



INTERNATIONAL
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Implementing the Copyright Society Provisions of Botswana's New Copyright Act

Analysis and Recommendations

Public Draft – Open for Comment

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Table of Contents

Table of Appendices	1
I. Introduction.....	2
II. The Basics.....	4
A. The various copyright rights and the forms of exploitation and licensing of works common in the music industry.....	4
1. Rights under copyright and neighboring rights as established in Botswana and international law.....	4
2. Copyright “rights” in the music world – how copyright is understood in relation to musical compositions and sound recordings.....	6
3. The Role of the Music Publisher	8
B. The new Copyright Society and its relationship to the Copyright Office.....	9
1. Legislative description of Copyright Society of Botswana (CSB).....	9
2. Principles for the relationship between the Government and the CSB.....	10
III. Structure of the Copyright Society of Botswana	12
A. Objectives of the Society	12
B. Recommended membership and general structure	14
1. Music Section.....	15
2. Authors’ Section	16
3. Fine Arts Section.....	17
C. Recommended board structure and governance system	18
IV. The Society’s Core Function – A Viable Collecting Society	22
A. Licensing of public performance rights	22
1. Who must have a license?.....	22
2. What are the traditional types of license agreements?.....	23
3. How are license fees calculated?	24
4. What goes into a License Agreement? What must it include?	26
B. Establishing an authoritative list of eligible works (the “Index”).....	27
C. Calculating the distribution of royalties to individuals.....	29
1. Calculating what will be distributed to individual artists	29
2. How to calculate public performance of broadcasts	31
3. How to calculate public performance in public establishments.....	33
4. Making individual distributions from licensing fees	33
D. Distributing blank media levies	34
E. “Nuts and bolts” of establishing such a system – software, etc.....	36
V. Secondary Missions of the Copyright Society.....	37
A. Settling all types of disputes among creators.....	37
B. Other activities to strengthen the artistic community	37
1. Establishing a funeral benefits scheme	38
2. Funding arts festivals, scholarships, new works, or public performances.....	38
3. Establishing a retirement annuity fund	39
4. Promoting copyright awareness and enforcement	39
VI. Summary of Recommendations	40
VII. Conclusion	43
ENDNOTES	45

Table of Appendices

Number Title

Sample charters of collecting societies

- 01 Articles of Association of the American Society of Composers, Authors, and Publishers (ASCAP) as amended through May 2002 [US]
- 02 Memorandum and Articles of Association of the Performing Right Society Limited (PRS), as amended through 1 July 2005, including Rules and Regulations of the Performing Right Society Limited [UK]
- 03 Certified Translation of the Statutes of GEMA, as amended on 24/25 June 2003 [Germany]
- 04 Unofficial Translation of the Articles of Association of Vereniging BUMA, as established in 1998 [Netherlands]

Sample membership agreements for collecting societies

- 05 ASCAP Membership Agreement
- 06 BMI Writer [membership] Agreement
- 07 BMI Publisher [membership] Agreement

Sample licensing agreements from collecting societies

- 08 BMI Music License for Eating and Drinking Establishments
- 09 BMI Hotel/Motel License
- 10 ASCAP Radio License Agreement

Other Materials

- 11 Sample index as Microsoft Excel spreadsheet
- 12 ASCAP Licensing Allocation Methodology
- 13 Sample radio log
- 14 Draft Copyright Act of Swaziland
- 15 Society for Administration of Remuneration for Audio Home Recording (SARAH) – Outline of Remuneration System

I. Introduction

To construct a house, a builder lays the foundation, constructs walls, installs a roof, and builds out the rooms. The house is sold and the builder is paid for his efforts. The whole process is supported by property laws: laws that ensure that the builder can market and be paid for what he has created. While much art comes purely from the joy of the creative experience, in a modern economy most artistic works – songs, novels, plays, films -- are created much the same way as the house, with copyright law giving the artist the right to control what he has created, market his work, and get paid for it.

Although a song cannot be touched and a play does not exist in physical space, these creative works are rightly regarded as the property of their creators. At the same time, these creative works often arise from a commonly shared artistic and musical heritage; their proper exploitation is of national importance. Botswana has created a new Copyright Act, joining other African countries that now have sophisticated, modern copyright laws. The new Copyright Act establishes a wide range of rights for authors and artists; it also provides that a new “Copyright Society” will be established to represent creators, particularly musical artists, in the licensing of their works.

While new to Botswana, organizations that serve to assist artists in the licensing of their works have been in existence in other countries for some time. These organizations are often referred to as “collecting societies” or Performers Rights Organizations (PROs). Under the new Copyright Act, the Copyright Society will serve as a national “collecting society” for all Botswana artists.

There is great potential in creating this Society, but also tremendous amounts of work to be done in educating people about copyright, licensing uses, collecting monies, and distributing those monies to creators. In writing about music in Africa, Nobel prize winner Amartya Sen has noted “[A] prominent place must be given to the economic returns from well designed programmes of distribution at home and abroad, with adequate protection of rights and entitlements.”¹

For the new copyright law to succeed, it is imperative for the new Society to work well – collecting what artists deserve and, after minimal administrative costs, distributing those monies to musical artists as well as using some of the funds to support Botswana’s creative community in different ways. As Professor Sen further observes, a good program for collecting and distributing music copyright revenues “can not only be a significant revenue earner (especially for some of the economically marginalized people), but also the support that this will provide to musicians can be expected to play a constructive role in making the industry and the practitioners more secure and more resourceful.”²

This Report tries to provide a “blueprint” to help government officials and members of Botswana’s music community establish the Copyright Society. We recognize that there is relatively little expertise in copyright law in Botswana – and the government itself will be busy establishing a new Copyright Office. Therefore, this report is designed to help guide the establishment of the Copyright Society of Botswana (herein CSB or the “Society”). Part II of this Report explores some of the “basics” – the different rights established by copyright law, what “music publishers” do in a developed music economy, and the statutory language on which the CSB will be established. Part III then explores how to organize the CSB and starts this Report’s series of recommendations. Many of the recommendations in Part III are

suggestions for rules and organizational structure that should be built into the Society’s “charter” or Articles of Association. Part III’s explanation of how to organize the CSB provides many references to collecting societies – particularly those in the United States, United Kingdom, Germany, Netherlands, and South Africa. Nonetheless, this Report assumes that the CSB is intended to be, as the Copyright Act provides, an umbrella organization for representation of all Batswana creators. Part IV then provides a detailed discussion of how the CSB should carry out its work as a “collecting society,” while Part V describes other “missions” for the Society. Part VI closes the Report by providing a summary of the recommendations made throughout, and a comparison of the contents of various collecting society charters that should assist the process of drafting Articles of Association for the CSB.

II. The Basics

The first step for effective development of the Copyright Society of Botswana is for the leadership of Botswana’s creative community to understand the basics about copyright law and how those rights are traditionally managed in a “music economy.” The legal forms – the kinds of rights established by copyright law – are fixed both by domestic law and by Botswana’s international obligations; some of the traditional business divisions and forms may or may not be right for Botswana, but it is important to understand them. With that foundation of knowledge in place, this Part sets out the statutory requirements for the Copyright Society of Botswana (which we will refer to in this Report as the “CSB” or the “Society”) and makes recommendations for its relationship with the Government’s new Copyright Office.

A. The various copyright rights and the forms of exploitation and licensing of works common in the music industry

In this section, we describe [1] the different kinds of “rights” that are established under copyright law, both under Botswana law and under international standards, [2] the ways these rights are traditionally understood in the music industry, i.e. customary business practices using copyright in relation to musical compositions and sound recordings, and [3] the role of the music publisher in the “music economy.”

1. Rights under copyright and neighboring rights as established in Botswana and international law

Copyright – and “neighboring rights” for performers – provide a variety of different rights to authors, creators, and artists. Different rights will be less or more important to different artistic groups. For example, the right of public performance will be important to composers, but much less important to novelists. The basic copyright rights, as established in Botswana law and/or as required by international legal norms (provision of national law and international treaties cited for each right), are as follows:

- + **The right to control reproduction** is the most basic of copyright rights. It is the right to control the making of copies.
[Sections 7(1)(a) and 24(1)(c) of Botswana law; Article 9 of the Berne Convention and Article 11 of the WIPO Performers and Phonograms Treaty (WPPT)]

This right is important for all copyrighted works, musical and non-musical. It applies to books, sound recordings, artist’s prints, newspapers, computer software, films, textile designs, and all kinds of art forms.

- + **The right to control distribution of copies**, which is understood to include importation of copies
[Sections 7(1)(d), 7(1)(f), and 24(1)(d) of Botswana law; Article 6 of the WIPO Copyright Treaty (WCT) and Article 12 of the WPPT]

This also is important for almost all copyrighted works, not just sound recordings. The right to control the distribution of copies is important to a

newspaper, to a novelist, to a textile designer, and, of course, to a musical artist.

- + **The right to control rental of copies of certain categories of works** [Sections 7(1)(e) and 24(1)(e) of Botswana law; Article 7 of the WCT and Article 13 of the WPPT]

This right applies only to music, to sound recordings, to computer software, and to films.

- + **The right to prepare derivative works** including translations, adaptations, arrangements, and abridgements [Section 7(1)(b) and (c); Articles 8 and 12 of the Berne Convention]

This right is important to all kinds of copyright owners. A novelist, poet, and textbook writer will be concerned about translations – a kind of derivative work. In the realm of music, a new musical arrangement of an existing song is a derivative work on that song.

- + **The right to control public performance of the work** [Section 7(1)(h) of Botswana law; Articles 11, 11^{ter}, and 14 of the Berne Convention]

The right of “public performance” is most important for the music business -- musical compositions (songs) and sound recordings – and for “dramatic” arts – plays and films.

- + **The right to control broadcasting of the work** [Sections 7(1)(1) and 24(1)(a) of Botswana law; Article 11^{bis} of the Berne Convention and Article 15 of the WPPT]

In many countries, broadcasting is just considered a sub-category of public performance; again, it is most important to the music industry and filmmakers.

- + **The right to control any other communication to the public of the work** [Sections 7(1)(j) and 24(1)(f) of the Botswana law; Article 8 of the WCT and Article 14 of the WPPT]

- + **The right to control public display of the original or a copy of the work** [Section 7(1)(g) of Botswana law; Article 11^{bis} of the Berne Convention]

This is probably the least important of copyright rights and is NOT very important for the music industry. Graphic artists, painters, photographers and designers are the people for whom the right of public display can be important.

- + **The author’s right of attribution**, including the use of pseudonyms [Section 8(1)(a) and (b) of Botswana law; Article 6^{bis} of the Berne Convention]

This is called a “moral right.” All creative people – whether they are musicians or writers or textile designers – care about proper recognition.

- + **The author’s right to prevent any distortion or modification of the work** which would be prejudicial to the author’s honour or reputation [Section 8(1)(c) of Botswana law; Article 6^{bis} of the Berne Convention]

This is another “moral right” which can be important to any creator who cares about the integrity of his or her work.

- + **The performer’s right to control fixation of his/her performance** [Section 24(1)(b) of Botswana law; Article 6(i) of the WPPT]

*This is really a special right for musical **performers** and for **actors**. It is not relevant to other kinds of artistic creators.*

In addition to these basic international legal norms which are reflected in Botswana’s copyright statute, the WCT and WPPT establish new international legal norms that countries must provide adequate legal protection and effective legal remedies [a] against “circumvention of effective technological measures” that control rights established under the Berne Convention, the WCT, and the WPPT and [b] against knowing removal of “electronic rights management information” pertaining to copyrighted works. At the level of international law, these cannot be characterized as “rights” pertaining to authors or copyright holders, although many countries implement these legal norms in their domestic law as rights held by copyright owners.

2. Copyright “rights” in the music world – how copyright is understood in relation to musical compositions and sound recordings.

Because the CSB will initially focus on the functions of a “collecting society” for composers and musicians, it is important to understand how the *legal rights* above are *traditionally* handled in the *music industry*. Many of the business practices in the music industry arose because of the different times technologies developed. Some of these distinctions and categories still used in the European and North American music industries may not be sensible for a moderate-sized economy like Botswana’s. Nonetheless, because the CSB will want to have reciprocity agreements with collecting societies in other countries, it is important for CSB members and Copyright Office officials to understand these categories.

