, and the primary access point for knowledge to the vast majority of the public.

5.4.2 Financial Mechanisms Supporting Public Interest

The authorisation of users’ rights does not mean free use of copyrighted works or excluding the legitimacy of compensation to rightsholders. Although some copyright LEs are regarded as users’ rights, they cannot unreasonably prejudice authors’ legitimate economic interests. However, the library sector should not be left to commercial licensing of copyrighted works either. If access to knowledge is dependent upon an individual’s capacity to pay, then the less

⁷⁶³ Okediji (n 668).

⁷⁶⁴ *ibid.*

⁷⁶⁵ *ibid.*

⁷⁶⁶ *ibid.*

privileged will be placed at a significant disadvantage. In particular, this can play a part in perpetuating poverty and the lack of educational opportunities. As specified before, the essence of LEs is to allow lawful music-users to perform certain acts on musical works without authorisation by rightsholders *with* or *without* remuneration. Thus, exclusive right can be converted into a remuneration right, with royalties paid every time, and the use of an existing creation makes it possible to create a new work. However, the amount of compensation must be carefully decided and the process of collection regulated.

With respect to the other important question on whether financial compensation is required, there is a great distinction among countries in the world. Countries have different understandings and have designed distinctive compensation mechanisms. Although the library and archive exception has been recognised by most countries, international copyright treaties have not recognised a uniform right authorised to library users. Under the national financial mechanisms, right-owners' will be forced to give up economic rights to a certain extent according to national copyright law or other legislation. For the purpose of supporting the development of creative works on the one hand, and compensating creators for the potential loss of sales from their works being available in public libraries, on the other hand, some countries have constructed the public lending right (PLR) system to balance the interests between owners and users. There is not a uniform definition of PLR although it does exist in some countries.⁷⁶⁷ But basically it refers to a remuneration right which is the right of a creator (not necessarily the copyright owner) to receive monetary compensation for the public lending of his/her work.⁷⁶⁸

⁷⁶⁷ Public Lending Right International Network website, "53 countries are known to have recognised lending rights in their copyright or other legislation. 33 of these have taken the next step of setting up a PLR system. (Systems exist where payments are being made, or where there is PLR legislation and funding has been committed.) 29 of the PLR systems are in Europe: Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Greenland, Hungary, Iceland, Ireland, Italy, Liechtenstein, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Slovakia, Slovenia, Spain, Sweden, and the UK. The other working systems are in Canada, Israel, New Zealand and Australia. There are no working PLR systems yet in the United States, South America, Africa or Asia." <<https://www.plrinternational.com/faqs/faqs.htm#recognise>> accessed 15 February 2017.

⁷⁶⁸ IFLA, 'The IFLA Position on Public Lending Right' (29 April 2016) <<https://www.ifla.org/publications/the-ifla-position-on-public-lending-right--2016->> accessed 30 May 2017..

Not all national PLR systems are included in the copyright legal system.⁷⁶⁹ Some countries have constructed PLR systems as a separate remuneration right recognised by law⁷⁷⁰ or as a part of national support for culture.⁷⁷¹ The EU has regulated PLR since 1992 by Directive 92/100/EEC on rental right and lending right, which was reconstituted in 2006. Nonetheless, European countries have designed distinctive schemes to implement the Directive. But the PLR schemes in the EU vary from country to country.⁷⁷²

There are two main methods to calculate payments to qualified creators: a) payment on the basis of how often an author's works are lent out, and b) payment per copy of an author's work held in libraries.⁷⁷³ The IFLA, as a leading international body representing the interests of library and information services and their users, reviewed that the access to public libraries must remain free at the point of use.⁷⁷⁴ Furthermore, the costs of PLR should not in any way impinge on the quality and variety of the services publicly accessible libraries provide. Therefore, in order to best support national cultural and educational objectives, the funds for establishing and maintaining PLR systems and remunerating rights holders must not come from library budgets but should be separately funded by the state.⁷⁷⁵

In practice, the IPLA systems either compensate creators from governmental funds, or sacrifice a part of the economic profits for free access to library resources. Apart from these remuneration systems discussed above, there is another important compensation mechanism – 10% deduction from CMOs' revenues to a social fund to support national arts. Nérison commented that the fixed amount of the 10% rule is to be found in all reciprocal agreements between CMOs in the domain of public performance rights upon musical works. He believed

⁷⁶⁹ The copyright-based approach can be found in Germany and Austria.

⁷⁷⁰ PLR as a right to remuneration outside copyright exists in the UK. The 1979 PLR Act gives authors a legal right to receive payment from the government for the lending out of their books by public libraries. This is a right to payment, not an exclusive right allowing authors to prohibit or license the lending of their books. The PLR system is administered by the PLR office which, since October 2013, is part of the British Library.

⁷⁷¹ PLR as part of State support for culture exists mainly in the Scandinavian countries where, for example, payments are made only to authors of books written in a country's native language.

⁷⁷² See Nérison (n 44).

⁷⁷³ PLR international, 'How Are Payments to Authors Calculated and Who Qualifies?'

<<https://www.plrinternational.com/faqs/faqs.htm#recognise>> accessed 15 February 2017.

⁷⁷⁴ IFLA (n 768).

⁷⁷⁵ *ibid.*

that the recognition of the 10% rule in an international convention would confirm copyright law's role of interest balancing.⁷⁷⁶ Indeed, the social function of copyright law is mainly mirrored by the social function of CMOs. As discussed in the beginning of this section, the social function performed by CMOs is one of the most distinct features that are different from other IMEs. Once the social function of copyright has been entrenched by legislation, it should be enforceable by concrete provisions, rather than a nominal right existing in the preamble of international treaties or only a guidance of copyright acts. CMOs can and have to perform the obligation to balance the interests with a well-designed compensation system. At the same time, some developed countries have built up financial compensation mechanisms in research and education sectors to compensate rightsholders' legitimate economic rights. The 10% rule has to be confirmed in an international copyright convention.⁷⁷⁷

The 10% deduction rule has also been criticised for some reasons. First, deduction is normally from all revenues of a national CMO from uses of both national and foreign works. Many European CMOs have this function as part of their statutory duty.⁷⁷⁸ As the deduction is made from the aggregate revenue of a whole CMO, obviously, the minority of high-earning CMO members would afford most of the deduction. This burden would cause the high-earning rightsholders to switch off from CMOs to other commercial management agencies if the 10% rule is not mandatory and only applicable to CMOs. Second, it has been argued that the 10% rule practice may infringe the national treatment principle in the Berne and Rome Conventions as well as by the WIPO.⁷⁷⁹ If international cross-border licensing is taken over by a few of the largest societies, these societies will most likely be established in the most prosperous countries. This would be unfair if the 10% deduction collected from cross-border licensing only benefits the public of the headquarter countries. For dealing with these issues, a proposed GRP⁷⁸⁰ which would integrate copyright licensing information into a one stop platform and require all types

⁷⁷⁶ Nérison (n 44).

⁷⁷⁷ *ibid.*

⁷⁷⁸ Towse and Handke (n 36).

⁷⁷⁹ See Matulionyte (n 52); Ferdinand Melichar, 'Deductions Made by Collecting Societies for Social and Cultural Purposes in the Light of International Copyright Law' (1991) 22 *International Review of Intellectual Property and Competition Law* 47.

⁷⁸⁰ See chapter 6.

JMOs to perform this social-cultural deduction obligation at the same level, is recommended as an alternative solution.

5.4.3 Establishing Global Public Interest for Education and Private Study Purposes

Right owners are able to exercise their copyrights by TPMs or licensing contracts which can largely restrain the access and usage of copyrighted works and render them private rights. The balance between rightsholders and users has historically been reserved mainly for the sphere of domestic regulation. Because authors' rights have been more explicitly defined in international copyright law, LEs must correspondingly be the object of more specific attention internationally as well. In the global context, determining the appropriate balance is understandably more complex.⁷⁸¹ The Berne Convention has left discretion to enact national LEs. However, developing countries are usually not able to tailor domestic copyright laws to their domestic circumstances for nurturing the development of local copyrighted works. This is because for entry into the World Trade Organisation (WTO), developing countries normally trade off some of their discretion to enact harsh copyright law to protect right-holders' copyright. Too protective copyright, in fact, hinders the free trade of copyrighted works, and a worse consequence is that it harms social welfare and public interest not only to local users but also to foreign users. In the long term, it harms the sustainable development of creativity. Thus, a pertinent question has to be taken into consideration about how deeply the international copyright system should intrude on domestic priorities and how best to meaningfully incorporate domestic welfare concerns into the fabric of international copyright regulation. Put differently, the relevant balance for international law purposes is between the mandatory standards of protection established in treaties and the scope of discretion reserved to states to establish LEs specifically directed at domestic concerns. This can be called the 'domestic/international balance'.⁷⁸²

⁷⁸¹ Okediji (n 668).

⁷⁸² *ibid.*

The growth of general social welfare and the economy depends on the flourishing production and distribution of knowledge assets; high quality production of knowledge outputs relies on the growth of quality of productive inputs and, more importantly, the accessibility of existing knowledge assets.⁷⁸³ Undoubtedly, global licensing of copyrighted works will promote the dissemination of knowledge goods, and accordingly benefit rightsholders. This is true for both developed and developing countries. And this free trade of copyrighted goods will increase social welfare gains for each member country.⁷⁸⁴ Poor access to copyrighted works, however, will adversely affect social welfare. The most disproportionately affected groups of users are the poor, uneducated, non-English speaking, women, and the elderly in the least developed and developing countries.⁷⁸⁵ For flourishing domestic innovation, developing countries need to ensure resources are accessible to users under a just LEs system. First of all, they need to avoid extreme protectionist measures evident in developed country legislation, implementing TRIPS and other international agreements. Second, each country must outline an industrial policy that is effectively coordinated with related macroeconomic policies, particularly education and science policies. Education is critical for building the national capacity to absorb, utilise, and adapt innovation to local needs. Third, developing countries need to enact just LEs system under international copyright law to their domestic circumstances.

In the digital era, a computer can replace an entire library, and the significance of access to knowledge for developing countries becomes obvious. Unlike in developed countries, the sources for education and knowledge are limited in transition countries, and not every city or village has a public library which provides comprehensive access to information for the public. The particularities of these countries must therefore be taken into account in the scope of a global regulation on copyright LEs. It is better to provide differentiated structures between

⁷⁸³ Peter Hall, 'The Theory and Practice of Innovation Policy: an Overview' (1986) *Technology, Innovation and Public Policy* Oxford: Phillip Allan 1.

⁷⁸⁴ See e.g, *Anne O Krueger, 'Global Trade Prospects for the Developing Countries' (1992) 15 The World Economy 457*; Deepak Lal, *A Liberal International Economic Order: the International Monetary System and Economic Development* (International Finance Section, Department of Economics, Princeton University 1980).

⁷⁸⁵ Ruth Gana Okediji, 'Copyright and Public Welfare in Global Perspective' (1999) *Indiana Journal of Global Legal Studies* 117.

developed and transition countries to enable detailed provisions to address specific and ongoing problems.⁷⁸⁶

5.5 The Cultural Objective of Copyright Legal System

Since social and cultural functions are connected to each other and sometimes hard to distinguish,⁷⁸⁷ the discussion of copyright law's cultural value is integrated into this chapter. Not only economic and social objectives of the copyright legal system are important, the cultural objective is another independent function played by JMOs. As a political liberty, rights of cultural expression and access to cultural goods have to be ensured and protected by copyright provisions.⁷⁸⁸ As demonstrated in chapter 2, unlike economic values, social and cultural values increase with usage.⁷⁸⁹ As such, for maintaining and developing creativity and cultural diversity, musical works should be encouraged to be used rather than restricted from accessing. CMOs' role is not only in efficient administration of copyrights and the impartial and rapid as possible distribution of the revenues they have generated, but also to ensure that they achieve the cultural objective of the copyright legal system, and equalise and correct the imbalance between the exploitation of large and small international repertoires.⁷⁹⁰

5.5.1 Incentivise Cultural Diversity

The essence of the notion of cultural diversity is the production and diffusion of diverse cultural expressions. To assess whether the current copyright system incentivises the diversity of musical works, the accessibility of users to these musical works, and how individuals and communities make use of copyright works to improve their capabilities has to be looked at.⁷⁹¹ Due to the features of cultural goods, culture will flourish with its use. The line between creators and users is by no means clear in relation to cultural works.⁷⁹² Each user, whether their

⁷⁸⁶ Abovyan (n 135) 77.

⁷⁸⁷ See section 2.5 and 3.4.

⁷⁸⁸ *ibid.*

⁷⁸⁹ Section 2.5.

⁷⁹⁰ Dietz (n 8).

⁷⁹¹ Wong and others (n 482); See also the discussion in section 5.2.3, classification of users.

⁷⁹² *ibid.*

purpose is creative use or pure consumption, needs adequate access to the raw materials for their learning, study, and creations, in many cases building on the works of others in some way.

It has to be observed that the term used to identify the objective of cultural policy should be cultural diversity rather than cultural innovation, since these two terms have different meanings. A commitment to cultural diversity is different from a commitment to cultural excellence. As Barry suggests, they are incompatible and one cannot be delivered by the other.⁷⁹³ Cultural diversity will not guarantee excellence, and vice versa.⁷⁹⁴ What copyright protects is originality rather than innovation. Also, it does not necessarily mean that the value of innovated works is more than an original work. Even the trashiest popular culture gives pleasure and meaning to some people's lives.⁷⁹⁵ As to a society, both cultural diversity and innovation are important, since originality constitutes the elements of innovation. All kinds of copyrighted works as elements of the intellectual commons constitute diverse social cultural products.⁷⁹⁶

Competition promotes market-friendly musical works, however, it harms cultural diversity. Some researchers assume that the more intense and open the competition, the greater the innovation and diversity to be found in the resulting music.⁷⁹⁷ But, the free market will of course compete out minority cultural goods. Free competition of the music industry is threatening non-mainstream music and small and less popular repertoires.⁷⁹⁸ Competition law or anti-trust law cannot foster the diversity of musical works. Rigorous application of anti-trust rules appears too negative to cultural diversity. This legislation pushes the societies to compete, which is not appropriate in this sector.⁷⁹⁹

⁷⁹³ Brian Barry, *Culture and Equality: an Egalitarian Critique of Multiculturalism* (Harvard University Press 2002) 198.

