

## 9. REALITY CHECK: CORPORATE GOVERNANCE TINGES ON THE COLLECTIVE MANAGEMENT ORGANIZATIONS IN KENYA

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### ABSTRACT

This article discusses the application of corporate governance principles by the collective management organizations (CMO) in Kenya. It delves into issues that are affecting realization of corporate governance principles as espoused by the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), and the Constitution of Kenya. The article highlights the historical epoch of CMOs in Kenya and seeks to identify the time when the rain started beating the sector. The role of the Kenya Copyright Board (KECOBO) has been prosecuted in the whole scheme of things with a focus on its administrative action and demonstration of how these actions have impacted on CMO operations. The academic enterprise elucidates status of CMOs as exposed by a forensic audit at the behest of KECOBO. The article also proffers the views and responses of indicted CMOs by highlighting issues that have been cited as having contributed to the current mayhem being experienced in the Kenya's CMO sector. These discussions are hinged on OECD literature, Kenya's 2010 Constitution, Copyright Act and related regulations that have enunciated the relevance of prudent management and leadership in the sector including the principles of corporate governance, disclosures, transparency and accountability. The paper elucidates the actions that players need to take in order to turn the tide in favor of copyright owners and users in equal measure. Lastly, the article makes recommendations that

will elaborate on enhancing transparency, accountability and corporate governance among Kenya's CMOs.

**Keywords:** royalties, copyright, corporate governance, accountability, transparency, collective management organizations.

### 1. INTRODUCTION: BACKGROUND

The Kenyan music and copyright sector has been blighted by numerous challenges that make it difficult for the sector to realize its full potential. Against this backdrop, the paper gives a snapshot of music and copyright sector and examine the reason behind dreary performance of the sector. Specifically, the paper addresses itself on the following areas of focus: an assessment of application of corporate governance principles by the collective management organizations (CMO); an evaluation of challenges befuddling CMO sector in Kenya; and proffering recommendations on how identified loopholes can be addressed.

The paper therefore seeks to situate nexus between efficacy of CMOs in the management of these rights on one hand and the question of how the CMOs are adhering to the principles of corporate governance and explore factors that are hindering efficacy and efficiency of CMOs in Kenya. The paper is based on qualitative research but from optics of doctrinal and comparative undercurrents. The secondary data is derived from the Constitution, Copyright Act, Copyright regulations, journals, media reports, case laws, and correspondences between Kenya Copyright Board (KECEBO) and CMOs. The collected data from those sources was analytically assessed and apposite critique is proffered.

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Collective management is a framework that enables owners of copyrightable works to authorize a CMO to monitor the use of their works.<sup>1</sup> The concept of collective management has become an increasingly important niche of investigation for a vast array of legal and entertainment scholars.

The role of CMOs is realised through collectivization of management of rights through which members authorized them to manage these rights *inter alia*, enter into licensing agreements with the users and monitor exploitation of their works. This provides a structured platform for exploitation of these rights<sup>2</sup>. Copyright like any other corporeal property can be licensed, assigned, or transferred by testamentary disposition or operation by law. However, licensing and assignment only apply to the economic rights<sup>3</sup>, which can be transferred in part or in whole. In contrast, moral rights cannot be assigned or transferred. They are known as the rights to integrity and paternity. The economic rights include but not limited to reproduction in any material form; adaptation or translate; distribution to the public by way of sale, rent, lease, hire, loan, importation; broadcast whole or part of the work; communication to the public; public Performance; and importation. Due to complexities involved, the management, exploitation and remuneration of creative sectors rely exclusively on collective management frameworks.

The law has conceived CMO public entities that are subjected to the exactitudes of rule of law, good governance, integrity and transparency. There is an old aphorism that holds that, "From everyone to whom much was given, much will be expected. From the one who was entrusted with much, much more will be asked."<sup>4</sup> This aptly describes CMOs in as far as observance of rule of

law and compliance with principles of accountability, transparency and good governance are concerned.

The genesis of collective management of copyright dates to the late 1700s. The practice begun earnestly in France in 1777 and it initially incorporated dramatic and literary works.<sup>5</sup> Through the years, the practice has been accepted in many jurisdictions around the world with musical works taking a lion share of established CMOs. In Kenya and other Commonwealth countries, collecting societies are usually not-for-profit organizations that are responsible for protecting the rights of those they represent.<sup>6</sup> They also take a percentage of the royalties they collect to pay their staff and overheads." Indeed, most CMOs are private in that they are set up and run for rights holders. They are not-for-profit in that the remuneration they collect is not the money of the CMOs, but money that they hold in trust for rights holders.<sup>7</sup>

The existence of collecting society in Kenya can be traced back in 1914 when the Performing Right Society (PRS) for Music was established in London, United Kingdom. The PRS acted as *de facto* collecting Society in the United Kingdom and its colonies including British Protectorate comprising of Kenya and Uganda. The PRS continued to exercise its role even after Kenya became a colony in 1920. Its influence was felt during the colonial the colonial period and even after independence up to 1983 when the Music Copyright Society of Kenya (MSCK) was founded. The MSCK operated without oversight until 2006 when the Copyright law was operationalized. In 2007, MCKS was granted a CMO license to collect on behalf of authors and composers of musical works. The law had in 2001, created and donated copyright regulatory powers to the KECOBO.

