

# ALAI Congress 2019 in Prague

## Managing Copyright

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### *Questionnaire*

*When drafting the national report, please: quote to the most relevant literature; refer to court decisions, wherever they exist; add a list of the quoted literature and of the abbreviations used; use the consistent terminology within your report; explain a special terms that might not be known outside your jurisdiction when you first use them; add the text of the relevant statutory provisions (translated into English or French) in the footnotes.*

## **1. General Overview of the Collective Management**

### ***1.1 Can collective management organizations be described as monopolies (natural monopolies or monopolies set by the law) in your jurisdictions?***

Collective management organizations are monopolies set by the law except for CMO for authors of music. Article 105 of the Korea Copyright Act provides that any person who intends to manage a CMO shall obtain permission by authorization from the Ministry of Culture, Sports and Tourism (hereinafter the MCST) as prescribed by Presidential Decree. It is very difficult to get authorization from the MCST for managing the service. Therefore, the Korean CMO system is considered a monopoly but there is one exception in the area of authors of music.

### ***1.2 Does your system make difference between the voluntary, extended (if any) and mandatory collective management? Which rights are managed under which regime?***

Korea has both voluntary and mandatory collective management, but it does not have any extended management. Korea has 13 voluntary CMOs for tariffs and 3 mandatory CMOs for remuneration (“levies”). There are differences between voluntary and mandatory collective management as follows:

1. Establishment: A person to manage a voluntary CMO must obtain permission by authorization from the MCST, whereas mandatory CMOs must be establishment with designation of the MCST.
2. Subject to management: Voluntary CMOs collect and distribute tariffs for the use of copyrighted works. Mandatory CMOs collect and distribute levies (remuneration) from two areas - (a) for use for the purpose of school education, etc. (in the area of exception and

limitation of copyrights) and (b) for the use of the rights of performers and of record producers (regarding relation rights).

3. Obligation : Quarterly, voluntary CMOs are recorded (in print and electronically). This list of works is managed in accordance with Presidential Decree and open to the public during business hours (Article 106(1)). Also, when users can make written requests for copies of CMOs to be used as legal evidence, CMOs must provide users with a copy within a reasonable period of time unless there is a justifiable reason not to do so (required by Presidential Decree)(Article 106(2)).

However, mandatory CMOs do not have the above-mentioned obligations.

The MCST supervise both voluntary and mandatory CMOs. As part of the supervision, the MCST may demand that a CMO submit an updated business report (Copyright Act Article 108(1)). Also, in order to promote the protection of rights and interests of authors and the convenient use of works, the MCST may issue necessary orders concerning copyright management services (Article 108(2)).

### ***1.3 Is the competition between collective management organizations permitted in your jurisdiction? If so, under which circumstances, how often and in which fields (e.g. tariffs, service for users, available repertoire, service for rightholders, amount of deductions) the competition may occur.***

In Korea, there is one CMO for each copyright field (in order to reduce competition). However, there are two CMOs for authors of music. As a result, there is much competition concerning the management of music authorship and monetary royalties.

### ***1.4 How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one organization?***

There is no extended collective management in Korea. Korean mandatory CMOs shall be established with the designation of the MCST. However, the MCST may revoke the designation if the organization, under Paragraph (5), falls under any of the following Subparagraphs (Article 25(5)):

1. Where an organization fails to satisfy the conditions of being a CMO (Answer to question 1.5);
2. Where an organization violates work regulations with regard to remuneration; and
3. Where there is a concern that the interests of a remuneration rights holder could be harmed due to the organization's suspension of its duties with regard to remuneration for a considerable period

of time.

***1.5 Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity (profitable entities such as business corporations), or by the state agency (such as the IP Office)?***

Non-profit CMO conduct the licensing of rights

Korean CMOs are entities that satisfy the following conditions (Article 105(2))

1. They consist of the rights holders of copyrighted works, etc.;
2. They are not for the purpose of profit making; and
3. They have ample capability to carry out their duties, including collecting and distributing royalties.

***1.6 Are the collective management organizations obliged to contribute to cultural development of the society? If so, in which areas and how is the cultural support implemented (e.g. management of social or cultural funds)? Is the creation of such funds and their allocation limited by law?***

There is no provision in the Copyright Act that CMOs shall contribute to the Cultural development of the Society. However, mandatory CMOs for levies may use undistributed remunerations, for which notification was made five or more years ago, for the public interest. The creation of such funds and their allocation is not limited by law but it must be obtained by the authorization of the MCST (Article 25(8)). Examples of public interests include the followings:

1. Copyright Education, Promotion and Research
2. Managing and providing copyright information
3. Support of work creation activities
4. Copyright Protection Project
5. Creative rights-and-interest projects
6. A Project that activates the distribution of compensation to the beneficiary
7. A project that promotes the use of copyrighted works, and promotes fair use

**2. Collective Management Organizations and Authors (Right-holders)**

***2.1 Do the authors/rightholders have a legal right to become represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?***

There is no provision in the Copyright Act that a CMO shall accept every author as a member. Even if a CMO rejects an author to become a member, there is no remedy for it.