⁷⁹⁴ *ibid.*

⁷⁹⁵ Parker (n133).

⁷⁹⁶ See more discussion about intellectual commons in section 5.3.

⁷⁹⁷ Street (n 476).

⁷⁹⁸ See section 6.5.2.

⁷⁹⁹ Dietz (n 8).

5.5.2 The Impacts of Cross-border Flow of Cultural Goods

In the field of music, the essence of cultural diversity lies in the creation and distribution of varied musical content. Proper rewards for creators and access to a wide range of music repertoires are unconditional for the preservation and further stimulation of cultural wealth.⁸⁰⁰ Music copyrights management has major repercussions for creative activity and the market availability of diversified musical content. The business model of IMEs used for the collection and distribution of revenues to right holders affect the volume of creative output and condition the presence of different types of music repertoire in the market.⁸⁰¹

The practice of the music industry shows a greater interdependence between developed and developing countries for their cultural development. Whether the CCM in musical works in developed countries is more efficient or shows more advantages than in developing countries, there is no definitive conclusion. Various western musical works are quite popular in Asia. Developing countries, China for example, need licensed western music flows into their music market.⁸⁰² At the same time, Asian music also shows their enthusiasm to enter into western music markets.⁸⁰³ Two typical examples are the Asian pop songs, *Gangnam Style*⁸⁰⁴ and *Little Apple*⁸⁰⁵, which have achieved a great success in western countries. From the international trade perspective, there is a mutual benefit between different countries by the cross-border flow of musical works.

The preamble of the UNESCO Convention 2005 claims that ‘cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values

⁸⁰⁰ Hoeren and others (n 461).

⁸⁰¹ *ibid.*

⁸⁰² IFPI, ‘China: Moving Towards Paid Services’ <<http://www.ifpi.org/China.php>> accessed 30 May 2017.

⁸⁰³ In Stanford University, a Pan-Asian music festival has been annually held each year since 2005 and the response are quite overwhelming. Pui Shiau, ‘Jindong Cai directs the Stanford Pan-Asian Music Festival’ (*Stanford: Office of International Affairs*, February 02, 2014) <<https://international.stanford.edu/info/news/jindong-cai-directs-stanford-pan-asian-music-festival>> accessed 30 May 2017.

⁸⁰⁴ It is a K-pop song created by a South Korean musician. Since the first release of *Gangnam Style* in July, 2012, it has become the first YouTube music to reach a billion views and attracted millions western people to learn the dance of the song.

⁸⁰⁵ It is a Chinese song. Since its release, it has quickly attained great popularity in Chinese cyberspace, making it a widespread internet meme.

and meanings, and must therefore not be treated as solely having commercial value'.⁸⁰⁶ Music as a cultural product has highly economic, social and cultural values that make it indispensable in terms of cross-border exchange between developed and developing countries. This is especially worthy for smaller countries which have no or limited natural or cultural resources and which thus rely on the import or export of music assets for their continuing economic development and social and cultural welfare.⁸⁰⁷ The exchange of cultural goods will impact on both the economy and society at large.⁸⁰⁸ As scholars point out, the reforms themselves to promote creativity and cultural diversity in the music industry, in seeking to change the role and behaviour of CMOs, will have profound consequences for the market in music, and for creativity and cultural diversity within the market.⁸⁰⁹

5.5.3 Supporting Cultural Diversity Globally

Culture is dialogue, the exchange of ideas and experience and the appreciation of other values and traditions; it withers and dies in isolation.⁸¹⁰ JCM is beneficial to the exchange of musical ideas, values and access to different cultural goods, encouraging diversity of musical works all over the world; on the contrary, it would destroy musical diversity when the world's cornucopia of music is mixed and assimilated by some dominant cultural goods and eventually, the world will be awash in the culture of only one nation.⁸¹¹ Johnlee Scelba Curtis believes that copyright, by its nature, serves to support and stifle innovation and the diversity of cultural offerings.⁸¹² He believes that the copyright chimera is born this way with two differing facets.⁸¹³ He demonstrates the debate by reviewing various approaches and arguments, and concludes that 'the current copyright regime hurts cultural diversity'.⁸¹⁴

⁸⁰⁶ Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

⁸⁰⁷ De Werra (n 71).

⁸⁰⁸ WIPO Draft Guidelines on Assessing the Economic, Social and Cultural Impact of Copyright on the Creative Economy (2013).

⁸⁰⁹ Street (n 476).

⁸¹⁰ UNESCO (n 455).

⁸¹¹ Curtis (n 454).

⁸¹² *ibid.*

⁸¹³ For a unique analysis of the copyright debate, see Lawrence Lessig, *Free Culture* (翔泳社 2004) 179.

⁸¹⁴ Curtis (n 454).

A comprehensive international repertoire is indispensable for supporting cultural diversity, and could provide a platform for culture exchange between musicians from different countries. Society must make substantial efforts with respect to the planning, administration and financing of cultural activities. The first practical trial to facilitate the multi-repertoire and multi-territorial licenses, the so-called Santiago Agreement, was concluded by nearly all the major European CMOs, representing authors in the area of performing rights.⁸¹⁵ This is a great opportunity for small repertoires from developing countries to join the one-stop-shop and operate beyond their territory. As previously mentioned, without such a multi-territorial agreement, small repertoires are constantly under the threat of being out competed by large repertoires on the free market. For fulfilling the objective of promoting cultural diversity, disadvantageous repertoires have to be supported by legal institutions nationally, regionally and internationally. However, the Santiago Agreement was called back in that it was announced to be in violation of EU competition rules.⁸¹⁶

Generally, the cultural mission of JMOs is embodied in their role in balancing small rightsholders' interests, including small repertoires, and managing their copyrights under the principle of economic fairness. The objective of cultural justice is in line with the objective of economic fairness. If JMOs treat all musical works, wherever they come from, equally and fairly, generate corresponding revenues for all creators, and operate according to a well-designed copyright legal system, the objective of cultural function namely to promote cultural diversity, would be fulfilled at the same time. Therefore, in the next chapter a comprehensive one-stop-shop, a GRP is proposed to fulfil this objective.

5.5.4 Current Legislative Scenario

Most constitutions of European countries do not provide a constitutional guarantee of the cultural function of copyright law.⁸¹⁷ This has been solved *politically* by a series of recitals

⁸¹⁵ Ficsor (n 24).

⁸¹⁶ Stef van Gompel, 'Santiago Agreement Potentially Incompatible with European Competition Law' (2006) European Commission, IRIS 2004-6:6/9 <<http://merlin.obs.coe.int/iris/2004/6/article9.en.html>> accessed 30 May 2017.

⁸¹⁷ *ibid.*

within the European Copyright Directives,⁸¹⁸ which underline in various aspects the importance of copyright law for the development of creativity and culture. To say “politically” rather than “legally” is because these recitals do not have legal binding force, but merely appear as guidelines for national legislative activities.⁸¹⁹ However, EU Directive 2014 addresses the role of CMOs in promoting cultural diversity in two ways: a) ‘enabling the smallest and less popular repertoires to access the market’,⁸²⁰ and b) ‘providing social, cultural and educational services for the benefit of their rightsholders and the public’.⁸²¹ Accordingly, Directive 2014 has also provided a number of provisions to enforce the objective of cultural diversity.⁸²² These are positive improvements to recognise the objective of cultural diversity by legislation. The international copyright legal system should have introduced far more concrete and explicit explanations and provisions to demonstrate how the principle of respect for cultural diversity would be realised.

Due to the lack of effective legal recognition of cultural objective, the current international copyright regime hurts cultural diversity through its observed impact on innovators, artists, consumers, and inextricable ties to oligopoly interests.⁸²³ As the main institutions operating to achieve copyright’s multiple functions, JMOs should play an essential role to protect and promote the diversity of cultural expressions by ensuring all kinds of copyrighted works be able to join a JMO and enabling the smallest and less popular repertoires to access the market. Only when the goal of promoting cultural diversity takes a heightened role and concrete provisions are respected and enforced by JMOs, can a true balance of interests be reached. Therefore, cultural function should be codified in forms of concrete enforceable provisions into the copyright legal system. And at the same time, assessment provisions should be established to ensure this policy has been respected and is not paid mere lip service.

⁸¹⁸ Recital 9, 11, 12, and 22, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

⁸¹⁹ Curtis (n 454).

⁸²⁰ Preamble 3, Directive 2014/26/EU (n 25).

⁸²¹ Preamble 3, 28, 44, Directive 2014/26/EU (n 25).

⁸²² Eg provisions about deductions for the purposes of social, cultural and educational services, see article 12 (4), article 21 (g), article 18 (f), article 22, Directive 2014/26/EU (n 25).

⁸²³ *ibid.*

In a nutshell, to appreciate the full cultural purpose of JMOs, this section takes a manifold way to consider promoting cultural diversity – balance small creators’ interests, take small repertoires’ interests into account, and support small repertoires from developing countries. As many as possible musical works, whether owned by larger corporate rightsholders or small creators, managed by larger repertoires or smaller ones, from developed or developing countries, have to be included and treated fairly within a comprehensive international repertoire. Encouragement should be given, in particular, to cooperation among developing and developed countries, so that knowledge of other cultures and of other experiences of development may enrich the lives of such countries. Thus, a well-designed GRP is vital and essential in terms of fulfilling this objective.

5.6 Conclusion

In order to maintain a just balance between the interests of rightsholders and music-users, the embodied principle of social justice by means of LEs is used to restrain exclusive rights. Thus, one of the aims of this chapter is to explore a consolidated LEs system at the global level. This is a challenging mission due to the various stipulations on LEs at national level.⁸²⁴ It has examined the overridability of various LEs and found that not all uses are justified to deserve substantive rights against exclusive copyrights. The issue of overridability depends on the nature of LEs due to the diverse types of music-users. Some types of uses are qualified as users’ rights; however, some are better to be regarded as users’ privileges or permitted uses. Through a doctrinal analysis on the nature of different LEs, it finds that uses for the purposes of music education and research are qualified as users’ right. For defending on this argument further, the Rawls’s theory of justice is applied to justify the social function of copyright, particularly to justify the rights of uses for music education and research purposes. The Rawlsian analysis on music users’ rights offers an alternative ethical justification – the reward that people gain from exercising copyrights of musical works is determined by a structure of rules which arrange social and economic benefits to everyone’s advantage, with priority to the worse off. Music resources in education and research are allocated so as to improve the long-term expectation of

⁸²⁴ Stipulations of national LEs are various worldwide and they are explained with or without appropriate justifications. See the discussion in section 3.4.2.2.

the least favoured. The uses for education and research have been emphasised since they enable a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of their own worth. Certainly, they are also highly related to re-creative activities and important to the development of public domain and social-cultural values for all human being. But, legislators have not paid enough attention to this area yet.

Given the advancement of technology, the scope of public interest has been broadened in digital era, and the social welfare between developed and developing countries interacts with each other, it suggests to establish a concept of international public interest for music education and research purposes. This important role is played by libraries which are the custodians of public interest and represent the majority of public users. It is imperative to establish mandatory library exceptions for facilitating access by lawful users. At the same time, the feasibility of international compensation schemes to compensate authors' economic rights and balance users' rights is explored. In a nutshell, for establishing a consolidated LEs system, international copyright treaties have to include normative principles as to the user's right and privilege, and explicitly entrench them as mandatory LEs. For promoting the dissemination of knowledge assets worldwide and improving the bulk access of copyrighted works in developing countries, music library exceptions should be codified into international copyright treaties.

Cultural diversity is another independent objective of copyright legal framework. Due to the lack of effective legal recognition of cultural objectives, the current international copyright regime hurts cultural diversity through its observed impact on innovators, artists, consumers, and inextricable ties to oligopoly interests. As the main institutions operating to achieve copyright's multiple functions, JMOs should play an essential role to protect and promote the diversity of cultural expressions by ensuring all kinds of copyrighted works be able to join a JMO and enabling the smallest and less popular repertoires to access the market. The cultural function should be codified in forms of concrete enforceable provisions into the copyright legal system, and, at the same time, assessment provisions should be established to ensure this policy is respected and is not paid mere lip service. For enhancing the multiple functions of JMOs at

global level, it proposes to establish a global repertoire platform by which to manage copyrights in musical works at the global level. This empirical proposal will be discussed in next chapter.

Chapter 6 – A Global Repertoire Platform for Joint Copyrights

Management in Musical Works

6.1 Introduction

With regard to the globally cross-border licensing of copyrights through reciprocal representation agreements between CMOs, it has been proved that “multi-territorial” licences are actually “multi-repertoire” licences by which right-users should approach each national CMO and obtain a licence in each state.⁸²⁵ Segmented repertoires have caused many problems. First, right-users, especially commercial users, need to pay crossed payments to repertoires if those musical works they need are managed by different repertoires. This is the case especially in online cross-border licensing of music. For picking up those they need, users may need to pay two or more repertoires. IMEs who manage larger rightsholders’ works have made the music repertoires more segmented. Second, segmented repertoires are also uneconomic for right-owners because they are obliged to pay membership fees to all the CMOs they have joined all over the world. Third, segmented copyrights information causes difficulties to licensing practice, especially for cross-border licensing in the digital era. Updated and accurate information is essential for successful licensing practice.⁸²⁶ Fourth, Co-existence of many repertoires allow rightsholders to transfer copyrights from CMO A to CMO B, which leads to instability in the licensing practice and makes it more complicated, making relations of CMOs completely obscure. Therefore, the global JCM lacks a one-stop-shop licence system across different repertoires.

⁸²⁵ See Enrico Bonadio, ‘Collective Management of Music Copyright in The Internet Age and The EU Initiatives: From Reciprocal Representation Agreement to Open Platforms’ (2010) International Federation of Library Associations and Institutions (IFLA).

⁸²⁶ Global Repertoire Database Working Group, *Global Repertoire Database Working Group Recommendations For: the Way Forward for the Development of A Global Repertoire Database* (2010).