First, it is important to distinguish between the *copyright* in the musical composition (or the “song”) held by the **composer** and the *neighboring right* in the sound recording held by the musical performer. So with a music recording, there are **two** sets of rights: the rights to the musical composition and the rights to the sound recording. With that in mind, the music industry in developed countries typically separate the following rights for purposes of licenses and royalties:

- ✓ The “print right” [held in the owner of the musical composition]

- The right to print the music and/or lyrics of a musical composition. The lyrics to a song can frequently appear as excerpts in publications or books.
 - In the history of what we now call the “music industry,” this was really the first business activity of musical composers after actual performances of works. But today in developed countries, the value of the market for printed musical compositions is substantially smaller to the market for sound recordings. The value of the market for printed music in Botswana is probably extremely small.
- ✓ The “sound recording right” [held by the owner of the musical composition];
 - This is the right that the owner of the musical composition has to allow a musical performer to make a recording (CD’s, cassette tapes, or digital downloads) of the copyrighted musical composition. Typically, the owner of the musical composition grants the right to make the first recording (the “master” recording), the right to make copies (“phonorecords”) of that recording, and the right to distribute those copies (phonorecords) to the public. The right to record copyrighted musical compositions for production of such “phonorecords” is also referred to as the “Mechanical Right.”
 - Obviously, the “sound recording right” or “mechanical right” came only after sound recording equipment was invented – long after people had been printing music.
- ✓ The “synchronization right” [held by the owner of the musical composition]
 - The right to record a musical composition in combination with a visual image, such as music used in TV commercials, video or film.
 - This is really just a form – or subclass -- of the sound recording right. The “synchronization right” became separate in the music industry because audiovisual works (films and television) were technologies that came after recorded music.
- ✓ The public performance right [rights separately held by the owner of the musical composition and by the owner of the sound recording]
 - The right to perform a copyrighted musical composition publicly, applies to music performed at a concert, theatre or arena, but also broadcasts over Radio or Television and when music is heard in a public place over a professional sound system. When it is a “live” performance, the performer is publicly performing the *musical composition* only, but when it is a sound recording being broadcast or played in a public place, it is a public performance of the *musical composition* under Article 7 of the Botswana law and a communication to the public of the *sound recording* under Article 24 of the Botswana law.
- ✓ The “grand” right to perform the work in a theatrical stage production [held by the owner of the musical composition]

- The right to perform copyrighted music publicly in a theatrical production, opera or musical. This is just a sub-class of the right of public performance. In the United States and Europe, the collecting societies generally only have the right to license the *non-dramatic* performances of their members' copyrighted music. A distinction was made when music is used in a theatrical production because the producer of the show could contact the copyright owner or their publisher directly to obtain a license. Based on the Copyright Law of Botswana, no distinction has been made between dramatic and non-dramatic uses, permitting the Society to license and collect fees for both types of uses.
- ✓ The right to alter and make arrangements
 - In order to preserve the integrity of the original work, no alteration of the music or lyrics of a copyrighted song may be changed or altered without the permission of the copyright owner.
- ✓ The right to make a translation into a foreign language
 - As with the right to alter the music and lyrics, permission is needed to translate a copyrighted song from its original language into a foreign language.

Each of these activities requires permission from the copyright owner (or the neighboring rights holder in the case of a sound recording).

As stated above, some of these distinctions will not be important for Botswana. For example, the CSB could, if its members wanted, grant licenses for public performances of all sorts – without making the distinction between public performance rights and “grand” rights. Similarly separating the sound recording right and the "synchronization right" – the right to record a musical composition with an audiovisual work – may not be necessary or appropriate for Botswana. (But even where the CSB chooses to license them together, CSB must be aware of the distinction in dealing with PROs from developed countries.)

3. The Role of the Music Publisher

As the Copyright Society of Botswana will represent both songwriters and Music Publishers, it may be useful to briefly define the roles and responsibilities of the music publisher. A century ago, the music “publisher” was the business entity arranging the printing and distribution of sheet music, just as a newspaper publisher prints and distributes newspapers. But in our times, as a practical matter the music publisher is also the business advisor, legal representative and manager to the songwriter and the songwriter’s works. When listing the main functions of a music publisher, it becomes readily apparent how much a modern music publisher acts as a ‘manager’ for the artistic property in songs:

- ✓ The Publisher will ensure that the songs it represents are properly copyrighted, registered and protected not only in its country of origin but is also protected in foreign territories.
- ✓ The Publisher will work to promote the works it controls for sound recordings (the mechanical right), TV commercials and motion pictures (the synchronization right), merchandise, and other uses.

- ✓ The Publisher will arrange for the printing and distribution of sheet music.
- ✓ The Publisher will ensure the accuracy and timeliness of the royalties and statements submitted by its licensees.
- ✓ The Publisher will work to ensure the songs it controls are promoted and represented in foreign territories.

For these reasons, music publishers in developed countries can range from small privately held companies that manage several hundred songs to a worldwide organization like EMI that has a repertory of approximately 1 million songs covering every genre. Successful African artists are sometimes with small companies and sometimes with very large music publishers. For example, Angelique Kidjo and Salif Keita appear to use small music publishers,³ while Senegalese musician/composers Wasis Diop and Toussou N'Dour have at least some of their compositions with Polygram International Publishing and EMI respectively.⁴ Successful songwriters can also be their own music publishers. Well known examples of such include Diane Warren, Paul McCartney and Andrew Lloyd Webber.

B. The new Copyright Society and its relationship to the Copyright Office

The 2005 amendment of Botswana's copyright law (Copyright and Neighboring Rights Amendment Bill, 2005, *hereinafter* 2005 Copyright Law) establishes a national Copyright Office within the Ministry of Trade and Industry as well as a separate, non-profit "Copyright Society" which is to serve as the main collecting society for Botswanan musicians, writers, and artists.

This section provides recommendations on the relationship between the Copyright Office and the Copyright Society. The first step is to describe the framework set out in the 2005 Copyright Law.

1. Legislative description of Copyright Society of Botswana (CSB)

Section 36A(2) of the 2005 Act provides that the CSB will be a "non-profit making company limited by guarantee" and that it shall be responsible for "negotiation and granting of licenses, and for the collection and distribution of royalties to appropriate rights holders." Section 36B(2) provides that the society "shall distribute royalties on an equitable basis to its members whether local or foreign." Beyond this, the 2005 Act provides little direction to the society's functions. If there is future occasion to amend the Botswanan copyright act, the Parliament might consider further clarification of the Society's role and responsibilities in relation to particular kinds of exploitation of copyrighted works.⁵

Nonetheless, as envisioned in the Act, CSB is clearly intended to be an umbrella entity that carries out collecting society functions for any and all categories of works. Section 36A(1) states that the society will be established "for the various categories of works protected under this Act" and section 36A(3)(a) says that the society shall "represent the owners of the copyright in the various categories of works protected under this Act." **For this reason, we provide recommendations on how to organize the CSB as an umbrella entity that includes various types of creators, but nonetheless allows decisions and recommendations to be taken by relevant creative communities.**

The statute does *not* require that the CSB be the sole and exclusive collecting entity for copyright holders in Botswana – and in many countries there are multiple collecting

societies for different categories of works and/or different collecting societies “competing” within the same category of works. But for practical purposes – principally the size of the Botswanan economy – we will assume that the CSB will be the sole functioning collecting society in the country. **The medium size of the Botswana economy strongly suggests that for the time being many copyright-related collecting and distribution functions should be centralized in one entity.**

The responsibilities of the new Copyright Office set out in section 22B of the 2005 Act and are similar in scope to other national copyright offices and do not warrant any analysis except that the Copyright Office is specifically charged with the duty to “supervise the activities of the Copyright Society” [section 22B(1)(b)].⁶ In this respect, the 2005 Act envisions a closer relationship between government officers and the non-profit collecting society that exists in many countries, but the 2005 Act does not provide specifics on that relationship.⁷

Another important aspect of the Office/Society relationship partially structured by the 2005 Act, is the allocation of monies raised in relation to copyright. The 2005 Act Section 22C provides that the Copyright Office will be funded by appropriations from the National Assembly as well as “such fees as the Office may impose for licenses issued under this Act” [22C(a)] and “such other fees or moneys as the Copyright Office may, by virtue of this Act, raise or impose” [22C(c)].

The “licenses” described in subsection (a) presumably include the “application fee(s)” for “accreditation” to apply the security devices newly mandated in section 35D. The “fees or moneys . . . raise[d] or impose[d]” under subsection (c) probably includes penalties for failure to comply with the security device provisions. But otherwise subsections (a) and (c) are open-ended descriptions that might, without appropriate safeguards, allow the Copyright Office to absorb monies that should be passed back to the creative community through their collecting society.

2. Principles for the relationship between the Government and the CSB

For this reason, we recommend that the Copyright Office and the Ministry of Trade and Industry adopt principles in its relationship to the new Copyright Society. These principles might be announced in a speech by the Minister and embodied in a joint statement by the Copyright Office and the Copyright Society, once the latter is fully operational. These could include the following:

- That the Government recognizes the Copyright Society as a legitimate voice of the Botswana artistic community, including in advocating reform and improvement of copyright law and its enforcement;
- That the Government and the Copyright Society both have the goal of developing the Copyright Society into the principal representative of the Botswana music community for purposes of licensing public performance rights in music and sound recordings; for purposes of representing authors and performers in distribution of blank media levies;

- That the Government recognizes and acknowledges the autonomy of the Copyright Society in these functions;

The Government might further want to establish that while committed to assisting the Copyright Society, the Government intends that the Society shall be, as soon as practical, a self-supporting, self-governing entity. The important thing in these declarations is that an environment of increasing confidence, cooperation, and coordination be established between the Government and Botswana's artistic community.

It appears that there is little or no market in Botswana for sheet music [with the possible exception of the grade school system], so the management aspects of music publishing will be the principle concerns that need to be addressed. Our impression is that there are only a few music publishers currently operating in Botswana. For this reason, the Society might consider (a) creating a separate publishing company representing the interests of Botswana's national writers and composers, and/or (b) hold one or more seminars on how Botswana composers could provide their own low-cost, cooperative music publishing function (at least until there are viable roles for one or more commercial music publishers.)

III. Structure of the Copyright Society of Botswana

This Part describes different possible membership structures for CSB and makes recommendations from among those possibilities; this Part also makes recommendations on a board of trustees and officers for the Society. Of course, recommendations on CSB officers, board of trustees, and membership all depends on a clear understanding of the Society's objectives, so that is where we start.

A. Objectives of the Society

Pursuant to the statutory description, the CSB is intended to be an umbrella organization for all creators, writers, composers, and artists in Botswana. This will make CSB different than most artists' associations or collecting societies which are limited to one type of creative activity (such as the "Dramatists' Guild" for playwrights in America or Buma/Stemra which is the collecting society for songwriters, composers, and music publishers in the Netherlands). Because Botswana is in the early stages of developing both its artistic community and a "copyright culture," we also recognize that CSB may want to take on a variety of "pro-arts" activities in addition to serving as a collecting society.

We recommend that the first meetings of the Society be dedicated to establishing an express agreement among involved parties as to the Society's objectives. This express agreement can take the form of a "Statement of Purpose" and a list of the Society's "missions." [Much of this may be necessary or useful in the process of writing the Society's charter or articles of association.] A CSB "Statement of Purpose" might be something like:

"The Copyright Society of Botswana is dedicated to the promotion of arts in Botswana by helping composers, writers, artists, and performers protect copyrights and neighboring rights in their works, ensuring the community respects our nation's copyright laws, and helping collect fees for the use of protected works, both for the benefit of creators and the larger community."

Of course, this is just a suggestion for a statement of the Society's goals. Such a "Statement of Purpose" should be broadly, but carefully worded. It can be used in the Society's charter and on promotional materials. Even the process of negotiating the words of such a Statement of Purpose will help CSB members think about the broad, long-term goals of the Society.

In addition to establishing a Statement of Purpose, the Society may want to make a priority list of its future activities – describing each "mission" of the Society. Obviously, being an effective collecting society is first and foremost of those missions. A list of the Society's objectives or "missions might look like the following:

PRIMARY MISSION

To serve as Botswana's collecting society

1. by collecting license fees for the public performance of copyrighted works;
2. by collecting license fees for the mechanical reproduction of musical works;
3. by coordinating the collection of blank media levies with the Government;

4. by collecting licenses fees for reprography; and
5. by distributing collected monies equitably and properly to creators, domestic and foreign, as well as by using collected monies to support the arts and the strengthening of copyright law in Botswana.

We have tried to formulate these functions in a way that neutrally, but specifically describes what the CSB should do – as a collecting society. For example, the South Africa Music Rights Organization (SAMRO) describes its own mission as being to “license the performance in public, broadcast or transmission of copyright music works, collect the license fees, assemble the information about the use of that music and then compute and distribute the royalties.”⁸

SECONDARY MISSIONS

+ *Creating a registry of Botswana copyrighted works*

As we describe in Part V.A, this function could be carried out by the Government. But since the Society will have to have its own registry of musical compositions and sound recordings in order to determine eligibility for any royalty distributions, it may make sense for the CSB to be deputized by the Government to develop the national copyright registry.

+ *To educate Botswana citizens about copyright and fighting piracy*

The level of understanding about copyright law is low in Botswana, even among educated people. One of the Society’s missions should be to promote understanding of artists, writers, and performers’ rights among consumers and the Batswana business community. We describe in Part V.B. ways the Society might do this.

+ *To promote Botswana’s artistic community through sponsoring music festivals and artistic events, establishing a funeral fund for poor musical artists, and promoting retirement savings*

Collecting societies often sponsor arts-related events, either on an *ad hoc* basis (as probably describes the US collecting societies) or may channel particular percentages of their revenues into support of local arts (as France’s collecting societies do). As we describe in Part V, if license revenues are quite small in the initial years and/or collection of licensing fees precedes the ability to distribute those fees, supporting arts events may be an especially attractive option.

+ *To represent artistic and creative community interests with the public and private sectors.*

Even in the best circumstances, the artistic community will need to continue advocacy of copyright enforcement with government officials and the business community. In the years to come,, Botswana’s copyright law will also probably need adjustments and improvements. The CSB could become the logical entity to represent the Batswana artistic community in these situations.