<sup>1</sup> Fisor M, *Collective Management of Copyright and Related Rights'* (World Intellectual Property Organisation, Geneva 2002) 7.

<sup>2</sup> WIPO, *the Importance of Collective Management of Copyright and Related Rights* (WIPO National Seminar on Copyright, Related Rights, and Collective Management, Khartoum, 2005) 63.

<sup>3</sup> Copyright Act, 2001. S. 33.

<sup>4</sup> Evangelical Heritage Version (EHV). Luke 12 47-49. The Holy Bible (Evangelical Heritage Version, 2019).

<sup>5</sup> CISAC: CISAC University-'*The History of Collective Management*' <<https://www.cisac.org/>> accessed 3 March 2022.

<sup>6</sup> Hofman J, '*Introducing Copyright-A plain Language Guide to Copyright in the 21<sup>st</sup> Century* (Commonwealth of Learning, 2009) 55.

<sup>7</sup> Koskinen-Olsson T, Lowe N, *Educational Material on Collective Management of Copyright and Related Rights Module 1: General aspects of collective management* (WIPO, 2012) 26.

In 2008, KECOBO granted a CMO license to the Kenya Association of Music Producers (KAMP). Incorporated in 2003, KAMP collect communication to the public and broadcasting license fees on behalf of producers of sound and audio-visual recordings. In 2009, the Performers Rights Society of Kenya (PRISK) was incorporated and given a CMO license to collect license fees on behalf of performers in musical and dramatic works in 2010.

Over the years, users of copyrighted works have challenged individual collection by licensed CMOs. This birthed idea of joint licensing within CMO ecosystem especially after KAMP and PRISK were licensed as CMOs in 2008 and 2010 respectively. To start with, KAMP entered a Memorandum of Understanding (MOU) with MCSK for joint revenue collection in October 2008 whereby this partnership went on smoothly until March 2010.

Negotiations between MCSK, KAMP and PRISK to have a new MOU signed for joint revenue collection from both public performance and broadcasting were initiated in early 2011. The MOU was signed in May 2011 but soon after made null and void after MCSK's license was revoked by KECOBO. With this new development, KAMP and PRISK embarked on a joint revenue collections initiative while MCSK continued to operate separately. In 2016, the discussions on revenue collections by the three CMOs were revived by KECOBO as a condition for licensing<sup>8</sup>. However, the discussions towards KAMP-PRISK-MCSK tripartite licensing did not bear much fruit. In March 2017, a new CMO by the name Music Publishers Association of Kenya (MPAKE) was licensed to represent the rights of authors, composers, and publishers instead of MCSK. This new development paved way for renewed discussions on a tripartite revenue collection and licensing arrangement for the three licensed CMOs to wit; KAMP, PRISK and MPAKE from April 2017. The actual revenue collections under this arrangement kicked off in

October 2017 and continued throughout 2018 until the legality of MPAKE's licensing was successfully challenged by MCSK through a court process in Kakamega<sup>9</sup>. In 2019, KAMP, PRISK and MCSK got their licenses from KECOBO following due process as per the legal provisions and soon embarked on a tripartite licensing structure by the three CMOs.

#### **A. CMOs ACCOUNTABILITY THROUGH PRISMS OF CORPORATE GOVERNANCE**

Corporate governance is the system of guidelines, rubrics, and procedures through which an association, organisation or a company is administered, managed, supervised, controlled, guided, governed, directed. Corporate governance encompasses harmonising the welfare and interests of investors, stockholders, board members, management, members, suppliers, society and those who do business with an organisation<sup>10</sup>.

The Organization for Economic Cooperation and Development (OECD) has formulated principles of corporate governance that should be observed by public and private entities. These principles require such entities to ensure that: corporate governance framework is formulated in line with consideration of "overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and well-functioning markets." The entities are also obligated to ensure that legal and regulatory requirements that affect corporate governance practices are consistent with the rule of law, transparency, and enforcement. Besides, the entities are called upon to have a clear division of labour and duties, roles, and responsibilities among different company organs for the interest of company and public at large. Regarding regulatory authorities, OECD principles of corporate governance requires them to exercise their authority diligently, transparently, and objectively.

<sup>8</sup> Muendo S, Rot in artiste's bodies exposed as stakeholders face Senate, the Standard (Nairobi, 7 July 2021).

<sup>9</sup> *Laban Juma Toto & another v Kenya Copyright Board & 13 others [2017] eKLR.*

<sup>10</sup> Chen J, *Investopedia. What Is Corporate Governance?* 4 July 2021. <<https://www.investopedia.com/terms/c/corporategovernance.asp>>

Governments are required to resource regulatory bodies adequately in order to ensure that they execute their mandate professionally and efficient manner<sup>11</sup>.

In the last few years, values of rule of law, transparency, accountability, and good governance have become hallmarks of management and leadership and are continuously being enshrined in public and private spheres. At a global level, the United Nations (UN) conceived and unveiled the Sustainable Development Goals (SDGs) in 2015<sup>12</sup>. There are a total of 17 SDGs that aim at promoting greater good and meaningful livelihoods among the world inhabitants. SDG 16 speaks directly to the issues of transparency, accountability, and good governance. This goal seeks to promote peaceful and inclusive societies for sustainable development by providing access to justice for all and by building effective, accountable, and inclusive institutions at all levels. It urges State and State-non actors to respect the rule of law and to substantially reduce corruption and bribery in all their forms. It urges for development of efficient, effective, accountable, and transparent institutions at all levels. This will ensure responsive, inclusive, participatory, and representative decision-making at all levels, and broaden and strengthen the participation of developing countries in the institutions of global governance.