The hypothetical solution to deal with the segmented repertoires in this thesis is to establish a common copyright licensing infrastructure named GRP by which to simplify and facilitate the current online cross-border licensing practice of musical works. This chapter comes to test the feasibility of this and draw a conclusion by the hypothesis of a proposal for the GRP. To achieve this goal, it starts with a brief introduction in section 6.2 to the project of Global Repertoire Database (GRD) in musical works and concludes the possible reasons for its failure from political, technological and legal perspectives. Section 6.3 examines the nature and features of the GRP to justify the necessity and feasibility of global JCM in musical works. Section 6.4 offers an alternative justification of global JCM in musical works by applying Rawls's justice theory, demonstrating the essential irreplaceable function of the GRP. And then two core legal obstacles to establish such a GRP, namely the issues of prohibition of formalities and natural monopoly, are analysed in section 6.5. At the end, a comprehensive conclusion will be drawn on the existing discussions.

6.2 Is Globally Collective Management of Copyrights Feasible and Essential?

A central information system of copyrights by establishing a global infrastructure would be useful for online cross-border music licensing. Lobbied by some music companies, including EMI Music Publishing, Universal Music Publishing, Apple, Amazon, PRS for Music, a GRD working group was established in 2009⁸²⁷ to achieve this goal but eventually failed. The failure of the first attempt does not mean it is impossible to establish such a database, rather it has revealed the practical issues which successors have to learn from and avoid in the future. This section starts with the introduction of the global repertoire database project and analyses the main issues which lead to the failure.

The GRD was initiated by the music publishing sector to create a central database that provides access to authoritative, comprehensive, multi-territory information about the ownership and control of the global repertoire of musical works around the world, and that should be openly

⁸²⁷ GRD was a project which aimed to establish a single, global, authoritative source of multi-territory information platform about the ownership or control of the global repertoire of musical works. See GRD, 'Global Repertoire Database Progress Update' (March 2013) <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/Music-GRD_0.pdf> accessed 30 May 2017.

available to rightsholders, publishers, producers, CMOs, users, and the public at large. The GRD aimed to facilitate locating and identifying the copyright information of musical works for licensees, and enable more efficient distribution of royalties to the corporations and/or individuals who are due payment.⁸²⁸ The GRD was supposed to improve the transparency and efficiency of distribution of royalties by providing accurate licensing data of musical works worldwide in the digital era, which would be accessible online as requested by the public at large at any time and any place.

With the support of this uniform data managing platform, the GRD would, first, benefit right-owners, especially those individual creators, by providing various updated and accurate copyright licensing information such as ownership/authorship, transferring information, usage, royalties' collection and distribution information. Second, the GRD would be also essential for licensees who are willing to legally access copyrighted works, facilitating the identification of correct copyright information in time. Third, for those publishers, they also look forward to a simplified licensing framework in the music business not only for increasing their members' royalties but also for increasing their own revenues. Fourth, individual CMOs could benefit from the GRD by saving the operational costs and improving transparency and cooperation between sister CMOs. Moreover, standardised data by a singular platform would also facilitate the flow of musical products across-border more smoothly. This is because the licensing data managed by individual CMOs coming from national standards are inconsistent to each other. It is another obstacle to cross-border licensing practice. The current scenario, however, is it is difficult to access copyright licensing information, and licensing practice is inefficient, especially for foreign works, due to many barriers⁸²⁹ to the free cross-border flow of copyrighted works. Thus, a central point of information of copyrights becomes increasingly imperative and crucial for standardising the information of copyrights worldwide, especially in the digital era where licensing activities become much easier online and are growing faster than before.

⁸²⁸ Global Repertoire Database Working Group (n 826).

⁸²⁹ Some core legal barriers will be analysed in section 6.5.

In 2014, the GRD project was officially announced as having failed. It is believed that the main reason was due to the cut-off of funding.⁸³⁰ The combined loss of significant funding and information left the GRD unable to move forward.⁸³¹ Some sources suggested that the CMOs feared losing revenue from operational costs under a more efficient GRD system.⁸³² In addition to these practical reasons, members involved had some other concerns, for instance, the control of the global database.⁸³³ If, potentially, there were a way to fully realise this project, the question would be who would have control over the data and who would have been administering the catalogue. The third potential reason is there was a concern that the presence of CMOs would become redundant if publishers started to license musical works directly, with no intermediaries in between.

In general, the issues that concerned the GRD participants, can be concluded as follows. First, from the political perspective, who has the administrative power to control the data supervise the operation of the distribution of royalties.⁸³⁴ Second, from the technological perspective,⁸³⁵ the standardisation of data is also a problem since this will be an international super database which will include hundreds of different languages and information modes. The inconsistent information standards will generate huge barriers to those people who want to access to it. Another big challenge is how to integrate all the registration information all over the world into one single point. A high-quality technological service will be essential for the success of the super database. Third, from the legal perspective, another difficult barrier is that the harmonisation of some aspects of copyright licensing policy at international level will be a far

⁸³⁰ It was reported that CMOs had begun pulling out with the American Society of Composers, Authors and Publishers (ASCAP) allegedly being the first one to retract from the project and stop funding it. See Klementina Milosic, 'The Failure of The Global Repertoire Database' (August 2015) Music Business Journal <<http://www.thembj.org/2015/08/grds-failure/>> accessed 30 May 2017.

⁸³¹ *ibid.*

⁸³² Chris Cooke, 'PRS confirms Global Repertoire Database "cannot" move forward, pledges to find "alternative ways' (10 July 2014) <<http://www.completemusicupdate.com/article/prs-confirms-global-repertoire-database-cannot-move-forward-pledges-to-find-alternative-ways/>> accessed 30 May 2017.

⁸³³ *ibid.*

⁸³⁴ This will need an effective supervisory mechanism in place for enhancing the transparency of CMOs' activities. This issue will be discussed in section 4.

⁸³⁵ As this issue is beyond the discussion of the current topic, it is only being raised here but won't be analysed further in this research.

more complex mission, even if it is only in the music sector, since nearly every territory has a different revenue collecting system.⁸³⁶

Although the first initiation of GRD failed, it has been widely accepted in the music sector that a better information system of rights ownership and management is crucial to the developing digital music industry; and despite the failures of previous attempts, a global database still seems like the best system to pursue.⁸³⁷ After the failure of GRD, alternatively, some CMOs have started to move to multi-territory licensing by bilateral agreements in the digital domain.⁸³⁸ Therefore, a number of mini-GRDs have been established in addition to the uber-GRD.⁸³⁹ Thus, it is better to re-evaluate how the GRD could be created or reformed based on the lessons from the first initiation, and take the issues put forward above into consideration. For this purpose, the following section is going to explore a new model of GRP, starting with the discussion on the nature and legal position of such a super platform worldwide.

6.3 Nature, Features and Benefits of the Proposed GRP

It is important to clarify the legal nature of the GRP because it affects their legal position, and determines whether or not regulatory policies should be adopted to interfere its operation. As discussed in chapter 3 that there is not a consensus as to the nature of CMOs worldwide: in some countries CMOs are private organisations, but in others they are public or semi-public organisations.⁸⁴⁰ The following section aims to explore to what extent the GRP is a public organisation.

⁸³⁶ Some core legal barriers will be analysed in section 8.3. See Chapter 3, CMOs perform different roles in different territories. For instance, U.S. CMOs only manage public performance rights, whereas European CMOs manage both public performance rights as well as mechanical rights.

⁸³⁷ Milosic (n 830).

⁸³⁸ Cooke (n 832).

⁸³⁹ Press Release, 'PRS for Music, STIM and GEMA to Collaborate on New Joint Venture: Licensing and Processing Hub to Provide Services Across Europe' <[http://www.authorsocieties.eu/uploads/PRS%20for%20Music%20STIM%20and%20GEMA%20launch%20joint%20venture%20FINAL%20\(2\).pdf](http://www.authorsocieties.eu/uploads/PRS%20for%20Music%20STIM%20and%20GEMA%20launch%20joint%20venture%20FINAL%20(2).pdf)> accessed 30 May 2017.

⁸⁴⁰ See the analysis of models of CMOs at international level in chapter 3. A degree of supervision and public control of the operations of CMOs exists in different forms in various countries around the world – for example, supervision of establishment by a public authority, the Ministry of Culture in France and Spain, the Ministry of Justice or the Patent Office in Germany; self-regulatory framework approach in UK; civil courts supervision over all disputes in Italy, Netherlands, Portugal and Spain; administrative authority in Germany; specialist copyright tribunals in Australia and UK; Government department supervision in Canada and Denmark, supervised by the general law of competition and the powers of the competition authorities. See, CISAC (n 68).

The proposed GRP, which can be regarded as a CMOs' CMO, would mainly function as an information system facilitating copyright licensing of musical works. But it would not perform the administration function, eg negotiating with users, collecting and distributing royalties, enforcing copyrights, and carrying out the social-cultural obligations. Such concrete administration functions mentioned above will still be performed by individual national CMOs which are members sharing membership of the GRP. The central contact point which serves to balance information asymmetries can be understood as a 'copyright management information system'.⁸⁴¹ The system itself does not grant licenses, but its most important task is to provide information to persons about who holds and possibly manages the rights. It also records every usage of copyrighted works by end users. To some extent it provides supervision on the operation of national CMOs. The system was supposed to work as an important part of cross-border licensing of musical works to achieve the objective of information economics at international level. Such a global database platform would contain accurate information about every recording, the copyright owners in each territory, the authors who wrote the underlying musical work, publisher information, and performer identification. It would substantially improve the transparency, efficiency, simplification and harmonization of international copyright licensing.

As a comprehensive information system, data provided by the GRP for its members and the public should include at least four aspects:⁸⁴² first, a register of members whose rights they represent; second, details of registered works (titles, authors, publishers and the agreed split of revenues between them); third, details of users with whom agreements are signed; fourth, details of music use by such users. These categories of documented information, originating from national CMOs, could be globally standardised, and offer with online access to their members and the public at large. The GRP would also oversee the information provided by national CMOs to ensure the information is accurate and updated. Therefore, the documentation of all the information becomes essential to the effectiveness and transparency of the operation of licensing practice in the digital era. The GRP does not serve rightsholders

⁸⁴¹ Towse and Hanke (n 36).

⁸⁴² Frith and Marshall (n 261) 112.

only. It is not the representative of CMOs or rightsholders. The members of the GRP would include individual songwriters, composers, publishers, producers, CMOs, and users. At the same time, commercial users could register as GRP members to exploit musical works from the platform. Platform users could require information any time at any place through the internet. Therefore, the GRP would be a not-for-profit semi-public organisation in nature.

Because of consumers' desire, it has been argued that one-stop-shop is justified for music joint ventures.⁸⁴³ One-stop-shop is a uniform and unproblematic acquisition of all required copyrighted works existing in the world in one single place.⁸⁴⁴ Licences can be directly granted through portals.⁸⁴⁵ In this case, consumers are provided with true one-stop licence shopping at a central online location, providing a convenient, easily adaptable, and secured system with the capacity to handle thousands of transactions every day.⁸⁴⁶ The GRP, however, does not function to directly grant licences to right-users. This is the main feature that distinguishes it from the concept of one-stop-shop. National repertoires can and should perform the function of one-stop-shop for the sake of reducing right-users' transactions costs.

From the perspective of a two-way copyright licensing industry, an online music licensing clearinghouse has been proposed to reconcile the existing licensing structure with new technologies by positing a method of digitally licensing music copyright.⁸⁴⁷ The online music clearinghouse would provide licensors with fair compensation in a manner consistent with traditional licensing practices and would allow those seeking a licence to easily and quickly pay one price for their desired use.⁸⁴⁸ It has been argued that it would provide an efficient way to manage and store JMOs' enormous music catalogues, as well as the detailed accounts of all clearinghouse users.⁸⁴⁹ As proposed, this clearinghouse may have to charge a small fee for each

⁸⁴³ Harry First, 'Online Music Joint Ventures: Taken for a Song' (2004) NY Univ Law & Econ.

⁸⁴⁴ Hansen and Schmidt-Bischoffshausen (n 36).

⁸⁴⁵ *ibid.*

⁸⁴⁶ Brian R Day, 'Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse' (2009) 18 Texas Intellectual Property Law Journal 195.

⁸⁴⁷ *ibid.*

⁸⁴⁸ *ibid.*

⁸⁴⁹ *ibid.*

transaction to help to offset administration costs.⁸⁵⁰ This feature is distinct from that of the GRP. The GRP records transaction history but would not charge an administration fee. This part is left to national CMOs as before.

The GRP would be a useful tool for establishing an infrastructure for multi-territorial licensing worldwide.⁸⁵¹ In addition to the multi-function, the GRP could also benefit developing countries which might do not have the ability to set up a modern functioning CMO, to facilitate the global free flow of cultural goods. With the technological advances in recent years of database software systems and the online environment, great efficiency could be achieved if a GRP could be created that each JMO could have access to.⁸⁵² The GRP initiative would greatly simplify, modernise and improve the conditions of licensing in the digital market.⁸⁵³ Its main objective is to provide, for the first time, a single, comprehensive and authoritative representation of the global ownership and control of musical works. The compilation and availability of accurate information on music creators' rights ownership information in one authoritative database is of utmost importance for facilitating efficient cross-border licensing and the distribution of royalties to the relevant right holders in a consistent manner. This information should be publicly available and provide transparent information to users, thus facilitating licensing. The main benefit of the GRP's system is rapid and efficient copyright documentation, permitting timely and accurate royalty distributions, which is delivering substantial benefits for the creators and rights-owners. Indeed, the copyright management information system is the prerequisite to ensure the transparency of the operation of JMOs. For markets in intangibles like digital musical works to function properly, full disclosure of all necessary information about copyright and the identity of rights-holders and licensors is indispensable.⁸⁵⁴

⁸⁵⁰ *ibid.*

⁸⁵¹ The GRD was deemed a useful infrastructure for multi-territorial licensing worldwide. See Bonadio (n 825).

⁸⁵² David Stopps, *Howto Make a Living From Music* (World Intellectual Property Org. 2008)3.

⁸⁵³ Mazziotti (n 309).

⁸⁵⁴ *ibid.*

6.4 Rawls's Theory of Justice and the GRP

Various JMOs worldwide as GRP members would be in a relation of cooperative interdependence under the social institution of international copyright licensing in musical works. Repertoires from different countries mutually rely on the common market of music for the sake of augmenting their national incomes. It is believed that gains in national income by international free trade are further augmented by economies of scale and the spread of technology and ideas, by reducing costs of production and increasing output, while the resulting gains in turn contribute to economic growth.⁸⁵⁵ The central point platform facilitating worldwide cross-border copyright licensing in musical works is to allow countries to further refine what was produced, allocate music copyright resources more productively and thereby increase national overall production and greater national-level income gains.

