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**CREATORS' ORGANISATIONS AS ACTORS IN  
COPYRIGHT POLICY:**

**MAPPING THE COMPLEXITY OF STAKEHOLDER BEHAVIOUR,  
DYNAMICS AND DIFFERENCES**

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Ph.D. in Law

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## Declaration

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Nevena Kostova

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Date



## Acknowledgments

I have never run a marathon but I imagine that it is in many respects like writing a thesis. It is up to you to take on the challenge, to train and pace yourself, to stay on track, run the distance, and finally, to cross the finish line. Yet, at every stage, what spurs you on is the guidance, encouragement, care, and support of so many wonderful people. Frankly, you know that without them you wouldn't be crossing that finish line, and it wouldn't really be worth it either.

\*

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## Abstract

A basic tenet and challenge of copyright law is the need to balance the interests of a range of stakeholders, from authors and performers to publishers, producers, broadcasters, intermediaries, service providers and the general public. To ensure that this balancing act takes place, policymakers involve organisations representing these stakeholders in the development of policy and the drafting of legislation in several ways, including through meetings, public consultations, and stakeholder dialogues. However, the process by which stakeholders steer the course and substance of copyright law and policy, their behaviour, as well as the varying extent to which they impact and characterise the copyright policy framework, have rarely been the specific focus of empirical research in IP.

The present thesis examines creators' organisations (COs) as participants and shapers of copyright policy. Through a socio-legal study into the workings of The Society of Authors, the Authors' Licensing and Collecting Society, the Musicians' Union, and the Performing Right Society on several contemporary policy issues, the thesis observes how two types of organisations: trade unions and collective management organisations, across the music and publishing industries, engage in policy work. Through in-depth analysis of primary data obtained from interviews with CO representatives as well as documentary data (public consultation responses, policy briefings, press releases, reports, academic studies, and more), the thesis captures and discusses differences in the behaviour of these actors and argues that these differences are not fully understood by policymakers. It illustrates how factors such as an organisation's mandate, resources, membership composition, political power, and self-concept, influence an organisation's policy proactivity. Some actors may be more concerned with influencing the copyright policy agenda itself, while others primarily seek to shape its outcomes.

The thesis also identifies power dynamics and imbalances between the COs and argues that some actors are in a better position to effectively participate in policy



compared to others. Furthermore, it discusses the effects of the plurality of actors with varying interests and priorities, as well as the competition of policy issues that this provokes. In this context, the thesis illustrates the complex structure of the copyright policy environment and, in particular, the role of umbrella organisations and ad-hoc coalitions in the furtherance of a particular policy issue or position. It concludes that as a result of complex stakeholder dynamics, power imbalances, and policymakers' insufficient understanding of these phenomena, certain creators' issues will not surface onto copyright policy agendas and will thus remain unaddressed by copyright law. The thesis further concludes that complex stakeholder dynamics challenge the objective of developing evidence-based policy and render the copyright policy process unclear and its outcomes unpredictable. Given the disparity of views and positions on many copyright law issues, policymakers often attempt to shape law and policy outcomes as a compromise between different stakeholder interests. However, this does not always produce sound or appropriate results for copyright law.

## Lay Summary

A basic principle and challenge of copyright law is the need to balance the interests of a range of stakeholders, from authors and performers to publishers, producers, broadcasters, intermediaries, service providers and the general public. Policymakers try to ensure that this balancing act takes place, by involving organisations that represent these stakeholders in the development of policy and in the drafting of legislation. This occurs in several ways, including through meetings, public consultations, and stakeholder dialogues. However, our understanding of the process by which organisations influence the substance and direction of copyright law and policy is limited. In particular, it is unclear how individual organisational actors behave, what dynamics characterise the stakeholder environment within which they seek to represent their members, and what effect organisations' behaviour, environment, and dynamics have on the way substantive copyright law is made.

This thesis looks at the way creators' organisations (COs) participate in and shape copyright policy. Specifically, it considers how The Society of Authors, the Authors' Licensing and Collecting Society, the Musicians' Union, and the Performing Right Society engaged with policymakers on several contemporary policy issues. The thesis thereby observes how trade unions and collective management organisations across the music and publishing industries engage in policy work. It draws conclusions about the behaviour, roles, and impact of these organisations on copyright law and policy based on interviews with respondents from the respective organisations, as well as based on documentary data (public consultation responses, policy briefings, press releases, reports, academic studies, and other).

The thesis concludes that COs are important and valuable actors in copyright law and policymaking and that, contrary to rather generalising portrayals of the impact of these organisations on copyright law, there are in fact considerable differences in the behaviour of individual actors. Differences exist in the causes that individual organisations prioritise, in the positions that they advance to policymakers, as well as

in the extent to which actors are proactive, and thus concerned with actually influencing the copyright policy agenda itself, rather than 'merely' its outcomes. Common factors underlying these differences include organisational mandate, resources, membership composition, political power, and self-concept.

The thesis further concludes that there are power imbalances and complex dynamics between individual actors, which means that some organisations are potentially more successful at shaping the way copyright law is made than others. In an environment populated by a large number of organisations with sometimes colliding interests and priorities, many different issues simultaneously compete for policymakers' attention. Furthermore, certain issues benefit from the backing of influential multi-stakeholder alliances, or from joint action by several actors, while others do not.

However, since differences between individual actors and the complex power dynamics that exist between industry organisations are not fully understood by policymakers, certain creators' issues are less likely to find their way onto decision-makers' agenda. Consequently, these will not be considered in the balancing act of interests described above, which means that they will ultimately also not be addressed by copyright law.

Moreover, to appease a wider range of copyright stakeholders, policymakers often try to shape the outcomes of policy as compromises between the interests of different actors. However, this approach does not always produce sensible or appropriate results for copyright law.

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## Abbreviations

AEPO-ARTIS	Association of European Performers' Organisations
ALCS	Authors' Licensing and Collecting Society
BASCA	British Academy of Songwriters, Composers and Authors
BCC	British Copyright Council
BPI	British Phonographic Industry
CEPIC	European Federation of Picture Agencies and Photo Libraries
CJEU	Court of Justice of the European Union
CLA	Copyright Licensing Agency
CMO	Collective Management Organisation
CO	Creators' Organisation
CRA	Creators' Rights Alliance
CREATe	RCUK Centre for Copyright and New Business Models in the Creative Economy
CRM	Collective Rights Management
ERA	Educational Recording Agency
FIM	The International Federation of Musicians
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (English: Society for musical performing and mechanical reproduction rights)
GESAC	European Grouping of Societies of Authors and Composers
IA	Impact Assessment
IAF	International Authors Forum
IFFRO	International federation of Reproduction Rights Organisations
IFPI	International Federation of Phonographic Industries
IMPALA	Independent Music Companies Association
IPO	Intellectual Property Office



MA right	Making available right
MCPS	Mechanical Copyright Protection Society
MPA	Music Publishers Association
MU	Musicians' Union
ORG	Open Rights Group
PA	The Publishers Association
PLS	Publishers Licensing Society
PPL	Phonographic Performance Limited
PRS	Performing Right Society
RIAA	Recording Industry Association of America
SoA	Society of Authors
WGGB	Writers' Guild of Great Britain
WIPO	World Intellectual Property Organization

# Chapter 1

## Introduction

Copyright law, like many areas of law, recognises and attempts to balance the interests of a range of stakeholders. These generally include authors, performers, publishers, producers, broadcasters, intermediaries, distributors and other service providers, collective management organisations, and consumers.<sup>1</sup> Policymakers involve these stakeholders in the process of policy development and the drafting of legislation in a number of ways, including through meetings, public consultations, public hearings, stakeholder dialogue and other.<sup>2</sup> However, the actors who

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<sup>1</sup> This enumeration is taken from the EU Commission webpage on the public consultation of the EU copyright rules (December 2013 – March 2014), particularly from the section defining the target group of the consultation

<[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)> (accessed 23 November 2016). For another enumeration, see Recital 9 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

<sup>2</sup> Jessica Litman, 'Copyright Legislation and Technological Change' (1989) 68 (2) Oregon Law Review 275, 278. As a recent example, the UK Intellectual Property Office (IPO) has called for views on the European Commission's draft legislation to modernise the European copyright framework. Among other things, it welcomes suggestions for how the language of the proposed legislation can be improved, see 'Call for views: Modernising the European copyright framework' (UK Intellectual Property Office, 25 October 2016)

<<https://www.gov.uk/government/news/call-for-views-modernising-the-european-copyright-framework>> accessed 07 February 2017. For a list of recent UK public consultations in the area of IP, see 'Publications: all consultations by Intellectual Property Office' (UK Government)

<[https://www.gov.uk/government/publications?departments%5B%5D=intellectual-property-office&publication\\_filter\\_option=consultations](https://www.gov.uk/government/publications?departments%5B%5D=intellectual-property-office&publication_filter_option=consultations)> accessed 07 February 2017. For examples of stakeholder dialogues and public hearings of stakeholders, see 'Licences for Europe' (European Commission) <[http://ec.europa.eu/internal\\_market/copyright/licensing-europe/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm)> accessed 07 February 2017

and 'Management of Copyright and Related Rights' (European Commission) <[http://ec.europa.eu/internal\\_market/copyright/management/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/management/index_en.htm)> accessed 07 February 2017.

participate on these occasions are generally *organisations* representing the above listed stakeholders, rather than individual authors, performers, publishers, etc.

The last two major reviews of the UK IP framework, conducted by Andrew Gowers in 2006 and Professor Ian Hargreaves in 2011, were both followed by consultations through which the Intellectual Property Office (IPO) asked stakeholders for their views and for evidence in relation to the policy proposals put forward by the government. The consultation taking forward Gowers' review of IP was sent to 163 stakeholders, all of which were organisations.<sup>3</sup> The list included trade bodies representing phonogram producers, associations representing publishers, broadcasting companies, educational and cultural institutions, as well as trade unions and associations representing various creator groups. There was no mention that the consultation would be sent to any individual authors, performers, publishers or producers. Similarly, several years later, the stakeholders that Hargreaves met during his review of IP and Growth, as listed in Annex B of his report, were also representatives of 68 individual organisations and industry alliances.<sup>4</sup>

The same practice of predominantly consulting and working with organisational stakeholders prevails on the EU level where the general direction of copyright policy is decided for the Member States. By way of illustration, in 2013 the European Commission initiated a structured stakeholder dialogue called 'Licences for Europe' with the aim of delivering rapid progress in bringing content online through practical industry-led solutions.<sup>5</sup> The stakeholder dialogue was organised into four working

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<sup>3</sup> UK IPO, 'Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions' (Consultation Document, November 2007) Annex A 37 <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>> accessed 09 February 2017.

<sup>4</sup> Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (May 2011) Annex B, Stakeholders Met during Review of IP and Growth 102f.

<sup>5</sup> 'Licences for Europe: Structured stakeholder dialogue 2013' (European Commission) <<https://ec.europa.eu/licences-for-europe-dialogue/en.html#workinggroups>> accessed 07 February 2017.

groups and the stakeholders invited to participate in the work of these groups were, without exception, all organisations.<sup>6</sup>

From the above, it is evident that organisational actors as opposed to individuals representing narrow or individual interests are the primary participants in determining the direction of copyright policy and the shape of the law. Creators' organisations (COs), in particular, represent the most fundamental stakeholders of the copyright system. COs emerged as a result of collective action by groups of creators who, as individuals, were politically helpless and thus sought to unite into an effective force in order to achieve common objectives vis-à-vis publishers and other exploiters of their works.<sup>7</sup> Today, COs, such as individual creator associations, unions and collecting societies, are very much part of copyright's complex network of actors and they actively engage with other industry stakeholders and decision-makers in an effort to shape copyright law and policy. However, there is limited research into the operations of individual COs in different industries and the implications of their work on law and policymaking in copyright.<sup>8</sup> Existing literature on organisations active in the copyright system suggests that these actors influence the outcomes of policy through their relationships with other stakeholders, the

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<sup>6</sup> 'Licences for Europe: Structured stakeholder dialogue 2013, Participants' (European Commission) <<https://ec.europa.eu/licences-for-europe-dialogue/node/63.html>> accessed 07 February 2017.

<sup>7</sup> For more on the history of COs, see: Victor Bonham-Carter, *Authors by Profession: Volume One* (The Society of Authors 1979); Victor Bonham-Carter, *Authors by Profession: Volume Two* (The Bodley Head and the Society of Authors 1984); Martin Cloonan, 'Musicians as Workers: Putting the UK Musicians' Union into Context' (2014) 41 (1) *MUSICultures* 10; John Williamson, 'Cooperation and Conflict: The British Musicians' Union, Musical Labour and Copyright in the UK' (2014) 41 (1) *MUSICultures* 73; Cyril Ehrlich, *Harmonious Alliance: A History of the Performing Right Society* (OUP 1989); Joyce Marlow, *The ALCS Story: 1977 – 1997* (The Authors' Licensing and Collecting Society Ltd 1997).

<sup>8</sup> Antonina Bakardjieva Engelbrekt, 'Copyright from an institutional perspective: actors, interests, stakes and the logic of participation' (2007) 4(2) *Review of Economic Research on Copyright Issues* 65; Monica Horten, *A Copyright Masquerade: How Copyright Lobbying Threatens Online Freedoms* (Zed Books 2013); Dave Harker, 'The wonderful world of IFPI: music industry rhetoric, the critics and the classical Marxist critique' (1997) 16 (1) *Popular Music* 45; John Williamson and Martin Cloonan, 'Rethinking the music industry' (2007) 26 (2) *Popular Music* 305; Graeme B Dinwoodie and Rochelle C Dreyfuss, 'TRIPS and the dynamics of intellectual property lawmaking' (2004) *Case Western Reserve Journal of International Law* 95. I consider this research in detail in Chapter 3, section 1.4.

evidence they present to policymakers, the way they define their representation unit, and, more generally, their lobbying power. However, it has offered little insight into the various COs' behaviour, environment, and resulting effect on copyright policy, and ultimately, on copyright law.

## 1. Objectives and significance of this research

In terms of the copyright policy environment, the rise of digital technologies and the Internet have given birth to new stakeholders and actors, such as online intermediaries, online platforms, and content aggregators that are challenging the position of established parties.<sup>9</sup> New ways of creating, disseminating, and enjoying copyright protected works are calling the effects and boundaries of copyright law on new technological capabilities into question and making the direction of copyright policy ever more contested. Against this background, a Centre for Copyright and New Business Models in the Creative Economy (CREATe), funded by several UK Research Councils, was set up in 2013 to explore questions around digitisation, copyright, and innovation in the arts and technology, as well as the interplay between these factors.<sup>10</sup> Seven interrelated themes characterised the research agenda of CREATe, including themes on the openness of business models, on regulation and enforcement and on intermediaries and platforms, to name a few. The research on creators' organisations, which is the subject of this thesis, forms part of CREATe's fourth theme, 'Creators and Performers: Process and Copyright'.<sup>11</sup>

The objectives of this research were to study COs as participants and shapers of copyright policy, and to understand, in this context, how these actors behave, what landscape they operate in, and what effects this landscape and organisations' workings produce on the nature and substance of copyright law and policy.

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<sup>9</sup> Bakardjieva Engelbrekt (n 8) 76.

<sup>10</sup> 'CREATe: Creativity, Regulation, Enterprise and Technology' (CREATe, 26 February 2013) <<http://www.create.ac.uk/blog/2013/02/26/create-creativity-regulation-enterprise-and-technology/>> accessed 07 February 2017.

<sup>11</sup> For an overview of CREATe's theme 4, see 'CREATe, Theme 4: Creators and Performers: Process and Copyright' (CREATe) <<http://www.create.ac.uk/research-programme/theme-4/>> accessed 07 February 2017.

Three questions guided my exploration of COs' operations, the dynamics of their industries, and their impact on copyright policy:

- How do COs participate in copyright policy?
- What, if any, differences exist in the nature of and motives for participation between trade unions and collective management organisations (the two types of organisations that I looked at)?
- What challenges do COs encounter in their efforts to participate in and shape copyright policy?

An exploration of these questions within an empirical examination of COs' engagement with policy work, their environment and the effects of organisations' behaviour and environment on copyright law and policy will deliver insight into the different roles that these actors play in copyright policy, as well as into differences in the way individual organisations approach issues of copyright policy.<sup>12</sup> This research will also throw light on the power dynamics at play in the copyright policy landscape and the effect of such dynamics on the way issues are advanced and agendas are potentially set, as well as on the considerations that underpin copyright policy outcomes.<sup>13</sup> With knowledge of the way stakeholders shape the policymaking process and its outcomes, it will further be possible to consider how stakeholder behaviour influences the objective of developing evidence-based policy.<sup>14</sup> This thesis will also offer a valuable perspective on how knowledge on the above issues can be absorbed and acted on further by researchers, the media, policymakers, as well as by COs themselves.<sup>15</sup>

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<sup>12</sup> See Chapter 8, section 2.1.

<sup>13</sup> See Chapter 8, sections 2.2 and 2.3.

<sup>14</sup> See Chapter 8, section 2.3.

<sup>15</sup> See Chapter 8, section 2.4.

## 2. Scope of the research

### *Defining 'creators' organisations'*

The scope of this research is set in large part by my definition of creators' organisations. I construe the term 'creators' organisations' as referring to organisations whose membership consists, wholly or in large part, of individual creators (writers, musicians, etc.) and respectively shapes the organisation's self-identity, and where the purpose of the organisation is to further the interests of creators.

In order to limit the scope of this key term, I drew on general concepts and classifications of organisations developed in organisational research. Specifically, my definition of 'creators' organisations' combines elements of two ideas presented by Eldridge and Crombie.<sup>16</sup> The first describes organisations as social systems with a collective identity, an exact roster of members and a programme of activity and procedures, while the second emphasises that organisations are systems deliberately constructed to seek specific goals and values.<sup>17</sup> In application of this definition, my research focuses on trade unions representing creators, as well as on certain collective management organisations (CMOs) that either exclusively or predominantly consist of and represent creators. I will elaborate on my decision to include certain CMOs in the scope of my research, as well as on the considerations underpinning my specific choice of organisations in chapter 2.<sup>18</sup>

At this point, it is sufficient to indicate that, by definition, a number of stakeholders fall outside the ambit of this research. Excluded are on the one hand trade bodies formed to represent the interests of publishers, producers, distributors, managers, intermediaries and other stakeholders, distinct from the creators. Such organisations

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<sup>16</sup> John Eric Thomas Eldridge and Alastair D Crombie, *A Sociology of Organisations* (George Allen & Unwin Ltd. 1974).

<sup>17</sup> Ibid 1, 23 citing Talcott Parsons, *Structure and Process in Modern Societies* (Free Press 1960).

<sup>18</sup> See chapter 2, subsections 2.2 and 2.3.

include the BPI<sup>19</sup>, the Music Managers' Forum<sup>20</sup> and the Publishers Association<sup>21</sup>. CMOs that solely consist of stakeholders other than creators, like the Publishers Licensing Society also fall outside the scope of this thesis.<sup>22</sup> Finally, my definition of 'creators' organisations' further excludes umbrella organisations, like the British Copyright Council<sup>23</sup> and UK Music<sup>24</sup> which house a wide range of different industry stakeholders. These industry alliances are typically only capable of pursuing policy goals that emerge as the common denominator of many potentially conflicting interests and such goals will not necessarily coincide, in reach or priority, with the goals specifically relevant to creators. However, given that the COs studied in this research are also members of such alliances, this thesis will also refer to the activities of some umbrella organisations where relevant.

### 3. Approach to research

The scope of the research presented in this thesis is further defined by the methodological approach that I adopted. My research on creators' organisations comprised a socio-legal study into the modalities of these organisations' participation in copyright policy.<sup>25</sup> In light of the objectives laid down above, the concern of this study was not with the body of law<sup>26</sup> that regulates the operations of trade unions and collective management organisations, or with the way organisations' behaviour fits within the legal instruments that set the remit, procedures and standards of operation of these bodies. The focus was rather on the 'raw law' that these organisations

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<sup>19</sup> British Phonographic Industry (BPI) <<http://www.bpi.co.uk/default.aspx>> accessed 07 February 2017.

<sup>20</sup> Music Managers Forum (MMF) <<https://themmf.net/>> accessed 07 February 2017.

<sup>21</sup> The Publishers Association (PA) <<http://www.publishers.org.uk/about-us/>> accessed 07 February 2017.

<sup>22</sup> Publishers Licensing Society (PLS) <<https://www.pls.org.uk/>> accessed 07 February 2017.

<sup>23</sup> British Copyright Council (BCC) Members <<http://www.britishcopyright.org/bcc-members/member-list>> accessed 07 February 2017.

<sup>24</sup> UK Music <<http://www.ukmusic.org/about/>> accessed 07 February 2017.

<sup>25</sup> For a description of socio-legal studies vis-à-vis doctrinal legal studies see Fiona Cownie and Anthony Bradley, 'Chapter 2: Socio-legal studies: A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton (eds) *Research methods in Law* (Routledge 2013) 34, 35.

<sup>26</sup> Primarily the Trade Union Act 2016, the Trade Union and Labour Relations (Consolidation) Act 1992, and the Companies Act 2006.



generate, i.e. on the plurality of activities through which they shape the process of law and policy development.<sup>27</sup> Consequently, my research on COs comprised an empirical study of four organisations, the Musicians' Union (MU), the Performing Right Society (PRS), the Society of Authors (SoA) and the Authors' Licensing and Collecting Society (ALCS).<sup>28</sup> The project was designed as two case studies, one looking into the activities of a trade union (the MU) and a collecting society (PRS) in the music sector, and another looking at a trade union (SoA) and a collecting society (ALCS) in the publishing sector. Music and publishing were chosen as two of the most successful traditional UK creative industries. As such, the needs and concerns of these industries regularly inform copyright policy debates. While I will elaborate on my choice of these industries in chapter 2, in essence, I selected these creative industries on the basis of some key commonalities and differences that, taken together, rendered both sectors comparable while also promising an intriguing insight into cross-industry dynamics in the copyright policy space. Music and publishing are similar in their importance for the UK economy, as well as in terms of their need to embrace and adapt to digital technologies. At the same time, differences exist with regard to the copyright issues that organisations from these industries appeared to be primarily invested in.

The analyses and findings from my study into COs emerged from a combination of primary data generated through semi-structured interviews with CO operatives<sup>29</sup> and

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<sup>27</sup> The term 'raw law' is used by Neil MacCormick in his contribution 'Four Quadrants of Jurisprudence' in Werner Krawietz, Neil MacCormick and Georg Henrik von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* (Duncker and Humbot 1994) to describe 'the unexamined substratum of brute fact that gives theorised, scholarly law-constructs whatever anchoring they have in the real world', see pp 53, 55.

<sup>28</sup> Musicians' Union (MU) < <http://www.musiciansunion.org.uk/>>, Performing Rights Society (PRS) < <https://www.prsformusic.com/Pages/default.aspx>>, The Society of Authors (SoA) < <http://www.societyofauthors.org/>>, Authors' Licensing and Collecting Society (ALCS) < <http://www.alcs.co.uk/>> all accessed 07 February 2017.

<sup>29</sup> Among the 24 interviews, one was conducted with a representative of the Writers' Guild of Great Britain (WGGB) < <https://writersguild.org.uk/>> accessed 07 February 2017, and another with representatives from the British Academy of Songwriters, Composers and Authors (BASCA) < <https://basca.org.uk/>> accessed 07 February 2017, see Chapter 2, section 3.

documentary data, including consultation responses, policy briefings, reports, online news publications, academic studies, and other. Within the two case studies, my exploration of the behaviour of the MU, PRS, ALCS and SoA was structured around these COs' activities on three copyright issues of contemporary or recent relevance: the contractual terms for authors and performers, the UK private copying exception, and the implementation of the EU collective rights management Directive (CRM Directive).<sup>30</sup>

Furthermore, as indicated above, my research was conceptualised and conducted as a socio-legal study of the selected two trade unions and collective management organisations. Therefore, this thesis will not present an in-depth exploration of these organisations on the basis of the legal norms that underpin their existence and frame their activities on an abstract, theoretical level.<sup>31</sup> Rather, the emphasis is on the law in action, which is better apt at offering insight into the way actors and decision-makers actually behave.<sup>32</sup> Nevertheless, chapter 3 will provide a detailed account of the differences in the functions and historical development of trade unions and collecting societies, in order to inform our understanding and expectations of these organisations' participation in copyright policy. I will also deal with the scope of COs' activities that formed part of my enquiry and the limitations of the work presented in this thesis in more detail in Chapter 2.<sup>33</sup>

#### 4. Overview of the thesis

The next chapter will present a detailed account of the methods used in this research and chapter 3 will subsequently review the literature on which this research is built. Following this, chapter 4, which looks at COs in the publishing industry and their fight for fair contract terms, will begin to identify how differences in COs' mandate,

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<sup>30</sup> For a detailed account of my methods, including selection of organisations, industries, copyright issues, methods and data analysis approach, see chapter 2.

<sup>31</sup> S 116 Copyright, Designs and Patents Act (CDPA) 1988, as well as the Trade Union Act 2016, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Companies Act 2006, to name a few.

<sup>32</sup> MacCormick, 'Four Quadrants of Jurisprudence' (n 27) 58.

<sup>33</sup> See Chapter 2, sections 1 and 5.

resources and self-concept shape the varying ways in which individual COs engage in policy. This chapter will also consider factors affecting the policy proactivity of COs. Furthermore, it will begin to shed light on the complex dynamics and interdependence that characterise the relationships between individual organisational actors, as well as the existence of colliding interests on particular policy issues.

Subsequently, chapter 5 will consider how COs from the music sector dealt with the problem of creators' and performers' contract terms. The chapter will expose how the policy behaviour of COs is also shaped by the composition of their membership. It will demonstrate differences in the approaches and priorities of individual COs even when it comes to functionally similar organisations, like the MU and SoA, both of which are trade unions. Chapter 5 will also consider the significance of industry networks and umbrella organisations, like the British Copyright Council and UK Music for the furtherance of a particular policy. In this context, it will expose power dynamics and imbalances between different stakeholders.

Against the background of the preceding chapters, chapter 6 on private copying will once again thematise the sheer granularity of COs' policy positions, priorities and preferences, based on nuances in their input regarding the private copying exception. The chapter will also consider the historical development of legislative initiatives on this issue and thereby reveal how stakeholder dynamics directly influence, and in a way limit, policy outcomes. It will show how, often, copyright policy outcomes in fact embody compromises. Furthermore, based on an analysis of the private copying judicial review, the chapter will argue that organisational actors are more likely to exercise influence over copyright law and policy when they act in unison. In this context, it will become clear that the interest constellations that form in the copyright landscape, i.e. the way organisational actors group together, are dynamic and issue-dependent. This renders the policy process and its outcomes more unpredictable.

Chapter 7 will consider the studied CMOs' behaviour with regard to the implementation of the CRM Directive.<sup>34</sup> It will expound on why collecting societies are potentially particularly powerful players in copyright policy, thus adding a further dimension to the emerging theme of power imbalances. At the same time, the chapter will demonstrate the existence of behavioural differences *also* between individual CMOs and consider the origin and implications of such differences.

Finally, chapter 8 will conclude the thesis. It will present a very recent development in EU copyright policy related to the so-called 'value gap'. This case will tie together and exemplify many of the findings and observations made across the preceding chapters of the thesis. Subsequently, the chapter will formulate the main conclusions that emerge from this research, as well as their implications for researchers, policymakers, the media, and for COs themselves. Based on the presented findings, and bearing in mind the scope and limitations of this research,<sup>35</sup> the thesis will draw several key conclusions as follows:

- **COs are important and valuable actors in copyright law and policymaking and should therefore continue to participate in these activities.**

They perform numerous indispensable roles in the policymaking process. To name a few, they raise awareness of the existence of shortcomings in the practical application of copyright law and its effects on creators. They monitor and react to legal and policy developments, and thereby play a role in safeguarding the interests of the stakeholders that they represent. COs also play a role in the practical implementation of certain aspects of copyright.

- **However, the behaviour of these actors is far from uniform.**

Considerable differences exist in the way different COs approach and act, or choose not to act, on a particular copyright issue, as well as in the issues that

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<sup>34</sup> Directive 2014/26/EU of 20 March 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 [2014] OJ L 84/72 (CRM Directive).

<sup>35</sup> See Chapter 2, section 5.

they prioritise. These differences stem from a range of factors, including organisational mandate, resources and resource allocation, membership composition, political power, and self-concept. The combination of these factors also influences and creates disparities in the level of policy proactivity that individual COs demonstrate. This means that some actors may be more concerned with actually influencing the copyright policy agenda itself, while others 'merely' seek to shape its outcomes.

- **Complex dynamics and power imbalances exist between individual actors.**

The copyright policy environment is populated by a large multiplicity of actors with varying interests, priorities, approaches, and concerns. In this space, numerous issues and policy causes coexist and compete for policymakers' attention. Some actors are in a better position to exercise influence over the direction and substance of policy than others. As a consequence of the multiplicity of actors, of colliding interests, and of power dynamics, organisations form coalitions and networks based on mutual interests and interdependence in order to further a particular issue. However, the positions advanced through such groupings are not accurate representations of the needs and priorities of individual participating actors.

- **Differences in the behaviour and power of individual actors, and in the dynamics that govern their interactions are not fully understood by policymakers.**

Policymakers, as well as IP reviewers and some academics, do not sufficiently distinguish between individual actors. They make rather sweeping and generalising statements in relation to right holder representations or CMOs, which do not take account of variations in the extent of influence exercised by different actors, and potentially, by different creative industries altogether.

- **As a result of complex stakeholder dynamics, power imbalances, and policymakers' insufficient understanding of these phenomena, certain creators' issues will not surface onto copyright policy agendas and will thus remain unaddressed by copyright law.**

Relatively weaker, resource-poorer organisations, or organisations acting alone and without support from important industry networks will struggle to assert their voice and advance their cause over other competing issues. As a consequence of this, and of wider stakeholder dynamics and power imbalances, policymakers will get uneven exposure to different issues. In this process, some matters may remain unheard by lawmakers and thus unaddressed by the law. Among the issues considered in this thesis, one example of this could be the UK lawmaker's lack of engagement with the problem of creators' and performers' contract terms, considered in Chapter 4.<sup>36</sup>

- **Given the disparity of views and positions on many copyright law issues, policymakers often attempt to shape copyright law and policy outcomes as a compromise between different stakeholder interests. However, this does not always produce sound or appropriate results for copyright law.**

Considering the stakeholder antagonism that exists on many issues of copyright law as well as stakeholders' active engagement in policy, decision-makers are interested in developing laws that embody compromised positions in an attempt to keep more parties content. Yet, as evidenced in the current UK status quo on private copying, compromises do not always result in sound outcomes for copyright law. Moreover, compromises may not amount to a true balancing of interests in so far as the policy process from which they emerge may not offer an accurate picture of the full range of

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<sup>36</sup> Further examples of issues that fall outside the scope of this thesis are provided in Chapter 8, section 2.3.

interests that require balancing, or of the actual *extent* to which particular stakeholders are affected.

## Chapter 2

### Methods

This chapter explains the methods used in completing the research on creators' organisations (COs). I will briefly re-visit the research approach indicated in chapter 1 and then proceed with a detailed account of the research participants, which includes the decision to include certain collective management organisations (CMOs), as well as the selection of creative industries and COs. I will subsequently discuss the case study approach and specific methods of data collection. Following this, I will present an outline of my approach to data analysis and then consider the limitations of this methodology.

#### 1. Methodology

As presented in the introductory chapter, I conducted the research into COs' role in copyright policy as a socio-legal study.<sup>37</sup> This approach was determined by my objective: to study COs as actors in copyright policymaking in order to understand the role that they play in defining the nature of the copyright policy environment and in the outcomes of the copyright policy process.

From a doctrinal legal perspective, there is a range of different statutes and regulations that lay the basis for the existence of the studied organisations, and that frame their activities.<sup>38</sup> These include the Trade Union Act 2016, the Trade Union and Labour Relations (Consolidation) Act 1992, the Companies Act 2006, the Copyright, Designs and Patents Act 1988, and The Collective Management of Copyright (EU Directive) Regulations 2016. Provisions in copyright law, for instance, define licensing

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<sup>37</sup> See Chapter 1, section 3.

<sup>38</sup> Some scholars distinguish a number of 'legal environments of organisations', see Lauren B Edelman, Mark C Suchman, 'The legal environments of organizations' (1997) 23 Annual Review of Sociology 479.



bodies and licensing schemes,<sup>39</sup> and set out the powers of the Copyright Tribunal, which may review licensing terms.<sup>40</sup> Company law and trade union law, on the other hand, contain the provisions that determine the internal governance, function and general procedures within the studied organisations.<sup>41</sup> However, while formal legal instruments like these provide COs and other organisations with their broad remit and a framework for activities, and even some of the standards to which they are held, they offer little insight into the day-to-day behaviour and agenda-setting of these organisations.<sup>42</sup> Similarly, they say nothing about the politico-legal processes in which they participate, or how that participation should be undertaken. As such, to understand how these organisations, working within their statutory framework, actually influence the politico-legal process through priority-setting, evidence-gathering, and lateral and vertical engagement, one must conduct empirical research on and with these organisations. This will additionally offer some insight into the operation of law in, and transformation of law by, society (or at least interested representatives thereof).

Given the above, this thesis examines the behaviour and environment of the subject COs, focusing on their external displays of action and their own perceptions of their public roles. This will allow us to understand 'raw law', which McCormick juxtaposed with 'law as science' and described as the 'plurality of activities' that

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<sup>39</sup> S 116 CDP A 1988.

<sup>40</sup> Ss 124 ff CDP A 1988.

<sup>41</sup> For instance, s 1 TULRCA 1992 defines the meaning and basic purpose of a trade union and ss 178 f regulate the content and form of collective agreements and collective bargaining. Similarly, ss 1- 6 Companies Act 2006 lay down the types of companies under company law and ss 281 f regulate the decision-making process (resolutions, meeting, voting rights) of companies.

<sup>42</sup> William T Gallagher, 'What is a 'Law and Society' Perspective on Intellectual Property?' in William T Gallagher (ed) *Introduction to Intellectual Property: International Library of Essays in Law and Society* (Ashgate Publishing 2007) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103681)> accessed 20 June 2016 xi; MacCormick, 'Four Quadrants of Jurisprudence' (n 27) 58; Lawrence M Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 763; Michael Adler and Jonathan Simon, 'Stepwise Progression: The Past, Present and Possible Future of Empirical Research on Law in the United States and the United Kingdom' (2014) 41(2) *Journal of Law and Society* 173, 175.

enrich our understandings of actors and their contributions to the process of law.<sup>43</sup> Greater knowledge of this raw law or law in action can enrich our understanding of the social life of law (i.e. of the social, cultural and political context of law), and in this case copyright law.

## 2. Research participants

### 2.1 Selection of subject industries

To begin, I will explain my choice to focus on the music and publishing industries. I chose two creative industries. To conduct an assessment of COs' role, their environment and impact on copyright policy against the backdrop of just one creative industry would not have adequately accounted for the fact that law and policy in this area must attend to the needs and interests of numerous different creative fields representing extensive and diverse stakeholders, activities and protected works. I therefore decided to undertake case studies of both music and publishing for this project, whereby I narrowed down my focus of the publishing industry primarily to book publishing and in exclusion of journalism. I did so in recognition of the distinct working conditions, outputs, general structures, as well as different actors that operate within the journalistic field.

As noted in chapter 1, the music and publishing industries were chosen for a number of reasons. The two creative industries share several commonalities that rendered both sectors comparable and at the same time also some key differences that promised an intriguing insight into cross-industry dynamics in the copyright policy landscape. In terms of similarities, music and publishing are both among the most successful traditional UK creative industries; as such they make a significant contribution to the UK economy in terms of jobs, sales and reach.<sup>44</sup> These industries' needs and concerns therefore regularly inform copyright policy debates and stakeholders from these businesses are generally regarded as exercising considerable influence over the

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<sup>43</sup> MacCormick, 'Four Quadrants of Jurisprudence' (n 27) 54.

<sup>44</sup> For key facts and figures on the UK creative industries, see 'UK Creative Industries: Facts and Figures' (Creative Industries Council) <<http://www.thecreativeindustries.co.uk/uk-creative-overview/facts-and-figures#>> accessed 07 February 2017.

development of copyright law and policy. Furthermore, digital technologies and the internet are impacting both industries by presenting them with new markets and opportunities as well as the need to adapt their business models to new formats and new actors involved in the delivery, access and dissemination of creative works.<sup>45</sup> This suggested that these industries' configuration may be in flux, with many issues challenging, as well as requiring the attention and work of COs. The idea that COs from these two sectors would be active in contemporary copyright policy was reinforced by the findings of several studies into authors' and performers' earnings and standing, according to which creator groups from these industries were not faring particularly well in the digital environment.<sup>46</sup>

A further similarity between the music and publishing industries and another reason for selecting these two creative sectors lies in the fact that in both, COs sit within and navigate a complex environment of diverse stakeholders. These include publishers, agents, retailers, distributors, producers, managers, recording companies, information service providers, and others, who all contribute to and draw from the value chains that ultimately sustain the activities of creators. Music and publishing are also more mature industries in comparison to some other, like games, and as such present a better opportunity to study how stakeholder behaviour influences copyright policy and the environment within which policies are developed. Therefore, studying COs in these industries presented a possibility of gaining insight into the dynamics and relationships of different actors whose interests the copyright system seeks to balance, i.e. into the interest group environment of copyright law.

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<sup>45</sup> Nicola Searle, 'Changing Business Models in the Creative Industries: The cases of Television, Computer Games and Music' (2011) Report commissioned by the UK IPO <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/310293/ipresearch-creativeind-full-201110.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310293/ipresearch-creativeind-full-201110.pdf)> accessed 23 June 2016 6.

<sup>46</sup> Séverine Dusollier, Caroline Ker, Maria Iglesias and Yolanda Smits, *Contractual Arrangements applicable to creators: law and practice in selected Member States* (European Union 2014) (EU contracts study); Johanna Gibson, Phillip Johnson and Gaetano Dimita, 'The Business of Being an Author: A Survey of Author's Earnings and Contracts' (Queen Mary University of London 2015).

My choice for the music and publishing industries was also motivated by some differences that characterise these sectors. Particularly relevant to my research was the fact that COs from both industries appeared to be primarily invested in different copyright issues. Such was the case with regard to the three substantive issues (contract terms, the private copying exception and the implementation of the collective rights management Directive) that were selected for their contemporary and relevant nature during the research period. The private copying exception was an issue of much greater significance for COs in the music industry than it was for COs in publishing. Individual contract terms, on the other hand, seemed to be an issue on which COs from publishing were more active than their counterparts in music. In publishing, contract terms between authors and publishers determine the revenue that authors can expect to get from the primary uses of their works (sales), whereas in music, a larger proportion of a creator's income could flow from rights and uses managed collectively by a CMO. This also suggested that CMOs in both industries could have a different standing and influence over copyright policy. Against this background, I expected that an exploration of these issues from the perspective of COs belonging to the music and publishing industries could provide an appropriate canvas for capturing both the opportunities and challenges in steering copyright policy to the benefit of (all) creators across various industries. It would also allow me to explore the existence of cross-industry synergies or divisions that could further contribute to the outcomes of certain policy developments.

## *2.2 Defining 'creators' organisations'*

The starting point in selecting the organisations that this research would focus on was defining the term 'creators' organisations'. As described in the previous chapter, I use this term in the thesis to refer to organisations whose membership consists, wholly or in large part, of individual creators (writers, musicians, etc.) who also shape the organisation's self-identity, and where the purpose of the organisation is to further the interests of those creators.<sup>47</sup> I arrived at this definition by studying general

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<sup>47</sup> See Chapter 1, section 2.

concepts and classifications of organisations in organisational research.<sup>48</sup> Specifically, I combined elements of two definitions presented by Eldridge and Crombie.<sup>49</sup> The first describes organisations as social systems with a collective identity, an exact roster of members and a programme of activity and procedures, while the second emphasises that organisations are systems deliberately constructed to seek specific goals and values.<sup>50</sup> In application of this definition, I focused my research on trade unions representing creators, as well as on certain collective management organisations (CMOs) that either exclusively or predominantly consist of, and represent, creators.

While creator trade unions could easily be subsumed under the above definition of COs, the application of the definition to collecting societies like the Authors' Licensing and Collecting Society (ALCS), the Performing Right Society (PRS) and Phonographic Performance Limited (PPL) is less straightforward. In the case of PRS and PPL, the organisations' memberships consist not only of creators but also of music publishers and producers. Still, individual creators do make up the far greater proportion of members, and in the case of ALCS, authors are in fact the only represented stakeholder group in the membership. One could, however, question whether the goals pursued by collecting societies like PRS and PPL reflect, in importance, *direct* relevance and priority, the interests of creators. This may not be the case since such collecting societies must reconcile the interests of creators and exploiters of works. Yet, a strong argument in favour of subsuming these CMOs under the 'creators' organisations' term came from the economic significance that these bodies have for creators. Organisations like ALCS and PRS serve as pipelines for value, and the money that they distribute to their members could constitute a considerable portion of these creators' total copyright related revenue.

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<sup>48</sup> David Dunkerley, *The Study of Organizations* (Routledge and Kegan Paul 1972); Eldridge and Crombie (n 16); David A Buchanan and Alan Bryman (eds), *The SAGE handbook of organizational research methods* (SAGE 2009).

<sup>49</sup> Eldridge and Crombie (n 16).

<sup>50</sup> Ibid 22, 23 citing Theodore Caplow, *Principles of Organisation* (Brace & Court 1964) and Talcott Parsons, *Structure and Process in Modern Societies* (Free Press 1960).

CMOs like ALCS and PRS are not only economically important for creators. They are also important in light of the way they present themselves to copyright policymakers. In their public relations, these organisations explicitly claim to represent creators, either exclusively as in the case of ALCS, or among other stakeholders, as in the case of PRS. ALCS' own mission statement includes campaigning and lobbying 'on issues of importance to writers both at a national and international level, to ensure that writers' rights are both recognised and rewarded.'<sup>51</sup> Similarly, PRS describes itself as 'a society of songwriters, composers and music publishers'<sup>52</sup> which represents the rights of its members. These self-identifiers may well influence the way the voice of these organisations is taken into account by copyright policymakers. Consequently, I contend that it is both reasonable and essential to subsume these CMOs under my definition of 'creators' organisations' for the purpose of this research. Creators comprise a large proportion of these CMOs' memberships, they are represented on the organisations' management boards, and these organisations' agendas are adopted and actions taken to benefit creators in some way.

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<sup>51</sup> 'What we do' (ALCS) <<https://www.alcs.co.uk/What-we-do>> accessed 29 November 2016.

<sup>52</sup> 'About us' (PRS for Music) <<https://www.prsformusic.com/aboutus/Pages/default.aspx>> and <<https://www.prsformusic.com/Pages/default.aspx>> accessed 29 November 2016.

### 2.3 Organisation selection

The COs studied in this research were SoA,<sup>53</sup> ALCS,<sup>54</sup> the MU,<sup>55</sup> and PRS<sup>56</sup>. These organisations were selected on the basis of their recognition and standing within their industries, as well as based on their function. All four organisations are well established; their foundations date back several decades, and in some cases over a century, and their voice and relevance are recognised both by other industry stakeholders as well as by copyright policymakers. This indicated a certain internal stability of the organisations and consequently a higher potential for coordinated and organised outward action. What made these organisations additionally suitable for the present study was also their continuous activity in public affairs, including copyright policy. While they may not be representative of every CO in the studied creative industries, representativeness was not one of my selection criteria. My aim was not to identify a random cross-section of COs and generalise findings based on an examination of their objectives and contributions to copyright law and policy.

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<sup>53</sup> SoA is a company limited by shares registered under the Companies Act 2006, ss 1, 3(1)(2), and a special register body pursuant to s 117 (1) Trade Union and Labour Relations (Consolidation) Act 1992. The object of SoA is laid down in Article 2 of its Articles of Association (Approved 21.10.2014) <

<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Governance/Articles-of-Association-21-10-14-APPROVED-final.pdf>> accessed 18 February 2017. It is discussed in Chapter 4, section 1.3.3.

<sup>54</sup> ALCS is a company limited by guarantee and not having a share capital, ss 1, 3(1)(3) Companies Act 2006. The objects of ALCS are laid down in Article 3 of the Memorandum of Association (November 2016). <

<http://www.alcs.co.uk/CMSPages/GetFile.aspx?nodeguid=2dc7bbdd-e0e9-4c81-a46a-7ccaf4d73289>> accessed 18 February 2017.

<sup>55</sup> MU is registered on the list of Trade Unions maintained by the Certification Officer under s 3 TULRCA 1992, < <https://www.gov.uk/government/publications/public-list-of-active-trade-unions-official-list-and-schedule/trade-unions-the-current-list-and-schedule>> accessed 18 February 2017. Its objects are defined in Rule I.2 of the MU Rules. See n 430 for more information.

<sup>56</sup> PRS is a company limited by guarantee and not having a share capital, ss 1, 3(1)(3) Companies Act 2006. The objects of PRS are laid down in Article 3 of the Memorandum of Association < <http://www.prsformusic.com/SiteCollectionDocuments/About%20MCPS-PRS/prs-memorandum-articles.pdf>> accessed 18 February 2017. PRS for Music is the brand name used by PRS and its operating company PRS for Music Limited, < <http://www.prsformusic.com/aboutus/ourpeople/governance/Pages/default.aspx>> accessed 18 February 2017.

Rather, in recognition of the limitations to generalisability in qualitative research, my intention was to deliver findings on a number of organisations that *do* actively engage with other actors and that *do* seek to shape the law and its application on issues that matter to the members. With this in mind, this thesis primarily maps the activities, relationships and impact of four established, reputable and influential COs.

In light of my research objectives, this thesis will only consider the studied organisations in their capacity as copyright policy actors. As such, the focus will fall on COs' interactions with other industry stakeholders and policymakers in the context of existing or emerging copyright policy initiatives. Other aspects of COs' roles, including their relationship with their membership, collective bargaining with employer representations, as well as the many individual services provided to members, including contract vetting, industry advice, and more, will not be considered in detail in this thesis. Reference to some of these other CO activities will only be made where it serves to enrich the context of COs' policy oriented functions, and where such references are sufficiently supported by the project data.

Aside from being suitable research subjects based on their active involvement in copyright matters, both individually and through memberships in larger groups and alliances, SoA, ALCS, MU and PRS also pool together and represent a considerable subset of creators. At the time of writing, SoA has more than 9000 author members, ALCS has around 90 000, the MU brings together around 30 000 musicians, and PRS administers the rights of 118 000 songwriters, composers and music publishers.<sup>57</sup>

In addition to the above factors, I also chose these four COs on the basis of their function, as trade unions or CMOs, to suit the typology of organisations that I aimed to explore more closely. I specifically sought a trade union – CMO pair of COs from each of the two industry sectors selected for this research. In the end, SoA and ALCS

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<sup>57</sup> Membership figures for each organisation were obtained from the respective organisation's website. The information reported reflects these sources as at 16 June 2016.



were the two COs from the publishing sector and MU and PRS were chosen from COs in the music business. Two issues merit a brief mention at this point.

- (1) In selecting COs from the music industry, MU was naturally approached as the only trade union dedicated to musicians. However, in terms of its CMO counterpart, I originally approached the Phonographic Performance Limited (PPL) as I considered it a better fit with regard to the MU. For one, it seemed that there was more liaison between these two organisations, possibly also as a result of John Smith, the MU General Secretary's presence as Chairman of PPL's Executive Management Team.<sup>58</sup> Moreover, the MU is above all a union of music performers, although many of its members are also songwriters and composers. PPL is the UK collecting society that manages the copyright in sound recordings.<sup>59</sup> As such, PPL is a valuable revenue bringer particularly for performers, who share returns from the public performance right<sup>60</sup> and the communication to the public right with phonogram producers, i.e. the record labels.<sup>61</sup> I therefore expected that there would be a larger overlap in the thematic focus of public affairs activities between the MU and PPL. However, access negotiations with PPL were stalling and in the interest of time, I approached the other major CMO in the music business – PRS. In contrast to PPL, PRS is the collecting society that manages the copyright in musical works<sup>62</sup> and is therefore primarily relevant to songwriters, composers and their publishers. Nevertheless, as access negotiations ran smoothly and efficiently, it was decided that PRS would be the focus CMO from the music sector.

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<sup>58</sup> For a list of the PPL Executive Management Team see 'Management and Boards' (PPL) <<http://www.ppluk.com/About-Us/Who-We-Are/Management-and-boards/>> accessed 17 June 2016.

<sup>59</sup> S 1 (1) (b) CDPA 1988.

<sup>60</sup> S 19 (1) CDPA 1988.

<sup>61</sup> S 20 (1) CDPA 1988.

<sup>62</sup> S 1 (1) (a) CDPA 1988.

(2) The second issue is relevant to the typology of the chosen organisations and concerns SoA. This CO is not a traditional trade union in the sense that it has a dual legal form.<sup>63</sup> As I will elaborate in the following chapter 3, the CO was originally established as a private limited company, which adopted the additional status of an independent trade union several decades later in 1978.<sup>64</sup> However, as I discuss in the next chapter, this CO performs many trade union characteristic functions. Furthermore, it appeared a more suitable organisation to focus on than the Writers' Guild of Great Britain (WGGB), the other trade union in publishing<sup>65</sup> as the latter is a much smaller union of roughly 2000 members and specialises in the interests and needs of screenwriters.<sup>66</sup>

### 3. Research methods

The present research was designed as two case studies, one focussed on the activities of the MU and PRS in the music sector, and the other on SoA and ALCS in the publishing sector. The case study approach is a research strategy that involves an empirical investigation of a particular phenomenon within its real life context using multiple sources of data.<sup>67</sup> This strategy allowed me to explore the actions and operations of four COs in the dynamic context of their work on several specific copyright law issues. The three issues that I chose to focus on were (1) contractual terms for creators and performers, (2) the UK private copying exception, and (3) the

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<sup>63</sup> See n 53.

<sup>64</sup> See chapter 3, section 2.2.1.

<sup>65</sup> Except for the National Union of Journalists (NUJ) <<https://www.nuj.org.uk/home/>> accessed 07 February 2017, which falls outside the scope of this thesis as I exclude journalism from my study of the publishing industry, see section 2.1 of the present chapter.

<sup>66</sup> See 2015 Annual Return for WGGB: 'Corporate Report: Writers Guild of Great Britain: annual returns' (UK Government, 11 July 2014) <<https://www.gov.uk/government/publications/writers-guild-of-great-britain-annual-returns>> accessed 07 February 2017 and <<https://writersguild.org.uk/>> accessed 1 December 2016.

<sup>67</sup> Colin Robson, *Real World Research* (3<sup>rd</sup> Edition, John Wiley & Sons Ltd 2011) 136; Robert K Yin, *Case Study Research: Design and Methods* (2<sup>nd</sup> Edition, SAGE Publications 1994) 13; John W Creswell, *Qualitative Inquiry and Research Design: Choosing among five approaches* (2<sup>nd</sup> edition, SAGE Publications 2007) 73.

implementation of the EU collective rights management Directive. These topics were arrived at after numerous scoping telephone conversations with representatives of the respective COs' management. These exchanges preceded the formal adoption of my research design. The idea behind this scoping exercise was to ensure that the focus of my research would capture issues of contemporary relevance to the work of the COs and the creative industries to which they belong. However, the contemporaneous nature of this research also meant that not all of these topics have come to a natural close in the timeframe of this project. The UK private copying exception, which entered into force in the fall of 2014 was repealed following a judicial review in the summer of 2015. The Regulations implementing the CRM Directive came into effect in April 2016. However, the issue of contract terms for creators is still live and evolving.

The case studies relied on two main sources of data. Primary data were generated from 22 semi-structured interviews with mostly high-ranking representatives of the four COs. These data were complemented with document analysis. The latter drew upon the organisations' own policy briefings, consultation submissions, press releases, website updates and reports, on the one hand, and external sources reporting on the actors' activities, primarily documents from online news sites, blogs and trade press, on the other. This multi-method approach benefitted my research in several ways. The secondary data offered insight into organisations' publicly declared policy positions and agendas as well as into the actors' formal reflections on policy and industry developments.<sup>68</sup> Through the interviews, on the other hand, I was able to capture the individual experiences, opinions and perceptions of important players *within* each of the organisations, specifically those who were responsible for the implementation of the organisation's stated aims and agendas. These two methods therefore not only complemented one another but also contributed to the process of triangulation by providing a possibility for the cross-checking of themes

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<sup>68</sup> The value of document analysis is considered by Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herber M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 926, 938 and Creswell (n 67) 204, 208.

and findings, thus helping ensure that internally valid and well-rounded conclusions were reached.<sup>69</sup>

The fieldwork took place in the period January – May 2015. Interviews were carried out on the premises of each CO. The access that I was able to obtain varied across the four organisations.<sup>70</sup> I was able to spend 10 days in the MU's London headquarters, in order to interview a range of respondents. During this time, it was also possible to conduct some unstructured observations. Three days were spent with PRS, one and a half days with ALCS and just over an hour with SoA. All interviews were recorded and transcribed with the consent of the respondents. Participants were offered two levels of confidentiality in terms of the way their contribution would be presented in research outputs. These are outlined in the participant information leaflet (see Annex B). This leaflet was made available to key gatekeepers within the COs during access negotiations and once more to every individual respondent prior to the interview. In essence, respondents could choose between being identified by name or having both their name and designation within the organisation kept confidential. In the latter case, the leaflet explicitly clarified that participants' affiliation with their respective organisation would not be confidential. As expected, both options were exercised without particular uniformity across each CO. Where a participant has agreed to be identified, their name is referenced in a footnote at the end of the quote (see Annex A for a list of named participants). To maintain consistency in reporting, all interview quotes have been attributed to participants following the same scheme (Respondent, Organisation's name). In order to ensure the confidentiality of all remaining participants, respondents across organisations were not numbered.

Differences in the degree of access that I obtained at each CO also led to an unequal number of interviews carried out with respondents from the studied organisations: 6 interviews were conducted at ALCS, 10 at the MU, 5 at PRS and 1 at SoA (see Annex

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<sup>69</sup> Webley, 'Qualitative Approaches to Empirical legal Research' (n 68) 208; Robson, *Real World Research* (n 57) 158.

<sup>70</sup> I will elaborate on this in section 5 of the present chapter.

A). Capacity limitations were indicated by SoA as the reason why I was encouraged not to approach a wide range of people from that CO. To offset this somewhat, a follow-up interview was conducted with my sole SoA respondent. This also led me to seek an interview with a high-ranking respondent at WGGB, the other – much smaller – trade union in the publishing industry, which is dedicated primarily to screenwriters.<sup>71</sup> This was done in order to gather more data on trade unions in the publishing sector with a view to obtain more depth and a possible means to triangulate some of the data generated with SoA. Richer data and a possibility of limited triangulation also motivated me to accept an opportunity to interview representatives of a professional association in music – the British Academy of Songwriters, Composers and Authors (BASCA) during my fieldwork in London. This brought the total number of interviews carried out for this project to 24 (22+2). However, the data generated from WGGB and BASCA has not been used to draw any stand-alone findings. Instead, it has been consulted to corroborate or question emerging themes and findings from the data pertaining to the other four COs that remain the focus of this thesis.

#### 4. Data analysis approach

The data gathered as part of this research was analysed with a thematic coding approach.<sup>72</sup> I began reducing the raw interview data through the use of annotations as I transcribed the interview recordings and then re-read the transcripts. I organised and coded these transcripts with the help of NVivo – a special qualitative data analysis software.<sup>73</sup> This software was also used, to a limited extent, for the document analysis. Codes and themes occurring in the data were determined inductively within the framework of the research questions. Many of the codes developed from the

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<sup>71</sup> As I explain in section 2.1, the thesis is only concerned with book publishing and excludes journalism. The National Union of Journalists was therefore not a viable option for a trade union.

<sup>72</sup> For a detailed account of the steps involved in thematic coding analysis see Robson, *Real World Research* (n 67) 474 ff and M B Miles and A M Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2<sup>nd</sup> edition) (Sage 1994) 9.

<sup>73</sup> For more information on NVivo see <<http://www.qsrinternational.com/what-is-nvivo>> accessed 1 December 2016.

issues discussed during the interviews and included labels, such as ‘contractual terms’, ‘private copying’, ‘licensing’, ‘technology driven change’, ‘creators’ organisations’ concerns’, ‘creators’ organisations and other stakeholders’ and ‘current priorities’. To focus the emerging themes, memos were developed in two ways. On the one hand, memos were drafted to reflect on the body of data under individual codes. Additionally, memos were also developed by CO – to consider differences in the data generated from each of the four organisations studied. The themes that emerged from the fieldwork data, as a result of this process, ultimately served to focus the collection of additional documentary data that was subsequently analysed. Overall, the process of thematic coding analysis was carried out until internal consistency was reached in the themes and theory emerging from the data.

## 5. Methodological challenges and limitations

The methodological approach adopted for this research on COs was characterised by a number of challenges and limitations. To begin with, the contemporaneous nature of the policy issues that were used to study the activities and environment of COs meant that at the time of analysis and writing, the outcomes on certain issues, like contractual terms, were (and to an extent remain) unknown. This meant that, at times, my ongoing observations and analysis needed to be revised or cross-checked against more recent industry and policy developments. It further meant that for practical purposes, it was necessary to determine a cut-off date for further documentary data collection. The date chosen was 31 July 2016, though some post-July policy developments of significance, particularly draft EU Directives published in September 2016, have also been taken into account.<sup>74</sup> Other more recent developments are identified in some of the footnotes.

Furthermore, as mentioned above, the levels of access that I was able to secure with each CO differed. This affected, in particular, the breadth of data generated for each

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<sup>74</sup> ‘Modernisation of the EU copyright rules’ (European Commission) <<https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>> accessed 07 February 2017.

CO from interviews. In particular, with regard to SoA, it was more difficult to gain a sense of this CO's culture having only spoken with one respondent. At the same time, my respondent made available to me a range of SoA consultation submissions and other policy briefings prepared by SoA, most of which are also available on the organisation's website.<sup>75</sup> Therefore, where possible, unevenness in interview data was addressed through particular scrutiny of documentary sources.

With regard to my use of documentary data, generally when data which originated from one of the studied COs (for instance, a press release on a CO website) was consulted and incorporated into my analysis, I attempted to verify the content of data through triangulation, in particular by consulting other independent, or third-party sources. However, this was not possible in every instance. I have identified key instances, where I considered this problematic, in the relevant chapters.

Finally, as I indicated in Chapter 1, it is important to note a few delimitations that apply to the work presented in this thesis. Firstly, while the thesis refers, where appropriate, to the legal instruments that govern the remit, structure, and procedures of the studied organisations, the focus of this research was not on the way organisations' behaviour relates to these legal provisions. Rather, the presented research was concerned with uncovering COs' role in and effect on copyright law and policy. Moreover, although every effort was made to ensure that the findings reported and discussed in this thesis are internally valid, there are limitations on the generalisability of my research outcomes. Through this research, I intended to map out the way creators' organisations participate in the process of copyright policymaking, the environment in which they do so and the effects that this environment and these actors' behaviour produce on the nature of copyright law and policy. However, I did not select the MU, PRS, ALCS and SoA for their representativeness of all such organisations. Rather, I chose them, among other things, *because* they are particularly active and relevant in public affairs. Furthermore,

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<sup>75</sup> 'Submissions' (The Society of Authors) <<http://www.societyofauthors.org/Where-We-Stand/Submissions>> accessed 01 February 2017.

given my chosen methodology, the perspective through which the copyright policy environment is depicted is also the perspective of these creators' organisations and it may differ from that of other creative industries stakeholders. Moreover, even with regard to these four organisations, the extent and type of access that I was able to secure, in terms of the number of interviews obtained from each organisation, the time spent on the premises of each, and the supplementary documents I was given access to, varied across the studied COs. It is also important to bear in mind that while music and publishing are two central components of the creative industries, this study has not considered the actors or environment pertaining to the audio-visual, crafts, visual arts, design and other creative industries.<sup>76</sup> Last but not least, the copyright issues around which I structured my observations of the COs' activities are a product of the timing of this research and, in line with one of my main conclusions, it is possible that even the studied four COs may behave or act differently in the context of other policy issues.

## 6. Summary

This chapter offered an account of the approach taken and methods used in researching COs' behaviour, environment and impact on copyright policy. After discussing the socio-legal nature of this research, I elaborated on the reasons behind the selection of music and publishing as the two creative sectors at the focus of this thesis. I also justified the selection of SoA, ALCS, MU and PRS as the focus COs. Following this, I presented the methods involved in this research: a case study approach involving 22+2 semi-structured interviews with respondents from the selected COs (+2 interviews with WGGB and BASCA), coupled with documentary analysis. I discussed the thematic coding approach used to interpret the data and concluded by describing some of the methodological challenges and limitations

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<sup>76</sup> See 'UK Creative Overview' (Creative Industries Council) <<http://www.thecreativeindustries.co.uk/industries>> accessed 28 November 2016 for one overview of the respective creative industries.



pertaining to access, validity and generalisability. In the next chapter, I will review the academic and policy literature that this research builds on.

## Chapter 3

### Literature Review

There is ample evidence that organisations, including COs, actively participate in the making of copyright law and policy. Yet, the process by which they do so and how their participation impacts on, and characterises, the copyright policy framework have rarely been the specific focus of empirical research in IP. Publications of consultation responses on the UK Intellectual Property Office's (IPO) website evidence that the bulk of input into public consultations on different copyright (and other IP) issues, which inform IP policies, generally come from organisations, not individuals.<sup>77</sup> Similarly, in 2015, it was two COs and a music industry alliance of organisations (the MU, BASCA and UK Music) that launched a judicial review of the regulations that introduced a private copying exception into copyright law, and this judicial challenge ultimately led to the repeal of the copyright exception thus directly shaping the substance of the law.<sup>78</sup> Freedom of Information requests by technology writer Glyn Moody have also led to the disclosure of meetings schedules and a number of e-mail exchanges between representatives of creative industries organisations and policymakers in the run-up to the adoption of various copyright exceptions in 2014.<sup>79</sup> Some of the released correspondence illustrates how in 2013 the

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<sup>77</sup> See, for instance, 'Consultation outcome: Copyright: UK orphan works licensing scheme' (UK IPO) <<https://www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme>> accessed 07 February 2017.

<sup>78</sup> The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361 were quashed by *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills (No. 2)* [2015] EWHC 2041 (Admin).

<sup>79</sup> 'Copyright exceptions' (Freedom of Information request made by Glyn Moody to the Intellectual Property Office, 3 April 2014) <[https://www.whatdotheyknow.com/request/copyright\\_exceptions#outgoing-346168](https://www.whatdotheyknow.com/request/copyright_exceptions#outgoing-346168)> accessed 07 February 2017; 'Meetings between IPO and copyright industries (3<sup>rd</sup> Jan- 3<sup>rd</sup> April 14) where copyright exceptions were discussed' (UK IPO) <[https://www.whatdotheyknow.com/request/205465/response/520020/attach/6/FOI%20list%](https://www.whatdotheyknow.com/request/205465/response/520020/attach/6/FOI%20list%20)

Alliance for IP, a major industry umbrella organisation, went as far as to make specific language recommendations on the text of the proposed exceptions for private copying and caricature, parody or pastiche<sup>80</sup>, to name a few, in a letter to the Minister for IP.<sup>81</sup> These are just a few examples of industry organisations' active role in copyright law and policy, none of which have been researched with a focus on these actors' behaviour.

As outlined in chapter 1, the purpose of this research was to study COs as participants and shapers of copyright policy, and to understand, in this context, how these actors behave, what landscape they operate in, and what effects this landscape and organisations' workings produce on the nature and substance of copyright law and policy.<sup>82</sup>

In this chapter, I situate my research. The chapter is structured into 3 main sections and a conclusion. In section 1, I will consider the social movements, recent IP reviews, and legal and policy developments that characterise the contemporary copyright policy landscape, thereby offering a sense of the players, currents and perceived shortcomings of the policy field. I will discuss how organisations' participation in policy has implicitly been assumed by academics and policymakers and how stakeholders have even been criticised for steering the course of the law through lobbying. I will review the portrayal of industry organisations, particularly trade unions and collecting societies in the media and following this focus on the limited existing research into the intersections of organisational behaviour and certain features of copyright policy. I will thereby consider how organisations have been

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20of%20meetings.pdf> accessed 07 February 2017; E-mail from Richard Mollet (The Publishers Association) to UK IPO (26 February 2014) <<https://www.whatdotheyknow.com/request/205465/response/532815/attach/2/FOI%20request%20REDACTED%20emails%20PA%20re.copyright%20exceptions.pdf>> accessed 07 February 2017.

