

# 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?

**The Spanish Copyright Act<sup>1</sup> (“LPI”) does not establish any monopoly in terms of collective management. Any entity that meets these requirements can manage intellectual property rights as CMO. However, due to the structure of the collective management market, the eight existing Spanish CMOs are in a situation of "natural monopoly" in their respective fields of activity, with the (relative) exception of *Sociedad General de Autores y Editores* (SGAE) and *Derechos de Autor y Medios Audiovisuales* (DAMA) (which they compete in the market for audiovisual media copyright management).**

Art. 147 LPI<sup>2</sup> establishes a series of requirements that must be met by an entity to be recognized as CMO. In essence, there are two characteristic features of the Spanish CMO: firstly, they are non-

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<sup>1</sup> Royal Legislative Decree 1/1996, of April 12, approving the revised text of the Copyright Act, regulating, clarifying and harmonizing the current legal provisions on the subject.

<sup>2</sup> Art. 147 LPI: "The legally constituted entities that have establishment in Spanish territory and intend to dedicate themselves, on their own or another's behalf, to the management of exploitation rights or other patrimonial rights, for the account and in the interest of several authors or other holders of intellectual property rights, must obtain the appropriate authorization from the Ministry of Culture and Sports, in order to ensure adequate protection of intellectual property. This authorization must be published in the "Official State Journal".

The collective management entities are the property of their partners and will be subject to their control, they cannot be for profit and, by virtue of the authorization, they can exercise the intellectual property rights entrusted to their management by their holders by means of a contract. management and shall have the rights and obligations set forth in

profit nature entities and, secondly, they need to obtain an authorization granted by the Ministry of Culture and Sports (“MCS”).

On the other hand, although the Spanish legislation establishes certain mandatory collective management rights, this collective management is not legally attributed to a single CMO for each of these rights.

Currently, eight CMO have been authorised by the Spanish Ministry of Culture:

- Sociedad General de Autores y Editores (SGAE) <http://www.sgae.es>
- Centro Español de Derechos Reprográficos (CEDRO) <http://www.cedro.org>
- Asociación de Gestión de Derechos Intelectuales (AGEDI) <http://www.agedi.es>
- Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) <http://www.aie.es>
- Visual, Entidad de Gestión de Artistas Plásticos (VEGAP) <http://www.vegap.es>
- Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) <http://www.egeda.es>
- Artistas Intérpretes, Sociedad de Gestión (AISGE) <http://www.aisge.es>
- Asociación Derechos de Autor de Medios Audiovisuales (DAMA) <http://www.damautor.es>

In addition, Euskal Kulturgileen Kidegoa (EKKI), <http://ekki.eus>, has been authorized by the Basque Autonomic Government to manage rights of basque authors, acting exclusively or mostly in the Basque Autonomous Community.

It has to be recalled that the natural monopoly exists in the exploitation of certain economic activities and public services in which, due to the phenomenon of decreasing marginal costs, companies have to be large, and a single company is sufficient to supply the entire market. This usually occurs in markets where large investments are needed whose profitability is only possible if the market is in the hands of a single operator. The natural monopoly occurs, therefore, in those markets where the most efficient way to allocate resources is the existence of a single operator.

In the field of CMOs, the monopoly makes it possible to take full advantage of the economies of scale that imply that the average cost of managing the works is reduced the greater the repertory administered. Since economies of scale depend on the aggregation of as many rights as possible, efficiency will be greater the greater the volume of rights managed.

Despite the fact that these requirements have been qualified by the Spanish competition authority, *Comisión Nacional de los Mercados y de la Competencia*<sup>3</sup> (CNMC) as legal barriers for the entry into the market of collective management<sup>4</sup>, the Spanish collective management system actually

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this title and, in particular, make effective the rights to equitable remuneration and compensation in the different cases provided for in this law and to exercise the right to authorize cable distribution. "

<sup>3</sup> Previously named *Comisión Nacional de la Competencia* (CNC)

<sup>4</sup> National Competition Commission, *Report on collective management of intellectual property rights (Informe sobre la gestión colectiva de derechos de propiedad intelectual)*, December 21th, 2009, p. 43-51; Spanish Competition Authority, *Agreement by which a report is issued on the Draft Bill amending the LPI, approved by Royal Legislative Decree 1/1996*,

responds to a sort of natural monopoly derived from the effects of network and attraction that characterize the bilateral or two-sided markets.

The two-sided markets have as a characteristic that there are two groups of "users" or "clients" different from the same platform that will also serve as an intermediary between both. The particularity that exists in this type of markets is that each of the categories of "users" generates positive externalities on the other.

The main difference between two-sided markets and common markets is that in bilateral markets the optimum behaviour of the platform is not to maximize its benefit on each group of users separately, but to optimize the efficiency of the system, even considering optimal behaviour to subsidize a group of users, since due to this profit is achieved for the other group.

Collective management of intellectual property rights is a good example of a two-sided market. The groups of users involved in the characterization of this market are, on the one hand, the holders of rights and, on the other, the licensees on these rights.

CMOs constitute key elements of this system since they will act as intermediary platforms between both groups (right-holders and licensees). In other words, CMOs will offer, on the one hand, services for the administration of rights to the right-holders, and, on the other, they will be able to grant licenses for the use of the works to the licensees. The more right-holders that entity attracts, the more attractive it will be for plaintiffs and vice versa.

Therefore, due to this structure and the network effects created by the CMO (platform), there is a tendency towards a monopolistic situation. In summary, each CMO can be considered as a paradigmatic example of an intermediation platform in a two-sided market, which, due to its structural conditions, tends to be (or is) a natural monopoly.

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

Yes. Spanish law differentiates between voluntary collective management (VCM) and mandatory collective management (MCM). However, the Spanish legal *acquis* does not foresee the concept of extended collective management

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*of April 12, and by which the Directive 2014/26 / EU of the European Parliament and of the Council, of February 26, 2014, on the collective management of copyright and related rights and the granting of multi-territorial licenses of rights on musical works for its online use in the domestic market is incorporated to the Spanish legal system (Acuerdo por el que se emite informe relativo al Anteproyecto de Ley por el que se modifica el LPI, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril, y por el que se incorpora al ordenamiento jurídico español la Directiva 2014/26/UE del Parlamento Europeo y del Consejo, de 26 de Febrero de 2014, relativa a la gestión colectiva de los derechos de autor y derechos afines y a la concesión de licencias multiterritoriales de derechos sobre obras musicales para su utilización en línea en el mercado interior), IPN / CNMC / 040/17, November 30, 2017, pp. 8-11.*

Generally speaking, an almost perfect parallelism can be established between exclusive rights and VCM, on the one hand, and rights of simple remuneration (*id est* to obtain a remuneration or equitable compensation) and MCM, on the other hand.

As to those rights that are subject to VCM, the right-holder may decide whether to manage the right individually or to entrust the management of the right to a CMO. By contrast, rights subject to MCM may only be exercised by their right-holder through a CMO.

Our legislation only allows CMOs that are established in Spanish territory and have been authorised by the Ministry of Culture and Sports to manage MCM rights (art. 151.4 of the LPI).

The following rights of simple remuneration must be subject to MCM:

- The resale right for the benefit of the author of an original work of art (art. 24.10 LPI)<sup>5</sup>;
- The right to an equitable compensation for private copying (arts. 31.2 and 25 LPI);
- Several remuneration rights regulated within the scope of the limitations of quotations and summaries with educational and scientific investigation purposes (arts. 32.1 II, 32.2.I and 32.4 LPI);
- The equitable remuneration linked to public lending in certain establishments (art. 37.2 LPI);
- The rights of audiovisual authors to remuneration for the rental right and for certain forms of communication to the public (arts. 90.2, 3 and 4 LPI);
- The rights of performers and producers, both musical and audiovisual, in relation to several acts of public communication of their respective recordings and fixations (arts. 108.4 and 5 and 116.2 and 122.2 LPI);
- The right of performers to an equitable remuneration regarding the rental of their performances fixed in phonograms and audiovisual recordings (art. 108.3 LPI);
- The right of musical performers to obtain an additional remuneration vis à vis phonogram producers (art. 110 bis.2 LPI).

In addition to the aforementioned, the right of cable retransmission is also subject to MCM, despite being an exclusive right (art. 20.4 b/ LPI)<sup>6</sup>.

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<sup>5</sup> Until the latest reform of the LPI, that took place in March 2019, the resale right for the benefit of the author of an original work of art was object of voluntary collective management in Spain.

<sup>6</sup> As far as cable retransmission rights, in accordance with Directive 93/83/CEE of 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (“Directive 93/83/CEE”), it is foreseen that, where a right-holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights (art. 20.4.c/ LPI).