The basic structure of the social institution of GRP can be organised in different ways, with varying consequences for the incomes of JMOs and for the socio-economic prospects of their country. This international social practice of market reliance would certainly generate issues of fairness. JMOs may benefit from the GRP to very different degrees overall, and specific groups of people may on balance be “losers” from global copyright licensing even if their represented JMO gains in the aggregated. Inside the GRP there are various sizes of repertoires from different countries managed by JMOs which have distinct natures, features and nuanced functions and abide by national laws. As far as the distribution of copyright benefits and burdens concerned, organisational members choose to form this society through negotiated agreements and, therefore, are subject to the demands of fairness beyond mere considerations of JMOs' interest, national economic efficiency, or overall welfare. This thesis suggests to arrange the basic structure of the social institution of global JCM according to Rawlsian principles.

The discussion of global justice in this section is the introduction of distributive fairness in copyright resources, rather than other morally important issues, including international

⁸⁵⁵ Aaron James, 'A Theory of Fairness in Trade' (2014) 1 *Moral Philosophy and Politics* 177.

relations, global wealth and poverty, or global inequality in other aspects. This is because philosophical discussion of global justice has become sufficiently rich and complex that it is no longer possible to discuss all the various threads of this discussion in one entry.⁸⁵⁶ Cross-border copyright licensing in musical works has become a factual global phenomenon. The global inequality as the outcome of globally copyright licensing is an imperative issue that we have to face. Rawls's theory offers two principles to assess the justness of any configurations or law. Some scholars argue Rawls justice theory is merely for domestic political institutions.⁸⁵⁷ Also, the concept of global justice has also been constantly debated.⁸⁵⁸ At macro-level the philosophical research on the phenomenon of global inequalities appears to be inconclusive. However, as a specific global phenomenon, cross-border copyright licensing in musical works is relevant from the standpoint of justice which is worth a separate test. Within the scope of this specific area, Rawls's theory of justice can be applied to assess and design the social institution of the GRP.

To fulfil the goal of global copyright justice, the proposed multi-objective theoretical framework is applied.⁸⁵⁹ The economic objective of copyright legal system is to fulfil economic fairness between different JMOs. According to Rawls's first principle of equal liberty, copyright should be a universal legal right that equally enjoyed by all rightsholders without prejudice.⁸⁶⁰ Thanks to international copyright treaties,⁸⁶¹ the content of copyright protection has been minimally harmonised at international level. Copyrights are able to be equally protected among member countries. For satisfying the first part of the second principle, fair equality of opportunity, the GRP should integrate all kinds of musical works from all over the world together into a central platform. All music owners, including famous music artists, larger rightsholders and less-known musicians, fairly enjoy the global market opportunities and the

⁸⁵⁶ Deen K Chatterjee, *Encyclopedia of Global Justice: A-I* (Springer Science & Business Media 2011).

⁸⁵⁷ See Thomas Winfried Menko Pogge, *John Rawls: His Life and Theory of Justice* (Oxford University Press on Demand 2007); Samuel Richard Freeman, *The Cambridge Companion to Rawls* (Cambridge University Press 2003).

⁸⁵⁸ Chatterjee (n 856).

⁸⁵⁹ See the proposed theoretical framework in chapter 2.

⁸⁶⁰ The first principle of Rawls's theory of justice states that 'each music creator is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'. See Rawls (n 137).

⁸⁶¹ For example, the Berne Convention and the Universal Copyright Convention (UCC).

GRP services regardless of their nationality or social class. The GRP should provide an equal opportunity to all member repertoires, whether from developed or developing countries, to disseminate musical works and to reach the global music market. The second part of the second principle ensures that everyone will benefit from the social cooperation. It requires that no one's life prospects would be worse off during such global copyrights licensing practice. In the global context, the understanding of "everyone" in the society should include both JMOs and JMOs' individuals. Neither the overall interests of JMOs or individual rightsholders' interests should be worsened off. According to Rawls, economic inequalities are only allowed when they will be to everyone's advantage, and with the priority to those who are worse off.

As discussed in chapter 5, the justification of the objective of social function is for improving the long-term expectation of the worse off.⁸⁶² With regard to the social cooperation by means of JCM in the global context, the scope of public interests has been broadened in digital era. People wherever they come from, contribute to add values to the common assets in some seen or unseen ways and easily share such common assets worldwide by means of internet. The scope of the concept of music users or contributors should not be limited according to their nationality. The subject of traditional discussion of global justice is mainly about the distribution of ordinary goods. However, ordinary goods are scarce goods which are different from cultural goods. Social institutions have to concern the allocation of scarce goods and burdens since the scarcity of them. That is why it is impossible to discuss philosophical theory regarding international distributive justice at the global level. On the contrary, cultural goods have infinite lives and they increase values by usage. Social institutions have to be designed to encourage the dissemination and exploitation of cultural goods. There is no difference in terms of values between diverse musical works. Also, due to the realities of globalisation and digitalisation, music users worldwide agreed to cooperate with each other behind a veil of ignorance under the condition to share the "primary goods". Accordingly, the concept of international public interests can and should be established. For improving the long-term expectation of the least favoured, the GRP could offer exceptions to and limitations of

⁸⁶² See section 3.4.2 and section 5.2.

copyrighted works, allowing the least favoured to exploit musical works freely without infringing copyrights, and fulfilling the social function of copyright legal framework. It could also offer mandatory licences to musical works for education purposes by the least advantaged.

As to the justification of cultural objective, the GRP would be commissioned to promoting cultural diversity at the global level. As discussed in chapter 3, the concept of cultural rights is justified by the first principle of Rawls's theory that cultural rights are equal political rights between all people which requires equality in the assignment of basic rights and duties. This function cannot be taken into effect by a singular repertoire of course. The GRP would provide an ideal place for musicians' cultural expression all over the world. At the same time, the access right of music users would also be improved through this social infrastructure.

6.5 Core Legal Issues to Establish Global Copyright Licensing Framework

The failure of the first attempt to create a GRD has proved that it is a formidable project to establish a global licensing framework. The challenges facing the policy-makers are not only from the financial problems, political obstacles, technological difficulties, but also, more importantly, from the legal barriers between different jurisdictions all over the world. This section studies the two core legal issues, named prohibition of formalities and natural monopoly, which would be the main obstacles to the establishment of a global licensing informational platform – the GRP.

6.5.1 The Issue of Prohibition of Formalities

Copyright formalities are defined as formal requirements that the law imposes on authors and copyright owners for the purpose of securing or maintaining copyright protection or enforcing this right before the courts.⁸⁶³ Copyrights are generated automatically along with the completion of creative works. From the moment that an original work is created, the author enjoys all the benefits that copyright protection grants, without the need to complete a registration, deposit the work, mark it with a copyright notice or comply with any other

⁸⁶³ Van Gompel (n 396) 10.

statutorily prescribed formality.⁸⁶⁴ Creators are not under any obligation to accomplish any formality to gain exclusive rights on their works. This famous rule of prohibition of formalities was introduced in Berne Convention in 1908 and now it is Article 5(2) of the Berne Convention (1971).⁸⁶⁵ However, formalities of copyright have not disappeared entirely. As will be discussed in the following sections, in some countries, some kind of formalities still exist. The advantage of registration is that it creates a presumption of constructive notice that a work is under copyright, which is useful to a plaintiff in an infringement action.⁸⁶⁶ In fact, in the digital era, copyright licensing will dramatically benefit from such formalities. Before arguing to remove this out-of-date provision from international treaties, this section starts with a brief introduction of the three forms of formalities of copyrights.

6.5.1.1 Registration: Information of Ownership

The registration of copyrighted works is not required to gain copyright protection according to the Berne Convention. However, rightsholders are encouraged to register their works by national copyright laws on a voluntary basis,⁸⁶⁷ for the purpose of establishing *prima facie* evidence from an official source in case of copyright conflicts. In most countries, online registration services of musical works are provided by CMOs or governments normally for a small fee, as well as other options like filing application forms by post are also available.⁸⁶⁸ These kinds of register services do not generate copyright, but are regarded as a way to better identify the basic information such as rightsholders of a musical work and proof of ownership. These services are usually convenient for rightsholders and aim to simplify as much as possible the registration process of musical works. This is because the information of ownership is important and fundamental in the field of copyright licensing, especially for digital musical

⁸⁶⁴ *ibid*, 1.

⁸⁶⁵ Article 5(2), Berne Convention. “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”

⁸⁶⁶ Christopher Sprigman, ‘Reform(aliz)ing Copyright’ (2004) 57 *Stanford Law Review* 485.

⁸⁶⁷ For example, in Spain, every work protected by Law 22/1987, of 11 November 1987, as amended by Law 20/1992, of 7 July 1992, may be registered in the General Registry of Intellectual Property. This register is under the authority of the Ministry of Culture and is made available to the public.

⁸⁶⁸ For example, SABAM, UK PRS, US copyright office, BMI, Canadian IP office, Kenya copyright board.

works whose structure of ownership can be rather complex and confusing for copyright-users.⁸⁶⁹ To set up a GRP, the registration of musical works becomes the prerequisite of the success of this project.

6.5.1.2 Recordation: Record of Transferring Information

Recordation is the registration of amendment, assignment, transfer or conveyance of copyrights, for keeping the registers up-to-date. If there is no transferring information, the original author is deemed as the right-holder(s). The basic rule of recordation of other IP rights like patent, trademarks, industrial design, is that if an assignment is recorded, the assignee is protected against earlier unrecorded transfers of rights. If he fails to do so within a certain period, a subsequent recorded transfer will take priority.⁸⁷⁰ The assignment or transfer of copyrights in musical works happen frequently in practice. US copyright law used to stipulate that recordation is required as a condition to sue for anyone claiming to be the right owner by virtue of a transfer of copyright. However, after joining the Berne Convention, it was modified as recordation only gives constructive notice of the facts stated in the recorded document and priority in case of conflicting assignments.

6.5.1.3 Notice

The rule of copyright notice was firstly introduced in US copyright law. It is a notice of a statutorily prescribed form that informs users all over the world of the underlying claim to copyright ownership in a published work. According to the US 1909 Copyright Act, the notice should consist of three elements, i.e., the indication ‘copyright’, ‘copr.’ or the symbol ©, the name or initials of the right owner and the year of publication.⁸⁷¹ It should be placed on the title page – or other visible part – of each copy of the work published or offered for sale in the US by authority of the copyright owner.⁸⁷² The use of notice informs the public that a work is protected by copyright, identifies the copyright owner, and shows the year of first publication.

⁸⁶⁹ See section 6.5.1.5.

⁸⁷⁰ See sec. 68, UK Patent Act 1977; sec.25(4) UK Trade Marks Act 1994.

⁸⁷¹ Sec. 18 of the US Copyright Act 1909; 17 USC § 19 (1947).

⁸⁷² Secs. 9 and 19 of the US Copyright Act 1909; 17 USC §§10 and 20 (1947).

6.5.1.5 Necessity and Feasibility to Reintroduce Formalities to GRD

In the context of copyright licensing in the digital era, identifying and locating copyright owners may be difficult, since not all works have an attached statement indicating the authorship or ownership of copyrights. Even if they do have notices, the information may be outdated since the ownership may have transferred to a third party or even sub-third party. In the absence of copyright formalities, adequate and updated copyright registers are insufficient. This can be a huge obstacle for the free cross-border flow of copyrighted goods due to the difficulty for users to obtain accurate information. This problem of unidentifiable and untraceable copyright owners, also known as the problem of ‘orphan works’,⁸⁷³ may also obstruct public access to cultural goods. The reintroduction of copyright formalities into copyright licensing law could be an optimum solution for clearing these obstacles and facilitating cross-border licensing and the free flow of musical works worldwide.

However, due to the fact that copyright law is facing such challenges, among scholars there is a hot debate on whether it is feasible to reintroduce copyright formalities into the copyright legal framework.⁸⁷⁴ Opponents argue that copyright is a natural right that ought to be protected independently from compliance with formalities.⁸⁷⁵ They believe that all the requirements of formalities discussed above can be very burdensome and costly for individual creators to fulfil them,⁸⁷⁶ and more importantly, they violate Article 5(2) of the Berne Convention.⁸⁷⁷ Authors cannot be forced to register their works. Professor Ginsburg emphasized that ‘orphan works

⁸⁷³ See Gompel (n 396) 5.

⁸⁷⁴ The prohibition of formalities rule in Article 5(2) of the Berne Convention stipulates that “the enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work...”

⁸⁷⁵ See Adolf Dietz, *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with special reference to the provisions of the Treaty establishing the European Economic Community*, vol 20 (Kluwer Law Intl 1978) 24-25; Jane C GINSBURG, ‘A Tale of two Copyrights: Literary Property in Revolutionary France and America’ (1991) *Revue internationale du droit d'auteur* 124; Silke Von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) 43, 119; Lessig, *Free Culture* (n 813) 250-251; Sprigman (n 866) 543; Graeme W Austin, ‘METAMORPHOSIS OF ARTISTS’ RIGHTS IN THE DIGITAL AGE: KEYNOTE ADDRESS’ (2005) 28 *Colum JL & Arts* 397; referring to such ‘natural rights’ claims in relation to (the abolition of) copyright formalities.

⁸⁷⁶ See Arthur Levine, ‘The End of Formalities: No More Second-Class Copyright Owners’ (1994) 13 *Cardozo Arts & Ent LJ* 553; Irwin Karp, ‘A Future Without Formalities’ *ibid* 521; Austin (n 875) 414; Gompel (n 396) 9.

