ALAI Congress 2019 in Prague
Managing Copyright – questionnaire Netherlands

1. General Overview of the Collective Management

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

The literature claims that collective management organizations generally have a natural monopoly, "a monopoly that is economically more efficient than free competition".[1] In the Netherlands there are around 24 collective management organizations active. [2] [3] [4]

There are four so called “own law organizations”. They have been exclusively appointed by law to exercise specific rights, mentioned in the law, in order to collect and distribute money without a mandate from the creators (authors, actors) granting them these rights to exploit. In the Netherlands, collective management organizations (hereafter: CMO's) set by law are:

- Foundation (Stichting) De Thuiskopie (Home copying); art. 16d, para 1 Dutch Copyright Act[5] and article 10, para e, Neighbouring Rights Act
- Foundation Leenrecht (public lending rights); artt. 12, 15c -15g Dutch Copyright Act
- Foundation Reprorecht (Reprographic Reproduction Rights); art. 16h and 16l Dutch Copyright Act
- Foundation Sena (Neighbouring rights); art. 7 and 15 Neighbouring Rights Act

These organizations have a monopoly by law.

There is one organization that exercises so called “voluntary collective management” by an exclusive mandate from rightholders and with permission, on certain exploitations, granted by the government. Buma is the organization with a legal monopoly for public performance on the basis of a license from the Minister of Justice and Security to exploit certain rights via the Dutch Copyright Act, Article 30a, on behalf of its members music authors (composers and lyricists) and -publishers – and the rights granted by its sisters societies all over the world through reciprocal agreements. The permit (art. 30a) is not applicable for online. Stemra is the organization for reproduction rights for music authors (composers and lyricists) and –

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[1] Prof. Mr P.B. Hugenholtz ,19 september 2018 (Sena besluit Aanwijzing 2018).
[2] https://www.cvta.nl/over-het-cvta/welke-organisaties/
[3] There also have been appointed 3 organizations as independent management organizations as described in CRM Directive 2014/26/EU
[4] Although not up to date the scheme on page 52 gives a broad overview of types of CMO’s in the Netherlands. https://www.ie-forum.nl/backoffice/uploads/file/IEForum/Artikelen/rapport_definitief_160032009_met_excel_gecorrigeerd%5B1%5D.pdf
Check for current list of CMO’s: https://www.cvta.nl/over-het-cvta/welke-organisaties/
[5] Non-official translation of the Dutch Copyright Act: https://www.ivir.nl/syscontent/pdfs/119.pdf

publishers based on voluntarily collective management on an exclusive mandate not set by law. Stemra has a natural monopoly. The two organizations (Buma and Stemra) are linked together.

There are also collective management organizations that operate by non- exclusive mandates of rightholders. Furthermore there are collective management organizations that purely distribute money and have no members. Some collective management organizations combine the two or three of the situations described. They all will have, more or less, a de facto monopoly in the field they are active.

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

We refer to the answer above in 1.1. In the Netherlands there is indeed mandatory and voluntary collective management as well as ECL (extended collective licensing).

The following rights are managed by mandatory collective management:

- Retransmission rights: art. 26a-c Dutch Copyright Act including ECL art. 26a par. 2 Dutch Copyright Act;
- Communication to the public of film works (VOD excluded): art 45d par. 2 Dutch Copyright Act (including ECL)
- Legal - exception - rights such as Home Copy (Thuiskopie), Lending rights (Leenrecht) and Reprographic Reproduction Rights (Reprorecht)
- Fair compensation/equitable remuneration for the publication of commercial phonograms (art. 7 Neighbouring Rights Act) (Sena)

All other rights or ways of exploitation of rights are handled by voluntary collective management.

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

In principle, competition between voluntarily established CMO's is possible and exists, depending on the area.

Regarding exploitation rights it occurred in the field of neighbouring artists' rights (performers) (other than the publication rights of commercial phonograms, which is dedicated to SENA). For a number of years there were two organizations, NORMA and IRDA, who both tried to obtain the mandates from performers for certain rights. They tried to collaborate in certain fields but also the competition got more aggressive during the years. Nowadays only NORMA is active.

In the field of music rights (Buma/Stemra) there is competition worldwide between the collecting societies in attracting rightholders to join their society for certain categories of

exploitation rights and/or countries. Furthermore the independent management organizations try to bind rightholders and ask them to write songs and transfer their rights.