***2.2 How does the CMO resolve a conflict between rightholders in case of a “double claim”? Are the rightholders referred to court or is there an ADR at hand?***

When a CMO faces a conflict between authors in the case of a “double claim”, the CMO can make a choice of referring it to court or of resolving it by an ADR.

***2.3 How can the authors (rightholders) participate in the activities of the collective management organization? Under which circumstances can they be elected into the management or controlling boards? Are there pre-conditions, such as a minimal amount of remuneration from CMO, to become elected?***

Authors may participate in the activities of a CMO by being board members, executives, or by being the president of the CMO. The president and executives of the CMO receives a regular salary, however board members receive some periodic remuneration whenever they attend a meeting of the CMO.

***2.4 How is the remuneration distributed amongst authors? How can the authors intervene in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?***

According to the provisions of distribution, CMOs distribute the collected levies according to their regulations of distribution. The distribution regulations are subject to approval by the Board of Directors and the General Assembly. In the case of taxation, CMOs are non-profit organizations, so they do not levy taxes when collected, but they are taxed in the process of distribution. However, authors cannot participate in the process of formulating distribution schemes.

***2.5 How does the law or legal practice reflect the will of the author (“autonomy of will”) to grant licenses individually? Is it allowed for the user to obtain the license directly from the represented author? Are such direct licenses null and void or are they valid, while the user still pays remuneration to the CMO? Please elaborate for each regime of the collective management.***

Under Korean CMO schemes, if an author becomes a member of a CMO, their copyrights are assigned to the CMO. It means that the owner of the copyrights is transferred from the author to the CMO. Therefore, the author is not entitled to license copyrights to any user. As a result, a user

is not allowed to obtain licenses directly from an author who is a member of the CMO. Licenses issued by the author become null and void. The user must get a license from the CMO. Meanwhile, authors still retain their moral rights even after their copyrights are assigned to the CMO. Therefore, users must obtain the license of moral rights from authors.

**2.6 Do CMOs allow the rightholders to grant a non-commercial license for their work? Are so called “public licences” used in this context? Are there any examples concerning the non-commercial distribution of the protectable subject matter by the CMOs in your country?**

It is available not explicitly but customarily.

### **3. Collective Management Organizations and Users**

**3.1 How does your jurisdiction prescribe private copying remuneration (“levies”)? Is the general principle of freedom of a contract respected in this area (i.e. is the remuneration a subject of the negotiations between users and collecting societies) or is the size of the private copying levy stipulated by any legislative act (such as governmental decree)?**

A user can reproduce by himself a work already made public for the purpose of his personal, family, or other similar uses within a limited circle, not for profit purposes. But this shall not apply to reproduction by a photocopier set up for public use(Article 30). Also, Korea does not provide private copying levies.

**3.2 Nowadays, the major use occurs on the Internet. Has there been any attempts in your country to set a private copying levies collected by CMOs or by different entities or state for the use of protected subject matters on the Internet (e.g. in the form of a so-called “flat fee” or a special tax)?**

No provisions.

**3.3 How are the tariffs set (by decision of the CMO, by negotiation with users, consumers or others)? What are the statutory criteria for the tariffs (e.g. assessing the value of the rights by experts, proportionality etc.)? Do they require approval of a regulatory authority (such as an IP Office, Ministry of Culture etc.)? How can they be contested by the users? By general courts, by special ADR procedure or specialized tribunals?**

First of all, CMOs negotiate with users about the tariffs. Then, CMOs submit the negotiated tariffs to the MCST. If the MCST endorses them after reviewing on the tariffs, they are set.

***3.4 Does the competition law in your country recognize abuse of dominant position of a CMO? Are there any examples (cases) that the CMO has been held responsible for the distortion of the competition?***

The Copyright Act is usually an exception to the Act on Monopoly Regulation and Fair Trade of Korea (Article 59). However, there have been cases in which the Antitrust Act applied to excessive rights abuses.

***3.5 In some jurisdictions the problem may be the non-transparency of tariffs. Are there any rules on the statutory level or as the outcome of the self-regulatory activities which concern the transparency of the tariffs? Has there been any development in this area in recent years?***

In Korea, the distribution of remuneration is always controversial over the transparency even if most COMs have provision of transparency in their operational rules. In particular, mandatory CMOs is problematic as it fails to distribute almost half of the collected levies and uses the undistributed levies for public interest

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