⁸⁷⁷ Jane C Ginsburg, ‘The US Experience with Copyright Formalities: A Love/Hate Relationship’ (2010) 457.

legislation should not occasion back door imposition of formalities that condition the “enjoyment or exercise” of copyright’.⁸⁷⁸

Whereas, supporters observe that copyright formalities may have a useful role to play in addressing the current challenges in copyright law.⁸⁷⁹ They seek to explain that by ‘making claims on the ownership of property clear’, formalities assure ‘that the property can be allocated in a way that makes everyone better off’.⁸⁸⁰ According to economic studies,⁸⁸¹ the costs of tracing the right owner and obtaining a license to use a work may be significantly reduced if copyright formalities are conditional. Also, the encouragement of formalities is a way to conserve cultural heritage.⁸⁸² The period of copyright protection is a creator’s life time plus 70 years. After some time, the information of ownership would become unclear if the work had never been registered. In this case, a register would act as the guardian of culture by recording the evolvement from our past and our present to future generations.⁸⁸³ Based on a legal-theoretical analysis, Gompel demonstrates that reintroducing copyright formalities is acceptable and feasible for an author’s economic rights which are property-related; however, moral rights aiming to protect authorial dignity, must be protected without formalities.⁸⁸⁴ For creators’ economic rights, formalities will benefit all stakeholders involved, not only for rightsholders but also for users, the domestic economy, and the society as a whole.⁸⁸⁵

The issue of the requirement of formalities is an important element for considering the essential question of whether the requirement of formalities by CMOs and GRP to establish a central licensing database is Berne compliant, in particular by those non-voluntary collective licensing systems. As regards Article 5(2) of the Berne Convention, it is a misperception to understand that this provision forbids all formalities. Subjecting copyright to formalities is prohibited only

⁸⁷⁸ Estelle Derclaye, *Copyright and Cultural Heritage: Preservation and Access to Works in A Digital World* (Edward Elgar Publishing 2010) 43.

⁸⁷⁹ Gompel (n 863).

⁸⁸⁰ *ibid.*, 8.

⁸⁸¹ Landes and Posner (n 96).

⁸⁸² Derclaye (n 878) 44.

⁸⁸³ *ibid.*

⁸⁸⁴ Gompel (n 863) 262.

⁸⁸⁵ *ibid.*

if it affects the ‘enjoyment’ or the ‘exercise’ of this right.⁸⁸⁶ Therefore, formalities that leave the enjoyment or the exercise of copyright unaffected are not covered by the Berne prohibition on formalities.⁸⁸⁷ CMOs act as intermediaries by providing licensing services between licensors and licensees, functioning to facilitate the control of the licensing process to benefit all stakeholders involved, including the whole society. Their collective management of copyrights, eg by means of setting up a central database, as well as the corresponding copyright licensing policies do not affect the enjoyment or exercise of proprietary rights authorised by copyright law. Creators are free to choose to license their works to another intermediary, eg a publisher or producer, to make profits, or authorise copyrights to any CMOs as they like. Also, rightsholders are still free to exercise their copyrights individually. Therefore, as long as CMOs do not interfere with rightsholders’ choices or exclude the means of individual licensing of copyrights, the requirement of formalities by CMOs is consistent with Article 5(2) of the Berne Convention. For non-voluntary collective management of copyrights, rightsholders would be authorised the rights to opt-out to enjoy or exercise their rights freely. Otherwise, non-voluntary CMOs would affect their “enjoyment” or “exercise” of rights that is inconsistent with Article 5 (2).

Nowadays, there are new ways music is distributed that permit its dissemination across national borders,⁸⁸⁸ and this trend has been growing dramatically during the last decade.⁸⁸⁹ When foreign musical works flowed into local repertoire, the local repertoire could be expanded dramatically. Some countries have extended the term of copyright protection.⁸⁹⁰ This has resulted in a much more increased number of works. Additionally, substantive national copyright law has only been harmonised at a minimum level by international treaties. There are still distinctions between domestic copyright laws which has caused practical difficulties

⁸⁸⁶ See Art. 5(2), Berne Convention.

⁸⁸⁷ Gompel (n 863) 174.

⁸⁸⁸ Bonadio (n 825).

⁸⁸⁹ See IFPI music report 2013, “the music industry has achieved its best year-on-year performance since 1998... The expansion has gone truly global”; IFPI music report 2016, “global music revenues increase 3.2% as digital revenues overtake physical for the first time”.

⁸⁹⁰ For example, the US Copyright Act of 1976 stipulated that copyright would last for the life of the author plus 50 years, or 75 years for a work of corporate authorship. The 1998 Act extended these terms to life of the author plus 70 years and for works of corporate authorship to 120 years after creation or 95 years after publication.

to copyright licensing. Another difficulty is caused by the principle of divisibility which is stipulated in the US Copyright Act 1976 – a copyright is a compilation of many individual rights, and it allows for the severability and distinct exploitation of those rights.⁸⁹¹ For example, a songwriter or music publisher as a copyright-owner may assign exclusive rights to a performing rights society BMI to perform the work publicly, but reserve all other rights, such as the right to reproduce the copyrighted works. That means CMOs have to carefully register what categories of rights they are representing and managing and by which country's law the copyrights of these works have been transferred that CMOs have to respect.⁸⁹² Because of the different rules as to the transferability and divisibility of copyrights, their ownership has also become more obscure. All of these are licensing difficulties that have intensified especially in the digital era due to the expansion of the amount of cross-border licensing of copyrighted works. Therefore, without an effective copyrights database platform, cross-border copyright licensing could become impossible.

Technologies have also rendered the structure of copyrights in musical works much more complex than ever before. The means to be a musician has, in many ways, changed. The scope of the meaning of creators have also changed: creators are no longer limited to songwriters, composers, performers and producers, but also including technologists, contemporary composers and performers, engineers, synthesiser programmers, turntablists, sample artists, mixers and remixer, individuals whose knowledge and skill in the uses of the recording studio, and the various technologies associated with it.⁸⁹³ All these people have become an important part to the creation of modern musical works. This has added new layers of protection to existing creations and has brought new categories of right holders into the realm of copyright. As such, a single object, a piece of musical work for example, now may be protected by various layers of overlapping rights, each of which may potentially be owned by a different

⁸⁹¹ 17 U.S.C. § 106 (1976). The five basic rights provided to the copyright owner are reproduction, adaption, publication, performance, and display. Thus, the right to produce a movie is severable from the right to publish the story upon which a movie may be based. See Elliot Groffman, 'Divisibility of Copyright: Its Application and Effect' (1979) 19 Santa Clara L Rev 171.

⁸⁹² This is due to the principle of 'country of origin' stipulated in Berne Convention.

⁸⁹³ Frith and Marshall (n 261) 139.

rightsholder.⁸⁹⁴ This perplexing structure of copyrights confuses users quite often. Now even the creators themselves, eg arrangers, synthesizer programmers, mixers and remixers, do not know whether or not they have copyrights to their musical works.⁸⁹⁵ If two different CMOs are set up to manage copyrights separately, this technological change will render copyrights licensing more complicated. Meanwhile, users refuse to pay twice for the licence of a repertoire if the musical works are managed by different repertoires at the same time.⁸⁹⁶ Licensees claim that payment should be combined.⁸⁹⁷ A central information system that provides one place of documentation would be cost-efficient to right-users. Therefore, it is a good idea to document all the information of authorship or ownership as well as copyrights licensing information to avoid any disputes about ownership, and also to help users to locate correct licensors. The licensing system would be much more simplified if there were a central information platform integrating and providing comprehensive information of the ownership and/or authorship of copyrights as well as copyrights licensing information altogether.

Generally, in the context of global cross-border licensing, such a central database to record information of musical works would not only benefit rightsholders and right-users, but also facilitate the licensing process and promote the free flow of musical works across borders. The principle of prohibition of formalities was more concerned with the practicability and political feasibility of the treaty than with ideological considerations.⁸⁹⁸ After a careful examination of the purpose of Article 5(2) of the Berne Convention and its practical feasibility, it can be concluded that a global information system of musical works is consistent with the Berne Convention. And more importantly, this common social infrastructure would benefit the stakeholders involved by providing them accurate information about copyrighted works and licensing activities. It would not only dramatically reduce transaction cost, but more important improve the transparency and efficiency of CMOs' performance. Member CMOs,

⁸⁹⁴ The typical case is the process of producing digital music that would involve some or all of arrangers, programmers, mixers and lyrics.

⁸⁹⁵ See Frith and Marshall (n 261).

⁸⁹⁶ Music users who obtained direct licenses had to pay twice for the music – once to the direct licensor, eg composers and publishers, and once to the relevant CMO. See D.J. Gervais and P.L. Landolt, *Collective Management of Copyright and Related Rights* (Kluwer Law International 2006) 337.

⁸⁹⁷ *ibid.*

⁸⁹⁸ Gompel (n 863).

rightsholders, users, as well as the public would be able to access to the core information at any time and any place over the world. This information system would operate as an essential infrastructure which is the prerequisite for functionalising JMOs to achieve multi-objectives.

6.5.2 The Issue of Natural Monopoly

Another legal obstacle is the so called natural monopoly function of CMOs. To justify the feasibility of a GRP, the inevitable issue of the GRP's *de facto* monopoly position has to be dealt with in terms of worldwide copyright information management in musical works. This section starts with a brief introduction of how GRP would work, and then the natural monopoly theory will be applied to assess whether or not GRP is a natural monopoly; if it is, should it be encouraged or any measures adopted to correct any possible distortion?

6.5.2.1 The Way Forward of GRD and Proposed GRP

Historically, CMOs have operated and administered the rights in musical works predominantly on a single territory basis with the users of these rights predominantly operating within a single territorial boundary. This leads to the databases of musical works, whether at national level or controlled by a global repertoire, being of varying quality and not always maintained at an optimum level.⁸⁹⁹ GRD can standardise the requirements and forms of the database of musical works at an international level. Such a centralised information system will be critical to register and keep track of performances, avoid duplication on the documentation, improve efficiency and convenience, and will dramatically facilitate the licensing practice.⁹⁰⁰ Authoritative, multi-territory, transparent, openly accessible, comprehensive rights ownership data is key to enabling these multi-territory licensing solutions to function effectively and efficiently. Such solutions that offer an aggregated worldwide repertoire licence would maximise stakeholders' trust in licensing practice, deliver administrative efficiency through standardisation and

⁸⁹⁹ GRD, WG, 'Global Repertoire Database Working Group the Way Forward for a GRD' (2010) <[http://www.globalrepertoiredatabase.com/docs/GRD-077-GRDRecommendations\(Finalv1.0\).pdf](http://www.globalrepertoiredatabase.com/docs/GRD-077-GRDRecommendations(Finalv1.0).pdf)> accessed 15 February 2017.

⁹⁰⁰ Philippe Gilliéron, 'Collecting Societies and the Digital Environment' (2006) 37 IIC 939.

interoperability and provide for a level of accuracy, comprehensiveness and automation fit for copyright licensing practice in the digital era.

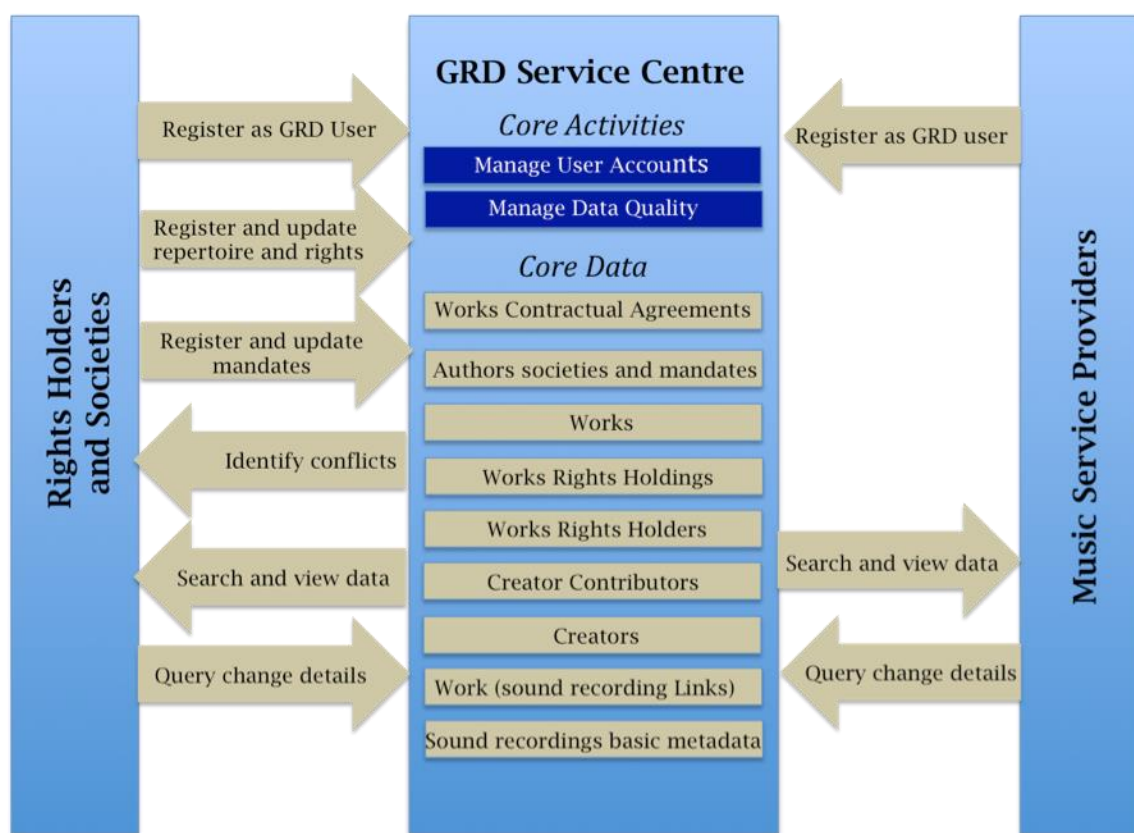
As shown in diagram 8.1 below, the main obligation of GRD is to manage the data quality and user accounts. Any rightsholders, CMOs and music service providers can register as GRD users. The GRD should strive to deliver a consolidated, comprehensive and authoritative source of truth.⁹⁰¹ This authoritative information provided by the GRD is about which organisation is in a position to grant the requisite licences for the exploitation of the musical works by rights share, by right type, by use type, by territory and by exploitation date.⁹⁰² Some of the data elements are static in the sense that they do not change, for example, the title of a musical work or its songwriter and composer. However, a significant amount of other information identified above is dynamic, such as the usage of the works, transfer of ownership, and royalties. Such data elements are highly time sensitive and need to be updated constantly. As claimed, none of the existing databases around the world provides such quality data⁹⁰³ which is deemed as a fundamental tool for worldwide copyright licensing service. The GRD must, therefore, be able to keep all the data updated over time and retain a complete historical record that can be accessed as requested any time.