In the area of exercising the exploitation music rights (licenses for users) for offline there is some competition between Buma/Stemra and independent management organizations. This competition is primarily based on tariffs. For online there is competition for Buma/Stemra from the other collecting music societies, music publishers or rightholders, granting their own rights directly to online users. But also users, offline (e.g. broadcasters) and online, try to build their own repertoire (mostly through buy-outs) to, amongst other reasons, avoid payment for every public performance.

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 mentioned in 1.2 extended mandatory collective management is arranged for in art. 26a - 26c Copyright Act (cable retransmission) and art. 45d Copyright Act (filmworks, except for music rights). It is applicable for more organizations but organizations for different kind of rightholders.

In article 26a – 26c provisions of the Satellite and Cable Directive have been implemented and, as in the Directive, it is ruled that if no agreement can be reached on the simultaneous, unaltered and unabridged broadcasting of a work as meant in Article 26a each party may call upon the assistance of one or more mediators.

The Supervisory Authority (*College Van Toezicht,* (hereinafter CSA)) supervises whether CMOs perform their task derived directly or indirectly by Law, in a correct manner.[6] More on the CSA and their role regarding tariffs in chapter 3.

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

Collective licensing in the Netherlands is conducted by non-profit CMO's, independent management organizations but also, depending on the definition of "collective licensing", agencies and rightholders themselves for their own catalogue.

According to the Law on Collective management a CMO is defined as any organization that is established in the Netherlands and which, by law or by means of transfer, licensing or other agreement, is authorized by more than one owner to manage copyright or related rights on behalf of one or more of them, in the common interest of the rightholders and which organization is under control of its members and is not-for-profit.

An independent management organization is defined as any organization, other than a collective management organization, which is established in the Netherlands and which, by law or by means of transfer, licensing or other agreement by more than one owner, is

[6] https://www.cvta.nl/site/wp-content/uploads/2016/12/stb-2016-435.pdf
Non-official translation of the previous Act (from 2003) *Wet toezicht collectief beheer op auteurs- en naburige rechten* https://www.ivir.nl/syscontent/pdfs/118.pdf (hereafter: Law on Collective management)

authorized with the main objective to manage copyright or related rights, for the benefit of one or more of the rightholders, in the common interest of these rightholders and which organization is directly nor indirectly, in whole or in part under control of rightholders and is a for-profit organization. [7]

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

The social and cultural funds, which serve to support national goals, have a long history. For example, the social funds of Buma originally date from the 1920s and 30s; they were created to provide a social safety net (and sometimes a pension scheme) for those in need. A certain percentage was withheld from the net available benefit amounts that was paid into the social security fund. The cultural funds were created not much later.

In the field of music copyright, the measure that - a maximum of - 10% of the available benefit amounts to be withheld for the social and cultural interests of its own - national – beneficiaries was formalized by the International Confederation of Societies of Authors and Composers (CISAC) in 1935 and has been a part of the reciprocal contracts.[8] With the European Directive 2014/26/EU of 26 February 2014 (hereafter: CRM Directive) this might change, because the consent to deduct a percentage must be negotiated in each individual reciprocal agreement between CMO's.[9]

It is not obliged in the Netherlands to contribute to the cultural development of the society. [10] However, around 7 of the CMO's, between whom Buma and Sena, do.
Buma for example provides social and cultural support for music authors. On the social side of the support Buma has the *Sociaal Fonds Buma (Buma social fund)*. Music authors who are in financial difficulty can apply to this fund. They can get a loan or in extreme cases have their debts restructured, they may be given a donation or a transitional payment or funding is used for their pension. It is important that the assistance offered should also produce a structural solution. Furthermore the so called *Toeslag Ernstig* is financed by it. There is also a *fund for pension* for music authors affiliated to Buma. On the Cultural side Buma Cultuur is established; a separate foundation that is involved in promoting the Dutch music product by organizing, financing and subsidizing numerous events. This helps to focus attention on Dutch music productions, both nationally and internationally, which in turn helps music authors improve their sales. Buma Cultuur is subsidized by Buma.[11]

The current rules (and limitations) on the social and cultural funding can be found in the CRM Directive, mentioned before and implemented in the Netherlands[12]. The Dutch CSA laid down

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[7] https://www.cvta.nl/site/wp-content/uploads/2016/12/stb-2016-435.pdf

[8] https://www.cvta.nl/site/wp content/uploads/2010/12/Notitie-socu-beleid11.pdf

[9] Richtlijn 2014/26/EU van het Europees Parlement en de Raad van 26 februari 2014 betreffende het collectieve beheer van auteursrechten en naburige rechten en de multiterritoriale licentieverlening van rechten inzake muziekwerken voor het online gebruik ervan op de interne markt (Pb. 2014, L 84, 92).