<sup>80</sup> Now s 30A CDPA 1988.

<sup>81</sup> Letter from Susie Winter, Director General, Alliance for IP, to Viscount Younger of Leckie, Minister for Intellectual Property (13 December 2013) <<https://www.whatdotheyknow.com/request/205465/response/520020/attach/2/FOI%20attach.IP%20Alliance.pdf>> accessed 07 February 2017.

<sup>82</sup> See Chapter 1, section 1.

shown to impact policy. Subsequently, I will look at the interaction between policy and organisations in the other direction, i.e. the way the existing institutional environment of the copyright system influences the behaviour of organisations.

Section 2 of this chapter will specifically consider trade unions and CMOs as two types of industry organisations. I will discuss the various functions of these actors and how they have been exercised by the MU, SoA, PRS and ALCS in the copyright field in order to inform our understanding and expectations of these organisations' participation in copyright policy. By emphasising the differences in the origin, purpose and functions of these bodies, I will suggest that the way they engage in the policy process is also different. In addition, I will highlight some areas where understanding these differences bears relevance on our understanding of the copyright policy landscape.

In section 3, I will briefly identify and outline the three copyright issues around which I structure my analyses and findings of the selected COs' role in copyright policy in the present thesis. These are the contractual terms for authors and performers, the UK private copying exception, and the implementation of the EU collective rights management Directive (CRM Directive).

## 1. The contemporary copyright policy landscape

### *1.1 Technological advancements and shifting attitudes towards copyright and IP generally*

The last decade of developments in copyright law and policy could be described as a series of attempts on the part of policymakers and industry stakeholders to react to the challenges and opportunities presented by the advancement of the internet and digital technologies. Some of the most notable technological changes that have affected the IP system and the music and publishing industries in particular, relate to the digitisation of information and the possibility of electronic storage, both of which have made the acts of copying and distribution fully straightforward.<sup>83</sup> This, in turn,

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<sup>83</sup> Charlotte Waelde and Hector MacQueen, 'From entertainment to education: the scope of copyright?' (2004) IPQ 259, 262.

has given rise to new infringing activities, such as illegal file-sharing of musical and audio-visual works, as well as of e-books.<sup>84</sup> Digitisation and the internet have also provided a breeding ground for new actors and new ways of accessing and enjoying creative works, for instance through video-on-demand, webcasts, podcasts, streaming, and more.

The stakeholder dynamics brought about through technological change have been described as a battle between digital millennials and copyright fundamentalists.<sup>85</sup> As access to knowledge became easier, cheaper, and more widely accessible, the content industries started facing growing opposition from hackers, cyber-anarchists, and legal experts who were part of a movement for open access, an expansion of the public domain and digital rights.<sup>86</sup> Indeed, the early 2000s saw the formation of the UK's Open Rights Group,<sup>87</sup> an organisation fighting for freedom in the digital age, including free speech, and thus for restrictions on the scope of copyright. Similar organisations and alliances have also come into existence across Europe and the US.<sup>88</sup>

In the UK, the growing debate over the scope of IP law and its fitness in the digital age, fuelled on the one hand by the established industry organisations that sought to maintain their positions of power and by open access and digital liberals on the other, was ultimately reflected in IP policy. Successive governments launched a number of reviews into the IP framework and its fitness to serve the new digital times. A parallel process has also unfolded on an EU level and the entailing reform package is, at the time of writing, still being finalised.<sup>89</sup>

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<sup>84</sup> Ibid 262-263.

<sup>85</sup> Peter Baldwin, *The Copyright Wars* (Princeton University Press 2014) 318.

<sup>86</sup> Ibid, at 319.

<sup>87</sup> Open Rights Group <<https://www.openrightsgroup.org/about/>> accessed 07 February 2017.

<sup>88</sup> The Open Rights Group is a member of European Digital Rights <<https://edri.org/about/>> accessed 07 February 2017, a network of 36 organisations pursuing similar aims across 21 European Countries. In the US, the pendant to the Open Rights Group is the Electronic Frontier Foundation <<https://www.eff.org/>> accessed 07 February 2017, founded as early as 1990.

<sup>89</sup> To date, this package includes legislative proposals for two Directives and two Regulations: 'Modernisation of the EU copyright rules' (European Commission)

## 1.2. Copyright policy developments and (perceptions of) organisations' role within them

In the UK, in 2006, Andrew Gowers published his review of the IP system.<sup>90</sup> The review aimed to rebalance the way UK's IP laws catered to the interests of right holders, commercial users, research institutions, consumers and other stakeholders. In the area of copyright, Gowers specifically examined the infringement framework, whether 'fair use' provisions for citizens were reasonable, and whether the complexity of copyright licensing was manageable by businesses.<sup>91</sup> It was clear that many of Gowers' recommendations were aimed at reducing the growing public perception that copyright law was serving as a hindrance to the world of opportunities created by new technologies.<sup>92</sup> Such perceptions were being amplified by the open rights movement.<sup>93</sup> As a result, Gowers made a number of recommendations. These included the development of an orphan works scheme to allow the re-use of protected works where the author could not be found or identified; a limited private copying exception for format shifting; a clearer research exception providing greater scope for research by universities; and new copyright exceptions for creative, transformative and derivative works, as well as for caricature, parody and pastiche.<sup>94</sup>

In 2007, the Labour Government decided to take forward a few of Gowers' recommendations, mainly those pertaining to copyright exceptions, and consulted on a number of proposals.<sup>95</sup> The implicitness of industry organisations' importance and participation in copyright policy shone through in the way the government chose to undertake the consultation. Unlike more recent copyright consultations, rather than

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<<https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>> accessed 07 February 2017. Primarily relevant for this thesis is Commission, 'Proposal for a Directive on copyright in the Digital Single Market' COM (2016) 593 final.

<sup>90</sup> Andrew Gowers, *Gowers Review of Intellectual Property* (The Stationary Office 2006).

<sup>91</sup> Ibid para E.5.

<sup>92</sup> Ibid paras 3.28f and para E.9.

<sup>93</sup> 'Open Rights Group welcomes Gowers Review' (ORG, 6 December 2006)

<<https://www.openrightsgroup.org/press/releases/open-rights-group-welcomes-gowers-review>> accessed 07 February 2017.

<sup>94</sup> Gowers (n 90) 6-9.

<sup>95</sup> UK IPO, 'Taking forward the Gowers Review' (n 3).

make the document open and available to the public, the IPO at the time sent a copy of the consultation to a list of industry organisations (including ALCS, the MU and PRS, but excluding SoA),<sup>96</sup> and merely indicated that further copies could be requested from the IPO.<sup>97</sup> The IPO itself, it was clear, considered industry organisations to be primary contributors and actors in copyright policy. Yet, the main focus of academic study was not the workings of these organisations but the substance of Gowers' recommendations, despite occasional reference that 'industry pressures' were moving ahead of sound theorizing.<sup>98</sup>

Rather than implicitly assuming the existence and operations of industry organisations like Gowers had, Ian Hargreaves, who produced the subsequent review of the UK's IP system in 2011, made several explicit and negative references to the impact of right holder organisations on IP policy generally and on copyright policy specifically.<sup>99</sup> He did so in order to emphasise one of the review's key messages – that IP policy should be evidence-based. In the document's Foreword, Hargreaves suggested that in the past, IP policy had been driven by weight of lobbying and therefore urged the government to ensure that future policies would be grounded in evidence.<sup>100</sup> In relation to copyright, the review claimed that 'lobbying on behalf of rights owners has been more persuasive to Ministers than economic impact assessments'<sup>101</sup> and that 'persuasive powers of celebrities and important UK creative companies have distorted policy outcomes.'<sup>102</sup> However, while Hargreaves criticised

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<sup>96</sup> Ibid 37-38.

<sup>97</sup> Ibid 5, para 24.

<sup>98</sup> Wendy J Gordon, 'Intellectual Property' in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (OUP 2005) 617, 627; Academics discussing the substance of the government's proposals included Ronan Deazley, 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73 (5) *The Modern Law Review* 785, and IP Foresight Forum, 'Response by the IP Foresight Forum (a grouping of independent intellectual property academics in the UK) to the UK IPO's Consultation: Taking Forward the Gowers Review of Intellectual Property; Proposed Changes to Copyright Exceptions' <<http://www.ipforesightforum.ac.uk/documents/UKIPO%20Consultation.pdf>> accessed 07 February 2017.

<sup>99</sup> Hargreaves (n 4) 1, 6, para 2.13, para 2.16, para 10.10.

<sup>100</sup> Hargreaves (n 4) 1.

<sup>101</sup> Ibid 6.

<sup>102</sup> Ibid para 10.10.

the impact of stakeholder behaviour, his statements were rather sweeping. In particular, they did not consider possible variations in the extent of influence exercised by different actors (representing different stakeholders, or performing different functions), or even by different creative industries altogether. Yet, this thesis will show that such distinctions are in fact necessary in light of differences and power-imbalances between actors, and potentially between industries.<sup>103</sup>

Hargreaves further criticised that much of the necessary data for the development of empirical evidence on copyright was held privately and therefore entered the public domain mainly as 'evidence', or 'lobbynamics', in support of arguments put forward by lobbyists.<sup>104</sup> Following the IP review, the government embraced Hargreaves' call for evidence-based policy and issued a 'Guide to Evidence for Policy' laying out and elaborating on three main criteria (clarity, verifiability and peer review) for the type of evidence that the government wished to receive from stakeholders; the IPO has since updated this guide on several occasions.<sup>105</sup>

Thematically, Hargreaves' Review, like Gowers', was characterised by the idea that copyright law was acting as a barrier to innovation, specifically with regard to the creation of new internet-based businesses.<sup>106</sup> Consequently, many of the reviewer's recommendations, including a series of copyright exceptions, an orphan works licensing framework, and the establishment of a Digital Copyright Exchange to ease the process of rights clearance, were aimed at making copyright law more user and consumer friendly.<sup>107</sup> A juxtaposition of Hargreaves' initial observations of the lobbying on behalf of rights holders and his identification of a need to 'fix' copyright

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<sup>103</sup> Chapter 8, sections 2.1, 2.4.1 and 2.4.3.

<sup>104</sup> Hargreaves (n 4) para 2.13.

<sup>105</sup> UK IPO, 'Guide to Evidence for Policy' (2013)

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>> accessed 07 February 2017; UK IPO, 'Guide to Evidence for Policy' (2014)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510985/Guide\\_to\\_evidence\\_for\\_policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510985/Guide_to_evidence_for_policy.pdf)> accessed 07 February 2017.

<sup>106</sup> Hargreaves (n 4) 3.

<sup>107</sup> Hargreaves (n 4) 8.



so that it could facilitate innovation indicate that the scholar had a somewhat negative perception of the way rights holder organisations had influenced copyright policy. This sentiment has also been echoed by other scholars, including Horten,<sup>108</sup> Williamson and Cloonan,<sup>109</sup> Baldwin,<sup>110</sup> and Harker.<sup>111</sup>

The key idea of facilitating the opportunities presented by new technologies for all market players and citizens was also at the heart of the EU copyright reform, which is part of the EU's Digital Single Market Strategy.<sup>112</sup> Similar to the UK, the European Commission undertook an extensive public consultation between December 2013 and March 2014, which elicited more than 9500 responses from 'a wide range of stakeholders including users, consumers, right holders, industry, collective management organisations and governments.'<sup>113</sup> The Commission's choice to list CMOs as distinct stakeholders in its stakeholder enumeration, and to offer 'CMOs' as a separate category for respondents to select in order to indicate their position within the industry, is notable.<sup>114</sup> Arguably, CMOs represent a collection of right holders and could, therefore, also have been subsumed under the author/performer and publisher/producer categories offered in the consultation document. At the same time, CMOs could also fall under 'industry' as industry organisations. Therefore, the

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<sup>108</sup> Horten, *A Copyright Masquerade* (n 8) 10ff; Monica Horten, *The Copyright Enforcement Enigma: Internet Politics and the 'Telecoms Package'* (Palgrave Macmillan 2012) 70ff.

<sup>109</sup> Williamson and Cloonan, 'Rethinking the music industry' (n 8) 305.

<sup>110</sup> Baldwin (n 85) 330f.

<sup>111</sup> Harker (n 8) 45.

<sup>112</sup> 'Towards a modern, more European copyright framework: Commission takes first steps and sets out its vision to make it happen' (European Commission, 09 December 2015) <<https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its>> accessed 07 February 2017.

<sup>113</sup> See 'Results of consultation and next steps' section of 'Public Consultation on the review of the EU copyright rules' (European Commission) <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)> accessed 07 February 2017.

<sup>114</sup> Respondents could identify themselves under one or several of the following categories: end users/ consumers; institutional users (such as public libraries); author/performer or representative of author/performer; publisher/producer/broadcaster or their representative; intermediary/distributor/other service provider or their representative; CMO or their European and international representatives; public authority; Member State; other (such as academics).

Commission's decision to separate CMOs out into a discrete stakeholder category could indicate that these actors tend to behave differently or to have discrete interests from the other listed stakeholders; it could also reflect the different function performed by CMOs. Alternatively, the Commission's move could also be a reflection of these actors' particular influence over copyright policy. The latter hypothesis was suggested in the EU consultation response submitted by the UK national copyright research hub CREATE (Centre for Copyright and New Business Models in the Creative Economy).<sup>115</sup> The academics authoring the consultation response suggested that the design of the survey questions in the document was more accessible and technically graspable by experts who were typically trained as lobbyists.<sup>116</sup> Consequently, the authors argued, there was a likelihood that the consultation would not illuminate empirically observable facts but rather what, CMO representatives (the authors' illustrative example) saw or wished to see, whereas 'artists, consumers, non-profit institutions and digital innovators' were less likely to be able to contribute meaningfully.<sup>117</sup> These academics suggested that CMOs' views and interests differ from those of the other enumerated stakeholders and that CMOs may be the ones more effectively shaping policy because of the structure of the policy process. In light of this, the need to study the policy engagement of CMOs and compare it with that of other industry organisations is evident. The thesis will discuss how based on their role and functions, CMOs may wield particular policy influence compared to other actors.<sup>118</sup> Furthermore, it will provide evidence that a mixed membership composition of creators and publishers can cause a CMO to take different policy positions from those adopted by organisations representing just one of the two stakeholder

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<sup>115</sup> Martin Kretschmer, Ronan Deazley, Lilian Edwards, Kristofer Erickson, Burkhard Schafer and Daniel J Zizzo, 'Public Consultation on the Review of EU Copyright Rules' (Response on behalf of CREATE, 5 March 2014) <<http://www.create.ac.uk/wp-content/uploads/2014/03/CREATE-Response-to-Public-Consultation-on-the-Review-of-EU-Copyright-Rules.pdf>> accessed 07 February 2017 1.

<sup>116</sup> Ibid 2.

<sup>117</sup> Ibid.

<sup>118</sup> See Chapter 7, section 1 and Chapter 8, section 2.2.

groups.<sup>119</sup> Moreover, the thesis will reveal differences in the policy behaviour, positions, and pursued influence between individual CMOs.<sup>120</sup>

After its public consultation, the EU Commission published a Communication highlighting four pillars that it would seek to develop and strengthen through its future legislative package: (1) widening online access to content across the EU; (2) adapting copyright exceptions to the digital environment; (3) creating a fair marketplace; and (4) strengthening the enforcement system.<sup>121</sup> To date, the Commission has rolled out a number of legislative proposals, including a Directive on copyright in the Digital Single Market, which addresses numerous issues, including the role of online intermediaries in the distribution of copyright-protected works and the remuneration system for authors and performers.<sup>122</sup> Where relevant, reference to some of the proposals put forward by the Commission will be made in the respective thesis chapters, which substantively engage with the corresponding issues. Given the contemporaneous nature of this topic, more recent policy developments may only be referred to in the thesis footnotes.

### ***1.3. Creative industry organisations in the media***

Similar to the academic and policy treatment of industry organisations discussed in the previous subsection, online media representations of organisations' role in copyright policy have also been largely negative and generalising.<sup>123</sup> Following the

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<sup>119</sup> See Chapter 5, section 2.

<sup>120</sup> See Chapter 7, section 2.

<sup>121</sup> Commission, 'Towards a modern, more European copyright framework' (Communication) COM (2015) 626 final 2-3.

<sup>122</sup> 'Modernisation of the EU copyright rules' (European Commission) (n 89).

<sup>123</sup> Mike Masnick, 'The Ridiculous Concept of the "Value Gap" in Music Services... And How it Could Harm Both The Tech Industry and The Music Industry' (*techdirt*, 08 August 2016) <<https://www.techdirt.com/articles/20160803/15263735147/ridiculous-concept-value-gap-music-services-how-it-could-harm-both-tech-industry-music-industry.shtml>> accessed 07 February 2017; Mike Masnick, 'Oh look, the publishing industry is growing in the digital age as well' 'Oh look, the publishing industry is growing in the digital age as well' (*techdirt*, 16 August 2011) <<https://www.techdirt.com/articles/20110812/17405615503/oh-look-publishing-industry-is-growing-digital-age-as-well.shtml>> accessed 31 October 2016; Glyn Moody, 'Copyright holders will define details of UK's orphan works bill, but not the public' (*techdirt*, 15 May 2013) <<https://www.techdirt.com/articles/20130510/03475523032/copyright->

outcome of the private copying exception judicial review, for instance, a news report appeared on *Ars Technica* which carried the title 'Thanks to the music industry, it is illegal to make private copies of music – again'.<sup>124</sup> The piece merely named the three organisations, MU, BASCA, and UK Music, which had launched the judicial review and then summarised that 'the music industry' had shown itself to be indifferent to what its customers want. With no elaboration on the claimants' arguments or motives, the piece effectively suggested that (a) these arguments and motives were the same for all claimants and (b) that the three claimants represented the entire music industry. As my thesis will show, there are certainly doubts as to the former, while the latter is evidently incorrect. Similarly, in reporting on the private copying judicial review, the *BBC* and *the Guardian* also merely named the three claimants, without offering any further contextualisation as to who these organisations are, what functions they perform and how they differ from one another.<sup>125</sup>

There has been no conscious effort by online commentators to critically distinguish between the views and actions of trade unions and CMOs as two different types of industry organisations, although, collecting societies have generally been viewed by media reporters with particular distrust and scepticism.<sup>126</sup> The main arguments

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holders-will-define-details-uks-orphan-works-bill-not-public.shtml> accessed 31 October 2016.

<sup>124</sup> Glyn Moody, 'Thanks to the music industry, it is illegal to make private copies of music – again' (*Ars Technica UK*, 26 November 2015) <<https://arstechnica.co.uk/tech-policy/2015/11/thanks-to-the-music-industry-it-is-illegal-to-make-private-copies-of-music-again/>> accessed 07 February 2017.

<sup>125</sup> 'Ripping music and films illegal again after High Court overturns new law' (*BBC*, 17 July 2015) <<http://www.bbc.co.uk/newsbeat/article/33566933/ripping-music-and-films-illegal-again-after-high-court-overturns-new-law>> accessed 07 February 2017 and 'Music groups win court battle over private copying of CDs' (*the Guardian*, 19 June 2015) <<https://www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds>> accessed 07 February 2017.

<sup>126</sup> Mike Masnick, 'This is What's Wrong With the Music Industry: Musicians Have to Pay to Pay Themselves' (*techdirt*, 20 September 2012) <<https://www.techdirt.com/articles/20120920/03183520447/this-is-whats-wrong-with-music-industry-musicians-have-to-pay-to-pay-themselves.shtml>> accessed 31 October 2016; Glyn Moody, 'UK Government censors copyright consultation submission about how awful collection societies are' (*techdirt*, 01 August 2012) <<https://www.techdirt.com/articles/20120729/02544819867/uk-government-censors-copyright-consultation-submission-about-how-awful-collection-societies-are.shtml>>

advanced against these actors relate to excessively high administration fees depriving members of larger revenues, CMOs' alleged aggression when it comes to licensing copyright users, and a lack of appropriate oversight in the context of various corruption scandals. Such news reports have painted an overall negative picture of CMOs and also spread an uncorroborated assumption that these types of allegations generally apply to all collecting societies, and that all collecting societies act in similar ways. My thesis will substantively challenge the notion that all CMOs are easily comparable. In fact, it will flesh out the factors that play a role in the way an organisation behaves in policy and thereby highlight the need to clearly distinguish between individual CMOs, between trade unions and CMOs, and more widely, between individual industry actors altogether.<sup>127</sup>

#### **1.4. Creative industry organisations in copyright research**

At the beginning of this chapter I indicated that, with a few exceptions, creative industry organisations have not been the specific focus of research in copyright law and that the intersection of organisational behaviour and the features of copyright policy has generally been underexplored.<sup>128</sup> In this subsection, I will consider some notable exceptions to this in the work of Horten, Williamson, Cloonan and Harker.<sup>129</sup> These researchers have all considered organisational behaviour in relation to specific issues, including the adoption of a particular legislative act (Horten), organisations' self-portrayal to policymakers, the media, and the general public (Williamson and Cloonan), and organisations' compilation and publication of 'evidence' (Harker).

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accessed 31 October 2016; Mike Masnick, 'Yet another music collection society corruption scandal may lead to real copyright reform in Peru' (*techdirt*, 3 April 2014) <<https://www.techdirt.com/articles/20140402/17490026782/yes-another-music-collection-society-corruption-scandal-may-lead-to-real-copyright-reform-peru.shtml>> accessed 31 October 2016.

<sup>127</sup> See Chapter 8, section 2.1.

<sup>128</sup> An exception to this is Bakardjieva Engelbrekt (n 8). However, in this piece, the author considers the copyright framework through the prism of institutional choice theory and considers the participation of the market, the political process and the courts as alternative decision-making processes with the aim of generating insights into the reasons for the complexity and alleged imbalance in the present copyright system.

<sup>129</sup> Williamson and Cloonan, 'Rethinking the music industry' (n 8); Horten, *A Copyright Masquerade* (n 8); Horten, *The Copyright Enforcement Enigma* (n 108); Harker, (n 8).

These scholars' research also presents how the studied organisational behaviour has affected and could potentially affect the copyright policy space.

In her book, *Copyright Masquerade: How Copyright Lobbying Threatens Online Freedoms*, Horten examined whether power exercised by the international entertainment industries (music and film) resulted in a bypassing of democratic accountability. She studied how the entertainment industries exercise power to gain political influence and further their own economic interests and, in a second step, how policymakers respond to these stakeholders' attempts to influence the political process. Horten looked at three case studies from different jurisdictions. The UK case centred around the adoption of the Digital Economy Act 2010. In this context, Horten documented how pressure had been exercised by entertainment industry organisations like the BPI – The British Recorded Music Industry trade body, on the UK government to enable the blocking of internet access as a means of protecting the commercial interests of right holders. Horten's findings – that procedural rules had been compromised in order to expedite the passing of the Bill as a result of such industry pressure – were drawn from an examination of the individual stages of the political process in conjunction with the stakeholder activity.<sup>130</sup> The author observed that the creative industries are well funded and 'highly advanced in putting forward their cause.'<sup>131</sup> Indeed, her research presented a strong case for the existence of interplay between entertainment industry organisations and policymakers and also showed how this interplay had impacted both the content and procedure applied to the specific piece of legislation that was studied.

Williamson and Cloonan's article, 'Rethinking the Music Industry', focussed on the discrepancy between the organisational structure of the global music economy and its portrayal in academic, media, and policy literature. Their key argument was that a complex, heterogeneous music landscape comprised of a large multiplicity of actors with different views and interests was inaccurately being referred to as 'the music

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<sup>130</sup> Horten, *A Copyright Masquerade* (n 8) 1-4.

<sup>131</sup> Ibid 8.

industry', in singular form, across academic, media and policy papers. The authors argued that a shift to the plural term 'music industries' was necessary as a more appropriate model for understanding and analysing the economics and politics surrounding music.<sup>132</sup> Williamson and Cloonan found that notions of 'the music industry' were being formulated by, among other actors, representatives of umbrella organisations which purposefully frequently used the term synonymously with the recording industry. The intended aim, the researchers concluded, was to paint a picture of simplicity where there was in fact complexity, and homogeneity in place of diversity. One reason that the researchers put forward for the use of the term 'the music industry' by recording industry organisations like the BPI and the International Federation of Phonographic Industries (IFPI) was to overstate their case. The researchers drew three conclusions with implications for copyright policy from this organisational behaviour:

- (1) The studied organisations tend to present themselves as representative of a greater section of the music industries than they actually are and this makes them seem more influential and thus attractive to prospective members;
- (2) The studied organisations mask their concerns and vested interests as being those of 'the music industry' as a whole, which leads to misrepresentation and misinformation about the nature and state of the industries;
- (3) The notion is created that there *is* such a thing as a single music industry, which aids these organisations in giving the impression of speaking on behalf of the widest possible range of interests when lobbying the government and other parties.<sup>133</sup>

Williamson and Cloonan analysed various instances in which the IFPI, the BPI, the Recording Industry Association of America (RIAA), but also PRS, the Music Publishers Association (MPA), and the Mechanical Copyright Protection Society (MCPS) had conflated different sectors of the music industries in their statements.

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<sup>132</sup> Williamson and Cloonan, 'Rethinking the music industry' (n 8) 305.

<sup>133</sup> Ibid 307.

They concluded that single interest or industry representative organisations were presenting themselves as representing ‘the music industry’ in order to elicit public and political support for campaigns which were potentially only in the interest of *parts* of those industries.<sup>134</sup>

Finally, Harker’s research into organisational behaviour focussed on the music sector and recording industry organisations’ actions. In his article, ‘The wonderful world of IFPI: music industry rhetoric, the critics and the classical Marxist critique’, he explored the effects of what Hargreaves described as ‘lobbynomics’, or the problem related to the fact that most industry data which enters IP policy debates originates from stakeholder organisations.<sup>135</sup> The author analysed a number of IFPI publications on world record sales data between 1969 and the mid-1990s and found methodological inconsistencies, for instance in the way the ‘world’, ‘developed’ and ‘mature’ markets were defined. As an example, he indicated IFPI’s unproblematic treatment of continents as though they were, at the time, well-defined, when Turks may have been less certain about whether they were European or Asians, just as Canadians or Chileans may not have wanted to be generally labelled ‘American’.<sup>136</sup> Through these and many numerical examples, Harker showed that the IFPI’s publications were not accurate representations of facts but rather representations of mediated, patchy and often inconsistent information, which served to strengthen certain ideological rhetoric that was of importance to the IFPI.<sup>137</sup> In particular, Harker alluded to the idea that showing consistent growth was crucial to the IFPI,<sup>138</sup> possibly in order to preserve a certain legal or political status quo when it came to music policy.

The above three studies demonstrate how influential the behaviour of industry organisations can be on the policy process in terms of the way creative industries are presented, policy problems defined and substantiated with ‘evidence’, and laws

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<sup>134</sup> Ibid 309.

<sup>135</sup> Hargreaves (n 4) para 2.13; Harker (n 8) 45.

<sup>136</sup> Harker (n 8) 47.

<sup>137</sup> Ibid 46.

<sup>138</sup> Ibid.



ultimately drafted and passed. Like the tip of an iceberg, this research gives a sense of the vast amount of existing but unexplored links between the operations of industry organisations and the nature and shape of copyright policies. As such, it offers a desperately incomplete picture. For example, all three studies focussed on the music industry, and on organisations representing the same stakeholder group – the phonogram producers, although Williamson and Cloonan did analyse a wider circle of organisations in the music sector, including PRS. Consequently, gaps in the literature on organisations in copyright law exist, first, within the music sector in relation to organisations representing other stakeholder groups like creators, but also in relation to other creative sectors, like the publishing or the visual arts sector, to name two examples. Moreover, there is a gap in comparative research considering organisational behaviour across different creative sectors but also across different types of organisations, distinguishing, for instance, between relatively resource-rich and resource-poorer organisations, or between trade unions and CMOs as two functionally different types of organisations. A richer understanding of the workings of these different organisations is necessary in order to better grasp how copyright policymaking, policies, and ultimately laws are affected by the behaviour of the actors who shape them.

The present thesis provides evidence and analyses that support Horten’s findings that organisations from the music sector, in particular, exercise effective advocacy and influence over the shape of copyright law and policy. It also corroborates Williamson and Cloonan’s observations on the strategies that certain music industry actors use and provides evidence suggesting that such tactics are effective. Furthermore, it confirms Harker’s argument that the evidence submitted by industry actors is often intertwined with targeted advocacy, which poses a challenge for the development of evidence-based policy. However, in addition to this, the thesis also offers insight into the way actors with different resources, functions and sizes, to name a few distinguishing features, engage in policy work, both in the music, as well as in the publishing sector. Consequently, the thesis offers cross-industry comparisons, based on which it maps potential differences in the extent to which individual creative

industries wield policy influence. It sheds light on differences in organisational behaviour and policy proactivity among individual actors and identifies power imbalances, which suggest that different actors have varying capacities to influence policy agendas and outcomes. Moreover, the thesis offers insight into how and why organisations group together and collaborate on policy issues, as well as how such collaborations influence policy outcomes.

### ***1.5. The policy environment and its effect on organisations' behaviour***

The preceding subsections discussed ways in which organisations have engaged in recent policy developments in the UK and Europe, examples of how their behaviour has impacted the policy process, as well as how organisations' engagement has been viewed by policymakers, academics and the media. It became clear that organisations, including COs have actively participated in shaping copyright policy, that their behaviour does affect the landscape within which copyright policies are developed, and that organisations' impact has generally been viewed negatively despite the lack of sufficient research into their behaviour and environment. Furthermore, there has been little, if any, deliberate effort to distinguish between the views or operations of different types of organisations. Differences could stem from the specific stakeholder that is being represented. They could also lie in the creative sector within which given organisations are active: music, publishing, audio-visual or other.<sup>139</sup> Such differences could also be based on the type of organisation, a CMO or a trade union, to name the two types that this thesis will look at more closely. However, while the preceding examination had as its starting point the idea that organisations actively shape their environments, it has also been shown that organisations are both producers *and* receivers of their politico-legal environments and that, to this effect, the institutional characteristics of a particular legal

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<sup>139</sup> In comparing music to dance, for example, Waelde and Schlesinger have argued that the organisational framework of music, i.e. the existence of various bodies representing music stakeholders has rendered the music industry powerful and vocal, see Charlotte Waelde and Philip Schlesinger, 'Music and Dance: Beyond Copyright Text?' (2011) 8 (3) SCRIPT-ed 257, 262.

environment can also influence the behaviour of organisations.<sup>140</sup> In the following subsection, I will therefore define the copyright policy environment as a multi-level system and consider, on the basis of sociological and political science literature, some of the effects that such systems produce on organisations.

### ***1.5.1 Copyright policymaking as a multi-level system and the effects of such systems on organisations***

An important recognition in relation to copyright policymaking is the fact that it occurs across a range of levels – national, European Union, and International. The existence of an interplay between higher and lower level policies and legal instruments, for instance through the signing and ratification of international agreements, EU regulations or the transposition of EU Directives, is well established and will therefore not be elaborated on further. However, it is important to observe that even on the lowest, national level, different overarching policy aims may be exercising influence over the nature and substance of IP policies. For instance, when the UK government broadly adopted Hargreaves’ recommendations, it clearly expressed that it would place economic growth at the heart of its IP policy.<sup>141</sup> This statement demonstrates that on the domestic level, copyright policy does not develop in isolation, merely taking into account different creative industry stakeholders’ evidentiary input. Rather, it is perceived as a subdivision of economic policy and an enabler of economic growth<sup>142</sup>; to this end, domestic copyright policy is to some extent

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<sup>140</sup> W Richard Scott and John W Meyer, ‘The Organization of Societal Sectors: Propositions and Early Evidence’ in Paul DiMaggio and Walter W Powell (eds) *The New Institutionalism in organizational Analysis* (The University of Chicago Press 1991) 108; Lauren B Edelman, ‘The Legal Lives of Private Organisations’ in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 231, 238; Edelman and Suchman, ‘The legal environments of organizations’ (n 38) 479; Lauren B Edelman, ‘Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law’ (1992) 97 (6) *American Journal of Sociology* 1531, 1532.

<sup>141</sup> HM Government, ‘The Government Response to the Hargreaves Review of Intellectual Property and Growth’ (August 2011) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf)> accessed 07 February 2017 1-3.

<sup>142</sup> Schlesinger and Waelde also argue that IP policy is increasingly considered an important tool for stimulating economic growth, see Philip Schlesinger and Charlotte Waelde,

dependent upon, and influenced by, the government's overarching policy objectives in these areas.<sup>143</sup> In fact, the IPO's summary of responses to Hargreaves' consultation even noted the concern of some respondents that copyright reform had been linked to the government's regulatory reform agenda.<sup>144</sup> This shows that interdependence exists not only between different levels of policymaking, but also between different policy domains on the same level.

On the national level, the interplay between copyright policy and other overarching policies could affect industry organisations by bestowing more power or importance upon some actors compared to others, if their contribution is perceived as also furthering the respective overarching policy objectives. In this sense, the UK government explained that it saw collecting societies as an important part of UK's future success and it therefore declared its intention to reinforce these organisations' status.<sup>145</sup> Indeed, there have been a number of legislative instruments dedicated to the functioning and operations of CMOs.<sup>146</sup> Collecting societies, as I will discuss in the next section of this chapter, are not only constituent parts of the copyright system as administrators and licensors of vast amounts of rights, but also large and powerful

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'Copyright and cultural work: an exploration' (2012) 25 (1) The European Journal of Social Science Research 11, 12.

<sup>143</sup> Department for Business Innovation & Skills, HM Treasury, UK Export Finance, '2010 to 2015 government policy: UK economic growth' (Policy paper) (8 May 2015)

<<https://www.gov.uk/government/publications/2010-to-2015-government-policy-uk-economic-growth/2010-to-2015-government-policy-uk-economic-growth#issue>> accessed 07 February 2017; 'Policy Area: UK economy' (UK Government)

<<https://www.gov.uk/government/topics/uk-economy>> accessed 07 February 2017.

<sup>144</sup> HM Government, 'Consultation on Copyright, Summary of Responses June 2012' (June 2012)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/320223/copyright-consultation-summary-of-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320223/copyright-consultation-summary-of-responses.pdf)> accessed 07 February 2017 5.

<sup>145</sup> HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (n 141) 7.

<sup>146</sup> The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, SI 2014/898, now repealed and replaced by The Collective Management of Copyright (EU Directive) Regulations 2016, SI 2016/221; The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2014/2588.

businesses, which directly contribute to economic growth through their own considerable turnovers.

Copyright policymaking on the EU level is also governed by wider policy considerations, not dissimilar to the ones existing in the UK. A key objective pursued through copyright policy has been the strengthening and growth of the common market.<sup>147</sup> EU harmonisation initiatives in this area have generally been underpinned by the argument that differences across national copyright laws could produce barriers to trade within the internal market. The most recent Directive in this area was the 2014 Directive on Collective Rights Management (CRM Directive), which substantively dealt with two separate issues: the regulation of CMOs and other organisations that manage copyrights collectively and the facilitation of multi-territorial licensing of music for online use in the internal market.<sup>148</sup> As on the domestic level, on an EU level much organisational activity flows into the policy cycle before the adoption of any copyright legal instrument. In the years leading up to the adoption of the CRM Directive, the European Commission formally consulted various organisational stakeholders in public hearings and 'calls for comments'.<sup>149</sup>

### *1.5.2 A plurality of industry actors: a precursor for coalition building and uncertainty?*

A feature of the EU level of copyright policymaking is the even greater plurality (compared to the national level) of organisational entities that regularly engages with the policy process. This plurality on the one hand reflects the multiple levels of the copyright policy framework and on the other hand adds to the complexity<sup>150</sup> of this very framework. For instance, in the context of the CRM Directive, when the UK consulted on the implementation of this instrument, the types of entities that

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<sup>147</sup> The very justification for the EU's legislative competence in this area rests on the idea that harmonisation of copyright law in certain areas is necessary for the establishment and functioning of the internal market, Art. 114 (1) Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>148</sup> CRM Directive (n 34).

<sup>149</sup> A list of consultative measures undertaken by the European Commission is available at 'Management of Copyright and Related Rights' (European Commission) (n 2).

<sup>150</sup> Bakardjieva Engelbrekt (n 8) 65.

responded to the consultation were UK-based CMOs and other professional associations like the Music Publishers' Association, or BASCA, UK industry alliances like the British Copyright Council and UK Music, as well as corporate organisations like Sky. In contrast, when the EU conducted a call for comments on collective cross-border management of copyright and related rights for online music services in 2007, contributions came in from a much wider range of actors. These included individual CMOs, author/performer rights societies, and associations from different Member States. They also included large corporations like the BBC and Google, as well as European and International Alliances of stakeholders, like GESAC - the European Grouping of Societies of Authors and Composers, the IFPI - International Federation of the Phonographic Industry, IFFRO – International Federation of Reproduction Rights Organisations, and AEPO-ARTIS – the Association of European Performers' Organisations.<sup>151</sup> These types of alliances or federations effectively band together those organisations that represent the same type of stakeholder on a lower (national) policy level in order to lobby and represent this stakeholder's interest more effectively on a higher level of policy.

Following notions in institutional theory that the institutional framework shapes the means by which interests are pursued,<sup>152</sup> the above example of the plurality of industry alliances and coalitions shows that creative industries stakeholders have responded to the institutional copyright environment by creating organisational entities to represent them across all levels of policymaking. This enables venue shopping in terms of pitching a given issue to the most receptive forum, as every

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<sup>151</sup> Individual contributions to the 2007 call for comments are available at Communication and Information Resource Centre for Administrators, Businesses and Citizens (CIRCABC, European Commission), 'Results of the monitoring of the Commission Recommendation' <<https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>> accessed 07 February 2017.

<sup>152</sup> W Richard Scott, 'Unpacking Institutional Arguments' in Walter W Powell and Paul J DiMaggio (eds) *The New Institutionalism in Organizational Analysis* (The University of Chicago Press 1991) 164, 165; Paul J DiMaggio and Walter W. Powell, 'Introduction' in Walter W Powell and Paul J DiMaggio (eds) *The New Institutionalism in Organizational Analysis* (The University of Chicago Press 1991) 1, 28.

decision-making body or forum harbours its own particular bias.<sup>153</sup> Furthermore, it facilitates the process of coalition building.<sup>154</sup> This thesis will discuss the particular power and significance of such industry alliances and networks for the furtherance of copyright policy issues.<sup>155</sup>

Although this has not been observed particularly in relation to COs or other organisations in the copyright system, political science literature suggests that the presence of a large number of actors generally affects policymaking and legal outcomes by rendering them more fluid and unpredictable.<sup>156</sup> Interest group activity begets more interest group activity thus increasing uncertainty as the number of stakeholders increases.<sup>157</sup> And the stakeholder numbers are bound to increase because the plurality of actors leads to the building of further networks and coalitions.<sup>158</sup> This thesis will build on this literature and demonstrate that the link between the plurality of actors and the unpredictability of policymaking also applies to the copyright policy space.<sup>159</sup> Moreover, the thesis will examine more precisely, what other features of the stakeholder environment and of the policy process bring about unpredictability in legal and policy outcomes.<sup>160</sup>

### ***1.5.3 Emergence, nature, and effects of networks and coalitions***

Emphasis has also been placed on understanding what holds networks and coalitions together, why organisations sometimes act in coalitions and sometimes

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<sup>153</sup> Frank R Baumgartner, 'EU Lobbying: A view from the US' (2007) 14 (3) *Journal of European Public Policy* 482, 483; Laurence R Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *The Yale Journal of International Law* 1, 7; Peter K Yu, 'Current and Crosscurrents in the International Intellectual Property Regime' (2004) MSU Legal Studies Research Paper No. 02-12 56ff.

<sup>154</sup> Jeremy Richardson, 'Government, Interest Groups and Policy Change' (2000) 48 *Political Studies* 1006, 1021.

<sup>155</sup> See Chapter 8, section 2.2. See also Chapter 4, section 2.3.3 and Chapter 5, section 3.2.3.

<sup>156</sup> Richardson (n 154) 1008.

<sup>157</sup> *Ibid.*

<sup>158</sup> Chris Ansell, 'Network Institutionalism' in Sarah A Binder et al (eds) *The Oxford Handbook of Political Institutions* (OUP 2008) 75, 81f.; Christine Mahoney, 'Networking vs. allying: the decision of interest groups to join coalitions in the US and the EU' (2007) 14 (3) *Journal of European Public Policy* 366.

<sup>159</sup> See Chapter 8, sections 2.2 and 2.3.

<sup>160</sup> See for instance Chapter 6, section 4.3.

independently, and what role coalitions play in policymaking. Ansell observed that actors in a certain network tend to link together around mutual interests, although they could also be brought together due to different forms of interdependence (on certain information, ideas or resources).<sup>161</sup> Rhodes, on the other hand, has focussed specifically on power-dependence as a reason for the formation of networks.<sup>162</sup> Networks and coalitions are generally considered beneficial by organisations because they can signal to policy-makers that a policy position has the support of a large and varied group of interests, but also because coalitions can provide a framework for more efficient use of resources.<sup>163</sup> However, although the latter benefit of coalitions would suggest that resource-poorer organisations would be more likely to seek to act together, Mahoney's study of 149 lobbyists active across 47 different policy issues in the US and EU found that it is in fact not the poorer organisations that join coalitions but rather the wealthier ones that use coalitions as a lobbying strategy.<sup>164</sup> On the basis of her findings, Mahoney suggested that the participation in coalitions and networks may be more cost-intensive than is generally assumed.<sup>165</sup>

This thesis studies the nature and effects of coalitions and networks in the copyright policy space across all of the remaining chapters. It demonstrates the applicability of Ansell's and Rhode's arguments to the copyright space by showing that coalitions and other forms of collaborative action form both on the basis of common interests and interdependence, but also as a consequence of power dynamics between different stakeholders.<sup>166</sup> By looking at CMOs and trade unions, the former generally being resource-richer than the latter, I also discuss Mahoney's hypothesis about the varying ability of different actors to participate in coalitions, and conclude that resources are

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<sup>161</sup> Ansell (n 158) 77, 81.

<sup>162</sup> R A W Rhodes, 'Power-dependence, policy communities, and intergovernmental networks' (1985) 49 Public Administration Bulletin 4.

<sup>163</sup> Mahoney (n 158) 375.

<sup>164</sup> Ibid 378.

<sup>165</sup> Ibid.

<sup>166</sup> See Chapter 8, section 2.2.



an important but not the sole factor that determines COs' behaviour with other industry actors.<sup>167</sup>

Trade unions and CMOs, the two types of organisations considered in this thesis, could not only be expected to operate differently in copyright policy because of differences in the amount of resources they may allocate or have at their disposal but also because of their distinct functions and goals. In the following section, I will therefore consider, in turn, the roles and functions that trade unions and CMOs have generally been found to fulfil. I will also specifically focus on the four organisations researched in this thesis and consider their historical evolution as well as, where available, studies which have focussed on some of these actors, in order to outline the specific roles that these organisations appear to play in the copyright landscape.

## 2. Trade unions and collective management organisations

Trade unions and CMOs are very different in terms of their origin, purpose and function. Trade unions originated in Great Britain during the 18<sup>th</sup> century Industrial Revolution as associations of wage earners for the purpose of maintaining or improving the conditions of their employment.<sup>168</sup> The basic idea behind the formation of such associations is that the organising group recognises a sufficiently enduring and distinct common interest, which it could further through collective action, provided this interest prevails over members' differences with regard to other issues.<sup>169</sup> Traditionally, trade unions mobilise the collective interests of employees and negotiate conditions on the applicable rates of pay and terms of work. To this end, they may employ various strategies, including collective bargaining with

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<sup>167</sup> See Chapter 8, sections 2.1 and 2.2.

<sup>168</sup> Sidney Webb and Beatrice P Webb, *The history of trade unionism, 1666 – 1920* (Printed by the authors for the Trade Unionists of the United Kingdom 1920) 1; Peter Ackers, Chris Smith and Paul Smith, 'Against All Odds? British Trade Unions in the New Workplace' in Peter Ackers, Chris Smith and Paul Smith (eds), *The New Workplace and Trade Unionism: Critical Perspectives on Work and Organization* (Routledge 1996) 1.

<sup>169</sup> Eldridge and Crombie (n 16) 25 citing Robert Morrison MacIver and Charles Hunt Page, *Society* (Macmillan 1957) 437; Robert K Merton, 'The Functions of the Professional Association' (1958) 58 (1) *The American Journal of Nursing* 50.

employers,<sup>170</sup> threats of industrial action,<sup>171</sup> such as striking, or banning overtime.<sup>172</sup> CMOs, on the other hand, undertake the exercise of certain copyrights and related rights on behalf of their members – the rights owners.<sup>173</sup> As such, unlike trade unions, collecting societies are entities specific to the copyright arena within which they serve a distinct systemic purpose. Their existence is enshrined in s 116(2) CDPA 1988 which envisages the existence of licensing bodies. CMOs do what copyright owners cannot economically and practically do for themselves;<sup>174</sup> they are agencies that act on behalf of their members, the copyright holders, to negotiate licenses with users, collect license fees and then distribute royalties to their members, as well as to monitor the use of works.<sup>175</sup> Given these differences in the general purpose and function of the two types of organisations considered in this thesis – trade unions and CMOs – a separate analysis of the literature studying these actors’ roles and functions is warranted.

### 2.1. Trade unions

As outlined above, the fundamental role of trade unions is to protect and improve the working lives and terms and conditions of employment of their members. This includes the pursuit of legislation favourable to the union’s members.<sup>176</sup> In this respect, s 11 TULRCA 1992 enables a trade union to engage in its affairs lawfully

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<sup>170</sup> ‘Collective bargaining and labour relations’ (International Labour Organization) <<http://www.ilo.org/global/topics/collective-bargaining-labour-relations/lang-en/index.htm>> accessed 07 February 2017; the relevant UK provision is s 178 TULRCA 1992.

<sup>171</sup> International Trade Union Confederation, ‘The Right to Strike and the ILO: The Legal Foundations’ (2014) <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/genericdocument/wcms\\_245669.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/genericdocument/wcms_245669.pdf)> accessed 07 February 2017. See also s 180 TULRCA 1992.

<sup>172</sup> Ackers, Smith and Smith (n 168) 1.

<sup>173</sup> ‘Collective Management of Copyright and Related Rights’ (WIPO) <<http://www.wipo.int/copyright/en/management/>> accessed 07 February 2017; Ann Harrison, *Music: The Business, The Essential Guide to the Law and the Deals* (5th Edition, The Random House Group 2011) 366.

<sup>174</sup> Dinusha Kishani Mendis, *Universities and Copyright Collecting Societies* (T.M.C.Asser Press 2009) V.

<sup>175</sup> Morten Hviid, Simone Schroff and John Street, ‘Regulating CMOs by competition: an incomplete answer to the licensing problem?’ (2016) CREATE Working Paper 2016/03 2-3.

<sup>176</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965) 76.

without fear of breaching the common law rules on restraint of trade. S 219 TULRCA 1992, on the other hand, provides protection from certain tort liabilities in the context of industrial action.

Ewing distinguished between five principal functions that trade unions serve: a representation function, a service function, a regulatory function, a government function, and a public administration function.<sup>177</sup> The service function includes the provision of services and benefits to members. According to Olson, this function is essential for the survival of trade unions because it incentivises individual workers to join or remain members. Absent the provision of individual services, workers would be disincentivised from participating in unions because they would prefer to 'free-ride' on the fruits of unions' representative and regulatory efforts, which they could also do without being members themselves.<sup>178</sup> The representative function of unions, as defined by Ewing, refers to unions' individual and collective representation of workers in the workplace.<sup>179</sup> In its individual dimension it may be an extension of the union's service function, for instance if the union provides a member with professional support or a companion for handling individual disputes. In its collective dimension, on the other hand, the representation function is close to the regulatory function and may take different forms, including consultation and collective bargaining.<sup>180</sup> The TULRCA 1992 defines collective agreements in s 178(1) and imposes certain obligations on employers in relation to the process of collective bargaining, such as the disclosure of certain information in s 181 (1) TULRCA 1992. The regulatory function of trade unions, on the other hand, recognises that trade unions participate in a process of rule-making which extends beyond their members, for instance because collective bargaining outcomes typically apply to all workers, irrespective of their union membership; the regulatory function also includes efforts in securing legislation which would benefit the union and its members.<sup>181</sup> Lastly, the

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<sup>177</sup> Keith D Ewing, 'The Function of Trade Unions' (2005) 34 (1) Industrial Law Journal 1.

<sup>178</sup> Olson (n 176) 44.

<sup>179</sup> Ewing (n 177) 4.

<sup>180</sup> Ibid 3.

<sup>181</sup> Ibid 4.

governmental and public administration functions emphasise unions as being engaged in the process of government, as well as being instruments for the delivery of certain policies. Following this classification of functions, it appears that the functions most closely related to the policymaking process are those of regulation, collective representation and government. Equally, the service function, depending on the amount of resources a given union chooses to allocate to it, could potentially detract from, in particular, a small union's ability to sufficiently engage with policy. The present thesis considers this in chapters 4 and 5.<sup>182</sup>

## *2.2. SoA and MU, and the British trade union environment*

### *2.2.1 A historical look at the formation, early priorities, and functions of these unions*

Both the MU and SoA have aimed to perform a wide range of the above functions for their members in the IP landscape since their establishment. Regulation and representation, both collective and individual, were in fact written into the prospectus of the future SoA as objectives that the new body would have to pursue. Specifically, the prospectus listed three causes for the creation of a society for authors in 1884: (a) the need for an international copyright convention with the USA; (b) the introduction of a Bill for the registration of titles; and (c) the maintenance of friendly relations between authors and publishers, by means of properly drawn agreements.<sup>183</sup> Given authors' great sense of grievance over the raw deals that they were getting from publishers in the late 19<sup>th</sup> century, SoA's main business in its early years revolved around the agreements between authors and publishers, along with the reform of copyright.<sup>184</sup>

It is notable, however, that although SoA was effectively fulfilling trade union functions from the outset, it was initially not founded as a trade union but rather as a company limited by shares. While prominent figures in the society's early management, like Bernard Shaw, had advocated for the adoption of trade union

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<sup>182</sup> See Chapter 4, section 1.3.3 and Chapter 5, section 3.1.

<sup>183</sup> Mark Le Fanu, 'British authors and their publishers: Dividing the spoils amid creative tension' (1991) LOGOS 21; Bonham-Carter, *Authors by Profession: Volume One* (n 7) 122.

<sup>184</sup> Bonham-Carter, *Authors by Profession: Volume One* (n 7) 125.

status, saying that 'without union and collective action we are helpless', the majority of members in the early 1900s were averse to trade unionism's displays of industrial action and felt that to regiment writers amounted to dictatorship over the mind.<sup>185</sup> Nevertheless, following legislative changes in 1974 and 1976, which made the closed shop legal in British industry and encouraged the formation of trade unions to facilitate collective bargaining, SoA eventually decided to retain its company status but to also become a union. It did so in 1978 in order to strengthen its position in the changing political climate, for instance by receiving access to the government's Advisory, Conciliation and Arbitration Service.<sup>186</sup>

SoA performed regulatory and representative functions by lobbying Parliament on copyright issues, engaging in collective bargaining with publishers and helping individual members with the negotiation of their contracts; the society also provided services to its members, such as contract vetting and industry advice. Scholars who have studied the history of SoA have observed that the organisation often experienced disappointment with government action. For example, when the government responded to the 1977 Whitford Report on copyright reform, it dismissed the idea of a levy on tapes and tape recording equipment, which SoA had advanced alongside the British Copyright Council.<sup>187</sup> In an article written by Marc Le Fanu, General Secretary of SoA between 1982 and 2011, the perception was expressed that despite the society's active efforts, 'to a large extent authors are – and will probably remain bewildered spectators of the book trade'.<sup>188</sup> This suggests that even from the perspective of SoA operatives, the organisation's efforts to exercise a regulatory and representative function, were often unsuccessful in their outcomes. In the more recent past, SoA objected to the introduction of a copyright exception for parody and laid out its position to the government in the copyright consultation implementing

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<sup>185</sup> Ibid 194, 124-125.

<sup>186</sup> Bonham-Carter, *Authors by Profession: Volume Two* (n 7) 125.

<sup>187</sup> Ibid 130-131; Le Fanu (n 183) 24.

<sup>188</sup> Le Fanu (n 183) 24.

Hargreaves' proposals. However, here too, the ultimate legal outcome was contrary to SoA's policy position.<sup>189</sup>

Ideas of improving the working lives and terms and conditions of employment of musicians were also behind the formation of the Manchester Musicians' Union, which became, first, the Amalgamated Musicians' Union and ultimately the MU of today.<sup>190</sup> The leading figure behind the initial collective action movement, Joseph B Williams, is reported to have circulated an anonymous message, outlining that:

The union we require is a Protecting Union, and one that will protect us from Amateurs, **protect us from unscrupulous employers and protect us from ourselves.** A Union that will guarantee our receiving a fair wage for engagements. A society that will keep the Amateur in his right place, and prevent his going under prices. A Union that will see you are paid for extra rehearsals, and in time raise salaries to what they ought to be.<sup>191</sup> (original emphasis provided)

The above quote shows that, aside from regulating the relationship with musicians' employers, a musicians' union was also necessary to manage potential tensions between (amateur and professional) musicians themselves. In its early years of existence, the MU dedicated most of its time to collective representation by negotiating standard terms and conditions of employment with various employment groups.<sup>192</sup> Unlike SoA, it also reached out to the wider labour movement and was affiliated with the Trades Union Congress from the beginning.<sup>193</sup> Historically, the MU has also exercised its collective representation role through strike action aimed at

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<sup>189</sup> The Society of Authors, 'Response to HM Government's Consultation on Copyright' (March 2012)

<<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/Hargreaves-consultation-Response-2012.pdf>> accessed 07 February 2017 16-17. The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 SI 2356/2014 introduced an exception for parody in s 30A CDPA 1988.

<sup>190</sup> 'Amalgamated Musicians' Union Chronology'

<[http://libguides.stir.ac.uk/ld.php?content\\_id=23354958](http://libguides.stir.ac.uk/ld.php?content_id=23354958)> accessed 07 February 2017.

<sup>191</sup> John Williamson, 'The Musicians' Union: A History (1893-2013): 120 Years Ago Today' (7 May 2013) <<http://www.muhistory.com/120-years-ago-today/>> accessed 07 February 2017.

<sup>192</sup> Ibid.

<sup>193</sup> Martin Cloonan and John Williamson, 'The Musicians' Union: A History (1893-2013): 1900 and Before' <<http://www.muhistory.com/pre-1900/>> accessed 07 February 2017.

protecting its members' jobs.<sup>194</sup> Alongside representation, since its early days the union has been offering various services to its members (e.g., through a benevolent fund for those members who were experiencing hardship).<sup>195</sup>

In contrast with SoA, copyright issues did not constitute a primary focus of MU's activities in its early history. The union only started exercising a regulatory function in the IP landscape when it intensively lobbied for performers' rights between 1952 and 1956.<sup>196</sup> Despite its late start, the MU is recognised as having played a major part in the formal recognition of the performer in UK law.<sup>197</sup> This late start is mainly due to the fact that, while copyright was critical to the authors' profession from early on, the MU has traditionally been, and still is today, mainly a union for performing musicians. The laws of copyright and related rights only gained direct relevance to the activities of performers with the introduction of more comprehensive performers' rights in the UK.<sup>198</sup> This ultimately became the case in 1996 with the implementation of the EC Rental and Lending Rights Directive through the Copyright and Related Rights Regulations 1996.<sup>199</sup> However, there remain issues of importance to the union, which it has sought to raise in a policy context but without any tangible outcome.<sup>200</sup>

With regard to the MU's capacity to perform its representative and regulatory functions, Williamson recognised that historically, the MU's membership

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<sup>194</sup> John Williamson, 'The Musicians' Union: A History (1893-2013): The Strike that Made History' (28 January 2014) <<http://www.muhistory.com/the-massacre-of-the-musicians-1980/>> accessed 07 February 2017; Cloonan, 'Musicians as Workers' (n 7) 14.

<sup>195</sup> Cloonan and Williamson, '1900 and before' (n 175).

<sup>196</sup> Williamson, 'Cooperation and Conflict' (n 7) 80.

<sup>197</sup> Ibid 79.

<sup>198</sup> Hector MacQueen and Charlotte Waelde, 'Audio-visual performers rights: UK National report' (2003) WIPO 1-2.

<sup>199</sup> The initial Directive 92/100/EC was repealed and replaced by Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28.

<sup>200</sup> An example of such an issue is performers' moral rights in the UK. The MU raised this issue in Musicians' Union, 'MU response to the IPO's Consultation on proposals to change the UK's copyright system' (March 2012) <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/response-2011-copyright-musicunion.pdf>> accessed 07 February 2017 2. However, the government did not take it up.

composition has made the exercise of these functions more difficult.<sup>201</sup> Specifically, Williamson's work highlights that internal dynamics posed a considerable challenge to the union's activities. Given the fragmented, largely freelance workforce that the MU housed, with differences among members in their employment status and musical proficiency, it was exceedingly difficult for the union to represent the entire membership collectively, particularly in light of the diverse demands that different types of members would voice.<sup>202</sup> Similar points have also been made in relation to SoA's activities; Bonham-Carter's historical account of SoA in particular describes challenges relating to internal membership dynamics as at times having stood in the way of the society's ability to effectively exercise its representative function.<sup>203</sup> The present thesis considers how membership affects the policy work of both unions and CMOs, in particular with regard to the composition of the membership, members' incentives to join these organisations, as well as members' level of political engagement.<sup>204</sup>

### ***2.2.2 Factors affecting the unions' exercise of a regulatory and representative function***

It is important to recognise that in the copyright landscape, both the MU and SoA are organisations that represent the interests of right owners. Yet, as we have seen, these organisations have struggled, both in the distant and more recent past, to produce successful outcomes out of the exercise of their regulatory function in the copyright policy landscape. This stands in contradiction to Hargreaves' general statement that right owner organisations have exercised pressure and thus shaped copyright policy.<sup>205</sup> It also contradicts Horten's general observation that the entertainment industries are well funded and highly advanced in putting forward their cause.<sup>206</sup> At the very least, it appears that there may be differences among active organisations representing right owners in the creative industries, and that, copyright policy may,

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<sup>201</sup> Williamson, 'Cooperation and Conflict' (n 7) 81-85.

<sup>202</sup> Ibid 81.

<sup>203</sup> Bonham-Carter, *Authors by Profession: Volume One* (n 7) 194.

<sup>204</sup> See Chapter 5, sections 2.1.2 and 3.1.1. See also Chapter 7, section 2.3.2.

<sup>205</sup> Hargreaves (n 4) 6.

<sup>206</sup> Horten, *A Copyright Masquerade* (n 8) 8.



in fact, be primarily shaped by a mere subset of organisations. In line with Williamson and Cloonan's article on the music industry, the interests of a subset of actors may not be representative of the needs of the entire industries.

#### 2.2.2.1 Membership

Two factors may be affecting the ability of the MU and SoA, as trade unions, to effectively regulate the industry within which they operate. The first factor, which appears to particularly characterise the activities of cultural trade unions, relates to these organisations' membership composition. By definition, trade unions rely heavily on their members' participation through activism, much more so than other organisations. Yet, both Shane and David-Guillou, who have studied cultural unions, observed that, historically, the very establishment of such unions for the purpose of collective action had been a particularly difficult endeavour.<sup>207</sup> Challenges in this respect were due to a range of what Shane described as 'idiosyncratic circumstances', including the (impermanent) nature of employment in creative sectors, the mobility of potential members, the varying employment status of performing artists, the large variety of musicians, actors, and other creators, and other factors.<sup>208</sup> This point directly relates to Bonham-Carter's and Williamson's observation on internal dynamics hindering the external work of SoA and the MU.

#### 2.2.2.2 Regulation

The second factor which could affect MU's and SoA's ability to effectively engage in copyright policy is the regulatory landscape within which British trade unions must operate in general. Over time, successive governments undermined the traditional role and power of trade unions through a series of reforms in UK employment law. These reforms, on the one hand, disincentivised collective action and negatively influenced the general levels of activism among trade union members, and on the

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<sup>207</sup> Rachel Shane, 'Resurgence or Deterioration? The State of Cultural Unions in the 21<sup>st</sup> Century' (2013) *The Journal of Arts Management, Law, and Society* 139, 146-147; Angèle David-Guillou, 'Early Musicians' Unions in Britain, France and the United States: On the Possibilities and Impossibilities of Transnational Militant Transfers in an International Industry' (2009) 74 (3) *Labor History Review* 288, 290.

<sup>208</sup> Shane (n 207) 146-147; David-Guillou (n 207) 290.

other hand, complicated the way trade unions can avail themselves of their traditional instruments of collective bargaining and strike action. Ackers, Smith and Smith,<sup>209</sup> Wrigley,<sup>210</sup> Taylor,<sup>211</sup> Cabrelli,<sup>212</sup> and Simpson,<sup>213</sup> to name a few, have all considered these legal and political developments and how they have diminished unions' strength, influence and role as representative institutions. Legislation designed to constrain the power of trade unions was introduced in line with the political persuasions of various governments that considered trade unions' actions as a hindrance to their wider policy objectives.<sup>214</sup> The 1980s, for instance, were characterised by the beginning of the government's commitment to free market ideas and solutions. In this context, trade unions were seen as organisations that could interfere with the natural pricing mechanism by imposing charges above the market rate; higher labour costs would lead to reductions in profit, which would cause unemployment.<sup>215</sup> Trade unions therefore needed to be weakened. This was done through a number of measures, which removed administrative supports for collective bargaining, hampered the freedom to take industrial action, and made unions' funds liable for damages actionable by employers and other companies.<sup>216</sup>

The trend of restricting trade unions' abilities to exercise power and influence has been continued by the current Conservative-led UK Government. Most recently, the Trade Union Act 2016 gave the Certification Officer, the trade union regulatory agency, more powers to investigate union affairs.<sup>217</sup> It introduced further restrictions on picketing<sup>218</sup>, as well as considerably higher voting thresholds and turnouts for

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<sup>209</sup> Ackers, Smith and Smith (n 168) 1.

<sup>210</sup> Chris Wrigley, *British Trade Unions since 1933* (CUP 2002).

<sup>211</sup> Robert Taylor, *The Future of the Trade Unions* (Andre Deutsch 1994).

<sup>212</sup> David A Cabrelli, *Employment Law in Context: Text and Materials* (OUP 2014).

<sup>213</sup> Bob Simpson, 'The Changing Face of British Collective Labour Law' (2001) 21 (4) Oxford Journal of Legal Studies 705.

<sup>214</sup> Cabrelli (n 212) Online Resource Centre, Chapter A 2.

<sup>215</sup> Ibid Online Resource Centre, Chapter A 8f; Ackers, Smith and Smith (n 168) 18.

<sup>216</sup> For an overview of the key pieces of legislation regulating trade unions, see Wrigley (n 210) Chapter 6 and Cabrelli (n 212) Online Resource Chapter C.

<sup>217</sup> S 17 Trade Union Act 2016.

<sup>218</sup> S 10 TUA 2016.

industrial action.<sup>219</sup> The new Act also added further procedural requirements for the exercise of industrial action, such as a doubling of the length of the notice period for action.<sup>220</sup>

### 2.2.3 *The changing role of trade unions*

Some scholars have observed that the very role of British unions has shifted as a result of union regulation. Ewing argued that various governments' regulatory interventions have been designed to produce a 'supply side trade unionism', and that, as a result, the service function of trade unions has grown in importance while the representative and regulatory functions have been diluted.<sup>221</sup> Bacon and Storey have also generally reported growth in trade unions' service function<sup>222</sup>

It can certainly be observed that today, both the MU and SoA offer their members a very wide palette of services.<sup>223</sup> With regard to the MU, an emphasis on the service function was recognised by Williamson. He observed that the union has shifted away from the collective context of unionism towards the provision of services for its members, such as low-cost instrument and public liability insurance; he suggested that this pragmatism is what has in fact allowed the MU to maintain its relevance and membership numbers within the music sector.<sup>224</sup> It is unclear how this shift in unions' role and relevance influences the way MU and SoA engage in copyright policy. It is conceivable that a greater emphasis on the provision of services, also in order to gain new and maintain existing members, may influence the internal resource allocation

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<sup>219</sup> Ss 2, 3 TUA 2016.