The remaining exploitation modalities that fall under any exclusive right (reproduction, distribution, public communication and transformation) may be subject to VCM.

The following two remuneration rights are also subject to VCM:

- The right to an equitable remuneration regulated under art. 33 LPI regarding works and articles on topical subjects disseminated by the media;
- The equitable compensation for the use of orphan works once the right-holder has requested the termination of the consideration of the work as orphan (art. 37 bis.7 LPI).

*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 right-holders, amount of deductions) the competition may occur.*

**Yes. Since 1987, our legislation admits the possibility of creating CMOs, regardless of the existence of prior organisations operating in the same sector. However, the capacity to operate from the Spanish territory as a CMO is subject to obtaining an authorisation from the MCS, which requires the prior accreditation that the applicant meets the conditions necessary to ensure an effective administration of the rights.**

Since April 2018, following the modification of the LPI as per Royal Decree-law 2/2018 and Law 2/2019<sup>7</sup>, our legislation foresees the possibility for the following bodies to also render services in Spain:

- Legally established CMOs without an establishment in Spanish territory, whose obligation regime varies if such organisations have an establishment in another EU Member State or in a Third Member State:
- Independent management entities (“IME”), whose obligation regime is not affected by their place of establishment.

In both cases, in order to operate in Spain, CMOs that are not established in our territory and independent management entities must communicate the start of their activity in Spain to the MCS.

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<sup>7</sup> Real Decreto-ley 2/2018, de 13 de abril, por el que se modifica la LPI, y por el que se incorporan al ordenamiento jurídico español la Directiva 2014/26/UE del Parlamento Europeo y del Consejo, de 26 de febrero de 2014, y la Directiva (UE) 2017/1564 del Parlamento Europeo y del Consejo de 13 de septiembre de 2017 (“Directive 2014/26/UE”) (“Royal Decree-law 2/2018”); and Ley 2/2019, de 1 de marzo, por la que se modifica la LPI, y por el que se incorporan al ordenamiento jurídico español la Directiva 2014/26/UE (“Law 2/2019”).

As neither of these bodies are *authorised* entities, they may only exercise the intellectual property rights that have been entrusted to them voluntarily by their right-holders and they may not exercise the rights to an equitable remuneration or compensation.

This means that there are greater possibilities for competition to take place between collective management organisations regarding voluntary collective management rights than in the scope of mandatory collective management rights.

In either case, the competition among collective management bodies may only occur on a repertoire level, as the current state of our legislation does not permit that a same right, over a same work or other subject-matter, in favour of a same right-holder, be simultaneously managed by more than one entity. This occurs not only regarding exclusive rights subject to VCM, but also regarding MCM rights, as tariffs must always be adjusted in light of the “scope of the repertoire” of the managing entity (art. 164.3.c/ LPI), and the right-holder of a MCM right must decide which of the different entities that manage a same category of rights represents him or her (art. 20.4 c/ LPI).

Nevertheless, in those scenarios in which more than one entity exists, in order to attract a larger repertoire, new entities offer right-holders more beneficial conditions, normally in the form of a lower administration discount, as increasing their tariff could entail a loss of their competitive advantage in the user market. Where an incoming organisation has reached a certain level of consolidation, it usually loses its incentives to compete through the tariff, which is charged to users. Any eventual increase in tariffs by incoming entities should be met with correlative decreases of the tariffs by the incumbent entities, whose repertoire has decreased in favour of the former, even though this equilibrium is not always produced in an immediate or perfect manner.

The matter at hand is also related to the level of substitutability of the repertoire at issue. It is easier for competition to take place when using musical works for a musical setting service than when using audiovisual repertoire to feed a television programming. Whereas in the latter case the user shall need to aggregate the portions of repertoires administered by different existing organisations, in the former case it may suffice for the user to use the repertoire of only one of the several organisations operating in the sector. Where the repertoire is more substitutable for the user, the market will tend to a higher competition among tariffs and the price of the service rendered to the user, and vice versa.

The situation in Spain is of scarce competition between CMOs and of a timid appearance of certain IMEs that begin to compete in some areas with a few CMOs.

The main area of competition is found in the sector of audiovisual authors (specifically, screen play writers and directors), where two organisations (SGAE and DAMA) have been competing since 1999 (when DAMA was authorized), reuniting a variable portion of the national and international repertoire.

On the other hand, as a consequence of the recent start of activity in Spain of two IME in the area of musical works (Soundreef y Unison), competition has arisen for the organisation that traditionally managed the rights of musical authors and editors.

A third IME exists in Spain, (MPLC), representing the main audiovisual producers regarding their rights of public exhibition of audiovisual productions through any means, including DVDs, downloads, streaming or television broadcasting, without charging a price of entry. This management strip could partially compete with EGEDA, the CMO in charge of managing the right of retransmission in favour of such right-holders.

On the other hand, a certain type of audiovisual productions (music videos) are managed by the CMO that represents phonographic producers (AGEDI) and not audiovisual producers. The above construes a case where repertoires are not substitutable and therefore no real competition exists, as the organisation representing audiovisual producers does not manage rights over music videos whereas the organisation representing phonographic producers does not manage rights over any audiovisual recordings other than music videos.

Finally, an area of controversial competition exists between two organisations which manage exclusive author rights over audiovisual works: whereas one of the entities that operates in the sector of audiovisual authors (SGAE) incorporates those rights in its tariff, in the understanding that authors of the audiovisual work may have reserved such rights in their agreement with the producer, the organisation representing audiovisual producers (EGEDA) appears to assume that those exclusive author rights are granted to the producer by virtue of the agreement entered into with the author, and the producer can therefore grant the management of such rights to the CMO. To the extent that it is not clarified whether the rights belong to the author or the producer, or in which percentage they belong to each party, an overlap in the management over a same object could be taking place.

Other than the aforementioned, there are currently no other cases of competition in the Spanish collective rights management market.

#### ***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?***

**As already indicated in section 1.2, the concept of extended collective management is not contemplated in the Spanish legal acquis. Nevertheless, Spanish LPI establishes several instances of mandatory collective management, reserved to CMO, regardless of any mandates from copyright holders.**

**Any CMO that has been duly authorised to administer the MCM rights of a certain category of right-holders is legitimised to exercise the rights legally granted to it and to enforce them upon all sorts of administrative or judicial proceedings, with the sole requirement of proving its legitimacy with a copy of its bylaws and a certification of its administrative authorisation (art. 150 LPI).**

The law does not expressly foresee a solution for the case where two or more CMOs have been authorised to administer the same mandatory collective rights belonging to the same category of right-holders. In such case, one must assume that **any duly authorised CMO may administer the rights foreseen in its bylaws**. However, a user that has already paid a CMO the amounts corresponding to mandatory collective management rights of a certain category of right-holders may, on the basis of such prior payment, oppose a claim for the payment of the same rights to a second CMO. In light of the above, it is essential that each CMO clearly inform on the amplitude of its administered repertoire.

Bear in mind that in Spain, rights subject to mandatory collective management (MCM) may only be administered in Spain by CMOs with an establishment in Spanish territory and authorized by the Spanish government. That is, CMOs that do not have an establishment in Spanish territory and IMEs operating in Spain may only administer VCM rights, but may not compete in the management of MCM rights.

On the other hand, through the execution of representation agreements, right-holders may grant the administration of their rights, subject to either VCM or MCM, to a specific CMO. In such cases where a CMO has entered into a representation agreement with the holder of a particular MCM right, its legitimacy to manage such right will be clear and uncontested. Therefore, users must pay each CMO the remuneration or compensation for the use of their respective repertoires.

### *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)?*

**Under Spanish law, licenses of collective rights may be granted either by CMOs or by IMEs.**

CMOs established in Spain and subject to an authorisation from the MCS must be organised on a not-for-profit basis (art. 147 LPI). This requisite is shared by CMOs that are established in another Member State of the European Union, as regulated by Directive 2014/26/EU<sup>8</sup> (art. 3.a/ii/). On the other hand, IMEs, by definition, are established on a for-profit basis (art. 153.2.b/ LPI). Finally, CMOs established in a non-EU Member state may be organised on a for-profit or non-for-profit basis as long as they meet the requirements established in their state of origin in order to operate as a CMO.

### *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*

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<sup>8</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.



## *funds and their allocation limited by law?*

**Yes.**

In addition to the activities related to the management of exploitation rights on behalf of the holders of intellectual property rights, our legislation requires CMOs to promote three types of activities (art. 178 LPI):

- a) **Promotion of activities or services of an assistance nature for the benefit of its members.** In this case, only holders of rights that are members of the entity will be able to enjoy these activities.