[10] For example: https://www.cvta.nl/site/wp-content/uploads/2018/12/rapport-CVTA-2017.pdf Page 123, 8.12 an overview given by the CSA of 2017.

[11] https://www.bumastemra.nl/en/about-buma-stemra/social-and-cultural-support/]

[12] 34.243 Wijziging van de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties in verband met de implementatie van Richtlijn 2014/26/EU van het Europees Parlement en de Raad betreffende het collectieve beheer van auteursrechten en naburige rechten en de multiterritoriale licentieverlening van rechten inzake muziekwerken voor het online gebruik ervan op de interne markt (Implementatiewet richtlijn collectief beheer)

its opinion about social and cultural funds in a memorandum.[13] The CSA states that CMO's should be reluctant with spending of funds for other purposes than to the distribution to rights-holders because the social and cultural funds are funded from the debt collection and therefore charged to the rights holders. CMO's should, according to the CSA, focus on their primary task; the collection and distribution of funds for beneficiaries. For the same reason the CSA believes that withholding of funds for such purposes should remain within bounds and this in an effective and legitimate way. Furthermore rightholders should also have sufficient say in the extent to which on their funds is withheld and in the manner in which they are spent. The social and cultural policy should be sufficiently transparent for the rightholders.[14]

The CMO that reserves funds for spending on social and / or cultural and / or educational funds convenes an annual members meeting in which the adoption and feedback of social cultural policy is discussed and decisions can be taken by the members about this. Members or affiliates are informed about the objective criteria that form the basis for determining the amount of money to be allocated as well as the choice of the destination(s) of the funds. The funds intended for social, cultural and educational purposes are spent in the three calendar years following the calendar year in which the reservation was made.[15]

The remittance percentage for Buma is (also in 2019) 8%.

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

Lilian Rozenberg / Anja Kroeze (Buma/Stemra)

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

In general

In the Netherlands there are (at this moment as mentioned under 1.1.) 24 CMO's (for Copyright and Neighbouring rights):[16] Regarding the "type" of CMO we refer to the answers in question 1. Not all of them have members. Buma is established as an association. The others are foundations.

All CMO's are subject to supervision via the Supervisory Authority (CSA) regulated by the Supervision and Dispute Settlement of Collective Management Organizations Copyright and Related Rights Act (hereafter: the Supervision Act)[17]. As mentioned before this Act is amended in November 2016 due to the implementation of the CRM Directive[18] .

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[13] See under 6
[14] The CSA mentioned this already in 2010 but you can find it also, more or less, in Directive 2014/26/EU. Check also: Besluit transparantieverslag richtlijn collectief beheer van 23 november 2016 art. 3 b under 3.
[15] Also: Keurmerk: www.voice-info.nl
[16] https://www.cvta.nl/over-het-cvta/welke-organisaties/
[17] https://www.ivir.nl/syscontent/pdfs/118.pdf
[18] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026
https://www.cvta.nl/site/wp-content/uploads/2016/12/stb-2016-435.pdf

Based on CRM Directive rightholders have the right to authorize a collective management organization of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organization or the rightholder. Unless the CMO has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity (article 5.2 of the CRM Directive).

A CMO accepts rightholders and entities representing rightholders as members if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminatory criteria. Those membership requirements shall be included in the statute or membership terms of the CMO and shall be made publicly available. In cases where a CMO refuses to accept a request for membership, it shall provide the rightholder with a clear explanation of the reasons for its decision (article 6.2 of the CRM Directive).

Buma/Stemra

Authors who enter an exploitation agreement with Buma and/or Stemra transfer their performing rights and/or mechanical reproduction rights exclusively to Buma and/or Stemra for certain (or all) categories of exploitation.

Based on the articles of the association[19] authors and publishers can be members and have the right to vote on condition that they 1. are residents or citizens of one of the member states of the European Union (EU), and 2. have concluded an exploitation agreement and 3. have received an average income of at least €280 for authors and €2800 for publishers per year under their exploitation agreement for three consecutive calendar years.