It should be clear that all these “missions” are interrelated, particularly in a country where the artistic community is small and the copyright tradition is not yet strong. The primary mission of collecting public performance licensing fees from broadcasters and large businesses like hotels will initially involve a great deal of “educating” Batswana businesses. And collecting “mechanical” reproduction fees for legitimate CD manufactures and sales

could be a largely pointless exercise unless the fight against piracy is stepped up in Botswana – something the Society could help do. In this sense, the primary mission of being a collecting society is strengthened by the things we will describe in Part V as secondary goals.

B. Recommended membership and general structure

Pursuant to the statutory description, the CSB is intended to be an umbrella organization for all creators, writers, composers, and artists in Botswana. This will make CSB different from most collecting societies that are limited to one type of creative activity. For this reason, we recommend

Rec 1. That CSB be organized with the possibility of four sub-groups:

- a. ***music section***
[composers (or “authors” of compositions), music performers, music publishers, and phonogram (or sound recording) producers]
- b. ***authors’ section***
[novelists, journalists, poets, and print publishers]
- c. ***fine arts section***
[textile designers, basket pattern designers, painters, sculptors]
- d. ***audiovisual section***
[film directors, actors, and producers]

The Society needs to be organized in a way that sections b-d may initially have few or no members.

As described below, we recommend a structure for CSB that will [a] ensure that the entire CSB can take an active role in advocating the arts in Botswana, while [b] allowing each section to make the decisions most relevant to its members. For example, the music group should make decisions regarding collection of public performance fees, while the authors group should make decisions regarding any fees collected from photocopying.

In many European and North American creators’ societies, membership is limited to composers or artists who have achieved an objective standard of professional accomplishment. With ASCAP and BMI, membership is limited to songwriters and composers who have had their work published and/or publicly distributed in sound recordings. The “Writers’ Guild” in the United States – the creators’ association for professional screenwriters – only allows people to join their guild who have been hired as writers for particular kinds of films or television programs. In South Africa, SAMRO has somewhat broader standards, allowing individual composers or lyricists to join if the person’s works “have been broadcast, or performed in public in a significant way, for at least two years prior to joining.”⁹

The CSB must make an important choice on this question. One choice is to be an exclusive group that limits its membership – or at least music section membership – in a fairly strict, objective way – as ASCAP, BMI, and SAMRO do. A different choice is that CSB may want to adopt broader membership standards to include all Botswana who consider themselves “musicians” or “professional musicians.” This second choice may be wiser given Botswana’s developing economy and with the desire to create an inclusive association of

artists, writers, and creators, the CSB may want to adopt broader membership standards. For this reason, we recommend

- Rec 2. A two-part membership structure: [a] automatic membership eligibility for “professional” artists (in each membership division), and [b] membership by application and approval for all others;*
- Rec 3. For each section, the CSB Board will determine membership requirements (as outlined in the Articles of Association); and*
- Rec 4. The membership structure should automatically be reviewed after five years.*

The CSB Board must also determine if annual subscriptions or membership fees are needed.¹⁰ There is nothing in the Copyright Act that would prevent such fees, but obviously if there are membership fees, they must be kept low to provide for as much participation in the Society and they must be equitable across the different CSB groups.

Simply put, the amount of membership fees have to be set in relation to [a] the practical costs of providing the services CSB will provide for creators' works, and [b] other revenues. One option would be to begin with a membership fee and provide in the CSB by-laws that the membership fee be eliminated (or evaluated by the Board for elimination) once a reserve fund representing 20% of total earnings is in place. Another option would be charge a low membership fee, but charge members additional amounts when they want to register a large number of musical compositions (to participate in music licensing royalties and blank media distributions) or written works (to participate in reprography royalties

We recommend that,

- Rec 5. As much as possible, CSB membership fees be kept low and evaluated periodically.*

1. Music Section

“Professional” members. The music section will almost certainly be the largest and most robust part of CSB. We recommend

- Rec 6. That songwriters, composers, lyricists, music publishers, and music performers should be able to join automatically with the same standards as would permit a South African artist to join SAMRO.*

Any songwriter, composer, or lyricist should be able to join if the applicant can provide proof that his/her music has been publicly performed in the recent past in Botswana, has been recorded and distributed in Botswana, or has been published by a recognized music publisher or available for sale or rental as sheet music, a score or folio in Botswana. In the case of someone joining on the basis that their musical compositions have been recorded and distributed in Botswana, the CSB may need to establish standards for what constitutes adequate recording and distribution. Many collecting societies and artists guilds in developed economies have fairly strict standards for when a person is considered a “professional” for purposes of society membership,¹¹ but standards may need to be more flexible with an artistic community in a developing country. For example, during the formation of a collecting society for Burkino Faso, the Burkinabe decided that relatively small scale distribution on

cassette tapes allowed a person to meet the “recorded and distributed” standard in that country.

A “music publisher” should be able to join if the individual or company is actively engaged in the music publishing business in Botswana, and assumes the financial risk involved in the publication of music and whose compositions the Society’s licensees regularly perform.

Because Botswana copyright law also provides that there are “neighboring rights” for musical performers, the Society can be the association for performers. Thus, we also recommend:

Rec 7. That a musical performer should be able to join automatically if he/she can provide proof that his/her performances have been recorded and made publicly available as sound recordings and/or his/her performances have been broadcast in Botswana in the past two years

Because there is already an organized society of musicians, we recommend:

Rec 8. That the CSB might consider a “one time” approval of all BOMU members as of a particular date – such as June 1, 2006. (This would depend on the music society having a genuine list of members.)

It should be kept in mind that all members – composers and performers -- who want to be eligible for distribution of any royalties collected by CSB must register their works [whether musical compositions or sound recordings] on the **national copyright registry**. We describe below that the national copyright registry may be established and maintained directly by the Copyright Office (CO) OR the national copyright registry can be established and maintained by CSB, acting as an agent or contractor for the Copyright Office. In the case of the former – registry at the CO – CSB members would have to provide CSB with proof of registration and CSB would have to maintain its own lists of works eligible for Society distributions.

Other members – by application In order to be an inclusive organization for artists and creators, CSB may want to establish a category of members for composers, songwriters, and musical performers who do not meet the standards for “professional” membership. For example, someone who has written many songs, but the songs have never been recorded or publicly performed might nonetheless be a valuable member of CSB. For that reason, we recommend:

Rec 9. That the Society consider establishing a non-professional membership category in which the membership application is reviewed by a membership committee of CSB to determine whether the person is a bona fide, albeit not-yet-professional, musician.

2. Authors’ Section

“Professional” writers. Membership in this section should be open to active writers, including journalists, novelists, and non-fiction writers – measured by whether they have had works published in Botswana for whom they are still the copyright holder. (The CSB may

need to establish some criteria for “publication,” just as there may be issues with what level of cassette tape distribution qualifies for “professional” membership in the music section.)

The Society might choose to make a one-time offering of CSB membership to members of the “Writers Association of Botswana,” along the same lines as we have suggested for musicians. The authors of this report have not found extensive information concerning the activities of the Writers’ Association of Botswana, although its existence is described in a few places.¹²

Again, the Society must decide how inclusive it wants to be – and whether unpublished individuals who identify themselves as writers should be able to join. To get a sense of this, there are three unpublished writers in Botswana who list themselves on www.writers.net (webpage available at <http://www.writers.net/writers/country/29/>): Nambula Imasiku, Lauri Kubuitsile, and Anthony Albers.

Given that the CSB may eventually have a role in the distribution of reprography license fees, CSB needs to consider a form of membership for publishers [any textbook publishers, newspaper publishers, etc.] similar to the membership offered to music publishers. At present, most Botswana publications are oriented toward government services, statistical, or scientific information.¹³ We understand that there are only a small number of publishers in Botswana – The Printing and Publishing Company, Pula Press, and Botsalano Press. In summary, we recommend:

Rec 10. That the Society have at least a small writers’ section that includes active journalists, novelists, and non-fiction writers on appropriate criteria that match those for the music section; that the Society have provisions for the membership of print publishers – which will be needed for distribution of any reprography fees; and that the Society involve (as members) the members’ of Botswana’s writers association in a parallel fashion as members of the music society members.

Other members – by application. In order to be an inclusive organization for artists and creators, CSB may want to establish a category of membership for writers and poets who do not meet the standards for “professional” membership. For example, someone who has written many poems, but the poems have never been recorded or publicly performed might nonetheless be a valuable member of CSB. For example, there may be (or has been) a Poetry and Storytelling Association of Botswana.¹⁴ Such an association – or the core of people who were active in it -- could be a source of members who do not earn substantial income from writing, but who feel they belong to and want to support the artistic community in Botswana.

3. Fine Arts Section

Without doubt, there is a substantial community of artisans in Botswana who might want to be members of a “fine arts section” defined to include creators of unique handicraft arts [Botswana baskets being the best known example]. While it is important to include these creators in any umbrella Copyright Society of Botswana, it is also important to recognize that craftspeople usually do not have the same sorts of copyright and copyright enforcement problems as composers, writers, and musicians.

As we understand it, one of the biggest problem confronting artisans creating original designs in baskets, textiles, and other crafts is the copying of local designs by industrial concerns (particularly a problem with Asian industries copying African designs). These are very different issues than broadcast licenses and blank media levies. Nonetheless, the Society might form a study/advocacy group to work on this problem with the Government. It must be kept in mind that copyright law per se may not protect traditional designs. But it might be possible for the Society to work both inside and outside Botswana on ways to protect better Botswana's artisans through certification trademarks or geographical indications (intellectual property subjects outside the scope of this report).

C. Recommended board structure and governance system

One of the most important issues that must initially be decided is how to govern the Society. There is one basic problem in establishing a governance structure for the Society: the Copyright Act envisions the Society represents all creators, but the most important, most immediate issue – establishing a collecting society – primarily concerns the interests of composers, performers, and publishers of music. We believe that issues concerning the music community should be decided by members of the music community; similarly, issues concerning writers should be decided by writers. But the Society needs an overarching Board of Directors and Botswana's creative community can benefit from everyone being brought together in a large collective group. These competing considerations have shaped our recommendations, which are as follows:

- Rec 11. That the Society officers be a President, Vice-President, and Secretary-Treasurer, elected by the membership at large for a two year term;*
- Rec 12. That the Society have an 8-12 member Board of Directors with each officer also being a member of the Board of Directors, each member serving for a two year term, and each member being confirmed by the membership at large;*
- Rec 13. That in addition to the three officers, the Board include*
- + one representative of Batswana broadcasters, whether a private or public official*
 - + one representative of the Batswana business community that will represent music licensees*
 - + PERHAPS one representative from the government's Copyright Office*
 - + at least two additional representative of the music section [assuming two or three of the officers are from the music section]*
 - + at least one representative of the writers' section*
 - + at least one representative of the fine arts' section*
 - + at least one representative of the audiovisual section*
- Rec 14. That when an issue arises that principally concerns one section, the Board is obligated to seek the recommendation of that section.*

In making recommendation #11 -- that the three officers (President, Vice-President, and Secretary-Treasurer) be elected by the Society membership at large -- we assume a large percentage of the Society's members will consist of people in the music industry, and thus people from the music industry would be elected as two, if not all three, of the officer

positions. If there were any chance that the Society's general membership would not initially elect music creators to these officer positions, then the whole structure might require re-thinking.

All of these roles are going to have very large amounts of work to do to get the collecting society function started. The CSB should plan on the "Secretary-Treasurer" position being held by the CSB's first paid employee. The amount of initial work for the Society *might* justify separating the Secretary and Treasurer positions with only the latter being an employee of the Society initially.¹⁵ We think that a two year term of office is appropriate to make sure that the officers and Board members remain accountable to the Society at large.¹⁶

Recommendation #12 recognizes that the board has to be a practical size, yet needs to represent the different CSB constituencies. Realistically, in the early years board members will have to devote substantial volunteer hours to get the Society up and running – and that is a reason to have a larger board of directors. SAMRO in South Africa has a 13 member Board (with one alternate);¹⁷ BUMA in the Netherlands has a 12 member Board; GEMA in Germany has a 15 member Board of Supervisors;¹⁸ BMI in the United States has a 12 member Board. ASCAP in the US and the Performing Rights Society of the UK (PRS) have substantially larger boards,¹⁹ but we recommend against this.

Recommendation #13 enters into the difficult question of the Board's composition. First, we recommend that the three officers also be board members. This both makes sense and is common practice in collecting societies. The SAMRO board includes three of its executive officers, as does the board of the PRS.²⁰

Even when they do not have this "umbrella organization" mission, collecting societies have a wide variety of governance structures, particularly in *who* serves on the board of directors. At one extreme, BMI in the United States has a board consisting of *broadcasters*, not the music artists that BMI represents. The lack of music artist representation on the BMI board is, however, compensated for by a simple fact: BMI competes with ASCAP and SESAC to represent music artists, so BMI (and ASCAP and SESAC) have to work hard to represent music artists well. In contrast, CSB will be Botswana's only collecting society and needs to be governed by the music artists.