The assistance activities and services can be of any type and are regulated in the statutes of each organization. These activities may include (i) the promotion of the incorporation of the member authors of the organization concerned through establishing a special status; (ii) making contributions to social benefit mutual societies; and (iii) providing financial assistance to other author-assistance entities.

- b) **Carrying out training and promotion activities for authors, artists, and performers.** This activity can benefit not only the members of the organization, but also any owner of intellectual property rights.

The statutes of each organization determine the type of activities that the cultural interest should pursue in all cases (e.g., promoting authors and artists, sponsoring and organizing concerts and similar events, and organizing festivals and prizes).

- c) **The lawful digital offer of protected works and subject-matter whose rights they manage.** This activity will only benefit the members of the entities, by referring only to the works and protected subject matter managed by CMOs.

The concept of “digital offer” includes (i) training, education or awareness campaigns on legal offer and consumption of protected content, as well as campaigns to combat infringement of intellectual property rights; (ii) the direct promotion of protected works and protected subject matter whose rights it manages through its own technological platforms or through those of third parties; and (iii) activities to promote the integration of authors and artists with disabilities in their respective creative or artistic fields, as well as to promote the digital offer of their works, creations and services, and access for people with disabilities in the digital field.

CMOs may carry out these activities themselves or establish non-profit legal entities for these purposes, provided they notify the competent Administration (art. 178.4 LPI). These legal entities can be associations and foundations, and even capital companies, provided they are not for profit-making purposes. Therefore, funds allocated for a social and cultural function of the management entities can be endowed with legal and economic autonomy.

For the activities mentioned in sections a) and b), in exceptional cases, CMOs may constitute or take part in profit-making legal entities (art. 178.5 LPI). Due to the exceptional nature, an express and singular authorization of the competent Administration will be needed.

**The Spanish legislation does not establish the amounts that must be allocated to these activities. However, a percentage of the fair compensation for private copying must be allocated to the activities indicated in paragraphs a) and b) above. This percentage will be determined by regulation, and it will be allocated to both activities equally.** According to Art.15.2 RD 1398/2018, of 23 november, this percentage will be 20%.

Finally, in addition to the activities and services indicated above, **CMOs must allocate certain amounts to the Fund for Aid to the Fine Art, which aims to promote, encourage and support creativity in the field of plastic art.** The beneficiaries of this Fund are the authors of plastic works. Specifically, the Fund is constituted by the amounts the management entities receive as rights of participation that have not been distributed to their holders within a specific period. Therefore, only the organizations that manage the right to participate are obliged to contribute to the Fund (nowadays there is only one CMO in Spain that manages this right: VEGAP).

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

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

Directive 2014/26/EU has been implemented in Spain.<sup>9</sup> To this date, all Spanish CMOs have been established as associations by virtue of the Organic Law 1/2002, dated March 22, regulating the right of association.

**The first question must be answered in an affirmative way. The intellectual property right-holders in Spain hold the right to be represented by a CMO according to the LPI.** In particular, art. 147 LPI foresees that the aim of CMOs is the management of intellectual property rights in the interest and on behalf of several right-holders and the second paragraph of this precept sets forth that, regardless of the management by virtue of agreement, the entities must implement the remuneration rights and equitable compensations granted by law which are subject to MCM in relation to both the right-holder and the CMO.

The specific right granted to right-holders to be represented by CMOs is foreseen inversely, i.e., as an obligation to said entities in art. 156 LPI, which must accept “the administration of rights which are conferred by virtue of agreement or law”. This obligation is subject to the following conditions: the commitment must fall under the internal rules of the entity, regardless of the membership, or not, of the right-holder in respect of the entity and the existence, or not, of a management agreement.

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<sup>9</sup> By Royal Decree-Law 2/2018 and Law 2/2019.

The article also foresees the capacity of the entity to reject the administration of the rights provided that “there are justified reasons to reject which shall be motivated on legal grounds”. It can be inferred from the third section of art. 156 that the capacity to reject is limited to those rights subject to voluntary collective management, and not in respect of those subject to compulsory management in relation to which CMOs implement the remuneration rights and compensations in favour of all the holders of rights protected under the Spanish legislation according to arts. 199, 200 and 201 LPI.

The bylaws of the Spanish CMOs do not provide an explicit answer to this question, but the objectives and aims of all them is the management of the intellectual property rights held by all the holders represented by them. Some CMOs which manage rights subject to mandatory management do foresee this legal obligation, which must be carried out regardless of the membership of the right-holder.

**As to the second question, it must be answered in a positive way also, even though it is not so clear as the previous one.** Art. 157 LPI refers to the “management agreement” as the agreement by which the right-holder grants the express consent to the CMO to administer the categories of rights and subject matters, as well as the territories, at his will. Therefore, **this agreement, apart from being the mandate in case of rights under voluntary management, in practice, it links the right-holder with the entity and establishes the economic and political rights between both.**

The Spanish legislation has not implemented the definition of “member” contained in art. 3.d) of Directive 2014/26/EU in a literal way. However, the wording of the LPI refers to “members” through several provisions. Art. 159 points out that CMOs’ bylaws shall foresee the criteria to lose or acquire membership. By implementing the second section of art. 6 of Directive 2014/26/EU, it is set forth that admission criteria must be “objective, transparent and non-discriminatory”. However, since this provision is contained in the regulation of the bylaws, it loses the strength of the provision of the Directive in some extent “a collective management organisation shall accept right-holder”. In any case, we can conclude that, regarding the Spanish law, CMOs are obliged to accept members who comply with the provisions of the bylaws of the CMOs in relation to the acquisition of said status, in terms of the provisions of the eight collective management entities authorized in Spain: *Asociación de Gestión de Derechos Intelectuales*<sup>10</sup> (AGEDI): art. 7; *Artistas Intérpretes Sociedad de Gestión de España*<sup>11</sup> (AISGE): art. 13; *Sociedad de Artistas Intérpretes o Ejecutantes de España*<sup>12</sup> (AIE): art. 11; *Centro Español de Derechos Reprográficos*<sup>13</sup> (CEDRO): art. 7; *Entidad de Gestión de Derechos de los Productores Audiovisuales*<sup>14</sup> (EGEDA): art. 7; *Visual Entidad de Gestión de Artistas Plásticos*<sup>15</sup> (VEGAP): art. 9; *Asociación de Derechos de Autores de Medios Audiovisuales*<sup>16</sup> (DAMA): art. 11; and *Sociedad General de Autores y Editores*<sup>17</sup> (SGAE): art. 15.

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<sup>10</sup> Representing music producers.

<sup>11</sup> Representing visual performers (actors, dubbing actors, dancers and choreographers)

<sup>12</sup> Representing music performers.

<sup>13</sup> Representing authors and editors of books and periodic publications concerning secondary uses.

<sup>14</sup> Representing audiovisual and cinematographic producers.

<sup>15</sup> Representing fine arts artists.

<sup>16</sup> Representing authors of audiovisual works (directors and screen-writers).

<sup>17</sup> Representing authors (also of audiovisual works) and editors.

**Concerning the third question, the LPI does not foresee any provision regulating the process or tools granted to right-holders against the rejection of the application to become a member. Art. 159.o) just obliges CMOs to include, in the bylaws, the procedure of “processing and resolve claims and complains issued by their members”, so the access is limited to members.**

The admission or rejection as member of the entity will be subject to the decisions of the political and representation bodies. However, neither art. 161 on the administration nor the other foresees a provision on the appeal of the resolutions issued by said bodies.

If we go through the bylaws of the collective entities, we can find three different provisions related to the rejection of the membership application. Firstly, the bylaws of AIE (art. 11. Sec. 8 in fine) lay down the possibility to appeal the resolution by the Board rejecting the membership application before the ordinary justice. Secondly, the bylaws of AGEDI (art. 14) empowers the right-holder to appeal the resolution rejecting the membership of the Directive Committee before the General Assembly of the entity. Finally, the bylaws of SGAE (art. 122 Sec. 1) establishes the possibility of right-holders —non-members— to bring any claim or complain related to any issue concerning the activity of the entity and, in particular, the requirements of the acquisition of the membership status.

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

The question at stake refers to disputes regarding ownership of works or services that are the subject-matter of rights of exploitation or the modalities of rights that the CMO in question manages.

Apart from the issues regarding the possible identification and revision of errors in the declaration, accreditation and recording of titles of ownership, the question refers to the alternative resolution systems for disputes involving ownership, real and declared.