<sup>220</sup> Ss 8, 9 TUA 2016.

<sup>221</sup> Ewing (n 177) 7.

<sup>222</sup> Nick Bacon and John Storey, 'Individualism and Collectivism and the Changing Role of Trade Unions' in Peter Ackers, Chris Smith and Paul Smith (eds), *The New Workplace and Trade Unionism: Critical Perspectives on Work and Organization* (Routledge 1996) 41, 43-44, 52, 56.

<sup>223</sup> For a list of exclusive SoA members' discounts and offers see: 'Exclusive Discounts and Offers' (The Society of Authors) <<http://www.societyofauthors.org/Join/Discounts>> accessed 07 February 2017. Similarly, the MU also emphasises various services: 'Join the MU: Benefits of Membership' (Musicians' Union) <<http://www.musiciansunion.org.uk/Benefits>> accessed 07 February 2017.

<sup>224</sup> Williamson, 'Cooperation and Conflict' (n 7) 87-88.

of these organisations and as a result lead to a weakening of their participation and engagement in policy. Furthermore, changes in the status and power of trade unions may also influence the way MU and SoA interact with other industry actors. On the one hand, Ansell's and Mahoney's research on networks and coalitions suggests that MU and SoA may be more reliant on their relationships with industry partners to further their own policy causes. This could be due to a power dependence, as suggested by Rhodes, or simply the capacity of networks and coalitions to manage resources more efficiently, and to send important signals of industry consensus to policymakers.<sup>225</sup> Yet, if this is indeed the case, then it is equally important to bear in mind the points advanced by these authors that network and coalition participation is both a resource and constraint on an actor's behaviour.<sup>226</sup> If the unions do rely on networks and on sponsorship from other organisations, including employer organisations, as suggested by Bacon and Storey,<sup>227</sup> to make the needs of their members heard, then it is likely that their own specific positions may be compromised and adapted to the liking of the other participating actors. The present thesis will pursue these considerations over the next chapters. In particular, chapters 4 and 5 will consider the relationship of SoA and MU with other industry actors, like ALCS, as well as with industry alliances, like UK Music and the British Copyright Council. These chapters will also shed light on the effects of resource (allocation) constraints and the unions' membership. Moreover, chapters 5 and 6 will consider differences in the specific priorities and positions of unions vis-à-vis CMOs and other industry organisations and how individual organisations' positions are potentially compromised as a result of their participation in networks and coalitions.

### ***2.3. Collective management organisations***

#### ***2.3.1 Emphasis on CMOs' economic functions***

As noted above, and unlike trade unions, CMOs are organisations specific to the copyright system. They specialise in the administration of copyrights held by a large

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<sup>225</sup> Rhodes (n 162) 4.

<sup>226</sup> Ansell (n 158) 76.

<sup>227</sup> Bacon and Storey (n 222) 44, 63ff.

number of owners. Economic literature on copyright consistently highlights CMOs' fundamental role in the copyright system and how without such organisations, copyright law could be ineffective in some markets for copyright works, where rights holders cannot practically contract directly with users.<sup>228</sup> The key economic functions performed by CMOs are the negotiation of license fees, the collection and distribution of royalties and the monitoring of the use of copyright works. By performing these functions, CMOs reduce transaction costs in the form of search costs, bargaining costs and enforcement costs.<sup>229</sup> However, not all CMOs perform all of these functions. For instance, of the two studied collecting societies, ALCS is not involved in the direct negotiation of license fees; it primarily focuses on the collection and distribution of royalties to its members. PRS, on the other hand, performs both of these functions, and also has an anti-piracy unit which tracks the use of protected works.

Given that this is the primary purpose of CMOs, it is not surprising that most literature on these organisations has focussed on issues relating to the way they perform their economic functions. To this effect, popular themes in the study of CMOs have included their monopolistic nature and the entailing need for CMO regulation,<sup>230</sup> the role of competition law in controlling these organisations' market power,<sup>231</sup> and the need for multi-territorial licensing to facilitate content consumption and distribution, as well as how it can best be achieved.<sup>232</sup> Other research has looked

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<sup>228</sup> Christian Handke and Ruth Towse, 'Economics of copyright collecting societies' (2007) *International Review of Intellectual Property and Competition Law* 937.

<sup>229</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (4<sup>th</sup> Edition, OUP 2014) 307; Mendis (n 174) 123; Handke and Towse (n 228) 938.

<sup>230</sup> Stanley M Besen, Sheila N Kirby and Steven C Salop, 'An economic Analysis of Copyright Collectives' (1992) 78 *Virginal Law Review* 383; Martin Kretschmer, 'The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments' (2002) *EIPR* 126; Handke and Towse (n 228) 941.

<sup>231</sup> Jay Fujitani, 'Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation' 1984 *California Law Review* 103; C Scott Hemphill, 'Competition and the Collective Management of Copyright' (2011) *Columbia Journal of Law and the Arts* 645; Hviid, Schroff and Street (n 175); Lucie Guibault and Stef van Gompel, 'Collective Management in the European Union' (2012) *Amsterdam Law School Legal Studies Research Paper No. 2012-08*.

<sup>232</sup> Sebastian Haunss, 'The changing role of collecting societies in the internet' (2013) 2 (3) *Internet Policy Review*; Guibault and van Gompel (n 231); Giuseppe Mazziotti, 'New

at the internal governance of CMOs, particularly with regard to the appropriate scope of the assignment of rights by members in favour of the CMO, the distribution of income, as well as a member's ability to have recourse to courts to decide on disputes with their CMO.<sup>233</sup>

### *2.3.2 CMOs as participants in copyright policy*

Yet, as we have seen in the context of recent IP reviews in the UK and the EU, as well as from media representations, CMOs are clearly more than mere enablers of the functioning of copyright dependent markets. As organisations, they are also active participants in copyright law and policy. Despite this fact, research into CMOs has rarely actually focussed on these actors as contributors to the policy process although they are particularly interesting given their generally mixed membership composition, consisting of both creators and exploiters.<sup>234</sup> Despite not studying collecting societies in depth, some scholars have in fact observed that the emergence of collecting societies has not only facilitated the collective management of copyright but also served as a platform for interest mobilisation, articulation, and political pressuring.<sup>235</sup> Yet, the question remains what particular interests CMOs mobilise, especially when interests within their mixed memberships collide, and how they may be shaping copyright policy.

Over time, CMOs have grown into powerful economic entities with considerable staff and expenses, broad membership coverage and with a substantial own interest in influencing the legislative copyright framework.<sup>236</sup> The latter was also indicated in the EU consultation response submitted by CREATE, which suggested that CMOs were especially capable of making meaningful contributions to copyright consultations.

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Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (2011) 34 Columbia Journal of Law and The Arts 757.

<sup>233</sup> Guibault and van Gompel (n 231); Dinusha Mendis, 'Show me the money'! An insight into the Copyright Licensing Agency (CLA) and its interaction with Higher Education Institutions' (2005) 2 (3) SCRIPT-ed 300; Edward Barrow, 'Licensing digitisation' (2000) 30 (1) VINE 22.

<sup>234</sup> Kretschmer, 'The failure of property rules' (n 230) considers this briefly.

<sup>235</sup> Bakardjieva Engelbrekt (n 8) 74.

<sup>236</sup> Ibid; Kretschmer, 'The failure of property rules' (n 230) 134-135.

Olson's 'by-product' theory, developed in his seminal work *The Logic of Collective Action*, could also support the idea that CMOs are not mere participants in the political process of copyright, but influential and well-organised participants at that. Olson argued that among different large economic groups, those that are significant lobbying powers are also those that have organised for some *other* purpose; the lobbying function of these actors, he suggested, is in fact the by-product of organisations that obtain their strength and influence through the performance of some *other* function, aside from lobbying.<sup>237</sup>

One example that Olson gave of such powerful organisations that are not pure political actors were in fact trade unions.<sup>238</sup> However, it is important to bear in mind that his work predated the changes in the regulatory landscape of unions and that it was also generally not set in the UK socio-political context. In the copyright system, Olson's 'by-product' theory undoubtedly applies to CMOs. As discussed, these organisations serve an indispensable role in the creative industries. Consequently, they should gain political influence and strength as a by-product of this role. In fact, it could be argued that, given today's reality of British trade unions, and particularly with regard to the two unions that this thesis focuses on, both of which are relatively small, in the copyright policy context Olson's 'by-product' theory may apply more widely to CMOs than to the unions. This is considered in chapter 7.<sup>239</sup>

Hargreaves asserted that rights owner representations have in the past effectively lobbied and shaped copyright law in the UK.<sup>240</sup> His claim presumably extended to CMOs as they too, like trade unions, are organisations that represent different right owners. What is more, the influence they wield in policy may be greater than that of trade unions considering that their economic functions are more directly aligned with some of the government's overarching policy considerations on economic growth, as

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<sup>237</sup> Olson (n 176) 132.

<sup>238</sup> Ibid 135.

<sup>239</sup> See Chapter 7, section 1.

<sup>240</sup> See n 99.

discussed above.<sup>241</sup> However, here too, the questions that arise are, on the one hand, whether all CMOs wield equal policy influence, and on the other hand, in what direction such influence may steer copyright policy, i.e. *how* the views and interests put forward by CMOs may differ from those of other organisational actors and stakeholders. Some scholars, like Bakardjieva Engelbrekt and Kretschmer have argued that, by allowing for the membership of publishers and producers under the same roof with authors, CMOs have largely sided with the agenda of respective industries, although tensions between authors and producers have also found their way to the legislative debate.<sup>242</sup> Pursuant to this view, it is likely that within CMOs that represent multiple groups (creators and marketers), the interests of one group may be emphasised at the expense of the other. The thesis will pursue this issue by studying PRS' behaviour on the topic of contract terms in chapter 5, as well as the way it developed a policy position on the issue of members' voting rights in the context of the CRM Directive in chapter 7.<sup>243</sup>

On the question of whether all CMOs wield equal policy influence, this chapter demonstrated on several occasions that IP reviewers, online news media, as well as academics have tended to generalise about the nature and power of CMOs. Yet, the two CMOs considered in this thesis have very different beginnings, historical priorities and developments, as the following subsection will show. In light of this, the next chapters, and in particular chapter 7, will closely attend to the similarities and differences in the policy input of PRS and ALCS on the chosen copyright issues, in order to assess to what extent CMOs can in fact be considered to produce a certain uniform effect on the direction and agenda for copyright policy.<sup>244</sup>

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<sup>241</sup> See section 1.5.1 of the present chapter.

<sup>242</sup> Bakardjieva Engelbrekt (n 8) 78; Kretschmer, 'The failure of property rules' (n 230) 128-129.

<sup>243</sup> See Chapter 5, section 2.1.2 and Chapter 7, section 2.3.2.

<sup>244</sup> See Chapter 7, section 3 and Chapter 8, section 2.2.



#### 2.4. PRS and ALCS as collective management organisations

Earlier in this chapter, I outlined an important difference between ALCS and PRS based on the functions they perform in the collective administration of copyright. Unlike ALCS, which deals with the collection and distribution of royalties to its members, PRS also engages in the front-end licensing of its repertoire to users. It also carries out some copyright enforcement through its anti-piracy unit. This subsection will show that a further difference between ALCS and PRS lies in the motives and forces behind the formation of these two collecting societies. I will also consider how these differences might affect organisations' behaviour in copyright policy.

A first notable difference in the history of ALCS and PRS lies in the age of both organisations, as well as in the movements and groups that propelled their establishment. PRS, the older of the two bodies, was established in 1914 by a group of music publishers. In contrast, ALCS was incorporated in 1977 through the efforts of a group of authors. The movement behind the birth of ALCS was characterised by active campaigning efforts on the part of a handful of authors operating as the Writers' Action Group, who fought for a loans-based, flat-rate, government-funded Public Lending Right (PLR) that would be paid to authors, not publishers.<sup>245</sup> What had induced the collective action of authors was a proposal to amend the 1956 Copyright Act to facilitate the introduction of a publisher dominated PLR scheme to be administered by a private company; the Authors' Lending Rights Society, the initial name of ALCS, was created to challenge this move.<sup>246</sup> At the heart of the new organisation was the idea that authors should take control of their own affairs.<sup>247</sup> Consequently, the objectives of ALCS were to extract existing value generated through various uses of authors' works and thereby ensure that authors would

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<sup>245</sup> Marlow (n 7) 1.

<sup>246</sup> Ibid.

<sup>247</sup> Bonham-Carter, *Authors by Profession: Volume Two* (n 7) 131-132; Maureen Duffy, Speech on occasion of 35 Years of ALCS: 'Celebrating 35 Years of ALCS' (ALCS, 30 July 2012) <<http://www.alcs.co.uk/getdoc/f161cccf-3aee-4d81-ad4a-27a57410a5bc/.aspx>> accessed 08 February 2017.

benefit from their rights under copyright, from new technological innovations, and from foreign markets for their works.<sup>248</sup>

The priority for ALCS in its early days was to ensure that otherwise uncollectable money could reach the authors to whom it was due. However, there was equal emphasis on the organisation's campaigning element and in this respect, ALCS' participation in copyright policy began with the CMO's very inception. Since then, it has continuously underlined its role as a collecting society run by writers, for writers, with a commitment to protecting and promoting authors' rights.<sup>249</sup> In the past, this CMO has sought to influence copyright policy on the reprography question as ALCS had recognised that photocopying could pose a threat to authors' income and was at the same time a potential revenue stream that could realistically only be managed collectively.<sup>250</sup> It is reported that in this context, ALCS had realised its need for the publishers' support and persuaded this group to set up a parallel Publishers Licensing Society.<sup>251</sup> Together with ALCS, these two organisations established the Copyright Licensing Agency (CLA) whose function it became to issue licenses to copyright users and pay over the received royalties to ALCS and the Publishers Licensing Society for the two groups of copyright owners. Today, ALCS remains a CMO which only houses authors among its members.<sup>252</sup>

In contrast, PRS is a collecting society for both authors (songwriters) and composers on the one hand, and music publishers on the other. As mentioned at the start, it was

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<sup>248</sup> Marlow (n 7) 6-7.

<sup>249</sup> This descriptor still appears on ALCS' website today, along with the headline banner that 'ALCS is dedicated to protecting and promoting authors' rights', see 'What we do' (ALCS) <<http://www.alcs.co.uk/What-we-do>> accessed 08 February 2017.

<sup>250</sup> Bonham-Carter, *Authors by Profession: Volume Two* (n 7) 132; Marlow (n 7) 22.

<sup>251</sup> Bonham-Carter, *Authors by Profession: Volume Two* (n 7) 132; Marlow (n 7) 24.

<sup>252</sup> Art. 4 ALCS, 'Memorandum and Articles of Association of the Authors' Licensing and Collecting Society (ALCS)' (November 2016)

<<http://www.alcs.co.uk/CMSPages/GetFile.aspx?nodeguid=2dc7bbdd-e0e9-4c81-a46a-7ccaf4d73289>> accessed 08 February 2017 lays out the eligibility criteria for membership. These include writers, as well as any surviving spouse, child or other relative, next-of-kin, beneficiary under the Will or personal representative of a deceased writer, or Member.

not the creators who were behind the formation of PRS, but rather the publishers.<sup>253</sup> The impetus for such collective action on the part of publishers was also dissimilar from the motives of the authors who were behind the set-up of ALCS. Music publishers were mainly driven by pragmatic and opportunistic considerations. In the early 20<sup>th</sup> century, music publishing in England generally depended on the sales of sheet music rather than on music performance; in fact, the performing right was regarded as an 'impediment to business' that could negatively affect publishers' primary source of revenue.<sup>254</sup> The idea of a performing right 'association' was advanced in 1912 by an influential publisher, Booth, who suggested to a group of fellow publishers that through an association they would be able to tap into new revenue opportunities, related for instance, to the growing number of cinemas that were being opened across the country.<sup>255</sup> However, Booth equally made the case that any such organisation would only succeed if it would serve authors and composers, alongside publishers, as was the case in France with the French collecting society SACEM.

Considering the motives underpinning the establishment of PRS, it is not surprising that for many years, the collecting society was primarily concerned not with campaigning or other public affairs work, but with asserting itself on the market, through advocacy, legal action and other means, since music users were initially reluctant to pay for something that had previously been free.<sup>256</sup> In this respect, PRS' influence over copyright law was less through the political process and more through the courts. Ehrlich reported that PRS took a rather aggressive and litigious approach to expanding its scope for licensing. An example of this is *PRS v Hammonds Bradford Brewery Ltd.*, where the CMO sought to establish that radio use to entertain one's customers was a 'performance' and thus required a PRS license.<sup>257</sup> The court agreed

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<sup>253</sup> Ehrlich (n 7) 15.

<sup>254</sup> Ibid 5, 12.

<sup>255</sup> Ibid 15.

<sup>256</sup> Ibid 26.

<sup>257</sup> *Performing Right Society Ltd v. Hammond's Bradford Brewery Co. Ltd* [1934] Ch 121; Ehrlich (n 7) 69.

with PRS. What eventually spurred PRS' engagement with policy were developments in the 1950s that threatened to affect the welfare of PRS' members and, ultimately, the standing of PRS itself. In the run up to the 1956 Copyright Act, the Board of Trade's Copyright Committee had published a report in 1952 in the context of the upcoming copyright reform. The resulting Bill included a number of proposals which PRS fought against, including the allowance of exemptions from performance fees for a loosely defined group of organisations, which according to Ehrlich, could have been interpreted as including the BBC.<sup>258</sup>

These condensed accounts of ALCS' and PRS' history illustrate how different the paths, motives and even self-identities of these two CMOs have been. ALCS was set up by authors and the organisation understood itself as a CMO existing to ensure that writers can retain more control over the revenue generated from the use of their works. Consequently, the policy causes that the organisation fought related to issues at the intersection of authors' rights and collective management. PRS, on the other hand, was established by publishers who only extended the organisation's membership to authors in order to guarantee its long-term recognition. The driving force behind PRS was mainly to tap into as wide a range of markets for licensing as possible. Since this was spearheaded by the publishers, it was underpinned less by moral reasoning about ensuring that authors get their dues and more by publishers' self-interest.

In essence, ALCS and PRS represent two models for how collective administration can be organised. In the publishing sector, where ALCS operates, there exists a CMO that solely represents authors, a further separate entity doing the same for publishers, and a joint body, the Copyright Licensing Agency which deals with the front-end licensing. In the music sector, on the other hand, there is PRS, which collectively represents both songwriters and composers, as well as music publishers and deals with both licensing and distribution. On this basis, one could in fact expect differences in the way that ALCS and PRS would engage with copyright policy, as well as with

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<sup>258</sup> Ehrlich (n 7) 123.

other organisational actors within their industries. The organisational set-up of CMOs in the publishing industry would enable more nuanced positions on authors' and publishers' interests on questions relating to collective management to enter policy debates, due to the existence of several different organisational entities. In music, on the other hand, PRS would speak on behalf of a larger subset of stakeholders; its policy positions would therefore possibly need to take account of both author and publisher interests. This could lead to differences in the extent to which ALCS and PRS can cooperate with unions, which, as I discussed above, may affect unions' representative function. It could be difficult for PRS to side with unions on an issue that furthers the interests of creators but adversely affects publishers. ALCS, on the other hand, could be a more reliable partner for author unions, as both ALCS and SoA solely represent writers. Consequently, the types of issues that receive amplification across music and publishing policies may differ. The thesis will provide insight on the practical effects of these structural and organisational differences between ALCS and PRS on the views and positions fed to policymakers, but also on the force, with which these CMOs carry forward their respective industries' agendas. Chapters 4 and 5 will consider these issues in relation to contract terms, whereas chapter 7 will do so in the context of the implementation of the CRM Directive. A brief overview of these issues will follow in the next section of this chapter.

### **3. Selected issues for exploring COs' engagement with copyright policy**

This thesis' exploration of the selected COs' role in copyright policy in the following chapters will be structured around three key issues: (1) authors' and musicians' contractual terms; (2) the UK private copying exception; and (3) the implementation of the Collective Rights Management Directive. These issues relate to contemporary and ongoing policy debates, and, as such, were frequently dwelled on in my interviews with respondents from the MU, SoA, PRS and ALCS. They will therefore guide my analysis of the studied organisations' engagement with copyright policy.

### 3.1. Contract terms between creators and copyright exploiters

As the preceding review of trade unions' functions generally, and of MU's and SoA's past efforts in copyright policy specifically suggests, the issue of fair contract terms for authors and musicians is of greater priority and significance to the unions than to the studied CMOs. Ensuring that creators conduct their work under a fair and balanced contractual framework is fundamental to improving the general working conditions of authors and musicians; it was recorded as one of the three objectives that the SoA was set up to achieve, and was also a cause for the establishment of the MU. The Copyright, Designs and Patents Act 1988, however, contains no provisions restricting the transfer of rights in terms of scope, duration or geographical territory. Furthermore, the Act does not prohibit the transfer of rights for future forms of exploitation and also explicitly allows for the transfer of rights in future works.<sup>259</sup> The Act contains no provisions regulating the amount of remuneration payable to authors or performers, and is generally considered to create a copyright law regime that is particularly devoid of creator-friendly and creator-protective rules.<sup>260</sup> In this context, many of the contracts entered into by creators include disproportionate and unreasonable clauses that negatively affect creators' ability to extract appropriate value from their work.<sup>261</sup>

By focussing on this issue in Chapters 4 and 5, I will explore how trade unions advance their interests in copyright policy, where they face challenges and what the possible underlying reasons for these challenges are. I will also examine what networks and alliances they participate in and where they seek support for their causes. Moreover, I will consider the extent to which ALCS and PRS engaged with this more union-specific issue, which will allow me to draw comparisons of actor dynamics across the publishing and music sectors. It will also offer insight into how the structural and functional differences in the two CMOs discussed above, influence

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<sup>259</sup> Ss 91 (1), 191C (1) CDPA 1988.

<sup>260</sup> EU contracts study (n 46); Bently and Sherman (n 229) 313.

<sup>261</sup> Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules*, (Edward Elgar Publishing 2010); Gibson, Johnson and Dimita (n 46).

the way they position themselves in policy. Finally, a discussion of the approach taken by SoA and the MU on the issue of fair contract terms will also illustrate how some of the complexity of the copyright policy space originates from the existence of multiple policy alternatives. It will also reveal the lack of uniformity in the way different actors representing the same stakeholder group approach a given issue.

### **3.2. Private copying exception**

The private copying exception is an issue that fell into both the unions' and CMOs' spheres of activities and touched the interests of both organisation types. The government introduced a private copying exception in October 2014 following a recommendation made by Hargreaves, which was later repealed as a result of *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills (No. 2.)*<sup>262</sup> The judgment came out of a judicial challenge launched by the MU, the music sector alliance UK Music, and the British Academy of Songwriters, Composers and Authors (BASCA). Consequently, in considering the policy developments around the UK private copying exception in chapter 6, I will explore a case where different types of organisations took effective joint action. At the same time, I will bring into focus the granularity of positions, priorities and preferences of individual copyright actors, and also explore differences between the two creative sectors – publishing and music – that this thesis studies. In the context of the private copying exception, I will also discuss the dynamics between COs, policymakers, and other stakeholders as they relate to the copyright policy process and its outcomes.

### **3.3. Collective Rights Management Directive**

The final issue, in relation to which the present thesis considers the policy activities of COs, is the implementation of the CRM Directive. This issue, dealt with in chapter 7, is of main concern to the activities and functions of CMOs. Therefore, like the problem of contractual terms will do for the unions, the study of this particular issue

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<sup>262</sup> *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills (No. 2)* [2015] EWHC 2041 (Admin) [21].

will allow me to focus my analyses on the behaviour of ALCS and PRS. As mentioned earlier in this chapter,<sup>263</sup> the CRM Directive dealt with two separate issues, multi-territorial licensing of music online and the regulation of CMOs. Only the implementation of provisions relating to the latter will be considered in Chapter 7. Through my examination of CMOs' policy engagement on the CRM Directive implementation, I will explore commonalities and differences in the self-concepts of PRS and ALCS and how these influence the way both actors participate in policy. I will also consider how the different membership compositions of ALCS and PRS, in terms of different stakeholder groups and types of creators represented, impact the way both CMOs form their policy positions on certain issues.

#### 4. Conclusion

This chapter considered the contemporary copyright policy landscape and reflected on how IP reviews, the media, and researchers have described the role that organisations have played in shaping this environment. In this context, the chapter showed that remarks about stakeholder influence have been sweeping with little consideration as to possible differences between individual actors and their effects on policy, as well as potential variations in the extent of influence exercised by different actors and creative industries.

The chapter also showed that while some research from the copyright domain has focussed on the interface of organisational behaviour and features of copyright policy, gaps remain in the literature in relation to music industry organisations representing creators, performers, and other stakeholders, but also in relation to organisations from other creative industries more generally.

Moreover, while there is a body of literature that considers how environmental factors, such as the plurality of actors, or the existence of networks and coalitions, can itself influence the behaviour of individual actors, this research and its implications have until now not been considered in relation to copyright law and policy. Similarly,

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<sup>263</sup> See section 1.5.1.



the chapter identified a gap in comparative research considering the behaviour of organisations across different creative sectors, which could deliver insight into inter-industry dynamics in copyright policymaking, as well as research comparing actors that perform different functions and roles, in order to assess how such differences too, may play out in the way copyright issues are advanced to policymakers. In this respect, the present chapter specifically considered literature on trade unions and CMOs, which demonstrated clear differences between these two types of organisations in terms of their origin, purpose, and functions. Moreover, against the backdrop of differences in the historical beginnings of SoA, MU, PRS and ALCS, in their self-identities, as well as changes in the political climate, which have, in particular, shaped the roles of unions, the way these individual organisations behave in copyright policy, the roles they play and the priorities that guide their own agendas appear less straightforward.

The research gaps identified above will be explored in the following chapters of this thesis in the context of the copyright issues outlined in section 3 of this chapter. These are contract terms for creators and performers (chapters 4 and 5), the private copying exception (chapter 6), and the implementation of the CRM Directive (chapter 7). A deeper understanding of the workings of different organisations is necessary in order to better grasp how copyright policymaking, policies, and ultimately laws are affected by the behaviour of the actors who shape them.

## Chapter 4

### Fair Contract Terms Campaign in the Publishing Industry

The problem of unfair contract terms for creators, in this case authors, is not new to creators' organisations (COs) in the publishing industry. In fact, as discussed in the previous chapter, one of the main objectives behind the formation of the Society of Authors (SoA) was to use the new representative body to form and maintain better relations with publishers by means of properly drawn agreements.<sup>264</sup> In the past, SoA had primarily sought to improve the contractual dealings of authors vis-à-vis publishers through minimum terms agreements with publishers' trade bodies, through negotiations with individual publishing houses, as well as through the provision of individual contract advice to its members.<sup>265</sup> In other words, SoA had attempted to establish an industry standard in order to address contractual problems such as the division of profit, unclear royalty statements, overly wide scope and duration of rights licensing, as well as the lack of proper accounting and transparency. In 2014, however, these problems were still widespread and additional ones were emerging in the context of the internet, print-on-demand technologies, e-book formats, online sales and other aspects of the new digital world of publishing.<sup>266</sup> In light of this, SoA decided to pursue another route: to seek the improvement of authors' contract terms as a matter of copyright policy. To this end, SoA, supported by the Authors Licensing and Collecting Society (ALCS) and others, actively engaged in the policy process and advocated change in contractual practices through legislative intervention.

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<sup>264</sup> See chapter 3, section 2.2.1; Le Fanu (n 183) 21; Bonham-Carter, *Authors by profession: Volume One* (n 7) 81, 122.

<sup>265</sup> Le Fanu (n 183) 23-24.

<sup>266</sup> D'Agostino (n 261) 16ff; EU contracts study (n 46) 6, 66ff.

This chapter will consider how SoA and ALCS approached the problem of creators' contract terms in policy. The chapter is organised in three main sections. Section 1 develops several themes in relation to the way COs behave and participate in the copyright policy process. I will study the measures taken by SoA and ALCS and the recommendations proposed by these COs to policymakers in the context of concurring legislative and policy developments. This will reveal that, on the matter of fair contract terms, the policy engagement of SoA and ALCS was more reactive than proactive. I will link organisations' reactive behaviour to a number of factors, including their self-concept and resources. This section will further identify notable differences in the nature and level of engagement demonstrated by SoA and ALCS and relate these to the distinct mandates and functions that the two COs perform as a trade union and a collective management organisation (CMO).

Section 2 will map stakeholder dynamics that characterise the environment within which SoA and ALCS operate. I will discuss how SoA and ALCS sought to bring the issue of contract terms to the attention of policymakers and thereby show that COs generally engage in copyright policy both independently, as well as through coalitions and larger umbrella organisations. In this context, I will elaborate on the dynamics between SoA and ALCS, illustrating how their collaboration on the issue of contract terms resulted from the pursuit of mutual interests, as well as a degree of dependence by SoA on ALCS. The latter will be linked to the existence of power imbalances between the studied actors. Furthermore, I will explore the interplay between the two COs and other industry stakeholders like the Publishers Association, as well as multi-stakeholder organisations such as the British Copyright Council. By doing so, I will identify several key features of the copyright policy environment: the conflictual nature of issues, the colliding interests of various stakeholders, and the inconclusive messages emerging from evidence presented by different stakeholders.

Section 3 of this chapter will discuss what the preceding analyses suggest about the role of COs in copyright policy, the nature of copyright policy outcomes, and the process by which copyright policies develop. I will illustrate the contribution of these

organisations in bringing to policymakers' attention problems and shortcomings in the way copyright law impacts creators in practice. I will also trace the results of authors' organisations' campaigning efforts in terms of legislation on contract terms in both the UK and the EU. Moreover, the section will consider some of the implications of the identified power imbalances between actors in terms of the way they are placed to participate in policy, as well as the consequences of advancing policy desires through coalitions and alliances. It will conclude with a consideration of how the existence of antagonistic views and inconclusive evidence may shape the substance of copyright policy outcomes.

## 1. COs' policy engagement on the issue of fair contract terms for creators

### *1.1 The problem with creators' contract terms: Legal background and changes post-digitisation*

As noted at the beginning of this chapter, the problem of creators' contractual standing is not a new one. To a degree, it can be traced back to the principle of freedom of contract, coupled with creators' weaker bargaining position vis-à-vis publishers.<sup>267</sup> Chapter 3 observed that UK copyright law does not include statutory provisions which restrict the transfer of rights in terms of scope, duration or geographical territory.<sup>268</sup> Furthermore, the Copyright, Designs and Patents Act 1988 (CDPA 1988) does not prohibit the transfer of rights for future forms of exploitation. It also explicitly allows for rights to be transferred in future works.<sup>269</sup> There are no provisions regulating the amount of remuneration payable to authors or performers. As a result, the CDPA 1988 is generally considered as having created a copyright law regime that lacks creator-friendly and creator-protective rules.<sup>270</sup>

The principle of freedom of contract, however, does not apply without restrictions. Common law doctrines of undue influence and restraint of trade can be and have

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<sup>267</sup> Ray Corrigan and Mark Rogers, 'The Economics of Copyright' (2005) 6 (3) World Economics 153, 161; EU contracts study (n 46) 16.

<sup>268</sup> See Chapter 3, section 3.1.

<sup>269</sup> Ss 91 (1), 191C (1) CDPA 1988.

<sup>270</sup> EU contracts study (n 46) 17; Bently and Sherman (n 229) 313.

been used to regulate contracts where authors have been particularly vulnerable.<sup>271</sup> Nevertheless, these mechanisms are generally considered insufficient to protect creators from disadvantageous or unfair contracts. Other legislation, like the new Consumer Rights Act 2015 or the Unfair Contract Terms Act 1977 also fail to make up for the lack of protection afforded to creators in their contractual dealings under copyright law and contract law. In the case of the Consumer Rights Act 2015, the definition of consumer only extends to an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.<sup>272</sup> As such, creators typically fall outside this narrow ambit. On the other hand, the Unfair Contract Terms Act 1977 explicitly excludes contracts relating to the creation or transfer of IP rights from its scope of application.<sup>273</sup>

Despite an already unfavourable status quo ante, as presented above, data from SoA and ALCS respondents indicates a further deterioration in creators' contractual standing post-digitisation. One ALCS respondent noted:

I think one of the dangers of digital is that it creates uncertainty. Out of that comes anxiety. And from anxiety comes a need to control what you can. And I think that manifests itself sometimes in the way that publishers will say to an author, 'I need all your rights, in perpetuity, throughout the universe. I don't know what I need them for yet but I need them.' And I think, you know, how often are authors genuinely empowered to say, 'Well, no, I'm not, I'll license this to you' and 'You can't have that; unless you can explain why you need it, I'm not going to agree', because many times authors will feel [that], well, 'I'm going to lose this contract' [...]. So, that inequality of bargaining, I think, is a long-standing issue. But [it matters] particularly when people are trying to acquire as many rights as possible and bank them for the

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<sup>271</sup> Charlotte Waelde, Graeme Laurie, Abbe Brown, Smita Kheria and Jane Cornwell, *Contemporary Intellectual Property Law and Policy* (3<sup>rd</sup> edition, OUP 2014) para 7.17; Bently and Sherman (n 229) 313.

<sup>272</sup> s 2 (3) Consumer Rights Act 2015.

<sup>273</sup> Schedule 1 s 1 (c) Unfair Contract Terms Act 1977.

future because of possible new digital business models [that] they haven't yet created.<sup>274</sup>

The SoA respondent who participated in my research expressed a similar sentiment:

I think it's fair to say that with straight analogue publishing, although we were always arguing over terms, the kind of parameters were basically there. Of course, we saw some terrible contracts, of course, we saw some very good contracts. But we did, everyone understood what they were granting, what they were granting it for and the kind of rate. And now we're in a bit of a, you know, digital is a bit of a wild west. Everything is up for grabs. The rates that are being paid for things aren't settled so negotiation has become increasingly important. And what's become clear from the digital world is, I feel very strongly, and publishers would disagree, but I feel very strongly that authors have done very badly after this. They are not being treated fairly, they are getting a smaller percentage and they are not getting a percentage which fairly relates to the amount of effort and value that they put into the chain.<sup>275</sup>

Interview data, coupled with some policy briefings produced by SoA offered insight into how changes brought about by new technologies and digitisation have found expression in the contract terms offered to authors. SoA was considered a reliable source on this matter because of its contract vetting and legal advice services, through which it has gained insight into a wide range of publishing contracts that are offered to its members. The key issue outlined by SoA was authors' difficulty in obtaining a proper return for their professional work.<sup>276</sup> According to SoA and ALCS, authors are presented with contracts that demand the assignment of their rights or excessively wide licenses with very limited reciprocal obligations on publishers to print, publish, sell or otherwise exploit the work and thus generate revenue. This idea of publishers 'banking' rights for the future is also reflected in the interview quotes above. The situation for authors today is contractually worse, the COs argue, because many authors are offered print-on-demand or e-book contracts only, where the size of a

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<sup>274</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

<sup>275</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>276</sup> SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (February 2014).

print run is not stipulated. At the same time, reversion of rights clauses, which were previously typically tied to the case that a book would run out of print, are no longer applicable precisely because of the existence of print-on-demand technologies and the result that books are never out of print. This means that authors are unable to regain control of and exploit 'unused rights', for instance through self-publishing. There is a growing body of academic and policy literature on creators' contractual dealings that corroborates the claims made by these COs.<sup>277</sup> In a policy paper issued by SoA and ALCS, the two COs noted: '[w]hile unions and professional associations have sought to address this imbalance by providing advice to their members and engaging in collective bargaining, the situation remains unsatisfactory for the majority of creators.'<sup>278</sup> Consequently, SoA, ALCS and other organisations took this problem to policymakers with a number of proposals for statutory change.

### *1.2. COs' action in the context of concurrent legislative and policy developments*

The first important insight gleaned from studying SoA's and ALCS' approach to tackling the problem of creators' contract terms through legislative change was that, both in terms of timing and substance, these COs' actions were contingent on other concurrent legal and policy developments. To this extent, SoA and ALCS acted in a more reactive, rather than proactive manner as they attempted to shape policy on this issue. I drew this conclusion by analysing (a) the timing of SoA's first policy briefings on the problem, (b) the substance of the organisation's proposals, and (c) the general emphasis that SoA itself placed on the timing of its action, as well as the temporal interplay between SoA's subsequent policy moves and the progress of concurrent legislative initiatives. Last but not least, interview data also corroborated this conclusion.

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<sup>277</sup> EU contracts study (n 46) 10ff; P Bernt Hugenholtz, 'The Great Copyright Robbery: Rights allocation in a digital environment' (2000) Paper presented at NYU School of Law Conference 11-12, 16; D'Agostino (n 261) Chapter 2; Europe Economics, Lucie Guibault and Olivia Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works* (Publications Office of the European Union 2016) 63-64.

<sup>278</sup> SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (n 276) 2.

(a) *The Timing of SoA's 2014 policy briefings and recommendations for legislative action*

SoA published two briefings on the problem of creators' unfair contract terms in February 2014, which were both formally supported by ALCS, and another briefing in December 2014.<sup>279</sup> My SoA respondent made these documents available to me following our interview as part of my fieldwork. The February briefings appeared just a month after the publication of a study titled 'Contractual Arrangements applicable to creators: Law and Practice of Selected Member States', which had been commissioned by the European Parliament.<sup>280</sup> This study looked at eight Member States, including the UK, and compared the national rules that could protect creators in their contractual dealings under the copyright and contract laws of these countries. In comparison, the UK appeared to have a particularly poor and inadequate framework for the protection of creators for the reasons outlined at the beginning of this chapter.<sup>281</sup> However, as other national frameworks also showed considerable weaknesses, the study made a number of recommendations aimed at restoring the negotiating power of authors and the overall fairness of contracts. Among other things, it recommended the introduction of an unfair terms model in copyright law, similar to the one in existence under consumer rights law, as well as specific conditions under which the transfer of rights for unknown forms of exploitation would be justified.<sup>282</sup>

In order to ascertain whether SoA or ALCS had previously brought the issue of unfair contract terms to the attention of policymakers and campaigned for legislative change on this matter, I conducted an online search for documents (press releases, policy

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<sup>279</sup> SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (n 276); SoA and ALCS, 'Unfair contracts: A blueprint for change' (February 2014), and SoA, 'Consumer Rights Bill and Creator Contracts' (Briefing paper) (2 December 2014) (copies available with the author).

<sup>280</sup> EU contracts study (n 46).

<sup>281</sup> See also Nevena Kostova, 'A Country with Exceptional Copyright Law' (*Copyright and Creators Blog*, 26 February 2014) <<http://blogs.sps.ed.ac.uk/copyrightandcreators/2014/02/26/a-country-with-exceptional-copyright-law/>> accessed 08 February 2017.

<sup>282</sup> EU contracts study (n 46) 13ff.



statements, briefings, website updates, reports, etc.) originating between 1 January 2000 and 31 December 2013.<sup>283</sup> My search revealed no evidence that either organisation had publicly lobbied or campaigned on this issue in the many years preceding 2014, although there was evidence that these COs had indeed been aware of the problems facing authors much earlier than 2014, not least through SoA's contract vetting service, mentioned above.<sup>284</sup> The finding that SoA had not prioritised the issue of fair contracts in its dealings with policymakers in the period leading up to the publication of the EU study was further supported by the substance of an SoA briefing note from January 2013, i.e. just one year earlier. This note, which I received from my SoA respondent, had been prepared by the SoA for a House of Lords debate on the value of the publishing industry. The document covered a wide range of issues, but did not address the contractual situation of creators.<sup>285</sup>

*(b) SoA's policy recommendations in the context of concurrent legislative initiatives*

The fact that the EU study on creators' contractual arrangements had driven SoA and ALCS into policy action on this matter was clear from the references that these organisations had made to its findings and recommendations in their own policy briefings.<sup>286</sup> Interview data also corroborated SoA's reliance on the EU study for its subsequent policy action. My SoA respondent noted:

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<sup>283</sup> This period was chosen as it immediately preceded the year 2014 and spanned a sufficient number of years during which digitisation and new business models would have been reflected in the contractual practices adopted by publishers, thus producing the contemporary problems faced by authors that SoA and ALCS raised with policymakers in 2014.

<sup>284</sup> Among the search results were a few newspaper articles reporting on SoA's criticism of publishers with regard to the terms they offered to authors, for instance Alison Flood, 'Ebook deals "note remotely fair" on authors' (*The Guardian*, 12 July 2010) <<https://www.theguardian.com/books/2010/jul/12/ebooks-publishing-deals-fair>> accessed 08 February 2017.

<sup>285</sup> SoA, 'Briefing Note: House of Lords Debate: Value of the Publishing Industry, Wednesday 6 February, Moses Room, 5PM' (January 2013). A copy of this briefing note was obtained directly from SoA and lies with the author. The issues covered included VAT for ebooks, the scope of the Public Lending Right, the need to promote a reading culture, and provisions in the Enterprise and Regulatory Reform Bill that was being debated at the time.

<sup>286</sup> SoA and ALCS, 'Unfair contracts: A blueprint for change' (n 279).

[...] when the EU did its policy paper also on fair terms, which we think is a very, very good document, we've been publicising that a lot and lobbying people here in relation to it. [...] It's a fabulous document, which talks about fair terms for creators; [...] it really says everything that we feel very strongly [about] and we would love to see that taken further. And some ...some law coming out of it.<sup>287</sup>

The specific recommendations that SoA, supported by ALCS, made in its briefings can be placed in the context of legal developments and initiatives that were already underway. In particular, SoA urged for the following four measures:

- (1) An amendment to the Unfair Contract Terms Act 1977 through the removal of s 1(c) of Schedule 1 which provides that ss 2 to 4 (negligence liability, liability arising in contract and unreasonable indemnity clauses) do not extend to intellectual property contracts;
- (2) A widening of the definition of 'consumer' in the (at the time debated) Consumer Rights Bill in order to protect creators and others who operate in an unfair environment;
- (3) A review of creator contracts by the government so as to ensure that the UK has legal frameworks which protect creators, like those in other EU countries, and to ensure that creators receive a fair share of the reward for their creativity;
- (4) A comprehensive review of the laws applicable to business-to-business contracts to ensure that they are fit for purpose in a digital world.<sup>288</sup>

When SoA communicated these recommendations to UK policymakers, the government was *already* reviewing the UCTA 1977 with the intention of replacing the Act's provisions on business to consumer contracts with the Consumer Rights Bill, which was itself an ongoing statutory initiative.<sup>289</sup> Evidently, SoA and ALCS were

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<sup>287</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>288</sup> SoA, 'Consumer Rights Bill and Creator Contracts' (n 279) 1; SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (n 276) 1; SoA and ALCS, 'Unfair contracts: A blueprint for change' (n 279) 3-4.

<sup>289</sup> The idea behind the Consumer Rights Bill was to consolidate consumer rights legislation. The Consumer Rights Act 2015 was adopted on 26 March 2015 and came into effect on 1 October 2015. It replaced the UCTA 1977 provisions regulating business to consumer

attempting to fit their recommendations on tackling the unfair contract terms problem into pre-existing legislative and policy developments and to thus take advantage of the government's, at the time, already determined agenda.

In brief, according to SoA and ALCS, there was no justifiable reason why under the UCTA 1977 creators were being denied the legal protection afforded to other businesses. Furthermore, the definition of 'consumer' in consumer protection legislation was too narrow and thus excluded authors. To this effect, anyone acting for purposes that were wholly or mainly within that individual's trade, business, craft, or profession would be excluded from the provisions of the Consumer Rights Bill. Yet, like consumers, authors too were often dealing on standard terms of business and in that respect had an equally weak bargaining position when it came to negotiating with large multinational companies. The idea that the government should ensure that the UK legal framework protected creators in their contractual dealings had come from the EU study.<sup>290</sup> Finally, with regard to the last recommendation (a review of laws applicable to business-to-business contracts), SoA explained in its December 2014 policy briefing: 'We understand that Government will be considering business-to-business and consumer-consumer contracts in due course following the adoption of the Consumer Rights Bill. [...] This would be an excellent opportunity to extend the remaining parts of UCTA to creators and to consider how best to protect creators and those who operate in an unfair negotiating environment.'<sup>291</sup>

(c) *The emphasis on timing*

The above quote from a SoA policy paper indicated how the organisation linked its fourth recommendation to the timing of other policy events. Indeed, SoA appeared to present *the timing*, the fact that the government was acting on these specific pieces of legislation *anyway* as one of its selling points when drafting briefings and

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contracts. The UCTA 1977 was amended accordingly so that it now only covers business to business and consumer to consumer dealings.

<sup>290</sup> EU contracts study (n 46).

<sup>291</sup> SoA, 'Consumer Rights Bill and Creator Contracts' (n 279) 6.

submissions for policymakers. SoA continuously contextualised its demands in relation to other separate initiatives.<sup>292</sup>

In fact, even after the government passed the Creators' Rights Act 2015 retaining a narrow definition of 'consumer' in s 2(3) of the Act, and although it also did not extend the scope of the UCTA 1977 as per SoA's recommendations, the CO continued to tie its calls for action to this, now adopted, legislation. As such, a year after the commencement of the CRA 2015, in March 2016, SoA published a website update on its campaign for fair contract terms which it had formally launched in July 2015, stating: 'This is the time to address this issue, with the Consumer Rights Act passed only last year.'<sup>293</sup>

### **1.3. Factors affecting the reactivity of SoA and ALCS**

SoA and ALCS had been aware of the problems facing creators in their contractual arrangements but had not attempted to place this issue on the copyright policy agenda prior to the 2014 EU study. This begs the question of why, rather than proactively raise this matter earlier, they had waited and subsequently tied their proposals to statutory initiatives already underway in relation to consumer rights. Recall that, irrespective of the government's initiatives in consumer law, SoA had knowledge of the contracts being offered to its members, and there existed academic work and policy studies that could have supported SoA and ALCS in making a case

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<sup>292</sup> SoA even set up a separate webpage titled: 'C.R.E.A.T.O.R.: why now?' (SoA) <<http://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts/C-R-E-A-T-O-R-Why-Now>> accessed 08 February 2017; SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (n 276) 3.

<sup>293</sup> 'C.R.E.A.T.O.R. Campaign for Fair Contracts – Update' (SoA, 15 March 2016) <<http://www.societyofauthors.org/News/News/2016/Mar/CREATOR-update>> accessed 08 February 2017. SoA named its campaign 'C.R.E.A.T.O.R.'. This acronym stands for Clearer, Remuneration, Exploitation, Accounting, Term, Ownership and Reasonableness. It marks SoA's key demands in relation to authors' contract terms. See 'C.R.E.A.T.O.R. campaign for fair contracts' (SoA) <<http://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>> accessed 08 February 2017. SoA's specific demands are discussed in more detail in section 2.1 of the present Chapter.

to the government that the bargaining power imbalance between creators and copyright exploiters needed to be addressed.<sup>294</sup>

A combination of interview and documentary data, as well as notes from unstructured observations made during my fieldwork led me to conclude that the reactivity of SoA and ALCS on this matter hinged to a large extent on these organisations' resource capacities and self-concepts. Neither organisation seemed to perceive its role in the copyright policy landscape as that of an agenda-setter. SoA's and ALCS' respective mandates also influenced, in different ways, how the two COs engaged with policy on the matter of contract terms.

### **1.3.1 Resources and mandate**

Based on the timing and policy context of SoA's action on contract terms, I established a link between resource disposability and proactivity in two respects.

- (1) The ability to generate momentum and initiate awareness on an issue from scratch is certainly more resource-heavy than stepping on and amplifying pre-existing movements or campaigns around a given issue. The same applies to the recommendations that an organisation advances: it is more difficult to convince policymakers to undertake a new, specific legislative initiative than it is to weave recommendations into initiatives that are already underway, especially because for the policymakers themselves, the former is more resource-consuming than the latter.

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<sup>294</sup> The studies and academic work referred to here include: D'Agostino (n 261), Martin Kretschmer, Estelle Derclaye, Marcella Favale and Richard Watt, 'The Relationship Between Copyright and Contract Law' (IPO 2012) <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-relation-201007.pdf>> accessed 08 February 2017; Martin Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a research Agenda' (2010) 18 (1) Journal of Intellectual Property Law 141; P B Hugenholtz and L Guibault, 'Copyright Contract Law: Towards a Statutory Regulation?' (Institute for Information Law Amsterdam 2004) <<https://iuccommonsproject.wikispaces.com/file/view/STUDY+of+Copyright+in+Netherlands.pdf>> accessed 08 February 2017.

- (2) Furthermore, especially in the aftermath of the Hargreaves Review, there is a call by the UK government toward IP policy developing out of clear, verifiable and peer-reviewed evidence.<sup>295</sup> However, the ability to prepare (in-house or commissioned) and present such evidence is also contingent on resource availability and resource allocation.

### 1.3.2 Comparing SoA's and ALCS' financial and human resources

When comparing the financial resources of SoA and ALCS, I found, as expected, that SoA has fewer resources at its command than ALCS.<sup>296</sup> At a basic level (excluding income from investments and other assets), both trade unions and collective management organisations rely on their members to sustain their operations. Trade unions charge set membership fees, which may vary by membership category (e.g. student or concessionary membership). CMOs on the other hand, apply a commission, or administration, rate (generally around 10%)<sup>297</sup> on their members' royalty income, which is sometimes in addition to a joining fee.<sup>298</sup> In the case of CMOs, the actual amount of this admin fee can vary widely as these organisations house both low-earning as well as high-earning, 'superstar' members.<sup>299</sup> Moreover,

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<sup>295</sup> See Chapter 3, section 1.2 and UK IPO, 'Guide to Evidence for Policy' (n 105).

<sup>296</sup> According to the financial statements filed by SoA with the Certification Officer for the year ended 31 December 2015, the total income of the union (from members and investments) was £ 1,124,771, whereas ALCS' financial statements for the year ended 31 March 2016 show that from a licence income of £ 30,675,294, the commission receivable was £ 2,861,106. ALCS' cash and cash equivalents at the end of the financial year were also reported at £ 17,238,546. See SoA, 'Form AR21: Annual Return for a Trade Union: The Society of Authors, Year ended: 31 December 2015' 17 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/570506/577T\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570506/577T_2015.pdf)> accessed 20 August 2017, and ALCS, 'Directors' Report, Strategic Report and Financial Statements for the year ended 31 March 2016' 7, 9 <<https://beta.companieshouse.gov.uk/company/01310636/filing-history>> accessed 20 August 2017.

<sup>297</sup> This applies to the two CMOs studied in this thesis.

<sup>298</sup> At the time of writing, lifetime membership of ALCS costs £36 and the organisation applies a commission rate of 9.5% on incoming royalties: 'Join' (ALCS) <<http://www.alcs.co.uk/Join>> and 'Commission/deductions and tax' (ALCS) <<http://www.alcs.co.uk/What-we-do/Membership-of-ALCS/Payments-to-writers/Commission-deductions>> accessed 08 February 2017.

<sup>299</sup> The 'superstar' phenomenon of creators' earnings distribution has been documented widely. See, for instance, Martin Kretschmer and Philip Hardwick, 'Authors' earnings from

the sheer size of CMO memberships far exceeds that of trade unions, especially in the case of the four COs considered in the current thesis.<sup>300</sup> Therefore, although the distribution and licensing operations of CMOs are themselves costly, these organisations tend to generally have an overall greater resource availability than the trade unions.<sup>301</sup> In terms of human resources, too, ALCS has a greater number of staff than SoA, but far fewer compared to the bigger CMO that is PRS.<sup>302</sup>

### *1.3.3 SoA's resource and mandate-related constraints*

The fact that resource constraints were an issue for SoA not only became clear from a comparative review of the organisations' financial accounts, but was also reflected in my interview data, in the access negotiation process that preceded my fieldwork, as well as in observations emerging from this fieldwork. As discussed in chapter 2, my primary contact at SoA referred to limited resources (primarily in terms of space and staff members' time) as the reason why I could not spend a longer period of time on

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copyright and non-copyright sources: A survey of 25 000 British and German writers' (2007) 11, 21; Ruth Towse, 'Copyright and the Cultural Industries: Incentives and Earnings' (2000) Paper for presentation to the Korea Infomedia Lawyers Association 2; Corrigan and Rogers (n 267) 161.

<sup>300</sup> See Chapter 2, section 2.3.

<sup>301</sup> For the financial year ended 31 December 2015, PRS' cash and cash equivalents were £141,290,000 and for the financial year ended 31 March 2016, ALCS' cash and cash equivalents were £ 17,238,546, see PRS, 'Annual Report and Financial Statements for the Year Ended 31 December 2015' 15 <

<https://beta.companieshouse.gov.uk/company/00134396/filing-history>> accessed 20 August 2017 and ALCS, 'Directors' Report, Strategic Report and Financial Statements for the year ended 31 March 2016' (n 296) 9. These figures are in stark contrast to SoA, which only had net assets of £ 1,152,528 for the year ended 31 December 2015, see SoA, 'Form AR21: Annual Return for a Trade Union: The Society of Authors, Year ended: 31 December 2015' (n 296) 7. MU, on the other hand, is comparable to ALCS with net assets of £ 17,523,527 for the same financial year, see MU, 'Form AR21: Annual Return for a Trade Union: Musicians' Union, Year ended 31 December 2015' 17

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/603800/154\\_T\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/603800/154_T_2015.pdf)> accessed 20 August 2017.

<sup>302</sup> For the year ended 31 March 2016, the number of staff working for ALCS was 30, see ALCS, 'Directors' Report, Strategic Report and Financial Statements for the year ended 31 March 2016' (n 296) 2. The average number of employees during the financial year ended 31 December 2015 at SoA was 17. See 'Form AR21: Annual Return for a Trade Union: The Society of Authors, Year ended: 31 December 2015' (n 296) 8. For the same year, the average monthly number of persons employed by PRS and its subsidiaries was 611. See PRS, 'Annual Report and Financial Statements for the Year Ended 31 December 2015' (n 301) 25.

the SoA premises and interview a wider range of respondents.<sup>303</sup> Indeed, in comparison with ALCS', PRS' and even MU's headquarters, SoA's building was significantly smaller and had an older feel compared to the more modern and spacious premises of the other three COs. Limitations in resource allocation were also brought up in the interview conducted with the SoA respondent. On the extent to which SoA was generally able to be politically active my respondent noted:

I mean, you know, we're a small organisation and our real duties are to our members so we can't spend a massive amount of time on these areas. But, and I don't spend a massive amount of my time lobbying [...]<sup>304</sup>

The SoA respondent further stated: 'I probably don't do as much EU lobbying as I'd like to simply because I can't.'<sup>305</sup>

The allocation of resources into various activities is not only restrained by the amount of resources in existence but also by the organisation's mandate. Pursuant to Article 2.1 of SoA's Articles of Association, the objectives of the society are to protect the rights and further the interests of authors of every kind of works and publications including literary, dramatic, artistic, scientific, technical, educational and musical.<sup>306</sup> This is an exceptionally wide mandate. In fact, a report on the status of artists in Europe from 2006 identified five distinct policy areas that needed to be addressed in order to improve the working conditions of creators: legal and organisational frameworks, social security, taxation, mobility of artists, and collective bargaining.<sup>307</sup> Aligned with the report's findings, SoA does not channel all of its available resources into lobbying for copyright policy issues. It also campaigns for the preservation of

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<sup>303</sup> See Chapter 2, section 3.

<sup>304</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>305</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>306</sup> SoA, 'Articles of Association of The Society of Authors' (Approved 21 October 2014) <<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebSite/Governance/Articles-of-Association-21-10-14-APPROVED-final.pdf>> accessed 08 February 2017.

<sup>307</sup> European Institute for Comparative Cultural Research, Suzanne Capiou, Andreas Johannes Wiesand, 'The Status of Artists in Europe' (Study) (European Parliament 2006) <[https://www.andea.fr/doc\\_root/ressources/enquetes-et-rapports/51b5afb01bb8d\\_The\\_status\\_of\\_artists\\_in\\_EU.pdf](https://www.andea.fr/doc_root/ressources/enquetes-et-rapports/51b5afb01bb8d_The_status_of_artists_in_EU.pdf)> accessed 08 February 2017 iii-iv.



public libraries to promote a reading culture, for authors' moral right of attribution<sup>308</sup>, for changes in libel law, changes in the VAT system, particularly in relation to e-books, as well as other issues.<sup>309</sup> Moreover, as we are reminded by Ewing's work, the representative function of unions, implemented through lobbying and other public affairs work, is just one of five functions that SoA as a trade union generally performs.<sup>310</sup>

Given that SoA's membership consists primarily of self-employed or 'independent workers', as they are referred to under employment law, these members are deprived of many common law and statutory employment rights. Most industrial safety legislation, as well as important social security rights, including those that relate to disability or unemployment do not apply to independent workers but only to employed persons.<sup>311</sup> Consequently, in order to act in accordance with its mandate, SoA needs to invest more resources into its service function, by offering its members specialist insurance, contract vetting services, other professional advice, and more.<sup>312</sup> This invariably impacts the extent to which SoA can also devote financial, human and other resources to copyright policy, i.e. to its regulatory and representative functions.

Considering these resource and mandate constraints, it becomes clear why SoA relied on the EU study to launch its policy work and why it sought to advance proposals that could easily be accommodated into the government's existing legislative agenda.

#### ***1.3.4 ALCS' resource-driven advantage and mandate-related constraint***

With regard to resources and mandates, ALCS' case is somewhat different. I discussed above that ALCS presides over a greater amount of both human and

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<sup>308</sup> S 77 CDPA 1988.

<sup>309</sup> For details on the individual campaigns and areas of involvement of SoA see 'Where we stand' (SoA) <<http://www.societyofauthors.org/Where-We-Stand>> accessed 08 February 2017.

<sup>310</sup> See Chapter 3, section 2.1.

<sup>311</sup> Ian Smith and Aaron Baker, *Smith & Wood's Employment Law* (11<sup>th</sup> Edition, Oxford University Press 2013) 37; Cabrelli (n 212) 61.

<sup>312</sup> 'Exclusive discounts and offers' (SoA) <<http://www.societyofauthors.org/Join/Discounts>> accessed 08 February 2017.

financial resources. This is an important factor behind the potential ability of this organisation to commission research and to thereby participate in the making of evidence-based policy with greater independence from other organisations or pre-existing publications compared to SoA. For example, ALCS commissioned research on the economic effects of education exceptions, as well as an economic analysis of copyright, secondary copyright and collective licensing in the context of the Hargreaves Review in order to make the case against a wide copyright exception for education and for the importance of secondary rights licensing.<sup>313</sup> ALCS has also been commissioning research into authors' earnings, much of which was being used by SoA to substantiate its claim that authors were not faring well in their present working environment.<sup>314</sup>

In terms of resources, ALCS is in a better position to contribute to the making of evidence-based copyright policy than SoA. However, whilst ALCS does allocate resources to the commissioning and production of evidence,<sup>315</sup> the organisation decided against being proactive in calling for legislation on creators' contract terms. The reason for this lies in ALCS' mandate and particularly the fact that the organisation is a CMO, whose primary function is collecting and distributing money from secondary rights licensing.<sup>316</sup> One ALCS respondent described this in the following terms:

[O]ur mandate is for secondary use of a work and for ALCS to see something as a politically urgent situation it would probably have to

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<sup>313</sup> See PWC, 'An economic analysis of education exceptions in copyright' (March 2012) <<https://www.pwc.co.uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf>> accessed 08 February 2017 and PWC, 'An economic analysis of copyright, secondary copyright and collective licensing' (March 2011) <[https://www.cla.co.uk/data/corporate\\_material/submissions/2011\\_pwc\\_final\\_report.pdf](https://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf)> accessed 08 February 2017.

<sup>314</sup> The studies commissioned by ALCS are Kretschmer and Hardwick (n 299) and Gibson, Johnson and Dimita (n 46).

<sup>315</sup> For all the research findings, as summarised by ALCS, see 'ALCS Research' (ALCS) <<http://www.alcs.co.uk/Resources/Research>> accessed 08 February 2017.

<sup>316</sup> See Chapter 3, section 2.3.

affect that world because first and foremost our role is to make sure that our members get these payments.<sup>317</sup>

As a CMO, ALCS is mandated by its members to permit or forbid the exercise of certain rights, to grant licenses, collect fees for use and to defend and protect those rights.<sup>318</sup> Consequently, ALCS is, by mandate and function, further removed from the issue of contract terms compared to SoA. For SoA as a trade union, on the other hand, the problem of contract terms directly falls into its core sphere of activity: to ensure the improvement of authors' working conditions.

### 1.3.5 Different types of engagement by SoA and ALCS

Ultimately, differences in the organisations' functions and mandates led to the different roles that both COs adopted in relation to the fair contract terms campaign. SoA took the lead in raising awareness, campaigning and lobbying for legislative action, while ALCS adopted a more facilitative and supportive role. It was SoA that prepared the February 2014 briefings to policymakers, which ALCS 'merely' supported. SoA is also the organisation that launched the C.R.E.A.T.O.R.<sup>319</sup> campaign for fair contract terms, which called for a review of laws applicable to creator contracts and the introduction of legislation to address the problem of unfair terms.<sup>320</sup> Trade press such as *The Bookseller*, as well as general newspapers like *the Guardian* also recognised SoA as being the organisation that spearheaded policy action on this issue.<sup>321</sup>

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<sup>317</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

<sup>318</sup> 'The ALCS Mandate: a comprehensive guide' (ALCS)

<<http://www.alcs.co.uk/Documents/The-ALCS-Mandate-a-comprehensive-guide.aspx>> accessed 08 February 2017.

<sup>319</sup> See n 293. See also 'C.R.E.A.T.O.R. campaign for fair contracts' (SoA)

<<http://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>> accessed 08 February 2017.

<sup>320</sup> Ibid.

<sup>321</sup> Alison Flood, 'Philip Pullman: professional writers set to become "an endangered species"' (*the Guardian*, 6 January 2016)

<<https://www.theguardian.com/books/2016/jan/06/philip-pullman-society-of-authors-open-letter-fairer-terms-for-writers>> accessed 08 February 2017; Katherine Cowdrey, 'SoA seeks new law to protect authors' (*The Bookseller*, 7 March 2016)

<<http://www.thebookseller.com/news/soa-seeks-new-law-protect-authors-323847>> accessed 08 February 2017.