If a decision is taken to reject the application for membership, reasons will be given. The applicant may lodge a written appeal with the Board of Buma/Stemra, giving their reasons for doing so, within three months from the date of the written notification of the management's decision. In the event of differences of opinion on whether all the requirements for membership have been met, the Association's records will be definitive unless evidence to the contrary is provided.

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

Every CMO has its own method.

In general a conflict between rightholders, both members of the CMO, is not a situation solved by the CMO itself. Rightholders are not directly referred to court but are free in choosing the way to solve a problem.

In case of contradictory claims on, for example, a share in a musical work, the management of Buma/Stemra is entitled to postpone payments until the parties have reached agreement or until the management is presented with a decision that is legally binding for both parties.

[19] https://www.bumastemra.nl/wp-content/uploads/2016/05/LR_BUM15230-Statutenboek-correcties-april-16.pdf

The *disputes committee* (*Geschillencommissie) (*hereafter: DC) of Buma/Stemra[20] is applicable for members of Buma/Stemra who have complaints about decisions of the Board or the management of Buma/Stemra. Please note that "double claims" do not fall within the scope of rules of the DC. The decision of the DC is binding for the parties, unless a Court decides otherwise. The DC is required on the grounds of articles 33, 34 and 35 of the CRM Directive.

For disputes on plagiarism a permanent committee for dealing with disputes on plagiarism or similar disputes, called the *Vaste Commissie Plagiaat* (Permanent Committee on Plagiarism, hereafter: VCP[21]) is in place. The VCP's decision serves as a non binding advice to the parties. Parties are entitled to ask the VCP to arrive at a binding decision on a complaint.

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

In general

Members of CMO's in the Netherlands should be allowed to participate in the continuous monitoring of the management of CMO's. To that end, those organizations should have a supervisory function appropriate to their organizational structure and should allow members to be represented in the body that exercises that function[22]. Depending on the organizational structure of the CMO, the supervisory function may be exercised by a separate body, such as a supervisory board, or by some or all of the directors in the administrative board who do not manage the business of the CMO. The requirement of fair and balanced representation of members should not prevent the CMO from appointing third parties to exercise the supervisory function, including persons with relevant professional expertise and rightholders who do not fulfil the membership requirements or who are represented by the organization not directly but via an entity which is a member of the CMO.

Based on article 6.2 of the CRM Directive a CMO accepts rightholders and entities representing rightholders, including other CMO's and associations of rightholders, as members if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminatory criteria. Those membership requirements shall be included in the statute or membership terms of the CMO and shall be made publicly available. In cases where a CMO refuses to accept a request for membership, it shall provide the rightholder with a clear explanation of the reasons for its decision.

Buma/Stemra

Buma/Stemra represents two bodies: Vereniging Buma (Foundation) and Stichting Stemra (Association). The authorities each have their own rules and regulations. They also have separate tasks: Vereniging Buma represents the interests of copyright holders of musical works in the field of public performance rights. Stichting Stemra represents their interests when it comes to mechanical reproduction rights. However, Buma and Stemra operate as one.

[20] https://www.bumastemra.nl/wp-content/uploads/2017/08/Rules-Disputes-Committee.pdf
[21] https://www.bumastemra.nl/en/about-buma-stemra/standing-committee-for-plagiarism/
[22] This is all according to the CRM Directive, implemented in the Netherlands.

The office and employees are shared and they have the same management. For efficiency reasons the Boards of the Foundation and of the Association meet at the same time.

Authors and publishers can be members of the association Buma and/or the foundation Stemra and have a right to vote on condition that they 1. are residents or citizens of one of the member states of the EU, and 2. have concluded an exploitation agreement and 3. have received an average income of at least €280 for authors and €2800 for publishers per year under their exploitation agreement for three consecutive calendar years.

The governance structure has changed in 2018 due to the implementation of the CRM Directive. The General Members Meeting is the highest body of Buma/Stemra. The General Members Meeting appoints and dismisses directors, adopts the annual accounts and decides on amendments to the Articles of Association. The *Board*, consisting of at least the CEO and CFO, and the *Supervisory Board* are accountable to the General Members' Meeting.

The Supervisory Board supervises the policy of the Board and the general affairs. It also has a power of approval of "important decisions" and of the strategy plan with accompanying budget. In any case, the Supervisory Board supervises:

- Decision making within the Board meeting
- The realization of the objectives
- The strategy and main risks
- The results of assessments of internal risk management and control systems
- Compliance with laws and regulations
- Preparing the annual accounts and preparing the annual budget
- In addition, the Supervisory Board can draw up committees, including an audit committee. This includes supervision of the administrative organization and proper functioning of processes and systems.