The declaration of a dispute over a percentage or the entire ownership of the exploitation rights in respect of a work or service must entail the immediate suspension of payments of the shares of the said right until the definitive and/or final resolution of the dispute.

As a starting point, **there is no legal obligation on CMOs to make available to right-holders alternative dispute resolution systems instead of the courts or arbitration.** Neither can the First Section of the Intellectual Property Commission (“FSIPC”), a collegiate body with national coverage associated with the MCS, mediate or arbitrate in the resolution of disputes over ownership. The purpose of its mediation or arbitration roles is set out in art. 194 LPI.

**However, some CMOs offer those systems to their holders, through their bylaws or through the internal rules and regulations of the CMO other than the bylaws.** Specifically, EGEDA regulates a dispute resolution system with regards to its registry of works and recordings, which provides for resolution through a disputes commission, and, if both parties to the conflict do not accept the

resolution, recommends the expedited arbitration of the World Intellectual Property Organisation (“WIPO”) in its version adapted for EGEDA (art. 14 Registration Regulation); AIE provides for a prior conciliation (art. 65 of its bylaws) to submit disputes that may arise between its members and before a possible legal claim is filed among them; AISGE (art. 102 of its bylaws) regulates its claims procedure regarding the distribution, as do other entities, but not limited exclusively to claims arising from disputes of ownership; SGAE (art. 96 of its bylaws and art. 52.3 of the Regulations) provides for a prior conciliation and mediation or arbitration at law or in equity of a section of the entity, although the scope of the differences that can be resolved is not strictly limited to disputes of ownership; and CEDRO (art. 8 of its internal regulations) establishes a resolution procedure conducted by its members department.

Litigation proceedings deriving from a dual claim of ownership of a work or service, as they depend on differences that affect individual rights of the members of the entity, are not susceptible to obligations that could limit their right to legal protection or to select the dispute resolution mechanism they may prefer. Therefore, these procedures are regulated on a voluntary basis.

### *2.3 How can the authors (right-holders) 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?*

**Members of CMOs have the right to be called to Assemblies or General Meetings and to attend them, participating in the discussions** on issues that are included in the agenda of the meetings, which must be stated in the convening notice, **and participating in the formulation of the will of its members and decision-making by exercising the right to vote** as regulated in the bylaws.

Through this body of the CMO, they participate in the adoption of decisions on the most important matters in the approval of the entity's general policies in accordance with the provisions of its articles and with the LPI and Directive 2014/26/UE.

They also have the right of access to information by law and in accordance with the articles to cast their votes in an informed manner in Assemblies or General Meetings.

They may also participate in the management body of the Management Entity and in its internal control Body, in accordance with the same regulations referred to above, with the right to vote and stand for election to office.

**In principle, any member may be elected to the CMOs’ governing bodies. CMO bylaws establish grounds for disqualification from eligibility which in general pertain to incompatibility, incapacity or due to reasons of a disciplinary nature.**

Some CMOs regulate certain restrictions on the eligibility to stand for election on members of the entity. In the case of SGAE, the right to stand for election is limited for members who have a minimum of five permanent votes; in the case of AIE, it is limited to those that the entity calls active members, who must meet the requirement of permanence in the entity for a minimum of three years and having received certain net economic returns during the preceding three-year period; and AGEDI requires that in order to stand for election, the member of the entity must hold at least six hundred points in accordance with the management entity's point system.

Due to the modifications to the LPI derived from the incorporation of Directive 2014/26/UE, the **members of the Internal Control Body must be independent, *de facto* and *de jure*, from the members of the entities' governing bodies**, which is also included in the bylaws of the different CMOs.

CMOs regulate some of the aforesaid items in the following articles: arts. 9 and 32 of the bylaws of EGEDA; arts. 14, 10 and 36 of the bylaws of AIE; art. 20 of AISGE's bylaws; arts. 18 and 46 of SGAE's statutory regulations; CEDRO in arts. 16 and 38 of its bylaws; DAMA in art. 15.5 of its bylaws; VEGAP in art. 12 of its bylaws; arts. 15 and 43 of the AGEDI's bylaws.

#### *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?*

Under art. 177 LPI, **the distribution of rights will be made periodically** and, unless justified by objective reasons relating to the communication of information by users, to the identification of rights holders or the collation of the information from the holders, **no later than nine months** from 1 January of the year following the collection of the royalties. CMOs will carry it out **in accordance with their distribution regulations, and separately for each category of works or protected subject matter**, in the event that the entity administers rights over different types thereof.

**The distribution criteria are approved by the Assemblies or General Meetings of members of the several entities.** The proposals submitted to the Assembly or General Meeting derive from resolutions passed by the Executive Boards or Boards of Directors, directly or at the initiative and proposal, in turn, of the committee of the entity that may perform, as applicable, said role. Therefore, the rights holders represented by the CMO can participate in the process of formulating the criteria and distribution systems by exercising their right to vote in General Meetings or General Assemblies or, where appropriate, through their participation (if elected according to the rules of the management entity) in the entity's administrative bodies and committees.

The distribution criteria are aimed at making a distribution based on the exploitation or use of the different rights or modes on the works or protected services.

For these purposes, distribution criteria are regulated by the different management entities. For example, art. 51 of EGEDA's bylaws and the regulation of distribution of rights of this entity; art. 84

of SGAE's bylaws and the distribution regulations of this entity; art. 55 of AIE's bylaws; art. 50 of DAMA's bylaws.

With regard to the collection of royalties, it takes place on the dates agreed in the contracts concluded with users, except in the case of fair compensation for private copying, in which the process of presentation and payment of settlements is made according to the current rule. The amounts are collected by the corresponding entities and payment of royalties to holders is made after the distribution has been made, which is the process of assigning the collected royalties to the works or services used by the users in accordance with the lawful rules and with the criteria set out in the internal regulations of the management entity and its distribution regulations. Once the distribution processes have been completed, the corresponding payments of royalties are made to the holders, who must detail the information established in art. 177 LPI, and the amounts will be paid to the owner once he or she has checked that they are correct.

*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.*

**As far as exploitation rights under voluntary collective management (VCM), distinction must be made between rights that have been mandated to be managed in exclusive by a CMO and rights which have not been mandated to its management. The author may grant individual licenses of any exploitation rights that have not been granted in exclusive to a CMO. Instead, when rights have been granted in exclusive to be managed by a CMO, the author could not – in principle- grant any individual licenses without infringing his contract with that CMO. However, a Supreme Court ruling of 2016 accepts the validity of an individual authorization from the author to the user, despite this amounts to a contractual infringement of the exclusive grant agreement entered by the author with the CMO. The user is safeguarded from the underlying contractual infringement.**

**As far as rights subject to mandatory collective management (MCM), such as remuneration rights, usually inalienable, unwaivable and subject to mandatory collective management, they can only be managed by the corresponding CMO, and cannot be licensed individually – not even by the author.**

Art. 2 LPI establishes that: *“Intellectual property is composed by rights of personal and economic nature, which grant the author full disposal and the exclusive right to exploit the work, with the only limitations established by the Law”*.

Therefore, the basic principle that rules the administration and management of intellectual property rights is the “autonomy of will” of the primary right-holder (being an author, artist or producer, as the case may be), in the sense that it is for the right-holder to decide the terms under which she wishes to exercise and dispose of those rights. Nevertheless, the LPI excludes from such principle the limitations established by the applicable law.

Those limitations include the limits to the exercise of exclusive rights ruled in arts. 31 to 40 LPI, as well as the cases of VCM rights, which are listed and described in the response to question 1.2 herein above in this questionnaire. Some of those rights derive from the application of the limitations previously referred (ex. private copy compensation).

With regards to MCM rights, the Law establishes that the obligation to adopt decisions regarding the management of those rights corresponds to the corresponding CMOs.

When those MCM rights are of simple remuneration (identified as well in the response to question 1.2), neither the right-holder nor the CMO may decide whether to authorize or prohibit the exploitation, as such authorization would have been granted *ex lege*. What the CMO shall do, not the original right-holder, is to establish the applicable fee to each modality of exploitation, negotiated and agreed with the users and the associations of users, as set forth in the LPI, except in those cases where it is ruled that the fee shall be fixed by Law or by the Administration (ex. private copy compensation). There is only one case of MCM right, the right of cable retransmission, with regards to which the CMO may decide not only the applicable remuneration to be claimed, agreed as set forth above, but also the granting of the very authorization itself (art. 20.4.b/ and related articles LPI).