⁹⁰¹ GRD, WG (n 899).

⁹⁰² *ibid.*

⁹⁰³ *ibid.*

Diagram 8.1: The conceptual framework for the GRD environment.⁹⁰⁴



Source: GRD WG (2010)

The concept of a GRD is now gaining greater attention across various stakeholder groups of the music industry because it is increasingly recognised that there are significant benefits to be had for all stakeholders. Accordingly, it is proposed that the objective of GRP is to establish a database to provide access to authoritative comprehensive multi-territory information about the ownership or control of the global repertoire of musical works that is openly available to all stakeholders, such as songwriters, publishers, musical works, CMOs and users (see diagram 8.1 above.) For rightsholders and CMOs it will provide significant improvements in efficiency and reductions in costs particular in the areas of data reconciliation and subsequent usage matching. For licensees, GRP is cost-efficient. The access to authoritative data about musical works would ensure that appropriate licences can be obtained with more transparent rights

⁹⁰⁴ *ibid.*

clearance processes, which will enable simpler reconciliation of royalty invoice and eliminate multiple administrative charges where rights are licensed on a multiple repertoire basis. Authoritative and comprehensive data will also maximise matching and improve the accuracy of distributions to rightsholders whether rights are licensed on a worldwide repertoire or specific repertoire basis. For all music industry stakeholders, there will be general reductions in costs and improvements in efficiency associated with the people and processes involved in works registration, resolution of data conflicts, matching of usage information and the management of the resulting financial transactions.⁹⁰⁵ All of these benefits in turn would inevitably lead to increased revenue generally to all stakeholder groups regardless of where they sit in the supply chain.⁹⁰⁶

6.5.2.2 The Application of Natural Monopoly Theory

With very few exceptions, CMOs are organised as natural monopolies.⁹⁰⁷ The term “natural monopoly” has been associated with CMOs, because it is widely accepted that collective management is the most efficient form for managing copyrights and at the same time, regulation is necessary to assure that the benefits of the natural monopoly will not be replaced by monopolistic abuses.⁹⁰⁸ The proposed GRP will also be the case. Research on CMOs’ natural monopoly, however, is usually superficial and most of the literature only points out that CMOs, as monopoly suppliers, are more efficient in the sense of having lower costs than if there were in competition, without demonstrating what the essence of natural monopoly is and how to apply this theory appropriately to CCM.⁹⁰⁹ They simply believe that the main measurement relies on whether CMOs who exploit their monopoly position, tolerate the market and reduce efficiencies or successfully regulate the market and achieve efficiencies.⁹¹⁰ Theoretically, all the stakeholders would rely on the information provided by the GRP, whether static or dynamic, which would be the only worldwide database of copyright licensing in musical works, stakeholders would certainly be concerned about the issue of monopoly. Thus,

⁹⁰⁵ *ibid.*

⁹⁰⁶ *ibid.*

⁹⁰⁷ Handke, ‘Collective Administration’ (n 36) 179.

⁹⁰⁸ See Katz (n 341).

⁹⁰⁹ See *ibid.*; Handke and Towse (n 917); Hansen and Bischoffshausen (n 36); Drexl and others (n 64).

⁹¹⁰ Studies on CMOs’ natural monopoly are usually on the ground of economic efficiency. See *ibid.*

this section will re-examine, in a different way, the nature of the natural monopoly of GRP by applying the natural monopoly theory.

It has been argued that markets with natural monopoly characteristics are thought to lead to a variety of economic performance problems, eg excessive prices, production inefficiencies, costly duplication of facilities, poor service quality, and to have potentially undesirable distributional impacts.⁹¹¹ It is believed that John Stuart Mill was the first to speak of natural monopolies in 1848,⁹¹² and the economic discussion about the definition, scope and regulatory attitudes, as well as the performance issues towards natural monopoly has evolved for over a hundred years.⁹¹³ The natural monopoly rationale for and the consequences of price and entry regulation came under attack from academic research and policy makers. Eventually, only a few sectors, such as electric power and gas distribution, water and telecommunication industry, have continued to have natural monopoly characteristics and are subject to price and entry regulation.

Joskow has concluded a range of questions that economists have raised to test and evaluate natural monopoly segments:

What is the most efficient number of sellers (firms) to supply a particular good or service given firm cost characteristics and market demand characteristics? What are the firm production or cost characteristics and market demand characteristics that lead some industries “naturally” to evolve to a point where there is a single supplier (a monopoly) or a very small number of suppliers? If an industry has “a tendency to monopoly” what are the potential economic performance problems that may result and

⁹¹¹ Paul L Joskow, ‘Regulation of Natural Monopoly’ (2007) 2 Handbook of law and economics 1227.

⁹¹² William W Sharkey, ‘The Theory of Natural Monopoly’ (1982) Cambridge University Press 14.

⁹¹³ See generally Edward D Lowry, ‘Justification for Regulation: the Case for Natural Monopoly’ (1973) 28 Public Utilities Fortnightly 1; Sharkey (n 912); Charles F Philips Jr, ‘The Regulation of Public Utilities: Theory and Practice’ (1984) Arlington, VA: Public Utilities Reports; Alfred Edward Kahn, *The Economics of Regulation: Principles and Institutions*, vol 1 (Mit Press 1988); Richard Schmalensee, *The control of natural monopolies* (Free Press 1979) Lexington, MA: Lexington Books; Baumol WJ Bailey EE and RD Willig, ‘Weak Invisible Hand Theorems on the Sustainability of Prices in a Multi-Product Monopoly’ (1977) 67 American Economic Review 350.

how do we measure their social costs? When is government regulation justified in the presence of natural monopoly and how can it best be designed to mitigate the performance problems of concern’?⁹¹⁴

These questions can be used to assess whether GRP is natural monopoly. If it is, what are the natural monopoly characteristics that make it a natural monopoly? How should this industry be regulated and how is government regulation justified, and how can the regulation best be designed to mitigate the performance problems of concern?

From a cost-efficient and market demand point of view, the most efficient number of firms to supply a copyrights information system is one – the one-stop-shop for blanket music copyrights licensing worldwide.⁹¹⁵ If there were two or more GRDs to provide such a database instead of one, from the economic analysis perspective the producing and distributing costs would rise. Then, this single firm in the music market would be a natural monopoly.⁹¹⁶ As discussed earlier in section 5, a GRP can provide a blanket licence which incorporates a uniform pricing structure. Under a blanket licence, the licensee is granted access to a large repertoire of works and the licensing terms and conditions and pricing are identical for all works, including foreign works, covered by the licence. No differential treatment of the works takes place although market conditions might warrant a higher price for popular works than for less popular works.⁹¹⁷ As discussed in section 5, a blanket licence is often advocated as a solution to many copyright licensing and enforcement problems, eg it is the most efficient method for licensing, monitoring and enforcing copyrights.⁹¹⁸ The larger the repertoire is, the more efficient the administration would be. Hence, the extreme case is that CCM is served by a single repertoire.

⁹¹⁴ Joskow (n 911) 1227.

⁹¹⁵ See section 5.

⁹¹⁶ “When total production costs would rise if two or more firms produced instead of one, the single firm in a market is called a “natural monopoly.” This formula is presented by Carlton and Perloff, see Dennis W Carlton and Jeffrey M Perloff, ‘Modern Industrial Organization’ (2005) 104.

⁹¹⁷ Herman Cohen Jehoram, ‘The Future of Copyright Collecting Societies’ (2001) 23 European Intellectual Property Review 134; Christian Handke and Ruth Towse, ‘Economics of Copyright Collecting Societies’ (2008) 38 IIC 937.

⁹¹⁸ Katz (n 341).

Kahn refers to both economies of scale and the presence of sunk or fixed costs that are a large fraction of total costs.⁹¹⁹ These attributes lead to destructive competition. In turn, the outcome is, that *naturally*, only a single firm or a very small number of firms remain in the market in the long run. He also recognises the potential social costs of duplicated facilities when there are economies of scale or related cost-side economic attributes that lead single firm production to be less costly than multiple firm production.⁹²⁰ Therefore, the GRP has natural monopoly characteristics of both economies of scale and the presence of sunk or fixed costs. These costs are a large fraction of total costs that no single music repertoire or even collaboration between stakeholders can afford.⁹²¹ These attributes determine that the music licensing industry is ruinous competition⁹²², which lead to monopoly naturally.

A natural monopoly happens when large-scale infrastructure, such as cables and grids for electricity supply, pipelines for gas and water supply, and networks for rail and underground, which are supposed to be extremely high fixed costs, is required to ensure supply.⁹²³ In this case, it is optimal to have a single firm to supply goods or services for market demand because it is less costly to produce any level of output of this product within a single firm than with two or more, because increased numbers of competitors lead to some loss of scale efficiencies.⁹²⁴ It is more efficient to allow only one firm to supply to the market because allowing competition would mean a wasteful duplication of resources.⁹²⁵ This would be the case for the GRP. If there is more than one database, it will be uneconomic for all stakeholders to participate in the licensing activities. Accordingly, it is believed that the law should not try to impose competition on natural monopolies since competition would endanger the efficiencies produced by the natural monopoly.⁹²⁶

⁹¹⁹ See Kahn (n 913).

⁹²⁰ Ibid.

⁹²¹ This is one of the reasons lead to the failure of the GRD. See Milosic (n 830).

⁹²² Carl Kaysen, *Antitrust Policy: An Economic And Legal Analysis* [By] Carl Kaysen and Donald F. Turner (Cambridge: Harvard University Press. 1959) 191, 195-96.

⁹²³ S Ran Kim and A Horn, *Regulation Policies Concerning Natural Monopolies in Developing and Transition Economies* (Citeseer 1999) DESA Discussion Paper No.8.

⁹²⁴ Joskow (n 911); Katz (n 341).

⁹²⁵ Sharkey (n 912).

⁹²⁶ Drexl and others (n 64).

Nevertheless, the law should regulate the monopoly by addressing its anti-competitive effects and, more specifically act against abuse of the market dominance of CMOs.⁹²⁷ As to the administrative regulation of prices, entry, and other aspects of firm behaviour have been utilised extensively in the US and other countries as policy instruments to deal with real or imagined natural monopoly problems. Joskow suggests that an imperfectly regulated market is better than an imperfectly unregulated market. A natural monopoly segment needs regulatory rules to regulate access, pricing and performance behaviour since regulated networks continue to be an essential platform to support efficient competition.⁹²⁸

Indeed, natural monopoly does not mean non-competition. The efficiency and behaviour of a monopolistic organisation, whether private or public, depends much on the framework in which it operates, and especially on the existence of performance-enhancing incentives and penalties.⁹²⁹ Thus, the design of regulation is essential. The question of which specific approaches and underpinning theories need to be applied is the crux of the matter when designing natural monopoly regulation policy. The monopolistic organisation should be motivated by productivity and growth since these objectives are more important for the sustainable development of the organisation.⁹³⁰ In order to do this, the spirit of distributional fairness for maintaining sustainable development should be embodied into the regulatory policy. Likewise, taking all different stakeholders' interests into consideration to strike a fair balance between them, and ultimately fulfilling distributional fairness should be the goal of the GRP rather than simply focusing on efficiency, economy, or competition. To achieve this goal, there are several approaches, and one possibility is to retain the monopoly but to create competition between companies for the right of exclusive supply over a limited period.⁹³¹ When competition is impossible within the market, this solution offering the right to be the natural monopolist may be an adequate substitute under some circumstances.⁹³² In this hypothetical situation, the right of monopoly is, in fact, a contract between governmental

⁹²⁷ *ibid.*

⁹²⁸ Joskow (n 911).

⁹²⁹ Kim and Horn (n 923).

⁹³⁰ *ibid.*

⁹³¹ This has been formalized as Demsetz-competition. See Kim and Horn (n 923).

⁹³² As to the circumstances, see below the analysis of the case *BMI v. CBS*.

authority and the organisation. They may be selected by auction as the exclusive provider with some terms and conditions, such as lowest price to consumers, and allowance to government to extract part of the monopoly rents for the benefit of the consumers.⁹³³ Hence, natural monopoly needs a well-designed supervision system for maintaining productivity and growth.

Therefore, the embodied theory⁹³⁴ and the goal of regulation⁹³⁵ which underpin the regulatory framework are of fundamental importance to determine whether a configuration of distribution of copyrights is just or not. The goal of copyright regulation is to fulfil distributive justice. It is important to keep in mind that the objective of natural monopoly of CMOs, in particular the GRP, is the sufficient and sustainable provision of the services of CCM in musical works. This objective is for achieving the ultimate goal of copyright law to fulfil distributive justice.

6.5.2.3 Common Objectives of Competition Law and Natural Monopoly

It is generally assumed that copyright law and competition law tend to conflict because competition law basically proscribes the abuse of monopoly power, while the purpose of copyrights is to grant legal monopolies, although limited ones.⁹³⁶ This view overlooks the fact that both of them have the common goal of promoting innovation and social welfare.⁹³⁷ As the famous US case of *Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc.* (hereafter *BMI v. CBS*),⁹³⁸ which was based on economic realities rather than on rigid legal doctrine, held that the practice of blanket licensing is not *per se* illegal. Yet, it did not rule that it was legal either. It highlighted that it is more appropriate to weigh the benefits of the considerable efficiencies and the blanket licences issued by CMOs under the rule of reason,⁹³⁹ which means

⁹³³ Antony W Dnes, 'Franchising and Privatization' (1995) 40 *Public Policy for the Private Sector* 5; Ronald R Braeutigam, 'Optimal Policies for Natural Monopolies' (1989) 2 *Handbook of industrial organization* 1289; Pierre Guislain, *The Privatization Challenge: A Strategic, Legal, And Institutional Analysis of International Experience* (World Bank Publications 1997).

⁹³⁴ A multi-objective theory – ensuring interactive multi-function named economic, social and cultural functions – of copyright law underpinned by Rawls's theory of justice is proposed.

⁹³⁵ As a pillar of the copyright legal framework, the proposed regulation aims to standardise JMOs' operational activities in a way consisted to the goal of copyright law that is to struck a real balance between different interests at stake, and ultimately fulfil copyright justice.

⁹³⁶ Katz (n 341).

⁹³⁷ Werra (n 61).

⁹³⁸ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc* 441 US 1 (1979) (Supreme Court).