Frequently, collecting society board of directors have established "slots" so that different groups are assured representation. In the United States, the large ASCAP Board of Directors is split evenly: 12 writer/composers and 12 representatives of music publishers. Within each group of 12, ASCAP also requires that one composer and music publisher represent classical (or "serious") music.²¹ In the UK, the PRS Board is divided; half are writers and half are music publishers.²² The 12 member board of BUMA in the Netherlands consists of 6 composers (3 popular and 3 serious composers), 3 lyricists and 3 music publishers. BUMA (officially the "BUMA Union") was founded in 1912 by four different music artists' associations.²³ These four sub-associations can nominate their respective board members and the regular members of BUMA can overrule those nominations when board members are elected at BUMA's annual general assembly.

Because CSB will be working hard to establish itself and will flourish best with political and social support from all quarters of Botswana society, we recommend such a "slot" structure for the CSB Board. We do not think it is necessary to designate some slots

for music publishers, some for composers, and some for performers because the Botswana music community is quite small at this point – and some of the most important activists wear several “hats.” But we do think it is important to ensure that the Board has broad representation, while consisting of a majority of artists and, within that, a majority of music artists.

We recommend one slot each for broadcasters and businesses that will be required to pay “site” licenses for public performance of music (such as hotels) – simply because CSB needs “ambassadors” within these communities to explain and advocate the copyright system and the need to pay license fees. These representatives could be nominated by the broadcasters and the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM), respectively, then confirmed by CSB membership at large (as happens with some BUMA board members).

The question whether a collecting society should have any government representatives on the board can also be a difficult issue. Although many collecting societies – such as SAMRO -- strenuously avoid having government officials on their Board of Directors, we think that during at least the early years of the CSB it **might** be appropriate to have a representative of the new Copyright Office serving on the CSB Board. Everyone is going to be “learning” – and literally **creating** the country’s copyright system; it is unquestionably better that the Copyright Office and the CSB be doing this in tight coordination. So, the issue is whether this goal is served well by having one government official on the Society’s Board. If there is a government representative on the CSB Board, the representative should be nominated by the government and confirmed by the Society’s general membership.

We also recommend that, initially, the Board be established in a way that ensures that there are at least two additional representatives of the music section of the Society (in addition to whichever officers may be from the music sector) and at least ONE representative on the Board from the writers’ section and the artists’ section respectively. These “section representatives” could be nominated [voted upon] by the section members, then confirmed by the general membership.²⁴ While older collecting societies in developed economies frequently provide guaranteed representation of certain genres of music (as the ASCAP Board always has two representatives of classical music), we do **not** recommend that the CSB charter mandate representation of different music styles on the CSB Board. Instead, the CSB charter might adopt some “aspirational” language as is found in the ASCAP Articles of Association, which states that “[t]he Board of Directors shall, as far as practical, represent writer members and publisher members with different participants in the Society’s revenue distribution and who reflect the diversity of the Society’s repertory and membership.”²⁵

In addition to establishing the officers and Board of Directors of the Society, the Society’s Articles of Association or Incorporation should also address a variety of organization points – points that are commonly addressed in collecting society charters. We recommend:

Rec 15. That the CSB charter require and describe an Annual Meeting of the general membership in which officers are elected, Board members are confirmed and elected, officers report to the general membership on the prior year’s activities of the Society including a general accounting for the Society, and the

general membership approve any important over-all questions related to the Society.

Rec 16. The President of the Society should be entitled to enter into license agreements on behalf of the Society, subject to quarterly approval by the Board of Directors, but no licensing agreement should exceed a predetermined number of years (i.e., 5 years).

Rec 17. That, in keeping with the recommendation immediately above, the Board of the Society meet at least four times a year, including one meeting held immediately after its election at the Annual Meeting of the general membership.

These recommendations concern “good governance” matters that it is appropriate to address in the Society’s charter – and careful study of the collecting society charters we have attached as appendices should be quite profitable on this count. For example, the GEMA charter require that an annual “General Meeting” which receives the annual report and “annual accounts,” elects officers, and votes on the “distribution plan.”²⁶ The ASCAP charter similarly provides for “one or more General Meetings each year”²⁷ and that “[t]he Board shall meet at least four times each year and shall hold a meeting in each year in which the Board shall be elected, after the General Annual Meeting in March or April”;²⁸ the ASCAP Articles of Association also elaborate on the Board’s powers, including making and approving contracts.²⁹ Finally, we recommend

Rec 18. That this structure for the Copyright Society be reviewed after 3-5 years.

IV. The Society’s Core Function – A Viable Collecting Society

This section of the report describes in a basic, but detailed narrative how a collecting society works. As with the discussions above, we have tried to refer to the practices and techniques of collecting societies in different countries.

A. Licensing of public performance rights

The CSB officers/members charged with the “licensing” function of the Society (Licensing Committee) must actively license and collect all applicable revenue for the public performances of its members’ copyrighted music. The Licensing Committee will have a lot of work to do in the first couple years of the Society’s activity as it [a] determines those companies and user groups available for licensing activities and [b] approaches all those groups and negotiates licenses.

1. Who must have a license?

The Licensing Committee may consider obtaining licenses from the following list of potential licensees, if copyrighted music is publicly performed in any of these places or at any of these events:

- ✓ The Maitisong Festival and Concert
- ✓ Orange Outdoor Festival
- ✓ Mokolodi Nature Reserve
- ✓ Ditshwanelo, The Botswana Center for Human Rights – Annual Film Festival
- ✓ The Alliance Francaise – African Francophone Film Festival
- ✓ The Gaborone Film Society
- ✓ Nightclubs, bars and community cultural centers
- ✓ Clubs –
 - Gaborone Golf Club
 - Galaxy Sports Club
 - Spie Batijnales Club House- Molepoloie
- ✓ Funeral Parlors
- ✓ Game Lodges
 - Chobe Game Lodge – Lasane
- ✓ Gymnasiums – Fitness clubs
- ✓ Hotels/ Lodges
- ✓ Botswana Broadcasting Services
- ✓ Kudo Communications
 - Radio Active Botswana
- ✓ Radio Botswana
 - Yarona FM 106.6
 - Radio Botswana, Radio Botswana II
 - GABZ FM
- Botswana Television
 - Department of Information and Broadcasting
 - Gaborone Broadcasting Corp.
 - Multi-Choice Botswana
 - Jawaneng Television Society
 - Voice of America – Selebi Phikue

License agreements generally are on an industry-wide basis and are non-discriminatory. No licensee will be treated less favorably than any other similarly situated licensee. For example, all commercial radio stations will receive the same license agreement, subject to the same rates, or all hotel owners that have public performances of music in their establishments will receive the same agreement and terms.

2. What are the traditional types of license agreements?

Based on the types of companies and groups available to license, licensing probably should differentiate between Broadcast, Non-Broadcast users (General Licensing), and New Media. This is how it is typically done in many developed countries.

“Broadcast licensing” includes commercial and non-commercial terrestrial radio, TV, and cable stations. “Non-broadcast Licensing” or “General Licensing” will include hotels, bars and restaurants, theaters, concert halls, and any other venues in which music is **publicly performed**, whether by live bands or by playing recorded music. General Licensing may also apply to some unusual services that may or may not be present in Botswana (such as “Music on Hold”). “New Media Licensing” is the term used in American and European collecting societies for licenses for new technological uses of music – like Ring Tones services, Web sites that stream music, and any future method for digitally transmitting public performances of music.

The Licensing Committee should assign each licensee a unique account number – so records can be kept more easily over the years.

Unless written for a specific event, license agreements generally are for a defined period of between one to four years.

BROADCAST LICENSING (Terrestrial)

- Radio
- Television
- Cable

NON- BROADCAST LICENSING

- Hotels
- Bars
- Restaurants
- Music on Hold (Telephone)
- Theaters/ Concert Halls/
- Live Performances
- Game Parks
- Airline
- Juke boxes
- Background Music Services
- Other Retail establishments

NEW MEDIA

- Wireless phone services- Ring Tones
- Internet Web Sites (interactive and non-interactive)
- Podcasts (I Pod programming)
- Satellite Delivery Services
- Digital Subscription Services

3. How are license fees calculated?

The complicated part of licensing is negotiating the **amount** of the license. For traditional broadcast media (Radio and TV), music is used to entertain and to draw a niche market of consumers for advertisers. In a larger, mature market, advertisers will frequently choose where to advertise not only the basis of audience size, but on reaching a particular demographic market. In a mature market, radio station formats are frequently adjusted from Hip Hop to Folk to Classical Music all in an attempt to draw a specific audience for its advertisers. License fees for commercial radio and TV stations can be determined either as:

- ✓ **Percentage of Revenues.** A percentage from the revenue received. For example, the total amount earned from ticket sales from a concert, the revenue from the sale of advertising, or donations received.
- ✓ **Audience Size.** License fees can be based on audience size. For example, the number of tickets sold or seating capacity, may serve as a proxy to revenue.
- ✓ **“Blended” fee based on Revenues and Audience Size.** License fees can be a combination of both revenue and audience size. For example, web sites can earn income from advertising revenue from banner ads and from user fees for subscribing to the service. Or license fees for a concert may be a combination of the revenue earned from ticket sales in addition to seating capacity.

Using the revenue based model --

For a revenue-based model, Radio and TV stations would pay a percentage of the cash received from either the sale from advertising or donations received for the use of the broadcasting facilities. Stations would report their income on a yearly basis. The revenue based model, tied to the economic health of the radio and TV broadcasters can provide a great opportunity for growth in license fees, however, if the stations were to experience a decline in revenue for a calendar year, there would be a negative effect on fees generated. A minimum fee requirement should be determined.

Example of a revenue based billing model using 5% as license fee factor

	Yearly Revenue	License fee	Total License Fee
#1 Radio Station based on earnings	350,000.00	5.00%	17,500.00
#2 Radio Station based on earnings	200,000.00	5.00%	10,000.00
#3 Radio Station based on earnings	100,000.00	5.00%	5,000.00
#4 Radio Station based on earnings	100,000.00	5.00%	5,000.00
#5 Radio Station based on earnings	75,000.00	5.00%	3,750.00
#6 Radio Station based on earnings	55,000.00	5.00%	2,750.00
#7 Radio Station based on earnings	28,000.00	5.00%	1,400.00
#8 Radio Station based on earnings	20,000.00	5.00%	1,000.00
#9 Radio Station based on earnings	20,000.00	5.00%	1,000.00
#10 Radio Station based on earnings	19,000.00	5.00%	950.00
#11 Radio Station based on earnings	18,000.00	5.00%	900.00

#12 Radio Station based on earnings	15,000.00	5.00%	750.00
#13 Radio Station based on earnings	0.00	5.00%	0.00
	1,000,000.00		50,000.00

Using the Audience based model --

For an audience based agreement, the CSB would first determine that the license fees for commercial radio stations who primarily broadcast music would be based on an industry “benchmark” of 5% - 20% of total revenues from radio broadcasting divided by the 13 licensed FM radio stations (The actual number of licensed stations to be determined) based on their individual audience ranking and programming. This requires some means of determining the audience size of the different stations; this is usually done in developed countries by third parties using neutral criteria, but it might be possible for general agreement to be reached on rough audience size of the different radio stations (particularly if they have made public representations on their audience size before). Determining the benchmark for the industry fee will be based on various factors to be determined by the Board. Music license fees for subsequent years, would be based on either a yearly reporting of all radio station revenue again pro-rated among the stations, or a growth factor to be added each year, based on inflation or other economic factors.

Example of an Audience Based license using 20% total industry value as the license factor

	Audience Rank	Industry Licensee Tot.	Station Share (Pula)
# 1 Radio Station by Audience size	32.00%	50,000.00	16,000.00
# 2 Radio Station by Audience size	16.00%	50,000.00	8,000.00
# 3 Radio Station by Audience size	14.00%	50,000.00	7,000.00
# 4 Radio Station by Audience size	13.00%	50,000.00	6,500.00
# 5 Radio Station by Audience size	5.00%	50,000.00	2,500.00
# 6 Radio Station by Audience size	5.00%	50,000.00	2,500.00
# 7 Radio Station by Audience size	3.50%	50,000.00	1,750.00
# 8 Radio Station by Audience size	3.00%	50,000.00	1,500.00
# 9 Radio Station by Audience size	2.25%	50,000.00	1,125.00
# 10 Radio Station by Audience size	2.10%	50,000.00	1,050.00
# 11 Radio Station by Audience size	1.75%	50,000.00	875.00
# 12 Radio Station by Audience size	1.25%	50,000.00	625.00
# 13 Radio Station by Audience size	1.15%	50,000.00	575.00
	100.00%		50,000.00

Total Projected Yearly Radio Industry Revenue – 1,000,000 Pula (6,30358 Pula/ 1 USD)

Radio Industry % Total Performance Licensee Fee- 20% or 50,000 Pula

The Society may elect to have the radio licensee pay the yearly fee in a single payment, in two equal amounts, quarterly, or in monthly payments in 12 equal installments.

License fee payments can be made by check, wire transfer, and the Society may consider accepting credit card payments from its licensees.

If credit is extended to the licensee (license fees paid over the course of a calendar year), the license agreement should provide for a finance charge for failure to pay fees on time and in full from the date due. For example, if the license provides for monthly payments, and if payment is not received within seven (7) days when due a finance charge will be applied which will appear on the subsequent statement. Finance charges can range from between 10% - 18%, or the common prevailing banking rate.