In fact, ALCS' decision to be less outwardly active was also reflected in my interview data. One respondent noted: '[T]he unions will take the lead on something like that because it's to do with primary rights [...].'<sup>322</sup>

### 1.3.6 Self-concept

Resource allocation and capacities and different mandates were not the only factors at play that influenced the way ALCS and SoA engaged in policy on contract terms. Relying on interview data, I found that an additional factor, which likely also contributed to the reactive nature of SoA's and ALCS' policy input, was the organisations' self-concept. More specifically, the interviews with ALCS and SoA respondents revealed a recurring notion that the organisations' own priority setting was reactive. This was underlined by the perception that it was not within the organisations' power and control to set the policy agenda, or to strongly influence the way this agenda was set on copyright matters. My SoA respondent explained:

Now, of course, priority setting is reactive to an extent. There's no point in us saying, you know, we're going to be writing loads of papers on copyright if that's not anything the EU is examining at the moment.<sup>323</sup>

A similar sentiment was shared by an ALCS respondent:

So our role, our strapline is 'protecting and promoting authors' rights'. So as part of that what we've got to do is make parliamentarians aware of what's happening out here. And also, where possible, what they can do to help. **Now, obviously, we can only ask them to help when there's specific legislation going through** but we also have a regular campaign to meet with as many parliamentarians as possible to make them aware of current issues around authors.<sup>324</sup> (emphasis added)

The idea that, to a large extent, agenda setting was outside the control of these organisations was expressed by another ALCS respondent, when asked what would make it easier for ALCS to get certain messages across to policymakers:

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<sup>322</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

<sup>323</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>324</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

to be perfectly honest, what makes it easier is probably a **politically urgent issue** and those are few and far between in the world of writers.<sup>325</sup> (emphasis added)

This respondent elaborated on their idea by distinguishing between the general functions of Ministers and the IPO in the policy process:

I mean, we've identified things that we think are not on the legislative agenda that should happen – immediately takes you outside of the immediate remit of the IPO. So those are difficult conversations to have because their job [of the civil servants] is to implement agreed policies and if it isn't within that then you can see why they might be sympathetic to it but they don't actually have too much of a prerogative to do anything about it. So there your kind of recourse is to people who do make decisions about directing policy, so you're talking about Ministers there really. [...] the idea of a fair contract that deals with things under a guiding set of principles [...]. That is not something that is on the political agenda and I wouldn't say it had a political urgency about it because even though we produced evidence of pretty dramatic falling incomes for writers [...] if you are reacting to something that's on the table, then yeah, you're in a conversation there with the IPO. And that sort of people will engage you because it's their policy they're trying to form. If you're going to these higher level issues of principle, it's very difficult to create that sense of urgency [...].<sup>326</sup>

If ALCS and SoA primarily identify their role in copyright policy, at least when it comes to advocating for certain legislative initiatives, as being more reactive rather than proactive, then it is likely that these organisations are defining their scope of action more narrowly than others and acting in accordance with this self-concept. Even in my sample of four COs, I identified distinctions in organisations' self-concept, which led to differences in the extent to which organisations were proactive in trying to influence the copyright policy agenda itself. I will re-visit this idea in chapter 7, where I discuss how PRS' self-concept in particular stood out as being distinct from that of SoA and ALCS.<sup>327</sup> Chapter 8 will offer a further recent example which corroborates this point. I will also consider how such differences may impact the way

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<sup>325</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

<sup>326</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

<sup>327</sup> See Chapter 7, section 2.

policy agendas are set and, ultimately, the issues that are reflected in the substance of copyright law.<sup>328</sup>

#### **1.4. Conclusion**

This section dealt with the approach, substance and timing of SoA's and ALCS' policy input on the issue of creators' contract terms. In the context of concurrent policy developments, publications and statutory initiatives, I showed that SoA's calls for legislative action, which were supported by ALCS, were reactive rather than proactive in the sense that both their timing and scope were contingent on other pre-existing circumstances and movements. The degree of proactivity demonstrated by SoA and ALCS was contingent upon the organisations' varying resource capacities and self-concepts, as well as upon their different mandates. SoA had fewer resources available than ALCS, which hindered its ability to be proactive. At the same time, both organisations appeared driven by an understanding that copyright policy agenda-setting was not something they had particular influence over. That, too, played a role in the manner (and timing), in which they engaged with policymakers. Distinctions in the functions and mandates of SoA and ALCS also accounted for the varying extents, to which each organisation was outwardly active in campaigning and lobbying for action on creators' contractual terms.

## **2. COs and their wider environment**

In the preceding section, I explored reactivity as a feature of the publishing industry COs' policy activity by considering how thematic and temporal aspects of SoA's and ALCS' behaviour fit within the context of the wider policy landscape. I also discussed COs' resource allocation and capacity, mandate and self-concept as factors that shape the way these organisations behave in copyright policy. This section will focus more closely on mapping the landscape within which the studied COs operate and their relationships with other relevant actors. I will show that actors form coalitions on the basis of mutual interests and dependencies, which are the result of power imbalances. I will also consider how this behaviour and COs' actions fit into and are influenced

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<sup>328</sup> See Chapter 8, sections 1.5 and 2.3.

by their environment, in particular by the existence of a large number of actors and interest constellations. Before exploring COs' relations with other organisational actors, such as the Publishers' Association, the Creators' Rights Alliance, and the British Copyright Council, the next subsection will begin by considering the dynamics that characterised the collaboration between SoA and ALCS.

### *2.1. SoA and ALCS: Collaboration based on mutual interests and dependence*

In the publishing industry, SoA and ALCS are established industry partners. They undertake joint action on various issues of policy in the form of joint briefings and joint papers.<sup>329</sup> They also reference and promote each other's work through website updates and press releases.<sup>330</sup> Furthermore, based on mutual agreement, one of the benefits of an SoA membership is an additional free membership with ALCS.<sup>331</sup> Underlying this partnership is a mutual interest in the furtherance of authors' interests and, as my exploration of the organisations' work on creators' contract terms illuminated, a degree of dependence by SoA on ALCS. The latter is indicative of the existence of power imbalances in the copyright landscape of organisational actors.

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<sup>329</sup> See n 279 for examples of joint briefings in the context of creators' contract terms. Further examples include: ALCS and SoA, 'Response to Draft Report on the Implementation of 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' (2015)

<<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/Joint-statement-with-ALCS-on-EU-Copyright-Harmonisation-2015.pdf>> accessed 08 February 2017; ALCS and SoA, 'Joint Briefing on the Digital Economy Bill' (September 2016) <<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20160927-Society-of-Authors-ALCS-digital-economy-bill-briefing.pdf>> accessed 08 February 2017.

<sup>330</sup> See, for instance, 'Shortlist for 2016 ALCS Educational Writers' Award' (SoA, 14 November 2016) <<http://www.societyofauthors.org/News/News/2016/November/ALCS-Educational-Writers-Award-Shortlist>> accessed 08 February 2017; 'ALCS Report: The Business of Being a Writer' (SoA, 21 April 2015) <<http://www.societyofauthors.org/News/News/2015/April/The-Business-of-Being-a-Writer-ALCS-Report>> accessed 08 February 2017; and ALCS' press release 'Save the Author! Join the Fairer Contracts Campaign' (ALCS, 21 January 2016) <<http://www.alcs.co.uk/getdoc/d7216ab5-5ee7-4054-9d41-cae2209d7d74/.asp>> accessed 08 February 2017.

<sup>331</sup> 'Exclusive Discounts and Offers' (The Society of Authors) <<http://www.societyofauthors.org/Join/Discounts>> accessed 07 February 2017.

The brief historical account of SoA and ALCS provided in chapter 3 illustrated that both organisations emerged from the collective efforts of groups of active authors with the primary aim of furthering the rights and interests of authors at large. In light of the different mandates and functions of these two organisations, SoA and ALCS complement one another in representing the interests of creators by performing different tasks and prioritising action on those issues that are more relevant to their individual sphere of activities. Consequently, SoA took the lead on the issue of contract terms as discussed above.

However, an additional factor that propelled the collaboration between the two COs on this matter was a certain degree of dependence by SoA on the networks, access, and resources of ALCS. Specifically, on the basis of documentary data, some of which I had been referred to in my interviews with ALCS and SoA respondents, I identified three main ways in which SoA had relied on and benefitted from ALCS' input with regard to its C.R.E.A.T.O.R. campaign.

- (1) SoA gained from ALCS' resources and ability to commission several studies into authors' earnings by using the findings within these studies as evidence to corroborate its own lobbying and awareness-raising activities. The first research commissioned by ALCS was published in 2007 – a survey of 25 000 British and German writers. It showed that both mean and median earnings of writers were well below subsistence levels and that only 40% of those who undertook writing on a full-time basis, i.e. 'professional writers', could make a living from this profession.<sup>332</sup> ALCS commissioned subsequent research into this topic in 2013.<sup>333</sup> This successive study showed, among other things, that in 2013 the percentage of professional writers, who could make a living from writing alone, had decreased to 11.5%. Additionally, writers' median income had dropped by 29% in real terms. SoA referred to these studies, quoting their

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<sup>332</sup> Kretschmer and Hardwick (n 299) 3, 5.

<sup>333</sup> Gibson, Johnson and Dimita (n 46).



findings in briefings to policymakers,<sup>334</sup> at industry events (which received press coverage<sup>335</sup>), in articles written directly for newspapers,<sup>336</sup> as well as in an open letter drafted to members of the Publishers Association.<sup>337</sup>

- (2) Thanks to ALCS' network and clout, SoA could gain a platform to promote and publicise its policy demands directly to policymakers through the All-Party Parliamentary Writers' Group.<sup>338</sup> This group exists in order to inform MPs and Lords from the whole political party spectrum on specific policy issues through input both within and outside Parliament. The group's administrator is ALCS.<sup>339</sup> One ALCS respondent explained what this entailed:

So that effectively means that we arrange meetings and run the website and have a sort of hand in bringing together organisations with an interest in authors and authors' rights to say what needs to be on the agenda of this group [...]<sup>340</sup>

Therefore, it was ALCS' role in this forum that enabled SoA's Chief Executive, Nicola Solomon, to launch and present the Society's C.R.E.A.T.O.R. campaign

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<sup>334</sup> SoA and ALCS, 'Unfair contracts: A blueprint for change' (n 279) 4.

<sup>335</sup> Benedicte Page, "Solomon: "once well-known authors now struggling"" (*The Bookseller*, 30 November 2015) <<http://www.thebookseller.com/news/solomon-once-well-known-authors-now-struggling-317464>> accessed 08 February 2017.

<sup>336</sup> James McConnachie, 'Publishers should pay authors as much as their other employees' (*the Guardian*, 11 February 2016) <<https://www.theguardian.com/books/booksblog/2016/feb/11/publishers-should-pay-authors-as-much-as-their-other-employees>> accessed 20 December 2016.

<sup>337</sup> Open Letter from The Society of Authors, supported by the Authors' Licensing and Collecting Society, the Writers' Guild of Great Britain, and the Royal Society of Literature to the Members of the Publishers Association and the Independent Publishers Guild (05 January 2016)

<<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/Open-Letter-to-Publishers-from-the-SoA-5-January-2016.pdf>> accessed 08 February 2017.

<sup>338</sup> This group was established in 2007. According to its website, it currently has 68 members. For more information, see All-Party Parliamentary Writers' Group (APPWG) <<http://www.allpartywritersgroup.co.uk/>> accessed 21 December 2016.

<sup>339</sup> Barbara Hayes, ALCS' Deputy Chief Executive of ALCS is the official administrator according to the APPWG website, <<http://www.allpartywritersgroup.co.uk/Contact-us>> accessed 21 December 2016.

<sup>340</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

during the group's summer reception in July 2015. This occurred in the presence of the Secretary of State for Culture, Media and Sport, MPs, Lords and industry professionals. ALCS subsequently published Solomon's speech in full in its online 'ALCS News' column thereby further raising awareness of SoA's key messages.<sup>341</sup> The C.R.E.A.T.O.R. campaign calls for legislation to ensure that:

- contracts become clearer, particularly in terms of scope;
- contracts include equitable and unwaivable remuneration for all forms of exploitation;
- there is an obligation of exploitation for each mode of exploitation;
- contracts include understandable and proper accounting clauses;
- the duration of contracts is reasonable and limited, taking into account new forms of exploitation;
- authors' moral rights, particularly to identification, are made unwaivable and respected, and
- all other contractual clauses are subject to a test of reasonableness.

(3) Finally, SoA's campaign was further reinforced by the simultaneous developments that took place on the subject of creators' contract terms through the International Authors Forum (IAF). The IAF is a very young organisation, incorporated in April 2013, which was formed to lobby and represent authors on the international level of IP policymaking.<sup>342</sup> Both SoA and ALCS are member organisations of the IAF, but ALCS is also the organisation's administrator.<sup>343</sup> As such, ALCS played an important

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<sup>341</sup> 'Fairer Contracts at the All Party Writers Group Summer Reception' (ALCS, 30 July 2015) <<http://www.alcs.co.uk/ALCS-News/2015/July-2015/Author-Contracts-are-the-story-of-the-2015-APWG-Su>> 08 February 2017.

<sup>342</sup> International Authors Forum (IAF) <<http://internationalauthors.org/iaf/>> accessed 20 December 2016.

<sup>343</sup> I obtained this information from several ALCS respondents and cross-checked it against the IAF website which lists its registered office and postal address as being the same as that of ALCS.

organisational role in the preparation and dissemination of IAF's 'Ten Principles for Fair Contracts', which effectively added more weight to SoA's own policy demands, and which SoA referred to in its awareness raising activities on social media.<sup>344</sup>

The above account shows that SoA and ALCS collaborated on the issue of contract terms both on the basis of mutual interests, as well as power-dependence. This aligns with Ansell's network concept and his, as well as Rhodes', observations about why networks are formed and how they operate, which were discussed in chapter 3.<sup>345</sup> The above account further exemplifies the existence of a power imbalance between various actors' ability to effectively engage in the policymaking process. In the next subsections, I will discuss why it was important for the COs to act together and form alliances in response to the characteristics of the wider stakeholder environment.

## *2.2. COs' act independently and in coalitions*

Aside from collaborating with ALCS, SoA also solicited support for its policy campaign from the Writers' Guild of Great Britain (WGGB) and from the Creators' Rights Alliance (CRA). WGGB formally lent its backing to SoA by adding its name and logo to the open letter that SoA published to the members of the Publishers Association in January 2016.<sup>346</sup> This letter intended to publicly put pressure on publishers by outlining the problems that authors were facing and linking them to the contracts offered by publishers. The letter's authors emphasised their wide base of support with the following concluding message: 'We don't stand alone in our commitment to fairer book contracts. The C.R.E.A.T.O.R. initiative is supported by the Creators' Rights Alliance. [...] The International Authors Forum has agreed the

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<sup>344</sup> 'Ten Principles for Fair Contracts' (International Authors Forum)  
<<http://internationalauthors.org/wp-content/uploads/IAFs-Ten-Principles-for-Fair-Contracts.pdf>> accessed 08 February 2017. SoA employed Twitter hashtags #fairterms and #betterbookcontracts to disseminate its campaign and these IAF principles.

<sup>345</sup> See Chapter 3, section 1.5.3.

<sup>346</sup> Open Letter from the Society of Authors (n 337).

attached principles which we fully support. Between them these organisations represent hundreds of thousands of individual creators.’<sup>347</sup>

CRA is a cross-industry alliance that brings together the major organisations representing copyright creators.<sup>348</sup> It took a number of steps to back SoA’s calls for action.<sup>349</sup> For one, the alliance had written a letter to Edward Vaizey MP, at the time Minister of State for Culture and the Digital Economy, addressing the problem of unfair contracts.<sup>350</sup> The letter referred to a meeting which had apparently taken place between CRA and the Minister where the latter had inquired about the policies CRA was advancing with regard to creators’ unfair contracts. Consequently, CRA’s letter went on to elaborate on SoA’s C.R.E.A.T.O.R. campaign. CRA also coordinated the launch of an online website dedicated to the issue of improving creators’ contracts.<sup>351</sup>

These accounts illustrate that the COs in question do not act alone when they attempt to influence copyright policy but rather through partnerships, coalitions and alliances. More precisely, COs appear to take unilateral action while at the same time acting together with other industry organisations. This is evidenced by the fact that on several occasions, ALCS and SoA put forward joint policy documents, while still taking unilateral action on the same issue.<sup>352</sup> One such example is their joint action

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<sup>347</sup> Ibid.

<sup>348</sup> ‘Member organisations and observers’ (Creators’ Rights Alliance) <<http://www.creatorsrights.org.uk/index.php?user=1&section=About+us&subsect=&page=Members&media=0>> accessed 08 February 2017.

<sup>349</sup> In a website news release from March 2016, SoA reported that CRA had adopted SoA’s C.R.E.A.T.O.R. campaign, which was also noted in *the Bookseller*, see ‘C.R.E.A.T.O.R. Campaign for Fair Contracts – Update’ (SoA, 15 March 2016) (n 279); Katherine Cowdrey, ‘SoA seeks new law to protect authors’ (*The Bookseller*, 7 March 2016) <<http://www.thebookseller.com/news/soa-seeks-new-law-protect-authors-323847>> accessed 08 February 2017.

<sup>350</sup> Letter from the Creators’ Rights Alliance to Edward Vaizey MP (16 November 2015) <<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/CRA-Contracts-letter-to-Ed-Vaizey-MP-2015.pdf>> accessed 08 February 2017.

<sup>351</sup> ‘Fair Terms for Creators’ <[www.fairtermsforcreators.org](http://www.fairtermsforcreators.org)> accessed 20 February 2017.

<sup>352</sup> A recent example of this are two briefings produced with regard to the Digital Economy Bill: ALCS and SoA, ‘Digital Economy Bill’ (Briefing) (September 2016) <<http://www.alcs.co.uk/Documents/Submissions/e-lending-and-the-digital-economy-bill-final.aspx>> accessed 09 February 2017 and ALCS and SoA, ‘Joint Briefing on the Digital Economy Bill’ (September 2016) <<http://www.alcs.co.uk/Documents/Submissions/20160927->

through the open letter to The Publishers Association. This occurred alongside SoA's own campaigning efforts and SoA's and ALCS' joint submission to the draft report on the implementation of the Information Society Directive (2001/29/EC). Interview data also substantiated this feature of COs' behaviour in policy. In this regard, my SoA respondent noted:

Governments count numbers very, very irritatingly. If you put in something which is from 100 000 writers, they'll give it exactly equal weight to something from one writer. They'll say: 'We've had two responses.' They say that they don't but I think that they do. So we tend to try and send in separate responses, as well as an overarching response with all the detail. Of course, they're more likely to read mine in detail but they also look at weight of numbers.<sup>353</sup>

Along similar lines, a respondent from ALCS also explained:

I always think that it's better if organisations can get together but they should do two things in my opinion. One is, we should do joint statements, and the other one is, we should still send our own in [...] because, you know, the one thing that, as far as I understand, is if an MP or an MEP receives one piece of paper, they kind of look at it and put it on the side, whereas if they receive a number of them, it's like: 'Oh, we might have an issue here, let's have a look into it.'<sup>354</sup>

What becomes clear is that the motives pursued by COs in taking both independent and joint policy action are the same as those documented by Mahoney in her exploration of coalition building, which I discussed in chapter 3.<sup>355</sup> COs rely on coalitions for generating volume, weight in numbers, and wider support. By collaborating and forming coalitions, they aim to signal to policymakers that their cause and position enjoys the support of a large and varied group of actors. In other words, they seek to send policymakers cues about the desirability of a certain policy option.<sup>356</sup>

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Society-of-Authors-ALCS-digital-economy-b.aspx> accessed 09 February 2017. Both are signed by ALCS and SoA but one is explicitly disseminated as a 'joint' briefing while the other appears to have been prepared by ALCS.

<sup>353</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>354</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

<sup>355</sup> See Chapter 3, section 1.5.3.

<sup>356</sup> Ibid; Mahoney (n 158) 368-369, 375.

This CO behaviour is in reaction to the environment within which these COs operate, as well as to internal challenges that individual organisations face. The characteristics that evoke the need to join with others, to amplify a given policy desire and to compensate individual resource shortages relate to inter-stakeholder dynamics. Specifically, they relate to the conflictual nature of issues in copyright policy, the existence of opposing interests and countervailing evidence, as well as to the need to be heard among a multiplicity of actors who compete for the attention of policymakers. The internal challenges facing organisations, on the other hand, are generally more specific to trade unions than to CMOs, and contribute to the power imbalance of the actors involved in copyright policy. Essentially, trade unions unite with other industry players to compensate for their own challenges and limitations in taking policy action. Such challenges may arise due to smaller resource allocations for policy participation and mandate constraints, as discussed above.

The following subsections will focus on the noted aspects of inter-stakeholder dynamics.

### ***2.3. The stakeholder environment***

To begin with, there appears to be a link between actors' formation of ad-hoc coalitions and the extent to which certain policy issues are contested.<sup>357</sup> In the context of creators' contract terms, the policy debate was marked by opposing views from other stakeholders who were challenging the cause advanced by the COs. Contradictory evidence about the state of the publishing industry was being fed to policymakers. This rendered the potential evidence-base for policy development inconclusive and the eventual policy outcomes unclear and unpredictable. Finally, COs shared a policy environment with many other important and influential interest

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<sup>357</sup> Such a link has previously been considered by a number of scholars, including Mahoney (n 158) 371; Marie Hojnacki, 'Interest Groups' Decisions to Join Alliances or Work Alone' (1997) 41 (1) *American Journal of Political Science* 61; William P Browne, 'Organized Interests and Their Issue Niches: A Search for Pluralism in a Policy Domain' (1990) 52 (2) *The Journal of Politics* 477, 496.

groupings, whose silence on the contract terms issue possibly diluted COs' policy demands and weakened their prospect of success.

### 2.3.1 *Opposing views and interests*

The Publishers Associations' (PA) response to the open letter issued by SoA illustrates the existence of opposing views on the matter of creators' contract terms. PA's at the time chief executive, Richard Mollet, commented:

Publishers share the frustration of the author community that it is increasingly difficult for authors to make a decent living from their writing. However, we locate the principal source of this problem not in the contractual relations between publisher and author but in deeper market factors.<sup>358</sup>

The Publishers Association denied the existence of a connection between the contractual terms governing the relationship of authors and publishers and the deteriorating situation of authors. Instead, the PA referred to factors, such as margins being squeezed across the whole supply chain, the competition books were facing from other entertainment media, and the presence of more writers overall as reasons for authors' struggles. These points were rebutted by James McConnachie, editor of SoA's journal *The Author* and board member of ALCS, in an article he wrote for *the Guardian*.<sup>359</sup> He argued that publishers' margins had not decreased by 29% like authors' and that irrespective of there being more writers, quality had always been hard to find, even in a buyers' market.

### 2.3.2 *Countervailing evidence*

The diverging views among stakeholders in the publishing industry could also be seen in the evidence that was communicated to policymakers. On the one hand, SoA pointed to the EU study and the ALCS commissioned research into authors' earnings. It made the case that the deteriorating situation of authors had a negative impact on the industry altogether. In particular, SoA's policy briefings described authors'

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<sup>358</sup> 'The PA responds to SoA open letter on author contracts' (The Publishers Association, 07 January 2016) <<http://www.publishers.org.uk/policy-and-news/news-releases/2016/the-pa-responds-to-soa-open-letter-on-author-contracts/>> accessed 09 February 2017.

<sup>359</sup> McConnachie, 'Publishers should pay authors as much as their other employees' (n 336).

difficulty in obtaining a proper return for their professional work as a 'barrier to growth'.<sup>360</sup> Onerous contract terms could 'stifle creativity and growth' and a fairer environment for creators was necessary in order to 'stimulate the creative economy'. In contrast, the PA drew policymakers' attention to evidence that the state of the publishing industry was healthy and thriving. In May 2016, the association published a press release according to which 2015 had been a strong year for the publishing industry, which had grown to £ 4.4bn.<sup>361</sup> The website statement reported growth in relation to physical books, academic journal publishing, school books, and audiobook downloads.

Unlike the evidence relied on by SoA, which had been conducted by independent academics and was freely available, the figures cited by the PA were taken from the organisation's own Statistics Yearbook which, according to the association itself, was 'the industry's annual authoritative analysis of the performance of the publishing sector.'<sup>362</sup> A copy of the yearbook was not freely available online but could only be purchased from the PA website, which is why I did not engage with this data source for my research. Without reviewing the data or methodology that led to the reported findings, it is not possible to draw any conclusion on the extent to which such evidence meets IPO's general criteria of being clear, verifiable or peer-reviewed.<sup>363</sup> Nevertheless, PA's reliance on such evidence is evocative of the problems that Hargreaves and Harker have previously alerted to.<sup>364</sup> Much of the existing empirical evidence in IP is held privately and presented to policymakers as 'lobbynamics', i.e. in a form that supports the interests of the respective stakeholders who bring such evidence to the fore. Yet, according to a journal publication by an economist within the IPO, despite the problems associated with such 'grey literature' or 'lobbynamics',

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<sup>360</sup> SoA and ALCS, 'Briefing Paper: Unfair Contract Terms: February 2014' (n 276) 1.

<sup>361</sup> 'Strong year for UK publishing industry as it grows to £4.4bn' (The Publishers Association, 13 May 2016) <<http://www.publishers.org.uk/policy-and-news/news-releases/2016/strong-year-for-uk-publishing-industry-as-it-grows-to-44bn/>> accessed 09 February 2017.

<sup>362</sup> Ibid Notes to Editors 2.

<sup>363</sup> UK IPO, 'Guide to Evidence for Policy' (2014) (n 105).

<sup>364</sup> See Chapter 3, sections 1.2 and 1.4. See also Hargreaves (n 4) para 2.13; Harker (n 8) 45-46.



the estimates and figures that are presented to policymakers in such ways are widely believed.<sup>365</sup> Indeed, two days after the publication of PA's statement on the publishing industry, Edward Vaizey MP, who at the time was Minister of State for Culture and the Digital Economy, linked to PA's press release with the following tweet: 'Strong year for UK #publishing industry as it grows to £4.4bn'.<sup>366</sup>

The above example shows that the copyright policy landscape within which COs operate and seek to further their causes is not only characterised by opposing views but also by contradictory evidence in support of these views. In such an environment, it is certainly possible that the existence of countervailing messages and evidence could detract weight from the claims made by COs. One ALCS respondent expressed concern that this was indeed the case:

BBC have the sort of figure for the contribution of say, you know, the publishing and TV sectors to the economy – they are as healthy as they ever were really. So politically, you're thinking, well one organisation is telling me writers are struggling and they're critical to the creative economy, my stats are telling me that the sector they are contributing to is doing really well.<sup>367</sup>

With this in mind, the outcomes of copyright policy can be as unclear and unpredictable as the pool of evidence that feeds into the policy process. Arguably, the more inconclusive the evidence base itself is, the more scope there may ultimately be for industry organisations to exercise influence over policymakers. This is where the ability to organise and act through coalitions and wider alliances comes into play as a strategy to amplify specific policy desires.

### **2.3.3 Silent powers**

Alongside the ad-hoc coalition that formed around creators' contract terms between SoA, CRA, ALCS and WGGB, the copyright policy landscape is also characterised by

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<sup>365</sup> Benjamin H Mitra-Kahn, 'Copyright, Evidence and Lobbyonomics: The World after the UK's Hargreaves Review' (2011) 8 (2) *Review of Economic Research on Copyright Issues* 65, 67, 77, 83.

<sup>366</sup> Twitter Post by Edward Vaizey (10:56AM, 15 May 2016)

<<https://twitter.com/edvaizey/status/731906179866210304>> accessed 09 February 2017.

<sup>367</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

the existence of formally established networks such as the Alliance for IP or the British Copyright Council (BCC).<sup>368</sup> Neither of these two influential actors formally backed the cause advanced by the COs or actively contributed to policy on this issue. Rather, both BCC and the Alliance for IP remained silent on the matter, despite the fact that both ALCS and SoA are, at least, member organisations of the BCC. Given the wide range of stakeholders represented by both umbrella organisations, including organisations representing the interests of publishers, neither organisation could formally take a side, either way, on whether legislating for fairer contract terms for creators was necessary.

It is possible that the silence of these big players could have weakened and diluted the cause advanced by the COs or, at the very least, put its urgency and importance for the industry into question. Ultimately, the UK government has not taken decisive steps that would indicate its intention to legislate on the matter of creators' contract terms although this is a matter of national law, rather than EU law, as is evidenced by the differences in various Member States' copyright and contract frameworks that the EU contract study documented.

Causality between this lack of legislative action and the lack of support from actors like the BCC could not be established. However, it is reasonable to argue that, for a number of reasons, the behaviour of such umbrella organisations and the positions that they advance in policy could send particularly strong signals to policymakers. For one, the participation of these networks in policy can indicate to policymakers that stakeholders represented within these networks have worked out their differences in viewpoints before approaching policy officials. Consequently, the position advanced through the network is one that has the backing of the whole industry and could thus be supported by the legislature.<sup>369</sup> Furthermore, given the extensive membership lists of both BCC and the Alliance for IP, as well as the way in

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<sup>368</sup> BCC (n 23); Alliance for IP <<http://www.allianceforip.co.uk/members.html>> accessed 21 December 2016.

<sup>369</sup> Mahoney (n 158) 368.

which they describe the interests that they represent, policymakers could easily be left with the impression that they are in fact listening to everyone in the creative industries when they speak to these actors. Policymakers may assume that these actors put forward the collective view of what matters most to these industries. To illustrate, BCC describes itself in policy submissions as follows:

The BCC represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. [...] Some of our member organisations also represent amateur creators and performers. Our members also include collective rights management organisations which represent right-holders and which enable access to works of creativity.<sup>370</sup>

Judging by this description, it seems that no part of the creative industries is left out from BCC's membership. The Alliance for IP creates a similar impression in the way it presents the interests that it speaks for.<sup>371</sup> Having actors like the BCC or the Alliance for IP be active on some copyright issues and passive on others, could raise doubts about the validity and importance of the latter, ultimately influencing policymaker focus and prioritisation.<sup>372</sup> The silence of the big players could ultimately influence

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<sup>370</sup> BCC, 'IPO Call for Views: Modernising the European Copyright Framework' (06 December 2016) (Response to call for views) <[http://www.britishcopyright.org/files/5714/8111/6697/BCC\\_response\\_to\\_IPO\\_Call\\_for\\_views\\_061212.pdf](http://www.britishcopyright.org/files/5714/8111/6697/BCC_response_to_IPO_Call_for_views_061212.pdf)> accessed 09 February 2017.

<sup>371</sup> Alliance for IP, 'IPO Call for Views: Modernising the European Copyright Framework' (09 December 2016) (Response to Call for Views) <[http://allianceforip.co.uk/ipocallforviews\\_dec2016.pdf](http://allianceforip.co.uk/ipocallforviews_dec2016.pdf)> accessed 09 February 2017.

<sup>372</sup> While BCC remained silent on the question of creators' contract terms, it produced a number of policy documents during the same period, including on the regulatory environment for platforms and online intermediaries, the enforcement of IPRs, and on collective rights management. For a list of all publicly available documents for the years 2015 and 2016 see 'Documents – 2015' (BCC) <<http://www.britishcopyright.org/policy/documents/2015/>> accessed 09 February 2017.

the issues that policymakers themselves choose to prioritise and focus on. In Chapter 8, I will discuss how the participation of multi-stakeholder alliances possibly added momentum to another policy issue (the so-called 'value gap') that ultimately made its way onto policymakers' legislative agenda.<sup>373</sup>

#### **2.4. Conclusion**

This section considered additional features of COs' behaviour in policy, their relationships with other stakeholders, as well as some characteristics of the environment within which they operate. I showed that COs collaborate on policy issues and form coalitions with other actors based on mutual interests and dependence. They also do so in order to compensate for potentially weaker individual power in shaping policy. The need to form coalitions and ensure that a greater fraction of industry organisations backs a certain policy desire is also a consequence of the fact that COs operate in an environment populated by many actors and interest constellations. On the issue of contract terms, I evidenced the existence of antagonistic actors, opposing the views advanced by the COs, as well as of countervailing evidence. A further challenge to COs' policy demands was the silence and non-participation of influential formal alliances like the BCC and the Alliance for IP. Taken together, these factors render the potential policy outcomes unpredictable. In particular, the lack of a clear message that could emerge from the body of evidence also enables industry organisations to exercise a greater influence over policymakers.

### **3. Discussion and conclusions**

#### **3.1. COs' involvement in policy**

##### **3.1.1 Awareness raising of copyright law's effects in practice**

The preceding analyses of COs' engagement in policy on the issue of creators' contract terms have shown that COs perform an important role in raising policymakers' awareness of problems and shortcomings in the way copyright law impacts creators in practice. They also advance possible solutions to address the

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<sup>373</sup> See Chapter 8, section 1.

identified problems. On the UK level of policymaking, COs' calls for action did not move the government to legislate on the matter in accordance with SoA's campaign. In its response to the 2013 EU consultation on modernising the copyright framework in 2013, the government addressed the EU's question, whether action on an EU level was necessary to ensure the fair remuneration of creators, by commenting that the matter fell under national contract law and was thus beyond the scope of the EU's consultation.<sup>374</sup> However, SoA's voice and policy work contributed to the calls for legislative action on creators' contracts that were being echoed by the wider community of authors' organisations on an EU level. In particular, the Authors' Group, a network of authors' organisations, issued a statement calling upon the EU Commission to act in order to ensure that better protection of authors against unfair contracts was guaranteed at EU level.<sup>375</sup>

The collective efforts of various authors' organisations on an EU and national level ultimately reached the European Commission, which issued a communication in December 2015, highlighting the importance of the issue of fair remuneration for authors and performers when they license or transfer their rights and how this may be affected by differences in bargaining power.<sup>376</sup> The Commission also acknowledged organisations' policy contributions: 'Mechanisms which stakeholders raise in this context include the regulation of certain contractual practices, unwaivable

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<sup>374</sup> Commission, 'Public Consultation on the review of the EU copyright rules' (05 December 2013) (Consultation Document)

<[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf)> accessed 09 February 2017; see, in particular, questions 72-74 of the document. The UK government's response is available from <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)> accessed 09 February 2017. See p 10 in particular.

<sup>375</sup> European Composer and Songwriter Alliance, European Federation of Journalists, European Writers' Council, Federation of Film Directors, and Federation Screenwriters Europe, 'Statement from the Authors' Group on: EC Communication "Towards a Modern, More European Copyright Framework"' (10 December 2015) <<http://www.scenaristes.org/pdfs/20151209%20authors%20group%20statement.pdf>> accessed 09 February 2017.

<sup>376</sup> Commission, 'Towards a modern, more European copyright framework' (Communication) (n 121) 10.

remuneration rights, collective bargaining and collective management of rights.<sup>377</sup> In the end, the Commission did include provisions regulating the contractual situation of creators in a proposal for a Directive on copyright in the Digital Single Market, which it issued in September 2016.<sup>378</sup> Specifically, the Commission proposed the introduction of a transparency obligation on authors' and performers' contractual parties, as well as a contract adjustment mechanism to the benefit of authors and performers.

### ***3.1.2 Power through numbers and power imbalance***

The case of COs' involvement on the issue of fair contract terms in the UK suggests that COs are more likely to succeed in their cause and maintain policymakers' attention with respect to a particular policy desire if they represent a large fraction of the stakeholder environment. They would thereby signal to policymakers that their issue is both relevant and urgent to their respective industry sector. This is due to the fact that their environment is populated by a large number of stakeholders, who are driven by different interests and priorities which compete for policymakers' attention and agenda. For this reason, COs approach policymakers both independently, as well as through coalitions, in order to add weight and importance to their cause.

However, there are a number of intra- and extra-organisational factors, which define and impose limitations on the behaviour of COs in policy. Intra-organisational factors like an organisation's resource allocation and resource capacity, mandate, or self-concept can shape the degree to which a certain organisation is dependent on other industry actors to advance a given issue, as well as the extent to which it can proactively create political urgency around that issue. A comparison of the configuration of these factors within ALCS and SoA revealed that ALCS appears to be in a stronger position to take policy action on copyright law than SoA. It commands greater resources, more of which can potentially be allocated to policy activities in

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<sup>377</sup> Ibid.

<sup>378</sup> Commission, 'Proposal for a Directive on copyright in the Digital Single Market' COM (2016) 593 final, Articles 14-16.

this field as its mandate is narrower compared to that of SoA. It is able to tap into and mobilise various networks and fora for support thanks to its organisational role within them, in this case the All-Party Parliamentary Writers' Group and the International Authors Forum. Finally, it also has the resources to commission evidence, which it can use to strengthen its policy position.

### *3.2. Plurality of actors, antagonistic forces, and countervailing evidence: the impact on copyright policy*

The extra-organisational factors that inform COs' policy behaviour and impose limits on the extent to which these COs' policy desires may be heard and taken into account relate to the existence of opposing interests and countervailing evidence to those advanced by the COs. Furthermore, the stakeholder environment is made up of a large number of interest constellations. Some form ad hoc on specific issues, like the fair contract terms movement fuelled by SoA, ALCS, CRA and WGGGB. Other networks exist irrespective of specific policy issues. Examples of these are the CRA, BCC, and the Alliance for IP. Given this plurality of actors and their varying interests, some may choose to support, oppose or abstain from acting on a certain issue. This induces a lack of clarity and overview of the relevance, importance, as well as justification for a specific policy desire. Moreover, the existence of evidence that both corroborates and potentially weakens a certain cause adds noise and confusion to the policy space. Consequently, policy outcomes become less predictable.

The conflictual nature of issues and evidence that feed into the copyright policy process means that there is more scope for industry organisations to actively exercise influence over policymakers and to steer the direction and outcomes of copyright policy. In light of the power imbalances, as well as antagonistic relationships between different industry stakeholders, there are two implications for policies in this area.

- (1) On the one hand, more powerful, resource-rich and proactive organisations could have a greater influence over the way agendas for legislative action are set. Conversely, it also means that weaker and less powerful organisations may depend on the support of other partners in order to advance a certain issue. This

may mean that the needs of those represented by such organisations remain underrepresented in policy discussions and legislative action, particularly if weaker organisations cannot solicit sufficient support for their cause. It may also mean that weaker organisations face a need to modify or adapt their positions in order to accommodate the aims and interests of their coalition partners. Perhaps, the fact that policy participation is a risky and resource-heavy endeavour without certainty as to the eventual outcome may deter organisations, smaller than those studied, from participating in the policy process in the first place. I will explore some of these interrelated issues further in chapters 5 and 6. However, beyond the insights that can be gleaned from my own research into COs, more targeted research into the possible effects of these circumstances will be necessary to definitively establish how these factors correlate.<sup>379</sup>

- (2) The fact that the copyright policy environment is marked by antagonistic stakeholders and antithetic evidence could impact the very substance of legislative and policy outcomes. It is likely that whatever policy desires are ultimately acted upon by the lawmaker will be watered down as a result of advocacy and lobbying by the opposing side. Moreover, policymakers themselves may be interested in developing laws that embody a compromise between different positions in an attempt to keep all parties content. This has been observed by Bakardjieva-Engelbrekt, Litman and Horten, according to whom, lawmaking institutions seek to reconcile the interests of the wide variety of old and new stakeholders.<sup>380</sup> Arguably, the European Commission's proposal for tackling the problem of unfair contract terms is itself an example of the institution's attempt to strike a compromise between the views of conflicting stakeholders. As I noted above, the proposal only addresses a number of existing contractual problems: the lack of transparency in relation to the exploitation of a

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<sup>379</sup> See Chapter 8, section 2.4.1.

<sup>380</sup> Bakardjieva Engelbrekt (n 8) 78; Litman (n 2) 278, 299, 311; Horten, *A Copyright Masquerade* (n 8) 28.



work and the lack of contract adjustment clauses allowing authors to request additional remuneration from their contractual party if a specific work does far better than expected. Other established contractual problems which COs have lobbied for, such as the need for an obligation to exploit each format and medium for which rights have been transferred or licensed, or the overly wide scope, or overly long duration of contracts, have not been addressed in the Commission's proposal. In this manner, the Commission has ensured that it acts on the policy desire of one stakeholder group without impinging on the interests of another too extensively<sup>381</sup> – in other words – it has sought to strike a compromise.

### *3.3. Conclusion*

This chapter considered how COs from the publishing industry engaged with policymakers on the issue of creators' contract terms in reaction to concurrent legislative and policy developments in the UK and in the EU. It identified differences in the roles played by SoA and ALCS in the context of the COs' campaign for fair contract terms. These differences were ascribed to distinctions in the organisations' mandates, functions, and resources. The chapter illustrated that these factors influence the way COs act in policy and that the actions of different COs are not uniform. The chapter also identified and discussed numerous features of the copyright policy environment and their effects on copyright policy. It shed light on existing power imbalances between individual actors, as well as on conflicting interests between different stakeholders. Furthermore, it studied the organisation of individual COs into networks and coalitions, and considered how the positioning of such entities on a given issue could likely influence the odds of that issue's advancement in policy. The following chapter will consider and compare how the

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<sup>381</sup> While publishers' organisations were not the focus of this research, it is conceivable that these also have and put forward valid arguments for some of the contractual practices sustained by publishers; such arguments may relate to publishers' need for more certainty as they take the risk to market and sell the works of authors.

studied COs from the music industry tackled broadly the same copyright issue: that of unfair contract terms in relation to musicians.



## Chapter 5

### Unfair Contract Terms in the Music Business – A Different Approach

Unreasonable content in the contractual terms between creators and copyright exploiters, which is associated with creators' weaker bargaining power, does not only permeate the publishing industry. In fact, the contractual issues discussed in the previous chapter, such as the scope, duration, unfair remuneration and territorial application of contracts, apply across a number of creative industries, including music, as has been corroborated by recent studies on creators' and performers' contractual dealings and remuneration.<sup>382</sup> In this chapter, I will consider how the creators' organisations (COs) from the music sector – the Musicians' Union (MU) and the Performing Right Society (PRS) – dealt with the issue of contract terms. I will demonstrate the difference in policy objectives and approaches of both of these organisations compared to those of the Society of Authors (SoA) and the Authors' Licensing and Collecting Society (ALCS) discussed in the preceding chapter. In this respect, the present chapter will advance the theme of diversity in approaches, positions, and priorities among the studied COs. It will also further expose the power dynamics and imbalances between different actors and the costs and benefits of taking policy action with other industry organisations.

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<sup>382</sup> The EU contracts study (n 46) was in fact focused on the contractual dealings of creators and publishers/producers in the fields of music, print and visual arts, as well as in relation to audio-visual works. However, the study excluded contracts concluded by performers or other related rights holders (see p 6 and 19). Another study on the contractual framework of authors *and* performers in the music and audio-visual sectors is Europe Economics, Lucie Guibault, Olivia Salamanca and Stef van Gompel, *Remuneration of authors and performers for the use of their works and fixations of their performances* (Publications Office of the European Union 2015).

This chapter is divided into four sections. Section 1 will focus on the MU. It will explore how this organisation viewed the problem of contract terms and the action that it took to address this problem on a policy level. I will reveal a certain inconsistency between the CO's account of the causes rendering performers to receive an unfair share from their work and the way the CO attempted to tackle this issue. In this context, I will consider the apparent disconnect between the work of the MU in the music industry and that of SoA in the publishing industry. I will argue that the distinction in approaches and priorities regarding creators' and performers' interests potentially weakened each of the two causes advanced by SoA and the MU, *the statutory regulation of contract terms* and *a statutory modification of the making available right*. The simultaneous lobbying by creator unions on these two issues with an overarching aim of improving the remuneration of creators and performers brought these distinct issues into competition as it likely led to them being perceived as policy *alternatives*.

Section 2 will compare the policy positions of the MU and PRS on the issue of contract terms based on interview data and several copyright consultation responses by these two organisations. This will reveal distinct differences in the positions of the two COs. The MU openly condemned some of the terms being offered to its members by record labels while PRS adopted a neutral position, abstaining from policy contributions on this matter. I will link these differences to the interests represented within the memberships of the two organisations. In doing so, I will demonstrate that aside from mandate, self-concept and resources, which were considered in the previous chapter, the membership composition of an organisation is another important factor that influences the way a CO behaves on a given issue and how it engages in relevant policy work.

Section 3 will shift the main focus back to the MU and consider intra-organisational challenges such as membership and mandate that posed limitations on the ability of this CO to effectively engage in policy. I will also discuss extra-organisational challenges, including antagonism between different stakeholders, wider inter-

stakeholder dynamics, the existence of contradictory policy evidence, and the role of large multi-stakeholder organisations. In the context of contract terms, these challenges affected the MU more so than PRS, given the neutrality of PRS on the matter. However, while the problems considered were challenges from the perspective of the MU, they are at the same time important determinants that characterise the power dynamics and imbalances in existence in the copyright policy environment. To this end, they affect not only the MU but also PRS, as well as other industry organisations.

Section 4 will present a broader discussion of the main insights into CO behaviour gleaned from this and the preceding chapter. In particular, I will discuss the need for more awareness and caution among scholars and IP reviewers of differences between similar stakeholders. Furthermore, I will consider the effect of power imbalances on the way a CO acts in policy. This section will also expound the problem of the costs and benefits associated with taking policy action with other industry partners or through multi-stakeholder alliances.

## 1. Unfair contract terms and MU's different priority for policy action

### 1.1. *Defining the problem*

Features of UK copyright law that created the prerequisites for the development of unbalanced contractual terms between creators and copyright exploiters were already discussed in chapters 3 and 4.<sup>383</sup> In brief, the governing principle of freedom of contract, coupled with copyright law's lack of provisions regulating the content of exploitation contracts and the level of remuneration payable to authors and performers, as well as creators' and performers' weaker negotiating position vis-à-vis publishers and producers led to the proliferation of unreasonable contractual terms that disadvantage individual creators and performers.<sup>384</sup>

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<sup>383</sup> See Chapter 3, section 3.1 and Chapter 4, section 1.1.

<sup>384</sup> Europe Economics, Guibault, Salamanca and van Gompel, *Remuneration of authors and performers* (n 382) 32f; D'Agostino (n 261) 121.

Before going into detail on some of the particular problems identified by the MU, it is important to note that unlike the previous chapter, which offered insight into the problems facing authors (i.e. creators) through an exploration of the work of SoA and ALCS, this chapter looks at contract terms from the perspective of the MU and PRS. Given that the MU is primarily a union of performing musicians, the issues raised by this organisation therefore relate to the contractual dealings of musical performers. PRS, on the other hand, generally referred to contract terms issues affecting composers and songwriters.

Similar to creators who enjoy exclusive rights in their works under copyright, performers have exclusive rights in their live performances, which they can contractually license or transfer to producers or other third parties. These include a reproduction right, a distribution right, a rental and lending right, and a making available right (MA right).<sup>385</sup> They also have equitable remuneration rights.<sup>386</sup> In the case of such statutory remuneration rights, the use of a work can take place without the prior authorisation of the performer, provided that remuneration for the respective use is paid. Especially economically significant is the right to claim equitable remuneration from the owner of copyright in a sound recording of a qualifying performance<sup>387</sup> where the sound recording has been played in public or communicated to the public, except by way of 'making available'.<sup>388</sup>

From interview data, a World Intellectual Property Organization (WIPO) Magazine article, as well as one particular copyright consultation response by the MU, it became clear that MU's main point of contention with regard to performers' contract terms was that performers were not seeing fair returns from the exploitation of their works, especially from digital exploitations. Linking these two things is justified since the level of remuneration that a performer earns depends, among other things, on the

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<sup>385</sup> Ss 182A, 182B, 182C, 182CA CDPA 1988. For an overview of performers' rights see Deming Liu, 'Performers' rights: muddled or mangled? Bungled or boggled?' (2012) EIPR 374.

<sup>386</sup> Ss 182 D (1), 191 G (1) CDPA 1988.

<sup>387</sup> S 181 CDPA 1988.

<sup>388</sup> S 182D CDPA 1988.

contract negotiated with the producer in exchange for a transfer of the performer's exclusive rights.<sup>389</sup>

Three contractual problems were particularly highlighted as causes for performers' inequitable remuneration:

- (1) royalty deduction clauses which pre-dated digital modes of music production and distribution were being applied to digital forms of exploitation;
- (2) general issues, such as the scope, duration, and territorial application of contracts, were inappropriate;
- (3) record companies were assuming ownership over the MA right in relation to older contracts that pre-dated the very introduction of this right.

#### ***1.1.1 Application of clauses designed for physical products in the digital environment***

The MU outlined three examples of how 'outdated' clauses had been applied to the digital context of music production and dissemination in its response to the European Commission's Public Consultation on the review of the EU copyright rules from December 2013.<sup>390</sup> Under title V on fair remuneration of authors and performers, question 73 of the consultation document asked: 'Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?' Responding to this question, the MU highlighted the inappropriate application of contractual royalty deductions for (a) packaging, (b) breakages, and (c) distribution in the digital environment, noting that these should be outlawed.

- (a) Packaging deductions, the MU explained, were introduced in the late 1950's to share the costs between performer and label for any packaging beyond a simple paper record sleeve; for instance, the recording company would take

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<sup>389</sup> Europe Economics, Guibault, Salamanca and van Gompel, *Remuneration of authors and performers* (n 382) 5.

<sup>390</sup> Commission, 'Public Consultation on the review of the EU copyright rules' (05 December 2013) (Consultation Document) (n 374). All published responses are available from 'Public Consultation on the review of the EU copyright rules' (European Commission) <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)> accessed 07 February 2017.



25% from the royalty rate if the artist<sup>391</sup> wanted a photo or a gold embossed gatefold album sleeve. According to the MU, packaging deductions were later employed by the record industry to share the burden of the format shift from vinyl to CD. However, these deductions were still being widely applied to digital formats where there was no packaging.

- (b) Breakage clauses, on the other hand, introduced a flat reduced royalty rate which was applied by record companies to the artist's share in order to provide for the eventuality of a broken vinyl. According to the MU, this deduction was also still widely applied to the artist's share for digital formats.
- (c) Distribution clauses contained a flat deduction from the artist's royalty rate so they would share the costs of transport of vinyl records / CDs to and from retailers. However, such deductions still applied to digital formats where a file was sent directly from the mastering engineers to the record label and then uploaded onto iTunes or another digital aggregator.

### ***1.1.2 Scope, duration, and territorial coverage of contracts***

In addition to the problem that record labels were taking a cut from performers' royalties on digital exploitations for costs like manufacture, storage, transportation, and distribution, which they did not incur to the same extent as with physical CDs,<sup>392</sup> one MU respondent touched on other contractual problems:

Then, of course, you've got deals that are too long because they tie the artist up for too long a period of time or they are looking for too much material from the artist. And then you've got deals that are for too great a territory, when, you know, if the record company is signing you for the world and all they've ever done is release records in the UK, then that's not fair.<sup>393</sup>

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<sup>391</sup> The term 'artist' is used to describe a performer signed to a record label. Other performing musicians, who are not signed to a record label are known as session musicians.

<sup>392</sup> Horace Trubridge, 'Safeguarding the income of musicians' (2015) 2 WIPO Magazine 8, 10.

<sup>393</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

### ***1.1.3 Assumption of ownership of the making available right***

In terms of the scope of rights transferred, the same MU respondent emphasised one particular practice as especially harmful to performers. This practice referred to the way producers had assumed ownership of the MA right in contracts that pre-dated the very introduction of this right through broad generic clauses prescribing the transfer of ‘all rights existing now or that come into existence in the future in all territories of the world, the universe and its satellites’ to the record company.<sup>394</sup>

The MA right was introduced in the 1996 WIPO Copyright Treaty and the 1996 WIPO Performances and Phonograms Treaty in appreciation of the fact that new rights needed to be adopted in order to cover the emerging range of technologies.<sup>395</sup> It is enshrined in s 182CA CDPA 1988 for the performer’s right in a qualifying performance. The significance of this exclusive right lies in the fact that it encompasses all forms of interactive internet distribution, video-on-demand, streaming, etc.<sup>396</sup> In assuming ownership of this right, record labels could exploit performers’ works through new digital dissemination channels without having to re-negotiate new terms or levels of remuneration with artists for the use of digital rights. The MU respondent, quoted above, condemned this practice and commented:

I want to know how two contracting parties can enter into a contract and one of those parties could assume ownership later for something that didn’t actually exist at the time?<sup>397</sup>

### ***1.2. Emphasis on older contracts***

According to the MU, artists on contracts signed many years ago are more affected by the contract terms problem than newer artists. One MU respondent commented:

Well, I think actually the issues aren’t so much with current deals. I mean, obviously there still are issues, I mean you will still see record

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<sup>394</sup> Trubridge (n 392) 10.

<sup>395</sup> Article 8 WIPO Copyright Treaty and Articles 10, 14 WIPO Performances and Phonograms Treaty.

<sup>396</sup> Europe Economics, Guibault, Salamanca and van Gompel, *Remuneration of authors and performers* (n 382) 26.

<sup>397</sup> Interview with Horace Tribridge, Assistant General Secretary Music Industry, MU.

contracts being offered that have got breakages and returns on digital.<sup>398</sup>

It is possible that the MU emphasised the problems in older contracts because these are the ones that lack specific provisions for digital exploitations, with the result that clauses applicable to physical products are being unreasonably applied to the digital environment.<sup>399</sup> One MU respondent also justified focussing on older contracts with the argument that older catalogue is still more widely enjoyed than works by newer artists.

[...] the problem is that the record companies will only ever talk to you about the deals they're doing now or the deals they did last week. They won't talk about the deals they did 10 years ago or 15 years, 20 years ago, 25 years ago, 30 years ago. And that's the bulk of material, still, that is being downloaded and streamed, you know. The hits of today, of course, they are very popular and there's massive streaming and downloading going on there but actually when you look at, I mean for instance, Universal told our, the Swedish Union that over 50% of the material that was being streamed on Spotify in Sweden was old catalogue.<sup>400</sup>

The idea that newer artists are less affected by record industry contract terms was also expressed in an interview with another MU respondent. However, overall, it seems that this distinction is not particularly helpful or necessary in light of the evidence that inappropriate terms permeate performers' contracts across the board. For instance, a 2015 EU study into musical performers' remuneration did not distinguish between old and new contracts but noted that many record contracts still lacked specific clauses on exploitation via online distribution channels.<sup>401</sup> This may either refer to the old contracts still in existence or to the lack of clarity and specificity in newer contracts.<sup>402</sup> Irrespective of this, the study made a number of recommendations addressing issues that were identified as pertaining to all contracts

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<sup>398</sup> Interview with Horace Tribridge, Assistant General Secretary Music Industry, MU.

<sup>399</sup> Tribridge (n 392) 10.

<sup>400</sup> Interview with Horace Tribridge, Assistant General Secretary Music Industry, MU.

<sup>401</sup> Europe Economics, Guibault, Salamanca and van Gompel, *Remuneration of authors and performers* (n 382) 77.

<sup>402</sup> Ibid.

in general. These included limiting the scope for transferring rights for future works and future modes of exploitation and specifying remuneration for individual modes of exploitation.<sup>403</sup> Moreover, I was not able to find data to validate whether over 50% of material streamed on Spotify in Sweden was indeed old catalogue. Such data is privately held and not publicly available. However, on the weekly list of most streamed songs on Spotify from 26<sup>th</sup> December 2015, out of 50 songs not one song was released before January 2012.<sup>404</sup>

### 1.3. Summary

While the MU recognised that both older and newer artists were affected by inappropriate contractual terms, the organisation accentuated the problems attached to older contracts, which lacked specific provisions on digital exploitations. In essence, the problems identified by this CO – the inappropriate application of outdated clauses in the digital environment, the scope of rights transfer, the duration and geographical scope of contracts, and the assumption of ownership of the making available right – relate to questions of reasonableness of contract terms and are all a consequence of the UK copyright law framework. Under this framework, the transfer of rights for future forms of exploitation is not prohibited. There are no provisions regulating the amount of remuneration payable to authors, or an *in duo pro auctore* interpretation rule that could be used to interpret the scope of certain clauses narrowly and, more reasonably, to the benefit of the performer.<sup>405</sup>

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<sup>403</sup> Ibid 142.

<sup>404</sup> 'Spotify's Most Played All-Time [Updated Weekly] | Most Streamed | Top Played | Major Lazer | Drake | Justin Bieber | 200Mil+' (Spotify) <<https://play.spotify.com/user/1221028518/playlist/2YRe7HRKNRvXdJBp9nXFza>> accessed 26 December 2016; 'List of most streamed songs on Spotify' (Wikipedia) <[https://en.wikipedia.org/wiki/List\\_of\\_most\\_streamed\\_songs\\_on\\_Spotify](https://en.wikipedia.org/wiki/List_of_most_streamed_songs_on_Spotify)> accessed 26 December 2016.

<sup>405</sup> According to Europe Economics, Guibault, Salamanca, and van Gompel, *Remuneration of authors and performers* (n 382) 35-37, some Member States regulate the scope of rights transfer by requiring that future forms of exploitations are sufficiently detailed, others rely on case law, while others apply the '*in dubio pro auctore*' principle to ensure a degree of reasonability in copyright contract law. In some Member States, rights relating to future forms of exploitation can only be transferred for uses that are either known or foreseeable at the time the contract is concluded.

#### 1.4. MU's approach: a different policy priority

In light of the fact that the MU clearly recognised several problems associated with the contract terms between performers and record companies, it is somewhat surprising that the organisation did not take policy action to address those *underlying factors* (relating to the UK copyright framework) that allowed such contractual practices to exist. Instead, the MU focussed on and prioritised another issue for lobbying: the introduction of an equitable remuneration right attached to the performer's exclusive right of making available. Specifically, the MU decided to join a Europe-wide campaign (Fair Internet for Performers Campaign) for the modification of the making available right through an addition of a performer's unwaivable right to equitable remuneration in the event that the MA right was transferred to a phonogram producer.<sup>406</sup> The remuneration would be payable by the user, i.e. the digital service (like Spotify) exploiting the MA right, and would be managed collectively by performers' CMOs. One MU respondent explained:

Well, what we're pushing for at the moment with this Fair Internet campaign is for the making available right to remain an exclusive right, partly, but also to become an equitable remuneration right as well [...] Now, the beauty of the equitable remuneration right, which I've written about in that paper I gave you [the WIPO Magazine article] is that it's unassignable. And that's what makes it the jewel in the crown for performers.<sup>407</sup>

The change sought by the MU models the provision already in existence with regard to authors' and performers' rental right.<sup>408</sup> While this policy desire is indeed aimed at raising the levels of remuneration of performers, the issue advanced by the MU does not address the root of the problem. Horace Trubridge, Assistant General Secretary of the MU argued in his article for the WIPO Magazine that exclusive rights, like the

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<sup>406</sup> The Fair Internet for Performers campaign is spearheaded by the International Federation of Musicians (FIM), of which the MU is a member, the Association of European Performers' Organisations (AEPO-ARTIS), the International Federation of Actors (EuroFIA) and the International Artists Organisations (IAO): 'Fair Internet for Performers: The issue' (AEPO-ARTIS, FIA, FIM, IAO) <<https://www.fair-internet.eu/description/>> accessed 30 December 2016.

<sup>407</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

<sup>408</sup> S 93B (1), (2) CDPA 1988 and s 191G (1), (2) CDPA 1988.

MA right in its current form, are not as valuable to performers as statutory remuneration rights because they are assignable and thus subject to the terms of performers' contracts with the record company. The desired equitable remuneration right, on the other hand, would remain with the performer.<sup>409</sup> However, the problem is arguably not in the fact that the MA right is assignable but in the *conditions* under which it is assigned, as pertaining to the remuneration agreed, the duration of the contract, the ability to re-visit the terms of the contract in the case of new modes of exploitation, etc. Similarly, the policy desire of attaching an equitable remuneration right does not address the problem, highlighted by the MU, of phonogram producers assuming ownership of the MA right in the first place. That problem would arguably be better addressed through legislation that regulates the circumstances under which future rights or modes of exploitation, not yet in existence when a contract is being concluded, can be transferred.

The MU presented detailed comments on the need to attach an equitable remuneration right to the MA right in various policy submissions.<sup>410</sup> During this time it did not take significant policy action to address the bigger issues affecting performers' remuneration relating to the substance of the contracts that performers conclude with phonogram producers. One exception to this is MU's submission to the EU copyright consultation discussed above. On that occasion, the MU was prompted by the European Commission's targeted question to comment on whether certain clauses in contracts should be prohibited. In that context, the organisation provided examples of such clauses and further stated that contracts needed to be

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<sup>409</sup> Trubridge (n 392) 9.

<sup>410</sup> MU expounded on this issue in MU, 'MU response to the All Party Intellectual Property Group's inquiry into "The Role of Government in Protecting and Promoting Intellectual Property' (March 2012) paras 18-22. A copy of this submission is annexed to Musicians' Union, '35<sup>th</sup> Delegate Conference, Midland Hotel, Manchester, 23-24 July 2013, Executive Committee's Report and Agenda' which was made available to me by the MU during my fieldwork. MU also presented its position with regard to the making available right in MU, 'A response to the Green Paper on the online distribution of audiovisual works in the European Union; opportunities and challenges towards a digital single market' (2011) <[http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual/non-registered-organisations/musicians-union\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/musicians-union_en.pdf)> accessed 09 February 2017.

clear, transparent and accountable. However, I did not find evidence that the MU had proactively raised this point with policymakers in the UK within the scope of other consultations, or as a stand-alone initiative.

Some interview data, along with an article in *the Guardian*<sup>411</sup> indicated MU's intention to test the validity of a record label's assumption of ownership of the MA right through legal action. In this respect, the MU had considered following the example of the Finnish Musicians' Union, which had provided one of its members with legal aid in a case against Universal Music Finland, where precisely this assumption and subsequent exploitation of digital rights by the record label had been successfully challenged.<sup>412</sup> However, at the time of writing, there is no evidence suggesting that the MU has taken steps in this direction. At the same time, the union continues to campaign for changes to the MA right.<sup>413</sup>

The most likely reason why the MU prioritised policy change on a niche issue such as the MA right, rather than the broader problem of shortcomings in the framework governing copyright exploitation contracts, is that it considered potential efforts to change the latter futile. I asked one MU respondent whether they felt strongly about extending the scope of the Unfair Contract Terms Act 1977, which is something that the SoA had lobbied for. The MU official responded:

Well, it's not something that we pursue [...] we operate [...] in a sort of landscape whereby freedom of contract has always been the case,

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<sup>411</sup> Rhian Jones, 'Musicians' Union to sue major labels over veteran acts' digital rights' (*the Guardian*, 20 May 2015) <<https://www.theguardian.com/media/2015/may/20/musicians-union-major-labels-digital-rights>> accessed 09 February 2017.

<sup>412</sup> For details on the Finnish case, see 'Finnish Musicians' Union: Universal Loses Market Court Case over Internet Music Rights' (*Business Wire*, 26 March 2015) <<http://www.businesswire.com/news/home/20150326005359/en/Finnish-Musicians%27-Union-Universal-Loses-Market-Court#.VVXIKos-BmA>> accessed 09 February 2017; Tim Ingham, 'Universal loses digital artist rights case in Finland – more major lawsuits to follow?' (*MusicBusiness Worldwide*, 27 March 2015) <<http://www.musicbusinessworldwide.com/universal-loses-landmark-digital-rights-case-in-finland/>> accessed 09 February 2017.

<sup>413</sup> 'Performers call on European legislators to ensure fair treatment of performers in the digital world' (MU, 9 December 2016) (News publication) <<http://www.musiciansunion.org.uk/Home/News/2016/Dec/Performers-call-on-European-legislators-to-ensure>> accessed 30 December 2016.

you know. I mean, [...] one of the fundamental tenets, I suppose, of contract law in the UK, is [that] you've got two parties, [who] know exactly what they're dealing with and if they sign – they sign, no matter how unfair it might be. If the court's convinced that both parties knew what they were doing, then it doesn't matter how unfair the terms are. The terms exist. We don't have, we don't have any kind of experience of the State intervening in contract law.<sup>414</sup>

When I put the same question to another MU respondent, the answer on whether extending the UCTA 1977 was something the MU felt strongly about was: 'Yeah, we'd like to strengthen copyright contract law in many ways and yeah, we'd support that.'<sup>415</sup> Formally, however, the MU did not do so.

### *1.5. Disconnect between unions in the music and publishing industries*

MU's general view that policy action aimed at the regulation of copyright exploitation contracts is ineffective on a UK level, is perhaps understandable given the UK's strong tradition of freedom of contract. However, this particular instance of the MU choosing another policy cause over the regulation of contracts is different in light of events and policy developments that were unfolding both in the UK and in the EU during the same time that the MU prioritised the MA right matter.

The MU was advocating a proposal to restructure the MA right on an EU level through its international partners, The International Federation of Musicians (FIM), The Association of European Performers' Organisations (AEPO-ARTIS), and other umbrella organisations. Yet, at the same time, in the UK SoA was spearheading a campaign precisely for the kind of legislative change that would have addressed the root causes of the problems that the MU too had identified in the context of performers' contract terms.<sup>416</sup> What is more, as discussed in the previous chapter, there were good reasons why COs in the publishing industry had begun to lobby for contract terms legislation at that particular time. For one, EU policymaking institutions had themselves shown interest in creators' and performers' contractual

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<sup>414</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

<sup>415</sup> Interview with John Smith, General Secretary, MU.

<sup>416</sup> See Chapter 4, section 2.1.



dealings as evidenced by the research they had commissioned into these issues, as well as by some of the questions posed in the European Commission copyright consultation document. Furthermore, the findings and policy recommendations of this EU research offered an authoritative and valid base upon which COs could lobby for the regulation of copyright exploitation contracts. Moreover, these publications occurred at a time when, on an EU level, the Commission was in the process of drafting legislative proposals to modernise the European copyright rules. On a UK level, the government was working on statutory initiatives, like the Consumer Rights Act 2015 and on revisiting the UCTA 1977, both of which could have been 'tweaked' to accommodate changes improving the contractual situation of creators and performers in the UK. In other words, if there was a time when the UK lawmaker was more likely to take regulatory action on contract terms for creators and performers, then that time was coinciding with MU's choice to prioritise the MA right.