⁹³⁹ *ibid.*

that the appropriateness of blanket authorisation for CCM should be read under particular circumstances. This point has been specifically acknowledged in subsequent decisions.⁹⁴⁰ Therefore, this raised a question about under what circumstances the blanket licensing is allowed.

The purpose of competition law is to ‘protect the public interest in competition by prohibiting acts that exclude competitors from the market-place or restrict output and raise prices so as to harm consumer welfare.’⁹⁴¹ In most jurisdictions, the basic objectives of competition policy are to maintain and encourage the process of competition in order to ‘promote efficient use of resources while protecting the freedom of economic action of various market participants’.⁹⁴² These objectives are not in conflict with the goal of discussing copyright licensing law. The multiple functions of copyright licensing regulation are: to equally protect various rightsholders’ economic interests, especially small rightsholders; encourage small repertoires’ licensing activities; prevent the dominant position of large rightsholders’ licensing activities; promote the free cross-border flow of musical works; preserve cultural diversity; protect users’ interests, social welfare, and the interests of the public at large. Thus, when competition law objectives are applied in the context of copyright law, the negative conditions should be explained as limitations or disturbances to the potential uses of copyrighted works which will be harmful to a competitive market, are not allowed. That is to say when the blanket licensing behaviour is not harmful to a competitive market, blanket licenses are allowed.

Undoubtedly, by the very meaning of natural monopolies, the purpose is to promote the efficient use of resources to increase economic interests for stakeholders. As to the objective of “protecting the freedom of economic action of various market participants”, natural monopolies do not necessarily mean it would exclude some market participants. As discussed in the last section, the market participants of the GRD would include registered users including

⁹⁴⁰ See *Broadcast Music v. Hearst/ABC Viacom Ent. Services* 746 F Supp 320 [1990] (Dist. Court, SD New York).

⁹⁴¹ Pamela Samuelson and Kurt Opsahl, ‘Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy’ (1999) 21 *European Intellectual Property Review* 386.

⁹⁴² R Shyam Khemani, *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank Publications 1999) 8.

publishers, creators, record companies, performers and various CMOs, and numerous users including ISPs who provide different online music services. One of the core objectives of GRD is to provide authoritative and comprehensive data which will be openly accessible for all stakeholders which will be supposed to benefit all stakeholders. Therefore, after a careful examination of the objectives of both competition law and natural monopoly of CMOs, it can be concluded that they are not necessarily contradictory as imagined. In fact, they can coexist under a well-designed regulation with a sound supervisory mechanism which will be discussed further in the following section.

6.5.2.4 Possible Monopolistic Abuse

One of the possible performance problems is that a natural monopolistic organisation would abuse its monopolistic position. The focus of this section is how the regulatory rules should be best designed to mitigate such a problem. Natural monopolies are *de facto* monopolies. It is necessary to consider whether the single supplier of JCM services in musical works would be beneficial for all stakeholders and the society at large in a just way. The abuse of a dominant position may particularly harm the interests of individual right-holder members, small CMOs and users. Like IMEs, CMOs have also gained substantial market power, thereby restricting competitors which might lead to the abuse of such market power.⁹⁴³

Theoretically, CMOs may abuse the monopolistic position by setting tariffs and imposing other licensing conditions in an arbitrary way. Watt believes that public supervision and regulation of a natural monopoly such as a CMO would promote efficiency.⁹⁴⁴ Economic arguments for regulating CMOs include the need to limit the market power of monopolistic societies vis-à-vis users as well as new members.⁹⁴⁵ The monopolistic abuse of a dominant position not only exists among individual members but also small repertories. When a competitive free market

⁹⁴³ P Sean Morris, 'The Reform of Article 82 and the Operation of Competition Principles Upon the Normal Trading Functions of Copyright Collecting Societies' (2009) 4 *Journal of Intellectual Property Law & Practice* 566. For example, a recent paper raises the issue of market power of collecting societies for musical rights, see F Jenny, 'EC Competition Law Enforcement and Collecting Societies for Music Rights: What Are We Aiming for?' EU Competition Law and Policy Workshop/Proceedings (Brussels, 2005).

⁹⁴⁴ See Watt (n 54). 'Collective administration is an example of a natural monopoly so that unregulated markets are unlikely to bring up socially efficient solutions.'

⁹⁴⁵ Besen, Kirby, and Salop (n 340).

is opened between all CMOs, the consequence of such a policy may well be that only a very few, most likely the currently most powerful, CMOs would be able to grant a blanket licence, and then small CMOs would be pushed out of the market.⁹⁴⁶ The smaller CMOs could hardly win this competition due to their smaller repertoire and general operational costs. The bigger CMOs, with their high-volume income, large reserves and cross-financing possibilities, can more easily operate even under the objectively necessary cost level.⁹⁴⁷

In addition, monopolistic abuse also harms users' interests. Theoretically, such monopolies can exploit their market power vis-à-vis music users, and set licensing terms and conditions, and their prices in order to maximize their revenue without any competitive restraints.⁹⁴⁸ The common argument is that CMOs do result in higher and monopolistic prices compared to those charged in a competitive market; yet such higher prices are dynamically efficient.⁹⁴⁹ Proponents of collective management, however, usually argue that CMOs are justified because the efficiencies that they create ultimately lead to lower, not higher, prices, and this is what makes them efficient.

Though the role of CMOs has grown to include the fight against piracy, fulfilment of social and cultural functions, and copyright compliance, the regional system for some CMOs has been labelled as outdated with numerous inefficiencies caused by the 'arcane organisation of copyright payments'.⁹⁵⁰ In practice, EU and US musicians are not satisfied with the performance of CMOs, which have been criticised as not representing their true voices.⁹⁵¹ In China, musicians have also complained that they have lost control of their works once they assigned the copyrights of their creative works.⁹⁵² Musicians in China are not willing to join

⁹⁴⁶ Drexl and others (n 64).

⁹⁴⁷ Peter Gyertyanfy, 'Collective management of music rights in Europe after the CISAC decision' (2010) 41 IIC International review of industrial property and copyright law 59.

⁹⁴⁸ Katz (n 341).

⁹⁴⁹ *ibid.*

⁹⁵⁰ *ibid.*

⁹⁵¹ CMOs have frustrated artists because they target file-sharers, even kids sharing cultural works with friends in name of songwriters which is contradicted with musicians' intentions. See Reda (n 258).

⁹⁵² CBICE, Musicians worrying the new copyright law will be protective to CMOs and creators would lose their saying on their works, available at <<http://portal.cbice.com/article/41/50/201207/20120700030098.shtml>> accessed 15 February 2017.

any CMO and they believe CMOs plunder their creative works. The current copyright licensing system has been so over commercialised that CMOs have been over concerned about the music business that they have not performed their social-cultural obligation as written in copyright law.⁹⁵³ The current system does not encourage creativity. CMOs can exploit their power against individual members by refusing to license certain uses without any valid reason, or discriminate against some members.⁹⁵⁴ Hence, the monopolistic position needs to be regulated.

To sum up, it is not appropriate to simply lock members up to CMOs by political policies like non-voluntary collective management, while keep disappointing rightsholders by poor performance. Rather, rightsholders and other members should be given the freedom to choose to entrust or withdraw their rights from CMOs. The global copyrights licensing practice facilitated by the GRP would attract stakeholders to join CMOs. The efficiency and justifiable behaviour of a monopolistic enterprise, whether private or public, depends much on the framework in which it operates, and especially on the existence of well-designed regulation with performance-enhancing incentives and penalties.

6.6 Conclusion

In addition to the multi-objective hard-law approach based on the proposed theoretical framework, the governance of JMOs also has to be improved to standardise JCM in musical works. From the experience of GRD, it seems that global copyright management in musical works is an impossible mission. After investigating the problems that lead to the failure of the former GRD and justifying the existence to reshape the proposed GRP, it appears that the idea of global regulatory framework on JCM in musical works is feasible and essential, although there are some obstacles and challenges for establishing a central information point for simplifying the current licensing practice. The first attempt of the GRD has failed, but a global database is still the best system to pursue. The proposed GRP is expected to improve the transparency and efficiency of distribution of royalties by providing accurate licensing data in musical works worldwide in the digital era which would be accessible online to the public as

⁹⁵³ See generally Street (n 476); Dietz, 'Cultural Functions of Collecting Societies' (n 461); Nérison (n 48).

⁹⁵⁴ See Katz (n 341).

requested at any time and any place. In doing so, CMOs' management service would be expected to improve by the common infrastructure of GRP. This hypothetical outcome would benefit not only rightsholders, in particular small rightsholders, but also users (both commercial and non-commercial users would benefit from it), licensees, publishers, producers, individual CMOs, and the society as a whole would also benefit from their social-cultural functions. Accordingly, CMOs would attract more rightsholders to join in. However, the current scenario is that it is difficult to access copyright licensing information, and licensing practice is inefficient, especially for foreign works, due to many barriers to the free cross-border flow of copyrighted works.

The barriers to establish the GRP are mainly from legal obstacles, administrative level issues, and technological difficulties. Due to the various national legal traditions, countries have many different attitudes towards CMOs as well as relevant policies. From the legal obstacles level, the harmonisation of some aspects of copyright licensing policy at the international level would be a far more complex mission, even in this one sector, the music sector, since nearly every territory has a different revenue collecting system. Two core legal issues have been discussed for the preparation to establish the legal framework for global JCM. The first one is the principle of prohibition of formalities. Based on the analysis of Article 5(2) of the Berne Convention it finds that the requirement of registration of information by CMOs to establish a global repertoire database is Berne compliant. As long as the formalities do not affect the "enjoyment" and "exercise" of copyrights, it is suggested to reintroduce formalities to GRP. The second one is natural monopoly. It is generally assumed that copyright law and competition law tend to conflict. Nevertheless, after a careful examination of the natural monopoly theory and applying it to CCM, it can be concluded that the goal of natural monopoly is consistent with the objectives of competition law, as long as a well-designed regulation comes into existence.

The GRD has failed but a global licensing system is still necessary and imperative. This paper offers an alternative justification by applying Rawls's theory of justice to establish a reshaped GRP. Rawls's theory of justice has been chosen because it provides a better explanation to

copyright law, in particular for configuring a just institution of global JCM. This central platform is a prerequisite for the transparency and efficiency of the performance of JMOs. Cooperation between different repertoires through the creation and exploitation of a common database is crucial for avoiding the problems raised by segmented licensing repertoires. Apart from registering and keeping track of performances to avoid duplication on the documentation side for improving licensing efficiency and users' convenience,⁹⁵⁵ this platform should function to achieve the multi-objective of JMOs under a balanced and fairer copyright legal framework, and ultimately fulfil copyright justice.

⁹⁵⁵ Gilliéron (n 900).

Chapter 7 – Discussion and Conclusions

7.1 Introduction

In this final chapter, the main research findings with regard to the research questions will be recapitulated and summarised. And then, some essential implications and contributions of this study will be presented in section 7.3. Section 7.4 will discuss on the relationship between the present research and existing studies, discussing about how the research gaps identified in literature review have been filled by it and pointing out the difference of researching focuses between them. Furthermore, section 7.5 will reflect on the limitations of and possible criticism to this thesis. At last, sections 7.6 will critically evaluate this thesis and draw on which to recommend some possible topics for future research.

7.2 Recapitulation of Purpose and Findings

As to the question presented in the chapter of introduction: do we need copyright law or not, the answer is yes, we need; however, the most imperative issue regarding copyrights in musical works is that we need a more just legal framework to facilitate and regulate global joint copyrights management in musical works in digital era. The role of copyright law is to serve as a legitimate base to receive revenues, and to promote the legal exploitation of copyrighted works, usually in a commercial way. The authorisation of copyright or monetary rewards are not the motivation of re-creation. Rather, innate non-monetary motivation drives people to create. In the music industry, particularly in digital era, there are many people involved in the music business chain from production to consumption. They are not only creators and users, but also many investors, JMOs and other types of organisations. Music creators are artists who usually do not have business talents. Some of them, therefore, join CMOs to manage the copyrights of their works. However, more others choose to assign whole or part copyrights to IMEs who are professional business investors. From the point view of generating more revenues, IMEs are highly professionals who invest time and money into music business. For example, they provide professional music recording facilities, commercial advertising,

marketing, distribution, artists training, and other business affairs. Due to the development of social division of labour, IMEs came into existence and have been playing important roles in copyrights licensing and management and dissemination of musical works. They are more trustworthy among music creators compared to CMOs since they commercialise musical works and generate more revenues. However, when too many investors are involved in the business chain without a common legal institution to standardise their behaviours, winner-take-all phenomenon occurs. Investors take away most of the profits by licensing contracts although they are not the person who creates the works. In addition, IMEs do not have the obligations and burdens to fulfil social-cultural functions usually through different social and cultural schemes and fulfilled by some CMOs. In such an unfair licensing market, CMOs are facing the threat of being competed out by IMEs. Unregulated copyright licensing activities cause the problem of imbalance. Therefore, a harmonised copyright legal framework is needed to regulate JMOs' licensing activities in musical works, by which to rebalance the competing interests and facilitate the cross-border flow of musical works.

The imbalance of copyright interests is not only reflected in the distribution of economic revenues between different rightsholders, but also exists in the aspects of public interests and cultural justice. Unlike the exclusive rights, copyright legal system does not provide concrete provisions to protect public interest. Although international treaties do provide the three-step test criteria, some countries have implemented as LEs in their domestic copyright law system, the tradition and preference of LEs stipulations vary dramatically all across the world. And LEs are not respected that they are usually overridden by copyright contracts or other means. There is a lack of harmonised predictable LEs system at the global level. In the digital environment, the scope of public interest has been broadened by the internet. Since the social welfare between developed and developing countries interacts with each other, it is necessary to establish an international online social welfare scheme. This important role is played by libraries who are the custodians of public interest and represent the majority of public users. However, the current international treaties do not explicitly entrench library exceptions so that member countries have very different attitudes toward this sector. Therefore, it is imperative to establish mandatory library exceptions for facilitating access by lawful users.

Additionally, the cultural value of musical works has not drawn too much attention among scholars and legislators. Unpopular musical works and small repertoires have been excluded by the competition of music market. Users' accessibility to musical works have not been fully ensured. The process of globalisation and McDonaldisation has become a hurdle to fulfil the objective of cultural diversity, which is also jeopardising the creation and production of high quality musical works since the re-creation of cultural goods depends on a flourish public domain. From the cultural diversity perspective, cultural imbalance is another problem facing modern copyright legal framework.