The Supervisory Board of Buma/Stemra consists of 9 persons:

- 3 independent members (including the chairperson)
- 4 authors (who have an exploitation agreement for at least 5 consecutive years and received an average income from Buma and Stemra of at least €1,120 per year in the last three consecutive calendar years).
- 2 publishers (who have an exploitation agreement for at least 5 consecutive years for all or at least fifty (50) original works that they have published under a direct legal relationship with authors or their successors in title, and received an average income from Buma and Stemra of at least €11,200 per year in the last three consecutive calendar years).

Furthermore there is a "*Council of Rightholders" (Raad van Rechthebbenden*). The Council of Rightholders advises the Board and the Supervisory Board. In addition, the Council of Rightholders prepares the decision-making at the General Members' Meeting.

The Council of Rightholders consists of at least 12 but not more than 13 persons:

- 8 authors (who are residents or citizens of one of the member states of the EU, and have concluded an exploitation agreement and have received an average income of at least €560 per year under their exploitation agreement for three consecutive calendar years.
- 2 publishers (who are residents or citizens of one of the member states of the EU, and who have an exploitation agreement for all or at least fifty (50) original works that they have published under a direct legal relationship with authors or their successors in title,

and received an average income from Buma and Stemra of at least €5,600 per year in the last three consecutive calendar years).

The Board, currently the CEO and CFO, is responsible for the ins and outs, all operational matters, of the company. They are also preparing the strategy plan, to be approved of by the Supervisory Board. Board members are appointed by the General Members Meeting and are accountable to the member's meeting and the Supervisory Board.

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?

In general

The distribution and payment of amounts due to individual rightholders are carried out in a timely manner and in accordance with the general policy on distribution of the CMO concerned, including when they are performed via another entity/CMO representing the rightholders.

CMO's in the EU are obliged (Article 13 of the CMS Directive) to distribute and pay the amounts to rightholders as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons relating in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject-matter with rightholders prevent the CMO or, where applicable, its members from meeting that deadline.

Buma/Stemra

The revenues collected by Buma and Stemra are paid to the rightholders of the music based on the Distribution rules of Buma / Stemra[23].

The Distribution Rules contain provisions that set out the method by which the distribution and payment of monies received are distributed to members and other interested parties. When certain distributions will take place is transparently communicated to all members online by means of a scheme.

The Board has the right to define and amend the distribution rules. The rules require the approval of the Members' Meeting before they take effect. The Council of Rightholders' task is advising the Board and preparing the decision-making at the Members' Meeting. Therefore all amendments of Distributions Rules will be discussed in the meetings of the Council of Rightholders. Finally also the CSA has to approve of the changes made in the Member's meeting in statutes and distribution rules.

Items, also regarding distribution schemes, can be placed on the agenda of the members' meetings by the Council of Members, the Board but also by at least ten (10) members.

Buma/Stemra will charge VAT (21%) on the license fee if the user is established in the Netherlands. The amounts a rightholder receives is considered as income and therefore

[23] https://www.bumastemra.nl/wp-content/uploads/2016/05/LR_BUM15230-Statutenboek-correcties-april-16.pdf

income tax has to be paid by the rightholder.

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.

Dutch law does not prohibit in general exclusive mandates.

Authors who enter an exploitation agreement with Buma and Stemra transfer their exploitation rights on certain categories of exploitation or all of them, exclusively to Buma and Stemra. As a result of the assignment and transfer of the exploitation right the author is not allowed to grant a license for the use of his/her works (except for non-commercial use as explained under 2.6). However Buma and Stemra may in exceptional cases upon request of the rightholder give its consent to the author to exploit and enforce the music performing right and/or mechanical reproduction right assigned and transferred to Buma and Stemra in those cases. Therefore a direct licenses of an author who entered an exploitation agreement with Buma and Stemra are in general null and void.

There are also CMO's that operate (partly) by non- exclusive mandates of rightholder[24]. In that case the rightholders are also allowed, under certain conditions published by the CMO, to license themselves.

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

In general
CMO's in the Netherlands are obliged to take the necessary steps to ensure that their rightholders can exercise the right to grant licences for non-commercial use. (article 5.3 of the CRM Directive).