Additionally, original right-holders of intellectual property rights may also voluntarily license to CMOs all or some of their exclusive rights for the CMOs to manage their exploitation. In these cases, if such license were exclusive, only the CMO may grant the corresponding authorizations to exploit, notwithstanding what will be said in the following paragraph. On the contrary, if the license were non-exclusive, both the author and the CMO may grant licenses to exploit to third party users. It will depend on the terms of the management agreement defined, in each case, by CMOs.

Notwithstanding the above, art. 150 LPI establishes that the defendant in a potential claim filed by a CMO for not having obtained the necessary authorization may use as a ground to oppose, among others, the granting of an authorization by the right-holder of the exclusive right on the basis of which she could have carry out the act of exploitation. The Spanish Supreme Court (“SC”) has issued a sentence dated 12 July 2016<sup>18</sup> corroborating the application of this provision. In its decision, the SC

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<sup>18</sup> In this case, SGAE had filed a claim against the Townhall of Telde for having used works of her repertoire in celebrations and cultural events, without the due authorization. The judge in first instance decide in favor of SGAE. However, in second instance, the decision was withdrawn. On its side, the SC declared that it cannot be questioned that there have been some acts of communication to the public of works which are part of SGAE’s repertoire in the concerts and events at stake, as it cannot be questioned that SGAE is legitimated to file a suit, as the management of the right of communication to the public had been granted to her. Nevertheless, the High Instance considers that “*If, as intended by SGAE, the management agreement excludes the authorization of the author, to be used as a ground to oppose to the claim of the CMO, the legal provision would be practically empty of any content. Therefore, as a general rule, and notwithstanding the fact that the burden of proof of the authorization is on the defendant, it shall be agreed that, with regards to the claims by CMOs ex art. 150 LPI, the individual or entity obliged to pay the equitable remuneration for the*



cites art. 150 LPI in order to affirm that a third party user may use as a ground in her defence in a litigation filed by a CMO that the holder of an exclusive right has granted her an authorization to exploit her work. That will be so notwithstanding the terms under which the right-holder may have mandated the CMO the managing of the exploitation rights on her work, and that said authorization may have caused the right-holder to breach. Therefore, this is a provision that essentially protects third party users who may have obtained such an authorization.

In particular, in the case of SGAE, its management agreement establishes, in its clause first, the exclusive license of all intellectual property rights of the author joining such entity with regards to her works, except with respect to (i) the right of first reproduction (synchronization) of a musical composition in a work or audiovisual recording or in a phonogram, and (ii) the right of theatrical representation of dramatic works, music-dramatic works, choreographies, pantomime and theatrical in general; which correspond to the categories of uses described in art. 166 LPI, which require an individual authorization by the author. Therefore, with regards to these two categories of rights, authors may negotiate directly with the user the granting of the license requested, according to clause fourth of the management agreement. Also, its clause fifth indicates that the author may license those rights previously licensed to a CMO to any third parties, without the CMO's consent. However, clause sixth of the agreement, citing art. 14 of the bylaws of the entity, foresees the possibility for the author to revoke any of the authorizations granted.

Therefore, an author represented by SGAE will not be able to: (i) directly claim any amount for the exploitation by third parties of her rights of simple remunerations, as they are of MCM nature, nor authorize the cable retransmission of her works, as the only exclusive rights subject to MCM; (ii) grant direct licenses to users of her work with regards to those exclusive rights of VCM that, by agreement, it would have licensed to SGAE (and not revoked) under exclusive terms, as per the management agreement, the latter without prejudice of art. 150 LPI, as interpreted by the SC in the terms previously described.

A different case would be AGEDI, whose management agreement establishes the granting of an exclusive mandate by the right-holder (music producer) for the management in Spain of the MCM rights that represent this CMO, which include: (A) with regards to phonograms: (i) the right of public communication, comprising the radio and television emission, even by satellite, the wireless retransmission and the public dissemination of phonograms emitted by radio or television the cable transmission of those phonograms and its use in commercial premises, in public transportation or similar locations, and the non-interactive simulcasting and webcasting, (ii) the right of reproduction exclusively for the previous categories of public communication, excluding interactive services, and (iii) the private copy compensation, established in art. 25 LPI; and (B) with regards to videoclips: (i) the right of public communications, in the same terms as above, excluding webcasting (ii) the right of reproduction as also referred above, and (iii) the private copy compensation.

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*acts of communication, with regards with certain works affected, has been authorized by the exclusive right holder of such right affected by the act of communication, notwithstanding the terms that the exclusive right-holder may have mandated SGAE to manage the rights of exploitation on her work”.*

On the other hand, the agreement establishes the non-exclusive license in favour of AGEDI of the exploitation of other intellectual property rights which are owned by music producers, specifically those which are of VCM, including: (A) for phonograms: (i) non-interactive simulcasting and webcasting in the countries having signed multilateral reciprocal agreements with AGEDI for that purpose, (ii) the right of making available to the public, in the form of webcasting, podcasting, music ambiance of web pages, in Spain and in those countries having signed multilateral reciprocal agreements with AGEDI to that end, and (iii) the right of reproduction for the purposes of the previous acts of exploitation; and (B) for videoclips: the rights of public communication and reproduction for the public communication made by music and audiovisual channels of the multiterritorial environment. With regards to these rights, it is also established the possibility for the right-holder to renounce to the non-exclusive license granted to AGEDI.

In all cases, the rights of synchronization and first fixation of phonograms and videoclips is excluded, as well as the uses for advertisement, with regards to which a direct authorization must always be requested to the right-holder.

As the VCM rights managed by AGEDI are licensed under non-exclusive terms, the right-holder may grant licenses to exploit to those uses who may request it, notwithstanding the fact that AGEDI may also grant those kind of licenses. The same applies to those rights whose license may be excluded from the management agreement, although in this case, AGEDI will not be allowed to grant any license.

***2.6 Do CMOs allow the right-holders 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 possibility to grant non-commercial licenses, as well as public licenses, by primary right-holders of intellectual property rights depends on the terms and conditions set forth in the management agreements signed with the corresponding CMOs and on their respective bylaws. This is formally stated by Art. 159 e), 1º LPI, according to which CMO bylaws Will establish the conditions for its members to grant non-exclusive authorizations (licenses) for the non-commercial exploitation of rights that have been mandated to the CMO as provided for by Art.160 LPI (“Management of rights mandated to a CMO will not prevent its owner to grant non-exclusive licenses to authorize non-commercial exploitation according to the terms provided for in the CMO bylaws”)-**

In particular, SGAE’s management agreement includes an Annex 2, under which authors are allowed to include in their own webpage certain musical works owned by such authors on *a la carte* basis for

autopromotional purposes. Such non-commercial use of music works is defined in the agreement as “the making available to the public of promotional works by the author without any remuneration and with no advertising including in the relevant website”.

SGAE’s management agreement does not include any provision regarding “public licenses”. However, as the management of MCM rights is granted to it by operation of the law and by the exclusive mandate of the author, and the management of VCM rights is granted under exclusive terms, it does not seem possible for the author who has entered into an agreement with SGAE to grant public licenses (ex. Creative Commons) based in such an agreement, at least *a priori*. They may only be eventually granted as per art. 150 LPI, in the terms previously analysed in the response to question 2.5; in other words, the license will be valid (in front of users) but it would infringe the transfer of rights granted in exclusive to the CMO.

With respect to AGEDI, its management agreement and bylaws are silent as to the possibility to grant non-commercial licenses and/or public licenses. Nevertheless, concerning those intellectual property rights whose license may have been granted to the entity under non-exclusive terms, and related only to VCM rights, the right-holder will be able to grant any licenses and with regards to any modalities of exploitation as it considers adequate, provided they are non-exclusive. However, if the right-holder intends to grant exclusive licenses, she would have to revoke the non-exclusive license granted to AGEDI.

Regarding VEGAP, its bylaws (art. 1.3.h) and 11) expressly establish that right-holders may grant non-exclusive authorizations for the non-commercial exercise of their rights whose management they may have licensed to the entity, provided that (i) the right-holder granting the authorization is the only owner of the intellectual property rights on the work to be use, or she has obtained the prior written agreement of the other co-owners, as applicable; and (ii) the right-holder expressly informs in writing to VEGAP about the conditions of the authorization prior to its granting, and provided the entity has not initiated the management of the use under authorization.

As to the rest of CMOs, as far as they would have established in their management agreements the non-exclusive agreement of exclusive rights under VCM, the right-holders would be allowed to grant those licenses as considered necessary, being or not for commercial purposes and being or not public.