Through the examination of existing copyright theories, it finds that the classic theories are failed to provide a morally accepted justification for designing a balanced copyright law. Differently, Rawls's theory of justice can be perfectly applied to justify the interests of the least advantaged groups, and accordingly adopted to design a truly balanced copyright legal framework. The law crystallised by Rawls's work is not so much concerned with the reward or desert of the talented person, but with the achievement of justice for all, in particular to benefit the worst well-off. Based on the analysis of the difference principle it finds that, first, the scheme of JMOs needs to pay more attention to economic fairness rather than economic efficiency. The model of CMOs can pass the assessment test of the difference principle if they meet some conditions, such as mandatory licensing and social-cultural obligations, while IMEs do not. IMEs' copyright licensing activities have to be reformed and regulated by a harmonised copyright legal system. Second, Rawls's theory can perfectly justify users' rights for the purposes of education and research as one of the social objectives of copyright. The deduction for the purpose of education is to improve the long-term expectation of the lease off. This justification optimally solves the problem of inconsistency between the rationales of LEs existing across member countries. Third, according to the first principle, people in a society enjoy cultural justice which includes at least equality of cultural expression, equitable access, and more importantly, equal recognition of the dignity of and respect for all cultures. In digital environment, since all cultural assets are able to freely flow across-borders and copyrights can be easily managed, licensed, and exploited internationally, net-users enjoy universal cultural justice by means of the internet. To fulfil the objective of cultural justice, JMOs should play

their roles to embrace as many as possible musical works from all over the world into the repertoire, and at the same time ensure the end-users' rights to access all the musical works.

It has to note that Rawls's theory should be applied in a general way to guide, evaluate, and assess the designation of the copyright legal framework. To fulfil copyright justice between stakeholders in musical works, the triple-objective of the copyright legal system has been formulated as a part of this theoretical framework. Through the analysis of the multiple values of cultural goods, it finds that the multiple values of musical goods are separate, independent but also interact with and impact on each other. Copyright legal system has a mission to increase the triple values of musical goods. Hence, the copyright legal framework in musical works should have multiple instead of singular objectives. The multiple objectives – economic fairness, social justice and cultural diversity – should be codified into the copyright legal framework. JMOs are the main organisations playing the role of fulfilling the multiple objectives of copyright. In the last chapter, it has also demonstrated that the idea of global regulatory framework on JCM in musical works is feasible and essential, although there are some obstacles and challenges for establishing a central information point for simplifying the current licensing practice.

7.3 Implications of The Main Research Findings

The practical proposal of GRP is underpinned by a solid theoretical foundation which has been sufficiently elaborated and demonstrated. The elaboration of this theoretical framework is based on Rawls's theory of justice which offers an ethical perspective to analyse the issues of imbalance of interests caused by copyright licensing activities. Rawls's work provides powerful explanation of copyright theory based on which to build a fairer social institution of JCM at both national and the global level. The challenging problem of copyright imbalance has been discussed among scholars for decades. However, researches on relevant issues are scattered and failed to correct the unbalanced copyright law. Copyright law based on those classic copyright theories have been criticised as too protective to rightsholders, and users' interests have been neglected. Although international copyright treaties have provided the criteria of "three-step test" for national legislators to establish domestic copyright LEs system,

which have been implemented in some countries, the requirements of LEs have not been fully respected in copyright practice. With the advent of digital era, the issue of unbalanced copyright interests has been worsened due the rapid and sometimes uncontrollable flow of musical works. And the imbalance is reflected on multiple aspects – economic interests between different rightsholders of musical works; interests between rightsholders and music-users; cultural rights of small rightsholders and repertoires and of music-users to access to musical works. The systematic analysis of the main factors causing the imbalance from a multi-facet perspective is different from traditional discussions. This is partly due to the special nature of musical goods. Musical goods are economic goods, but they are also cultural goods. The multiple values – economic, social and cultural values – interact with and impact on each other. To increase the multi-value of musical goods, it has to fortify their economic, social and cultural capitals at the same time. A true balance of copyright interests at stake and the prosperous repertoire of musical works rely on the simultaneous fulfilment of the multiple objectives. This finding is fundamentally different from traditional views of one-sided stress on copyrights from economic perspective or copyright LEs from the view of public interest.

At the global level, few scholars have touched this complex area due to the nature of this topic. Global copyrights licensing of musical works causes a wide range of legal issues, including private international law, copyright contract, copyright infringement, diverse national provisions of LEs. Additionally, there is another issue of balance within copyright licensing at the global level, which is called international and domestic balance. The issues such as unbalanced economic revenues between music repertoires from different countries, whether music-users enjoy public interests, and how to improve cultural diversity through the GRP, have been seldom discussed before but have been researched in this study. The application of Rawls's work to justify small JMOs' economic interests, international public interests, and cultural justice at the global level is another important innovation and achievement of this thesis. The new view of international balance has been rarely discussed. However, this legal issue becomes increasingly important in the digital era when international copyright licensing in musical works happen easily and frequently nowadays.

The innovative application of Rawls's theory of justice to assess and design the global joint copyrights management legal framework, would hopefully provide a new perspective for copyright theory debate for improving the proposed theoretical framework. In this thesis, there are several theory innovations, including economic fairness by Rawlsian analysis, international public interests, copyright users' rights, global LEs system, cultural justice, multiple objective theoretical framework. By proposing the GRP and sufficient demonstration of its feasibility and essentiality, this study would contribute to the global copyrights licensing practice in musical works. From the perspective of black law analysis, this research would also provide doctrinal suggestions, such as harmonised conflict of law rules for dealing with international copyright contract disputes. The harmonization of the rules of conflict of laws is necessary because the present network of international conventions does not provide a complete set of tools for resolving such conflicts.⁹⁵⁶ Private international law is one of the hurdles of the free cross-border flow of musical works.⁹⁵⁷ International commercial copyright licensing activities call for independent, uniform and predictable conflict of law rules for balancing small rightsholders' economic interests nationally and internationally; and facilitating the free cross-border flow of musical works. The uncertainty and unpredictable rules have caused economically and timely inefficiency for individual rightsholders, especially for foreign rightsholders.

7.4 Relationship with Previous Research

Existing researches claim to balance interest; however, they are failed to provide morally accepted theory or enforceable measures to strike a real balance between competing interests. Most of them claim that the balance between copyrights and users' rights is extremely hard to strike and believe that the discretion of specific cases still goes to judges.⁹⁵⁸ Economic analysis of copyright has paid sufficient attention to its economic justification that JCM is justified because of economic efficiency in copyrights management. The issues such as how JMOs' economic function affects the fairness and how to maintain the balance between different types

⁹⁵⁶ Dessemontet (n 664).

⁹⁵⁷ See section 4.2.2.

⁹⁵⁸ Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' (n 7).

of rightsholders. In addition, the study on the cultural function of copyrights has been extremely scarce, particularly in musical works. Copyright studies on the three balances are scattered. This thesis provides a systematic analysis of the three balances of copyrights in musical works, intending to demonstrate their dynamic relations of the triple copyright balances and propose a triple objective theoretical framework for global copyrights management in musical works.

The existing studies of the different copyright topics regarding the economic, social and cultural functions of JMOs, are usually based on different IP theories. For example, there are utilitarianism, natural rights such as Locke's labour theory and personality theory, social planning, and economic analysis to justify copyright's economic rights or moral rights; legal doctrines (eg fair dealing and fair use) and principles (eg including fundamental rights, general interests, and public interests) to justify copyright LEs; cultural theory⁹⁵⁹ or principle of cultural diversity to justify copyright. It is a paradox that copyright subjects are justified by omnifarious theories within a common copyright system. Whereas, as discussed in this thesis, Rawls's theory of justice can be perfectly adopted to justify the whole copyright legal system in a unified way. Rawls's principles focus on the least advantaged group by which to benefit everyone of the society since social, legal and political institutions are arranged in a social cooperation system. Accordingly, least advantaged group can be identified from different perspective of analysis, as long as Rawls's two principles have been strictly applied. In this system, all copyright resources would be efficiently, and more importantly fairly, distributed among stakeholders. This unified copyright theory for the legal framework of global joint copyrights management would benefit the harmonisation of national copyright legal systems and accordingly benefit the cross-border flow of musical works.

There is an unbalanced research trend in existing literature within the area of joint management of copyrights. A wide range of excellent research has been conducted from the perspective of economic analysis; and along with the development of new models of copyright licensing in

⁹⁵⁹ See Julie E. Cohen, 'Creativity and Culture in Copyright Theory Symposium: Intellectual Property and Social Justice: Copyright, Creativity, Catalogs' (2006) 40 UC Davis L Rev 1151. (It contends that 'human nature causes people to flourish more under some conditions than under others, and that social and political institutions should be organized to facilitate that flourishing').

practice, economic analysis has been developed further to explore the economic functions of IMEs. This thesis has highlighted the equal importance of the three functions of JMOs. Research on CCM at national and regional level has been sufficient. However, this thesis discusses JCM at the global level which hopefully direct the debate into a new trend. This is because in copyright licensing practice in musical works, IMEs become increasingly important but less examined and discussed, particularly in a comparison way to CMOs.

7.5 Limitations of The Research

It may appear that the attitude of this thesis towards IMEs is slightly harsh, but it has to note that IMEs are important and popular JMOs who are managing copyrights in musical works and generate profits for creators and other rightsholders. They are professional merchants. Music creators need IMEs to manage their works in a commercial way since artists usually lack of such business talents and resources. The argument in this research is that the distribution of aggregated copyright revenues from music industry should be fair between creators and other types of rightsholders. This has been discussed in the chapter of economic fairness. However, since IMEs have their own nature and features that are different from CMOs, with regard to the detailed regulation on IMEs it has to investigate the legal issues existing in practice. Thus, empirical research in practice should be necessary prior to detailed discussion in this area.

From the perspective of methodology, this thesis intends to adopt a mix-method methodology to analyse different legal issues where is needed and relevant. With respect to the comparative method utilised to compare differences or similarities of copyright laws from different countries and jurisdictions, it may appear not sufficiently discussed occasionally. For example, when discuss about the nature of CMOs across EU countries and LEs' rationales from global countries, the analysis may be not deep enough in these areas. Due to the infinite nature of LEs, it is impossible to analyse each type of them in this thesis. Therefore, the study has formulated the framework where the objective of social justice can be used to assess whether a type of use is lawful use. Therefore, it has chosen one of the most important type of exception only - the uses for research, study and education purposes – to be analysed and justified as users' rights

at international level. In the light of this analysis, future research could take this as a case-study to assess and evaluate other categories of LEs, and to enrich the research in this area.

In addition, global information system required by the proposed GRP would be a technology-demanding project. It requires high standard technology equipment. Hopefully, this technic problem would not be too challenging; or alternatively would be solved with the advancement of high-technology.

7.6 Recommendation for Future Study

The conducted theoretical framework – multi-objective system underpinned by Rawls’s justice theory, has been proved an appropriate theory to justify the copyright legal system. So, it would be suitable to adopt this theoretical framework for further study in other areas of IP law, for example patent law. Also, all the discussion has been defined within the copyright category of musical works. There are still many other categories of copyrights, such as literary works, dramatic works, painting works, movies, and other artistic works, could be examined according to this theoretical framework. In addition, this thesis discusses the copyright legal framework from the global level, so it touches only the tips of some national copyright laws. It would be interesting to see if this theoretical framework could be adopted to design a national copyright legal system, eg the UK or China’s copyright legal system, or a national IP legal system. This would require much more in-depth research though could provide interesting and practical results. It is recommended that these areas could be selected for further study to grow and expand the current researching topic.

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WIPO Performances and Phonograms Treaty

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Appendix

Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Article 13(4): Where the amounts due to rightholders cannot be distributed after three years from the end of the financial year in which the collection of the rights revenue occurred, and provided that the collective management organisation has taken all necessary measures to identify and locate the right-holders referred to in paragraph 3, those amounts shall be deemed non-distributable.

Preamble 3: Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

Preamble 44: Aggregating different music repertoires for multi-territorial licensing facilitates the licensing process and, by making all repertoires accessible to the market for multi-territorial licensing, enhances cultural diversity and contributes to reducing the number of transactions an online service provider needs in order to offer services. This aggregation of repertoires should facilitate the development of new online services, and should also result in a reduction of transaction costs being passed on to consumers. Therefore, collective management organisations that are not willing or not able to grant multi-territorial licences directly in their own music repertoire should be encouraged on a voluntary basis to mandate other collective management organisations to manage their repertoire on a non-discriminatory basis. Exclusivity in agreements on multi-territorial licences would restrict the choices available to users seeking multi-territorial licences and also restrict the choices available to collective management organisations seeking administration services for their repertoire on a multi-

territorial basis. Therefore, all representation agreements between collective management organisations providing for multi-territorial licensing should be concluded on a non-exclusive basis.

Preamble 46: It is also important to require any collective management organisations that offer or grant multi-territorial licences to agree to represent the repertoire of any collective management organisations that decide not to do so directly. To ensure that this requirement is not disproportionate and does not go beyond what is necessary, the requested collective management organisation should only be required to accept the representation if the request is limited to the online right or categories of online rights that it represents itself. Moreover, this requirement should only apply to collective management organisations which aggregate repertoire and should not extend to collective management organisations which provide multi-territorial licences for their own repertoire only. Nor should it apply to collective management organisations which merely aggregate rights in the same works for the purpose of being able to license jointly both the right of reproduction and the right of communication to the public in respect of such works. To protect the interests of the rightholders of the mandating collective management organisation and to ensure that small and less well-known repertoires in Member States can access the internal market on equal terms, it is important that the repertoire of the mandating collective management organisation be managed on the same conditions as the repertoire of the mandated collective management organisation and that it is included in offers addressed by the mandated collective management organisation to online service providers. The management fee charged by the mandated collective management organisation should allow that organisation to recoup the necessary and reasonable investments incurred. Any agreement whereby a collective management organisation mandates another organisation or organisations to grant multi-territorial licences in its own music repertoire for online use should not prevent the first-mentioned collective management organisation from continuing to grant licences limited to the territory of the Member State where that organisation is established, in its own repertoire and in any other repertoire it may be authorised to represent in that territory.