In this context, MU's decision to focus on the re-structuring of the MA right, rather than to add its voice to the parallel policy movement in the UK publishing industry and in the EU seems counterintuitive. Had individual COs in the music industries collaborated with those in publishing, then their policy cause would have stood out as a *common* cause and thus gained additional weight. The problem of unfair contract terms could have been elevated to one of relevance across multiple creative industries and been accompanied by a policy option that enjoyed wider cross-industry support. Certainly, this idea would have been communicated more strongly if individual unions had added their weight to the same cause, *alongside* the Creators' Rights Alliance, of which they were members. Instead, perhaps unwittingly, unions in the music and publishing sectors were fragmenting the interests of creators and performers, creating an impression of dividedness and disagreement over what action merited priority among the greater copyright stakeholder group comprising creators and performers.

It is, however, worth mentioning that it is in fact unclear whether SoA had itself reached out to individual unions from other creative sectors for support and

collaboration. Perhaps, it had decided to only work with partners from its own industry – out of habit, due to pre-existing partnerships and better channels of communication, or due to a lack of coordination. However, it can at least be assumed that unions, including the MU were aware of SoA’s campaign as they were, at least formally and collectively, backing the C.R.E.A.T.O.R. campaign as members of the Creators’ Rights Alliance, albeit not individually. My interactions with individual MU respondents, however, did leave questions open as to the extent to which the MU was actively informed and engaged in the activities of the CRA, at least on that particular issue.

### **1.6. Conclusion**

The fact that organisations across several creative industries advanced different proposals in relation to the overarching problem of authors’ and performers’ inequitable remuneration was ultimately acknowledged by the European Commission. In its December 2015 communication, it outlined that mechanisms raised by stakeholders in the context of the issue of authors’ and performers’ fair remuneration *included* ‘the regulation of certain contractual practices, unwaivable remuneration rights, collective bargaining and collective management of rights.’<sup>417</sup> It seemed unlikely that the Commission would act on all of these options, as it appeared to be considering them as alternative routes to addressing one particular problem. Moreover, given that all these issues were being lobbied for, it was equally unclear and uncertain *how* the Commission would go about the problem of contract terms and remuneration. Rather than presenting a unified front, COs seemed to be disagreeing on what the more urgent or important course of action was. The seeming lack of consultation and collaboration between COs in the music and publishing industries had led to the fact that two policy options, which in principle both had their merits and could further the interests of creators and performers in different ways, were now competing for policymakers’ attention. In fact, they were weakening

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<sup>417</sup> Commission, ‘Towards a modern, more European copyright framework’ (n 121) 10.

one another's prospects of success in so far as they were being perceived as policy alternatives.

## **2. Division in policy positions and engagement between the MU and PRS**

Studying COs' engagement with the issue of unfair contract terms across two creative industries not only revealed differences in the policy approaches and recommendations prioritised by the trade unions in music and publishing but also between the way unions on the one hand and collective management organisations on the other (CMOs) approached this issue.

In the preceding chapter, we saw differences between SoA and ALCS in the extent to which each of these organisations was publicly spearheading lobbying on legislation that would regulate contract terms. The differences observed were linked to the distinct functions and mandates underpinning SoA's and ALCS' activities. The analysis of MU's and PRS' policy positions and behaviour on contract terms, however, produced even more significant disparities in the way the two music industry COs positioned themselves on this issue. MU took a firm stand, as outlined in the previous section, whereas PRS maintained a decidedly neutral position. The factors at play causing this disparity were not only the different functions of the two COs but also the different composition of MU's and PRS' memberships.

### ***2.1. A comparison between the MU and PRS***

The positions of MU and PRS on the issue of creators and performers contract terms were mapped out on the basis of interview data and policy submissions made by the two organisations. Among the latter, I compared several consultation responses drafted by PRS and the MU. I particularly studied the COs' submissions to the European Commission consultation on the review of the EU copyright rules from 2013, as well as their submissions to the European Commission Green Paper on the online distribution of audiovisual works in the European Union from 2011.

#### ***2.1.1 MU: taking a stand on contract terms***

MU's position, as discussed in the previous section, was articulated clearly, both in interviews with key MU respondents, as well as in the organisation's consultation

responses, and in the WIPO magazine article written by the organisation's Assistant General Secretary. From these sources, it was clear that the MU recognised the existence of unfair contract terms as a cause for performers' inequitable remuneration and traced this problem back to the way recording companies had drafted and interpreted the contracts that they concluded with performers. MU did not shy away from commenting on unfair contract terms, or giving examples of such terms, and openly accused phonogram producers of the terms and royalties that they offered to performers.

### *2.1.2 PRS: neutrality as a way of handling conflicting interests*

In the case of PRS, the first indication that the organisation was being cautious around the subject of contract terms came from the way one PRS respondent approached my question on PRS' involvement with the issue in an interview:

[...] you would have to talk to representatives of composers or songwriters if you wanted to find out more about where difficult contractual practices lie. [...] I just think you should talk to them because it's not something that PRS is active on. We have to be a little bit neutral because we have publishers and writers in membership. And we also have broadcasting companies with publishing arms in membership. And I'm well aware that some groups of writers are active and concerned but it's not something that PRS is directly, directly involved in.<sup>418</sup>

PRS aimed to be neutral, to refrain from positioning itself in discussions around contract terms, due to the fact that it formally represents both music creators and publishers, i.e. the two stakeholder groups whose interests potentially collided on this particular issue.<sup>419</sup> The PRS respondent recognised the possibility of a clash of

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<sup>418</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>419</sup> Note that, as indicated earlier in this chapter, PRS manages rights in musical works, rather than in sound recordings. Its members are therefore (not necessarily) performing musicians, but rather songwriters and composers, as well as music publishers. In this respect, the relevant contractual relationship from the perspective of PRS is that between composers/songwriters and publishers, not that between music performers and phonogram producers.

interests and attempted to outline the organisation's internal approach to resolving such challenges.

I mean, undoubtedly there will be examples of songwriters who don't think their music publisher gave them the right deal but it's not, it is actually not anything PRS can be involved in. [...] So but, you know, for every story that there might be one who thinks that they've been-, they've had a bad treatment from the music publisher, there'll be another writer who knows that they would never have success without their music publisher. Does it lead to differences of opinion on policy issues? We, we talk all the time to make sure that we have common positions.<sup>420</sup>

In this particular case, having a common position meant not adopting a position at all. Neutrality seemed to be the compromise approach that respected the interests of both stakeholder groups represented within the PRS membership. This approach was consistently followed by PRS in its written policy submissions. For instance, in its response to the European Commission Green Paper on the Online Distribution of Audiovisual Works in the EU from 2011, PRS stated up front: 'We have answered only the questions on which we can offer a view.'<sup>421</sup> Consequently, PRS did not respond to questions 16 and 18, which asked whether an unwaivable right to remuneration for audio-visual authors or performers was necessary in order to guarantee proportional remuneration for online uses of their works after they had transferred their MA right. Similarly, PRS also did not engage with question 20 of the consultation, which asked whether there were other means to ensure the adequate remuneration of authors and performers. These were the most obvious questions under which the CMO could have addressed issues around contracts.

Similarly, PRS offered an elaborate, yet indefinite response to question 72 of the 2013 EU Consultation on the review of the EU copyright rules, which sought views on the

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<sup>420</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>421</sup> PRS for Music, 'EC Green Paper on the Online Distribution of Audiovisual Works in the EU, Comments to EU Commission' (16 November 2011) <[http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual/non-registered-organisations/prsformusic\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/prsformusic_en.pdf)> accessed 09 February 2017.

best mechanism for ensuring that authors and performers would receive an adequate remuneration for the exploitation of their works and performances:

The copyright framework has provided a stable basis for the EU's creative industries which has, in turn, allowed the sector to grow and create jobs across the EU. However, as the manner in which rights are exploited is evolving it is pertinent for the EU authorities to investigate whether the current framework is continuing to ensure individual authors, composers and creators are rewarded adequately whenever and wherever their rights are used. The copyright framework must support a sustainable ecosystem for the creation of, and investment in, new works and in supporting services that supply and distribute new services to consumers.

PRS for Music will not comment on the questions which concern contract but we are aware of Commission work in this area in support of composers, authors and performers.

Finally, question 73 of the same consultation document asked whether there was a need to act at the EU level, for instance to prohibit certain clauses in contracts. On this question, PRS checked the box 'no opinion'. It is worth recalling that this is the same question, in relation to which the MU had presented its three examples of clauses through which phonogram producers were reducing royalties for digital exploitations of performances. While it is understandable why PRS was unable to take a stand on this issue due to conflicting interests within its membership, this reason may not have been immediately obvious to policymakers.

## *2.2. Conclusion*

The evidence considered above clearly shows that PRS' position and approach to the contract terms problem was distinctly different from that of the MU, as well as of ALCS, which was discussed in the previous chapter. PRS' need to remain neutral on this issue was mandated by the different interests represented within its membership, which can ultimately be traced back to the very composition of this membership. Differences among COs in the same industry, coupled with the cross-industry interest divides emerging from the analyses of this and the preceding chapter, reinforce the sense of complexity in copyright policy, resulting from such a granularity of interests and policy positions.

### 3. Challenges affecting COs' policy work and defining features of the copyright policy environment

The exploration of COs' behaviour and approach to the contract terms problem in the music industry shed light on a number of intra-organisational and extra-organisational factors that have an impact on the extent to which these organisations can effectively further their policy goals. From the perspective of the COs, these factors can be described as 'challenges'. However, extra-organisational factors are also defining attributes of the copyright policy environment within which the studied organisations are a mere subset of all actors. This section will delve into the power dynamics and imbalances between different individual organisations, as well as between COs and large multi-stakeholder industry networks.

#### *3.1. Intra-organisational challenges*

Two intra-organisational factors that affect the strength and authority, and ultimately the power of the MU to advance a given policy position, as well as the extent, to which it can commit resources to this activity, are the organisation's membership and mandate. These factors also influence PRS' policy behaviour, albeit in different ways. Section 2 exemplified how PRS' membership composition plays a decisive role in the way the organisation navigates certain issues in policy. I will consider this challenge in more detail in chapter 7 within the context of a CMO-specific issue regarding the implementation of the collective rights management Directive because it is an instance where PRS did in fact take a decisive stand.<sup>422</sup> That chapter will also discuss the link between PRS' political power and its pivotal function (related to its mandate) in the copyright system.<sup>423</sup> In the following paragraphs, I will therefore primarily focus on membership and mandate-related issues as they affect MU's ability to participate in policy. Ultimately, the issue of contract terms is inherently more central to the activities of a trade union than to those of a CMO.

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<sup>422</sup> See Chapter 7, section 2.3, in particular section 2.3.2.

<sup>423</sup> See Chapter 7, section 1.

### 3.1.1 Membership

The membership-related challenge for the MU derives from members' level of political involvement. Traditionally, unions were founded through the activism of groups of workers that came together in order to gain strength through unity and fight for more rights and better working conditions collectively.<sup>424</sup> Consequently, much of these organisations' leverage in exercising their regulatory and representative roles has usually come from the ability of the union's management to organise the membership, for instance in strike action, and exert pressure through a wide base of support from within the organisation. However, the MU faces challenges in mobilising its members to support its campaigning and lobbying activities. Consequently, it struggles to add weight to the messages that it communicates to policymakers in this way. This is due to the fact that a large majority of the union's members are not politically engaged, which is likely linked to the changing role of trade unions, discussed in chapter 3.<sup>425</sup> Today, unions attract members primarily through the individual services that they offer, and not because of members' activism or identification with the trade union movement.<sup>426</sup> This idea was supported by one MU respondent:

I think, and this is potentially not a view that's shared by all my colleagues but - and it might sound a bit negative - but I think we have to be realistic about why a lot of our members are members. And that is because of the benefits and services; and they use us as an insurance service, so they want public liability insurance, the instrument insurance, or they want contract advice, or they want somebody to do the chasing when somebody breaks a contract or doesn't pay them, or taking somebody to a small claims court, or whatever it might be. And so a lot of, a certain proportion of our members, I guess, are not activists. Well, a lot of them, most of them aren't activists, they're not. They're potentially not unionists. They are using certain of our benefits and services and they might not be a member for ideological reasons.<sup>427</sup>

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<sup>424</sup> See Chapter 3, sections 2 and 2.1.

<sup>425</sup> See Chapter 3, sections 2.2.2 and 2.2.3.

<sup>426</sup> See Chapter 3, section 2.2.3; Bacon and Storey (n 222) 43-44, 56; Ewing (n 177) 6-7.

<sup>427</sup> Ben Jones, Ben Jones, National Organiser for Recording and Broadcasting, MU.



A change in the motives leading musicians to join the MU was also documented by Cloonan, who emphasised that in recent years a key motivation has been the fact that membership gives access to certain services.<sup>428</sup> The MU itself clearly aims to appeal to potential new members by highlighting its various services rather than trade union ideals of collectivism.<sup>429</sup> Yet, the fact that lack of activism among the membership presents a challenge to the MU's activities is visible in the fact that, as reported in the Autumn 2015 edition of the MU's journal, *The Musician*, the union adopted a motion to encourage activism during its 36<sup>th</sup> MU Delegate Conference.<sup>430</sup> Moreover, the quote chosen by the organisation to head the 'campaigns' section of its website reads: 'I think the MU is a very positive force. I wish that more people would use it to its full potential.'<sup>431</sup>

It seems that the disengagement of members with their unions, the greater emphasis on these organisations' services rather than their regulatory and representative roles may indeed have led to a certain weakening of these roles. Certainly, more activism, more proactive engagement and support by the MU's members on issues of policy could add weight and authority to the union's representative role. The voice of a myriad of individual performers would be more difficult to miss or ignore than that of a union's management. Moreover, this voice may be especially necessary to empower the MU on a policy issue like contract terms, where it is already representing the weaker of two parties and standing up against more powerful organisations whose members, the record companies, have an advantage in the current UK copyright framework. This intra-organisational factor therefore sets up

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<sup>428</sup> Cloonan, 'Musicians as Workers' (n 7) 14.

<sup>429</sup> The MU's homepage <<http://www.musiciansunion.org.uk/>> accessed 09 February 2017 opens with a large headline reading 'Join a bigger band and see the benefits' and below lists numerous benefits, including insurance policies, legal advice, access to an online profile and teacher services.

<sup>430</sup> Musicians' Union, 'Motion 19: Encouraging Activism Guidance' (Autumn 2015) *The Musician* 49 <[http://www.musiciansunion.org.uk/Files/Publications/2015/Musician-Journal/The-Musician-\(Autumn-2015\)](http://www.musiciansunion.org.uk/Files/Publications/2015/Musician-Journal/The-Musician-(Autumn-2015))> accessed 09 February 2017.

<sup>431</sup> Hannah Miller, Moulettes, see 'Our current campaigns' (MU) <<http://www.musiciansunion.org.uk/Campaign>> accessed 09 February 2017.

the MU with a less powerful starting point to influence policy than that enjoyed by other actors.

### 3.1.2 Mandate

In the context of MU's changing role, as reflected in the reasons that drive members to join the organisation, the already broad mandate<sup>432</sup> of the union needs to be re-interpreted in light of the importance that members attach to each of the different functions that the union performs. Inevitably, this process is closely tied to the way the organisation will choose to allocate its available resources and energy. These considerations are not dissimilar to the ones contemplated in the previous chapter in relation to SoA.<sup>433</sup>

Like SoA, the MU spreads the resources allocated to its regulatory and representative roles across a range of policy areas beyond copyright, while simultaneously also engaging with multiple issues relevant to performers in the copyright and neighbouring rights domain.<sup>434</sup> Furthermore, in implementation of its mandate, it maintains a range of services for its members, organises skills and training workshops, negotiates collective bargaining agreements, and much more. The breadth of issues affecting performers' working conditions on which the MU must take action in accordance with its mandate, from copyright and neighbouring rights, to arts funding cuts and music venues regulation, coupled with the union's other areas of activity, inevitably impact the extent to which the organisation can invest itself in any one given issue of copyright policy.

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<sup>432</sup> Rule I.2 of the MU Rules (Revised 23 July 2015)

<<http://www.musiciansunion.org.uk/Files/Guides/MU-Rules>> accessed 09 February 2017 formally sets out the MU's mandate. The list of objects includes the organisation of musicians and the regulation of their relations with employers and employers' associations; improving members' status and remuneration; advancing their knowledge and skills; offering financial assistance; promoting equality through various means, and more.

<sup>433</sup> See Chapter 4, section 1.3.3.

<sup>434</sup> See a list of issues that the MU engages with at 'Our current campaigns' (MU) <<http://www.musiciansunion.org.uk/Campaign>> accessed 09 February 2017.

### *3.2. Extra-organisational challenges*

In addition to the intra-organisational challenges identified above, COs' participation and impact in copyright policy are also affected by the wider industry and policy environment. In the next subsections, I will focus on the antagonism between the MU and organisations representing the recording companies, in order to illustrate the existence of power dynamics between different copyright stakeholder groups. I will discuss the problem of the biased presentation of evidence and implicit contradiction of messages communicated to policymakers and then consider the role of multi-stakeholder umbrella organisations like UK Music and the British Copyright Council (BCC).

#### *3.2.1 Inter-stakeholder dynamics*

Interview and documentary data delivered insight into key challenges that the MU would have faced if it had decided to lobby the government for the regulation of contract terms and to make the argument in policy circles that recording companies were treating performers unfairly and remunerating them disproportionately for the exploitation of their performances. For one, the union would have had a strong opponent in the face of the BPI, the trade body representing the interests of UK phonogram producers. Moreover, the MU would not have succeeded in securing the support of influential industry alliances, such as UK Music or the British Copyright Council. At the same time, in music, as in publishing, the ability to demonstrate to policymakers that a significant subset of industry stakeholders backs a certain policy option, was considered to increase that option's prospect of success.

##### **3.2.1.1 Antagonism between the MU and record labels**

MU's relationship with record companies on the topic of contract terms was difficult and antagonistic. This was evidenced by the way several MU respondents reflected on their interactions with record labels during the interviews. In the context of recording companies' practice of reducing performers' royalties from digital uses, one MU respondent noted:

So you then start to see that they're *really crooked*, that it's not a case of a little bit of, you know, bending the rules or clever accounting. It is downright high-way robbery, that's what it is.<sup>435</sup>

Another respondent said the following with regard to conversations between the MU and record labels on the reasonableness of contract terms:

But there's never been, as far as I know, they have never been particularly fruitful discussions. They have a stated position, we have a stated position [...]<sup>436</sup>

The divergence of interests and viewpoints on contract terms between the MU and organisations like the BPI is significant in several respects. First, it indicates that policymakers would potentially be exposed to contradictory messages and policy submissions on this issue. Furthermore, it makes it less likely that the MU would be able to present similarly impactful data to corroborate its own position, as there may be a bias towards the more positive data presented by the record industry. Such data may also enjoy wider publicity. Finally, antagonism between the MU and recording companies also has a bearing on the way other industry networks will position themselves on the contract terms issue. All of these factors may well have influenced MU's decision to let the bigger and more contested issue of regulating contract terms rest and to instead lobby for a less radical change. The MA right matter would only indirectly affect the interests of phonogram producers since the proposed remuneration right would be payable by the services that exploit this right, such as Spotify, or Deezer.<sup>437</sup>

### 3.2.1.2 Different messages and evidence communicated to policymakers

The notion that policymakers may be subject to contradictory messages first presented itself in my interview data. According to several MU respondents, record

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<sup>435</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

<sup>436</sup> Interview with Isabelle Gutierrez, Head of Government Relations and Public Affairs, MU.

<sup>437</sup> 'Fair Internet for Performers: The issue' (n 406); Spotify <<https://www.spotify.com/uk/>> accessed 07 February 2017; Deezer <<https://www.deezer.com/en/>> accessed 07 February 2017.

companies objected to MU's assertions that the contracts they were offering to performers were unfair in conversations between the two sides.

Now when you talk to the record labels about their deals, they will say: 'we're doing great deals, look at what we're paying out. We're actually paying out more to artists now than we've ever done before compared to the money we're bringing in.' And they've got the IFPI, [the] BPI who produces figures to show that.<sup>438</sup>

Another MU respondent expressed the same idea:

[...] they [record companies] say that artists get rewarded enough, that they don't want to skew the market, they say it [the introduction of an equitable remuneration right attached to the transfer of the making available right] skews it the other way. So the artists will get a disproportionate reward. And I don't accept any of these arguments. They say that it's a new market still [for streaming], it's developing, year on year, artists get paid better. They also say that new artists do particularly well. And, actually, I don't dispute that, not particularly well, they do, it's okay, because the new contracts deal with Spotify and with streaming services. [...] they'll tell you in that sense that everything's fine. Everything's good. Artists are earning more money. They're getting more of a percentage of the income, why are you complaining?<sup>439</sup>

Ironically, in the same issue of the WIPO magazine, at the same time as the Assistant General Secretary of the MU was trying to communicate the message that policy needed to address a problem pertaining to performers' income streams from digital exploitation, IFPI's<sup>440</sup> Director of Licensing and Legal Policy was offering a positive recording industry perspective on streaming and copyright.<sup>441</sup> According to the IFPI, local subscription streaming data collected between 2009 and 2013 from three major music companies across 18 territories relating to payments made to locally signed

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<sup>438</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

<sup>439</sup> Interview with John Smith, General Secretary, MU.

<sup>440</sup> International Federation of the Phonographic Industry (IFPI) <<http://www.ifpi.org/>> accessed 09 February 2017.

<sup>441</sup> Lauri Rechardt, 'Streaming and copyright: a recording industry perspective' (2015) 2 WIPO 2.

artists indicated that artists' share of revenue had increased by 13%.<sup>442</sup> One of the conclusions drawn from this was that the present status quo of the business models underpinning streaming (which includes performers' contracts) had the potential to support a '**sustainable music industry where revenue and the benefits of growth are shared in a fair and balanced manner.**'<sup>443</sup> (emphasis added) Two important observations can be made on the basis of this conclusion, as well as on the general structure and content of the IFPI article:

(1) IFPI's view of the adequacy of the status quo is in stark contrast to that of the MU; yet, it has the ability to weaken MU's position through the data that it presents, as well as *the way* this information is presented.

(2) This article is evidence of Williamson and Cloonan's finding that some stakeholders in the music sector purposefully conflate the terms 'music industry' and 'recording industry' in order to overstate their case.<sup>444</sup>

These observations, which I expand on below, not only illustrate a case of power imbalance between different industry actors but also bare strategies that powerful actors use to further play to their strength.

(1) The message communicated by the IFPI is diametrically opposed to that presented by the MU and on which the union based its demand for policy action to ensure that more revenues reach performers. However, the IFPI has the ability to weaken the significance of the information communicated by the MU and call its veracity into question because its own figures present a story of an industry's success and growth, which appears more appealing to policymakers. Moreover, this presentation may well come across as more authoritative given that it is substantiated by numerical data and analyses

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<sup>442</sup> Ibid 7. The same results were also published in IFPI, 'IFPI Digital Music Report 2015: Charting the Path to Sustainable Growth' (2015) 20 <<http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>> accessed 09 February 2017.

<sup>443</sup> Rechartd (n 441) 7.

<sup>444</sup> See Chapter 3, section 1.4; Williamson and Cloonan, 'Rethinking the music industry' (n 8) 306.

which the MU did not, and could not, match through data of its own. The IFPI presents numbers on the trade value of the recording industry revenues, the millions of dollars generated from streaming services and percentages of growth in global industry revenues from subscription services and artists' shares compared to previous years. The advantage that the IFPI and, in the UK, the BPI, as well as CMOs, have over organisations like the MU is precisely this access to valuable data, including sales and licensing data, which is used to measure value and the economic significance of industry sectors. This data is highly valuable to policymakers, particularly those looking to develop policies for economic growth.<sup>445</sup>

Moreover, the way that the IFPI presents this data relates to what Mitra-Kahn describes as some stakeholders' 'rhetorical device'.<sup>446</sup> They set the stage for policymakers by presenting 'big numbers' and a big picture that answers the political question of how important and significant something is, in order to then advance one's own cause on the basis that one's activities are inherently linked to those numbers and the respectable status quo.<sup>447</sup> The evidence presented in IFPI's article is also consistent with Harker's findings, discussed in chapter 3, that the organisation presents information to accentuate industry growth.<sup>448</sup> It is therefore equally important to bear in mind the scholar's critique that data privately held and provided by the IFPI may be mediated, patchy and inconsistent, as it essentially enters the policy space with an agenda: to further the interests of the body controlling the flow of this data.<sup>449</sup>

According to Hargreaves, the presentation of 'lobbynamics' is not merely characteristic of the IFPI and BPI, but of copyright stakeholders in general.<sup>450</sup> In an

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<sup>445</sup> Schlesinger and Waelde, 'Copyright and cultural work' (n 142) 12 argue that IP policy is increasingly seem as a tool for stimulating economic growth.

<sup>446</sup> Mitra-Kahn (n 365) 77.

<sup>447</sup> Ibid.

<sup>448</sup> See Chapter 3, section 1.4.

<sup>449</sup> Harker (n 8) 45-46.

<sup>450</sup> Hargreaves (n 4) 6.

environment where policy should develop on the basis of evidence - information is power. And, indeed, in copyright policy, the presentation of information may contain an opportunity to influence. However, relevant and valuable industry information to policymakers is unevenly distributed across different industry stakeholders.

(2) In the example of the IFPI article under consideration, the way the record industry trade body plays to its own strength is precisely what Williamson and Cloonan documented in their article 'Rethinking the music industry', which I discussed in chapter 3.<sup>451</sup> The IFPI conflates the 'recording industry' and the 'music industry' and claims that the data and analyses it offers in fact bear significance and relevance for the whole 'music industry'. This is especially visible in the conclusion that the IFPI draws, which I directly quoted above, but also in phrasing, such as 'Over the past 15 years the music industry has changed radically. In most markets physical product sales have declined sharply, while revenues from digital services have grown rapidly.'<sup>452</sup> In this sentence, the example of change characterises the recording music market. Neither the example provided, nor the data that follows to corroborate it apply to markets for music publishing, instrument and audio makers, music promotion, live performance, or music education and training; yet these are all part of the larger music industry. The effect that the IFPI produces by misrepresenting the music industry is that by overstating its own importance and contribution, it presents itself and its data as being definitive and representative of a greater industry section than is actually the case, thereby demanding more of policymakers' attention.

By intensifying the notion of one music industry, on behalf of which the IFPI reports, this organisation makes the work of organisations like the MU that appear to purposefully focus on more niche issues more difficult. The MU has a more

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<sup>451</sup> See Chapter 3, section 1.4.

<sup>452</sup> Recharadt (n 441) 4.



challenging case to make to policymakers of why these should engage with papers, campaigns and policy proposals that only address issues pertinent to one small aspect of the music industry – performing musicians, when other actors claim to put forward matters of importance to the industry at large.

### *3.2.2 MU's evidence and UK Music's research: unevenness of media coverage and policymaker attention*

Incidentally, in 2012 the MU had actually commissioned research into musicians' earnings, which it reported on in a paper titled 'The Working Musician'.<sup>453</sup> The research comprised a UK-wide survey which received almost 2000 responses from MU members, coupled with semi-structured interviews and other documentary data. The report revealed that musicians' earnings were low, with 56% of those surveyed earning less than £20 000 per year and 60% reporting to have worked for free over the preceding 12 months.<sup>454</sup> However, apart from an online news piece revealing the research findings on the MU website and a reflection piece on a largely unfamiliar website, I found no evidence that this research had been communicated to or taken up by mainstream news media, or that it had indeed stirred a discussion among policymakers.<sup>455</sup> It is indeed unclear whether and to what extent the MU had disseminated this research to policy officials.

It may be that the MU tried to disseminate the research findings to policymakers but these findings were not met with interest. It may be that a lack of access to online media prevented the research from gaining more publicity. Or it may simply be a missed opportunity by the MU to generate more debate on the remuneration and contracts of performers. However, it is also possible that messages like the ones

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<sup>453</sup> DHA Communications, 'The Working Musician' (2012) (Study) <<http://www.musiciansunion.org.uk/Files/Reports/Industry/The-Working-Musician-report>> accessed 09 February 2017.

<sup>454</sup> Ibid 5.

<sup>455</sup> 'Low levels of pay for musicians revealed' (MU, 11 December 2012) <<http://www.musiciansunion.org.uk/Home/News/2012/Dec/Low-levels-of-pay-for-musicians-revealed>> accessed 09 February 2017; Louderthanwar, 'The Working Musician' (Louderthanwar, 12 December 2012) <<http://louderthanwar.com/the-working-musician/>> accessed 09 February 2017.

communicated by the MU were simply being overshadowed by more positive sounding evidence delivered and emphasised, not only from the record companies, but also from other parts of the music sector. For example, UK Music, the largest formally established network of music sector stakeholders in the UK, an umbrella organisation whose members include organisations representing record labels, music publishers, songwriters, composers, promoters, music venues and CMOs, published a study in 2015, called 'Measuring Music', with data collected from several of its members.<sup>456</sup> The very objective of the study was to highlight the economic significance of the music industry to the UK economy. Therefore, although it reported that a UK Music survey of musicians had revealed that 35% of musicians were not paying into pension schemes and that 21% had undertaken work for free during the previous year, these findings were not highlighted on page 2 of the report, which summarised its 'key findings'.<sup>457</sup> Instead, the report, and the report's opening, made by the then Secretary of State for Culture, Media and Sport John Whittingdale, focussed on the contribution of the UK music industry to the UK economy, on the jobs it created, and on the fact that this sector had outperformed the rest of the British economy by generating 5% growth.

This affinity of policymakers towards positive messages and figures of growth is also evidenced by the words of Matt Hancock MP, the Minister for Digital and Culture in his address to the BPI AGM: 'It is a huge pleasure to be here as the champion of music in Government. It's a great task [...] made easier by the incredible talent that *makes the sector such a great success story for the UK.*' (emphasis added)<sup>458</sup> The Minister referred to the figures published in the Measuring Music report. These were also widely reported by, among others, *MusicBusiness Worldwide*, *MusicTank*, and the

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<sup>456</sup> UK Music, 'Measuring Music: 2015 Report' (2015)

<[http://www.ukmusic.org/assets/general/Measuring\\_Music\\_2015.pdf](http://www.ukmusic.org/assets/general/Measuring_Music_2015.pdf)> accessed 09 February 2017.

<sup>457</sup> Ibid 2.

<sup>458</sup> 'Matt Hancock praises the music industry and reaffirms government support'

(Department for Culture, Media & Sport, UK Government, 7 September 2016) (Speech)

<<https://www.gov.uk/government/speeches/minister-for-digital-and-culture-addresses-the-bpi-agm>> accessed 09 February 2017.

BBC.<sup>459</sup> In light of such positive findings, it is less likely that the UK government would be inclined to interfere in the status quo and legislate for changes in contract terms or other mechanisms relating to the internal flow of revenue in the music business, so as to not distort the already positive trends reported for the sector at large.

The above example demonstrates the difference in the type of evidence produced by UK Music and the MU, as well as in the uneven media and policy attention given to evidence presented by these two actors.

### ***3.2.3 The role of formal industry networks like UK Music and the British Copyright Council***

The example offered in the previous subsection showed how several ministerial officials engaged with research produced by UK Music and chose to emphasise the positive messages that it conveyed, whereas MU's research seemingly remained unnoticed. UK Music holds more political power and influence than the MU, *precisely* because it is an alliance of many different and important stakeholders across the music sector. As such, the positions of UK Music send important signals to policymakers about what matters or affects the sector at large. The above example also clearly demonstrates that this formally established network of stakeholders enjoys more attention by policymakers and more publicity because of the information that it holds and produces, which includes trends and indicators that are of relevance beyond the music sector. These same considerations apply to other cross-industry or multi-stakeholder organisations, like the British Copyright Council or the Alliance for IP, as I discussed in the previous chapter.<sup>460</sup>

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<sup>459</sup> Tim Ingham, 'Labels generated 50% less money than live for UK economy last year' (*MusicBusiness Worldwide*, 5 November 2015) <<http://www.musicbusinessworldwide.com/labels-generated-50-less-money-than-live-for-uk-economy-last-year/>> accessed 09 February 2017; 'Measuring Music 2015' (*MusicTank*, 25 April 2015) <<http://www.musictank.co.uk/resources/industry-insight/measuring-music-2015/>> accessed 09 February 2017; Mark Savage, 'British music industry boosts economy by £4.1bn' (*BBC*, 5 November 2015) <<http://www.bbc.co.uk/news/entertainment-arts-34722928>> accessed 09 February 2017.

<sup>460</sup> See Chapter 4, section 2.3.3.

The existence of umbrella organisations like UK Music or the BCC is a product of the plurality and diversity of stakeholders and organisations with vested interests that exist in the music industry and, generally, in the creative industries.<sup>461</sup> The formation of such multi-stakeholder organisations is mandated by the need of individual stakeholders to develop formal communication channels with one another, but also in order to enable stakeholders to lobby more successfully, by presenting a unified front to policymakers on issues that are important to all the member organisations. In this respect, umbrella organisations formalise the practice that we already observed, in this as well as the previous chapter, of organisations acting in policy both independently and in coalitions. In the densely populated stakeholder environment of copyright policy, this is necessary in order to increase the impact, volume and weight of a certain policy demand. For such strategic reasons, the MU, for instance, acts both as a stand-alone organisation, but on a UK level also as a member of UK Music, the BCC, the Performers' Alliance, the Federation of Entertainment Unions, and as a member of the Artists, Managers and Performers Alliance (AMP).<sup>462</sup> Similarly, on a UK level, PRS is a member of the Alliance for IP, the BCC and the Creative Coalition Campaign.

The plurality described above adds to the complexity of the copyright policy environment and creates further prerequisites for the proliferation of issues, viewpoints, recommendations and calls for action that would compete for policymakers' attention and agenda. This is explained by the fact that the issues advanced by coalitions and umbrella organisations can generally only be issues on which all individual member organisations can have a common position, which often includes individual organisations modifying or compromising on their own original position.<sup>463</sup> Where this is not possible, as I discussed in the previous chapter, such organisations may refrain from adopting a position on a given issue in the first place.

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<sup>461</sup> See Chapter 3, section 1.5.2.

<sup>462</sup> This is not an exhaustive list as there are more industry alliances in existence and new ones form dynamically.

<sup>463</sup> Mahoney (n 158) 368-369.

In the same way that SoA could not solicit support from the BCC for its fair contract terms campaign, the MU could not avail itself of the support and backing of UK Music or the BCC for its making available right-related campaign and would similarly not have received support had it lobbied for statutory regulation of copyright exploitation contracts. Just as PRS could not position itself on the issue of contract terms because of its mixed membership, UK Music too would not have been able to put forward a definitive position on this matter, given that it houses both the MU and BPI, among many other actors.

Yet, for the reasons discussed above relating to UK Music's and BCC's political power and significance, when these umbrella organisations cannot support issues of importance to smaller, or even just individual industry organisations, the odds of such issues being acted upon by policymakers may be tipped against the smaller actors or the lone players in copyright policy. There is indeed a compelling case for reasoning that the power imbalances between individual organisations, especially smaller and politically weaker organisations like trade unions, and larger industry alliances are particularly substantial and that smaller organisations' prospects of success with certain policy initiatives may depend on the extent to which these initiatives are adopted and backed by industry coalitions and alliances. This is especially so in light of the fact that if large alliances are not lending their voice in support of one particular issue, they may still concurrently be acting on another. In 2015 and 2016, when COs in the publishing industry were lobbying for statutory regulation of creators' contract terms and some COs in the music industry were lobbying for change in a statutory exclusive right, UK Music and the BCC were filing submissions to policymakers on 'Safe harbours and Intermediaries' and on 'Intermediaries, Aggregators, Safe Harbour and Transfer of Value'.<sup>464</sup> In chapter 8, I

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<sup>464</sup> For a list of UK Music and BCC policy submissions from 2015-2016, see 'Documents – 2016' (BCC) <<http://www.britishcopyright.org/policy/documents/2016>> accessed 09 February 2017 and '2015 Submissions' (UK Music) <<http://www.ukmusic.org/policy/submissions/2015-submissions/>> accessed 09 February 2017.

will discuss how these issues ended up taking the spotlight in mainstream media, as well as in policy debates.<sup>465</sup>

Arguably, issues and positions advanced by alliances like UK Music would have an edge in the competition for policy attention and action. By describing itself as the body that 'represents and promotes the interests of every part of the British music industry', UK Music feeds the notion of one homogenous industry with shared goals and interests, which other organisations like the BPI also advance.<sup>466</sup> Consequently, policymakers may find themselves under more pressure to engage with issues that are carried by a larger number of different stakeholders. Equally, decision-makers may assume that such issues are of greater importance and priority for all actors and would thus be easier to legislate on, since there would be less stakeholder opposition from within the respective industry.

#### *3.2.4 Perception of government bias in favour of some stakeholders*

Related to the above discussion of the role and power of multi-stakeholder networks in policy is also an observation that I came across in the interview data of respondents from the MU, ALCS and the Writers' Guild of Great Britain. Respondents from these COs shared the perception that umbrella organisations like UK Music, the BCC and the Alliance for IP gain more access to high-ranking policy officials than the individual COs. The reasons for this that my respondents advanced were different but they all indicated a certain bias on the part of the government in its dealings with different industry organisations.

The ALCS respondent reasoned that large industry alliances were better placed to engage with policymakers because they conveyed the impression upon decision-makers that these were hearing the views of the whole sector:

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<sup>465</sup> See Chapter 8, section 1.

<sup>466</sup> See 'About' (UK Music) <<http://www.ukmusic.org/about/>> accessed 6 January 2017.

The Ministers rarely want to see an ALCS. They want to see an Alliance for IP that covers the whole spectrum, they want to see the BCC that covers the whole spectrum [...].<sup>467</sup>

According to my respondent from the WGGB, the government's bias was simply in favour of organisations representing business interests, which excluded COs.

The whole British political system is all about pandering to business interests. It's not about individual people. It's not about the rights of creators or anything like that. They're not the least bit interested in that. I think they've bought a political story which says that, actually, writers will always write.<sup>468</sup>

Finally, according to respondents from the MU, the government's bias was likely against unions as such. One respondent outlined the difficulty that the MU had had in gaining access to the ministerial level of policy officials:

[...] in the last government we were never, we wrote to every Secretary of State for Culture, Media and Sport as they came in and none of them, they all refused to meet with us. [...] The only person we met with- we did, Ed Vaizey who was Minister for Culture, was not quite that bad. We did have some meetings with him but [were] completely refused a meeting with Maria Miller and with Sajid Javid. And Jeremy Hunt. Jeremy Hunt, interestingly, we met him in opposition but when he got the job, he wasn't interested.<sup>469</sup>

Another MU respondent noted:

It's difficult, we're a trade union, Conservative ministers don't like us very much, they want, they see us as a threat, so we've had difficulty with ministers.<sup>470</sup>

The same respondent also commented:

[...] our influence at the IPO, such as it is, is more these days through UK Music and through BCC, I would say, than individually.<sup>471</sup>

It is difficult to verify these statements and therefore important to treat them cautiously as reflecting above all a perception present among respondents within

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<sup>467</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

<sup>468</sup> Interview with Bernie Corbett, General Secretary, WGGB.

<sup>469</sup> Interview with Isabelle Gutierrez, Head of Government Relations and Public Affairs, MU.

<sup>470</sup> Interview with John Smith, General Secretary, MU.

<sup>471</sup> Interview with John Smith, General Secretary, MU.

these COs. Yet, it is equally noteworthy that this perception spans *three* COs, two unions and a CMO, the latter of which itself also only represents creators. Ultimately, perhaps this perception is in itself significant to the extent that it may shape a given CO's self-concept, which, as I argued in the previous chapter, influences the way the organisation conducts itself in policy, and in particular, the extent to which it chooses to act proactively.<sup>472</sup>

### **3.3. Conclusion**

In this section, by looking at the MU, I showed that the placement of an organisation to influence policy is in part contingent on intra-organisational factors, like membership and mandate. Specific to trade unions, my MU related findings suggest that with a stronger emphasis on the organisation's service function, imposed both through the wider regulatory environment, as well as members' expectations, comes a certain weakening of the organisation's representative role, i.e. its capacity to effectively engage in policy. Through the analysis of extra-organisational factors affecting the COs, I demonstrated how the copyright policy environment is characterised by stakeholder tension and power dynamics with some actors being more powerful policy influencers than others, both because of their possession of important industry information but also because of presentation strategies that they use to overstate the significance of their own data and contribution. In this context, I also argued that large multi-stakeholder alliances are particularly well placed to exert influence over policymakers, which could disadvantage smaller, or individual actors pursuing issues that these umbrella organisations could not support. The attention dedicated to different evidence by the media as well as by policymakers appears uneven. Moreover, there is often disagreement among industry stakeholders on the factual basis underlying certain policy proposals. Finally, this section also considered a perception among some COs that power imbalances between organisations (in the extent to which their voice is taken into account by policy officials) also exist because

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<sup>472</sup> See Chapter 4, section 1.3.6.



the government itself is not impartial to different stakeholders, instead engaging with some more than with others.

#### 4. Discussion and conclusions

Taking the findings from this and the preceding chapter further, which together looked at the way COs from the publishing and music industries engaged with the issue of unfair contract terms for creators and performers, a number of insights can be gained into COs' behaviour in policy and the effects of inter-stakeholder dynamics on the copyright policy process and environment.

##### *4.1. Diversity of priorities, approaches and positions*

To begin with, the analyses of the way SoA, ALCS, MU and PRS dealt with the problem of unfair contract terms, revealed significant differences in the approaches, priorities and positions of these four organisations. Between the two studied unions, both SoA and the MU identified similar problems associated with creators' and performers' contractual dealings. However, while SoA prioritised the battle for statutory regulation of copyright exploitation contracts, MU chose to advance a different policy recommendation and introduce a remuneration right in the event that the exclusive MA right was transferred. As for the two CMOs, while ALCS took a clear position on the issue of unfair contract terms and supported SoA in its campaign and policy work but refrained from taking the lead, PRS decided not to take a position on this issue at all and refrained from contributing to the contract terms debate. These findings indicate that it may be necessary for IP scholars and reviewers to pay closer attention to differences between stakeholders before generalising, in a spirit similar to Hargreaves, that 'lobbying on behalf of rights owners has been more persuasive to Ministers than economic impact assessments.'<sup>473</sup> In strict terms, all four COs studied in this thesis are organisations representing right owners. Yet, my analyses have shown that even organisations representing the same copyright stakeholder, and those that have identified the same problem relating to the way copyright law affects this stakeholder in practice, can present different views and courses of action on this

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<sup>473</sup> Hargreaves (n 4) 6; Chapter 3, section 1.2.

problem. In other words, there can potentially be considerable differences in the way presumptively similar organisations – with comparable representation units and comparable functions – conduct themselves in policy.

#### ***4.2. Power dynamics and environmental factors***

Differences in COs' behaviour are also predicated on the power imbalances and inter-stakeholder dynamics that govern their environment. This and the preceding chapter showed that the way a CO positions itself and acts in policy will depend on a combination of intra- and extra-organisational factors. Relevant questions in this respect are what resources and information the organisation holds; what resources it allocates to policy activities; whether there are enough industry actors that can support and carry forward its policy demand; whether it can win the support of influential multi-stakeholder alliances; whether there are strong oppositional forces that could challenge or dispute the CO's position and whether these have a power advantage emerging from their resources, their ability to influence the behaviour of larger networks, their political power with policymakers, or the information that they hold. This and the preceding chapter showed that power imbalances exist on the one hand between unions and CMOs<sup>474</sup>, and on the other hand between smaller organisations or groups of fewer organisations acting against larger and more influential industry alliances.<sup>475</sup> The discussion of the existing antagonism between the MU and the BPI also exemplified that self-portrayal strategies used by a given organisation can intensify policymakers' perception that this organisation carries more weight and importance in the bigger picture of the common creative sector.

#### ***4.3. Costs and benefits of acting together***

In light of the described power dynamics, as well as the sheer plurality of different stakeholders, my explorations of COs' working on contract terms showed how individual organisations seek to collaborate with other industry bodies when participating in policy. As discussed in the context of SoA's collaboration with ALCS,

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<sup>474</sup> See Chapter 4, sections 1.3.2 and 2.1.

<sup>475</sup> See sections 3.2.2 and 3.2.3 of the present Chapter.

CRA and WGGB, this has the benefit that a given policy issue would receive more exposure and would benefit from a greater weight in numbers and volume of policy-submissions, which would increase the likelihood that the issue may be taken up by decision-makers. At the same time, PRS' neutrality on contract terms, due to the different stakeholder interests that it represents, is an indicator of how collaborations with other stakeholders may alter, or perhaps dilute the substance of a policy measure desired by an individual stakeholder, in order to accommodate the potential differences of views among the others. While we did not see this in effect in the case of SoA's C.R.E.A.T.O.R. campaign, I will discuss evidence of this in the next chapter on private copying. Working with other actors may be a necessity in terms of having one's voice heard across the densely populated landscape of stakeholders and competing issues. However, it may come at the cost of having to give up on certain issues, or to modify one's own position. This is indicated by the fact that on contract terms, neither UK Music (where MU is a member), nor BCC (where both MU and SoA are members) backed the unions in the problems that they identified, or in the remedies that they proposed. It follows that the views and priorities of individual COs in their clearest, most genuine and uncompromised form are unlikely to reach policymakers and be formally addressed.

Another advantage of collaborative action that is implied in the findings of this and the preceding chapters, is that such action would minimise the existence of competing policy alternatives that could detract weight and attention from the particular cause that is being pursued. SoA's and MU's different routes to increasing remuneration for creators and performers meant that in a general sense, organisational actors representing creators and performers presented a divided front. Assuming that policymakers see their role in reconciling the interests and needs of *different* stakeholders within the copyright domain, as has been suggested by several scholars, then it is unlikely that policymakers will take action to implement *several*

recommendations advanced by creator and performer unions that all relate to one particular matter.<sup>476</sup>

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<sup>476</sup> Bakardjieva Engelbrekt (n 8) 65-66, 78; Litman (n 2) 278, 311, 357.



## Chapter 6

### The Rise and Fall of the UK Private Copying Exception

Among the recommendations in the 2011 Hargreaves Review that the UK government decided to take forward in the area of copyright was the introduction of a limited private copying exception. This matter proved to be particularly controversial, both during the public consultation phase of the proposed measure, as well as after the adoption of a private copying exception. However, unlike the issue of contract terms considered in the preceding two chapters, the divide in positions on private copying was less between individual stakeholders within the studied creative industries, music and publishing, and more between these actors and the government, as well as organisations across different industry sectors altogether. In this respect, the primary oppositional forces stemmed from the music and technology industries, with the government's own view on the matter being more closely aligned with that of the technology sector. Consequently, the final form and scope of the copyright exception prompted the Musicians' Union (MU), UK Music, and the British Academy of Songwriters, Composers and Authors (BASCA) to launch a judicial review challenging the lawfulness of the implementing Regulations.<sup>477</sup> As a result of the judicial challenge, the private copying exception was repealed *ex nunc* less than 12 months after it came into effect.

This chapter will discuss how all four of the studied creators' organisations (COs) engaged with the issue of the private copying exception. The chapter is divided into four sections. Section 1 will trace COs' policy input both before and after the adoption of the private copying exception on the basis of interview data, press releases,

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<sup>477</sup> The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361 (The 2014 Regulations).

consultation responses and the two judicial review judgments. This will illustrate some of the tensions existing between COs and the government on private copying, as well as the general controversy around private copying between the creative industries and actors external to these. In this context, I will demonstrate how stakeholder dynamics directly influence, and in a way limit, policy outcomes. I will also show that, perhaps as a consequence of these dynamics, COs' engagement with policy on this matter was more reactive, rather than proactive, thus shedding light on a further – monitoring – role that COs play in copyright policy.

In section 2, I will bring into focus the granularity of positions, priorities and preferences of individual copyright stakeholders as a further facet of the complexity of the copyright policy environment. To this end, I will explore subtle differences in the primary motives and in the emphasised arguments that were advanced by the four COs against the government's specific proposal for a private copying exception. Despite general consensus on the need for post-legislative judicial action, different primary motives appeared to be fuelling individual organisations to take action against the new Regulations<sup>478</sup>. More pronounced differences existed in the general extent of engagement with this issue between COs in the music and COs in the publishing industries. This section will also consider the idea, alluded to in previous chapters, that particularly smaller, less powerful actors benefit from the support of larger umbrella organisations, and that copyright stakeholders in general appear more likely to effectively exercise influence over policymakers when acting in unison. However, I will also suggest that this form of joint action implies a need for individual actors to compromise on their most favourable outcome.

Section 3 will focus on the dynamics between COs, policymakers, and other stakeholders as they relate to the copyright policy process and its outcomes. I will show that an added layer of complexity in the making of substantive copyright law stems from the fact that interest collisions exist not only between actors from within the creative industries, but also between creative industry actors, on the one hand,

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<sup>478</sup> Ibid.

and other industry sectors, on the other. A subsequent discussion will illustrate how the existence of opposing interests, the abundance of evidence with discordant arguments, and a perception of the existence of intense lobbying undermine copyright actors' trust in the fair and unbiased nature of the policymaking process. Finally, I will also demonstrate that stakeholder tension, historical 'baggage', and the government's own wider policy aims influence the way copyright policies develop.

As in previous chapters, the final section 4 will bring insights gleaned from this and from previous chapters together, and discuss the implications of these observations for COs' role and impact on policy in broader terms. In this section, I will also discuss unpredictability and compromise as features that permeate the copyright policymaking process and its outcomes.

## **1. COs' involvement on the issue of private copying: before and after the coming into force of the copyright exception**

### ***1.1. Background and wider legislative context***

The 2014 Copyright and Rights in Performances (Personal Copies for Private Use) Regulations (2014 Regulations)<sup>479</sup>, which introduced the exception for private copying into the CDPA 1988 as s 28B, were adopted in exercise of s 2(2) of the European Communities Act 1972 since the provision being implemented into UK law was Article 5 (2) (b) of the InfoSoc Directive.<sup>480</sup> This provision allows Member States to introduce a copyright exception to the reproduction right in respect of reproductions on any medium made by a natural person for private use and for non-commercial ends, on condition that the right holders receive fair compensation. Recital 35 of the same Directive further provides that when determining the form, detailed arrangements and possible level of fair compensation, account should be taken of the particular circumstances of each case, whereby a valuable criterion is the possible harm to the right holders resulting from the act in question. Recital 35 observes that where right holders have already received payment in some other form,

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<sup>479</sup> Ibid.

<sup>480</sup> InfoSoc Directive (n 1).



for example as part of a licence fee, no specific or separate payment may be due. It concludes with the sentence that in 'certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.'

The majority of EU Member States that have implemented this exception provide for fair compensation through levy schemes on copying media and equipment, which are intended to compensate right holders for the harm caused by private copying.<sup>481</sup> With this in mind, the potential for conflicting interests between right holder organisations and technology producing companies, but also open rights groups, in the practical application of this exception is evident.<sup>482</sup> In fact, the actual existence of stakeholder conflict in the area of private copying is evidenced by the recent surge of cases referred to the Court of Justice of the European Union (CJEU) on the application of Article 5 (2) (b) InfoSoc Directive. Among other things, the CJEU has engaged with the questions of what constitutes 'harm' suffered by right holders and under what circumstances such harm is 'de minimis' and thus does not require fair compensation.<sup>483</sup> The Court has also considered who is responsible for discharging the obligation to pay fair compensation, as well as what kinds of devices may be subject to a private copying levy in the *Stichting de Thuiskopie*, *Amazon.com International Sales and Others*, and *Copydan* cases, among others.<sup>484</sup>

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<sup>481</sup> Martin Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* (IPO 2011) 8.

<sup>482</sup> The contrasting positions of these actors were apparent in their responses to the IPO consultation implementing Hargreaves' recommendations, HM Government, 'Consultation on Copyright' (14 December 2011) (Consultation Document) <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/consult-2011-copyright.pdf>> accessed 09 February 2017 These will be considered in detail in section 2.2.

<sup>483</sup> Case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S* [2015] ECDR 9, paras 56-61 on the question of when harm is minimal; Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de Espana* [2011] ECDR 1 para 44 on what constitutes harm.

<sup>484</sup> Case C-462/09 *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH* [2011] ECR I-5331 para 23; Case C-521/11 *Amazon.com International Sales Inc v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH* [2013] ECDR 217 para 20, and *Copydan* (n 483) para 29.

In the UK, stakeholder activity around private copying has also not been lacking. However, absent a respective exception under copyright law, this activity has manifested itself in the policy rather than judiciary context.

### ***1.2. Policy initiatives on private copying prior to the Hargreaves Review***

At the outset, it is important to note that although the option to legislate for a private copying exception was available to the UK at least since the implementation of the 2001 InfoSoc Directive<sup>485</sup>, containing Article 5 (2) (b), I found no evidence of COs proactively and publicly taking initiative to lobby for the adoption of such an exception over the last 15 years. Rather, during this time COs' input on this issue has been reactive and typically in response to different governments' plans to introduce a private copying exception following several IP reviews' recommendations. To this effect, the case of private copying reveals a different dimension of the role that COs play in copyright policy to the one considered in chapters 4 and 5. This case is indicative of COs assuming a monitoring and defensive role. On this occasion, rather than seeking change in the status quo, as some COs had done in the context of creators' contract terms, the studied organisations attempted to safeguard the status quo by reacting to policy initiatives that could undermine the rights and interests of their members. The reasons why these stakeholders did not proactively lobby for an exception that would introduce an additional revenue stream for creators through a compensation mechanism possibly relate to the complex dynamics and conflicting interests between the COs, other industry stakeholders, and the government.<sup>486</sup>

#### ***1.2.1 Recommendation for a format shifting exception in the Gowers Review***

After the adoption of the 2001 InfoSoc Directive<sup>487</sup>, the government had first considered introducing a format shifting exception in 2007 when it consulted on ways

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<sup>485</sup> In section 3.3 of this chapter, I will discuss that a proposal to introduce a format shifting exception accompanied by a levy scheme had also been tabled and considered much earlier, within the Whitford Report of 1977.

<sup>486</sup> Section 3 of this chapter discusses these inter-stakeholder and inter-industry dynamics in detail.

<sup>487</sup> In the UK, The Copyright and Related Rights Regulations 2003 SI 2003/2498 transposed this Directive.

of taking forward the Gowers Review recommendations from 2006, which had included a proposal for the introduction of a format shifting exception.<sup>488</sup> At that time, the government had proposed the adoption of an exception that would allow consumers to make a copy of a legally owned work so as to make that work accessible in another format for playback, without envisaging a compensation scheme for right holders. The lack of such a scheme was justified on the basis that no significant harm would be caused to right holders.

At this stage, tension between music industry stakeholders and other interested parties could already be observed. On the one hand, the Music Business Group (MBG), UK Music's forerunner and an informal cross-UK music industry body, which included PRS and the MU among its members, had submitted a collective consultation response opposing the government's plan.<sup>489</sup> The umbrella organisation made four key points in its policy document:

- (1) it recognised that consumers wanted and should be able to benefit from the ability to legally format shift their music;
- (2) it argued that the government's recommendation ran contrary to established practice in Europe where creator compensatory mechanisms prevailed;
- (3) it maintained that value from format shifting was being derived by technology companies, and creators and right holders were legally entitled to share in this value, and

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<sup>488</sup> UK IPO, 'Taking Forward the Gowers Review of Intellectual Property' (n 3). See, in particular, paras 80ff of the consultation document.

<sup>489</sup> Music Business Group, 'Response to UK IPO consultation on copyright exceptions' (2007) <[http://www.ukmusic.org/assets/general/The\\_Music\\_Business\\_Group\\_Response\\_to\\_the\\_UK\\_IPO\\_Consultation\\_on\\_Copyright\\_Exceptions\(1\).pdf](http://www.ukmusic.org/assets/general/The_Music_Business_Group_Response_to_the_UK_IPO_Consultation_on_Copyright_Exceptions(1).pdf)> accessed 02 Sept 2016; 'Music Business Group unveils collective submission on private copying and format shifting' (Music Business Group, 8 April 2008) <<http://musicbusinessgroup.blogspot.co.uk/2008/05/music-business-group-unveils-collective.html>> accessed 09 February 2017; Jeremy, 'Format shifting: the MBG responds' (*The IPKat*, 13 April 2008) <<http://ipkitten.blogspot.co.uk/2008/04/format-shifting-mbg-responds.html>> accessed 09 February 2017.

(4) it asserted that the better way forward was through an exception subject to licence.

In contrast, the Open Rights Group, an organisation established to fight for freedom in the digital age, which generally perceives copyright law as too restrictive,<sup>490</sup> had welcomed the government's proposal. It explicitly argued that there was a lack of evidence that consumer practice around format shifting did in fact have a negative impact on sales of recorded music and thereby made a case against the introduction of a compensation scheme.<sup>491</sup> Intel, a technology manufacturer, called for the introduction of a private 'fair use' exception, which would cover private non-commercial copying in its own evidence submission to Gowers and also argued against copyright levies as a form of compensation, stating, instead, that certain uses should be included in the price at the point of sale.<sup>492</sup>

In the end, Gowers' recommendation for a format shifting exception was not implemented, or even carried into the second stage consultation on copyright exceptions in 2009. For one, Gowers' own deadline for implementation of his findings had been 2008.<sup>493</sup> Moreover, in the period between the publication of the review in 2006 and that set deadline, there had been a change of government and leadership, which may have influenced the policy priorities and the general pace of policymaking during that period.<sup>494</sup> Most of all, it is clear from the IPO's second stage consultation document itself that the question of format shifting was taken off the agenda due to

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<sup>490</sup> See Chapter 3, section 1.1.

<sup>491</sup> Open Rights Group, 'Taking forward the Gowers Review of Intellectual Property: proposed changes to copyright exceptions, Response of the Open Rights Group' (2007) 3 <[https://www.openrightsgroup.org/uploads/080408\\_ukipo\\_gowers\\_exceptions.pdf](https://www.openrightsgroup.org/uploads/080408_ukipo_gowers_exceptions.pdf)> accessed 12 January 2017.

<sup>492</sup> Intel Corporation, 'Comments of Intel Corporation submitted in connection with the Gowers Review of Intellectual Property' (21 April 2006) <[http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/intel\\_204\\_193kb.pdf](http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/intel_204_193kb.pdf)> accessed 15 January 2017. Views against the introduction of levies were also expressed by British Telecom, and others.

<sup>493</sup> Gowers (n 90) 6, Recommendation 8; Hargreaves (n 4) para 10.5.

<sup>494</sup> For a Prime Ministers and Politics Timeline see 'History: Past Prime Ministers' (UK Government) <<https://www.gov.uk/government/history/past-prime-ministers>> accessed 09 February 2017 and 'Prime Ministers and Politics Timeline' (BBC) <[http://www.bbc.co.uk/history/british/pm\\_and\\_pol\\_tl\\_01.shtml#three](http://www.bbc.co.uk/history/british/pm_and_pol_tl_01.shtml#three)> accessed 13 January 2017.

stakeholder dynamics and irreconcilable differences in views. Specifically, the executive summary to the second consultation referred to ‘the polarised nature of responses’ and the existence of ‘little consensus as to how the proposal could be implemented.’<sup>495</sup> The main points of contention that the IPO indicated related to the scope of the exception and the question of whether right holders would suffer significant harm as a result of private copying, so as to require the introduction of a fair compensation scheme. According to the document, it had become apparent that the proposed exception would not meet the needs and expectations of both consumers and right holders, particularly in relation to the issue of fair compensation.<sup>496</sup>

The lack of implementation of the format shifting exception following Gowers is an example of a deadlock between competing stakeholder interests. It illustrates the influence that these actors had over policymakers, and the limitations that inter-stakeholder dynamics appeared to be imposing on the possible policy outcomes.

### *1.2.2 The Hargreaves call for evidence and review*

Just as in the years between the implementation of the InfoSoc Directive and the Gowers Review, in the period leading up to the Hargreaves review there was no evidence of COs publicly and proactively lobbying the government for a private copying exception. In fact, as I will discuss below, even during Hargreaves’ call for evidence, which preceded the drafting and publication of the IP review, none of the four studied COs took the opportunity to urge for the adoption of an exception with compensation. This can likely be explained by the fact that these actors were cognizant of the strong opposition that such a proposal would be subject to by other stakeholders, having only recently experienced the clash of positions and interests under Gowers. Consequently, it could be argued that COs’ decision to adopt a

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<sup>495</sup> IPO, ‘Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions’ (December 2009) paras 7-8  
<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-gowers2.pdf>> accessed 09 February 2017.

<sup>496</sup> Ibid para 8.

monitoring, a defensive role on the issue of private copying, i.e. to define their aim as safeguarding the status quo of lack of exception, rather than to lobby for an exception with compensation, was a consequence of wider inter-stakeholder dynamics.

Hargreaves issued a Call for Evidence in December 2010 with the purpose of ensuring that the widest possible range of interests could be heard and that emerging policy would be securely grounded in evidence.<sup>497</sup> According to the list of published responses<sup>498</sup>, among the studied COs, only ALCS and PRS responded to the call, whereas the MU and SoA did not make individual submissions of evidence and only collectively gave their input through the submissions of UK Music and the British Copyright Council (BCC). The unions' lack of submissions were possibly due to a smaller resource allocation for such policy participation. In the case of SoA this could certainly have been based on the organisation's generally more limited resource capacity.<sup>499</sup> This could thus be further evidence of power imbalances between individual stakeholders, and of some stakeholders' greater ability to engage in policy than others. Chapter 4 presented interview data which indicated SoA's perception of not being able to engage in policy as much as it would like.<sup>500</sup> With regard specifically to public consultations, my respondent from the Writers' Guild of Great Britain (WGGB) explicitly stated: 'We are a very small organisation. It's a drain on resources to actually even write a response for a consultation.'<sup>501</sup>

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<sup>497</sup> 'Review of Intellectual Property and Growth: Call for Evidence' (IPO, 2011) <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipreview/w/ipreview-c4e.htm>> accessed 09 February 2017.

<sup>498</sup> Ibid.

<sup>499</sup> See n 296 and 301 for a comparison of the financial accounts of the studied organisations. Unlike SoA which concluded the financial year ended 31 December 2015 with a deficit of £47,080 (see p 6 of its financial statement, n 296), the MU was able to conclude the same financial year with a surplus of £ 849,748. In that year, the music industry trade union also had net assets worth £ 17,868,493. Nevertheless, the analysis of the organisations' administrative expenses for that year suggests that this CO generally allocated fewer resources to policy participation and public affairs. The reasons for this are not fully clear.

<sup>500</sup> See Chapter 4, section 1.3.3.

<sup>501</sup> Interview with Bernie Corbett, General Secretary of the WGGB.

Of the two CMOs that contributed to the call for evidence, neither individually took a firm stand to urge for an exception with compensation. ALCS, on the one hand, took a matter-of-fact approach to the issue. The organisation framed its private copying comments in relation to the question whether there was evidence of areas where the UK copyright framework was not delivering optimal outcomes. ALCS reasoned that the illegality of private copying presented a non-optimal outcome to the extent that it was a commonplace activity undertaken by millions of individuals daily and thus practically unenforceable by right holders. However, rather than advocating for a copyright exception with compensation, ALCS suggested two preliminary steps: to define 'private copying' in terms of its scope and to gather more evidence on its effects.<sup>502</sup> The latter was deemed necessary given the contentious nature of the debate surrounding the need for fair compensation and the way compensation was measured through the harm caused to the right holder. ALCS suggested that useful evidence could look at how the ability to make private copies added value to digital products and services.

PRS, on the other hand, did not make any comment in relation to private copying in the individual submission that it made to Hargreaves' call for evidence. Rather, its position could merely be inferred from UK Music's response to the call for evidence, which essentially maintained the position of its forerunner MBG that licensing offered a preferred solution in the area of format-shifting.<sup>503</sup> UK Music took a clear stand on the matter of private copying as the organisation representing the collective interests of the music industry. However, PRS' silence on the matter within its individual submission is still indicative of a more passive, monitoring position on private copying. In many other instances, as we will also see later in this chapter, collective

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<sup>502</sup> ALCS, 'Independent Review of Intellectual Property and Growth' (Evidence submission) 22-24

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/iprevie-w-c4e-sub-alcs.pdf>> accessed 09 February 2017.