License fees from Television broadcasting may use a similar license model as radio – Revenue based or Audience based. As Television can potentially reach a more affluent audience, revenues per TV station can be much greater than the revenues per radio station similarly located. The Copyright Society of Botswana may determine that if it were to use the audience based model for licensing TV that it would seek 3-5% of total revenue paid by all commercially licensed TV stations.

4. What goes into a License Agreement? What must it include?

License agreements for all licensee types should include the following elements. This is what a license contract should have —

- ✓ The Parties – The CSB with its' location, and the Licensee name and their location.
- ✓ The industry the agreement applies to;
 - Radio
 - TV
 - Concert
 - Web Sites
 - Wireless phone services- Ringtones
- ✓ Grant of the License;
 - The dramatic and non-dramatic public performance of copyrighted music.
- ✓ Term of the License;
 - 1 – 4 years
- ✓ Limitations of the License;
 - The public performance right.
- ✓ Definitions;
 - It may be useful to provide a definition for each of the license elements.
- ✓ License Fees;
 - How fees are calculated.
 - Minimum fee.
- ✓ License Fee Report Forms (If applicable)
- ✓ Reports and Payments;
 - When Reports are due.
 - When Payments are due.
 - Late Report payments.
 - Annual Adjustments (if revenue based).
 - Late Payment Charge.
 - Music Use Reports.
- ✓ Whatever obligations that the broadcaster has to provide “logs” of what was performed. (We discuss in Section IV how the CSB must determine how to distribute license fees based on what was broadcast, using information provided by the broadcaster and/or gathered by CSB members.)

- ✓ Right to Audit;
 - If the agreement is revenue based, report and revenue verification will be needed.
- ✓ Breach or Default;
 - 30 days to cure the default, or the agreement is terminated.
- ✓ Indemnification of licensees.
 - The Copyright Society of Botswana would represent the licensee if any legal action were brought against the licensee for copyright infringement for public performances.
- ✓ Notices
 - The method used to notify its' licensees.
- ✓ Governing Law

We provide examples of license agreements in Appendices 08, 09 and 10.

B. Establishing an authoritative list of eligible works (the “Index”)

A key function of any performing rights society is to create and maintain an authoritative list of all musical compositions. Thus, each Society member who is a songwriter or composer will need to register his works with the Society -- creating an informational list of songs in a standardized format. This is also true of musical performers who want to enjoy licensing rights in their sound recordings. Because song titles are not unique (and cannot be copyrighted), creating a standardized index of songs with several different pieces of information about each song can also help alleviate potential ownership and authorship disputes that may arise between members.

The authoritative list that a collecting society maintains is commonly called an “index.” Here is a sample index for musical compositions.

Song Code	Composition Title	Copyright Date	Writer Name	Writer's Publisher		Publisher CAE #	Publisher Share	Duration mm:ss	Insrtumentation (Symphonic/ Concert only)	Submitted by
				CAE #	Name					
000001	Love Song	01/01/1998	John Smith	001	ABC Publishing	004	50%	2:20		John Smith
000002	Love Song	01/01/1998	Robert Smith	002	DEF Publishing	005	50%	2:20		John Smith
000003	A1 Concerto	12/05/2002	Mary Doe	003	ABC Publishing	006	100%	15:20	woodwind ensemble	Mary Doe

Appendix 11 provides another sample Index form using a Microsoft Excel spreadsheet, a software package that could be used for at least the initial (relatively small) versions of the CSB “Index.” Note that this sample does NOT include the musical performer for each sound recording. In licensing “neighboring rights,” (i.e., public performance rights) the Society would have to keep a separate, parallel database of sound recordings OR add additional information to the musical composition Index.

The first field shown in this sample Index is the “song code” – simply a unique number that the Society would give to each musical composition registered on the Index. Once CSB is firmly established, the song code will need to be migrated to the internationally used ISRC codes. These numbers are used for all record keeping at the Society and in the royalty statements for distribution to members. The other information shown on this sample Index is largely self-explanatory:

- ✓ Composition (Song) Titles- Song titles are not unique, and there can be multiple songs with the same title.
- ✓ Copyright Date -- for example (01/ 01/ 2000)
- ✓ Writer’s Name – songs can have multiple writers for both words and music.
- ✓ Writer’s CAE # - The CAE [CAE is the acronym for **Composer, Author, Editor** (a/k/a Publisher)] # is a number assigned to every writer or publisher in the world who is affiliated with a performing or mechanical right society. This number is assigned to a writer or publisher member. The assigned CAE # remains with the writer or publisher, even if the writer or publisher resigns or joins another society. There is a different CAE # assigned to each variation of a writer's or publisher's name.
- ✓ Writer Share (In a developed artists community, artists who co-author a work may agree to different shares; the song might **not** be divided evenly among the co-authors. The Index should note this. Of course, however, the co-authors divide their ownership interests in a song, the total of all shares must equal 100%).
- ✓ Publisher Name/ Affiliation
 - Songs can have multiple publishers.
 - Is the publisher affiliated with The Copyright Society of Botswana or any other Performing Rights Organization?
 - If the publisher is affiliated with another performing rights society is it affiliated with CSB?
- ✓ Publisher CAE # (See the explanation above for Writer CAE #)
- ✓ Publisher Share
 - The publisher share of a song may not be divided evenly among the different publishers; however, the total of all shares must equal 100%.
- ✓ Duration
 - In minutes and seconds.
- ✓ Submitted by
 - This is name of the individual who has submitted the composition to CSB to be indexed.

You will see that the sample Index entries above also include a column for “instrumentation,” which is typically only relevant for classical or symphonic works. While the CSB’s Index can easily include this category, it may only be relevant for indigenous folk music or classical works.

The sample Index above is for *public performance* licensing, but can also be expanded if the Society granted licenses for *reproduction of copies* of the musical composition, i.e. making cassettes or CDs. As described in Part II, the licensing of the right of reproduction is termed “mechanical rights.” International numbering standards exist for mechanical right licenses; the “UPC,” “ISWC,” “ISRC” systems are three dominant international numbering systems that Society staff should understand; these are being further developed and refined by other foreign territories.

Essentially, a “UPC” is a “uniform product code” which a compact disc would have as a manufactured item – UPCs are ubiquitous in developed economies and are not special to music or copyrighted works. In contrast, an “ISWC” code (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical compositions. The ISWC numbers are established by CISAC, the confederation of societies of authors, and approved by the ISO (International Organization for Standardization). While ISWC are used for musical compositions, the counterpart codes

for sound recordings are called ISRC (international sound recording code). The ISRC system gives each unique sound recording a unique, 12 character alpha-numeric code. Thus, each musical composition will have only **one** ISWC and each sound recording will have only **one** ISRC (although a musical composition that has been recorded by several different artists has one ISWC and several ISRC).

In addition to providing the information needed for the Index, registration of a song – either by itself or in tandem with membership in the CSB -- must fulfill one key function: it must empower the CSB to license the public performance of the song. A collecting society can be authorized to license the works it represents “by assignment, grant of license, appointment of it as [the copyright owners] agent or otherwise.”³⁰ In Canada, different collecting societies use different methods. In the United States, ASCAP and BMI act as legal representative and attorney-in-fact for their members; ASCAP and BMI are barred by judicial decree from having *exclusive* licensing power. Whatever the legal structure is, the Society must have at least the non-exclusive right to license songs on behalf of its members; otherwise, it cannot function as a collecting society.

C. Calculating the distribution of royalties to individuals

After the Society has an Index of members’ works and *after* the Society has negotiated and issued licenses to broadcasters and companies engaged in public performance of music (like hotels, resorts, and restaurants), there are three basic steps remaining in the collecting society function: [1] collecting the license monies and keeping proper accounts of the sources, [2] calculating the distribution to individual musical artists of the license monies, and [3] the actual distribution of the monies. The first of these – collecting the license monies and keeping proper accounts of the sources – is straightforward once the license contracts have been executed with individual broadcasters and public establishments. Either a licensee pays the Society at the time of the contract or the Society invoices the licensee and collects regularly. We would recommend against allowing a licensee to make monthly payments – this creates needless administrative burdens for the Society. We recommend that licensee payments should be annual, biannual (twice a year), or quarterly.

1. Calculating what will be distributed to individual artists

A key function of the collection and distribution process is the calculation of what royalties are due each songwriter, publisher, and/or musical artist. This is the “royalty” function in a collecting society. The CSB must track and process the payments, statements, cue sheets, and music logs provided by its licensees for public performances, applying the correct amount, number of plays, duration, share and rates to the compositions performed or recorded.

First, as an accounting matter, the royalty function will require the Society to deduct three amounts from the total licensing fees received:

1. Society operating expenses
2. Monies that that Society allocates to the “reserve fund”
3. Monies that the Society allocates to activities described in Section 5 (“beneficial activities”).

As a practical matter, the Society *could* try to launch itself as an all-volunteer organization. Even if an employee or employees can be hired early in the establishment of the Society, it is important to keep operating costs as low as possible. In either case, it will have to start deducting operating expenses from license fees as soon as those license fees are received. For this reason, we make the following recommendations for the “start-up” phase of the Society’s operations:

- Rec 19. Proper accounting procedures for the receipt of income and the payment of operating costs must be in place before the Society receives its first license fee.*
- Rec 20. The CSB Board should make an initial estimate of its goal for a total “reserve fund” and for annual contributions to the reserve fund, so that there is some income for “beneficial activities” and annual royalty distribution as soon as possible.*
- Rec 21. The CSB Board should make some very modest goal for “beneficial activities” during the first 1-3 years, so that there is some income for annual royalty distribution as soon as possible.*
- Rec 22. Operating costs and contribution to the reserve fund should be deducted from licensing income immediately.*

The first of these four recommendations is straightforward; accepted accounting procedures must be in place from “day one” for the Society. The last of these four recommendations is also straightforward – indeed, it will be absolutely necessary unless the Government is willing to subsidize the Society for a “start-up” period.

As to deductions for the reserve fund, although the goal might be a reserve fund of one to three years of estimated operating costs for the Society, the annual contributions to the reserve fund should be limited so that there is, if possible, some licensing income to distribute in the first few years (otherwise, all income beyond operating costs might go to the reserve fund during the first few years, which would be unfair to artists whose works were publicly performed during that period). Similarly, while we believe that the Society should establish some modest “beneficial activities” quickly, the Society should have a simple, overarching goal: that within three years, total costs of operating expenses, reserve fund, and beneficial activities will leave substantial licensing income for distribution to musical artists.

Once the Society has been operating a few years, it will be able to make an estimate of each year’s *prospective* total operating costs in relation to the year’s *prospective* total licensing income. The efficiency of collecting societies is most easily measured by the percentage of total income that goes to operating costs. For example, 13% of total annual revenue at ASCAP is spent on operating costs; 23% of total annual revenue at SAMRO is reportedly spent on operating costs. In Europe, there is a wide variety of practices. In France, collecting societies appear to use up to 35% of income for operating expenses with an average of 23%.³¹ In contrast, the Dutch collecting society BUMA/STEMRA distributes 100% of its licensing income to artists, but delays the distribution long enough to pay operating costs from interest income it earns on the licensing fees (meaning that a reasonably small percentage of BUMA’s total revenue goes to operating costs).

For purposes of some of the discussion below, we will assume that CSB should have a goal of spending 23% [SAMRO’s number] **OR LESS** of income on operating expenses.

Distributing the after-expenses¹ licensing income to individual artists can involve “exceedingly complex” systems.³² The CSB has to choose among different methods for calculating royalties due to individual members; we recommend that the Society start with a very simple system.

2. How to calculate public performance of broadcasts

At the foundation of the royalty distribution system, the CSB must establish a system of monitoring what music is played on licensed broadcasters. In developed countries, licensed broadcasters are required to keep “music logs” that show what musical compositions and sounds recordings are played at what times by the broadcaster. In the United States, BMI relies on such detailed logs. BMI does **not** require that every radio or television broadcaster keep such logs for **every** day. Instead, BMI requires *selected* radio and television stations to file the detailed logs for *selected* weeks.

Because of the small number of broadcasters in Botswana and because the CSB will be launching a new system, we recommend that *each* broadcaster taking a license from the CSB be required to provide logs for *selected* weeks (to be agreed upon by the broadcaster and CSB). CSB should also be prepared to organize one or more seminars with the broadcasters on how to maintain these logs.

Separate from these logs, CSB may want to organize volunteer members to monitor broadcasters during sample periods and keep their own “surveys.” Although volunteers listening to radio stations may not be able to get all the details correctly, such survey samples can provide valuable information. In the United States, ASCAP “primarily relies upon tape recordings made by teams of surveyors sent to different parts of the country during the year.”³³ These are paid employees, but the collecting society in Burkino Faso successfully began operations using member volunteers to listen to Burkina radio stations and record survey samples of what was played.

Once the Society has a set of music logs representing a reasonable period of time and survey sample data as to what was broadcast, that information is used in a formula – which can be simple or complex – to determine how much gets paid to each musical artist. This is called the “credit system.” Each public performance documented on the music logs (submitted by the broadcasters) and the sample surveys (provided by the CSB members) is assigned one or more “credits” (or fractions thereof). The “credits” are then used to divide up the available income money for distribution.