### **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)?*

**Private copying remuneration is determined by the Government, after a process of negotiation between stakeholders, so as to achieve the highest degree of consensus regarding which supports and devices will be subject to levies, and their amount. Specifically, equitable compensation in Spain is set by a joint-regulation of two Ministries, despite previously trying to find a consensus between CMOs and the associations of manufacturers and distributors of reproduction devices, and with advisory reports from Consumers Council and the FSIPC (an independent mediation and arbitration body on intellectual property matters).**

Art. 31.2 LPI establishes the private copying as a limit to the right of reproduction "without prejudice to the fair compensation provided for in art. 25." Art. 25 LPI provides for a compensation regime based on a levy applied on equipment, devices and supports which are used for the reproduction of works in three modalities: books, phonograms and videograms (as well as similar publications, sound and audiovisual media). In order to qualify as a private copy, the copy must be made exclusively for private use, not for professional or business purposes, and without any direct or indirect commercial purposes. The compensation for private copying shall be equitable and unique for each of the three modalities of reproduction of books/publications, phonograms and audiovisual media, and shall be determined by a governmental Regulation, based on the equipment, devices and material, analogue and digital that are suitable for making such reproductions and have been manufactured in Spanish territory or acquired in other countries for commercial distribution within Spain.

Art. 25.4 LPI provides a joint Ministerial Order (Regulation) by the MCS, and the Ministry of Energy, Tourism and Digital Agenda will establish: the equipment, devices and material suitable for reproduction, the media subject to payment of fair compensation, the amounts that debtors (manufacturers and distributors in Spain) must pay to creditors (payments are collected through a "one-stop-shop" (a "single window") managed by all the entities that represent the several rights holders entitled to compensation) as well as the distribution of the compensation between the different reproduction modalities (books, sound supports and audiovisual supports). The Council of Consumers and Users will be consulted beforehand and the FSIPC will also issue a mandatory report. Within the process of drafting the regulation, CMOs, stakeholders and associations representing the majority of the debtors (that is, associations of manufacturers and distributors of reproduction devices...) will be heard by submitting a proposal of their area of interest and a justifying report. This Ministerial Order may be revised at any time depending on the technological evolution and market conditions and, at least, every three years.

No regulation has been passed yet. The current regime was introduced by Royal Decree-law 12/2017<sup>19</sup>, which modified art. 25 LPI, and developed by Royal Decree 1398/2018. Until the new levy amounts are established by a joint Ministerial Order, a transitory regime provided for in that Royal Decree-law applies.

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<sup>19</sup> Real Decreto-ley 12/2017, de 3 de julio, por el que se modifica la LPI, en cuanto al sistema de compensación equitativa por copia privada, y Real Decreto 1398/2018, de 23 de noviembre, por el que se desarrolla el artículo 25 del texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril, en cuanto al sistema de compensación equitativa por copia privada

*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)?*

**Spanish law provides for an exception for private copying, which expressly extends to digital private copying, subject to a single equitable compensation which operates by means of levies applicable to equipment, devices and supports which are suitable for making private copies. In principle, this compensation for private copying does not cover online uses.** This is so for several reasons. The private copying exception (Art.31.2 LPI) does not cover copies made from unlawful sources (such as “top manta” or P2P platforms, or websites linking to unlawful contents) nor copies obtained from works and phonograms made available on demand and in exchange for a price. In addition, this exception only covers acts of reproduction, but not subsequent acts of making these copies available online.

**Nevertheless, indirectly, the compensation for private copying may affect some online uses.**<sup>20</sup> This private copying levy is imposed on both the equipment and apparatus that are most “suitable” for private copying, as well as material mediums that store copies for private use of the protected works and other protected subject matter. In this regard, the levy would apply to hard drives and USB flash drives, among others, which are used for online copies. However, under no circumstances is a fair compensation for private copying established for using protected works and other protected subject matter on the Internet.

It is also important to emphasize that under Spanish law, for **temporary acts of reproduction**, it is not necessary to obtain authorization from the author, provided that besides having no independent economic significance themselves, the acts are transient or incidental, and form an integral and essential part of a technological process and whose sole purpose is to enable transmission in a network between third parties through an intermediary, or a lawful use, with this being understood to be a use authorized by the author or by the law.

Beyond private copying, a compensation for the online use of works and performances was introduced **in 2014, when Art.32.2 LPI introduced a specific remuneration right (unwaivable and subject to mandatory collective management) in exchange for the authorization of press**

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<sup>20</sup> In Spain, the private copying exception extends to digital private copies. As a counterpart, our legislation determines that the reproduction of books and equivalent publications, phonograms, videograms or any other visual or audio means would originate a single equitable compensation for such reproduction, provided that the reproduction is made by using non-typographic apparatus or technical devices, and is exclusively for private use, without professional and business purposes and without any direct or indirect commercial purposes (art. 25 LPI). Under the LPI, debtors of the fair compensation are the manufacturers located in Spain, provided they act as commercial distributors, of the equipment, the reproduction apparatus and the material mediums that are suitable for the reproduction of books and equivalent publications, phonograms and videograms, or any other sound or audiovisual means. Debtors also include those who acquire, outside Spain, the equipment, apparatus or mediums for commercial distribution or use in Spain.

publications to be used (indexed and linked) by online news aggregators. This remuneration – commonly referred to as “Google tax”- is not enforced in practice, yet.

*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?*

According to art. 163 LPI, CMOs are obliged to negotiate and grant in exchange of a remuneration non-exclusive licenses of rights managed by them, to any users who request it, except for justified reasons. Both parties must act under the principles of good faith and transparency: they must exchange any information that is necessary. The granting of licenses will be based on equitable and non-discriminatory conditions; CMOs must inform users about the commercial conditions granted to other users who carry out similar economic activities. If parties do not reach an agreement, the corresponding license shall be deemed granted if the applicant makes a judicial reserve or deposit of the amount required by the CMO’s general rates.

Specifically, art. 165 LPI states that CMOs are **obliged to negotiate and conclude general licenses of their repertoire with users’ associations**, provided that they request it and that they are representative of the corresponding sector.

Without prejudice to negotiations and individual or sectorial agreements between CMOs and users or associations of users, art. 164. 1 and 2 LPI provides that CMOs are obliged **to establish simple and clear general rates** that determine the remuneration required for the use of their repertoire, having to foresee reductions for cultural entities lacking a lucrative purpose. The general rates will be set by each CMO taking into account the different modalities of use of the exclusive rights or remuneration that they manage. These general rates will apply to all users (without discriminating them for their success in the market), leaving aside the cases in which they were negotiated individually with users or users’ associations. For the rest, the general rates set by each management entity must be accompanied by an economic report whose content will be determined by a regulation, which will provide a detailed explanation for the rate modality (that is, for each type of exploitation of the right or rights affected) for each user category. The general rates should provide for reductions for cultural entities that lack a lucrative purpose.

With regard to the **criteria that general rates must comply with**, art. 164.3 LPI provides that the amounts will be established under reasonable conditions, taking into account the economic value of the use of rights over the work or subject matter protected in the activity of the user and trying to achieve the right balance between both parties; To this end, at least the following criteria shall be taken into account: a) the degree of effective use of the repertoire within the user's activity as a whole;

b) the intensity and relevance of the use of the repertoire within the user's activity as a whole; c) the breadth of the repertoire of the management entity; d) the economic income obtained by the user for the commercial exploitation of the repertoire; e) the economic value of the service provided by the management entity to enforce the application of tariffs; f) the rates established by the CMO with other users for the same modality of use; g) the rates established by similar CMOs in other Member States of the European Union for the same modality of use, provided there is a homogeneous basis of comparison.

**The general rates do not require the approval of the regulatory authority (Ministry of Culture and Sports); CMOs must only communicate the general rates approved to said authority.**

Lacking an agreement, when users or users' associations do not agree with the general rates determined for exclusive rights and / or remuneration rights, they **may challenge them in any manner (judicially or extrajudicially)**, including the mere refusal to pay (but in that case, they must pay "on account" 100% of the last rate that they had agreed with a CMO or, lacking a previous agreement, 50% of the established general rate). Once this payment has been made and until the dispute is resolved, it will be provisionally understood that the payment obligation has been fulfilled and, in the case of an exclusive right that could be accompanied by a right to remuneration, the authorization for the use of the exclusive right has been granted (see art. 164.5 LPI). If the fee is judicially or extrajudicially challenged by a users' association, the payment "on account" must be made by each one of its members (Art. 164.7 LPI). The same conditions will apply in the event that a general tariff is null and void or when any circumstance that makes it inapplicable arises (art. 164.6 LPI).