<sup>503</sup> UK Music, 'UK Music response to the Call for Evidence of the Independent Review of Intellectual Property and Growth' (March 2011) paras 67 – 71

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/iprevie-w-c4e-sub-ukmusic.pdf>> accessed 09 February 2017.

responses by umbrella organisations like UK Music and the British Copyright Council (BCC) are not a substitute for their individual members' own input in policy.<sup>504</sup>

### *1.2.3 2012 IPO consultation on proposals to change the UK's copyright system*

The researched COs had not expended time and resources to proactively and publicly advocate for the adoption of a private copying exception with a compensation mechanism, as envisaged by Article 5 (2) (b) InfoSoc Directive, outside of the context of IP reviews. However, they considerably stepped up their efforts to influence the course of policy once it became clear that the government had generally adopted Hargreaves' recommendations<sup>505</sup> and after the IPO had launched a consultation on proposals to change the UK's copyright system. This change in behaviour aligns with my observation that the organisations had opted for a more defensive and reactive role.

Hargreaves had proposed a limited private copying exception without a compensation scheme reasoning that right holders would not suffer any harm since the benefits of private copying had already been factored into the price that they were charging.<sup>506</sup> The consultation document drafted by the IPO also clearly demonstrated the government's strong inclination towards adopting a technology-neutral private copying exception that would apply to every type of copyright work and medium, without right holder compensation.<sup>507</sup>

From the perspective of the COs, these new policy developments threatened to undermine the interests of their members. The established status quo could tip against their interests and give a greater advantage to their opponents in the technology sector. This catalysed the COs to react. Consequently, SoA, ALCS, the MU

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<sup>504</sup> For instance, in the framework of the copyright consultation implementing Hargreaves, PRS, SoA, ALCS and the MU all made individual consultation submissions, despite also being represented through the submissions made by various umbrella organisations, like the CRA, or UK Music.

<sup>505</sup> HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (n 141).

<sup>506</sup> Hargreaves (n 4) paras 5.30-5.31.

<sup>507</sup> HM Government, 'Consultation on Copyright' (n 482) paras 7.23ff and 7.39.



and PRS all made individual contributions to the 2012 IPO consultation. All COs, with the exception of ALCS, expressed strong and definite positions in relation to the questions put forward on private copying. ALCS, in contrast, maintained a more moderate stance and re-asserted its view that further evidence gathering needed to precede any legislative activity on this issue.

The policy positions of the studied COs, as presented in their consultation responses, did not appear entirely uniform, but rather indicated some degree of divergence in the primary considerations that fuelled each CO to take a firm stand. I will explore these differences more closely in section 2 of this chapter.

In relation to private copying, the government was consulting on five questions:

Q. 67: whether respondents agreed that, the exception should not permit copying of content that the copier did not own;

Q. 68: whether the exception should allow for copying of legally-owned content for use within a domestic circle, such as a family or household;

Q. 69: whether the exception should only allow copying of legally-owned content for personal use, and whether limiting the exception in this way was sufficient to ensure that only minimal harm would be caused to copyright owners;

Q. 70: whether the exception should be explicitly limited to only apply in cases when harm caused by copying is minimal;

Q. 71: whether existing mechanisms allowing beneficiaries of exceptions to access works protected by technological measures should be extended to cover a private copying exception.

There was general agreement among ALCS, SoA, and PRS on the questions relating to the scope of the envisaged exception (questions 67-69)<sup>508</sup> to the effect that the

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<sup>508</sup> SoA and ALCS did not provide an answer to question 69. ALCS instead laid out its view that independent research analysing harm, costs and benefits associated with the operation of such an exception was necessary.

exception should only apply to copies made from legally owned content and that it should not extend to copies made within a domestic circle or household. ALCS had further noted the significance of the distinction between family and household. MU, on the other hand, had decided against answering these questions and instead focused its own response on challenging the notion, put forward in question 70, that harm caused to right holders could be minimal.

What SoA, PRS and the MU explicitly agreed on was the need for a compensation mechanism on the basis that the absence of such a mechanism would be in breach of EU law. Some COs quoted *Padawan* where the CJEU had reasoned that 'Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned.'<sup>509</sup> As noted above, the private copying exception had been subject to a large number of referrals to the CJEU and, while the UK was developing its policy and future legislation on private copying, the European Court had established a number of principles pertinent to the controversy existing between the views of different stakeholders in the UK. For instance, the CJEU had found that 'harm' referred to in Recital 35 of the InfoSoc Directive, and 'fair compensation' were autonomous concepts of EU law,<sup>510</sup> and that copying by natural persons acting in a private capacity needed to be regarded as an act likely to cause harm to the right holder, as quoted above. It had also established the general obligation on Member States implementing the exception under Article 5 (2) (b) InfoSoc Directive to provide for fair compensation pursuant to that provision,<sup>511</sup> asserting that Member States enjoyed broad discretion in determining the form and level of such compensation.<sup>512</sup>

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<sup>509</sup> See, for instance, PRS for Music, 'Response to the Consultation on Copyright' (21 March 2012) 32

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/respons-e-2011-copyright-prs.pdf>> accessed 09 February 2017; *Padawan* (n 483) para 44.

<sup>510</sup> *Padawan* (n 483) paras 31-33.

<sup>511</sup> *Ibid* para 30.

<sup>512</sup> *Stichting de Thuiskopie* (n 484) para 23; *Amazon.com International Sales Inc* (n 484) para 20.

During this pre-legislative stage, the researched COs remained engaged with the private copying issue through all steps of the consultation process, consistently attempting to influence and effect a change in the way the exception was being drafted. To this end, they engaged with policymakers in a number of ways. In the first instance, the COs actively submitted responses to government consultation documents at various stages of the legislative process, from the initial consultation, as shown above, to the technical review of the draft Statutory Instruments in 2013.<sup>513</sup> What is more, COs had deliberately sought to provide, and had also commissioned, evidence supporting their positions<sup>514</sup> and, especially in the case of the COs from the music industry, to present a unified front to the policymakers. The latter was evident in the way that both the MU and PRS had explicitly endorsed and referred to the common UK Music consultation submission in their own individual submissions. It was also visible in the joint press release published by the MU and BASCA at the end of 2012, when the government had announced its plan to adopt a private copying exception without compensation.<sup>515</sup>

It was UK Music that extensively challenged the government's economic theory, expounded on in the Impact Assessment, according to which private copying was already priced into the market value of the products.<sup>516</sup> UK Music is also the actor that

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<sup>513</sup> See, for instance, SoA, 'Society of Authors' response to Technical Review: draft Statutory Instruments. Part 2' (July 2013) <<http://www.societyofauthors.org/SoA/MediaLibrary/SoAWebsite/Submissions/Copyright-exceptions-july-2013-pt-2-education-and-libraries.pdf>> accessed 09 February 2017, and ALCS, 'ALCS Response to the Intellectual Property Office Technical Review of Draft Legislation on Copyright Exceptions' (2013) <[https://www.alcs.co.uk/Documents/Submissions/IPO-technical-review-note-\\_6-13\\_.asp](https://www.alcs.co.uk/Documents/Submissions/IPO-technical-review-note-_6-13_.asp)> accessed 09 February 2017.

<sup>514</sup> ALCS' research in the context of the Gowers review, as well as UK Music's research are discussed in this subsection, further below. Further research commissioned by UK Music is discussed in subsection 3.1 of this chapter.

<sup>515</sup> 'MU and BASCA challenge exception' (MU, 20 December 2012) <<http://www.musiciansunion.org.uk/Home/News/2012/Dec/MU-and-BASCA-challenge-exception?feed=801abc79-dc9c-471a-85ff-4a3a36bf8a3b>> accessed 09 February 2017.

<sup>516</sup> UK Music, 'HM Government: Consultation on Copyright' (Consultation Response) (March 2012) <<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/pro->

commissioned and reported on research into the value attributed by consumers to the ability to play music copied from CDs onto MP3 players, phones and tablets, as well as on the value ascribed to locker-based cloud storage of music.<sup>517</sup> This is not surprising considering UK Music's political power and ability to send important signals to policymakers as an organisation speaking on behalf of the whole music industry,<sup>518</sup> as well as its ability to pool together and make efficient use of the resources of its members.<sup>519</sup>

Incidentally, the approach of attempting to influence policy by substantiating one's position with evidence had already been pursued by some of the studied COs in the context of the Gowers Review. During my fieldwork for this project, respondents from ALCS had pointed me to research that their organisation had commissioned in 2008 on consumer attitudes towards digital downloads.<sup>520</sup> 54% of survey respondents in that research had affirmed that they would be prepared to pay a reasonable sum added to the price of digital recording equipment to compensate creators for their loss of income. In that context, one ALCS respondent's comment expressed incomprehension as to what was necessary, if not evidence, in order to convey a certain message:

They've [consumers] told us that they'd be willing to pay and also how much. And yet the government wouldn't listen. So, I don't really know what to say other than – it seems to be a very un-British thing to put a levy on this. So no private copying levy for us. We are benefitting

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policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright/response-2011-copyright-ukmusic.pdf-link> accessed 09 February 2017 paras 27-38.

<sup>517</sup> Oliver & Ohlbaum Associates, 'The UK Music Consumer: A presentation for UK Music prepared by Oliver & Ohlbaum Associates' (2012) <<http://www.impalamusic.org/sites/default/files/pictures/attachedfiles/UK%20Music%20-%20OO%20Copyright%20Research%20Presentation%20Copy.pdf>> accessed 09 February 2017; See UK Music, 'HM Government: Consultation on Copyright' (Consultation Response) (n 516) paras 68ff and 98ff reporting on the commissioned research.

<sup>518</sup> See Chapter 5, sections 3.2.2 and 3.2.3.

<sup>519</sup> Mahoney (n 158) 368; Chapter 3, section 1.5.3.

<sup>520</sup> A survey with a sample base of 1223 was conducted by *Tickbox.net* in January 2008 and the results were disseminated, among others, through the All Party Parliamentary Writers Group: *Tickbox.net*, 'Digital Downloads: for ALCS' (survey) (2008) <[http://www.allpartywritersgroup.co.uk/Documents/PDF/Final\\_Report.aspx](http://www.allpartywritersgroup.co.uk/Documents/PDF/Final_Report.aspx)> accessed 09 February 2017.

[from levies across other EU countries] but we have research here and I mean, that was 2008, maybe things have changed now, I don't know. But, you know, at the time it was an argument that we didn't win.<sup>521</sup>

Apart from written submissions challenging the government's arguments and advancing a different position on private copying, supported by research, there were further ways in which the COs were trying to influence the course of policy on private copying. Specifically, an MU respondent explained that the MU had also sought to influence debates on private copying through the Performers' Alliance All-Party Parliamentary Group that works alongside the trade unions of the Performers' Alliance consisting of Equity<sup>522</sup>, the MU and WGGB.<sup>523</sup>

So, over the private copying exception, for example, when those [draft Regulations] were going through Parliament there were several debates. So we were kind of briefing MPs to intervene in those debates and ask the questions that were being ignored by the government. [...] And, of course, sometimes it's not so much questions, we're just trying to influence the way they think.<sup>524</sup>

The above account demonstrates that CO policy activity dramatically increased after the organisations identified a threat in the government's intention to introduce a private copying exception in the form outlined during the pre-legislative process, i.e. with a technology neutral application, extending to cloud services, and without fair compensation for right holders and creators. However, COs' efforts at this stage were unsuccessful for reasons that I will discuss in section 3, and the 2014 Regulations came into effect on 1 October 2014.

### ***1.3. The judicial review***

The case of COs' activities on the issue of private copying is a particularly tangible example not only of the tensions between COs and other stakeholders that influence the way COs themselves choose to act on a given policy matter, or in this case to react.

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<sup>521</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

<sup>522</sup> Equity <<https://www.equity.org.uk/home/>> accessed 09 February 2017.

<sup>523</sup> 'Register of All-Party Groups [as at 30 July 2015]' (UK Parliament, 4 August 2015) <<https://www.publications.parliament.uk/pa/cm/cmllparty/register/performers-alliance.htm>> accessed 09 February 2017.

<sup>524</sup> Interview with Isabelle Gutierrez, Head of Government Relations and Public Affairs, MU.

This case, particularly the judicial review launched by the MU, BASCA, and UK Music is also an example of the impact that stakeholder action *can* have on the substance of copyright law and policy. As outlined at the beginning of this chapter, following the coming into force of the new s 28B CDPA 1988, MU, UK Music, and BASCA challenged the lawfulness of the implementing 2014 Regulations through a successful judicial review. In *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills (No. 2)*, Green J quashed the 2014 Regulations in their entirety with prospective effect.<sup>525</sup> This reinstated the illegality of private copying in the UK.

In the context of the judicial review, the claimants challenged the government's assumption that a compensation scheme was not necessary as legally and factually flawed; they attacked the inferences and conclusions that the government had drawn from the evidence collected, as well as the procedure adopted for the consultation. The claimants also submitted that the consultation had been predetermined to the extent that the Secretary of State had been so determined to introduce an exception without any compensation scheme that he had closed his mind to the evidence and generally acted unfairly in the consultative process.<sup>526</sup> Consequently, Green J identified six issues on which a ruling was necessary. These included the meaning of 'harm' (II), the alleged irrationality and/or inapplicability of the pricing-in principle, i.e. the argument pursued by the government that private copying was already priced into the final products (III), the submission that the government's decision with regard to the form of the exception was flawed because the evidence relied upon to justify the lack of a compensation scheme was inadequate (IV), and whether the outcome of the consultation had been predetermined (V).<sup>527</sup> The claimants' application was granted in relation to issue IV.

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<sup>525</sup> *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills (No. 2)* [2015] EWHC 2041 (Admin) [21].

<sup>526</sup> *R (On the Application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) [16].

<sup>527</sup> *Ibid* at [18].

Green J reasoned that the evidence that the Secretary of State had to collect and the inferences which could be drawn had to be sufficient to answer the question as to whether harm was minimal or zero.<sup>528</sup> However, according to the Judge, that had not been the case and, in addition, there had been no articulation of what was to be understood by the concept of *de minimis* in relation to harm.<sup>529</sup> In light of this, the Judge ruled that the decision to introduce s 28B in the absence of a compensation mechanism was unlawful.<sup>530</sup> On the question of whether the outcome of the consultation had been predetermined, the Judge opined that the Secretary of State was entitled to have a strong predisposition and that such a predisposition, which was accepted as having persisted, was not inimical to a fair consultation, provided the decision maker was prepared to keep an open mind and be persuaded in light of the available evidence.<sup>531</sup> No evidence of predetermination was found and the end result could in itself not be taken as an indicator of predetermination.<sup>532</sup>

The final outcome of the judicial review, a return to the previous status quo of private copying being an illicit act, was not considered optimal by the COs but rather a compromise in light of the opposing interests of the technology sector, and of the open rights movement.<sup>533</sup> Nevertheless, through the judicial review, the music industry organisations succeeded in attaining important objectives – to avert a precedent that could have eroded the established principle of fair compensation, and to prevent a measure that could have hindered the development of new licensing schemes (in relation to cloud services). These, respectively, were trade union and CMO COs' primary concerns, as I will illustrate in the next section of this chapter.<sup>534</sup>

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<sup>528</sup> Ibid at [249]-[250], [271]-[272].

<sup>529</sup> Ibid at [269], [271(i)]

<sup>530</sup> Ibid at [233], [268]-[269], [270]-[274].

<sup>531</sup> *R v Secretary of State* (n 526) [274]-[281].

<sup>532</sup> Ibid.

<sup>533</sup> This is discussed in more detail in section 4.2.

<sup>534</sup> See section 2.2.

#### 1.4. Conclusion

This section presented how COs engaged with copyright policy, and with the law, on the issue of private copying. The analysis of COs' activities demonstrated that, prior to the adoption of the private copying exception, COs were taking a reactive and defensive stand, rather than proactively and publicly seeking to change the status quo through the introduction of an exception with fair compensation. COs' primary aim had been to *prevent* the introduction of an exception, applying to the cloud and without compensation, rather than to *propel* the introduction of a more appropriately scoped exception with fair compensation. I linked this to COs' cognizance of the strong opposing interests from the technology sector (favouring an exception without compensation), which had resulted in policy deadlocks in the past. In this context, stakeholder dynamics directly influence and, in a way, limit policy outcomes. Furthermore, the successful judicial review was used as an example of the impact that stakeholder action can have in shaping the substance of copyright law and policy. At the same time, I indicated that the ultimate outcome of the review was not considered optimal by the actors, who had effected it, as it represented a compromise between opposing interests across the creative industries and the technology sector. To this effect, as I will discuss in section 4, as well as in chapter 8, the result for UK copyright law on private copying – a compromise brought about by the existence of polarised positions and the policy engagement of many different actors, is perhaps a common example of how stakeholder dynamics influence copyright policy outcomes.

#### 2. Differences between individual stakeholders and creative industries

This section will illustrate that there is a granularity of preferences, priorities and considerations, between individual copyright actors, as well as between different creative industries, and that individual preferences and priorities may be compromised in the final outcomes of copyright policy. This occurs not only as a result of opposing stakeholder forces, as depicted in the previous section, but also when actors who share a common overarching aim join forces to act together. I will also argue that in light of power imbalances between individual actors, joint action may particularly benefit smaller organisations that could otherwise struggle to



advance their policy goals. Conversely, this could suggest that absent mutual interests among players holding different power, copyright policy agendas may be influenced more strongly by those actors with a greater capability of effectively acting alone, or by those who enjoy greater industry support.

The above insights emerged from a comparative analysis of COs' policy submissions on two occasions –in relation to the 2012 UK implementation of the Hargreaves review, and in relation to the 2013 European Commission consultation on the review of the EU copyright rules. Equally, they also emerged in my exploration of the semi-structured interviews.

### *2.1. Differences by creative industry*

Generally, the evidence suggested differences in the extent of engagement between COs from the publishing and COs from the music industry. A major difference manifested itself in the fact that it was organisations from the music industry alone that launched a judicial review of the Secretary of State's decision to implement a private copying exception. Furthermore, as illustrated in the previous section, ALCS' approach to the private copying issue in its submission to Hargreaves' call for evidence had been matter-of-fact. In this respect, there was an absence of indicators that ALCS had a specific interest or predisposition in relation to private copying. This neutrality suggested that the publishing industry CO was less invested in the private copying matter compared to MU and PRS from the music sector. This was possibly due to the fact that the music industry had felt a greater impact of developments in personal use technologies than publishing. In its submission to the UK IPO's consultation on implementing Hargreaves, ALCS accurately pointed out that both the consultation document and the supporting Impact Assessments had mainly focused on music when discussing private copying as the industry having felt the greatest effect of developments in personal use technologies.<sup>535</sup> This may go some way

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<sup>535</sup> ALCS, 'A response from the Authors' Licensing & Collecting Society: HM Government Consultation on Copyright' (March 2012) 20  
<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/responses-2011-copyright-alcs.pdf>> accessed 09 February 2017.

towards explaining the relative detachment of the publishing sector on this issue. Even SoA, while taking a firmer stance on private copying in writing than ALCS, had noted in its 2012 consultation submission that e-books and digital access were relatively new and there was therefore insufficient data to know the effect of even the narrowest exception.<sup>536</sup>

The idea that the private copying issue was considered to be of greater significance for the music industry than for publishing also manifested itself in interview data. To this effect, one ALCS respondent noted:

Well, I'm not surprised that there's a judicial review, we were fully expecting it because I don't think that [the] music industry, in fairness, standing up for their musicians and writers and all that good stuff could have done anything else.<sup>537</sup>

Similarly, my SoA respondent also remarked:

We were so thrilled with the Musicians' Union; I think they're right. I mean there's no doubt about it. It's more of an issue for them than it is for us but we're very, very pleased about the judicial review [...].<sup>538</sup>

The reason why private copying as an issue was taken up more actively by the music industry COs compared to publishing may also have a historical dimension. While it is true that even as recently as the Hargreaves implementation process, the government had framed the topic primarily around the consumption of music, during the Gowers review the issue of private copying was referred to as 'format-shifting' and was even more narrowly focused on music, and secondarily, on films. The 2007 IPO consultation document taking forward the Gowers review recommendations introduced the 'Background' section on format shifting with the following sentence: 'It is now commonplace for consumers to copy recorded music, and more recently films, to allow playback on different devices, such as from a CD to

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<sup>536</sup> SoA, 'The Society of Authors: Response to HM Government's Consultation on Copyright' (March 2012) 13 <  
<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/response-2011-copyright-soa.pdf>> accessed 09 February 2017.

<sup>537</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

<sup>538</sup> Interview with Nicola Solomon, Chief Executive, SoA.

a MP3 player.<sup>539</sup> The most frequent example of a portable device given in that document was the mp3 player, applying only to music files, and a justification for the proposal to introduce an exception was that many consumers 'simply do not understand why the act of transferring music from CDs they own to their MP3 players is illegal'.<sup>540</sup> And while the consultation document explicitly stated that the Gowers recommendation was not limited to musical works, it also pointed out that it was not entirely clear exactly what activities consumers undertook in relation to other works, such as artistic or literary works.<sup>541</sup> It therefore seems that the difference in the level of engagement between COs from music and publishing on the issue of private copying stemmed from a mixture of historical policy focus on music in relation to this matter and a lack of data and evidence on private copying effects across literary works.

Since my research only focussed on COs in the music and publishing industries, the extent of policy engagement from similar organisations in the audio-visual industry fell outside the scope of this thesis and was therefore not explored. However, the analysis of policy documents in the context of Gowers' and Hargreaves' review suggests that stakeholders from the AV industry should have had similarly strong objections to the proposed private copying exception as the ones expressed by COs in the music industry. In the context of both IP reviews, films were recognised as another category of works, in relation to which consumers were undertaking private copying.<sup>542</sup> In fact, one of the options proposed by the government in taking forward Gowers' recommendation was that the format shifting exception should only apply to sound recordings and films.<sup>543</sup> Audio-visual works are also arguably more comparable to music than books when it comes to the value obtainable through private copying in the sense that such works may be consumed with a higher rate of repetition compared to literary works. In this respect, it is unclear how stakeholders

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<sup>539</sup> UK IPO, 'Taking Forward the Gowers Review of Intellectual Property' (n 3) 15 para 80.

<sup>540</sup> Ibid para 81.

<sup>541</sup> Ibid para 89.

<sup>542</sup> Ibid; HM Government, 'Consultation on Copyright' (n 482) paras 7.28-7.29.

<sup>543</sup> UK IPO, 'Taking Forward the Gowers Review of Intellectual Property' (n 3) para 90.

in the audio-visual industry reacted to the introduction of the private copying exception and why there was no cross-industry action between the music and AV industries in challenging the adopted legislation judicially. Research specifically into COs' actions on private copying within the AV industry could supplement the findings of this thesis and offer a perspective on whether actors in one creative sector are perhaps better organised than actors in another, and are as a result able to exert more influence over copyright law and policy, also when it comes to agenda-setting.<sup>544</sup>

## *2.2. Differences between individual COs*

Both by studying the individual consultation responses of SoA, ALCS, PRS and MU, as well as from the interviews conducted with respondents from these organisations, I perceived that, even among the three COs that took a firm stand on the private copying exception, SoA, PRS, and the MU, there were subtle differences in the primary considerations and motives that each CO put forward in objecting to the government's concrete legislative proposal.

There appeared to be two main priorities that directed the way the researched COs approached the drafting of their consultation submissions. One focused on emphasising the incompatibility of the proposed exception with EU law and thereby highlighting the need to respect the principle of fair compensation and the Berne three-step-test<sup>545</sup>, while the other stressed the implications of the exception for licensing practices. ALCS' position, as discussed above, seemed to follow a different path altogether.

SoA and the MU, appeared to be primarily led by the impetus to safeguard the established principle of fair compensation as such. They wanted to deter the establishment of a precedent that could weaken this principle and be in breach of EU law. In fact, the MU did not mention licensing, or the fact that the proposed exception would be technology neutral and include copying through cloud services at all in its

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<sup>544</sup> See Chapter 8, section 2.4.1.

<sup>545</sup> Article 9(2) Berne Convention for the Protection of Literary and Artistic Works (1886).

consultation submissions. My SoA respondent also emphasised the importance of the principle:

I think we have to hold Government to account, you can't do things which are outside the Berne three-step-test and you can't do things which, if, *if* the rule is, you have to give equitable remuneration, then you have to give equitable remuneration! And there's a very important principle there about creators being paid for their work [...].<sup>546</sup>

Unlike the MU, SoA did also argue for an exception limited to copying from physical products, which would not extend to copying through online cloud services in its UK IPO consultation response.<sup>547</sup> MU's main concern, however, was with emphasising the importance of fair compensation as an additional revenue stream for creators and performers. Such an additional micropayment could make a positive difference to the overall viability of creators' and performers' careers.<sup>548</sup> In this respect, the MU advanced a fairness argument that musicians should benefit financially from the value contained in the copy-ability of their work, since device manufacturers were benefiting through the sale of their portable devices.<sup>549</sup> In a subsequent, wider consultation on copyright in the EU in 2014, the MU also clearly stated, among other things, that 'The payment of fair compensation to right holders is an essential requirement for the legitimacy of the implementation of private copying exceptions in national law.'<sup>550</sup>

ALCS approached the topic of private copying from a distinctly different angle compared not only to PRS, but also to the other two researched COs, as discussed earlier. It did not position itself clearly in favour of or in opposition to the way the government was planning to introduce an exception and instead focused its response

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<sup>546</sup> Interview with Nicola Solomon, Chief Executive, SoA.

<sup>547</sup> SoA, 'The Society of Authors: Response to HM Government's Consultation on Copyright' (n 536) 13-14.

<sup>548</sup> Musicians' Union, 'MU response to the IPO's Consultation on proposals to change the UK's copyright system' (n 200) paras 23 – 28.

<sup>549</sup> Ibid para 30.

<sup>550</sup> MU, 'British Musicians' Union response to the Public Consultation on the review of the EU copyright rules' (February 2014) 4 (response to Question 65) <  
[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)>  
accessed 09 February 2017.

on the idea that the planned exception would fall short of producing a future-proof system that would work equally well for all copyright works, on all platforms.<sup>551</sup>

PRS, on the other hand, *did* take a clear stand in relation to private copying. The issue that it emphasised most strongly in its UK IPO consultation response was not the possibility that the UK government would violate EU law and the principle of fair remuneration. Rather, PRS stressed that the planned exception could compromise its online licences for cloud services, as the exception was intended to be technology neutral and to thus also apply to copying to the cloud.

Our conservative estimates project that the reduction in online revenues from exceptions applied to cloud services over the next five years could amount to a loss of at least £40m in revenues for composers and music publishers alone. Since cloud services can be licensed and represent the future business model for technology and rights, there is no justifiable case for an exception.<sup>552</sup>

The fact that the scope of the exception, rather than the lack of fair compensation was at the heart of the issue for PRS was also indicated in the way a key PRS respondent introduced the subject-matter in our interview:

[...] one of the policy issues that we had in the course of the last year was the new exception for private copying from the UK government because that is technology neutral, which means that it not only impacts format shifting in the traditional way, which is consumers making copies, but it will also impact copies made in a remote technology storage system. So then the question came up, does that impact licenses that PRS already issues to other, you know, to services?<sup>553</sup>

This is not to say that PRS agreed to the fact that a more narrowly drawn exception could be introduced without fair compensation. It made explicit reference for the need that this condition is met in accordance with EU law within its IPO consultation response. However, I did not perceive that to be the main issue for the CMO. Rather, PRS' primary concern in relation to private copying seemed to be preventing the

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<sup>551</sup> S 70 CDPA 1988 regulates the case of time-shifting.

<sup>552</sup> PRS for Music, 'Response to the Consultation on Copyright' (n 509) 2-3.

<sup>553</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

potential loss of licensing flexibility. In fact, the organisation's headline position on the government's proposal for a private copying exception, as worded in its IPO consultation response, concluded with the sentence: 'Exceptions for private copying should only apply if licensing is not feasible.'<sup>554</sup> To that extent, the CMO was furthering the idea once advanced by Music Business Group and then by UK Music, that with regard to private copying, licensing provided a better solution than an exception.<sup>555</sup>

There was, of course, overlap in the positions advanced by the trade unions and by PRS. As noted above, SoA had itself referred to the scope of the exception urging that it should not apply to cloud services. Moreover, the Berne three-step-test, also enshrined in Article 5 (5) of the InfoSoc Directive, which was referred to by SoA, includes the qualification that exceptions may only apply where they do not unreasonably prejudice the legitimate interests of the right holder. These interests logically include the possibility of extracting value from the licensing of certain uses of works. The argument made, therefore, is that differences appeared to exist in relation to the *main* issue of concern for each organisation. I mapped these nuances against interview data, and the content of their consultation submissions, but they were also reflected in the length and space dedicated to a particular argument in each CO's consultation response.

The subtle differences in the primary points advanced by the individual COs can likely be explained by the different functions performed by the MU and SoA on the one hand, and by PRS on the other.<sup>556</sup> As a CMO, PRS' main activity and purpose centre around the licensing of works. Therefore, it is of little surprise that the organisation emphasised a potential licensing problem pertaining to the government's proposal for a private copying exception as that was the aspect that directly concerned the CMO's own *raison d'être*, as well as its responsibility towards

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<sup>554</sup> PRS for Music, 'Response to the Consultation on Copyright' (n 509) 4.

<sup>555</sup> Ibid 2.

<sup>556</sup> See Chapter 3, section 2, in particular sections 2.1 and 2.3.

its members in managing and safeguarding the value of their rights. Equally, trade union COs were not involved in licensing activities, on which the exception could have any impact. It is therefore not surprising that they focussed their policy submissions on the more general arguments that the creator, or rather, right holder protective principle of fair remuneration should be defended, that EU law to this end should be respected, and that the internationally established Berne three-step-test should be applied.

### ***2.3. Implications of taking joint action***

Interestingly, there was some indication in the judicial review judgment itself that despite an intended appearance of a unified front, the views of music industry organisations had generally not been all that consistent and uniform. At para 80, Green J described that a Deputy Director of Copyright Policy at the IPO had produced witness statement evidence in the proceedings observing, among other things, that the position adopted by UK Music was not wholly representative of the views expressed by its membership.<sup>557</sup> According to Green J, the witness had reported that during meetings with HM Treasury, some members of UK Music had felt that they *could* accept a narrowly defined private copying exception without levy on the basis that it largely reflected current reality. This example is indicative of the way the messages and positions conveyed through coalitions or alliances are less nuanced, less *granular* compared to those of their constituting members. It also shows how individual organisations' positions are ultimately modified when represented through larger, multi-stakeholder alliances. Perhaps, if PRS had acted alone rather than through UK Music and alongside the MU, it would have called for an exception subject to license, or merely lobbied for a further narrowing of the proposed scope to the exclusion of copying on the cloud. Similarly, if the MU had acted alone, it may not have challenged the actual scope of the exception, as much as the lack of fair compensation, and in that respect, it may have settled for a levy scheme, as in other

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<sup>557</sup> *R v Secretary of State* (n 526) [80].



EU member states. These considerations further illustrate how joint action likely affects the priorities and preferences of individual organisations.

At the same time, the judicial review case is an example of impact through unity, and of how smaller, less powerful actors can have a greater influence over copyright law and policy when their interests align with those of larger, more powerful stakeholders. Specifically, interview data suggested that considering the costs of the judicial review, such an endeavour may not have been feasible for the MU or BASCA to undertake on their own.<sup>558</sup> One MU respondent offered insight into the way the financial burden of the judicial review had been shared across the initial<sup>559</sup> claimants.

PPL and PRS funded it. [...] We paid, the Musicians' Union paid for the communications part of it. [...] We paid for all the coms. So, it's quite a lot of money for us. I think we put 10 000 pounds to one side.<sup>560</sup>

Perhaps, if less had been at stake for the collecting societies and for other music industry stakeholders, industry organisations would not have organised themselves to take joint action and the effect of the government's legislation would not have been reversed. In this respect, it could be argued that copyright stakeholders are also generally more likely to effectively exercise influence over policymakers when they act in unison.

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<sup>558</sup> Indeed, comparing the financial statements filed by PRS and BASCA with the Companies House and by MU with the Certification Officer, it is evident that PRS is considerably resource-richer compared to the other two organisations. For the financial year ended 31 December 2015 PRS' total recognised gains were £ 13 939 000, see PRS, 'Annual Report and Financial Statements for the Year Ended 31 December 2015' (n 301) 10. In contrast, MU's surplus for the same year was £ 849 748, see MU, 'Form AR21: Annual Return for a Trade Union: Musicians' Union, Year ended 31 December 2015' (n 301) 3. For the same financial year, BASCA was entitled to exemption from audit under section 477 of the Companies Act 2006 relating to small companies, see <  
<https://beta.companieshouse.gov.uk/company/03643088/filing-history>> accessed 19 July 2017.

<sup>559</sup> After the judicial review application by MU, BASCA and UK Music had been launched, the Incorporated Society of Musicians applied to the court to become an intervener and sought to add an additional claim in relation to the issue of state aid to the judicial review.

<sup>560</sup> Interview with John Smith, General Secretary, MU.

## **2.4. Conclusion**

Through an analysis of all four COs' positions on private copying, expressed both in the semi-structured interviews and in several copyright consultations, this section demonstrated differences based on the creative industry to which a respective CO belonged, as well as more general differences in the considerations prioritised by every CO. Furthermore, positions were shown to be subject to modification when COs take joint action. At the same time, I argued that the judicial review case exemplifies that copyright stakeholders can have a greater impact in shaping copyright law when they act in unison, and particularly how smaller, less powerful stakeholders can benefit when their interests are aligned with those of more powerful policy actors.

## **3. The interplay of music industry stakeholders, the technology sector, and policymakers in the policy process**

Despite the fact that on this issue, more so than on the issue of contract terms explored previously, both trade union and CMO COs combined their efforts and were generally on the same side vis-à-vis the UK lawmaker, the COs still faced a number of challenges in their efforts to change the course of law and policy on private copying.

This section discusses the dynamics and challenges that characterised COs' attempts to effect change to the government's policy on private copying, both before and after the adoption of the copyright exception. In doing so, it will further develop the analyses of section 1 on the tensions between COs and the government, as they related to the policymaking process, in particular the evidence gathering and evaluation, as well as the conduct of the consultation. The weight and influence of stakeholders that are external to the creative industries on copyright policy, and the government's own wider policy objectives will also be considered.

### **3.1. The evidence underpinning the private-copying exception**

The parameters within which the government could adopt a private copying exception were set by Article 5(2)(b) InfoSoc Directive, as discussed in section 1 of this

chapter. This provision gave the government considerable discretion. It neither dictated how harm should be measured, nor what constitutes minimal harm, both of which were relevant for deciding whether a fair compensation scheme would be necessary in implementing the exception. Such areas where the government enjoys a margin of discretion thanks to inbuilt flexibilities within legal norms generally present industry stakeholders with an opportunity to lobby and make their case. In this context, one could recall Hargreaves' emphasis on the principle of evidence-based policy.<sup>561</sup> This principle could be interpreted as meaning that the government's decision on how to exercise its discretion should follow from evidence.<sup>562</sup>

The Explanatory Memorandum which accompanied the Statutory Instrument introducing the private copying exception, succinctly addressed the way the UK legislator had made use of this discretion.<sup>563</sup> The government had argued that compensation was not necessary if right holders were receiving payment in some other form, suggesting that the ability to make private copies was already factored into the price of the content, and that compensation was not necessary in the event that only minimal harm was caused to right holders.<sup>564</sup>

COs and umbrella organisations that had presented evidence to the government challenging the notion that private copying had been factored into the sale price of creative products<sup>565</sup> felt that their evidence had not been duly taken into account. As a consequence, their trust in the whole consultation process preceding the adoption of the exception had been shaken, as I will show below.

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<sup>561</sup> Hargreaves (n 4) 1, 3, 7, 8.

<sup>562</sup> For a discussion on what constitutes evidence for policy, see Martin Kretschmer and Ruth Towse (eds), 'What Constitutes Evidence for Copyright Policy?' (2013) CREATe Working Paper 2013/1.

<sup>563</sup> Explanatory Memorandum to The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361 and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356.

<sup>564</sup> Ibid paras 3.2.2 – 3.2.5.

<sup>565</sup> PRS for Music, 'Response to the Consultation on Copyright' (n 509) 33; UK Music, 'HM Government: Consultation on Copyright' (n 516) paras 27 – 37.

According to several respondents from the MU and PRS, the evidence relied on by the lawmaker had been flawed, incorrect inferences had been drawn therefrom, and their own opposing evidence had not been sufficiently considered. One MU respondent noted:

I think that Hargreaves used spurious economic evidence when he, the amount of money he said that would be made by an exception was... enormous.<sup>566</sup>

A further MU respondent expressed the same sentiment with regard to the quality of the evidence:

[...] I also think that the IPO, you know, their own impact assessments were utterly flawed, they even admitted themselves that they've got bits of them wrong. But, you know, it's like they just didn't want to back down.<sup>567</sup>

A respondent from PRS implicitly criticised the lack of consideration given by the government to research supporting a form of compensation:

There is some publicly available data from a consumer survey which we, which the UK Music commissioned from *Compass Lexecon*, which showed that consumers thought creators ought to be paid and showed they would pay more for their devices if there was a compensation payable on [to creators]. So we showed that public opinion supported rewarding creators.<sup>568</sup>

The issue of the evidence relied on and ignored by the UK government in the adoption of the private copying exception also comprised one of the main points that Green J was asked to consider in the judicial review. The Judge studied the IPO's Impact Assessments, which drew on the assumption that since private copying was widespread and yet infringements were not pursued, any costs to copyright owners and benefits to consumers had already been priced into the purchase price of content.<sup>569</sup> Any additional costs, not already priced in, were therefore expected to be minimal or zero and capable of being compensated through the purchase price. In

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<sup>566</sup> Interview with John Smith, General Secretary, MU.

<sup>567</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

<sup>568</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>569</sup> *R v Secretary of State* (n 526) [77].

reference to this assumption, the IPO had stated that it would commission research to investigate the relationship between the prices charged for content and the permissions to copy which were included.<sup>570</sup> In his judgment, Green J had found that this IPO Research Report was in fact what the government had placed predominant reliance upon in going forward with the exception.<sup>571</sup>

From the conclusions of the IPO-commissioned research report, as well as from the Judge's own reasoning, it appears that the COs were correct in perceiving the government's handling and evaluation of research as problematic and as a hindrance to their arguments being appropriately taken into account. To begin with, as the Judge rightfully identified, the remit of the IPO research had not been specifically framed in terms of an evaluation of the actual extent of pricing-in and whether it satisfied the *de minimis* threshold.<sup>572</sup> Moreover, with regard to music, the research had not shown evidence of pricing-in as between CDs and downloads, but rather the opposite effect; what constituted '*de minimis*' harm was nowhere defined, nor was there evidence that this threshold was met.<sup>573</sup> Although the final Impact Assessment from March 2014 had claimed to rely on further evidence, Green J had discredited this assertion and found that rather than additional evidence, all the Impact Assessment had done was explain why certain pieces of evidence were not probative and why other research possibilities had not been pursued.<sup>574</sup> Still, the updated Impact Assessment had maintained its position and explained why, contrary to the researchers' conclusions, the research results had in fact been consistent with the government's pricing in theory.<sup>575</sup>

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<sup>570</sup> Ibid at [77]-[78].

<sup>571</sup> Ibid at [271(iii)]; Roberto Camerani, Nicola Grassano, Diego Chavarro, Puay Tang, 'Private Copying' (Report) (IPO, 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/309681/ipresearch-private-150313.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309681/ipresearch-private-150313.pdf)> accessed 10 February 2017.

<sup>572</sup> *R v Secretary of State* (n 526) [115].

<sup>573</sup> Ibid [268]-[271].

<sup>574</sup> Ibid [271(vi)].

<sup>575</sup> IPO, 'The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, Impact Assessment 2014/98' (23 March 2014) 17

The Judge had also agreed with the claimants' allegation that the government had ignored relevant evidence.<sup>576</sup> What the COs had mainly referred to in this context, as the above interview quote indicates, is research commissioned by UK Music and conducted by *Compass Lexecon/FTI* estimating the harm caused by the private copying exception.<sup>577</sup> In relation to this research, Green J had been particularly critical to the effect that the IPO itself had deemed a consumer survey on purchasing considerations, like the one commissioned by UK Music, as a way of investigating the pricing-in effect. Yet, the IPO had itself not undertaken such research and still essentially dismissed the evidence presented by UK Music on the basis that it appeared to have gaps and flaws in its methodology and analysis.<sup>578</sup>

This case on the one hand shows how COs can in fact not only challenge the objective of developing evidence-based policy, but equally hold the government to this objective, especially when this aligns with organisations' own interests. The case of the evidence for the private-copying exception further illustrates how unpredictability of policy outcomes is in some ways built into the copyright policy process, specifically in the step of evidence evaluation and interpretation by the government. This step may produce results that do not necessarily reflect, or follow from, the main messages of the evidence. This could result both from intense stakeholder activity that complements the evidence submitted to policymakers, as well as an existing policy predisposition on the part of the government. The latter point and its effects on the policy process are considered in the following subsection.

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<<http://www.legislation.gov.uk/ukdsi/2014/978011112700/impacts>> accessed 10 February 2017.

<sup>576</sup> *R v Secretary of State* (n 526) [271(vi)-(vii)].

<sup>577</sup> Letter from Jo Dipple, Chief Executive of UK Music to Lord Goodlad, Chair of the Secondary Legislation Scrutiny Committee (30 April 2014)

<[http://www.ukmusic.org/assets/general/SLSC\\_Copyright\\_Exceptions\\_Submission\\_April\\_2014.pdf](http://www.ukmusic.org/assets/general/SLSC_Copyright_Exceptions_Submission_April_2014.pdf)> accessed 10 February 2017. The research by Tim Battrick et al, 'Estimation of the harm caused by private copying exception based on survey evidence' (April 2014) is attached to the letter.

<sup>578</sup> *R v Secretary of State* (n 526) [100], [112]-[113], [254].

### *3.2. Lack of trust in the consultation process as a result of the government's predisposition*

A large amount of interview data evidenced different COs' lack of trust in the copyright consultation process on private copying, with some comments questioning the general nature of consultations. In essence, COs had felt barred from communicating their views, arguments and evidence in an effective way as they had felt that the government was not open to any submissions that would challenge the lawmaker's view. Music industry stakeholders' lack of belief that they could influence the consultation was also evident in the fact that preparations for the judicial review were ongoing well before the adoption of the exception, as confirmed by a respondent from BASCA in a semi-structured interview: 'We've spent two and a half years putting this legal case together.' The judicial review was launched in November 2014, just one month after the private copying exception had entered into force because the MU, BASCA and UK Music had all anticipated the outcome of the consultation. One BASCA respondent noted:

[...] at no point in the whole consultation process did Government give us any indication that they would change their mind. [...] That was it, they were steam-running ahead. So even though we went through all the different stages with the IPO consultation and through the House of Commons, to the House of Lords, and the various Committees that it went through, that whole way, and even though – I mean – there were serious concerns raised in those Committee processes where many MPs and peers are on our side and they all, they [were] always concerned it was not enough to stop it [the legislation].

A respondent from the MU also noted:

[...] as ever with government consultations, when they consulted on the issue they already had a view. And they, you know, the way they were putting forward the consultation it was very clear that they wanted to introduce an exception with no fair compensation. [...] I mean, I spent a lot of time writing consultation responses and a lot of the time, you know what the government are aiming to do, and all of the responses can tell them they're wrong and they can still go ahead. They don't always.<sup>579</sup>

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<sup>579</sup> Interview with Isabelle Gutierrez, Head of Government Relations and Public Affairs, MU.

My respondent from WGGB expressed strong criticism about copyright consultations more generally:

We are in a system in this country [...] whereby consultation has replaced research. So Government now will no longer carry out research to inform its political proposals, it will come up with a political proposal [...] and then they will consult to see what people say about it. [...] But there's so much political certainty in Westminster based on so little knowledge and research that, actually, it's quite hard once they've [the decision makers] alighted on their latest brilliant idea, to actually divert them from it.<sup>580</sup>

The issue of whether the government had predetermined the outcome of the consultation had also been put to the judiciary in the review. However, Green J reasoned that the government was entitled to have a strong predisposition and that this did not prevent the possibility of conducting a fair consultation, so long as the decision maker was prepared to keep an open mind.<sup>581</sup> While the Judge explicitly stated that it was right to record that the government had a strong predisposition which it had set out in the consultation document, there was no evidence that the consultation outcome had been predetermined as this could not be inferred from the end result alone.<sup>582</sup> Certainly, there is a general fundamental difficulty of proving before a court a causal link between a legislator's predisposition and a legislative outcome, particularly where all procedural steps have been formally followed.

### ***3.3. The origin of the government's predisposition***

Given that the Judgment itself recognised the existence of a strong predisposition by the government in the way it wished to legislate on private copying and that this was perceived as a challenge by the studied COs, I explored the interview data for explanations of where the COs saw the origin of this predisposition. The interview data-based themes were then triangulated with documentary evidence, including the government's impact assessment and 2012 consultation document, the Hargreaves review, and some scholarly literature. The predisposition appeared to be a

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<sup>580</sup> Interview with Bernie Corbett, General Secretary (at the time of the interview) of WGGB.

<sup>581</sup> *R v Secretary of State* (n 526) [274]-[281].

<sup>582</sup> *Ibid* [9], [281].



consequence, on the one hand of the government's own wider policy agenda, and on the other, of inter-industry dynamics, i.e. the policy input of the technology sector on private copying.

*Incompatibility of an "ipod tax" with a free market and deregulation*

The first theme that emerged from the interview data explained the substance and origin of the government's predisposition with its unwillingness to interfere in the market's price-setting mechanism through the introduction of a levy scheme. CO respondents explained that the government perceived a potential levy scheme as a tax and applying a tax on creative content, such as music, was not a measure that the government was willing to take.

In this sense, one PRS respondent commented:

The UK government have been absolutely, have been absolutely clear that they do not want to implement a compensation mechanism. And that comes from deep in the Treasury, that they think it's a tax. So there's a complete, there is a complete ban for them on implementing what they see as a tax [...]<sup>583</sup>

This was also corroborated by a respondent from the MU:

First of all, they talked about it as an iPod tax. In fact, a civil servant said this to me in the House of Commons, I got really angry. It's difficult with MPs there because you can't – they are the ones who are supposed to do the talking. And I, and this guy said: 'No way will we have an iPod tax'. I thought 'You're a civil servant, *these* people decide this, they're MPs!' And it's *not* an iPod tax, this is quite clear.<sup>584</sup>

Equally, implementing a compensation mechanism would have been against the government's wider policy of pursuing deregulation.<sup>585</sup>

CO respondents saw the government's predisposition as one of the main challenges in influencing policy on private copying. I therefore considered whether, aside from

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<sup>583</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>584</sup> Interview with John Smith, General Secretary, MU.

<sup>585</sup> The government's aim to reduce burdens resulting from legislation for businesses, other organisations, or for individuals found expression in the Deregulation Act 2015, which came into force in March 2015.

the deadlock created by stakeholder tension, as discussed in section 1, a long-standing and unchanging predisposition of the UK lawmaker could have been an additional reason why for the last 15 years, and perhaps since 1988, COs had not actively, at least publicly, lobbied for a private copying exception with fair compensation.

According to one PRS respondent, the music industry had made previous attempts, prior to the adoption of the 1988 CDPA to lobby the government for the adoption of an exception with compensation:

The UK government, you can go back, in 1986 the UK music industry was lobbying for an exception with compensation and the government had drafted an exception with compensation in the 1988, the draft law for the 1988 Act. And they pulled it last minute. So they were going down the route of adopting what the European system is and then they decided not to. And then when they implemented the UK, I mean the EU Copyright Directive in 2001, they decided to implement nothing. But you can go back, the Whitford Committee recommended an exception for private copying with compensation, and that's 1977.<sup>586</sup>

This historical background was also provided in PRS' IPO consultation response from March 2012.<sup>587</sup> An article from a 1977 March issue of *Billboard* corroborated this respondent's assertion. It described that the Whitford Committee report, which had recommended the introduction of a levy on tape recording equipment to compensate right holders, had referenced a 1975 record industry survey, which indicated a considerable amount of unauthorised recording.<sup>588</sup> The record industry had indeed lobbied for a levy. Furthermore, scholars had reported that between the Whitford Report, three Green Papers, and a White Paper of 1986 titled 'Intellectual Property and Innovation', major changes had been made to the original Bill in its lengthy

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<sup>586</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>587</sup> PRS for Music, 'Response to the Consultation on Copyright' (n 509) 34.

<sup>588</sup> Adam White, 'U.K. Hardware Levy Urged: Compensate Copyright Owners In "Home Tape Piracy"' (26 March 1977) *Billboard* 63; Patricia M Leopold, 'The Whitford Committee Report on Copyright and Designs Law' (1977) 40 *The Modern Law Review* 685, 698 also corroborates that a recommendation for the compensation of right holders through a levy had been introduced by the 1977 Whitford Committee.

progress through Parliament.<sup>589</sup> There is also evidence that the government was intending to include a proposal for a compulsory levy on blank recording tape as payment for the right to make recordings of copyright material for private purposes in its Bill. Such evidence was found in the British Computer Society's submission to the Copyright Committee objecting to this particular proposal.<sup>590</sup>

Against this background, it seemed that while the record industry had indeed lobbied for fair compensation before 1988, a long-standing, unchanged predisposition of the UK legislator could not have been a reason why COs had not lobbied for an exception with fair compensation since then. After all, the fact that in 1977 an IP review had actually favoured and recommended a compensation mechanism for right holders, and the fact that the government had intended to legislate to this end in the 1988 Act does not prove the *fixed* nature of the government's predisposition against introducing of a 'tax'.

The reason that policymakers gave in 1988 for the refusal to adopt a levy in relation to private copying was that according to the government, the lawmaker should not interfere in the enforcement of private rights. These were the words of Lord Beaverbrook in a House of Lords debate on the proposed amendments to the Bill from 1988:

With the amendments we are returning to the vexed question of private copying, on which we have had much debate already. For the reasons outlined in Committee by my noble friend the Secretary of State, we do not believe that a levy is the answer. I do not want to go over that ground again. But suffice it to say now that we rejected the levy because we did not believe that it was the Government's business to establish a cumbersome bureaucracy to enforce private rights. Copyright is a private right and must be enforced by the rights' owners. They should not rely on government to do that job for them.<sup>591</sup>

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<sup>589</sup> Hazel Carty and Keith Hodgkinson, 'Copyright, Designs and Patents Act 1988' (1989) 52 (3) *The Modern Law Review* 369.

<sup>590</sup> British Computer Society, 'Response to the Government's White paper entitled "Intellectual Property and Innovation"' (Cmnd. 9712) (1987) 2 (5) *Computer Law & Security Review* 2.

<sup>591</sup> HL Deb 23 February 1988, vol 493, col 1139.

That stated consideration is reminiscent of the recent government's position that it should be up to the market to set the price for creative works in such a way that it is inclusive of the value obtainable through private copying. In both cases, the government preferred a hands-off approach. However, it cannot be excluded that stakeholder influence from the technology sector, in particular hardware manufacturers, may have held sway over the government nearly two decades ago and thus been an underlying reason why the government had advanced the private rights enforcement argument. Certainly, the influence on the government by the technology sector emerged as a second theme in my interview data to explain the predisposition that the government had displayed in relation to the private copying exception in 2014.

#### ***3.4. The opposing interests of the technology sector***

Ample interview data indicated COs' perception that the lobbying of actors from the technology sector had played a large part in the course that copyright policy had taken on private copying. This was an interesting observation considering that in the context of contract terms, one of the identified challenges had related to *inter-stakeholder* dynamics when there had been competing interests between different actors within the same (creative) industry. In contrast, the issue of private copying sheds light on the existence and possibly on the practical effects of *inter-industry* dynamics, thus revealing an added layer of difficulty and complexity when it comes to COs and their efforts to influence copyright policy.

The government-proposed private copying exception was seen to mainly further the interests of technology companies. On this basis, respondents from several COs argued that advocacy work by such companies had been at the bottom of, or at least a contributing factor to the government's predisposition and ultimate decision to implement the exception in the way that it did.

One MU respondent noted:

I think, I'm sure they [IPO officials] were pushed by the government

into making it easier for tech companies, I'm sure they were [...] <sup>592</sup>

The tension between the interests of the music industry on the one hand and the government together with technology manufacturers on the other was also emphasised by a PRS respondent:

[...] the beneficiaries of, the people who make the most out of there being massive consumer copying are the people who make the technology devices. So if you are on the side of creators you believe, you think there should be compensation. So we just have a different opinion from the government, and from the technology device manufacturers. <sup>593</sup>

Finally, a further MU respondent argued that power dynamics to the benefit of the technology sector had played a role in the consultation outcome:

Well, I think that we're pretty good at putting forward the views. I think the problem is that the legislators choose to ignore those views in preference to other people's views. And again, I don't know to what extent the companies who benefit from this exception to copyright, you know, the Apples and Samsungs and Nokias of this world, to what extent they have better lines of communication to Government but I should imagine they're far better. I would imagine they're far [better] because they have so much more money to throw at it. <sup>594</sup>

I could not ascertain to what extent technology companies had actually held sway over the government in relation to the adoption of the private copying exception. However, there was certainly evidence that technology companies had held a different view with regard to private copying and fair compensation (1), that this view had been persuasive, at the very least to Hargreaves (2), and that the government had deemed technology companies to be among the key beneficiaries of the proposed legislation (3).

With regard to (1), it is sufficient to review the evidence submission made by Microsoft to the Hargreaves review, where the company explicitly stated that in relation to private copying, '[f]or technology vendors, the priority issue here is

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<sup>592</sup> Interview with Isabelle Gutierrez, Head of Government Relations and Public Affairs, MU.

<sup>593</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>594</sup> Interview with Horace Trubridge, Assistant General Secretary Music Industry, MU.

elimination of “private copy levies” among other EU countries, or at the very least harmonisation.<sup>595</sup> Similarly, in its consultation response to the UK IPO copyright consultation from 2012, Nokia had reasoned that the costs to right holders of a narrow exception were intended to be and *would in fact be minimal at most* since the copies in question were not copies that were substitutable for another purchased copy.<sup>596</sup>

With regard to (2), Green J himself had considered that Professor Hargreaves was influenced by evidence provided to him by innovators, in particular by the submission of Mr Martin Brennan who had invented the Brennan J7 Music Player.<sup>597</sup> Brennan had claimed that out of date legislation and red tape could sabotage his growth as he had to expend costs in assuring customers that record labels would not sue them. In fact, not only Hargreaves, but the government itself had used the example of the Brennan J7 Music Player to make a case for a private copying exception.<sup>598</sup> Furthermore, Hargreaves had also been influenced by a solution proposed by Nokia according to which there was a way that the exception would not give rise to a requirement for fair compensation.<sup>599</sup>

With regard to (3), the government’s Impact Assessment had clearly identified that the intended legislative measure would primarily benefit, among others like consumers, also UK firms working in the development of new consumer technology and services in that area. The IA stated: ‘The measure will benefit technology firms (particularly SMEs) by removing barriers and costs and improving entry to technology markets which rely on consumers being able to make private copies.’<sup>600</sup>

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<sup>595</sup> Microsoft, ‘Response of Microsoft to the UK Independent Review of Intellectual Property and Growth Call for Evidence’ (4 March 2011) para 30.1

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/iprevie-w-c4e-sub-microsoft.pdf>> accessed 10 February 2017.

<sup>596</sup> Nokia, ‘Response to Consultation on Copyright: Private Copying Exception’ (20 March 2012) 2

<<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/respons-e-2011-copyright-nokia.pdf>> accessed 10 February 2017.

<sup>597</sup> *R v Secretary of State* (n 526) [52]; Hargreaves (n 4) para 5.29.

<sup>598</sup> HM Government, ‘Consultation on Copyright’ (n 482) para 7.33.

<sup>599</sup> *R v Secretary of State* (n 526) [53]-[54]; Hargreaves (n 4) para 5.29.

<sup>600</sup> IPO Impact Assessment (n 575) 1, 2.

Taken together, this evidence confirms that technology companies' interests differed from those of the studied COs and that the views and arguments advanced by some such companies were indeed taken up by Hargreaves, whose recommendation the government went on to implement. Indeed, as recognised by the government in its IA, the form of the adopted private copying exception would have primarily advanced the interests of the technology sector. To this extent, it was reasonable for COs to perceive a challenge to their private copying battle stemming from inter-industry dynamics and the opposing interests of important stakeholders from the technology sector and to relate these to the government's predisposition.

As an aside, the comment made by an MU respondent that 'the Apples and Samsungs and Nokias of this world' possibly had better lines of communication to the government also indicates that the trade union considered its own resource capacity as a limitation to the extent that it could effectively contribute to and steer policy. While the CO did not provide evidence to corroborate this remark, the underlying idea that financially comparatively more powerful organisations may have the ability to allocate a greater portion of their resources to lobbying and advocacy is not deprived of reason and has already been advanced in this thesis in the context of power imbalances.<sup>601</sup>

### ***3.5. Conclusion***

This section considered the interplay of music industry COs, the technology sector, and policymakers in the policy process relating to the private copying exception. By discussing the way the government dealt with the available evidence, the potential predetermination of the consultation process, as well as the possible origins of the government's predisposition, I showed that stakeholder tension, historical 'baggage', and the government's own wider policy aims and principles, like deregulation and a free market, all influence the way substantive copyright law is made. I also argued that unpredictability of copyright policy outcomes is in some ways built into the

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<sup>601</sup> See, for instance, Chapter 4, sections 1.3.2, 1.3.3, and 3.2. See also Chapter 5, sections 3.1 and 3.2.4.

policy process precisely in the step of evidence evaluation to the extent that this step may produce results that are not necessarily conclusive from the evidence, and to the extent that the government, as a distinct stakeholder, may favour a particular outcome. Moreover, an examination of the opposing forces on private copying between the music and technology industries revealed that complexity in the copyright policy environment also derives from the fact that certain copyright issues are not only subject to inter-stakeholder dynamics from *within* the creative industries, but also to influence from stakeholders within other affected industry sectors.

#### 4. Discussion and conclusions

The analyses in this chapter relating to CO's policy involvement on the issue of private copying revealed important insights into the role of COs as actors in copyright policy, as well as into the way compromise and unpredictability permeate the copyright policymaking process and its outcomes. I will elaborate on these in turn in this section 4.

##### *4.1. COs' role and contribution in copyright law and policy*

Chapters 4 and 5 illustrated that a key role played by COs in copyright law and policy is these organisations' exercised capacity to bring to policymakers' attention problems and shortcomings in the way copyright law impacts creators in practice. Typically, as shown in the previous two chapters, COs also advance and advocate for possible legislative (and other) measures to address the identified shortcomings. Their campaigning efforts could potentially trigger concrete legislative proposals, or, at the very least, an uptake of these issues by researchers for further investigation. The present chapter revealed an additional dimension to COs' role as actors in copyright law and policy. It showed that alongside a more proactive role in alerting policymakers to potential areas requiring legislative intervention, COs' role also includes a reactive component – to monitor, respond to and, where necessary, take further action to avert emerging policies that threaten to negatively affect the interests of creators, or to undermine legal principles established for creators' and right holders' benefit.



The chapter illustrated COs' capacity to hold the government to account by testing the validity of Statutory Instruments before the judiciary. Ultimately, it is an example of the impact that stakeholder action can have in shaping the substance of copyright law and policy. Not only did music industry organisations effect a change in the status quo of UK copyright law with regard to private copying. Through the judicial review, they also drove developments in the way future policies are adopted as well as how existing legal norms are interpreted. Specifically, as a result of the judicial review, there is now more clarity and legal certainty on the general issues considered by the Judge, including the necessary qualitative standard for evidence in support of legislative measures, the potential interpretation of harm in relation to private copying, the interpretation of the fairness requirement for government consultations, and others. Similarly, the fact that the government was held to account through a judicial challenge which led to the repeal of legislation may also result in a greater scrutiny of evidence and policy inputs by the governmental decision-makers in future legislative initiatives.

#### *4.2. Power through unity and compromise due to conflict and diversity*

The reversal of the status quo on private copying through the quashing of the 2014 exception is also an example of stakeholders' power through unity. This chapter particularly discussed how through combined efforts between smaller trade union COs, and larger, financially more powerful CMOs and industry alliances, industry organisations can succeed in reaching important objectives vis-à-vis the lawmaker. In this context, I illustrated that even among the actors that collaborated, and among all four studied COs in general, there were some differences in the issues that were of primary concern to them. The fact that intricate differences exist between organisations that represent the same, or overlapping stakeholder groups (creators/right owners), as well as between creative industries, reveals the sheer granularity of priorities and considerations that characterise the copyright environment. This renders policymaking particularly complex. At the same time, the theme of power dynamics between individual actors also presented itself in this chapter. On the issue of private copying, unlike with contract terms, the trade union

COs benefited from the support of resource-rich and more influential CMOs and multi-stakeholder alliances and were thus also able to exercise more influence over the shape of copyright law. Conversely, matters important to less powerful actors that do not benefit from the support of CMOs or influential umbrella organisations may be less likely to result in impactful action and resolution on a policy level.

However, while the successful judicial review represented a victory for the COs and the music industry more widely, the final result for UK copyright law arguably represents a compromise between conflicting stakeholder interests. Through the judicial review COs were able to uphold the principle of fair compensation and to safeguard potential emerging licensing schemes for online cloud services by preventing the application of the enacted private copying exception. Similarly, neither the government, nor technology manufacturers now have to deal with the prospect of a levy scheme. Yet, all parties were in fact in agreement that the act of private copying should be legalised. The government, however, expressed no intention of re-introducing a private copying exception *with* a compensation mechanism and instead put the matter to rest after the outcome of the judicial review. In this respect, the compromised outcome on this issue did not produce a sensible, or even desired, result for copyright law. Moreover, there is little doubt that today's illegality of private copying, in defiance of widespread and common infringing consumer practice that will remain unenforced, brings copyright law into disrepute.

Outcomes embodying compromises may well be a common example of how stakeholder dynamics, in particular the existence of polarised positions and the engagement of many different actors from various industries, influence copyright law and policy, and impose limits on what is achievable through policy. Such stakeholder dynamics, which lead to policy deadlocks, may also explain the observable cyclicity in the appearance of some policy issues, like private copying. As we have seen in this chapter, private copying was on policymakers' agenda in 1977-1986, in 2006-2009 and, once again, in 2012-2015. While the status quo, as a compromise, may hold for some

time, it may be that, given its contested nature, this issue will be re-visited once more in the future.

### **4.3. Unpredictability**

This chapter also delivered further insight on why copyright policy agendas and outcomes are often unpredictable. The process of evidence evaluation may in fact produce results that do not necessarily follow from the evidence considered, as the Judge found to be the case in the judicial review with regard to the inferences that the government had drawn from the available evidence.

Moreover, reflecting on the stakeholder dynamics described in this chapter together with those considered in chapters 4 and 5, unpredictability as a feature of copyright policy can also be linked to the shifting nature of interest groupings (or constellations) that form within the music and publishing industries on a given policy issue. All three chapters have shown the tendency of copyright actors to form coalitions and partnerships in order to advance their policy positions and priorities. However, what becomes apparent is that different configurations of organisations may emerge depending on the issue at hand. Chapter 4 presented a case where a trade union CO and a CMO were able to join forces and act together, whereas the same formation was not possible between the studied CO and CMO from the music industry, as shown in chapter 5. Furthermore, in contrast to the dynamics presented in the contract terms chapters, the case of private copying is an example of an issue on which the umbrella organisations *did* in fact add their weight and power to a mutual cause that they shared with the unions. The way interests and majorities form in support of a certain cause will likely have implications for the agenda-setting process in copyright policy. Consequently, unpredictability manifests itself not only in the results of the copyright policy process but also in its very beginning.

## Chapter 7

### Implementing the Collective Rights Management Directive

In chapters 4 and 5, I examined COs' activities in law and policy movements relating to contract terms, which was an issue of primary relevance to the studied unions. Subsequently, chapter 6 considered COs' role with regard to the private copying exception, which to a greater degree concerned and affected both trade unions and collective management organisations (CMOs). This chapter will focus on the studied CMOs in the context of the implementation of the collective rights management Directive (CRM Directive).<sup>602</sup> As a preliminary point, it will be argued that, based on their pivotal role in facilitating the functioning of the copyright system, these organisations are potentially particularly powerful actors in copyright policy. Subsequently, in the context of the CRM Directive, I will identify and discuss differences in the extent to which individual CMOs appear to take advantage of their potential influence over policymakers. I will show that PRS in particular, demonstrates proactive, agenda-setting and momentum-creating behaviour, which distinguishes it from the other studied COs.