In the simplest system of all, each public performance would be given one “credit.” The system can be made more complex in the following ways:

- + giving a larger (fractional) credit for performance on a popular broadcast radio or television station

¹ By “expenses” here, we mean the Society’s operating costs for that year, contribution for that year to its own reserve fund, and contribution for that year to its “beneficial activities.”

- + giving a larger (fractional) credit for performance at a popular time of day when more people are known to be listening to radio or watching television
- + giving a larger (fractional) credit for performance which are important to the cultural heritage or indigenous music traditions.
- + giving a larger (fractional) credit for “feature” performances versus background performances

The weighted credit entries are then brought together on one database. Consider two imaginary Batswana singer/songwriters, Hilda Dambe and Monty Sibisibi, and that each has two songs which have been played on Batswana radio stations during the week. In this simple example, the credit formula only varies for how many listeners the radio stations have – radio station A is the most popular, station B is the second most popular, and C is the third most popular, so we give them “credit” exponentials of x1.75, x1.25, and x1 (these are purely examples):

Formula

Week of April 1					
Station	Date/Time	Artist	Song	Sibisibi gets	Dambe gets
A	April 1	Sibisibi	“True Love”	x1.75	
A	April 1	Dambe	“Life is True”		x1.75
A	April 3	Sibisibi	“True Love”	x1.75	
A	April 4	Sibisibi	“True Love”	x1.75	
A	April 6	Sibisibi	“True Love”	x1.75	
A	April 6	Sibisibi	“The Road North”	x1.75	
B	April 2	Dambe	“Life is True”		x1.25
B	April 2	Dambe	“Francistown”		x1.25
B	April 2	Sibisibi	“True Love”	x1.75	
B	April 3	Dambe	“Life is True”		x1.25
B	April 3	Dambe	“Francistown”		x1.25
B	April 4	Dambe	“Life is True”		x1.25
B	April 4	Dambe	“Francistown”		x1.25
B	April 5	Sibisibi	“True Love”	x1.75	
C	April 1	Dambe	“Life is True”	x1	
C	April 1	Sibisibi	“True Love”	x1	
C	April 6	Sibisibi	“True Love”	x1	
C	April 6	Sibisibi	“The Road North”	x1	
C	April 6	Dambe	“Life is True”		x1
TOTAL CREDITS FOR PERIOD				Sibisibi	Dambe
				13.50	11.25

As you can see, Sibisibi’s song “True Love” was more popular on station A, while station B favored Dambe’s songs “Life is True” and “Francistown.” Sibisibi’s other song, “The Road North,” was only played once – on station C.

In the case of foreign works – which also must be noted on the music logs provided by the licensed broadcaster and on the survey samples prepared by CSB members, it may be adequate to identify the nationality of the sound recording and musical composition – because this will allow the Society to pay an amount directly to that other country’s collecting society.

Of course, in using both music logs from broadcasters and sample surveys from members, the Society must make sure that it does not “double count,” i.e. use a music log and a sample survey covering the same broadcaster for the same period.

3. How to calculate public performance in public establishments

In the United States, most performance data comes from analysis of broadcasts with the assumption that the music being performed in hotels, nightclubs, bars, and other public venues will be roughly the same as the music being broadcast.³⁴ This assumption is reasonable because [a] much music played in public venues comes directly *from the broadcasts*, and [b] when the music being played in a public venue comes from CDs and tapes, it is still safe to assume that people’s tastes are roughly the same. (These same assumptions justify distributing the blank media levy monies on the same formula as the distribution of the public performance licensing monies, a point discussed below.)

Sample overall calculation

Total public performance licensing revenue	350,000 pula
<i>minus operating costs</i>	<i>-90,000 pula</i>
<i>minus allocation to reserve fund</i>	<i>-35,000 pula</i>
<i>minus concert sponsorship</i>	<i>-55,000 pula</i>
Licensing revenues for distribution	180,000 pula

Now, imagine that when all the log sheets are aggregated that it totals 120,000 “credits.” That means that each credit is worth 1.5 pula in distribution. For the week of April 1, Sibisibi should be paid 20.25 pula (13.5 credits x 1.5 pula) and Dambe should be paid 16.87 pula (11.25 credits x 1.5 pula). This gives you a rough idea of how the system would work.

The example shown above assumes that each artist (Sibisibi and Dambe) has all the rights for each song -- in other word, the example assumes that Sibisibi composed the songs, is serving as his own music publisher, was the performer who recorded the songs (the sound recordings), and was the producer of the sound recordings. Under Article 26(1) of the Botswana Copyright Act, the broadcast or public performance of a sound recording triggers a right of "equitable remuneration" for the producer of the sound recording; the producer must, pursuant to Article 26(2), share this remuneration equally with "performer or performers." Because of this structure, the Society should also be licensing this Article 26 right in its licenses to broadcast entities and public venues -- and must internally settle the question of what percentage of the license goes to the musical composition side {composer and music publisher} versus to the sound recording side {performers and sound recording producer}. We recommend that the larger share should go to the musical composition side, recognizing that for a very large percentage of local music the composer and performer will be the same.³⁵

4. Making individual distributions from licensing fees

A distribution payment cycle for domestic and foreign royalties has to be created. Depending on the volume of transactions and resources, the Society may decide to have two semi annual distribution payments for domestic receipts and one annual payment for foreign royalties paid. The Society might also decide that during the first year of operation, there will

just be one distribution payment – at the end of the fiscal year. It is important for the Society’s reputation that it make the distributions in a timely manner in relation to whatever distribution period is decided.³⁶

Basically, the Society’s distribution system again has to adhere to straightforward accounting and business practices. There should be a monthly “closing” – a balancing and accounting of all payments to the statements received from the various sources -- as well as a semi-annual closing (even if there are only annual distributions) which balances the prior six months of closing. The distribution operation also has to set up with eligible Society members if they will receive their payments by check or, if available, electronic transfer.

Separate payments should be made to separate rights holders. So, for example, if there is a music publisher who holds some rights to a musical composition separate from the composer, each rights holder has to receive a separate payment. On the other hand, there is nothing wrong in aggregating payments due to the *same* rights holder on *different works* – like a music artist who has registered 20 of his musical compositions with the Society. As in any business a “statement” must be prepared for the account holder. With a collecting society license/royalty payment, the statement would typically include the following information:

- Source (i.e. Radio, Television, General Licensee)
- Program/ Film Title
- Date performed
- Song Title
- Song Code (As established by the Society)
- Share %
- The number of plays (for example, radio stations will frequently replay songs)
- Duration in minutes and seconds (mn:sc)
- The “number of credits” – explained above
- Royalty Amount

Of course, the royalty amount paid to the individual is determined by [a] the total pool of money available for payment divided by the total number of “credits” producing a *per credit* value, [b] multiplying the credits a music artist has times the per credit value.

D. Distributing blank media levies

Section 35G of the 2005 Botswana Copyright Act provides for a levy in amount(s) prescribed by the Minister to be imposed on “all imported and locally manufactured blank sound and audio visual carriers, compact discs and equipment capable of being used to copy protected material” [35G(1)]. The Act then provides that:

“The levy shall be collected by the Department of Customs and Excise and shall be deposited in a fund to be established by the Minister of Finance and Development Planning for authors and publishers of works.” [35G(2)]

With this change in its copyright law, Botswana follows many developed economies in compensating artists for musical and audiovisual works reproduced by private copying.³⁷

Botswana's new copyright act does not establish the amount of the levy. Nor does the Copyright Act give any further details on the distribution of this levy; the Society is not expressly mentioned for involvement in the distribution of this levy. Nonetheless, we believe that the Government should want the Society to take care of distribution to the creative community. In fact, this is a common practice in other countries. For example, in Germany the levy on blank media goes to the government's Zentralstelle fuer Private Ueberspielungsrecht (ZPUE) -- Central Office for Private Transferring Rights.³⁸ From there, a portion of the collected monies go to GEMA for distribution to musical artists. In Japan, the Japanese Copyright Act expressly calls for a non-profit society to be designated by the Commissioner of the Agency for Cultural Affairs to distribute monies collected on blank media (That society is called "SARAH" – Society for Administration of Remuneration for Audio Home Recording).³⁹ SARAH makes recommendations to the Government on what the levy should be on machines and blank media. Canada has an umbrella collecting society – the Canadian Private Copying Collective – which collects on behalf of eight separate collecting societies.⁴⁰ Following these examples, we recommend:

Rec 23. That the Society appoint a committee to study the proper amount of levy on blank media and recording equipment and that the Society make recommendations to the Government concerning the levy amounts

There are generally two ways that levies are calculated. One approach – applicable to both recording machines and blank media – is to use the value of the item. For example, in Japan the levy on a recording machine is an "amount corresponding to 2% of a portion of the standard price" with a maximum ceiling (approximately 10 USD) while the levy on blank media is 3% of the standard price.⁴¹ Another approach is to set the levy on blank media based on the **capacity** of the blank media – usually measured as **recording time**.

Rec 24. That the Minister of Finance and Development Planning distribute the monies from the blank media levy either by [a] transferring the monies annually to the Society for distribution, or [b] distributing the monies pursuant to the recommendation of the Society.

Of these two approaches, we believe that "a" is preferable because it does not make sense for the Minister of Finance and Development Planning to create an independent system for distribution to musical artists.

It is theoretically possible to survey users of blank media, but the amounts of money that will be collected from the levy will almost certainly be too small for independent study. At least in the initial years, there are a number of ways these monies could be distributed easily. In order of increasing complexity, three options are [a] distribute these levy monies in roughly the same percentages as distribution of the public performance license monies; [b] distribute these levy monies based on logs kept for broadcast licenses; [c] use same information from "b" coupled with information about recorded CD, DVD, and cassette sales in Botswana. Finally, in lieu of these options, the levy monies could be used for promotion of the musical and artistic communities through some of the activities described in Part V (funeral benefits scheme, arts festivals, prizes).

Distributing blank media levies along the same lines as public performance license monies would be the easiest approach – simply adding the levy monies to the licensing "pot" for distribution. Making distributions based only on logs of licensed broadcasters would be

more accurate in the sense that a great percentage of private recording of music in Botswana may be recording directly from radio station broadcasts (and television broadcasts in the case of audiovisual media). A more complex system could also gather information on recorded music (and audiovisual) retail sales in Botswana – again, on the grounds that private recording of music and audiovisual works is done either with a broadcast or a pre-recorded “source” – this “mixed” approach of measuring broadcasts and CD sales is, for example, what is done in Canada.⁴²

Finally, because the Copyright Act says only that the levy monies will be deposited in a “fund . . . for authors and publishers of works,” it would certainly be justifiable to use these monies to support the artistic community (including publishers) through some of the mechanisms described in Part V.

E. “Nuts and bolts” of establishing such a system – software, etc.

All of the key functions described in this report will need some technical systems support -- although we should add that as many of the collecting societies were formed in the early part of the 20th century, they carried out these functions for decades without computers and the CSB can, if necessary, start that way. All of the foreign societies mentioned in this report have varying levels of sophistication regarding their computer and accounting practices. Based on available funding and resources decisions should be made about acquiring computers and software for internal operations. In addition, a Society website can be a valuable external tool for providing information to licensees, foreign affiliates, and members.

In choosing a software system for internal operations, the Society will need a program that can store licensing and royalty data. Depending on the amount of data, Microsoft EXCEL or Microsoft ACCESS along with an accounting software package like Great Plains (or SAGE PFW (Platinum For Windows)) may provide enough processing size. Music publishers and record companies that have too much catalog to use either of these programs use specialized software – specialized software which can also be purchased, customized, and used by a small collecting society like the CSB.

Two widely-used royalty-calculation software packages are “Counterpoint” and “Musicalc.” Counterpoint [www.counterpoint.com] is headquartered in London and is used by clients in over 40 countries, including several music publishers in South Africa. Counterpoint can be used on a PC or a mainframe computer (AS400). Musicalc [www.musicalc.com] is also headquartered in England. Musicalc is used widely by record companies and music publishers, operating either in the older DOS environment or with a Windows operating system. Musicalc lacks a licensing module.

V. Secondary Missions of the Copyright Society

A. Settling all types of disputes among creators

In addition to the Copyright Office and the Copyright Society, the 2005 Act establishes a “Copyright Arbitration Panel” for “the settlement of disputes under” the Copyright Act. [section 33A] The Panel is to have three to five members, with at least the chairperson being an attorney and the other members being “persons who are knowledgeable in the field of copyright.” [section 33A(3)]. Although the Act does not establish any relationship between the Copyright Society and the Copyright Arbitration Panel, we recommend:

Rec 25. That at least one member of the Copyright Arbitration Panel under the Botswana Copyright Act be a Board Member of the Society.

Rec 26 That, regardless of the scope of the activities of the government’s “Arbitration Panel,” the Society charter establish a “conciliation and arbitration committee” which can address any disputes within the Society.