In the context of Kenya's 2010 Constitution<sup>13</sup>, national values and principles of governance are enshrined in Article 10 while values and principles of public service are encapsulated under Article 232. The Constitution lists several national values to include rule of law, good governance, integrity, transparency and accountability and sustainable development. Article 232<sup>14</sup> requires public officers and public entities exercise their mandate and authority efficiently, effectively through application

of high standards of professional ethics. They are also obliged to be accountable for their administrative actions, be transparent while providing services and provide to the public timely and accurate information.

By dint of these provisions, the CMOs and KECOBO are bound by ligatures of corporate governance as espoused by OECD, SDGs, the Constitution of Kenya and other legal and policy instruments establishing these institutions.

## **B. COLLECTIVE MANAGEMENT OF RIGHTS IN KENYA**

The doctrine of collective management of rights is well entrenched in Kenya. Courtesy of a robust constitutional, statutory and policy interventions, intellectual property (IP) rights are now firmly enshrined in the Constitution. These rights are well encapsulated under the 2010 Constitution<sup>15</sup> Further, the existence of CMOs is buttressed by Copyright Act<sup>16</sup> which makes provisions for copyright protection in literary, musical, artistic works, audio-visual works, visual artistes, sound recordings, and broadcasts rights. The Act also makes provisions for setting up of CMOs. It also prescribes compliance, administration, and management requirements of these organizations.

Section 3<sup>17</sup> of the Copyright Act establishes the KECEBO as a body corporate capable of suing and being sued in its own name. Its functions are outlined in section 5<sup>18</sup> of the Copyright Act which include among others licensing and supervising the activities of CMOs. It also administers and enforce all matters copyright and related rights as provided for in the Act and to deal with ancillary matters connected with its functions.

Section 46(1)<sup>19</sup> provides that no person or association of

<sup>11</sup> OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris, <<http://dx.doi.org/10.1787/9789264236882-en>>.

<sup>12</sup> UN General Assembly, transforming our World: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at: <<https://www.refworld.org/docid/57b6e3e44.html>> accessed 18 May 2022.

<sup>13</sup> Constitution of Kenya 2010, Articles 11, 40(5) and 69.

<sup>14</sup> Ibid 13.

<sup>15</sup> Ibid 13.

<sup>16</sup> Copyright Act, 2001 amended in 2019. Government Printer, Nairobi.

<sup>17</sup> Ibid 15.

<sup>18</sup> Ibid 15.

<sup>19</sup> Ibid 16.

persons shall commence or carry on the business of a copyright CMO except under or in accordance with a certificate of registration granted under the Copyright Act. Section 46(6) of the Copyright Act permits the KECEBO to assist in establishing a CMO in case it deems expedient. KECOBO has so far licensed three CMOs namely KAMP, PRISK and MCSK. These CMOs are required to operate in line with established nuances of corporate governance.

The current structure of CMOs falls within jurisdictions of two Acts of Parliament namely the Copyright Act and the Companies Act<sup>20</sup>. Each CMO has a Board of Directors with seven to nine members. The day-to-day operations are executed by a Secretariat headed by a Chief Executive Officer. CMOs are each issued with an annual license.

Since the enactment of the Copyright Act (2001), the CMOs have made noticeable achievements through entrenchment of corporate governance in their operations. The CMOs have established governance structures in line with the approved and adopted Memorandum and Articles of Association. This has ensured that all CMOs have a duly elected Board of Directors and Secretariat. In addition, the Board of Directors have established various committees as per the Company's Act, KECOBO circulars and good governance principles to oversee and make sound decisions on various functions pertaining to the operations of the CMOs. In 2020, KECOBO issued Framework<sup>21</sup> that *inter alia* requires CMO Board to establish a maximum of four Board Committee to wit: Audit, Risk and Legal Committee; Licensing Committee; Finance, Human Resources and Administration Committee; and Membership, Public Relations and Marketing Committee.

In addition, KECEBO requires CMOs to meet certain corporate governance preconditions before being issued with annual CMO license. These conditions include but

not limited to holding of annual general meeting; Allocation of 70% of revenue for royalty payments. Any request for amounts above 30%, must be approved in writing by the KECOBO Chairperson having received valid reasons upon demonstrating efforts to reach the threshold; payment of all applicable taxes; submission of Board Calendar of Meetings; demonstrable efforts of cost cutting measures to the Board of Directors; implementation of the CMO Policy *in toto*; submission of annual Audited Accounts; and an obligation to collect royalties jointly under a tripartite arrangement.

