

ALAI Congress 2019 in Prague

Managing Copyright

Israel ALAI response to *Questionnaire*

Response prepared by Tony Greenman, Israel ALAI Chairman¹

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?

Under the Economic Competition Law, the Director of the Economic Competition Authority may declare a CMO to be a monopoly. The Authority has made two such declarations regarding: a) ACUM, the Society of Composers, Authors and Music Publishers; b) the Israel Federation of Phonograms and tapes (IFPI Israel).

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

Most rights are managed on a voluntary basis. However, two rights are managed under mandatory extended collective licensing. Those rights are:

- The rights of Performers to equitable remuneration for the public showing or playing of their visual or audio, or audio-visual performances.
- The rights of authors, performers and producers to compensation for the private and personal copying of works and performances and phonograms.

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.

¹ Tony Greenman Law Offices, Adjunct Professor of Law, Tel Aviv University.

Competition is possible and is not barred by law. However, CMO's must receive a permit to operate from the Economic Competition Tribunal, or an exemption from the Director of the Economic Competition Authority.

At present, two CMO's manage rights in works, although there is generally a distinction between their repertoires. ACUM manages right in musical works and Lyrics and some other literary works. TALI, the Collecting Society of Film and Television Creators manages the rights in cinematic works, namely, screenplays and film direction.

There are also two CMO's representing the owners of rights in phonograms, namely IFPI Israel and "Hapil", the Federation for Israeli and Mediterranean Music.

Finally, two CMO's represent performers. Escholot represents actors and singers. Eilam represents instrumental musicians.

Because of the fragmented collective management landscape, user organizations are lobbying for legislation to concentrate the licensing and collection of collectively managed rights into the hands of a single organization.

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?

Performers equitable remuneration: The law mandates that the statutory rights of performers to equitable remuneration for the public showing or playing of their visual or audio, or audio-visual performances will be administered by a single CMO "which represents the largest number of performers and holders of performers' rights." In practice, the two CMO's in this field have formed a jointly owned and run CMO for this purpose, called "the Representative Organization of Performers in Israel."

Private Copying Compensation: the law provides that the compensation for private and home copying is to be paid in three equal parts to the CMO representing the majority of copyright owners, the CMO representing the majority of owners of performers' rights and the CMO representing the majority of producers of sound recordings together with the society representing the majority of audiovisual producers. These CMOs must be approved by the Minister under the law. Since a court ruling last year, the copyright owner's share is paid directly in two parts to ACUM, which represents composers, authors (mostly poets and lyricists) and music publishers (2/3) and TALI, which represents audiovisual authors (1/3).

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)?

Collective Licensing is conducted exclusively by non-profit CMO's

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?*

The CMO's are not mandated by law to contribute to cultural development. In practice, some do in a small way. For instance, ACUM grants an annual prize to creators in the field of music and has a fund for creators in need. There is not a limit on such activities.

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?*

Under the rules imposed on them by the Competition Tribunal and Authority, CMO's must be open to all rightsholders in the area in which the CMO manages rights.

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?*

Most CMO's have ADR at hand. In fact, some have compulsory arbitration for some kinds of disputes regarding the allocation of royalties.

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?*

Each CMO has different rules regarding the right to serve as a director. CMO's that manage rights of multiple sectors of rightsholders normally reserve a certain number of positions on the board of directors for each sector. For instance, ACUM reserves a certain number of positions for each of the

sectors of composers, authors and publishers; Tali reserves one-third of the positions for film and tv directors and one third for screenwriters (the other third is reserved for public directors).

Those CMO's that operate under permits or exemptions under the Economic Competition (*i.e.* all CMO's, except for those representing performers) are subject to a condition that at least one-third of the board must be comprised of "public directors", who have no personal interest in the CMO and have been approved for this post. As regards eligibility for election, some require the signature of a minimum number of proposers (TALI), while the IFPI has positions reserved for founding members.

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?

Remuneration is distributed by rules set by the board of directors, or a committee set up for this specific purpose. The rules are quite complex and take into account, depending on the CMO, various factors such as air or screen time (length of play/time of day or night/prime or non-prime time) and genre of the work (which is thought may be an indication of the time dedicated to production of the work), channel (in connection with TV and radio use). Eshcolot, the larger of the performer's rights organizations has a rule whereby the remuneration for airing of a performance decreases after a certain number of runs of the program in which it was included. The rules must be non-discriminatory.

Recipients must pay their own taxes, but in some circumstances, if they do not have an income tax account, the tax will be deducted at source.

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.

Authors have a right to grant individual licenses. Some CMO's require prior give written notice to the CMO of their intent to do so. To the extent that an author has granted an individual license, the CMO may not collect for that work, and, if the use is covered by a blanket license, the use will not give rise to a right of participation in the distributions in relation to the said blanket license (no double payments). However, in the case of an individual synchronization license, for example, for a feature film, the rightholder may still receive remuneration for other uses of the work, such as broadcast.

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?

The rules regarding individual licenses would apply here, so that the rightsholder has a privilege to grant a gratis license. This is often done in the field of TV and Film where a rightsholder may have an interest in granting a synchronization license, with a view to profiting from the ensuing public performance or broadcast royalties.

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)?

The remuneration is paid from government funds and its size is set by a governmental committee, comprised of representatives from the ministries of justice, culture and finance. Unfortunately, because the remuneration is paid only in regard to analog media and not at all in regard to devices, the amount is quite insignificant. This is a major concern of CMO’s at present.

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)?

This is a subject that is very much on the agenda of the CMO’s and other author-performer-producers’ organizations. Unfortunately, the current private copying remuneration is not paid in respect to copies made via download over the internet. Furthermore, as is well known, the biggest losses to rightsholders are caused by illegal streaming of content. Any attempts to impose a flat fee or special tax on access providers, or host sites in order to compensate for that must overcome government aversion to imposition of new taxes, as well as the lobby of the internet giants.

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?

Tariffs for general users are set by the CMO's and may be challenged by users, or user organizations in the District (second tier) Court, or through arbitration. In the interim, a temporary tariff will be in effect. Tariffs with broadcasting organizations are usually negotiated between the CMO and the broadcasters. In cases where the parties cannot reach an agreement, the dispute may be resolved in court, or by an arbitrator.

A variety of methodology is used by the CMO's in tariff setting, including a percentage of revenue (often based on the 10% pro rata temporis rule with certain adjustments), tariff by size of audience, or capacity, or area and other methods.

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?

CMO's are subject to the prohibition of abuse of a dominant position. To date there are no recorded instances where they have held to be in abuse.

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?

CMO's under the regulation of the Economic Competition Authority are now required to publish their tariffs on a publicly accessible website. However, individually negotiated tariffs, as well as those set through arbitration may be unpublished. CMO's may not discriminate between identical types of users in tariff setting.

Lucie Straková (Masaryk University), Pavel Koukal (Masaryk University), Rudolf Leška (University of Finance and Administration)