Establishing an internal dispute resolution system is important, particularly as regards ownership issues, listing on the Society’s “index” for musical works, and the distribution of license and royalty monies. We recommend a two-step system: a first step of “mediation” or “conciliation” with a second, more formal arbitration step if the aggrieved individual remains dissatisfied. Both GEMA and ASCAP have such two part processes for resolution of disputes. GEMA’s charter establishes a conciliation committee, a distinct arbitration tribunal, and, separately, a grievance committee. If the conciliation committee fails to resolve a dispute, the arbitration tribunal settles that dispute – at least those relating to interpretation of the GEMA charter, the distribution plan for monies, and some ownership issues related to copyrighted works.⁴³ ASCAP’s charter establishes a “Board of Review” to consider protests over distribution of royalties;⁴⁴ if a person refuses to accept the Board of Review’s decision, the matter goes to an internal arbitration panel.⁴⁵ The Society membership agreement should expressly state that a person joining the CSB agrees to try to resolve all “index” listing and distribution of monies issued by the internal dispute resolution process.

In the case where internal mediation and arbitration cannot resolve a dispute between Society members, the matter should be referred to the government’s Copyright Arbitration Panel.

B. Other activities to strengthen the artistic community

It is common practice throughout the world for collecting societies to engage in other activities to strengthen the artistic community, promote copyright, and contribute to the development of local and national culture. Some of these activities can be self-supporting or cost very little money – such as working with a bank to provide artists with a favorable and easy-to-understand way to establish retirement account (although the Society would not want to be a guarantor of such retirement accounts). Other activities will require funding from the licensing fees and/or levy monies received by the Society. Judicious use of *some* of these monies for well-chosen and well-run programs can unquestionably strengthen Botswana’s creative community.

1. Establishing a funeral benefits scheme

Some African collecting societies, including SAMRO, use some of the collected monies to fund a funeral benefit fund for musical artists.⁴⁶ Ensuring that a respected musical artist who died with little money receives a proper funeral would be an extremely worthwhile use of *some* collected monies from public performance licenses. This kind of use of license monies can strengthen public support for the Society in asking Batswana companies to pay the license fees they owe. But it would be important to establish equitable criteria for the distribution of such funds and ensure there is a proper appreciation in the CSB membership that the fund does not provide universal coverage of funeral costs. It would be worthwhile for the CSB to appoint some members to an *ad hoc* committee to research how SAMRO operates its funeral benefits scheme.

2. Funding arts festivals, scholarships, new works, or public performances

While *most* royalty and licensing monies need to be distributed to creators, some collecting societies retain a percentage of their income to support programs for general promotions of music and culture. Over the long-term, this is an acceptable practice as long as the percentage is reasonable. For example, the Japanese Copyright law expressly provides that up to “20% of the compensation received” can be used “for such activities contributing to the protection of copyright and neighboring rights as well as to the promotion of the creation and dissemination of works.”⁴⁷ The charter of the PRS in the UK is much more strict – indeed, probably too strict to serve as a model for the Society. The PRS charter expressly identifies that the PRS Board may want to make “loans” or “gifts . . . for any purpose conducive to the improvement or advancement of the composition, teaching, or performance of music,” the charter also stipulates that payments under this and the “benevolence” fund may not exceed 1% of the monies distributed to members in the preceding year.⁴⁸

Providing financial support for music festivals is an obvious possibility for the Society, using those festivals to showcase Batswana music and arts. Any local concerts or music festivals sponsored by CSB should be broadcast on national radio and, if possible, provided as a webcast through a CSB website – as a tool to promote awareness of Botswana’s music community with people in developed countries following the African music scene. A regular series of sponsored concerts broadcast on the radio would be a logical and very appropriate activity for the CSB. And one way to inspire radio broadcasters to cooperate in this endeavor would be for the Botswana Government to suggest, if not mandate, that radio stations carry a certain amount of local content. (This was a proposal in a 2000 seminar on African music organized by the World Bank;⁴⁹ such local content requirements exist in several countries, including France, Canada, and South Africa.) Any local content requirement from the government must, however, be reasonable and carefully formulated in light of existing business models of Batswana radio broadcasters – and the recognition that Botswana’s citizens are entitled to enjoy access to the world’s music, not just local artists.

As part of a public performance and broadcast series, CSB could offer small premiums for new works by Batswana artists. SAMRO, for example, maintains a “SAMRO Endowment for the Encouragement of the National Arts” (SENA) which offers scholarships and commissions new musical works.⁵⁰

It is *possible* that in the first few years of licensing efforts the license amounts will be quite small – so small that distributions to Society members might not be justified until the Society has established a small financial reserve. For that reason, we recommend caution in sponsoring festivals, performances, broadcasts, and new works in the first few years of the CSB. Just because the Society has been formed, musical artists cannot be allowed to think it is suddenly the source for monies that have not yet been collected. Getting broadcasters and large companies (like hotels, resort facilities, restaurants) to agree to pay the licensing fees that they should have to remain primary.

3. Establishing a retirement annuity fund

SAMRO provides an example of another activity the CSB might consider: SAMRO operates a “non-contributory,” i.e. compulsory, retirement annuity fund. According to the SAMRO description “[e]ach writer member participates in the fund in proportion to their earnings” and the system presently benefits “in excess of 6,000 members and their beneficiaries.”⁵¹ Although this is an attractive idea, we recommend against any compulsory retirement savings plan based on license revenues at least in the early years of the CSB. Nonetheless, the CSB might work with Metswana bank to establish a CSB-sponsored or CSB-branded retirement account program that would encourage creators to save income for their retirement.

4. Promoting copyright awareness and enforcement

Raising awareness of the protection offered by copyright and neighboring rights is unquestionably a suitable activity for the Society – for example, Australia’s Code of Conduct for collecting societies states “[e]ach collecting society will engage in appropriate activities to promote awareness among Members, Licensees, and the general public about . . . the importance of copyright.”⁵² This can be done in all kinds of ways, ranging from songwriters and musicians visiting schools and talking about artists’ rights to organizing concerts, or even peaceful protests (that could include concerts) outside merchants that sell unquestionably pirated CDs and DVDs. [While in Botswana this summer, one of the authors of this report visited some stores, finding large amounts of pirated DVDs.] Raising awareness about copyright and neighboring rights could include events done jointly with Botswana’s lawyers, Gaborone and Freetown chambers of commerce, schools, and the University of Botswana.

VI. Summary of Recommendations

Below is a re-cap of the broadest recommendations in this report:

1. *That CSB be organized with the possibility of four sub-groups:
 - a. *music section ;*
 - b. *authors' section;*
 - c. *fine arts section; and*
 - d. *audiovisual section.**
2. *That the CSB employ a two-part membership structure: [a] automatic membership eligibility for “professional” artists (in each membership division), and [b] membership by application and approval for all others.*
3. *For each section, the CSB Board will determine membership requirements (as outlined in the Articles of Association).*
4. *The membership structure should automatically be reviewed after five years.*
5. *As much as possible, CSB membership fees be kept low and evaluated periodically.*
6. *That songwriters, composers, lyricists, music publishers, and music performers should be able to join automatically with the same standards as would permit a South African artist to join SAMRO.*
7. *That a musical performer should be able to join automatically if he/she can provide proof that his/her performances have been recorded and made publicly available as sound recordings and/or his/her performances have been broadcast in Botswana in the past two years.*
8. *That the CSB might consider a “one time” approval of all BOMU members as of a particular date – such as June 1, 2006. (This would depend on the music society having a genuine list of members).*
9. *That the Society consider establishing a non-professional membership category in which the membership application is reviewed by a membership committee of CSB to determine whether the person is a bona fide, albeit not-yet-professional, musician.*
10. *That the Society have at least a small writers' section that includes active journalists, novelists, and non-fiction writers on appropriate criteria that match those for the music section; that the Society have provisions for the membership of print publishers – which will be needed for distribution of any reprography fees; and that the Society involve (as members) the members' of Botswana's writers association in a parallel fashion as members of the music society members.*
11. *That the Society officers be a President, Vice-President, and Secretary-Treasurer, elected by the membership at large for a two year term.*

12. *That the Society have an 8-12 member Board of Directors with each officer also being a member of the Board of Directors, each member serving for a two year term, and each member being confirmed by the membership at large.*
13. *That in addition to the three officers, the Board include:*
 - + *one representative of Batswana broadcasters, whether a private or public official;*
 - + *one representative of the Batswana business community that will represent music licensees;*
 - + *PERHAPS one representative from the government's Copyright Office;*
 - + *at least two additional representative of the music section [assuming two or three of the officers are from the music section];*
 - + *at least one representative of the writers' section;*
 - + *at least one representative of the fine art' section.*
 - + *at least one representative of the audiovisual section.*
14. *That when an issue arises that principally concerns one section, the Board is obligated to seek the recommendation of that section.*
15. *That the CSB charter require and describe an Annual Meeting of the general membership in which officers are elected, Board members are confirmed and elected, officers report to the general membership on the prior year's activities of the Society including a general accounting for the Society, and the general membership approve any important over-all questions related to the Society.*
16. *The President of the Society should be entitled to enter into license agreements on behalf of the Society, subject to quarterly approval by the Board of Directors, but no licensing agreement should exceed a predetermined number of years (i.e., 5 years).*
17. *That, in keeping with the recommendation immediately above, the Board of the Society meet at least four times a year, including one meeting held immediately after its election at the Annual Meeting of the general membership.*
18. *That this structure for the Copyright Society be reviewed after 3-5 years.*
19. *Proper accounting procedures for the receipt of income and the payment of operating costs must be in place before the Society receives its first license fee.*
20. *The CSB Board should make an initial estimate of its goal for a total "reserve fund" and for annual contributions to the reserve fund, so that there is some income for "beneficial activities" and annual royalty distribution as soon as possible.*
21. *The CSB Board should make some very modest goal for "beneficial activities" during the first 1-3 years, so that there is some income for annual royalty distribution as soon as possible.*
22. *Operating costs and contribution to the reserve fund should be deducted from licensing income immediately.*

23. *That the Society appoint a committee to study the proper amount of levy on blank media and recording equipment and that the Society make recommendations to the Government concerning the levy amounts.*
24. *That the Minister of Finance and Development Planning distribute the monies from the blank media levy either by [a] transferring the monies annually to the Society for distribution, or [b] distributing the monies pursuant to the recommendation of the Society.*
25. *That at least one member of the Copyright Arbitration Panel under the Botswana Copyright Act be a Board Member of the Society.*
26. *that, regardless of the scope of the activities of the government's "Arbitration Panel," the Society charter establish a "conciliation and arbitration committee" which can address any disputes within the Society.*

VII. Conclusion

In the words of one economist who studies the developing world, building a country's musical culture requires understanding "the most basic economic characteristic of the music business: that music is a business, as opposed to simply a cultural activity."⁵³ Establishing an efficient Copyright Society that collects and distributes monies for music creators and artists (as well as others) will be a genuine challenge, but it is also a central part supporting Botswana's creative community and cultural heritage – as both culture and business.

With a new Copyright Act in place, the Copyright Society must be created into existence at the same time that the Botswana Government is itself establishing a Copyright Office. And as these two entities come into existence, they will have to begin working together immediately. That relationship needs to be one of open communication and, above all, *partnership*. In a sense, this is the "moment" to establish a cooperative experience in which private government officials and private individuals build and – learn – a copyright system together.

This Report is an initial guide to that learning and building process; the Report is written to be a reference tool for both policymakers and Copyright Society leaders. A large part of this Report – Part II – provides an explanation of the basic rights of copyright law, how those rights are used in the music industry, and the traditional role of a music publisher. Part III and Part IV provide a series of recommendations, respectively, on establishing the key functions and structure of the Copyright Society and operating it as a collecting society. As with any business, operating a collecting society is a "hands on" activity. Part V discusses additional activities that the Copyright Society may want to undertake – eventually, if not immediately – in its role of fostering Botswana creativity.

Of course, no written guide can substitute for actual experience and many of the recommendations in Part III, IV, and V may need to be modified to take account of available funding, technical resources, the number of involved Society members, licensing opportunities, etc. For example, it is not possible for us to gauge how much of the Copyright Society activities – including membership and licensing activities – will have to be done, at least initially, by dedicated volunteers. Both government officials and Society members must be realistic about collection and distribution activities in the relatively small Botswana economy; no one should expect a sudden gold mine for musical creators and artists just because of a new copyright law. As they organize and start their activities, both the Copyright Society and the Copyright Office should continue to seek out expertise from abroad, adjusting that knowledge and experience for Botswana's circumstances.

In closing this report, we must emphasize that the Copyright Society is an important part, but just one part of supporting Botswana's development of a stronger, more robust creative community. Indeed, the copyright law itself is just one piece of a bigger project of creating an environment to develop Botswana's artistic and cultural heritage and potential. Many government policies can affect a country's artistic communities. For example, in the 1980's Ghana severely hurt its local music industry by, first, having a curfew that lasted three years and, second, imposed a 160% import duty on musical instruments. Churches were exempt from the import duty as well as the local entertainment and income taxes. Not surprisingly, the "music industry" in Ghana shifted from a (nighttime) "music scene" into gospel and church music.⁵⁴ Building up Botswana's music community requires not just a modern copyright law, but a friendly, supportive and inclusive environment that provides

opportunities for people to learn, create, practice, perform, and enjoy music. The same, of course, applies to all the arts – in which the Batswana people will increasingly excel.