As already mentioned, users or associations of users may question the general rates fixed unilaterally by the entities in any manner: before the courts of justice (Commercial Courts of first instance) or through an extrajudicial procedure (before the FSIPC), whose structure, composition and functions are regulated in arts. 193 and 194 LPI. **The FSIPC will exercise functions of mediation, arbitration, rate determination and tariff control.**

In its **mediation function**, the FSIPC may collaborate in negotiations between CMOs and users for the non-exclusive authorization of rights managed by them (art. 194.1 LPI).

In its **arbitration function**, the FSIPC may provide a solution – when parties voluntarily submit to it - to any conflicts that may arise regarding the negotiation of rights managed by CMOs and, in particular, may determine (at the request of a CMO, an association of users, a broadcaster or a particularly significant user - and upon the acceptance of the other party) amounts in substitution of the general rates, taking into account the criteria established in art. 164.3 LPI (cf. art. 194.2 LPI). The submission of the dispute to the arbitration decision of the FSIPC will not prevent the exercise of any judicial actions, but they will not be able to hear the claim - when the interested party invokes it by exception - until a resolution has been issued by the FSIPC.

In its **tariff determination function**, the FSIPC will set the rates for rights subject to mandatory collective management as well as for rights of voluntary collective management that, with respect to

the same category of owners, concur with a right to remuneration on the same work or subject-matter (e.g. exclusive rights and rights of "mere" remuneration of producers of audiovisual recordings for the retransmission of their fixations by any means, ex art. 122 LPI). In these cases, the FSIPC will establish the amount of the remuneration for the use of works and protected subject matter in the CMOs' repertoire, as well as the form of payment and the rest of necessary conditions to make the management of rights effective, at the request of the CMO, an association of users, a broadcasting entity or a particularly significant user, when no agreement has been reached after six months from the formal start of the negotiation. To establish the amounts/rates, the FSIPC will have to take into account the criteria set in art. 164.3 LPI. The rates determined by the FSIPC will be applied in general for all rights holders and for all users, with respect to the same modality of use of works and benefits and the same sector of users, and may be appealed before the contentious-administrative jurisdiction (See art. 194.3 LPI). In order to request the intervention of the FSIPC to determine tariffs, the significant user or the users association must previously make the payment "on account" (arts. 164.6 and 7 LPI) of 100% of the last tariff they had agreed with the CMO or, in the absence of a prior agreement, 50% of the current general rate. If the applicant is an association of users with less than one thousand members, it may request the FSIPC to determine tariffs when, at least a number of members representing at least 85 % of the income of all members of the association are up to date with the payment made "on account" (see art. 164.8 LPI). For the time being, the FSCPI has never exercised this function.

In its **tariff control function**, the FSIPC will ensure that the general rates established by CMOs are equitable and non-discriminatory; for that purpose, it should assess, among other aspects, whether in its determination the CMO has applied the minimum criteria provided in art. 164.3 LPI. If the FSIPC finds that these criteria have not been observed or, in general, that the tariffs are uneven or are applied in a discriminatory manner, this circumstance will be communicated to the National Commission of Markets and Competition so that, where appropriate, it takes action for an eventual infringement of free competition rules (cf. art. 194.4 LPI).

### *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 Spanish Competition Act<sup>21</sup> (LDC) does not contain any provision about CMOs. However, art. 2 LDC<sup>22</sup> (in which the conditions of the abuse of a dominant position in the Spanish legal**

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<sup>21</sup> Ley 15/2007, de 3 de julio, de Defensa de la Competencia (hereinafter, LDC).

<sup>22</sup> Art. 2 LDC determines that: "1. It is forbidden the abusive exploitation by one or more companies of their dominant position in all or part of the national market. 2. The abuse may consist, in particular, of: a) The imposition, directly or indirectly, of prices or other commercial conditions or unequal services. b) The limitation of production, distribution or technical development to the unjustified detriment of companies or consumers. c) The unjustified refusal to satisfy the demands of purchasing products or providing services. d) The application, in commercial or service relations, of unequal conditions for equivalent services, which places some competitors at a disadvantage compared to others. e) The



**system are determined) is fully applicable to the activity of CMOs in the market, and Spanish CMOs have been sentenced in numerous occasions for abuse of a dominant position.**

An example of the express recognition of this direct application can be found in the Supreme Court Judgment of 18 October 2006<sup>23</sup>, in which the Supreme Court states, regarding the determination of an equitable remuneration for acts of public communication of audiovisual recordings: "*The requirement of fair remuneration is not derived for the appellant only from the aforementioned Art. 122 LPI, but also, as it is for other companies or entities that are in a dominant position, from Art. 6 LDC (currently Art. 2 LDC) which considers abuse of this situation, among other things, the imposition of prices or other unfair commercial or service conditions*". We can highlight the following recent cases in which a CMO has been sanctioned for abuse of a dominant position in Spain:

- *SGAE – Authors Case*<sup>24</sup>: In this case, SGAE was accused of two illicit conducts. The first one was the configuration of a system of discounts and tariffs regarding musical rights for television broadcasting that was not transparent. This system generated unjustified discrimination between television operators. The second of the illicit conducts was the distortion of the capacity of two operators (Antena 3 and Telecinco) to determine their musical contents by imposing abusive conditions. The two operators, both editors of musical works as well as licensees, were offered discounts on the condition that they agreed to restrict their own use of their self-edited contents. The Spanish Competition Authority terminated the procedure by a resolution dated 9 July 2015 accepting the commitments presented by SGAE in order to remedy these behaviours.
- *SGAE – Concerts Case*<sup>25</sup>: In this case, the abuse of a dominant position occurred through several actions of SGAE in the markets of collective management of intellectual property rights of authors and editors of musical and audiovisual works and the markets for granting authorizations and remuneration of reproduction and public communication rights over the same works. More specifically, this behaviour consisted in the application of unfair and

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subordination of the conclusion of contracts to the acceptance of supplementary benefits that, by their nature or according to the uses of commerce, do not relate to the purpose of said contracts. 3. The prohibition provided for in this art. shall apply in cases in which the dominant position in the market of one or several companies has been established by legal provision. "

<sup>23</sup> In this case, (ECLI: ES: TS: 2006: 6223) the Spanish Supreme Court settled the case EGEDA / AIE / AISGE-Hotels, which confronted these CMOs against the Spanish Federation of Hotels and the Hotel Association of Tourist Areas of Spain. This case is judged by the Spanish Supreme Court after the judgment issued by the Contentious-Administrative Chamber of the National Court on January 14 (appeal No 867/2000 and cumulative No 869/2000 and 892/2000), 2004 dismissed the appeal filed against the decision of the Spanish Competition Authority dated 27 of July 2000. This decision imposed on the appellants fines of 45, 10 and 5 million pesetas respectively, for abuse of dominant position (both individual and collective) when trying to impose inequitable and discriminatory tariffs on hotel establishments.

<sup>24</sup> CNMC, Sanctioning File S / 0466/13. The conventional termination of this file was appealed by the Corporation of Spanish Radio and Television, SA before the National High Court, who rejected this appeal (Judgment of April 25, 2019, ECLI: ES: AN: 2019: 1845).

<sup>25</sup> CNMC, Sanctioning File S / 0460/13. This decision was appealed by SGAE before the National High Court, who partially upheld the appeal in its Judgment of February 7, 2018 (ECLI: ES: AN: 2018: 414). This Judgment was appealed before the Spanish Supreme Court by the SGAE. The Spanish Supreme Court dismissed the appeal filed in its Judgment nº 522/2019, of April 11, 2019 (ECLI: ES: TS: 2019: 1263).

excessive fees in the licenses granted by SGAE for the public communication of musical works protected by copyright in concerts held in Spain.

- *AGEDI/AIE-Television Operators Case*<sup>26</sup>: In this case, the CMOs, AGEDI and AIE, were sentenced, the authority deeming them responsible for abuse of a dominant position for imposing inequitable and discriminatory tariffs to free-to-air TV operators since 2003.
- *SGAE- Restaurants Case*<sup>27</sup>: In this case, SGAE was convicted for an abuse of a dominant position by the application of discounts in a discriminatory and non-transparent manner in the tariffs applied to the remuneration of the public communication of musical works in dances celebrated during weddings, baptisms and communions or events where the access of the assistants derived from personal invitations. These discounts were linked to conditions that were applied unevenly to the different operators (by sections or blocks). Also since 2009, it had introduced a tariff called "substitute tariff", which was inequitable and discriminatory.
- *AISGE-Cinemas Case*<sup>28</sup>: In this case, AISGE was convicted of two conducts constituting abuse of a dominant position in relation to the right to fair remuneration for public communication of audiovisual recordings in cinemas. In particular, AISGE had unilaterally and unjustifiably increased the general rate applied and, on the other hand, had applied different rates and bonuses to different cinemas in a discriminatory manner.