The joint revenue collections venture is governed through a tripartite Board comprising of respective CMOs Board. The Board membership include seven Board members from KAMP, seven from PRISK and eight from MCSK. The tripartite Board is the top decision-making organ in the joint venture and is charged with the responsibility of making policies that guide in the day-to-day operations. Before final decisions are made, issues are first discussed at a nine-member operations committee comprising three representatives from each CMO. The chairing of tripartite meetings is handled on a rotational basis for three months in each quarter of the year. The CEO from each CMO also implement strategy and policy directives by the tripartite Board.<sup>22</sup> The joint license has made it easier for users to comply and lowering license fee due to a reduced joint tariff. It has reduced the cost of revenue collection through sharing of personnel, regional offices, logistics and resources. It has brought harmony and reduced acrimony among the licensed CMOs experienced earlier when each CMO was licensing on their own.<sup>23</sup>

The tripartite arrangement has exposed some noticeable challenges including delays in decision making, interorganizational conflicts, and lack of policy framework to guide operations of KPM, lack of

<sup>20</sup> Companies Act, 2015. Government Printer, Nairobi.

<sup>21</sup> Kenya Copyright Board, *Medium Term Collective Management Organizations (CMOs) Policy Framework (Kenya Copyright Board 2021)* 7.

<sup>22</sup> Kenya Association of Music Producers, Performance Society of Kenya and Music Copyright Society of Kenya. *Duties and Responsibilities of KPM Quarter Leadership*. 2019.

<sup>23</sup> Kenya Association of Music Producers, *Report Presented to the Senate on Tuesday, 15 October 2021 (KAMP, 2021)* 4.

measurement of execution and corrective action at KPM level.

CMOs are further subjected to rigours and exactitudes of other legal and statutory requirements including the provisions of the Companies Act. The Act permits formation of CMOs as private companies limited by guarantees. To this end, each CMO has set of Memorandum and Articles of Association which spell out the relationship between members and directors, governance structures, terms and powers of Board of Directors, decision making process, powers of members as expressed through the annual general meetings and powers of directors. The Act also obligates CMOs to file annual returns showing whether there has been any change on the structure of the company including directors, shareholding among others.

Indeed, the CMOs have strived to comply with provisions of Companies Act<sup>24</sup> which require them to hold annual general meetings and present the Audited Financial Reports. However, holding of annual general meetings for the CMOs did not take place in 2020 and 2021 due to the COVID-19 pandemic, which precipitated imposition of public health containment measures and protocols. Despite the setback, the CMOs have resorted to using online platforms to hold member meetings and to conduct other business. There has been smooth transition of leadership for the CMOs with elections being held every three years.

## 2. SNARES AND TRAPS ENTANGLING KENYA'S CMOs

The Copyright sector in the post-independence Kenya got a boost in 1966 when the first Copyright Act was established. This legislation was unsophisticated and failed to introduce any form of regulatory and copyright collective structures for exploitation of copyright. For about 17 years Kenya operated without a CMO. In 1983,

the MCSK was born. However, it operated without any form of government regulations, and it has been alleged that MCSK created a monopoly that was marred with lack of transparency and accountability. In 2001, the Copyright Act was enacted and for the first time introduced government regulation and framework of collective management of copyright works. The law allowed for the operationalisation of the KECOBO. It has been argued that for eight years the power of KECOBO was limited and this allowed CMOs to operate unabated. As a result of this Copyright was amended in 2019 and expanded powers of KECOBO over CMOs to improve their integrity, transparency, accountability, good governance, and their responsiveness to artists in terms to royalties' collection and distribution.

These CMOs in Kenya have attracted criticism for conducting their business without giving much attention to corporate governance principles and for disregarding laid out procedures and best practices<sup>25</sup>. This has left them reeling from negative publicity, distrust and apathy from creative sector stakeholders. The challenges befuddling copyright sector are commonplace. These challenges include internal and external challenges. One of internal challenge affecting CMOs revolves around allegation of non-adherence to corporate governance.

According to KECOBO, the operational efficacy of the CMOs have been cause of concern to the Board. This concern has seen KECOBO revoke CMOs licenses on several occasions. On 1 April 2011, MCSK was deregistered as a CMO, for functioning inappropriately as a CMO, pursuant to section 46(9) of the Copyright Act, Cap 130. Five years later the same licensed was revoked when KECOBO declined to renew MCSK license for 2017 this time for failing to submit audited accounts, a list of its members and amount received in royalties contrary to Regulation 16 of the Copyright Regulations of 2004.

The Society was ordered to cease collecting royalties until

<sup>24</sup>The Companies Act, 2015.

<sup>25</sup> Muendo S, Rot in artiste's bodies exposed as stakeholders face Senate, the Standard (Nairobi, 7 July 2021).

the application of their license was reviewed. Consequently, KECOBO designated MPAKE as a collecting society for 2017. MCSK license was later reinstated in 2018. In 2021, KECOBO revoked joint license incorporating KAMP, PRISK and MCSK for failing to meet licensing conditions. In a press release issued on 24 August 2021, KECOBO noted that decision to revoke the license was arrived at after the three CMOs failed to meet the stringent conditions. The CMOs were unable to hold annual general meetings; allocate 70% of revenue for royalty payment and engage with Kenya Revenue Authority and resolve dispute on tax arrears. Additionally, they were accused of failing to demonstrate evidence of marketing and promotion of the use of ICT collection system, uploading of repertoire to the system under KECOBO supervision and delay in implementing the CMO policy in total.

KECEBO's decision to revoke the three CMO licenses has impacted negatively on the collections. The public, including CMOs' traditional users have as a result lost trust in the CMOs and have since been withholding payments until the matter, which is in court is resolved. Further as indicated earlier, KECOBO discourages users from making payments to the CMOs hence reducing the compliance rate and in turn result in low collections.