ENDNOTES

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- ¹ Amartya Sen What's the Use of Music? The role of the music industry in Africa www.worldbank.org/research/trade/africa_music2.htm.
- ² *Id.*
- ³ Angelique Kidjo has published some of her music with a small company called Aye Music Publishing. See liner notes, Angelique Kidjo, *Fifa* (1996). Salif Keita has his music published by Delabel Edition and Editions Africa Nostra. See liner notes, Salif Keita, "Mouffou" (2002). Editions Africa Nosta is also the music publisher for many songs that Cabo Verde artist Cesaria Evora has recorded. See <http://www.abc.net.au/rn/dailyplanet/stories/2004/1093969.htm#>
- ⁴ See liner notes, Wasis Diop, *Toxu* (1998). N'Dour has songs with EMI Virgin Publishing France one of the EMI companies. See liner notes Youssou N'Dour, *Nothing's In Vain/Coono Du Reer* (2002).
- ⁵ In this respect, the 2005 Act is much less detailed than, for example, the present draft provisions concerning a Copyright Society in the proposed Swaziland Copyright Act, attached hereto as Appendix 14. The Swazi draft first provides a more elaborate description of the Copyright Society. Section 33(2) provides:
"The Society shall be a non-profit making body corporate having perpetual succession and a common seal and shall under that name, be capable of suing and being sued and of purchasing or otherwise acquiring, holding and alienating movable, immovable property and subject to the provisions of this Act, of doing or performing all such acts and things as bodies corporate may by law do or perform."
After laying out the general responsibility of the Society "for the promotion and protection of the interests of authors, artists, and performers," [section 34(1)] the Swazi draft provides in section 34(2) that "the Society shall be responsible for the collection and distribution of any royalties or other remuneration to its members in respect to their rights under sections 26, 29, and 30."
Section 26 of the Swazi draft law secures, as neighboring rights, the rights of performers to control the broadcasting or communication to the public of their performances, the fixation of their performances, the reproduction of said fixed performances, and the distribution of copies of said fixed performances (including a rental right).
Section 29 concerns "equitable remuneration" to the producer of a sound recording for its use in broadcasting; Section 30 requires the labeling of phonograms and does not address income, payments, or royalties.
For that reason, "sections 26, 29, and 30" may be intended to read "sections 26, 28, and 29." Section 28 concerns phonogram producers' rights. Regardless of this small problem, the draft Swazi law more specifically delineates the responsibilities of the Swazi Copyright Society.
- ⁶ Minister Moroka's cover memorandum for the 2005 Copyright Law also says that the Copyright Office "will, amongst other things, supervise the activities of the Copyright Society of Botswana."
- ⁷ In contrast the draft Swazi copyright law does set out specific supervisory obligations. See Appendix 14 at Article 37. We do NOT recommend any amendment of the Botswanan copyright law on this topic at this time, thinking it is better for the Ministry to retain flexibility while representing – and keeping to its commitment – to allow the Copyright Society to run autonomously as long as relevant stakeholders are involved and satisfied with the Society's functioning.
- ⁸ This comes from the SAMRO description of its activities. See http://www.samro.org.za/index.pl/about_samro/key_areas
- ⁹ SAMRO's website says that the individual's works "must also have been transmitted through a diffusion service (music that is, for example, played in a shopping mall)."
- ¹⁰ For example, the PRS charter provides that "[t]he Board may require each member to pay to the Society an annual membership fee. . . . The Board may charge each member the annual fee in such manner (including, without limitation, by deducting such fee from any monies distributable to such member) and at such rate as the Board may from time to time determine, provided that such rate is reasonable under the circumstances." Memorandum and Articles of Association of the

Performing Rights Society Limited [hereinafter PRS Articles of Association], Article 11B, Appendix 2 at 19

11 For example, to be eligible for membership in the Directors Guild of America (DGA), the society which collectively represents film directors in America, a person must file the “deal memo” – equivalent to a recording contract – between the person and a film production company recognizing the person as the film director of a funded audiovisual project. Once a production company becomes a “signatory” to the DGA, they have a strong incentive to hire only DGA members for further directing work.

12 See Ratanang Motihabane, *The Book Chain in Botswana*, available at <http://www.inasp.info/pubs/bookchain/profiles/Botswana.html>. See also listing at UNESCO’s “World Observatory on the social status of the artist,” http://portal.unesco.org/culture/en/ev.php-URL_ID=21452&URL_DO=DO_TOPIC&URL_SECTION=201.html

13 African Imprint Library Services, August 2002, Chapel Hill, North Carolina, available at <http://www.africanbooks.com/BTweb0802.htm>

14 The biography of Motswana playwright Benjamin Lesele Janie described him as the vice-chairperson of the society.

15 For example, ASCAP has separate Secretary and Treasurer positions with the Articles of Association providing that each “may be an employee of the Society.” ASCAP Articles of Association, Articles IX and X, Appendix 1 at 13. We think it is important to be practical and accept that, initially, the CSB may have only one paid employee, although it might eventually have more. For example, SAMRO has a staff of 170. SAMRO Fact sheet, 4 May 2006, at 5. The CSB will, of course, always operate on a much, much smaller scale than SAMRO.

16 A two year term for officers and Board members is common in collecting societies. See, e.g., ASCAP Articles of Association, Article VI, Appendix 1 at 12.

17 http://www.samro.org.za/index.pl/about_samro/board_of_directors.

18 Statutes of GEMA, Article 13, Appendix 3 at 11, also available at http://www.gema.de/engl/aboutus/board_of_supervisors/

19 The Performing Rights Society of the UK has a 26 member Board of Directors. The elaborate structure of the PRS Board is available at <http://www.mcps-prs-alliance.co.uk/DocsRepository/3497/PRS%20Board%20July%202006.pdf>.

20 The PRS affiliate that handles licensing musical compositions for phonorecords (“mechanical” licensing) is called the Mechanical-Copyright Protection Society (MCPS). It has an 18 member Board of which 12 are music publishers, 4 are music writers, and the other members come from the MCPS executive. See <http://www.mcps-prs-alliance.co.uk/aboutus/>

21 Historically, ASCAP used to require that three of the 12 writer/composers and three of the 12 music publishers on the Board represent “serious” or symphonic music, but in the 1990s ASCAP accepted that that greatly overrepresented the true share of classical music in public performances. Author’s communication with Fred Koenigsberg, counsel to ASCAP, October 25, 2006. Again, we do **not** recommend any attempt to guarantee representation of different music genres on the CSB Board.

22 Information available at <http://www.mcps-prs-alliance.co.uk/aboutus/>.

23 Of the four founding organizations, one represents the Dutch music publishers and the other three are authors organizations – one for serious music composers, one for popular music composers and lyricists, and one for other lyricists. Author’s correspondence with Hans Eijkelenboom, Legal Affairs, BUMA/STEMRA, October 25, 2006.

24 For example, the three separate GEMA groups – composers, lyricists, and publishers – election their own members to the GEMA Board of Supervisors. See Statutes of GEMA, Article 11, Appendix 3 at 10.

25 ASCAP Articles of Association, Article IV(1), Appendix 1 at 5; PRS Articles of Association, Article 35, Appendix 2 at 26 (“The Board shall consist of not more than 27 Directors in all)

26 Statutes of GEMA, Article 10, Appendix 3 at 11, also available at http://www.gema.de/engl/aboutus/board_of_supervisors/

27 ASCAP Articles of Association, Article XVIII, Appendix 1 at 20.

28 ASCAP Articles of Association, Article IV(2), Appendix 1 at 5. *See also* PRS Articles of
Association, Articles 12-14, Appendix 2 at 20.

29 ASCAP Articles of Association, Article V(2), Appendix 1 at 9.

30 Canadian Copyright Act, R.S.C. 1855, c. C-42, section 2. *See also* Mario Bouchard, *Collective
Management in Commonwealth Jurisdictions: Comparing Canada and Australia* in COLLECTIVE
MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283, 291 (Daniel Gervais, ed. 2005).

31 In its review of French collecting societies, the Permanente de Controle concluded that “the
money sometimes transits through several [royalty collection and distribution societies – RCDS]
and what is levied on financial products does not necessarily appear in the accounts: the figure is
thus closer to 25 to 35 per cent. For all societies together, the average is 23 per cent.” quoted in
Nathalie Piaskowski, *Collective Management in France*, in COLLECTIVE MANAGEMENT OF
COPYRIGHT AND RELATED RIGHTS 153, 176 (Daniel Gervais, ed. 2005).

32 AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING (3rd edition, 2002) at 924.

33 AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING at 925.

34 AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING at 925.

35 Where the music logs and survey samples show that a payment for public performance is due a
foreign collecting society -- to pay a foreign composer and/or performer -- ideally, CSB should
conclude an agreement by which it deals with a single collecting society (for musical
compositions) for a foreign country's musical repertoire and it is that foreign collecting society
which determines what must be forwarded to performers and phonogram producers.

36 For example, in the United States, the important newspaper The New York Times recently
mocked Sound Exchange, the collecting entity that distributes audio digital performance rights
royalties to musical performers. An article in the newspaper entitled “Anyone Seen the Mormon
Choir?” starts “WHERE the devil is the Mormon Tabernacle Choir?” Sound Exchange had failed
to pay this group on the grounds that Sound Exchange did not know where to find them – but
practically everyone in the United States knows that the Mormon Tabernacle Choir is based in
Salt Lake City, Utah. Dan Mitchell, *Anyone Seen the Mormon Choir?*, THE NEW YORK TIMES,
October 28, 2006. This kind of bad press shows why it is important to make distributions in a
conscientious and timely manner.

37 Different sorts of levy schemes, whether for analog media, digital media, or both exist in Austria
(1980), Canada (1997), Finland (1984), France (1985), the Netherlands (1990), Spain (1992),
Switzerland (1992), Denmark (1992), Italy (1992), Belgium (1992), Greece (1992), Japan (1993),
Portugal (1998), Sweden (1999), and the United States (1992). *See* Katerina Gaita and Andrew
F. Christie, *Principle or Compromise? Understanding the Original Thinking behind Statutory
License and Levy Schemes for Private Copying*, [2004] INTELLECTUAL PROPERTY QUARTERLY
422, 423, fn. 2.

38 Since January 1, 2002, the levy is 8.7 Euro cents per hour of blank media recording capacity.

39 *See* Society for Administration of Remuneration for Audio Home Recording (SARAH), “Outline
of Remuneration System,” Appendix 15, available at www.sarah.or.jp/ruke/rule_e.html

40 *See also* Mario Bouchard, *Collective Management in Commonwealth Jurisdictions: Comparing
Canada and Australia* in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283,
289 (Daniel Gervais, ed. 2005).

41 *See* SARAH, *The practices of sarah*, Appendix 15, available at
http://www.sarah.or.jp/index_e.html.

42 Bouchard, *supra* note 40 at 293.

43 Statutes of GEMA, Article 16, Appendix XX at 13-14.

44 ASCAP Articles of Association, Article XIV(4) and (5), Appendix 1 at 15 – 16.

45 *Id.* Article XIV(6) establishes the “Panel,” Appendix 1 at 18-19, while Article XIV(4) describes
how disputes are referred to it. Appendix 1 at 15 – 16.

46 As UK collecting society expert Phil Hardy has noted, “[o]ne thing African societies do, being in
mind the poverty levels of their members, is to offer funeral grants. That is considered by
European societies to be a social deduction made from revenues that should have been remitted to
members.” *See* Phil Hardy, remarks at Workshop on the Development of the Music Industry in
Africa (sponsored by the World Bank and the Policy Sciences Center), June 20-21, 2001.

Available at www.worldbank.org/research/trade/africa_music2.htm. The PRS charter provides that its Board may establish a “benevolent” fund for members, ex-members, widows, and members’ families. See PRS Articles of Association, Article 48(ii), Appendix 2 at 30. An article of this sort in a charter permits a collecting society Board to provide financial assistance for funeral costs.

⁴⁷ Copyright Research and Information Center, Copyright Law of Japan, November 1999, Article 104octies, at page 1116; See also SARAH, *Outline of Remuneration System*, Appendix 15 *supra*.
⁴⁸ PRS Articles of Association, Article 48, Appendix 2 at 29-30.

⁴⁹ “To help generate local income for musicians it is imperative to have local content mandated on the radio stations, as in South Africa and many places in the world (for example, France, Canada).” DAY 2, “The Creation of an African Music Industry: A Practical Plan of Action,” The World Bank, at 16.

⁵⁰ SAMRO Fact sheet, 4 May 2006, at 3-4.

⁵¹ SAMRO Fact sheet, 4 May 2006, at 3.

⁵² Code of Conduct for Copyright Collecting Societies, Section 2.8, at page 8, available at <http://www.screen.org/factsheets/COC.pdf>.

⁵³ See Professor Keith Maskus, remarks at Workshop on the Development of the Music Industry in Africa (sponsored by the World Bank and the Policy Sciences Center), June 20-21, 2001.

Available at www.worldbank.org/research/trade/africa_music2.htm.

⁵⁴ See Professor John Collins, remarks at Workshop on the Development of the Music Industry in Africa (sponsored by the World Bank and the Policy Sciences Center), June 20-21, 2001.

Available at www.worldbank.org/research/trade/africa_music2.htm.