However, two recent cases are noteworthy, in which CMOs are not the cause of the competitive disturbance:

- *AIE / AGEDI-Radio Case*<sup>29</sup>: In this case, the Spanish competition authority determined the existence of a collusive agreement (art. 1 LDC and art. 101 TFEU) consisting of the issuance of collective recommendations to its members by the Spanish Association of Commercial Radios ("AERC") in restraint of competition. Specifically, these recommendations intended

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<sup>26</sup> CNC, Sanctioning File S / 0297/10. This decision was appealed by AGEDI and AIE before the National High Court, who, in its judgment of April 10, 2015 (ECLI: ES: AN: 2015: 1189), partially upheld the appeal, referring the proceedings to the Spanish Competition Authority for the recalculation of the fine. This Judgment was appealed, in the part that had not been estimated, before the Spanish Supreme Court. The Spanish Supreme Court in its judgment n° 374/2018 of March 7, 2018 (ECLI: ES: TS: 2018: 776) dismisses this appeal.

<sup>27</sup> CNMC, Sanctioning File S / 0220/10 SGAE. This decision was appealed before the National High Court who in his Judgment of December 21, 2015 (ECLI: ES: AN: 2015: 4724) estimated the appeal in part, determining the need for a recalculation of the fine. This Judgment was appealed before the Spanish Supreme Court by the SGAE because it was considered that the allegation of the abuse was unfounded. The Spanish Supreme Court in its judgment n° 975/2018, of June 11, 2018 (ECLI: ES: TS: 2018: 2073), dismissed this appeal.

<sup>28</sup> CNC, Sanctioning File S / 0208/09. This decision was appealed before the National High Court, who in its Judgment of November 11, 2013 (ECLI: ES: AN: 2013: 4959) dismissed the appeal. This Judgment was appealed before the Spanish Supreme Court by AISGE. This appeal is dismissed by the Spanish Supreme Court in its judgment n° 318/2017, of February 24, 2017 (ECLI: ES: TS: 2017: 668).

<sup>29</sup> CNMC, Sanctioning File S / 0518/14. This decision was appealed by AIE and AISGE before the National High Court arguing that the amount of the fine was insufficient. The National High Court rejected this appeal in its Judgment of March 17, 2018 (ECLI: ES: AN: 2018: 1634). This Judgment was appealed before the Spanish Supreme Court who dismissed the appeal by the Order of the Court of January 8, 2019 (ECLI: ES: TS: 2019: 46).

that AERC members stop paying the invoices issued by AGEDI / AIE or proceed to the judicial appropriation of the payments corresponding to the remuneration rights for the public communication of phonograms published for commercial purposes and for the instrumental or technical reproduction of these phonograms. The purpose sought with this behaviour was to use it as a bargaining chip during the negotiation of an agreement on tariffs between AIE/AGEDI and AERC.

- *AFEC vs. CEDRO* Case<sup>30</sup>: In this case, the Spanish Federative Association of Clipping Companies (“AFEC”) accused CEDRO of implementing an alleged tariff coordination between press editors associated with CEDRO regarding the tariffs for the use of their online content. In this case, the Spanish competition authority determined that the rates set by each of the press editors for the management of their rights by CEDRO presented substantial differences. In addition, with respect to digital press clipping rates - for which the press editors have not established a flat rate model - there was no equivalence in the prices fixed by the main Spanish publishing groups, nor was there uniformity in the percentage difference between these amounts and the corresponding rates for paper editions.

### *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 Spain, CMOs have a legally established obligation regarding both the transparency in the tariffs and the methodology for calculating them.**

The regulation of this obligation is one of the aspects on which the Spanish legislator has focused especially in recent years. We can define two substantially important moments:

- Prior to the transposition of Directive 2014/26/EU, Law 21/2014<sup>31</sup> introduced a series of amendments to art. 157.1. On the one hand, the new wording of this article established the characteristics and criteria that should govern the determination of these tariffs. On the other hand, Point 1 of Section d) of the amended art. 157.1 introduced the obligation for the CMO to publish the tariffs on their website in an easily accessible way: "(t)he general tariffs in force for each one of the modalities of use of your repertoire, including the discounts and the circumstances in which they must be applied, must be published within ten days from their establishment or last modification, along with the principles, criteria and methodology used for their calculation".

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<sup>30</sup> CNMC, Sanctioning File S / DC / 0613/17 AFEC v. CEDAR.

<sup>31</sup>Ley 21/2014, de 4 de noviembre, por la que se modifica la LPI y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (“Law 21/2014”).

- Following the transposition of Directive 2014/26/EU, Royal Decree-Law 2/2018 was passed. We now find the following obligation in Section e) of the new art. 185<sup>32</sup>: "*Management entities must publish on their web page in an easily accessible way and keep updated the following information : [...] e) The general tariffs in force, along with the justifying economic report, for each one of the modalities of use of its repertoire, including the discounts and the circumstances in which they should be applied. All this must be published within ten days of its establishment or last modification.*"<sup>33</sup>

Thus, the obligation of transparency is relevant in the Spanish legal system and must be strictly complied with by CMOs.

The tariffs in force for each one of the different CMOs can be consulted in the following links<sup>34</sup>:

- SGAE: <http://tarifas.sgae.es/>
- CEDRO: <https://www.cedro.org/docs/default-source/0tarifas/tarifas.pdf?sfvrsn=34>
- VEGAP: <https://www.vegap.es/tarifas/tarifas>
- DAMA: <https://www.damautor.es/transparencia#tab-1536927891-1-421536931516760>
- AIE: <https://www.aie.es/en/users/contracts-and-tariffs/>
- AISGE: <http://www.aisge.es/tarifas>
- AGEDI: <https://www.agedi.es/index.php/usuarios/tarifas>
- EGEDA: [http://www.egeda.es/EGE\\_InformacionLegalTarifas.asp](http://www.egeda.es/EGE_InformacionLegalTarifas.asp)

In addition to this individualized information, there are two specific situations where the collective management entities offer accessible information via internet about the applicable tariffs. These two cases are the following:

- The tariffs applied for the repertoires managed by the joint collection body of artists and producers (AGEDI-AIE),: <https://agedi-aie.es/tarifas>
- The tariffs applied in the digital single window for the centralized management of equitable compensation for private copying, of which the eight CMOs mentioned are a party: [http://ventanillaunica.digital/VU\\_Tarifas.aspx](http://ventanillaunica.digital/VU_Tarifas.aspx)

It is noteworthy that the documents pertaining to the rates in force, in addition to appearing on the

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<sup>32</sup> This article is located in the new chapter VI of Title IV entitled "Obligations of information, transparency and accounting of management entities".

<sup>33</sup> We find the same provision with the same numeral in the reform of the LPI made by Law 2/2019.

<sup>34</sup> The last consultation of each of the mentioned pages was made on June 30, 2019.

website of each of the entities, are collected (through the URL of each document) by the MCS on its website<sup>35</sup>.

## Abbreviations

CMO – Collective Management Organization

IME – Independent Management Entities

LPI – Spanish Law of Intellectual Property

MCM – Mandatory Collective Management

FSIPC – First Section, Intellectual Property Commission

MCS – Ministry of Culture and Sports

TFEU - Treaty on the Functioning of the European Union

VCM – Voluntary Collective Management

Spanish CMOs:

- Sociedad General de Autores y Editores (SGAE) <http://www.sgae.es>
- Centro Español de Derechos Reprográficos (CEDRO) <http://www.cedro.org>
- Asociación de Gestión de Derechos Intelectuales (AGEDI) <http://www.agedi.es>
- Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) <http://www.aie.es>
- Visual, Entidad de Gestión de Artistas Plásticos (VEGAP) <http://www.vegap.es>
- Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) <http://www.egeda.es>
- Artistas Intérpretes, Sociedad de Gestión (AISGE) <http://www.aisge.es>
- Asociación Derechos de Autor de Medios Audiovisuales (DAMA) <http://www.damautor.es/>  
<http://www.culturaydeporte.gob.es/cultura-mecd/areas-cultura/propiedadintelectual/gestion-colectiva/direcciones-y-tarifas.html>

IMEs operating in Spain:

- Soundreef Ltd.
  - Unison Rights España
  - MPLC España
  - Jamendo
- <http://www.culturaydeporte.gob.es/cultura-mecd/areas-cultura/propiedadintelectual/gestion-colectiva/operadores-gestion.html>

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<sup>35</sup> <http://www.culturaydeporte.gob.es/cultura-mecd/areas-cultura/propiedadintelectual/gestion-colectiva/direcciones-y-tarifas.html>