The 2021 license revocation was largely informed by a forensic audit report that largely indicted CMOs operating in Kenya. In pursuant to Section 46E, the KECEBO commissioned a forensic audit to establish causes of underperformance by CMOs in Kenya. The audit revealed certain weaknesses afflicting CMOs. The Audit identified 13 key issues<sup>26</sup> recommended for action.<sup>27</sup> These issues are highlighted as follows: Lack of guidelines on the management of social-cultural funds, which are provided for through MCSK and PRISK Memorandum and Articles of Association. These funds are meant to serve the interests of their respective members. The audit

revealed that CMO Board of Directors were conducting their affairs without complying with corporate governance principles. Some of the issues highlighted were unnecessary meetings; missing or unsigned minutes, doubtful board decisions, lack of Board oversight on critical governance areas such as audit, finance and statutory compliance. The audit also indicated that the Board's lack key skills necessary in the running of the Board Affairs due to their composition.

The Board also lacked continuous in-depth induction and training as well as gender inclusivity. Furthermore, it was noted that Boards have been involved in turf wars with management pointing to micromanagement tendencies. This it was noted, was caused by lack of awareness of Board roles or a structural flow in the CMO structure. The issue of Board continuity was identified owing to lack of retirement by rotation policy. The report also cited annual general meetings as failing to meet governance standards. This was precipitated by inadequate preparation. In some instances, CMOs failed to present annual financial reports.

It was further noted that CMO Board do not have full control and oversight of budget function resulting in poor budget management, poor debt management and poor financial discipline. Additionally, the Boards lacked work plans, which led to increased board meetings. The report also indicated that CMO did not have standard operating procedures and internal policies such as Board Charter, code of conduct for directors, by-laws, licensing policy, procurement policy among other policy documents which falls within the ambit of respective Board mandates.

It is also apparent that most CMOs have inadequate copyright expertise among the managers and members

<sup>26</sup> Kenya Copyright Board, *Forensic Audit Report for the Period 2017-2019, 2020* (KECOBO, 2021).

<sup>27</sup> Kenya Copyright Board, 'CMOs Forensic Audit'. <<https://copyright.go.ke/media-gallery/news-and-updates/386-kecobo->

[to-forward-final-report-of-forensic-audit-on-the-operations-of-the-three-collective-management-organisations-to-law-enforcement-agencies-for-fraud-investigation.html](#)>.

of the organizations.<sup>28</sup> This has continued to haunt their operations a fact that evidenced by poor score on corporate governance parameters.

CMOs were called out for failure of remitting statutory deductions on time. It is a cardinal crime for an organisation to fail remit statutory deductions when they fall due. These statutory deductions that are applicable to CMOs include remission of Pay as You Earn (PAYE), National Hospital Insurance Fund (NHIF), the National Social Security Fund (NSSF), and Higher Education Loans Board (HELB).

The CMOs were put to task for failing to give full disclosures on their operations.<sup>29</sup> The inability to give full disclosure affects negatively on the quality and quantity of collection and distribution of royalties by CMOs. In addition, the Board committee's structure did not address adequately the matters that are supposed to be conversed by the Board. Some CMOs did not have audit committees as well as internal audit function. "We note that after the onset of joint operations between KAMP, PRISK and MCSK, this function is yet to be operationalised at a joint level."<sup>30</sup>

Failure by CMOs to comply with statutory requirements was also cited. CMOs were unable to comply with KECOBO's recommended administrative ratio of 30:70, 30% for administrative cost and 70% as royalty eligible for distribution to members<sup>31</sup>. The forensic audit disclosed that CMOs were owing Kenya Revenue Authority in unpaid VAT taxes running into millions of shillings. The CMOs have been accused of misusing royalties at the expense of member interests. The issue of diversion and misuse of royalties has remained a sticky matter for decades. For instance, in 2019, President Uhuru Kenyatta

called out CMOs for paying small amount of royalties to artists. The President informed the nation that, CMOs collected more than KES 200 million but ended up spending 60% on administrative expenses.<sup>32</sup> The allegations of misappropriation of funds led to suspension of MCSK Chief Executive Officer, Maurice Okoth, and his management team in March 2016. Soon thereafter, Okoth resigned and criminal charges were preferred against them.<sup>33</sup>

One of cardinal roles of the Board is to manage risks. However, the audit indicated that CMOs lacked risk management policies. This implies that CMOs are not in a position to increase risk awareness and hence enable Secretariat to identify, assess and control risks.

#### CMOs RIGHT OF REPLY

CMOs have not been sitting on their laurels but have been keen on devising means and ways of circumventing governance and administrative barriers plaguing the industry. The issues of governance have remained sticky subject for Kenyan CMOs. Whereas the entities have been accused of flagrantly ignoring the dictates of Corporate Governance, the CMOs have on several occasions defended themselves against these accusations citing external factors that have led to dismal performance. They portend that a requirement for annual license as being disruptive to a CMO's strategic plan and operations. Concerning joint licensing, CMOs have accused KECOBO of abusing its administrative powers. They allege that KECOBO is unwilling to issue them with operational license on time<sup>34</sup>. The Copyright Act provides that CMO licenses should be an annual (12 months) license valid only until 31 December every year, but the last license to be issued to CMOs was in

<sup>28</sup> Sihanya B, 'Copyright Law in Kenya' (2009) <<https://innovativelawyering.com/attachments/article/26/Copyright%20Law%20in%20Kenya%20-%20Prof%20Ben%20Sihanya.pdf>> accessed 3 March 2022.