The present chapter is organised in three sections. Section 1 will consider the factors that set up CMOs as particularly powerful policy actors. Interview data will be used to expound on the key functions performed by CMOs in the copyright system: licensing, royalty collection and distribution, and rights enforcement. This data will illustrate that a further facet of COs' role in copyright law and policy is the implementation of copyright law in practice. Moreover, in applying Olson's 'by-

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<sup>602</sup> CRM Directive (n 34).

product' theory, I will argue that this role and the functions of CMOs elevate these organisations to particularly important and influential copyright policy actors.

In section 2, I will use the implementation of the CRM Directive as an example to discuss differences in the policy contributions of ALCS and of PRS. Differences emerging from interview data and from a comparative analysis of these organisations' responses to the implementation of the CRM Directive consultation will be related to the varying self-concepts, membership compositions, and perceived industry significance of PRS and ALCS. This section will also explore CMOs' own perception of how they contribute to copyright policy and thereby discuss how stakeholders' behaviour complicates the objective of developing evidence-based policy.

Section 3 will consider how the findings with regard to CMOs' policy behaviour relate to academics' and the media's portrayal of these actors, as discussed in chapter 3. In this section, I will also expose the problem for copyright policymaking that relates to the reconciliation of interests within organisations representing multiple copyright stakeholders.

## **1. Applying Olson's 'by-product' theory to CMOs: the significance of CMOs' functions for the copyright system**

### ***1.1. Background: importance of collective rights management for copyright law***

The contractual terms problem that this thesis considered in chapters 4 and 5 illustrated how contract law is the legal vehicle through which copyright is effected in practice. At the same time, considering the nature of certain rights covered under copyright law and the practical ways in which creative works are put to use, there are instances where the individual licensing of works would not be economically practicable or practically feasible. For instance, it would be inconceivable for a higher education institution to negotiate individual licenses with every right holder, whose books an institution wishes to make available within its libraries for photocopying, just as it would be impracticable for a broadcaster to negotiate individually with every owner of rights in musical works for the public performance of such works.

Consequently, licensing bodies, defined in s 116 (2) CDPA 1988, exist in order to do what copyright owners cannot economically and practically do for themselves.<sup>603</sup> CMOs negotiate licenses with users, collect and distribute license fees to their members, and monitor the use of works. When these functions are performed collectively, individual right holders' search, bargaining and enforcement costs are greatly reduced. In this respect, CMOs ensure a certain economic efficiency in the functioning of the copyright system.

Of course, not all rights existing under copyright are managed collectively by CMOs. For instance, PRS manages its members' 'performing right', which is defined in the PRS Articles of Association as including the right to perform the work in public, as well as the right to communicate the work to the public.<sup>604</sup> The rights administered by ALCS include the lending, rental, and reproduction right.<sup>605</sup>

As described earlier in this thesis, not all CMOs are the same in terms of the specific functions that they perform.<sup>606</sup> In fact, the two CMOs considered in this thesis, ALCS and PRS, are different in several ways, aside from the respective creative industry to which they belong. ALCS does not engage with frontend licensing, but is primarily responsible for the backend collection and distribution of royalties from secondary uses of literary works. Furthermore, its membership is solely constituted of writers.<sup>607</sup> In contrast, PRS represents both songwriters and composers on the one hand, and music publishers on the other. It performs rights licensing, alongside royalty collection and distribution, as well as a limited degree of rights enforcement through its anti-piracy unit.

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<sup>603</sup> See Chapter 3, sections 2 and 2.3.1.

<sup>604</sup> Article 7 (b), 1 (xix) PRS, 'Memorandum and Articles of Association of the Performing Right Society Limited' (As amended 26 May 2016) <<http://www.prsformusic.com/SiteCollectionDocuments/About%20MCPS-PRS/prs-memorandum-articles.pdf>> accessed 10 February 2017; ss 19 (1), 20 (1) CDPA 1988.

<sup>605</sup> Art. 7 (a) (c), 1 vi, xv, xvii PRS Articles of Association (n 604); ss 17(1), 18A (1) CDPA 1988.

<sup>606</sup> See Chapter 3, section 2.3.1.

<sup>607</sup> Art. 4 ALCS Articles of Association, see n 252.

### 1.2. Olson's 'by-product' theory and CMOs

The observation behind Olson's 'by-product' theory, discussed in chapter 3, is that some large groups with common interests are not well organised to lobby and obtain a collective benefit, while others are.<sup>608</sup> From this consideration, Olson developed his theory that a common characteristic among large economic groups that *are* well organised to act as significant lobbying organisations is that these groups are *also* organised for some *other* purpose.<sup>609</sup> In fact, according to Olson, large and powerful economic lobbies are the *by-products* of organisations that obtain their strength and support because of some other function that they perform in addition to lobbying. Applying this theory to collecting societies, I argue that these particular organisations have the potential to be particularly powerful and effective actors in copyright policy precisely *as a result* of the systemic and pivotal functions that they perform within the copyright system. In the following subsections, with the aid of examples from interview data, I will offer insight into the intricacies associated with CMOs' functions, in order to illustrate the scope that these organisations have, as well as the manner in which they in fact put copyright law into practice and facilitate the functioning of the copyright system.

### 1.3. CMOs as implementers of copyright law

Through the analysis of CMOs' activities related to collective rights management, this chapter presents a further role that the studied organisations play in copyright law and policy. Aside from awareness raising, which includes identifying and highlighting to policymakers shortcomings or problems in the way copyright law affects creators in practice,<sup>610</sup> and a monitoring and defensive, status-quo preserving role, which came to light in the private copying chapter, CMOs in particular are also directly responsible for putting copyright law into practice. This role itself can be broken down into two facets. On the one hand, CMOs facilitate copyright's transition from legal norms into practice through the development and operation of licensing

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<sup>608</sup> See Chapter 3, section 2.3.2 and Olson (n 176) 132.

<sup>609</sup> Ibid.

<sup>610</sup> See Chapter 4, section 3.1.

and administration, by which copyrights are exploited and rights holders remunerated. This section of the chapter will focus on this facet. Furthermore, CMOs also directly shape copyright law by implementing legislation that pertains to their own governance and operations as copyright collecting societies. This latter aspect will come to the fore more clearly in section 2 where I discuss how ALCS and PRS engaged with the public consultation on the implementation of the CRM Directive.

Interview data delivered insights into the workings behind licensing and royalty payments, on the one hand, and the preservation of the value in the rights managed through litigation and enforcement on the other. The data demonstrates the complexity inherent in the work of CMOs, as well as the level of resources, and the system and technological sophistication necessary to perform these functions. These features contribute to the power and relevance that CMOs enjoy in copyright law and policy.

### ***1.3.1 Licensing and Royalty Payments***

#### *PRS*

With regard to the business of licensing, one aspect that became clear was that CMOs do not merely possess some leeway with respect to *how* they license but also in relation to *whether* they license in the first place, making them indispensable players within the creative industry value chains, as well as powerful gatekeepers of valuable rights. Respondents from PRS highlighted the existence of general differences in the approach that CMOs could take to licensing new users. Comparing PRS to the German collecting society GEMA<sup>611</sup>, PRS representatives emphasised their organisation's willingness to support start-ups and new business models, rather than withhold licenses and litigate as a means of obtaining higher fees.<sup>612</sup> One PRS respondent noted:

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<sup>611</sup> Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) <<https://www.gema.de/en/>> accessed 10 February 2017.

<sup>612</sup> The case referred to in this context was the ongoing litigation between GEMA and YouTube, at the heart of which was a disagreement over the amount of royalties due to be paid by YouTube, see Benjamin Schuetze, 'Germany: What do YouTube and GEMA have in



I think we have always wanted to be, we've always sought to license rather than to play really hardball.

Another PRS respondent elaborated on this matter:

I think one thing that PRS is known for is that it has been the first to license in many of these sort of new business kind of senses. We have taken a, an approach that is different from other parts of the music industry, especially abroad. [...] If we look at GEMA for example, they've taken quite a different approach in that they've taken a litigation approach trying to extract as much value as possible out of the service YouTube. We have licensed YouTube for I think 6 years or more. So we do try to reach a licensing solution to support new businesses and start-ups and to find novel ways of extracting some value for our members' repertoire that's used by those services.

To avoid the possibility of under-licensing certain services, an inherent danger when licensing emerging and still unestablished business models, respondents explained that PRS limits the duration of its licenses to one or two years. Short-term licenses allow the organisation to regularly update the terms of the license, taking account of possible changes in the market, as well as in consumer consumption as indicators of the value and success of a given service and business model.<sup>613</sup> This example shows that licensing CMOs, like PRS, have considerable leeway, subject to potential referrals to the Copyright Tribunal, in deciding on what conditions and for what duration to license the use of certain works.<sup>614</sup>

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common?' (*Kluwer Copyright Blog*, 8 February 2013)

<<http://kluwercopyrightblog.com/2013/02/08/germany-what-do-youtube-and-gema-have-in-common/>> accessed 10 February 2017; Chris Cooke, 'GEMA suffers another knockback in ongoing YouTube litigation' (*CMU*, 1 February 2016)

<<http://www.completemusicupdate.com/article/gema-suffers-another-knockback-in-ongoing-youtube-litigation/>> accessed 10 February 2017. A deal between GEMA and YouTube was finally struck in late 2016, see Ingham T, 'YouTube strikes deal with GEMA to host music videos in Germany' (*MusicBusiness Worldwide*, 1 November 2016) <<http://www.musicbusinessworldwide.com/youtube-strikes-deal-gema-host-music-videos-germany/>> accessed 10 February 2017.

<sup>613</sup> Amy Sandiford-Watts, 'YouTube signs international licensing deal with PRS for Music' (*campaign*, 22 August 2013) <<http://www.campaignlive.co.uk/article/1208564/youtube-signs-international-licensing-deal-prs-music#>> accessed 10 February 2017.

<sup>614</sup> Where a CMO and a potential licensee cannot agree on the terms of a license, these may be referred by the potential licensee to the Copyright Tribunal subject to s 118 (1) CDPA 1988.

## ALCS

Unlike PRS that conducts both direct licensing to users and data processing and distribution of payments to its members, ALCS is mainly active as a processing and distribution society. It distributes money to its members from secondary uses of works, which include photocopying, cable retransmission, digital reproduction, educational recording, and other.<sup>615</sup> ALCS receives fees from other CMOs, such as the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA). CLA and ERA are the bodies that directly negotiate licenses with other users, such as educational institutions, while ALCS' strength lies in the administration of micro-payments. According to ALCS respondents, this process itself is quite complex and requires that certain systems for data processing are in place.

So, it's quite a complex operation in terms of managing that data because you need to know who you are and to disambiguate people with similar names, that sort of thing. You need to know which works you wrote. You've also got to identify the correct works and make sure that's all accurate...and then into that system the money flows in and has to then be apportioned between – you might be the co-author of a book with five other people. So, and then of course there's the allocation, payment and dispatch to you and to your bank or to your agent, plus providing you with all the record keeping that you need for tax validity or whatever. So there's quite a lot of work to be done in making sure that people...this huge chunk of money that comes in at the very top level then becomes these tiny fragments that are dispersed far and wide.<sup>616</sup>

Albeit indirectly, ALCS is also involved in the business of licensing and as one ALCS respondent explained, the CMO generally participates in discussions concerning the future shape of certain licenses, which may require change subject to technological developments.

So ALCS and PLS [Publishers Licensing Society], we are responsible for making sure that the CLA has mandates. So we provide the legal authority on behalf of authors, and publishers - PLS - do the same for the rights held by publishers. [...] So in an established license sector

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<sup>615</sup> 'What we do' (ALCS) <<http://www.alcs.co.uk/What-we-do>> accessed 27 September 2016.

<sup>616</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

like HE [higher education], that is the normal run of what we do. But if the sector says: 'Well look, something different is happening now, I want to use the work in a different way', then there will be consultations. So the CLA will hear that from its customer effectively, they will pass that back to us and we can consult with our constituent parts and say, 'Okay, well look, the license used to do this, it used to be able to photocopy a chapter. [...] now people want to create a digital copy of a chapter and put it onto an internal resource within a university's education network.' So we consult on – are people happy with that and then we report that back to CLA who then negotiate with the licensee.<sup>617</sup>

From the above examples, it follows that CMOs have several important advantages over other actors in copyright policy. For one, they enjoy power as gatekeepers to a large pool of rights. Furthermore, they have valuable knowledge of the way the collective exploitation and administration of certain rights under copyright works in practice. CMOs are the actors involved in the development of licensing and distribution schemes for various uses of works. As such, policymakers effectively rely on these actors for the provision of information and data on how these licensing markets operate in practice, so that future policy decisions can be based on an accurate understanding of the present status quo. These expertise, operational systems, and information consequently elevate CMOs' importance as participants and contributors to copyright policymaking

### ***1.3.2 Protecting the value of the licenses – litigation and rights enforcement***

A further facet of CMOs' function in the copyright system, as a by-product of which they gain power and importance as policy actors, involves CMOs' role in preserving the value of the licenses that they grant. This includes, on the one hand ensuring that the negotiated licensing terms are being complied with and, on the other hand, that existing licenses are not being undermined altogether through the illegal use of works. This subsection, developed on the basis of interview data, only applies to PRS, since ALCS is, as stated above, mainly a distribution society. Some of the strategies

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<sup>617</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

employed by PRS to maintain the licenses' value include litigation and the operations of the CMO's anti-piracy unit.

According to one PRS respondent, litigation, a term that the respondent used loosely to include general disputes as well as court proceedings, is often licensing-based. Debt, i.e. insufficient or non-payment, and reporting were regarded as the two main causes of disputes in connection with licenses, and as examples of non-compliance with the terms of a respective license:

So under our online licenses we receive reporting either monthly or quarterly, there's different reporting frequencies for different licensees and depending on the scheme but they [the licensees] report back to us the revenues they've been making because, for one, our royalties are calculated on a percentage of revenue, often, so we need to know how much they are earning so we can invoice the right amount. But also we need to know what music they've been using, so that kind of data. And we need to have it in a certain format so that it actually works with our system. [...] Because we're processing billions of lines of usage now at PRS and this doesn't work unless there's some order and format to it. Occasionally we have licensees who are either failing to meet the format criteria for data or they are just failing to meet the sort of deadlines and that's important for us to have so that we can get the money distributed to the right place. It might be they are paying us but without the reporting to go with that we can't actually use the money for anything.

The importance of reporting by licensees for CMOs will be considered in more detail in section 2. Apart from engaging in disputes and litigation with licensees, in order to ensure that the licensing market works as intended, PRS also houses an anti-piracy unit.<sup>618</sup> According to a PRS respondent, that unit primarily exists as a support structure for the core business of licensing, rather than to pursue a more general copyright enforcement agenda. 'We come at this from a commercial perspective. So we have a small anti-piracy unit that's made up of three full-time employees [...] We're looking to implement and use technology as much as we can to really get the

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<sup>618</sup> 'Anti Piracy Unit' (PRS)

<<http://www.prsformusic.com/aboutus/ourorganisation/antipiracyunit/pages/default.aspx>>  
accessed 27 September 2016.

most efficient impact out of the resources that we have. [...] there's a process of notice and take down that you probably know a bit about which is the monitoring of online services that aren't licensed.'

#### **1.4. Conclusion**

The above accounts offer insight into the functions that PRS and ALCS primarily exist to perform. The importance of these activities for the functioning of copyright is evident. Through the negotiation of licenses, the safeguarding of their fulfilment through litigation, enforcement measures against unlicensed activities, as well as the general collection and distribution of payments based on comprehensive reporting and data processing, CMOs facilitate the exploitation of certain rights under copyright for specified uses. Following Olson's 'by-product' theory, as a result of the valuable rights that CMOs hold and administer, of their role as copyright law implementers, as well as of the inside information that they hold on how licensing markets work, CMOs have the potential to be more powerful and influential copyright policy actors than other stakeholders, such as the studied unions. However, in the following section, I will demonstrate that the extent to which the two studied CMOs, ALCS and PRS, exercise this potential, for instance through proactive policy behaviour, varies, possibly as a consequence of differences in their self-concept, memberships, and perceived industry significance.

## **2. Mapping differences between ALCS and PRS in the context of the implementation of the CRM Directive**

CMOs are generally in a better position to influence copyright policy compared to unions as a consequence of their indispensable role and functions for the copyright system. However, the context of CMOs' policy input in relation to the implementation of the CRM Directive will demonstrate that despite commonalities between ALCS and PRS in the circumstances that render them potentially powerful actors, PRS presents a more proactive, self-starting and assertive behaviour in policy. It marks itself as a leader and an authoritative policy player, whereas ALCS, in contrast, appears more subdued, measured and reserved.

ALCS' and PRS' input will specifically be considered in relation to the implementation of two provisions of the CRM Directive. One relates to users' obligations to provide CMOs with certain data (Article 17), which re-introduces the issue of reporting mentioned in section 1. The second issue relates to the implementation of Article 8 (9) in conjunction with Art. 6 (3) CRM Directive, which govern CMO members' voting rights and their representation in these organisations' decision-making processes. The latter issue in particular, will exemplify how PRS' large and diverse membership challenges and influences the way the organisation frames its policy positions on certain matters. Following an analysis of interview data and PRS' and ALCS' consultation responses on these two specific themes, I will discuss, more generally, how ALCS and PRS approached their input both on the CRM Directive implementation and in policy more widely. This will broach the issue of the difficult practical delimitation between 'awareness raising' and 'educating' on the one hand, and 'lobbying' on the other, as descriptors used by CMO respondents to characterise their CMO's policy output. In this context, I will illustrate how facts and advocacy are often intertwined when presented by copyright actors to policymakers and, as such, both permeate the policymaking process.

### *2.1. Background: the CRM Directive*

The CRM Directive (Directive 2014/26/EU)<sup>619</sup>, as outlined in chapter 3, deals with two separate issues: the regulation of CMOs and the multi-territorial licensing of music online.<sup>620</sup> The two specific issues that will be discussed in this section relate to the first arm of the Directive on the regulation of CMOs. According to Michel Barnier, at the time European Commissioner for Internal Market and Services, cases of mismanagement of rights revenue and long-delayed payments had shown a need to improve the functioning of CMOs and thus set the wheels in motion for the drafting of the CRM Directive.<sup>621</sup> Among the aims pursued through this Directive were to

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<sup>619</sup> See n 34.

<sup>620</sup> Chapter 3, section 3.3.

<sup>621</sup> Commission, 'Commissioner Michel Barnier welcomes the European Parliament vote on the Directive on collective rights management' MEMO/14/80 (4 February 2014).

improve the governance and transparency of CMOs, to enable greater involvement by right holders in the decision-making processes of CMOs, and to ensure timely and accurate payments of royalties to right holders.<sup>622</sup> The UK policy process on the implementation of the CRM Directive was formally launched with a public consultation in February 2015. Of the studied four COs, only PRS and ALCS submitted responses to the consultation and generally engaged with policymakers on the topic, whereas SoA and the MU did not do so, likely because the Directive did not directly affect their own core sphere of activities or mandates and thus did not justify a respective allocation of time and resources. The transposition of the Directive concluded with the adoption of The Collective Management of Copyright (EU Directive) Regulations 2016, which took effect on 10 April 2016.<sup>623</sup>

## *2.2. Article 17: Users' Obligations*

The evidence on the way the government consulted on the implementation of Article 17 CRM Directive shows the lawmaker's dependence on CMOs for their information and knowledge input to inform policy. To that extent, it substantiates the point made in section 1 that CMOs gain their importance and power as copyright actors in part through the industry knowledge that they hold. The evidence further presents a contrast in the way ALCS and PRS engaged with the government's consultation questions on this provision, which particularly demonstrates PRS' proactive and leadership quality in seeking to be at the forefront of discussions and to participate in setting the direction of policy implementation.

As noted above, Article 17 CRM Directive prescribes an obligation on users, i.e. licensees, to provide CMOs with certain data to facilitate CMOs' function of collecting and appropriately distributing revenues. For ease of reference, the text of Article 17 reads as follows:

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<sup>622</sup> Recitals 5, 6, 9 CRM Directive (n 34).

<sup>623</sup> The Collective Management of Copyright (EU Directive) Regulations 2016 SI 2016/221; 'Implementation of the Collective Rights Management Directive' (IPO, 4 February 2015) <<https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive>> accessed 10 February 2017.

### Users' obligations

Member States shall adopt provisions to ensure that users provide a collective management organisation, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders. When deciding on the format for the provision of such information, collective management organisations and users shall take into account, as far as possible, voluntary industry standards.

#### 2.2.1 Power dynamics between the government and CMOs in the consultation process

Once the EU adopted the Directive, the UK government launched a public consultation on its implementation. In relation to Article 17, it put forward the following question for consultation:

Q. 28: What format do you think the user obligation should take and how might it be enforced? What is 'relevant information' for the purpose of user reporting?<sup>624</sup>

On some other issues, like the management of rights revenue, the government had already indicated a certain inclination regarding the way it intended to transpose the Directive.<sup>625</sup> However, this was not the case with regard to the questions arising in relation to Article 17. On this matter, it seemed that the lawmaker was waiting and relying on input from affected CMOs. The government was itself looking to gain a better understanding of the different ways in which such a user obligation may be implemented, as well as to gain a sense of the various existing categories of information that effectively played a role in the negotiation and compliance with licenses. While the government had indicated in the consultation document that it

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<sup>624</sup> IPO, 'Collective rights management in the digital single market: Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market' (Consultation document) (January 2015)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401225/collective\\_rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401225/collective_rights.pdf)> accessed 10 February 2017 (IPO, CRM Directive Consultation) 13.

<sup>625</sup> Ibid 12.



'seeks views on the options for implementation' and 'welcomes evidence', in practical terms, it was arguably dependent on the input of CMOs for the meaningful transposition of the Directive. CMOs were the vehicles facilitating the collective licensing of certain rights under copyright in the first place; they were thus the essential actors holding the information on what was necessary for the proper application of Article 17.

The IPO's reliance on CMOs' participation and information in the process of the CRM Directive implementation was also reflected in the Impact Assessment that accompanied the consultation document. In many areas, the IA was left blank since a complete economic assessment could not be undertaken without information held by the CMOs. Moreover, several respondents from both ALCS and PRS commented in relation to the CRM Directive that the IPO had had several meetings with UK CMOs and was working closely with these organisations on the transposition of the Directive – something that the IPO itself affirmed in the government's response to the CRM consultation.<sup>626</sup> A respondent from ALCS stated:

I mean we're also working with [the] IPO at the moment, I say we, all the UK CMOs, on the implementation of the Collective Rights Management Directive. [...] So, we're at the stage now, the UK and the IPO are trying to implement the Directive, they are having, [have] just run a consultation that closed on Monday and, you know, we're still having meetings with them to kind of talk about the impact of how are the regulations going to really work for all of our different organisations that do subtly different things under the same broad kind of umbrella CMO activity.<sup>627</sup>

On the one hand, in the context of the CRM Directive, CMOs were the actors being subject to regulation. At the same time, the power dynamics between these actors and the lawmaker were less straightforward, considering that the government also relied

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<sup>626</sup> IPO, 'Collective rights management in the Digital Single Market, Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: Government response' (July 2015) 9 <

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446772/response-crm-directive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446772/response-crm-directive.pdf)> accessed 10 February 2017.

<sup>627</sup> Interview with Richard Combes, Head of Rights and Licensing, ALCS.

on CMOs, on their industry knowledge and experience, to put flesh on the bones of the provisions adopted in Brussels.

### *2.2.2 ALCS' and PRS' input in relation to the users' obligation*

It became clear from the interview data considered in section 1 of this chapter that data reporting by licensees, especially in the area of online licensing, was a particularly hot topic for PRS and one of the most common triggers of disputes between the CMO and its licensees. PRS was therefore especially interested in the possibility of bringing in a statutory reporting duty on users through the Directive and, as I will show, ALCS, too, supported this initiative.

Before the adoption of the Directive, PRS had called on the EU lawmaker to introduce an obligation upon licensees to provide good quality data to CMOs in a position paper that it had published, which included a section titled 'Data is essential for the good functioning of collective management'.<sup>628</sup> I did not find a similar position paper outlining ALCS' views on the then still to be adopted Directive. The fact that PRS chose to draft and disseminate a 'position paper' outside of the direct context of a public consultation or a public hearing, the latter of which it had in fact taken part in in 2010, is already indicative of the fact that PRS' self-identify, or self-concept, is characterised by confidence, authoritativeness, and leadership. PRS drafted this position paper because it believed that its voice would be heard and taken into consideration. It also drafted it because it wanted its view to influence the specific substance of the Directive.

In their submission to the IPO consultation on the implementation of the CRM Directive, both PRS and ALCS engaged in detail with the IPO's question on users' obligations. ALCS dealt with the respective question 28 in its joint response with CLA

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<sup>628</sup> PRS, 'Position Paper: Proposal for a Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market ("CRM Directive")' (March 2013) <<https://www.prsformusic.com/SiteCollectionDocuments/CRM%20Directive%20PRS%20for%20Music%20Mar%202013%20English%20FINAL.pdf>> accessed 10 February 2017.

(the Copyright Licensing Agency) and PLS (The Publishers Licensing Society).<sup>629</sup> It outlined what 'relevant information' in Article 17 of the Directive meant in relation to the licensing undertaken by CLA. The organisations' preferred approach to the transposition of this provision was the establishment of voluntary industry codes for data reporting by licensee, in consultation with the IPO, based on the view that a common industry standard for reporting obligations on users would unlikely be workable given the different requirements of individual CMOs across diverse sectors.<sup>630</sup>

PRS also drafted an extensive answer to this question within its consultation response, detailing its information requirements in relation to musical works. For its part, the CMO urged for the direct copying out of Article 17 into the implementing regulations as an enforceable users' obligation, suggesting that the provision could be supported with more practical information, such as best practice, minimum standards, codes of practice, etc., to help stakeholders comply with the requirements.<sup>631</sup> To this point, both ALCS and PRS had substantively responded to the government's question and offered their view on what an appropriate implementation of Article 17 CRM Directive would look like.

However, PRS went even further and asked for a range of enforcement measures in relation to this obligation, including rights of complaint to the National Competent Authority, as well as full audit rights on data quality and accuracy. PRS' implementation strategy also envisaged the existence of a Data Standards Working Group. Additionally, PRS suggested that the implementation of users' obligations

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<sup>629</sup> CLA, ALCS and PLS, 'Consultation on Collective Rights Management in the Digital Single Market' (Joint Consultation Response) (2015) 12-13

<<https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive>> accessed 10 February 2017 (CLA, ALCS, PLS Joint Response).

<sup>630</sup> Ibid.

<sup>631</sup> PRS, 'Collective Rights Management in the Digital Single Market' (Consultation Response) (30 March 2015) 19-20

<<https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive>> accessed 10 February 2017 (PRS, CRM Directive Consultation Response).

would necessitate the set-up of a working group and noted, in this respect, that it would wish to be part of such a group. These comparatively bold and extensive suggestions made by PRS could indicate the extent to which reporting problems hinder PRS' own internal operations. They also demonstrate the organisation's thorough engagement with the consultation, which benefits the decision-makers who, as a result, were ultimately presented with a wide range of proposals and options for consideration. However, the proposal to set up a working group that would guide the implementation of this provision, coupled with PRS' request to be part of this group also demonstrate PRS' willingness to lead and shape policy implementation, as well as a certain confidence in its own political power, which allowed it to make this request in the first place.

Ultimately, based on the information received by ALCS, PRS and other CMOs, the government decided to copy out the Directive in Regulation 16 without including specific details on the type of information, format, or enforcement measures, leaving these subject to the negotiation between the parties to a license. Perhaps, a certain compromise can be seen in this decision. The government's hands-off approach was possibly motivated by the insight gleaned through the consultation responses into the myriad of different format and data requirements that various CMOs had.

### ***2.3. Article 8 (9) and Article 6 (3) CRM Directive: CMO members' voting rights and representation in CMOs' decision-making process***

The evidence regarding the way ALCS and PRS engaged with the consultation questions pertaining to Articles 6(3) and 8(9) CRM Directive on members' voting rights and representation in the CMOs' decision-making process presents further differences between ALCS' and PRS' approaches in contributing to and influencing policy. In comparison, ALCS' submission comes across as more moderate and modest in its manner, while PRS' input appears more determined and assertive. Furthermore, interview data coupled with the written consultation response on the issue of members' voting rights particularly reveals how PRS' large and diverse membership challenges the organisation's ability to develop policy positions on certain issues. At

the same time, it also becomes clear that this membership structure directly influences the positions that PRS takes. Moreover, the position adopted by PRS in relation to the implementation of Article 8(9) also exemplifies how the interests of some groups of members are possibly compromised in the ultimate position that the CMO adopts. This would suggest that the positions of such complexly composed copyright actors should not be taken to directly reflect the uncompromised interests of all of the actors' constituents.

### 2.3.1 Article 6(3)

Article 6(3) CRM Directive reads as follows:

The statute of a collective management organisation shall provide for appropriate and effective mechanisms for the participation of its members in the organisation's decision-making process. The representation of the different categories of members in the decision-making process shall be fair and balanced.

In consulting on the appropriate transposition of this provision, the government asked in its consultation document under question 14: 'What should "fair and balanced" representation in Article 6(3) look like in practice?'<sup>632</sup>

PRS took the approach of relating this question to its own set-up and thereby confidently indicated that its own structure exemplified good practice and compliance. The organisation opened its response to question 14 with the following sentence: 'Our view is that the representation of the different categories of members – i.e. writers and publishers – in the PRS decision-making process is "fair and balanced" as required by Article 6(3) of the Directive.'<sup>633</sup> PRS subsequently outlined the equal representation of writer and publisher members on the PRS Board with reference to its Articles of Association and then briefly touched on its membership structure, which includes multiple categories of members with varying or no voting rights. Here, again, using the words of the Directive, PRS pointed out that promotion to a membership category with more voting rights was based on 'fair and

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<sup>632</sup> IPO, CRM Directive Consultation (n 624) 11.

<sup>633</sup> PRS, CRM Directive Consultation Response (n 631) 9.

proportionate criteria' and that the current system of voting rights allocation was generally considered fair. In taking this approach, PRS appeared authoritative. It also demonstrated confidence and leadership in its interpretation of 'fair and balanced' by subsuming these criteria directly under its pre-existing set-up, rather than attempting to define the terms in more abstract or general ways. One could argue that this in fact presents an example of good advocacy, as it effectively plants the idea into policymakers' minds that PRS' structures and workings stand for good practice.

ALCS' approach to the government's consultation question, in contrast, came across as more modest and reserved. In particular, in its individual response to the CRM Directive consultation, which ALCS drafted alongside the joint response with CLA and PLS, ALCS began by recognising the potential existence of differing views and perspectives on the question put forward, as a result of different organisational and membership structures.<sup>634</sup> It then outlined its own particular structure, where each member has equal voting rights and moved onto the next question, without offering its own perspective on whether this set-up in fact meets the criteria of 'fair and balanced' in the same way that PRS had done. Moreover, and again in contrast with PRS, ALCS', CLA's and PLS' joint response actually endeavoured to propose, in more general and abstract terms, objective guidelines on what 'fair and balanced' representation could require, rather than directly subsume these criteria under their own structures. The joint response first positioned the way decision-making power was generally distributed within private companies limited by guarantee – the company form adopted by both ALCS and PRS. The response then sketched some guidelines, including that a fair and transparent mechanism for members' voting should avoid weighted voting systems which unfairly favour one type or class of member and which are disproportionate to their contribution to the company.<sup>635</sup>

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<sup>634</sup> ALCS, 'ALCS Response to the Consultation on the Implementation of the EU Directive on the Collective Management of Copyright and Multi-territorial Licensing of Online Music Rights in the Internal Market' (2015)

<<https://www.gov.uk/government/consultations/implementation-of-the-collective-rights-management-directive>> accessed 10 February 2017 (ALCS, CRM Consultation Response) 4.

<sup>635</sup> CLA, ALCS, PLS Joint Response (n 629) 8-9.

This comparison of approaches demonstrates the various ways in which different CMOs choose to engage and contribute to policy. The differences identified here, where PRS appeared slightly more imposing and assertive, while ALCS came across as more moderate, while still authoritative, may also be indicative of differences in the goals that these actors pursued through the consultation. It may be that on this occasion, ALCS was indeed primarily concerned with helping the government through its own information and expertise in transposing the Directive in the intended spirit. And perhaps, PRS' approach in focussing on how its current structure was already compliant with the Directive's requirements, rather than on attempting to present its own view on the meaning of this requirement more generally, suggests that PRS used the consultation to try and ensure that it would not need to implement too many changes within its organisation. Certainly, from the perspective of PRS, this is a sensible approach, as it would mean keeping its own compliance costs down. The latter would ultimately also benefit its members.

Ultimately, the government implemented Article 6(3) through Regulation 6 (a) and (b) by copying out the relevant wording from the Directive. No concretising details of what 'fair and balanced' representation actually means were provided. This suggests that both of the studied CMOs will be able to maintain their established structures and that PRS in particular will have the scope to argue that its current arrangement meets the specified criteria.

### **2.3.2 Article 8(9)**

Article 8(9) CRM Directive establishes the principle that all CMO members should have a right to vote at general assemblies of their organisations. The provision further stipulates that restrictions to members' voting rights may apply under specified circumstances. The provision is worded as follows:

All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members. However, Member States *may* allow for restrictions on the right of the members of the collective management organisation to participate in, and to exercise voting rights at, the general assembly of members, on the basis of one or both of the following criteria:

- (a) duration of membership;
  - (b) amounts received or due to a member,
- provided that such criteria are determined and applied in a manner that is fair and proportionate. (emphasis added)

The corresponding consultation question put forward by the UK government was: 'Which of the discretionary provisions of Article 8 do you think should be adopted?'<sup>636</sup>

The first indication that this was a particularly sensitive issue for PRS came from a semi-structured interview with one PRS respondent, where the respondent said:

[...] okay, so one thing that we're still lobbying Government on is around voting: AGMs and membership, different categories of membership and their voting rights at an AGM.

This respondent explained, as I later verified in PRS' Articles of Association, that the present structure of PRS consists of three membership categories: provisional members, associate members, and full members.<sup>637</sup> A member's category depends on their royalty earnings and on the extent to which these earnings meet or exceed certain thresholds over a given period of time.<sup>638</sup> Crucially, according to PRS' constitution, provisional members do not have voting rights and may not attend AGMs.<sup>639</sup> On a poll or postal ballot, associate members have one vote, whereas full members have ten votes.<sup>640</sup> There is also a further voting category, informally referred to as 'supervoters', where, subject to additional financial qualifying criteria, full members may avail themselves of additional 10 votes, making their total number of votes 20.<sup>641</sup> Another PRS respondent commented that 75% of PRS' large membership of over 118 000 members<sup>642</sup> are provisional members and as such, have no voting (or

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<sup>636</sup> IPO, CRM Directive Consultation (n 624) Question 17, p 11.

<sup>637</sup> Article 5(c) PRS Articles of Association (n 604).

<sup>638</sup> See 'PRS for Music membership categories' (PRS)

<<http://www.prsformusic.com/aboutus/ourpeople/governance/pages/membership-categories.aspx>> accessed 10 February 2017.

<sup>639</sup> Article 6(b) PRS Articles of Association (n 604).

<sup>640</sup> Article 27(b) PRS Articles of Association (n 604).

<sup>641</sup> Article 27(c) PRS Articles of Association (n 604).

<sup>642</sup> This figure was obtained from PRS' website on 06 October 2016

<<https://www.prsformusic.com/Pages/default.aspx>> accessed 06 October 2016.



attendance) rights. This was corroborated by PRS' written response to the CRM Directive consultation, which indicated in Table 1 that only ca. 25% of the membership was eligible to vote.<sup>643</sup> Against this background, it is evident that the issue of voting rights and the way PRS should position itself on this issue in its consultation response had the potential of causing discord within the membership.

One PRS respondent explained how the organisation dealt with this problem in order to ensure that the ultimate position communicated to policymakers was one that could be carried by the entire PRS membership:

[...] one of our roles is to highlight issues early, develop positions, take them through the board so that we know we have the mandate of the board to lobby positions. What issues [...] the recent Directive on the regulation of collective management because it's quite possible that the members would have had a different view about what the appropriate level of regulation is. So, that's one area where we talked through the issues and it probably does mean that the PRS position, I'm quite careful to structure our positions so that they are effectively positions in principle. So you could say, for example, on the Collective Rights Management Directive, one of our, our positions are that, in principle, that the members should govern the society and the members should decide how to structure the voting rights within the society. And that's a point of principle. And, furthermore, that the government shouldn't be imposing restrictions on how the members govern their society or determine the voting rights. So, that's a point of principle. That doesn't mean that we've gone further. What it doesn't mean is that PRS' management are saying, 'oh actually, we're defending the status quo of the current way the voting and the governance works', because I don't think that's appropriate for us to do. That's a membership issue. But because our position is as a matter of principle – It's for the members to decide, not for Government – the members are very comfortable with us maintaining that position.<sup>644</sup>

PRS' consultation submission indeed put forward that PRS wished for the government to permit restrictions on voting rights because '[a]s a point of principle, we think that it should be up to the members of a CMO, who own the CMO and

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<sup>643</sup> PRS, CRM Directive Consultation Response (n 631) 11.

<sup>644</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

assign their rights to it, to determine the way in which the CMO is organised.<sup>645</sup> Incidentally, as outlined with regard to PRS' response in relation to Article 6(3), the organisation *did* in fact argue that it considered its present system of voting rights a fairer way of allowing members to be represented. To this extent, it did defend the present status quo. This reveals some contradiction between the words of my PRS respondent and the content of the organisation's written consultation submission. Perhaps my respondent was not fully at ease when speaking about this matter in awareness of the potential remaining tension between different PRS members regarding the way the organisation had positioned itself. After all, while the point made was that it was for the members to decide, in principle, on their own voting rights system, it seemed unlikely that the deciding, more powerful members would relinquish voting power to the benefit of the greater mass of the lower earning 75% of PRS members.

The case of PRS' positioning in relation to the issue of CMO members' voting rights illustrates the inherent challenge facing copyright stakeholders with large and diversely composed memberships of developing policy positions that are representative of their membership. In chapters 5 and 6, I argued that the views expressed by umbrella organisations, like UK Music and BCC, are not fully representative of the individual views of their constituent member organisations.<sup>646</sup> The individual member organisations are faced with a need to compromise their positions in order to find common ground. It could be argued that the present case of PRS' policy position on voting rights depicts the occurrence of the same effect but on a smaller scale, i.e. within one complexly composed organisation. The position advanced by PRS, phrased as a position in principle, could possibly be carried by the whole membership. Yet, as acknowledged by the PRS respondent quoted above, the fact remains that the views, and arguably interests, of different PRS members on this

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<sup>645</sup> PRS, CRM Directive Consultation Response (n 631) 10.

<sup>646</sup> See Chapter 5, sections 3.2.3 and 4.3. See also Chapter 6, section 2.3.

issue will vary and there may well be some lower earning members who would see it fit to have a right to participate in their organisation's general assembly.

The challenge identified above applies to both PRS and ALCS to the extent that both COs have large memberships and, within these, more and less successful and established creators: creators who work as full-time professionals and others for whom writing, or music may be one of several occupations. Naturally, the viewpoints and priorities of this wide pool of creators may well differ on certain issues and be influenced by the stakes they hold, on the one hand in their CMO, and on the other hand, in the respective creative industry more generally. PRS' case is further complicated by the fact that it also represents music publishers. However, the question of whether restrictions on voting rights should be introduced was less of a sensitive issue for ALCS because under this CO's governance structure, each member has equal voting rights.<sup>647</sup> In the end, the government copied out the relevant wording of the Directive and introduced the possibility for CMOs to restrict members' voting rights in Regulation 7(1)(f),(4). As Article 8(9) of the Directive, Regulation 7(4) stipulates that members' voting rights may be restricted based on one or both of the two criteria laid out in the Directive: duration of membership and amounts received or due to a member, provided these criteria are determined and applied in a fair and proportionate manner and are included in the CMO's statute or membership terms. In this respect, it is likely that neither of the studied CMOs will need to make changes to its current governance structure when it comes to members' voting rights.

#### ***2.4. General approach of ALCS and PRS to the CRM Directive consultation***

In the preceding analyses of PRS' and ALCS' policy input in relation to Articles 17, 6(3) and 8(9) CRM Directive, I demonstrated differences in the positions advanced and in the presentation of these organisations' submissions, arguing that, in comparison, PRS came across as being more determined, assertive, and confident in its power. This organisation also demonstrated a desire to lead and shape policy. ALCS on the other hand, appeared more matter-of-fact, more moderate and

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<sup>647</sup> Art. 26 ALCS Articles of Association (n 252).

unimposing. These differences highlight distinctions in both CMOs' self-concept, i.e. in the way that each organisation perceives and identifies its role and place in copyright policy. Through effective advocacy, PRS establishes itself as a thought leader and an example of good practice, while ALCS seeks to play a more neutral role, as a contributing, rather than leading, participant in the policy process. This difference was also underlined by both organisations' general position in relation to the consultation on the CRM Directive implementation.

The position expressed both by PRS respondents in the semi-structured interviews, as well as in PRS' consultation response was that the organisation considered itself to be generally compliant with the provisions of the Directive.<sup>648</sup> In contrast, ALCS did not maintain that it was already largely compliant. Rather, it openly admitted early on in its consultation response that estimating costs for the overall implementation and ongoing compliance with the CRM Directive was challenging, 'especially as we do not yet know the detail of UK implementation'.<sup>649</sup> PRS' position seems odd given that the very purpose of the consultation was to establish *how specifically* the Directive should be transposed. In this respect, it was not yet clear what changes would be necessary for organisations to undertake in order to be compliant with the Directive. In other words, it was not clear how the government would exercise its discretion. This was accurately acknowledged by ALCS. At the same time, PRS' approach, again, demonstrates effective advocacy and confidence. It implied that PRS was already embodying the Directive's prescriptions on good practice and thereby implicitly advocated for a certain reading of the Directive's provisions.

The differences in ALCS' and PRS' approaches to policy as exemplified through their responses to the CRM consultation, may not only be the result of differing self-concepts. Membership composition may play a role in this as well to the extent that PRS may gain some of its confidence and political power from the fact that, unlike ALCS, it speaks for both creators and publishers, i.e. for a larger subset of copyright

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<sup>648</sup> PRS, CRM Directive Consultation Response (n 631) 2, 12, 13, 21.

<sup>649</sup> ALCS, CRM Consultation Response (n 634) 1.

stakeholders. Furthermore, PRS might derive reinforcement to be particularly assertive from the understanding that its economic significance as a music industry CMO is greater than that of CMOs in publishing. One PRS respondent expressed this as follows:

the very big difference between us and the publishing industry is, of course, that publishers use collective management for what they call secondary uses and, therefore, it's not very important, economically important. And most publishers would say: 'Oh, collective licensing royalties are about 3-4 per cent of our income.' Whereas you come into music and collective management is the primary source of income for most people in the industry – in[cluding] composers and songwriters. And music publishers.<sup>650</sup>

It is perhaps a consequence of these varied factors that PRS appears to pursue a position of leadership when it comes to influencing and shaping copyright policy. In any event, another PRS respondent also emphasised the importance for PRS of being a thought leader, and of disseminating its policy positions widely and effectively:

So, how do we react? How do we, how can we inform debates? How can we engineer, you know, opportunities for our senior people to be actually exposed to and provide opinions for leadership pieces [...]. So, some of the things we will be doing is kind of liaising with contacts in the industry to get people on panels, get people at events [...]. So, for example, Robert Ashcroft, our CEO, we've got him, he's attending something called the Westminster Media Forum in a couple of weeks' time. So [...] that's just by knowing a few contacts and speaking, you know, that we get the invite extended so Robert can go and then has a platform to talk about whatever issues we need to talk about.

### *2.5. The nature of stakeholder policy input*

Section 1 of this chapter demonstrated the importance of CMOs for the functioning of the copyright system and linked this both to CMOs' power and influence over copyright policy, as well as to their role as copyright law implementers and as valuable sources of policy-relevant information. The preceding subsections of this section 2, on the other hand, provided specific examples of both how the government

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<sup>650</sup> Interview with Frances Lowe, Head of Legal and Policy Affairs, PRS. The same point was made in PRS' Position Paper on the Proposal for a CRM Directive (n 628).

relies on these actors' input in policy, as well as of how these CMOs contribute to the policymaking process. The examples also showed that PRS' and ALCS' input is reflective not only of their own experience and expertise, but also of the interests that they represent within their membership, the goals that they potentially pursue through their input, as well as their own self-concept. These observations alone already point to the intertwined nature of the copyright policy process and stakeholders' behaviour, which may in certain instances challenge the objective of developing purely evidence-based policy. To further substantiate this point, I will show that even from the perspective of respondents from PRS and ALCS, the lines between 'raising awareness', 'educating', and 'lobbying' policymakers are not entirely clear.

In the context of the implementation of the CRM Directive, CMOs' participation in policy was vital as a means of informing discussions and possibly also of laying the parameters within which policy measures were *practically* reasonable and achievable. At the same time, and particularly with regard to such a policy that would affect CMOs' work or their internal organisation, these actors naturally also had their own stake in the final outcome. I therefore sought to understand through the interviews with ALCS and PRS respondents, how these actors defined and perceived their policy role in relation to this issue, as well as more generally.

One PRS respondent emphasised that communicating the organisation's views on all matters of copyright, including collective rights management, was part of the general 'flow of information':

PRS is very clear about its views on copyright: copyright policy development, international copyright issues... on anything to do with regulation of collective management [...] then I also ensure that we communicate those views to the European Commission, to the UK government, to the Parliament, the European Parliament, to Westminster. So I run the public affairs programme to make sure that our views are communicated and that the intelligence is, you know, is just a flow of information.<sup>651</sup>

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<sup>651</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

Other respondents from both ALCS and PRS described their role in policy as 'educational', as 'information sharing' or 'awareness raising', as well as 'lobbying'. However, it is notable that on several occasions respondents would distance themselves from the notion of lobbying, implicitly (and at times explicitly) assigning a negative connotation to this act. In this respect, one ALCS respondent, commenting on the organisation's commissioned research into authors' earnings<sup>652</sup>, noted:

And again, I won't use the word lobbying but in our communicative activity, our relationships with politicians and civil servants, we've been able to use that sort of research – it's been quite helpful.<sup>653</sup>

On the other hand, another ALCS respondent freely described their activity as lobbying but at the same time equated *that* with information sharing:

[...] we also have a regular campaign to meet with as many parliamentarians as possible to make them aware of current issues around authors. So, it's, whilst we call it lobbying, it's actually more, information sharing and raising awareness [...] lobbying to me is communicating, information sharing and sometimes making a point.<sup>654</sup>

In relation to the CRM Directive transposition and PRS' policy role on this topic, contradictory statements were made by different PRS respondents. Some spoke freely of 'lobbying' and 'trying to influence', particularly in relation to the Directive's provisions on members' voting rights, whereas others were much more cautious, or disinclined to use, such a characterisation. The following quote by a PRS respondent illustrates the latter case:

I'll give you a copy of our input. But it's interesting you use the word lobbying because we were, you know, Government is consulting on the economic impact of the regulations so our response is a reply about the economic and, and kind of regulatory impact of this Directive. So, if I'm lobbying on one issue in that area it is, there's one very interesting thing which the Directive opens up, which is that users are obliged to supply data to collecting societies. [...] And that is one area where our costs go, increase if we can't find, if we haven't got good

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<sup>652</sup> See chapter 4, section 2.1.

<sup>653</sup> Benjamin Pearson, Policy Development Advisor, ALCS.

<sup>654</sup> Interview with Barbara Hayes, Deputy Chief Executive, ALCS.

data and we can't pay accurately if we don't have good data. And so, it's an area of uncertainty but I don't think Government knows how to implement this obligation and we're very clear that this is now an opportunity for Government to help collecting societies and creators by increasing the, our ability to get better data from the licensees. So, I might count that as lobbying.<sup>655</sup>

I followed up this respondent's statement and asked if they could explain what 'lobbying' actually meant.

It's a really interesting one. I mean, I just think, I think so much of what we do is educational. And I explained to you, you know, explaining how we license rights, how we license new markets. Some of that is just to inform people so that they know and they can take decisions about policy issues [...] So much of what we do though is, although you might see it differently, but we are a business and we are subject to regulation. And so I don't care about us lobbying when you are effectively explaining how regulation impacts a business.<sup>656</sup>

All of the above accounts of ALCS and PRS respondents' own perception of their role and purpose in copyright policy illustrate the inevitably intertwined nature of general facts and information, on the one hand, and advocacy, on the other. In fact, in oral, as well as in written evidence, submitted by copyright stakeholders, information generally serves a purpose beyond merely 'informing', or 'educating'. This challenges the recipients of all such evidence, in the case of UK copyright policy, primarily the IPO, in assessing the evidence purely on the merits of its information content.

## *2.6. Conclusion*

Through an analysis of ALCS' and PRS' approach and policy positions on the general implementation of the CRM Directive, as well as with regard specifically to the Directive's provisions on users' obligations and members' representation and voting rights, this section demonstrated marked differences between the two CMOs' policy contributions. PRS' behaviour was characterised by assertiveness, confidence and a clear desire for leadership in shaping the substance and implementation of policy, whereas ALCS' behaviour in contrast appeared more neutral, reserved and moderate,

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<sup>655</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>656</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.



while still authoritative. The identified differences were ascribed to a divergence in the way ALCS and PRS appeared to perceive and define their roles in policy, i.e. their self-concepts, to differences in their membership composition, as well as to perceived differences in their economic significance. From PRS' approach to the issue of members' voting rights, I further concluded that copyright stakeholders with large and diversely composed memberships face an inherent challenge in developing policy positions that are representative of their memberships. The final positions adopted are in fact not accurate representations of the interests of all groups covered in such an organisation's membership and some interests are necessarily compromised.

Another theme that emerged from the analyses of the government's consultation documents and questions, as well as from the interview data is that there is a certain reliance by policymakers on the input and participation of CMOs in the policy process, in order to inform debates, offer practical proposals for the implementation of certain provisions and provide relevant policy information. At the same time, in considering how individual respondents from PRS and ALCS perceive and define their role in policy, I argued that the lines between facts, or information provision, and advocacy are fluid and the two are often intertwined, particularly because CMOs themselves, as copyright stakeholders, have vested interests.

### 3. Discussion and conclusions

The analyses in this chapter corroborate the broader theme emerging from the findings of the preceding chapters that not all actors who represent right owners are easily comparable in terms of their policy behaviour; there are, in fact, observable differences even between functionally similar organisations. A comparison of chapters 4 and 5 particularly demonstrated differences in the behaviour of the studied unions, SoA and MU, as it discussed the different priorities and approaches that the two organisations took in relation to the issue of creators' and performers' contract terms. Similarly, the present chapter evidenced differences in the policy behaviour and positions adopted by the two CMOs, ALCS and PRS, in relation to the

implementation of the CRM Directive. In fact, this chapter argued that distinctions exist not only with regard to the specific positions that individual COs adopt on a given matter, but also with regard to the role that they seek to play in the policymaking process overall.

Chapter 3 pointed to policy submissions by academics, which had treated CMOs in general terms when arguing that they wield particular policy influence.<sup>657</sup> However, contrary to the portrayals by these academics, by the media, and by IP reviewers, CMOs do not produce a uniform effect on copyright policy, as individual CMOs behave differently in the policy process. Moreover, based on differences in self-concept and in general policy behaviour, some CMOs may wield more influence over policy than others. In light of this, there is a need for a more nuanced and less generalising treatment of individual copyright actors.

Finally, this chapter's analyses of PRS' stance with regard to the issue of members' voting rights, as well as of the way PRS abstained from taking a position on creators' contract terms, as discussed in chapter 5, produce an important observation. The more diverse the membership of any given policy actor is, the more likely it is that some of the views and interests held by different contingents within this actor's membership will not surface in the ultimate position that the actor adopts and advances. This applies particularly to actors like PRS, whose membership is large, representing various categories of creators, as well as publishers. It also applies, to an even greater extent, to more complex actors like the British Copyright Council, or UK Music. The greater the internal disparity between the individual positions held by different members within an organisational actor, the more nuances will become lost, and thus unrepresented, in the process of compromise and power dynamics that precede the publicly visible common position. As such, certain nuances and issues will be advanced less powerfully and vocally, and will have a smaller chance of being taken up by policymakers.

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<sup>657</sup> See Chapter 3, sections 1.2 and 2.3.2.



## Chapter 8

### Conclusion

Like other fields of regulation, copyright policy is of course, and as demonstrated, constantly in flux. As the research for this thesis came to completion, the European Commission issued a proposal for a Directive on copyright in the Digital Single Market.<sup>658</sup> Article 13 of this proposed instrument tackles the so-called ‘value gap’ – an issue that was also raised by PRS respondents during the fieldwork for this thesis. This new policy development helpfully exemplifies some of the findings that I have articulated in the preceding chapters. As such, before moving to my overall conclusions, in section 1 I will briefly present the case of the so-called ‘value gap’ as a recent policy development that ties together and illustrates multiple observations made in this thesis. Section 2 will then offer an overview of the thesis, its main conclusions, as well as their implications for researchers, policymakers, the media, and for COs themselves.

#### 1. Recent development: The so-called ‘value gap’

The ‘value gap’ case will underline PRS’ particular policy proactivity and its effective and successful advocacy work. It will thus offer a stark contrast to the self-concepts of SoA and ALCS, presented in chapter 4.<sup>659</sup> This will not only corroborate the relative power of certain CMOs over other actors but also the existence of important differences between individual actors representing right owners. Furthermore, the ‘value gap’ case will exemplify power dynamics in action: it will show how some individual actors, in this case PRS, are capable of exercising particular influence within industry umbrella organisations, like the British Copyright Council and UK Music. Moreover, it will suggest that power imbalances exist not only between

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<sup>658</sup> See n 89.

<sup>659</sup> See Chapter 4, section 1.3.6.

individual actors, but also between different creative sectors. The 'value gap' as an issue was spearheaded by music industry organisations, and the private copying chapter itself already demonstrated the strength and efficacy of music industry stakeholders taking joint action. In the following, I will show how power dynamics and effective stakeholder behaviour mean that certain voices and issues in copyright policy benefit from greater media and policymaker attention compared to others, and are thus heard and acted on more. Finally, the 'value gap' matter will also exemplify the dynamic nature of interest constellations in copyright, as well as the idea that copyright actors succeed in their policy causes when they act in unison.

### 1.1. Defining the so-called 'value gap'

In the last 2-3 years, the term 'value gap' has been used by music industry organisations, such as the IFPI (International Federation of the Phonographic Industry), to describe the discrepancy between the significant rise in music consumption through ad-supported user upload services and the considerably lower revenue returns from such consumption for right holders.<sup>660</sup> References in the context of the 'value gap' have consistently been made to YouTube, which is seen as the primary culprit for this present status quo.<sup>661</sup> Music industry organisations see the legal underpinnings of the 'value gap' in the liability exceptions for information service providers established under the E-Commerce Directive, the so-called 'safe

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<sup>660</sup> Frances Moore, 'The value gap – the missing beat at the heart of our industry' (IFPI, 5 May 2016) <<http://www.ifpi.org/news/The-value-gap-the-missing-beat-at-the-heart-of-our-industry>> accessed 10 February 2017.

<sup>661</sup> Ibid; Helen Smith, Veronique Desbrosses, Frances Moore, 'Value gap is crucial for the music sector' (*the Guardian (Letter)*, 24 July 2016) <<https://www.theguardian.com/business/2016/jul/24/valu-gap-music-sector-youtube>> accessed 10 February 2017; Daniel Adrian Sanchez, 'Is YouTube Really Shortchanging Artists? A Look at Some Actual Data' (*Digital Music News*, 19 October 2017) <<http://www.digitalmusicnews.com/2016/10/19/uk-music-youtube-value-gap/>> accessed 24 January 2017; Matthew Garrahan, 'Pop stars complain to Brussels over YouTube' (*Financial Times*, 29 June 2016) <<https://www.ft.com/content/efee9eec-3e15-11e6-9f2c-36b487ebd80a>> accessed 10 February 2017; Chris Cooke, 'Artist organisations says "value gap" not just about what YouTube pays the labels' (CMU, 22 June 2016) <<http://www.completemusicupdate.com/article/artist-organisations-says-value-gap-not-just-about-what-youtube-pays-the-labels/>> accessed 10 February 2017.

harbours'.<sup>662</sup> In particular, pursuant to Article 14 E-Commerce Directive, which in the UK is implemented by Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002<sup>663</sup>, information society service providers are not liable for the information that they merely 'host' and are only obliged to remove or disable access to infringing content upon obtaining knowledge or awareness of its existence.

According to music industry organisations, including PRS, the safe harbour defence for hosting is being inappropriately relied on by user upload services like YouTube because these services are not passive and neutral intermediaries but rather actively organise, promote and monetise the works that they host.<sup>664</sup> The challenge arising from this for an organisation like PRS, which is directly involved in the frontend licensing of rights to such services, is that the service's reliance on a liability exception hinders PRS from extracting the full monetary value of the rights that it administers. On its dedicated 'Digital Focus' webpage, PRS outlined the problems associated with the present status quo.<sup>665</sup> It described that, on the one hand, video sharing platforms like YouTube generate vast amounts of revenue but by relying on the 'safe harbours' they seek to avoid obtaining a music license, or aim to limit their licenses to only that content which they directly monetise. At the same time, PRS maintained, these platforms undermine other legitimate subscription-based music services like Spotify Premium, by diverting user traffic from them, thus also decreasing right holder revenue streams from the subscription-based business model.

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<sup>662</sup> Directive 2000/32/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive); PRS describes the problem under the section 'Working with Government' at 'Digital Focus: Our approach' <<https://www.prsformusic.com/digitalfocus/approach/Pages/default.aspx>> accessed 10 February 2017.

<sup>663</sup> The Electronic Commerce (EC Directive) Regulations 2002 SI 2002/2013.

<sup>664</sup> Stuart Dredge, 'Why is the music industry battling YouTube and what happens next?' (*the Guardian*, 20 May 2016) <<https://www.theguardian.com/technology/2016/may/20/music-industry-battling-google-youtube-what-happens-next>> accessed 10 February 2017.

<sup>665</sup> 'Digital Focus: Our approach' <<https://www.prsformusic.com/digitalfocus/approach/Pages/default.aspx>> accessed 10 February 2017.

## 1.2. Organised music industry action and policymakers' response

The 'value gap' issue demonstrates music industry stakeholders' remarkable capacity to effectively organise, generate debate and to influence, in real-time, policymakers' agenda and the shape of copyright policy outcomes. This observation was also made by Horten in her study of the impact that actors from the music and film industries had on the content and procedure applied to the passing of the Digital Economy Act 2010.<sup>666</sup> For one, in relation to the 'value gap' music industry organisations simultaneously took action across various levels of copyright law's multi-level system:<sup>667</sup> stakeholders in the US, primarily record label organisations, targeted the Digital Millennium Copyright Act, which includes the corresponding safe harbours for intermediaries under US law. International music industry organisations like the IFPI disseminated publications on the issue both through their own websites, as well as through mainstream newspapers, like *the Guardian*, fuelling the perception that the 'value gap' is a global problem.<sup>668</sup> In the meantime, in the UK umbrella organisations like UK Music and the BCC were sending letters to MPs highlighting the need for legislative action and issuing policy papers on the problems relating to online platforms' application of safe harbour provisions.<sup>669</sup> On an EU level, IMPALA, the Independent Music Companies Association, had sent a letter to the European Commission President Jean-Claude Juncker and other relevant Commissioners,

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<sup>666</sup> See Chapter 3, section 1.4. See also Horten, *A Copyright Masquerade* (n 8) 169-170 and 211-225.

<sup>667</sup> See Chapter 3, section 1.5.1 for a discussion of copyright policymaking as a multi-level system.

<sup>668</sup> Moore, 'The value gap – the missing beat at the heart of our industry' (n 660); Smith, Desbrosses and Moore, 'Value gap is crucial for the music sector' (n 661).

<sup>669</sup> Letter from UK Music to Mike Weatherley MP (19 January 2015)

<[http://www.ukmusic.org/assets/general/UK\\_Music\\_-\\_safe\\_harbours\\_-\\_19\\_1\\_15.pdf](http://www.ukmusic.org/assets/general/UK_Music_-_safe_harbours_-_19_1_15.pdf)> accessed 10 February 2017; BCC, 'Digital Single Market Strategy, Position paper from the British Copyright Council' (19 August 2015)

<<http://www.britishcopyright.org/files/5014/4120/6373/DSMStrategy190815.pdf>> accessed 10 February 2017.

demanding legislative action to fill the 'value gap'; this letter bore the signatures of over 1000 recording artists and songwriters.<sup>670</sup>

No other creative industry was as concerned with the 'value gap' and the safe harbour provisions as the music industry. This was not only reflected in the extensive media coverage, which consistently only associated the problem with the music sector, but also in the European Commission's report on the submissions received to a public consultation that it had held on the regulatory environment for platforms, online intermediaries and the collaborate economy.<sup>671</sup> The latter, in particular, reported that on consultation questions regarding the relations between online platforms and digital content right holders, right holders from the music sector had been most vocal about the problems relating to the limited liability of intermediaries under the E-Commerce Directive and had pointed to the 'value gap'.<sup>672</sup>

The described concerted efforts by music industry stakeholders resulted in the uptake of this issue by policymakers in the UK, as well as in Europe. Quoting the Minister of State for Digital and Culture, Matt Hancock MP, the website *TorrentFreak* reported that the UK government considered the issue of the value gap important and would

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<sup>670</sup> Letter from recording artists (coordinated by IFPI and IMPALA) to President Jean-Claude Juncker, European Commission (29 June 2016)

<<http://impalamusic.org/sites/default/files/pictures/attachedfiles/Recording%20Artists%20calling%20for%20a%20Solution%20to%20the%20Value%20Gap%20-%202018%20July%202016.pdf>> accessed 10 February 2017.

<sup>671</sup> See, for instance, Ben Sisario, 'Music World Bands Together Against YouTube, Seeking Change to Law' (*The New York Times*, 31 May 2016)

<[https://www.nytimes.com/2016/06/01/business/media/music-world-bands-together-against-youtube-seeking-change-to-law.html?\\_r=1](https://www.nytimes.com/2016/06/01/business/media/music-world-bands-together-against-youtube-seeking-change-to-law.html?_r=1)> accessed 10 February 2017; Andy, 'UK Govt. will address music "value gap" as part of Brexit' (*TorrentFreak*, 3 November 2016)

<<https://torrentfreak.com/uk-govt-will-address-music-value-gap-as-part-of-brexit-161103/>> accessed 10 February 2017; Andrew Orlowski, 'Music's value gap? Follow the money trail back to Google' (*The Register*, 14 April 2016) *The Register*

<[http://www.theregister.co.uk/2016/04/14/you\\_and\\_your\\_wellies/](http://www.theregister.co.uk/2016/04/14/you_and_your_wellies/)> accessed 10 February 2017; Commission, 'Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy' (January 2016) <<https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and>> accessed 10 February 2017 (Commission, Synopsis Report).

<sup>672</sup> Commission, Synopsis Report (n 671) 11 para 3.6.1.



address it as the UK leaves the European Union.<sup>673</sup> In Brussels, on the other hand, the European Commission addressed the issue through Article 13 of the proposed Directive on copyright in the Digital Single Market, which at the time of writing is still under consideration. The proposed provision indicates that online platforms need to become licensed; it also places an obligation on service providers to monitor content uploaded to their platforms. This is prescribed in the proposed Article 13 (1) of the Directive on copyright in the Digital Single Market, which reads as follows:

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

### *1.3. PRS' role in fuelling debate and triggering a response from policymakers*

Interview and documentary data both evidence that PRS played a proactive and important role in driving debate on the 'value gap' issue and in urging policymakers to take action. The data further documents PRS' influence through UK umbrella organisations like UK Music and the BCC, and also shows how the organisation embraces the strategy of presenting a unified front and taking organised, joint action, which, as suggested above, was at the heart of the music industry's success in shaping policymakers' agenda and output.

The 'value gap' problem first came up in my fieldwork during a semi-structured interview with a PRS respondent. The respondent underlined that it was one of the main priorities of PRS at the time:

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<sup>673</sup> Andy (n 671).

The second element which we are investigating and working quite a bit on is the extent to which the safe harbours in the e-Commerce Directive are being applied appropriately. We find that quite a few services claim the benefit of safe harbours when they are operating very commercial services to make music available and they rely on the fact that they aren't putting the music up, that they are just pure 'hosts' under the Article 14 E-Commerce Directive.<sup>674</sup>

In fact, before commencing my fieldwork in 2015, in June 2014, I attended an event organised by Westminster Media Forum in London on 'Next steps for copyright policy: UK and European reform' where PRS' Head of Legal, Policy and Public Affairs, Frances Lowe, gave a speech as a member of the 'Modernising the European copyright framework' panel. Lowe concluded her speech by referring to the fact that the E-Commerce Directive intermediary liability provisions had not been reviewed although they were producing effects on the value of rights in the copyright field. The PRS operative therefore announced that she would be next on the door of Maria Martin-Prat's office, Head of the Copyright Unit in the European Commission, to inform her that a review of the E-Commerce Directive was greatly needed. In the interview conducted with Ms Lowe for this research, she confirmed that PRS had had conversations with EU officials regarding the review of the E-Commerce Directive. She also referred to a paper that PRS' CEO had co-written, which PRS was using as evidence for the unsustainability of a status quo in which intermediaries' business models were benefitting from copyright exceptions and safe harbour liability limitations:

So, we have an economics paper which we wrote, which our Chief Executive wrote with an academic, George Barker, last year: 'Is copyright fit for purpose?', which shows as a matter of academic theory that exceptions to copyright and any sort of limitation on the ability to consent to the use of rights will take away value from creators. And we are starting to apply that in the field of the hosting service providers because of the safe harbours. So it's a really tangible piece of work now which is, as you said, when I said we'd be knocking on Maria Martin-Prat's door... but we have! We have published this paper and we do talk about safe harbours [...] that's the most important thing. And why is it the most important thing? Because it

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<sup>674</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

doesn't seem to us that the online digital environment is offering a sustainable living career path for composers and songwriters.<sup>675</sup>

The paper referred to by the PRS respondent is available on the organisation's Digital Focus webpage under the section 'thought leadership'.<sup>676</sup> The document was also submitted as evidence to the Digital4EU website, which was set up by the European Commission in February 2015 to collect views and experiences on how to create a well-functioning digital single market.<sup>677</sup>

This evidence illustrates PRS' proactivity in raising this issue with policymakers, as well as its political power reflected in the seeming ease of access that the organisation has to high-ranking EU officials.<sup>678</sup> The paper referred to also demonstrates a point made in chapter 7 about the intertwined nature of evidence, as verifiable information, and advocacy. While the respondent remarked during our interview that the paper was co-written by an academic and that it relied on academic theory, thus suggesting that the paper was an impartial, authoritative piece of evidence, in many ways, including through the specific language used, its structure, and in places rather scarce references, the paper reads more as a lobbying document. For instance, it drives home the message that copyright exceptions are harmful for the market and presents as an accepted fact that they 'increase the costs of operating a market as they encourage

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<sup>675</sup> Interview with Frances Lowe, Head of Legal, Policy and Public Affairs, PRS.

<sup>676</sup> 'Digital Focus: Our approach' <<https://www.prsformusic.com/digitalfocus/approach/Pages/default.aspx>> accessed 10 February 2017.

<sup>677</sup> Robert Ashcroft and George Barker, 'Is copyright law fit for purpose in the Internet era? An economic and legal perspective' (2014) <<https://ec.europa.eu/futurium/en/content/copyright-law-fit-purpose-internet-era>> accessed 10 February 2017.

<sup>678</sup> PRS acts not only on the national level of copyright policymaking through public consultation submissions, meetings with the IPO and various MPs, including through the All Party Parliamentary Group on Music, but also on the EU level, where PRS for Music features as an interested party on the EU's Transparency Register. According to the EU Transparency Register, PRS for Music spent an estimated 50,000 Euro on activities covered by the register: 'Profile of registrant: PRS for Music' (EU Transparency Register, last modified 13 April 2016) <<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=798071410461-65>> accessed 10 February 2017.

opportunism in the form of parasitic behaviour, or free riding and market bypass.<sup>679</sup> It could, however, be reasoned that overall economic benefits are produced not by copyright rights alone, but by the balance between rights and exceptions: exceptions may allow other markets or industries to grow.<sup>680</sup> Moreover, the evaluation of copyright exceptions' utility through a purely economic perspective is in any case flawed, as their primary purpose is to balance the rights of copyright owners with other rights, freedoms and interests.<sup>681</sup> Nevertheless, PRS actively disseminated this paper as evidence to policymakers.

PRS' influence and power as an industry stakeholder further came to light through evidence of the way it had been able to avail itself of the support of industry alliances like UK Music and the BCC. As noted above, as well as in chapter 5, UK Music and BCC had both made policy submissions relating to the need to review the liability limitations of service providers in the E-Commerce Directive.<sup>682</sup> Moreover, some of the wording of these alliances' submissions clearly showed that they had been influenced by the PRS CEO's paper. One of the key ideas developed in Ashcroft and Baker's paper was that as an unintended consequence, safe harbour legislation had encouraged 'parasitic growth' of intermediaries' businesses at the expense of right holders. In fact, these two words were used 14 times in that PRS paper to describe the problem. And, similarly, in its letter addressed to Mike Weatherley MP from January 2015, UK Music noted that the result of safe harbours was 'parasitic growth in which

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<sup>679</sup> Ashcroft and Barker (n 677) 16.

<sup>680</sup> Mitra-Kahn (n 365) 72; James Boyle, 'Fantasy and reality in intellectual property policy' (*Financial Times*, 1 December 2010) <<https://www.ft.com/content/d08ebc8c-fce7-11df-ae2d-00144feab49a>> accessed 10 February 2017.

<sup>681</sup> Bently and Sherman (n 229) 221.

<sup>682</sup> Letter from UK Music to Mike Weatherley MP (n 668); UK Music, 'Intermediaries, aggregators, safe harbour and transfer of value' (Briefing) (27 November 2015) <[http://www.ukmusic.org/assets/general/intermediaries\\_aggregators\\_safeharbour\\_transferofvalue.pdf](http://www.ukmusic.org/assets/general/intermediaries_aggregators_safeharbour_transferofvalue.pdf)> accessed 10 February 2017; BCC, 'Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy' (consultation submission) (05 January 2016) <<http://www.britishcopyright.org/files/5014/5216/8800/answer3436d744-13e4-400f-8fd0-f17fbc6771b3.pdf>> accessed 10 February 2017 (BCC, Regulatory environment for platforms consultation response).

the digital sector grows at the expense of right holders.<sup>683</sup> In the same way, BCC explained in a submission, how online platforms taking advantage of safe harbours had led to ‘parasitic growth’ and immediately thereafter referred to Ashcroft and Barker’s paper, which the BCC even went on to inaccurately describe as a ‘study’.<sup>684</sup> This clearly shows PRS’ strong influence both independently, as well as through, and within, these wider industry alliances.<sup>685</sup>

Presenting a unified front and organising many music industry stakeholders around a given issue is an important strategy for PRS in its policy work, according to one PRS respondent:

[...] we will join forces to make sure, in as much as we can, that we are presenting a unified front when it comes to, for example, [the] CRM Directive and what we’re saying to Government. We will, we will, Frances will be at pains to make sure that she’s speaking to the MPA [Music Publishers Association] and she’s speaking to BASCA and that, where we can, we’re saying, you know, we all agree with one another. This is the best way to go. And where there are divergences from that, those are explained.

#### *1.4. Reactions to the European Commission’s legislative proposal addressing the ‘value gap’*

Since the Commission announced its intention to address the ‘value gap’ issue through sector-specific regulation in the area of copyright,<sup>686</sup> and especially after the publication of its proposal for a Directive on copyright in the Digital Single Market, the Commission’s plans and specific legislative proposal in Article 13 of that Directive have been subject to extensive criticism.<sup>687</sup> Among the critics are Open Rights Groups,

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<sup>683</sup> Letter from UK Music to Mike Weatherley MP (n 668) 1.

<sup>684</sup> BCC, Regulatory environment for platforms (consultation response) (n 682) 5.

<sup>685</sup> In a letter from Janet Ibbotson, Chief Executive Officer BCC, to Damian Collins MP, acting Chair of the Culture, Media and Sport Select Committee (27 October 2016) <<http://www.britishcopyright.org/files/1714/7766/2188/CMSBrinq271016fin.pdf>> accessed 10 February 2017 it is stated (at p 3) that the UK played a major role in setting out the economic harm being caused by the legal ambiguity in the current law covering the liability of platforms.

<sup>686</sup> Commission, ‘Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe’ (Communication) COM (2016) 288 final 8.

<sup>687</sup> Commission, ‘Proposal for a Directive on copyright in the Digital Single Market’ (n 89).

academics, Google, and many voices in the online community.<sup>688</sup> Some of the most serious concerns expressed in relation to the proposed Article 13 are outlined in an open letter signed by 40 academics across Europe, which was sent to the European Commission.<sup>689</sup> The letter's authors warn that the proposed Article 13 will likely be in breach of Article 15 E-Commerce Directive, which prohibits general monitoring obligations on information service providers in order to prevent the transmission of unlawful content. However, Article 13 requires that services put measures in place to prevent the availability on their services of works or other subject matter identified by right holders, such as the use of 'effective content recognition technologies'. Academics further warn that Article 13 may not be proportionate and also argue that the prohibition of general monitoring obligations should be maintained as it safeguards fundamental rights of internet users, such as the protection of their personal data, as well as freedom of expression and information.<sup>690</sup> Other criticisms generally relate to the fact that this provision has essentially been drafted with YouTube in mind and the regulatory burden being imposed on service providers may

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<sup>688</sup> Alice O'Donkor, 'Reactions to EU copyright proposals' (*Managing Intellectual Property*, 20 September 2016) <<http://www.managingip.com/Article/3587213/Reactions-to-EU-copyright-proposals.html>> accessed 10 February 2017; Paul Sanders, 'A fair way to close the value gap' (Open Rights Group, 16 September 2016) <<https://www.openrightsgroup.org/blog/2016/a-fair-way-to-close-the-value-gap>> accessed 10 February 2017; Agustin Reyna, 'A tale of two industries: the "value gap" dilemma in music distribution' (8 August 2016) *Internet Policy Review* <<https://policyreview.info/articles/news/tale-two-industries-value-gap-dilemma-music-distribution/421>> accessed 25 January 2017; Mike Masnick, 'The ridiculous concept of the "value gap" in music services...And how it could harm both the tech industry and the music industry' (*techdirt*, 8 August 2016) <<https://www.techdirt.com/articles/20160803/15263735147/ridiculous-concept-value-gap-music-services-how-it-could-harm-both-tech-industry-music-industry.shtml>> accessed 25 January 2017; Open Letter from Sophie Stalla-Bourdillon et al to the European Commission on the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society (30 September 2016) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2850483](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483)> accessed 10 February 2017 (Open letter from 40 academics).

<sup>689</sup> Open letter from 40 academics (n 688).

<sup>690</sup> Articles 8, 11 Charter of Fundamental Rights of the European Union [2000] OJ C346/1.

be greater than smaller innovators and start-ups can cope with and could, as a consequence, stifle such players.<sup>691</sup>

It remains to be seen whether pressure and organised lobbying from music industry stakeholders will lead the EU lawmaker to rush through with the adoption of this provision or whether other stakeholder voices and internal legal and policy analysts within the EU will bring about a revision of the published proposal.

### ***1.5. Discussion and conclusions***

The ‘value gap’ case demonstrates the strength of music industry actors in advocacy and in influencing the copyright policy agenda and its outcomes. It further underlines PRS’ proactivity, strength, and political power in reaching high-level policy officials, as well as its influence within important industry alliances like UK Music and the BCC. The success of the music industry actors in placing this issue on policymakers’ agenda could also be treated as evidence of the importance of taking unified action, as well as of having support from influential industry networks. At the same time, the fact that UK Music and BCC sided with the music industry actors on this issue, as in the case of private copying, but did not side with SoA or ALCS on creators’ contract terms further shows the shifting, dynamic nature of interest constellations in copyright.

Two further considerations emerge in light of the ‘value gap’ case: (1) copyright policymakers get uneven exposure to different policy-relevant issues, and (2) copyright policy may be unevenly influenced from different creative sectors.

#### ***1.5.1 Copyright policymakers get uneven exposure to different policy-relevant issues***

The ‘value gap’ case, in conjunction with chapters 4, 5 and 6 illustrates how at any given time, there are multiple issues, both within the same creative industry, as well as across different creative industries, that stakeholders advance to policymakers. The

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<sup>691</sup> Mike Masnick, ‘EU regulators seem to think they can tell YouTube that its business model should be more like Spotify’ (*techdirt*, 18 April 2016)

<<https://www.techdirt.com/articles/20160415/23443134194/eu-regulators-seem-to-think-they-can-tell-youtube-that-business-model-should-be-more-like-spotify.shtml>> accessed 10 February 2017.

ones considered in this thesis are the need for a legislative framework to govern creators' contractual dealings, a change to the statutory right of making available through the introduction of an unwaivable right to equitable remuneration (briefly considered in chapter 5 as the alternative issue pursued by the MU), and legislative action to address the 'value gap' problem. However, my analyses also reveal that some issues benefit from far greater media attention and stakeholder advocacy than others, although there is not necessarily a correlation between the importance of a given issue and the amount of policy attention that it gets. The latter in fact depends to a greater degree on stakeholder activity, in particular on the extent of proactivity of different actors, on the political power and networks of the actors fuelling an issue, on the resources that they possess to participate in policy, and on their ability to organise and act effectively.

Arguably, the 'value gap' problem presents an example of very successful advocacy by certain music industry organisations. In this respect, the 'value gap' substantiates links between industry pressure through the music industry and certain legislative outcomes, which were the subject of Horten's work.<sup>692</sup> However, it is important to remember that even in the music industry, which appears to be particularly skilled at organising itself and exerting influence over policymakers, some actors are more powerful policy players than others. The MU itself did not individually contribute to the 'value gap' discussion. Perhaps it assumed that enough powerful actors were already lobbying on it and it could therefore invest its energy elsewhere. Perhaps it deemed other issues of greater priority and in greater need of its own voice. In fact, the battles that were being fought by the unions, both in publishing and in music addressed important questions of how much contractual flexibility creators and performers should have in order to be able to benefit from new business models. They also addressed the issue of how revenues should be split between creators and performers, on the one hand, and publishers and producers, on the other. Arguably, these questions are at least as important for copyright policy as the ones fuelled by

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<sup>692</sup> See Chapter 3, section 1.4.



PRS and industry alliances like UK Music and BCC that ultimately seek to bring more money into the music industry (or creative industries) as a whole.

Yet, my research on the different issues listed above suggests that by far the largest number of online publications (whether through individual blogs, online newspapers, news websites, industry trade press, or other) related to the so-called 'value gap'. Music industry organisations brought the UK government to declare its intention to address this issue post-Brexit and EU policymakers took specific legislative action to address the problem, which proved considerably more controversial than the Commission's draft provision on creators' contractual terms in the proposed Directive on copyright in the Digital Single Market.

### *1.5.2 Uneven influence over copyright policy*

The case of the 'value gap' problem defined and lobbied on predominantly by music industry organisations may also illustrate how, again, as a consequence of organised stakeholder behaviour, few, or even one creative industry, may sometimes set the direction and substance of copyright policy for all creative sectors.<sup>693</sup> The 'value gap' problem had essentially been fuelled by music industry organisations. Even when policy input was coming from cross-industry alliances like the British Copyright Council, it was influenced by evidentiary input from organisations in music. Yet, when the European Commission drafted its proposal addressing the 'value gap' in Article 13 of the draft Directive on copyright in the Digital Single Market, it worded the provision so that it would apply to information society service providers active across all industries who provide access to all categories of copyright protected works.

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<sup>693</sup> Incidentally, this observation does not contradict the argument advanced in previous chapters that policy outcomes are often the product of compromises. Even on the issue of the 'value gap', policymakers decided against changing the liability regime for information service providers under the E-Commerce Directive, which was music industry stakeholders' primary demand, and instead sought another way to address these stakeholders' demands, though the latter proposal's compatibility with the established safe harbours is, as I discussed, questionable.

Some scholars warn that it was wrong for legislators to use the law to essentially try and regulate the behaviour of one specific company, YouTube, and with a focus on one specific industry, music, as this type of legislation increases the risk of unforeseeable and potentially negative consequences in the wider online environment.<sup>694</sup> Arguably, well-organised and proactive behaviour of stakeholders within one creative industry may not necessarily be to the detriment of another. For instance, in the context of private copying, it was music industry actors that brought down the enacted exception. Yet, this was arguably also to the benefit of the audio-visual industry, which would also likely have preferred an exception that allowed for some form of monetisation for the act of private copying. Similarly, it is certainly possible that the 'value gap' may have presented a problem for other creative industries as well, whose stakeholders lacked the political power, resources, networks, access to policymakers, or organisation, to lobby on this issue. Consequently, such industries could now potentially benefit from the momentum generated by actors in music. The Centre of the Picture Industry (CEPIC), a European federation of picture agencies and photo libraries, for example, commented in an online publication that the 'value gap' also presented a problem for the picture industry and in fact welcomed the Commission's proposed Article 13 as an 'encouraging first step'.<sup>695</sup> According to this organisation, online platforms increasingly frame images instead of hosting them on their website and paying for a licence.<sup>696</sup> However, CEPIC argued that Article 13 had been written for the music and audio-visual industries. It lamented that the proposal had not given due

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<sup>694</sup> Reyna (n 688).

<sup>695</sup> 'European Parliament: Public Hearing on the "Value Gap"' (CEPIC, 30 November 2016) <<http://cepic.org/issues/european-parliament-public-hearing-on-the-value-gap-2>> accessed 10 February 2017.

<sup>696</sup> Framing incorporates an image into a website so that a website visitor perceives the image as appearing on that website, even though the image is technically hosted on a third party site. Framing allows the framing website to have the image appear on its website while not bearing the costs of hosting the image, of content licence fee, etc. See 'Image Providers Call for a Better Protection of Images Online' (CEPIC, 25 June 2015) <<http://cepic.org/issues/image-providers-call-for-a-better-protection-of-images-online>> accessed 10 February 2017, and 'Not all Links are Equal...' (CEPIC, 3 August 2016) <<http://cepic.org/news/not-all-links-are-equal>> accessed 10 February 2017.

consideration to the needs of other industries by describing how, in its present form, it did not address the interests of the image sector as the proposed Directive excludes aggregators and framing in Article 13 and all types of hyperlinks in Recital 33.<sup>697</sup>

In conclusion, the fact that a certain copyright policy that would apply for all creative industries is brought to life predominantly through the lobbying of one creative sector alone, is not necessarily in itself problematic, as the lobbying stakeholders may be voicing concerns and needs beyond their own. However, the 'value gap' case shows that in such instances there is perhaps a greater onus on policymakers to gather more information, research and stakeholder input from all other creative sectors, in order to assess and contextualise the potential implications of its policy proposals more widely. In particular, policymakers need to adequately reflect on the needs of stakeholders who may have been less vocal in relation to a particular legislative proposal, if a proposed policy measure would also have an effect on such actors.

## 2. Overview, main conclusions, and implications

This thesis studied creators' organisations (COs) as participants in, and shapers of, copyright law and policy with the objective of understanding how these actors engage in policy work, the environment they operate in, and how organisations' behaviour and environment impact and characterise the nature and substance of copyright law and policy.

My research comprised a socio-legal study of the Musicians' Union (MU), the Performing Right Society (PRS), the Society of Authors (SoA) and the Authors' Licensing and Collecting Society (ALCS): one trade union and one collective management organisation (CMO) from the music and publishing industries respectively. The evidence for this thesis emerged from a combination of primary data generated through empirical fieldwork<sup>698</sup> and documentary data, including

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<sup>697</sup> CEPIC, 'European Parliament: Public Hearing on the "Value Gap"' (n 695).

<sup>698</sup> 24 semi-structured interviews were conducted with CO operatives. Among these, one interview was conducted with a representative of the Writers' Guild of Great Britain and another with representatives from the British Academy of Songwriters, Composers and Authors, see Chapter 2, section 3.

consultation responses, policy briefings, reports, online news publications, IP reviews, academic studies, and other literature. The thesis was structured around the policy work of these four COs on three copyright issues of contemporary relevance: the contractual terms for authors and performers, the UK private copying exception, and the implementation of the EU collective rights management Directive (CRM Directive). Three questions guided my work:

- How do COs participate in copyright policy?
- What, if any, differences exist in the nature of and motives for participation between trade unions and CMOs?
- What challenges do creators' organisations encounter in their efforts to participate in and shape copyright policy?

My exploration of these questions in relation to the empirical examination of COs' engagement in policy work, their environment and the effects of these organisations' behaviour and environment on copyright law and policy support several conclusions, which are discussed below.

## 2.1. COs as actors in copyright policy

With regard to the first research question aimed at understanding COs' roles as participants and shapers of copyright policy, as well as their behaviour in policy, the thesis concludes that

**COs are important and valuable actors in copyright law and policymaking and should therefore continue to participate in these activities.**

The exploration of COs' input and activities in copyright policy on the different substantive issues covered in this thesis has shed light on the numerous roles that these organisations play in copyright law and policy. These actors are important for identifying and raising awareness on shortcomings in the way copyright law's application in practice affects creators and performers.<sup>699</sup> COs bring such issues, like

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<sup>699</sup> See Chapter 4, section 3.1.1.

the problematic contractual frameworks through which copyright is exploited, to the attention of policymakers and simultaneously advance proposals on how the identified problems could be addressed. This facet of stakeholder organisations' role in policy was not considered in the work of Horten, Harker, or Williamson and Cloonen, who focussed on other aspects of how organisational behaviour affected the copyright policy space.<sup>700</sup> Moreover, as exemplified through the private copying matter, COs also perform a monitoring role in policy. They follow industry and policy developments and take action to safeguard the interests of the stakeholders that they represent.<sup>701</sup> The private copying case also evidenced COs' capacity to challenge legislation judicially and thus to directly bring about change in copyright law. Finally, chapter 7 shed light on the role of CMOs in particular in putting the structures in place, like licensing schemes, collection and distribution of royalties, and rights enforcement, which facilitate the functioning of the copyright system.<sup>702</sup>

This thesis mapped the proximity of COs to the policymaking process and exemplified the importance of the roles that they play for copyright law and policy. More fundamentally, it revealed that

**the behaviour of these actors in policy is far from uniform.**

In principle, SoA, MU, PRS and ALCS are all organisations that represent right owners. Apart from this commonality, SoA and MU also have in common the fact that they are trade unions, just as ALCS and PRS are both collective management organisations. Yet, this thesis has evidenced the existence of differences in the policy behaviour of these four organisations, many of which are regardless of trade union or CMO-specific features.<sup>703</sup> In particular, the thesis showed a lack of uniformity in

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<sup>700</sup> See Chapter 3, section 1.4.

<sup>701</sup> See chapter 6, section 4.1.

<sup>702</sup> See Chapter 7, sections 1.3 and 1.4.

<sup>703</sup> The purpose and main function of the organisation, defined in its mandate, influences the types of issues that a CO prioritises. In this respect, Chapters 4 and 5 illustrated how unions were more invested in issues relating to creators' and performers' contracts and remuneration, whereas Chapter 7 described how only CMOs had participated in the public consultation on the implementation of the CRM Directive.

the degree of policy proactivity demonstrated by the studied organisations. This contradicts Horten's observation that the entertainment industries as a whole are highly advanced in putting forward their cause<sup>704</sup>, suggesting instead that within these industries there are some more proactive organisations that play a greater part in shaping copyright policy agendas compared to others. Chapter 4 presented ALCS' and SoA's perspective that their own agenda-setting was to an extent reactive, that it was difficult to create political urgency around an issue which was not already on policymakers' agenda, and that lobbying activities were generally tied to policy issues that were already under consideration.<sup>705</sup> In contrast, chapter 7 presented PRS' proactive and self-initiating behaviour in relation to the CRM Directive, and the 'value gap' case considered in this chapter further underlined PRS' own proactive advocacy work.<sup>706</sup> It follows that some actors are more concerned with actually influencing the copyright policy agenda itself, whereas others 'merely' aim to participate in shaping the outcomes of this agenda.

Aside from differences in the degree of proactivity of individual COs, the thesis further identified differences in these organisations' priorities,<sup>707</sup> as well as in the approaches that they took on particular issues. The latter came out particularly strongly in comparing the way SoA and the MU dealt with the problem of creators' and performers' unfair contract terms.<sup>708</sup>

Finally, there were also very clear disparities between the policy positions that COs adopted on certain issues. Recall the different positions of MU and PRS on the question of contract terms, or the way ALCS' position on private copying deviated from the general stance adopted by the other three COs as examples of this.<sup>709</sup> These

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<sup>704</sup> Horten, *A Copyright Masquerade* (n 8) 8.

<sup>705</sup> See Chapter 4, section 1.3.6.

<sup>706</sup> See Chapter 7, sections 2.2.2, 2.3, 2.4, and 2.6. See also chapter 8, section 1.3.

<sup>707</sup> See n 703. Different priorities were also identified in relation to the private copying exception in Chapter 6, section 2.2.

<sup>708</sup> See Chapter 5, sections 1.4 and 1.5.

<sup>709</sup> See Chapter 5, section 2.1 and Chapter 6, section 2.2. As a further example, see chapter 7, section 2.3 where I discuss the positions of ALCS and PRS with regard to the question of members' voting rights under the CRM Directive.

findings support Williamson and Cloonan's observation in relation to the music industry that it represents a complex, heterogeneous and diverse landscape of actors with different views and interests;<sup>710</sup> moreover, the thesis has demonstrated that such complexity, diversity and heterogeneity are also characteristic of the publishing industry.

The differences described above stem from a range of common factors, which include organisational mandate,<sup>711</sup> resources and resource allocation,<sup>712</sup> membership composition,<sup>713</sup> political power,<sup>714</sup> and self-concept.<sup>715</sup> The composition of these factors within each of the studied organisations varies. Moreover, the particular configuration of these factors appears to have a strong influence on an organisation's respective level of policy proactivity, which, in turn, influences the amount of copyright policy influence it wields.<sup>716</sup>

## 2.2. The copyright policy environment within which COs operate

With regard to the second research question, which asked what landscape, or environment, COs operate in, the thesis found that

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<sup>710</sup> See Chapter 3, section 1.4.

<sup>711</sup> For discussions on the impact of organisational mandate on a CO's policy behaviour see, Chapter 4, sections 1.3.3 and 1.3.4. See also Chapter 5, section 3.1.2.

<sup>712</sup> For discussions on the impact of resources and resource allocation on a CO's policy behaviour, see Chapter 4, section 1.3, Chapter 5, sections 2.3 and 3.4.

<sup>713</sup> For discussions on the impact of the membership composition on a CO's policy behaviour, see Chapter 5, section 2.1.2, and Chapter 7, section 2.3.2.

<sup>714</sup> Historical political power and influence were first considered in the context of the changing political climate for trade unions in chapter 3, sections 2.2.2 and 2.2.3. Chapter 5, section 3.1.1, in particular, also considered the effects of the shifting role of trade unions for the MU. Chapter 7, section 1, on the other hand, considered the potential political power of CMOs, and the example of the 'value gap' in this chapter, under section 1.3, in particular, discussed PRS' political power.

<sup>715</sup> Differences in the self-concepts and self-identities of the studied COs were considered in chapter 4, section 1.3.6 and Chapter 7, section 2.

<sup>716</sup> Differences in COs' levels of policy proactivity were discussed in chapter 4, section 1.2 in relation to SoA's and ALCS' action on contract terms, in Chapter 7, section 2.2 in relation to ALCS' and PRS' input on the CRM Directive Implementation, as well as in the present chapter with regard to the 'value gap', see section 1.

**COs' environment is characterised by complex dynamics and power imbalances between individual actors.**

The copyright policy space is populated by a multiplicity of actors and, as the sample of 4 organisations considered in this thesis has shown, these actors have different interests, approaches, priorities and concerns.<sup>717</sup> As evidenced, this applies even to actors who broadly represent the same copyright stakeholders: creators or performers. This leads to the permanent coexistence of multiple policy causes that compete for policymakers' attention and agenda.<sup>718</sup>

However, in the competition for decision-makers' attention, not all actors are equally well placed to exercise influence over the direction and substance of law and policy. This has not previously been emphasised and discussed in the copyright law literature on industry organisations considered in this thesis.<sup>719</sup> Between trade unions and CMOs, the latter are in a better position to wield policy influence.<sup>720</sup> They gain political power through the pivotal role that they play for the functioning of the copyright system. Moreover, their influence is elevated through the rights that they administer, the significant size of individual right holders that they represent, and the information that they hold. What is more, these actors generally allocate more resources to participate in policy, whether through the administration of certain All-Party Parliamentary Groups, the maintenance of contacts with high-ranking policy

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<sup>717</sup> Differences in the priorities and concerns of individual COs emerged on the one hand in relation to the private copying exception in chapter 6. Moreover, a juxtaposition of the narratives of chapters 4 and 5 which discussed SoA's and MU's approach to the issue of fair contract terms also revealed how differently the two unions had approached this issue, especially as the MU ultimately prioritised another legal matter. The thesis offered many examples of distinctions in the positions of the studied organisations, for instance between MU and PRS on the issue of contract terms (Chapter 5), or between ALCS and PRS with regard to the implementation of the CRM Directive (Chapter 7).

<sup>718</sup> See section 1.5.1 of this Chapter for a summary of the competing issues captured in this thesis.

<sup>719</sup> See Chapter 3, section 1.4.

<sup>720</sup> This argument is made in Chapter 7, section 1. See, also, for instance, the comparison between the resources of ALCS and SoA in Chapter 4, sections 1.3.2, 1.3.3, and 1.3.4, but also the discussion on the dependence of SoA on ALCS in section 2.1 of that chapter. Furthermore, chapter 6 argued that MU and BASCA benefitted from the support of the music industry CMOs, and UK Music, in the judicial review case, see Chapter 6, section 2.3.



officials, or to the preparation or commissioning of evidence in support of a particular policy cause. The unions, in contrast, are more limited in the amount of policy influence that they can wield. This is due to, among other things, the shifting role of trade unions following the regulatory weakening of their representation and regulatory functions.<sup>721</sup> In this respect, in chapter 5 I discussed the challenge that the MU faces with regard to the lack of activism and political engagement among its members.<sup>722</sup> Moreover, as observed both in the context of contract terms, as well as in relation to private copying, unions' policy behaviour is also constrained by the more limited resources that these organisations allocate to policy-relevant activities. Particularly in the case of SoA, this results from the CO's generally lower resource capacity.<sup>723</sup> The thesis also discussed how unions' resource allocation should be considered in the context of these organisations' exceptionally wide mandates.<sup>724</sup> These mandates effectively prohibit unions from channelling too many resources into copyright law related matters, let alone into any one particular issue within this policy domain.

Power imbalances, however, also exist among organisations of the same type. Chapter 7, as well as the recent policy development on the 'value gap' showed that PRS appears to wield more policy influence than ALCS and seems to act in a more proactive manner, with a clearly pursued objective of offering thought leadership on matters of copyright policy development and implementation.<sup>725</sup> Based on the private copying case, as well as with regard to the 'value gap', this thesis also suggests that power imbalances exist not only between actors, but also between creative sectors.<sup>726</sup> On both of the above issues, other creative sectors, such as the audio-visual or the picture industry, also had vested interests in relation to private copying and the 'value

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<sup>721</sup> See Chapter 3, section 2.2.3.

<sup>722</sup> See Chapter 5, section 3.1.1. See also Chapter 4, section 1.3.3 for a consideration of this problem in relation to SoA.

<sup>723</sup> See n 499.

<sup>724</sup> See Chapter 4, section 1.3.3 and Chapter 5, section 3.1.2.

<sup>725</sup> See Chapter 7, sections 2.2.2, and 2.4. See also Chapter 8, section 1.3.

<sup>726</sup> See Chapter 8, section 1.5.2.

gap'. Yet, on both occasions, it was actors from the music industry that demonstrated particularly effective joint action. In both cases, this stakeholder behaviour achieved tangible outcomes for copyright law, though in the case of the 'value gap', the adoption of the proposed Directive on copyright in the Digital Single Market is not yet a matter of fact.

As a consequence of the large number of actors and competing policy causes, of power imbalances, as well as of colliding interests, organisations form coalitions and networks. In line with Ansell and Mahoney's reasoning, organisations collaborate with others in order to further their particular policy cause.<sup>727</sup> These coalitions and networks form both on the basis of mutual interests, as well as interdependence. In this regard, chapter 4 showed the collaboration between SoA and ALCS to be reflective of their shared goal in furthering the interests of authors, but also of SoA's reliance on ALCS to amplify its C.R.E.A.T.O.R. campaign.<sup>728</sup> Similarly, chapter 6 presented how the private copying exception brought the MU, BASCA and UK Music together as they had a common overarching goal.<sup>729</sup> At the same time, I questioned whether BASCA and the MU alone would have gone forward with a judicial review, given the entailing financial burden of a judicial challenge. The 'value gap' issue exemplified a further case of joint industry action, and, in fact, of the success of such action. The dependence of weaker actors on stronger organisations or on multi-stakeholder alliances suggests that if acting on their own, less powerful organisations may be less likely to have their particular policy cause heard and acted on by policymakers.

Joint or concerted action between organisations, as well as activities that are supported by multi-stakeholder organisations, like UK Music, or the British

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<sup>727</sup> Ansell and Mahoney argue that organisations benefit from their participation in networks and coalitions as these formations amplify organisations' own agendas and signal to policymakers that their issues enjoy wider industry support, see chapter 3, sections 1.5.2 and 1.5.3.

<sup>728</sup> See Chapter 4, section 2.1.

<sup>729</sup> See Chapter 6, section 1.3.

Copyright Council, send policymakers important signals.<sup>730</sup> They indicate that certain issues bear relevance for an entire creative industry, or at least for a larger subset of stakeholders within that industry. They further create the impression of existing unanimity among the represented organisations as to the measures necessary to address a particular issue. However, the positions advanced through such groupings are not accurate representations of the needs and priorities of all participating actors.<sup>731</sup> Rather, they are the product of compromises. For one, in the presence of power dynamics, some organisations exercise more influence *within* industry alliances and umbrella organisations than others.<sup>732</sup> Furthermore, given the diversity of stakeholders represented in bodies like UK Music, or the BCC, and the conflicting interests that exist between these stakeholders on certain policy issues, there are inherent limitations to the *types of issues* that can be advanced through multi-stakeholder bodies. Chapters 4 and 5, for instance, demonstrated how antagonism between creators and performers, on the one hand, and publishers and producers on the other, meant that neither the BCC, nor UK Music could back the unions in their policy causes.<sup>733</sup> Chapter 6, on the other hand, offered evidence of disparities between the views of individual members of UK Music and the collective UK Music view on the private copying exception. The effect of attempting to reconcile the interests of multiple stakeholder groups was also evident in PRS' approach to forming a position on members' voting rights in the context of the CRM Directive.<sup>734</sup> When several organisations act together on a certain issue, this has the effect that the common position will necessarily be filtered down to what is mutually acceptable. The more diverse the membership of any network or coalition is, the more likely it is that some

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<sup>730</sup> See Chapter 3, section 1.5.3. See also Chapter 4, section 2.3.3 and Chapter 5, section 3.2.3.

<sup>731</sup> For instance, Chapter 6, section 2.3 describes evidence considered by Green J in the private copying judicial review that the views of individual UK Music members varied from UK Music's collective view. The disparity between individual organisations' positions and those presented through industry alliances was also discussed, among other places, in Chapter 7, section 3.

<sup>732</sup> See the example of PRS' influence within UK Music and the BCC discussed in this chapter, section 1.3.

<sup>733</sup> See Chapter 4, section 2.3.3 and Chapter 5, section 3.2.3.

<sup>734</sup> See Chapter 7, section 2.3.2.

of the views and interests held by different contingents within this body will not surface in the ultimate position that it adopts and advances.

In the context of the presented findings on COs as policy actors and their environment, another conclusion of this thesis is that

**differences in the behaviour and power of individual actors, and in the dynamics that govern their interactions are not fully understood by policymakers.**

The same applies to IP reviewers, the media, and, at least in part, to academic circles. Chapter 3 considered the portrayal of COs in IP reviews, in the media, and by some academics.<sup>735</sup> I discussed Hargreaves' sweeping statements about the impact of stakeholder behaviour and about how 'lobbying on behalf of rights owners ha[d] been more persuasive to Ministers than economic impact assessments.'<sup>736</sup> These statements did not consider possible variations in the extent of influence exercised by individual actors. The media as well as academic representations of COs had also not critically distinguished between the views and actions of different *types* of organisations, or of different organisations of the same type altogether. With regard specifically to CMOs, this thesis pointed to policy submissions by academics, which had treated CMOs in general terms when arguing that they wield particular policy influence, thus suggesting that all CMOs followed similar behavioural patterns in policy.<sup>737</sup> Moreover, I evidenced policymakers', as well as the media's uneven engagement with input from different copyright actors.<sup>738</sup> One example of this was policymakers' response to UK Music's 'Measuring Music' report and policymakers' lack of response to the MU's survey 'The Working Musician', which was thematised in chapter 5.<sup>739</sup> This chapter also presented evidence of various CO respondents' perception that policymakers are more concerned with the positions of multi-stakeholder alliances than with those of individual organisations as the former are

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<sup>735</sup> See Chapter 3, sections 1.2, 1.3, and 2.3.2.

<sup>736</sup> Hargreaves (n 4) 6.

<sup>737</sup> See Chapter 3, sections 1.2 and 2.3.2.

<sup>738</sup> See, for example, Chapter 4, section 2.3.2 and the present chapter, section 1.2.

<sup>739</sup> See Chapter 5, section 3.2.2.

assumed to speak for the whole spectrum of relevant stakeholders.<sup>740</sup> This signifies an incomplete understanding of the differences and power dynamics between individual actors.

### 2.3. The effects of stakeholders' behaviour and environment on copyright law and policy

The third objective of this thesis was to consider the effects of COs' behaviour and environment on copyright law and policy. The following conclusions can be drawn with regard to this question.

**In light of complex stakeholder dynamics and power imbalances between individual actors, as well as policymakers' insufficient understanding of these phenomena, some creators' issues will not surface onto copyright policy agendas and will thus remain unaddressed by copyright law.**

As a result of power dynamics and collaborative action, some policy issues are advanced by a larger subset of organisations, through a larger volume of concerted lobbying action, or by more powerful actors and industry alliances.<sup>741</sup> Both the private copying judicial review and the 'value gap' cases are examples of this. Relatively weaker, comparatively resource-poorer organisations, or organisations acting alone and without support from important industry networks will struggle to assert their voice and advance their cause over such issues. Among the issues considered in this thesis, the matter of creators' (and performers') unfair contract terms was primarily advanced by smaller and weaker organisations. It was not supported by the BCC or other influential industry alliances, and was ultimately not acted upon by the UK

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<sup>740</sup> See Chapter 5, section 3.2.4.

<sup>741</sup> This was also discussed in section 1.5 of the present chapter.

lawmaker.<sup>742</sup> Policymakers likely get uneven exposure to different policy matters.<sup>743</sup> Those issues that are carried by more powerful, proactive and vocal actors, or by larger groups of organisations, including important umbrella organisations, are more likely to win the attention of policymakers and make it onto decision-makers' agendas for action compared to other competing causes. A contributing factor to this may be seen in the uneven coverage of different issues in the media.<sup>744</sup>

Furthermore, policymakers' perception of the importance or relevance of a given issue may be skewed by the interest constellations that form in relation to it, as well as by certain actors' strategies of overstating their case and their representation unit. In this respect, this thesis offered further evidence corroborating Williamson and Cloonan's argument that some actors purposefully conflate 'the music industry' and the 'recording industry' and generally aim to convey that their particular issue affects the entire industry in broader terms.<sup>745</sup> This thesis also argued that multi-stakeholder

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<sup>742</sup> There are other examples of issues that fall outside the scope of this thesis, which have repeatedly been raised by the studied unions without any legislative or policy consequence. For instance, on numerous occasions the MU has raised the issue of the so-called 'right against the user'. S 182D CDPA 1988, in application of Article 8 of Directive 92/100/EEC, now Article 8 (2) of Directive 2006/115/EC, grants the performer a right to equitable remuneration from the *owner* of the copyright in the sound recording where a commercially published sound recording of a qualifying performance is played in public, or is communicated to the public. However, subject to Article 8 (2) of the said Directive, the performer in fact has this right against the *user* of the phonogram. In the UK, record companies as the right holders in sound recordings have the sole ability to licence and collect remuneration. According to the MU, this UK implementation of Article 8(2) was the result of a powerful lobby by record companies. The MU raised this issue in the context of the Implementation of Directive 2011/77/EU and in its response to the 2012 All Party IP Group's inquiry into 'The Role of Government in Protecting and Promoting Intellectual Property'. However, no further action has been taken by policymakers to re-consider this matter.

<sup>743</sup> I discuss this in relation to the 'value gap' in section 1.5 of the present chapter. See also Chapter 5, sections 3.2.3 and 3.2.4.

<sup>744</sup> My research demonstrated that the private copying exception and the response of music industry organisations through a judicial review, coupled with the problem of the 'value gap' received considerably more publicity, including through a wider range of sources, compared to SoA's and ALCS' C.R.E.A.T.O.R. campaign, and certainly compared to the Fair Internet campaign, which the MU supported. Similarly, chapter 5 discussed how MU's research 'The Working Musician' had not been reported on by the media or publicly taken up by policymakers unlike UK Music's 'Measuring Music' report, see Chapter 5, Section 3.2.2.

<sup>745</sup> See Chapter 3, section 1.4 and Chapter 5, section 3.2.1.2

alliances like the BCC, the Alliance for IP, or UK Music, purposefully present themselves as speaking on behalf of their whole respective industry, or even of the creative industries overall (in the case of the BCC), thus expanding the validity of Williamson and Cloonan's claim beyond the confines of the music industry alone. Yet, as demonstrated, there are limits to the types of issues that these umbrella bodies can support and advance, just as there are limits to the extent that their common positions do in fact reflect the priorities and concerns of all of their members.

Moreover, based on the demonstrated ability of music industry actors to take effective joint action in the context of private copying, as well as the so-called 'value gap', this thesis also suggested that further power imbalances may exist between different creative industries, although more research is necessary as will be discussed in the following subsection. This could mean that issues of importance to one particular, less influential or less vocal industry, may also go unnoticed or unheard.<sup>746</sup>

A further effect of stakeholders' behaviour and environment on copyright law relates to the substance of policy outcomes, out of which substantive copyright law is made.

**Given the disparity of views and positions on many copyright law issues, policymakers often attempt to shape copyright law and policy outcomes as a compromise between different stakeholder positions. However, this does not always produce sound or appropriate results for copyright law.**

Policymakers' approach to tackling specific issues by attempting to strike a compromise between different positions was evidenced on several occasions.<sup>747</sup> By doing so, policymakers aim to keep a greater subset of copyright stakeholders content. However, the case of the private copying exception in particular exemplifies how compromises may in fact produce disappointing outcomes for all. The current

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<sup>746</sup> In the context of the 'value gap' an organisation from the picture industry made the case that the needs of that creative sector had been overlooked, see section 1.5.2 of the present chapter.

<sup>747</sup> It was illustrated in relation to the private copying exception (Chapter 6, section 4.2), the 'value gap' (see n 693), creators' contract terms (Chapter 4, section 3.2), and in the context of Article 17 of the CRM Directive (Chapter 7, section 2.2.2).

status quo fails to produce a sensible outcome for copyright law and instead brings the law into disrepute. What is more, the illegality of private copying was not an outcome that any one stakeholder desired. It also fails to address the interests of consumers, technology manufacturers, as well as right holders.

Moreover, compromises may lead to inappropriate outcomes for copyright law to the extent that the policy process from which they emerge may not offer an accurate picture of the full range of interests that require balancing, or of the actual *extent* to which particular stakeholders are affected. This could result in certain interests being sacrificed. Chapter 4 discussed how the EU's approach to tackle the problem of unfair terms could be seen as a compromise in so far as it aimed to address some contractual problems, such as the lack of transparency, while at the same time leaving many others (from the perspective of creators and performers), such as the overly wide scope or long duration of rights transfers, unaddressed.<sup>748</sup> An evaluation of the adequacy of the Commission's proposal to address the contract terms issue falls outside the scope of this thesis and would require a thorough examination of evidence and literature that consider the situations of creators and performers, as well as publishers and producers. However, based on the insights into the policy process and stakeholder environment gleaned from this thesis, doubts remain as to whether this compromise would amount to a balancing of interests between the affected stakeholders, as is desirable for copyright law and policy. For instance, the balancing act itself may be influenced by the positioning (or lack thereof) of influential actors on a given issue as this could affect policymakers' perception of the extent to which particular interests need to be redressed. It was discussed that in the UK, important industry actors like the British Copyright Council did not add their voice to authors' campaign for fair terms despite ALCS' and SoA's membership within this umbrella organisation.<sup>749</sup> Moreover, the interests that policymakers primarily take into account

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<sup>748</sup> See Chapter 4, section 3.2.

<sup>749</sup> Publisher organisations, on the other hand, actively rejected the idea that contract terms were at the heart of creators' problem. No UK policy action followed on this issue.



may well be those of the more vocal actors<sup>750</sup> and these in turn may be overstating their case.<sup>751</sup> With these considerations in mind, even when policymakers attempt to address the interests of different stakeholders through compromises, the outcomes may not represent an accurate balancing of interests.

Finally, based on the research presented in this thesis, certain observations can be made regarding copyright stakeholders' behaviour and the objective of developing evidence-based policy. Challenges to this objective are a common phenomenon across various fields of policy.<sup>752</sup> This thesis has shown that in the copyright policy domain, the behaviour of organisational actors can complicate the objective of evidence-based policy. Challenges arise from the proximity of these actors to the copyright process and from the way they intertwine information and advocacy in their evidence submissions.<sup>753</sup> In this respect, the thesis confirmed Harker's argument that evidence submitted by industry actors is often intertwined with targeted advocacy, a point also made by Hargreaves in his IP review.<sup>754</sup> It also showed that the objective of developing evidence-based policy is challenged by the fact that, often, certain evidence is contested by different actors, or the overall picture of the evidence presented by stakeholders to policymakers is inconclusive, given the contradictory messages embodied in different evidentiary input.<sup>755</sup> This directly reflects the antagonism that exists between different copyright stakeholders on certain issues. This was primarily considered in relation to SoA's relationship with the Publishers

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<sup>750</sup> In the context of the 'value gap', for example, sections 1.4 and 1.5.2 of the present chapter considered views of right holders from the picture industry, as well as views of academics and other stakeholders that did not appear to have been sufficiently taken into account by the EU lawmaker.

<sup>751</sup> This thesis corroborated Williamson and Cloonan's argument that organisations like the IFPI, or the BPI conflate the terms 'recording industry' and 'music industry' to overstate their case, see Chapter 3, section 1.4 and Chapter 5, section 3.2.1.2.

<sup>752</sup> Adam La Caze and Mark Colyvan, 'A Challenge for Evidence-Based Policy' (2017) 27 *Axiomathes* 1; Ronald Bayer, David Merritt Johns and Sandro Galea, 'Salt and Public Health: Contested Science and The Challenge of Evidence-Based Decision Making' (2012) 31 (12) *Health Affairs* 2738.

<sup>753</sup> This is discussed in Chapter 7, section 2.5, as well as in section 1.3 of the present chapter.

<sup>754</sup> See Chapter 3, sections 1.2 and 1.4, Chapter 4, section 2.3.2 and Chapter 5, section 3.2.1.2

<sup>755</sup> For instance, this was illustrated in the disagreement between the Publishers' Association and SoA as to the reasons for authors' low earning levels, see Chapter 4, section 2.3.1.

Association and MU's relations with the BPI in the context of creators' and performers' contract terms. At the same time, however, this thesis also provided evidence that copyright stakeholders *can*, in fact, also *hold* the government to its objective of developing evidence-based policy, particularly when this aligns with their interests – a more positive facet of the interaction between industry organisations' behaviour and the government's objective that neither Hargreaves nor Harker have acknowledged. The very basis, on which MU, BASCA and UK Music succeeded in their judicial challenge of the private copying exception was the argument that the evidence relied upon by the government had been inadequate to justify the lack of a compensation scheme.<sup>756</sup>

## 2.4. Implications of this research

The conclusions and observations drawn from the research presented in this thesis have important implications for a number of actors.

### 2.4.1 Implications for researchers

The focus of this research was primarily confined to the policy work of SoA, ALCS, MU, and PRS and could thus offer some insight into the workings of a subset of actors across two creative industries. Further research is necessary to map the dynamics and workings of *other* actors within the studied creative industries (music and publishing), such as broadcasters or online intermediaries, in order to understand how *their* behaviour and action fits into the emerging picture. Research should also focus on actors within different creative industries, such as audio-visual or the picture industry as older and established sectors, or on gaming as a newer and increasingly important sector. In this way, it will be possible to ascertain whether certain creative industries, like music, are indeed more dominant policy influencers than others. Furthermore, it will help us understand which particular actors within these industries are the ones that successfully drive forward policy issues. Moreover, questions of power imbalances between individual actors and industries could also be pursued through research with and on policymakers themselves. Such research

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<sup>756</sup> See Chapter 6, sections 1.3 and 3.1.

could study the perspective of policymakers on their interactions with different actors and on the way these actors advance their issues. This would offer insight into the extent to which issues fuelled by different actors do in fact reach decision-makers and what, ultimately, determines the way policymakers set their agenda for policy development. Research with policymakers could also examine where such officials themselves see challenges in the adoption and implementation of copyright law and policy.

A larger body of research mapping stakeholder differences and dynamics across numerous creative industries is also necessary considering the fact that, in general, the politicians responsible for the setting of policy in a given area tend to change and rotate. As such, policymakers who have had less exposure and experience in dealing with the complex copyright landscape may find it more difficult to navigate this policy space. Authoritative, independent research on stakeholders in the creative industries could therefore enable policymakers to be more aware and discerning of the ways in which different stakeholders try to exercise influence over copyright policy.

The thesis revealed a discrepancy between the general representation of stakeholders in IP reviews, some academic submissions, and in the media, on the one hand, and the actual differences in the behaviour and priorities of individual organisations, on the other. It follows that future research and IP reviews should therefore undertake a more granular approach in distinguishing between the interests and behaviour of different actors, if they are to present a more accurate picture of the creative industries.

#### ***2.4.2 Implications for the media***

The media, too, could differentiate more clearly between the particular organisations that fuel a certain issue. Mainstream media, in particular, such as the *BBC* and *the Guardian*, could do more to contextualise the reported actors against other organisations and stakeholders in the industries when informing about a specific event, in order to portray the diversity of views and priorities among different actors,

as well as the different functions that various types of organisations serve.<sup>757</sup> Moreover, the media has the potential to play a balancing role in relation to existing power dynamics between industry actors by providing more equal coverage of different issues and industry campaigns.

### *2.4.3 Implications for policymakers*

The present research also has implications for policymakers. On the one hand, it highlights the value and importance of COs for copyright law and policy in light of the different roles and functions that they perform. In light of this, it is important that policymakers continue to work with these actors in the making of substantive copyright law. This thesis also observed the potential of industry actors to challenge the government's objective of developing evidence-based policy through these actors' own submissions of evidence that are often intermixed with advocacy. With this in mind, it is important that the IPO continues to undertake and commission independent research on policy-relevant matters in order to complement and verify, to the extent possible, information communicated from industry stakeholders.<sup>758</sup>

In view of the differences that exist between organisational actors, not only in terms of the issues that they prioritise, their positions and approaches, but also in terms of their varying levels of policy proactivity, policymakers should be careful not to equate organisational actors, even when these represent the same broad category of copyright stakeholder, like 'right holders'. Policymakers should also specifically not equate the views and positions advanced by multi-stakeholder alliances with those of their individual members. Furthermore, they need to continuously bear in mind

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<sup>757</sup> For instance, no information was provided on the individual claimants that banded together for the private copying judicial challenge, other than the names of the organisations, see n 125.

<sup>758</sup> The IPO commissions research on a range of copyright and general IP matters, see 'Intellectual property research publications commissioned by the IPO that cover copyright' (IPO, 5 July 2016) < <https://www.gov.uk/government/collections/intellectual-property-research-copyright> > accessed 21 August 2017. See also 'Intellectual property research: IP in general' (IPO, 23 September 2016) < <https://www.gov.uk/government/collections/intellectual-property-research-ip-in-general> > accessed 21 August 2017.

the existence of power dynamics and imbalances between individual actors and actively seek to engage with those actors, whose voices and issues are heard less, or not heard at all in policy debates. Copyright law will never be able to address the issues of all actors. However, if it is to *balance* the interests of the different stakeholders, then it is important that these interests and issues are at least *all* considered.

#### **2.4.4 Implications for COs**

Finally, the insight that this thesis offered on the behavioural differences among individual actors, on the factors that contribute to these differences, on the environment within which COs operate, as well as the effects of all of the above on copyright law and policy could also be beneficial for the studied COs themselves.

In general, an awareness and a better understanding of the varying self-concepts and levels of proactivity between organisations could lead individual COs to reflect on their own strategies, priorities and understanding of their role, and their intended role, in policy. COs could thereby make more conscious choices about the manner and timing of their policy action, about their allocation of resources, as well as their interactions with other industry players.

Specifically, this thesis suggests that COs, particularly less powerful COs (i.e. trade unions and professional associations like MU, SoA, BASCA, and WGGB), need a separate collective identity, in order to ensure that the issues, positions and priorities that are of particular importance to *them* can also regularly surface on the copyright policy agenda, alongside those advanced by other stakeholders. A collective body for COs should exclude CMOs, especially since these, like PRS, usually represent multiple stakeholders, and may generally have priorities that relate more closely to their economic functions. Based on the observations made within this thesis, a collective identity for COs may be particularly important for COs in the music industry, given the presence of powerful and influential actors like PRS who, as shown, cannot accurately represent the interests and priorities of music creators.

Although a collective identity already exists for unions through the Creators' Rights Alliance, based on the research conducted for this thesis, it does not appear that the CRA, in its current set-up and operations, presents an effective counterforce to more powerful actors and multi-stakeholder organisations. Yet, a strong collective identity is necessary to advance those issues on which UK Music, the Alliance for IP, or the British Copyright Council would prefer to remain silent. It is necessary, in order to more powerfully challenge one-sided messages about the healthy state of certain creative industries, especially when the reality for the creators and performers within those industries may be different. A collective identity is further necessary because, as I have shown, organisational actors appear to exercise more influence over policy when they act in unison. Moreover, the positions advanced through stakeholder alliances will always necessarily be a compromised version of the individual organisations' views. Yet, with a separate collective entity for COs, at least the starting point for such compromise would likely be based on more common ground. It is important that COs have a real possibility of being more vocal and assertive collectively so that decision-makers can feel and consider the full weight of the voice of creators, alongside the voices of other stakeholders, when they make copyright law and policy.



## ANNEX A

### Interviews

Table 1 provides an overview of the total number of interviews conducted with operatives from different creators' organisations that participated in this research.

<b>Name of Organisation</b>	<b>Number of Interviews conducted</b>
Authors' Licensing and Collecting Society	6
British Academy of Songwriters, Composers and Authors	1
Musicians' Union	10
Performing Right Society	6
Society of Authors	1
Writers' Guild of Great Britain	1

*Table 1*



Table 2 provides a list of the individual respondents, who opted for option (1) of the participation consent form (see ANNEX B) and thus agreed to be identified by name.

<b>Name of Organisation</b>	<b>Respondent Interviewed<sup>759</sup></b>
Authors' Licensing and Collecting Society	Richard Combes, Head of Rights and Licensing
Authors' Licensing and Collecting Society	Barbara Hayes, Deputy Chief Executive
Authors' Licensing and Collecting Society	Benjamin Pearson, Policy Development Advisor
Musicians' Union	Peter Thoms, Sessions Official
Musicians' Union	John Smith, General Secretary
Musicians' Union	Isabelle Gutierrez, Head of Government Relations and Public Affairs
Musicians' Union	Horace Trubridge, Assistant General Secretary Music Industry
Musicians' Union	Naomi Pohl, London Regional Organiser
Musicians' Union	Dave Webster, National Organiser, Live Performance
Musicians' Union	Diane Widdison, National Organiser, Education & Training

<sup>759</sup> Respondents' designations within their respective organisations, as listed above, relate to the period during which the fieldwork for this research was conducted, i.e. January - May 2015.

Musicians' Union	Michael Sweeney, Recording & Broadcasting Official
Musicians' Union	Ben Jones, National Organiser, Recording & Broadcasting
Performing Right Society	Frances Lowe, Head of Legal, Policy and Public Affairs
Performing Right Society	Tim Arber, Head of Membership Support
Society of Authors	Nicola Solomon, Chief Executive
Writers' Guild of Great Britain	Bernie Corbett, General Secretary

*Table 2*

A follow-up interview by telephone was conducted with Nicola Solomon, SoA, and with Richard Combes, ALCS.



## ANNEX B

### Participant Information and Consent Form

A copy of the Participant Information and Consent Form, as provided to ALCS respondents, is provided below. The form that was made available to research participants was tweaked slightly in a few places, depending on the organisation to which the respective participant belonged, in order to take account of the particular functions of each organisation. These places are highlighted in the form below.

## INFORMATION SHEET FOR PARTICIPANTS

### Creators' Organisations Research Project

#### **About the Project**

This research project will explore the role played by creators' organisations in the way copyright law is operationalised and exploited within existing and emerging business models. It will look into how creators' organisations represent creators, how they extract value for creators in the way copyright law is interpreted and applied, what challenges (pertaining to shortcomings in the law, industry practices, or other) they encounter in the process and what steps they take. This research is being organised and conducted by Ms Nevena Kostova, PhD Candidate at the University of Edinburgh, under the supervision of the Principal Investigator for the project, Dr Smita Kheria, Lecturer in Intellectual Property Law at the University of Edinburgh.

The Project is being undertaken as part of the research programme for CREATE, the Centre for Copyright and New Business Models in the Creative Economy jointly funded by UK Research Councils ([www.create.ac.uk](http://www.create.ac.uk)). This project is situated within CREATE's 'Creators and Performers: Process and Copyright' research theme.

#### **Why is this Project being done?**

Creators' organisations perform a myriad of functions (representative, advisory, educational, etc.), which significantly shape the framework within which creators operate in practical as well as legal terms. One of the objectives of these organisations is to ensure that copyright is an economic asset not just for content exploiters but also for the original creators. In recent years, copyright law itself has been undergoing numerous changes in an attempt to address some of the challenges which have emerged with the shift from analogue to digital content creation, dissemination and consumption. Many of these changes are still at the stage of implementation and several issues pertaining to new business models in the creative industries have yet to be addressed. It is therefore a particularly relevant time to focus our attention on the role that creators' organisations play in furthering the interests of creators in this changing landscape and on the various challenges that these organisations may face.

#### **What does participation involve?**

I would like to spend approximately one hour talking to you about the above mentioned themes in the context of your work on contractual terms and the recently adopted private copying exception [...]. The aim of the interview is to explore how your organisation works/has worked with the law of copyright on these topics. How does ALCS negotiate licensing terms which can extract maximum value for its members and how are these terms being influenced by changing business models? What steps does and did ALCS take to represent and protect the interests of creators in the context of the private copying exception as well as unfair contract terms? What are the challenges that ALCS faces in its efforts to bring forward copyright policy and legislation which will benefit creators? The interview will be recorded for the purposes of transcription, analysis and reporting the results of the project. You may be asked to clarify or answer follow up questions by e-mail or in person, if you agree to it.

I would also like to spend a few days in your organisation, in order to observe the day-to-day activities which ALCS undertakes on the issues of contractual terms/ fair remuneration and private copying. This will allow me to gain a richer understanding of the actual process by which ALCS performs its function in securing value for its members and advocating copyright policy in the interest of creators.

### **What are the benefits of contributing to this project?**

The aim of this project is to deliver empirically grounded insight into the role of creators' organisations in the creative industries and their impact on the modalities of copyright frameworks, i.e. on the way copyright law is interpreted and operationalised. Moreover, the project will identify legal and practical shortcomings which hinder creators' organisations from extracting maximum benefit for creators from existing and emerging business models. The findings of this research will therefore directly benefit organisations like yours by delivering the basis for developing a road map to tackle these shortcomings. At the same time, because of the very focus of this research, the success of the project will very much depend on your contribution.

### **What are the possible disadvantages and risks of taking part?**

A disadvantage may be the time put aside for the interview (approx. 1 hour). The interview itself will be arranged at a time and location which is convenient for you (between January-June 2015).

In addition, if short-term observation is possible, my presence on your office premises may necessitate a small amount of additional time for orientation. I will endeavour to cause as little disruption to the regular activities as possible. The extent of my access to meetings and specific activities will be at your discretion.

### **Can you withdraw from the project?**

Yes. Participation in this project is entirely voluntary. If you agree to an interview then it can be stopped at any time and it is open to you to pass any question. If you have given an interview and want to subsequently withdraw your participation you may do so at any point up to 21 calendar days after the interview. You may equally withdraw your consent to the use of data gathered from observation within this period. Thereafter, your data will be merged with the rest of the data for analysis purposes. If you wish to withdraw you should e-mail me (see contact details below). There are no consequences to deciding you no longer wish to participate.

### **What about confidentiality?**

The organisations which will be studied will be named and your affiliation with an organisation will not be confidential. However, if you wish for any part or all of your interview data to be anonymous in relation to your name and designation in the organisation, then all necessary steps will be taken to ensure the same. In this case, if any specific quotations are used then the quoted participant will be described using an anonymous identifier (e.g. Interviewee No 3 of Organisation X). All consent forms will be stored in a separate, secure (locked) location from the project data itself.

Furthermore, any data from observation will not expose the actions of individual organisation members or representatives unless they explicitly agree to this.

### **What will happen to all the data?**

All data will be saved securely and confidentially during the lifetime of the project and only I and the PI will have access to them. The data and consent form will be securely retained at the University of Edinburgh until the end of the project and for five years thereafter. The project data will then be destroyed.

At the end of the project, observation data and interview data for which anonymity as outlined above **has not** been requested will be made available in an accessible and appropriate data repository in the form of redacted transcripts or redacted audio-recordings. Such extracts may also be shared through blogs and other media. Interview data for which anonymity **has** been requested will only be made available in the data repository **if** such data continues to be of significant value after all measures have been taken to ensure the agreed level of anonymity has been met. Any extracts used from such data will always meet this level of anonymity.

**What about the results of this project?**

The results will be published and disseminated in the form of a PhD thesis, journal articles, conferences papers, blog posts and other documents. If you decide to participate then I will notify you of any future publications of the research findings.

**Who has reviewed this project?**

The project has received ethical approval from Edinburgh Law School, University of Edinburgh.

**Thank you for taking the time to consider this invitation.**

**I sincerely hope to hear from you.**

## INTERVIEW AND OBSERVATION CONSENT FORM

### Creators' Organisations Research Project

By signing below, I agree with the following statements and consent to my participation in the project:

- I know that it is up to me whether or not I want to take part.
- I have read and understood the Participant Information Sheet and have been given a chance to ask questions and to discuss this study.
- I can withdraw from this research without giving any reasons up to 21 calendar days after the interview. This period will also apply for withdrawing my consent to the use of data obtained through observation. (thereafter both interview and observation data will be merged with other data for analysis).
- I am not being rewarded financially or otherwise for my participation.
- I understand that Nevena Kostova will record the interview unless I object.

Please indicate by inserting the number **(1)** or **(2)** (as described below) how you wish to participate:

\_\_\_\_\_ .

**(1)** I agree to be identified by my name in relation to my contribution to this project. I grant all permissions necessary to enable the storage, archiving, sharing, reporting and dissemination of my contribution to this project (to the extent outlined in the Information Sheet).

**OR**

**(2)** I do not want to be identified by my name or designation within the organisation. If any specific quotations are used I will be described using an anonymous identifier (e.g. Interviewee No 3)) which will include a reference to my affiliation with, but not my role within, the particular organisation (e.g. Interviewee No 3 of Organisation X). I grant all permissions necessary to enable storage, archiving, sharing, reporting and dissemination of my contribution to this project (to the extent outlined in the Information Sheet) as long as I am not identified.

Print Name: \_\_\_\_\_

E-mail: \_\_\_\_\_

Phone (optional): \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

#### **Contact Details:**

Ms Nevena Kostova

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Project Blog: Copyright and Creators <http://blogs.sps.ed.ac.uk/copyrightandcreators/>





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