<sup>29</sup> Ibid 31.

<sup>30</sup> Ibid 33.

<sup>31</sup> Kenya Copyright Board, *CMOs Regulations 2018*, Clause 3(2)(e).

<sup>32</sup> Isaya G, 'Uhuru Unveils Measures to Protect Musicians from Exploitation' Newgram (Mumbai, 25 August 2019).

<sup>33</sup> Nzomo V, 'MCSK Board Unceremoniously Removes Long-serving CEO', IP Kenya (2016), <<https://ipkenya.wordpress.com/2016/04/04/mcsk-board-unceremoniously-removes-long-serving-ceo/#more-6188>> accessed 12 January 2022.

<sup>34</sup> Music Copyright Society of Kenya, 'Music Copyright Society of Kenya's Statement on Kenya Copyright Board's Long Standing Unfair and Ill Intended Regulation of Collective Management Organizations' (2021) <<https://mcsk.or.ke/press-release-kenyas-statement-on-kenya-copyright-boards/>> accessed 3 March 2022.

2020. This means that MCSK, KAMP and PRISK operated without a license for failing to meet the terms and conditions for provisional licenses.

The CMOs have termed these licensing conditions as being rigid, impractical, and going against provisions of their Memorandum and Articles of Association. The regulator has also been accused of not exercising good faith, a fact that saw KECOBO revoking CMOs operating license on 23 August 2021. The CMOs are of the view that the Regulator did not avail to them or the public a reasonable justification for withdrawal of their operating license and therefore the move by the regulator was in its entirety unwarranted. They also note that the Regulator failed to renew **in writing** their operating license for 2021 and that the CMOs have operated on the word of the Regulator since January 2021 until the license was withdrawn. Again, there was no reasonable justification for the Regulator's failure to issue **in writing** a renewal of the license. These actions undermine the whole architecture of good governance principles on the part of the regulator.

Dissatisfied with this action, CMOs sought a reprieve from Court where the KECOBO's decision, to revoke their licenses, was suspended. Today, CMOs are operating at the mercy of a Court Order<sup>35</sup>. Despite Court ruling in their favour, the CMOs are smarting from effects of negative publicity arising from KECOBO's action. The public confidence in CMO is at its lowest ebb as evidenced by low collection and compliance levels by users of copyrightable works.

The issue of revocation of licenses has been a perennial occurrence. This has seen MCSK license revoked in 2011, 2017 and 2020. On 10 December 2020, KECOBO informed MCSK that its 2020 CMO license had been revoked, two weeks before it expired. This was done without any justifiable reasons, without giving MCSK an opportunity

to be heard on any allegations that would warrant such an action and failing to abide by any of the laid down procedures within the provisions of The Constitution of Kenya, The Copyright Act and Fair Administrative Actions Act, Laws of Kenya<sup>36</sup>.

These actions, delays, and uncertainties in issuance of a CMO license greatly affects KAMP, PRISK and MCSK in collection of royalties (increases resistance to comply by users), implementation of strategies and general governance. Additionally, the action by the regulator negates 'going concern accounting principle', which assumes that CMOs as business entities will remain in business for the foreseeable future and that they will not be compelled to cease their operations. However, Kenyan CMOs, the going concern principle is compromised by actions of the regulator. This in turn has affected CMOs corporate governance, operational structures, and general capabilities.

CMOs while agreeing that they are obligated to comply with statutory requirements of 70:30 ratio, this means that 70% goes to distribution while 30% goes to administrative cost. In order to mitigate the negative impact on this requirement, the KAMP-PRISK-MCSK tripartite Boards resolved and communicated the resolution to KECOBO that they have decided to operate at the ratio of 50:50 for the time being to mitigate the effects of COVID-19 until royalty collections improve. KECOBO responded with disregard and insisted on their preferred 70:30 ratio without any justification(s) and commitment to help the CMOs overcome the challenges they are facing in royalty collection and levels of compliance by big users like telecommunication providers, broadcasters, and hotel and transport sectors. The police directive had big impact on royalty collections. The revenue generated from PSVs has plummeted from KES 40,556,108.50 in 2019 to KES 10,296,621 in 2020 and

<sup>35</sup> *Kenya Copyright Board v Music Copyright Society of Kenya & two others* (2021) (undecided case).

<sup>36</sup> Kenya Association of Music Producers, Kenya Association of Music Producers, *Submission On Public Notice By KECOBO Requesting Comments From Music Stakeholders* (KAMP, 2021).

zero revenue in 2021<sup>37</sup>.

Furthermore, the requirements have not been met due to low royalty collections which is directly attributed to vicissitudes of COVID-19, withdrawal of police<sup>38</sup> enforcement in 2019, low compliance by the users of copyrighted works, low tariffs which were sanctioned by the regulator in 2020 and lack of support by other government agencies.

Noncompliance with approved tariffs continues to exact a heavy toll on CMOs. CMOs' applicable tariffs are published in the Kenya Gazette after a conscientious public participation. Unlike 2019 tariffs which had relatively higher tariffs, the 2020 tariffs<sup>39</sup> have been decried for adopting flat rate parameters and ignoring previous scientifically based parameters that were largely based on size, dimension of the buildings, lodges, hotels, public utility, and other entertainment spots.

CMOs have been complaining that the current tariffs were imposed on them by the government agencies. The government made a justification that the levels of compliance were bound to rise with reduced and flat rated tariffs. The converse is true, the levels of compliance has considerably gone down with some premises that used to pay over KES one million now being billed for paltry KES 200,000. The flat rate has significantly reduced CMOs revenues since it was a deviation from music licensing principles and standard practice in that the tariffs did not take into consideration the extent to which a premise uses music. Using the 2019 gazette tariff, Intercontinental Hotel in Nairobi's License fee was KES 1,871,384 and was based on surface area (background use) tariff while the 2020 tariff, the license fee plummeted to KES 133,000. Nairobi Hospital whose invoice using the 2019 gazette tariff was KES 664,004.90. The license fee dropped to KES 175,000 using the 2020

gazette tariffs<sup>40</sup>.

CMOs allege that reduced revenues have hamstrung CMOs Board operational efficiency. This has ultimately affected their oversight role in as far as management of resources and meeting statutory compliance requirements are concerned.

CMOs still maintain that 2020 tariffs are laced with some fundamental mistakes of principle, which have led to further market confusion thus undermining streamlined licensing. They hold that while there is consistency in parameter usage in some tariffs and not in others, there is clustering of diverse businesses or non-comparable businesses, and this has affected fair licensing. It has been observed that economic zone principles were not employed throughout retail sector. Additionally, minimum fees per groupings and categories did not incorporate the disparate economic zones and thus should be reviewed to incorporate economic zone principles.

Over the years, the CMOs have been keen on using ICT systems and infrastructure to aid with collections and distribution in a transparent manner. However, this remains an area of concern for the CMOs due to regular system changes with the current system causing some noticeable challenges. In the year 2016, KAMP and PRISK procured the **Distro System** for monitoring and distribution purposes, this was later replaced in 2018, by the **Suave System**. However, the system was shut down in July when the High Court ruled that MPAKE was procedurally and unlawfully licensed by the KECOBO. Following issuance of a joint licence by KECOBO in 2019 Tenacle **Licensing System** which was being operated by MCSK was acquired for the KAMP-PRISK-MCSK tripartite collection activities. The system was short-lived given that in 2020, the current ICT system was procured. There

<sup>37</sup> Kenya Association of Music Producers, Kenya Association of Music Producers, *Submission on Public Notice By KECOBO Requesting Comments From Music Stakeholders* (KAMP, 2021).

<sup>38</sup> Ombati C, 'Mutuyambai withdraws police escorts from MCSK operations as probe commences' the Standard (Nairobi, 3 September 2019).

<sup>39</sup> Kenya Gazette Legal Notice No. 39, the Copyright Act, 2001 (No. 12 of 2001) Joint Collection Tariffs. <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN\\_39\\_2020.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN_39_2020.pdf)> accessed 2 March 2022.

<sup>40</sup> Kenya Association of Music Producers Annual Reports 2019, 2020 and 2021.

have been debates of how this system, which operates on principle of self-licensing, was forced down the throat of CMOs by government authorities. The cost associated with the current system are relatively higher compared to the previous systems a fact that reduces the amount of money that should be distributed to the rights holders. Further to this, the system is to date still not able to monitor and distribute scientifically as initially expected.

It is instructive to note that CMOs license was revoked in August 2021 due to failure to upload their repertoire on ICT system. According to the CMOs, they have been in consultation with the developer of the ICT system (Liberty Afrika Ltd.) and have provided the necessary metadata for uploading to the ICT system for identification of rights holders within respective CMOs mandate. They complain that the developer is yet complete royalty distribution module, which is still under development phase. CMOs hold that they will upload other details to facilitate scientific royalty distribution subject to the court's ruling on the ongoing petition between CMOs and the regulator.

Broadcasters have been accused of failing to comply with gazetted tariffs. Most broadcasters, including the government broadcaster KBC, still owe royalties to KAMP dating back to 2014. At the current value of 2020 broadcast radio tariffs for the three CMOs at 100% compliance from the over 180 radio stations licensed by Communications Authority of Kenya is KES 63,650,000; the broadcast compliance for 2019 was KES eight million, KES 11 million in 2020 and KES 29 million in 2021.

Collectively, broadcasters owe right holders KES 1,096,123,200 between January 2017 and December 2019, a period within which broadcast radio collectively made KES 200,373,000,154 (including 2020) and broadcast TV collectively made KES 214,249,876,912 both totaling to KES 414,622,877,066 in advertisement

revenue.<sup>41</sup> The fee owed to CMOs (KES 1,096,123,200) is only 0.2% of the total *global figure of* KES 414,622,877,066.

Regarding marketing activities, CMOs maintain that they have developed animated promotional video clips that demonstrate how to access the online licensing platform via USSD code \*553# and web platform [www.kpmlicensing.co.ke](http://www.kpmlicensing.co.ke) in both English and Kiswahili. These video clips have been shared on social media platforms before and would continue being shared to promote the online ICT licensing system. Other promotional materials including digital posters have also been developed and have been used for promotional purposes of the ICT licensing system on social media platforms.

Concerning tax arrears disputes, KAMP and PRISK successfully challenged the Kenya Revenue Authority tax assessment before the Tax Objections Tribunal. The matter has since been concluded with the ruling given in CMOs favour<sup>42</sup>. The tribunal held that CMOs are companies limited by guarantee, which fall in the same docket as non-profit companies, clubs, charitable trusts and other similar set, which benefit from the VAT and Income Tax exemptions. The ruling further noted that pursuant to section 21(2) of the Income Tax Cap 470, a trade association can choose or elect, by notice in writing to the Commissioner of Domestic Taxes, to be considered for carrying out business chargeable to tax in respect of any yearly income. However, CMOs have not written to the Commissioner electing that the years under assessment be chargeable to tax<sup>43</sup>.

### 3. CONCLUSIONS

From the arguments proffered above, it is a clear that CMOs in Kenya and their regulator, the KECEBO, have a case to answer in as far as application of corporate

<sup>41</sup> PwC, *Media & Outlook Report* (PwC 2019).

<sup>42</sup> *Kenya Association of Music Producers v Kenya Revenue Authority* (2020) Tax Appeals Tribunal Appeal No. 13 of 2020.

governance principles is concerned. It is apparent that the sector has been dogged by controversies as a result of actions of the regulator on the one hand and the actions of the CMOs on the other. It has been demonstrated that CMOs are expected to operate within strictures and exactitudes of corporate governance. Corporate governance cannot be gainsaid. It is a glue that weaves and allows interoperability between different organs in an organization. It allows realization of vision and mission of organization as well as creating value to member-based organizations such as CMOs. It has been established that the concept of corporate governance will suffer injury if there is strained relationship between the administrative regulatory body such as KECEBO and regulated entities in this case CMOs in Kenya. The study shows that a forensic audit has indicted CMOs for failing to adhere to the dictates of corporate governance. In retrospect it has also been established that CMOs are hemorrhaging from the actions of government entities to wit, copyright regulator, police service, and other regulatory bodies. These factors have led to apparent poor performance of CMOs in Kenya with collection going under leaving them with nothing to distribute to the right holders.

#### **4. RECOMMENDATIONS AND WAY FORWARD**

It is imperative that KECEBO and CMOs should bury the hatchet and identify a formula for working together in an environment devoid of acrimony which has characterised Kenya's copyright sector for decades now.

To ensure efficient management of royalties, KECEBO should devise strategies on implementing corporate governance management changes envisaged under the Constitution, Company's Act, Copyright Act, and copyright regulations. Articles 10 and 73 on the national values and principles of governance and Article 232 on values and principles of public service behoove both KECEBO and CMOs to work together in the interest of right owners and consumers of copyrighted works.

It is in this spirit that the KECOBO should enhance existing copyright regulations guidelines, policies and manuals on corporate governance, for CMOs. These corporate governance tools should be anchored on the 2010 Constitution, Copyright Act, specifically corporate governance reforms applicable to CMOs under sections 46E, 46F and 46G of the Copyright Act and all other relevant laws.

To enhance corporate governance, other government agencies should come to the aid of CMOs. To achieve this goal, KECOBO, CMOs, other government agencies such as police, should work in unison to realize constitutional provisions especially Article 40(5) which obligate State to support, promote and protect the IP of the people of Kenya. The regulator should carry out campaigns to ensure that there is top of mind awareness regarding respect of copyright and related rights. KECOBO should continuously create awareness of member rights and organize member seminars and workshops.

To address loopholes identified in the forensic audit, CMOs should continue to improve their systems to ensure they collect and distribute effectively and efficiently. They should also ensure that they afford their members the opportunity for a fair and balanced representation on the Board taking into account the direct economic interest a member has in the functioning of the organization.

The CMO Boards should strive to adhere with the principles of corporate governance. They should deploy strategies for addressing all 13 issues that were identified by the forensic audit report. Board Charter, Code of Conduct and policies, should guide specifically the Board. The Boards should ensure that all necessary policies are put in place. The Boards should also address all structural issues by establishing statutory board committees such as audit and legal committee as well as stabling internal audit at individual CMO level and at KPM level.

To avoid disruption of CMOs operations, the law should be amended to allow for a three-year license instead of one-year license. This will enable CMOs to have realistic and meaningful strategic planning cycles that will allow them to execute planned activities within licensing cycle.

On tariffs, there is a consensus that a flat rate is not sensitive to practical circumstances and leads to dissention or conflict among or between users. New tariffs based on scientific formula should be formulated and implemented.

The systematic leakages in the current copyright regime should be sealed through adoption and operationalization of good governance, entrenchment of transparency and accountability by CMOs. Entrenchment of these values will bequeath to this industry a veritable gain to copyright holders, users of copyrightable works and CMOs in equal measure.

[Through a letter dated 28 August 2019, the Inspector General of National Police Service instructed Police officers to stop supporting the CMOs in enforcing compliance to the Copyright Act. This directive by the IG was based on a misrepresentation of how the CMOs work and KECOBO, the Regulator, did not take any initiative to address the problem in spite of numerous pleas from CMOs, knowing very well the implications of such a directive on the collection of royalties by CMOs. Unfortunately, the situation in Kenya is that CMOs require the help of National Police for the public to comply with their obligations as provided for in the Copyright Act.

Section 46A of the Copyright Act (2001) provides that the tariffs to be used by the CMOs shall be published in the Kenya Gazette by the Cabinet Secretary.]

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