Buma/Stemra
Buma/Stemra offers its members the opportunity to, besides commercial exploitation through Buma/Stemra, license non-commercial exploitation of their musical works through Creative Commons themselves, strictly for promotional purposes[25]. Authors that are already a member of Buma/Stemra can therefore license non-commercial use according to the Creative

[24] Although not up to date the scheme on page 52 gives a broad overview of types of CMO's in the Netherlands. https://www.ie-forum.nl/backoffice/uploads/file/IEForum/Artikelen/rapport_definitief_160032009_met_excel_gecorrigeerd%5B1%5D.pdf
Check for current list of CMO's: https://www.cvta.nl/over-het-cvta/welke-organisaties/
[25] https://www.bumastemra.nl/en/faq/creative-commons/

Commons conditions within the membership context of – and the commercial exploitation by – Buma/Stemra. Creative Commons offers authors, artists, scientists and all other creative creators the freedom to handle their copyrights in a flexible way. A Creative Commons license is a so called public license.

If members want to license non-commercial use according to the Creative Commons conditions they are obliged to inform Buma/Stemra by filling out a form on the website of Buma/Stemra and agree upon special conditions.
The definition of non-commercial use is “all use of that is not described under the definition commercial use of the conditions”.
Commercial use is defined in art. 1 sub c of the special conditions and means:

- All use by a for-profit entity
- All use against payment or financial compensation
- All use by broadcast organizations, in the hospitality sector**,** shops, working areas and all organizations (non-profit and for-profit) who use music in or in addition to the performance of their duties, such as churches, (dance) schools, welfare institutions etc.

3. Collective Management Organizations and Users

Joep Meddens and Charlie Engels (Höcker advocaten, Amsterdam)

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)?

In line with the Copyright Directive, the Dutch Copyright Act both implements a private copying exception and a Levy system to establish a fair remuneration for the harm caused by the implementation of that exception. Levies are to be paid by producers or importers of objects that are meant to be used to store or make private copies. The Levy System as such is thus imposed by law, however the Copyright Act has deferred the actual setting of tariffs on specifically named products to a foundation (SONT) governed by a board made up out of rights holders on the one hand and industry representatives on the other. In previous years, the foundation would usually be divided after which the chairman was empowered to decide on the foundation's behalf. To strengthen the system, the tariffs advised by the chairman of the foundation were set in a Government Decree. Starting 2018 however, the tariffs are based on the foundation's decision only.

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)?

In its latest decision the foundation considered that private copies that have been sourced from streaming services and private copies stored in the cloud are part of the basis for tariffs set for several products. Tariffs are currently in place for such objects as smartphones, tablets and notebooks. These devices can be used to make private copies sourced from a streaming service and they can be used to make a private copy online (in the cloud).

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?

Different types of legal regimes are applicable to different types of tariffs in the Netherlands. The main distinction that can be made in this regard is between: a) the 'general' legal regime applicable to tariffs set by CMO's and; b) the specific legal regimes applicable to the determination of levies that are owed in relation to the exercise of certain exceptions to copyright (e.g. lending and home copying). These two main categories will be dealt with consecutively below. Additionally some comments will be made about how the tariffs are set by CMO's.

a) <u>general legal regime applicable to tariff setting by CMO's</u>

<u>Competition law</u>

Firstly, the setting of tariffs is regulated by general competition law. The two main criteria that are relevant in this regard are that tariffs of CMO's may not be excessive or discriminatory. The Dutch Competition Authority (ACM) indicated in a 2007 report that the only method available to determine excessiveness under competition law is an international comparison with the tariffs of the other CMO's. The ACM concluded however that this method is not appropriate to supervise the setting of tariffs of CMO's. One of the reasons for this is that in general the tariffs of one monopolist will be compared with those of another monopolist. The ACM therefore advised the government to introduce a specific legal regime to determine the lawfulness of tariffs of CMO's. Such specific rules regarding the lawfulness of the tariffs of CMO's have indeed been implemented in recent years in the Dutch Act on the Supervision of CMO's[26] (hereinafter "DASC") which will be discussed below. This seems to have made the application of competition law to tariffs of CMO's less relevant.

[26] *Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten.*

Dutch Act on the Supervision of CMO's

- Excessive increases of tariffs

The Copyright Supervisory Authority (*College Van Toezicht,* hereinafter "CSA") is the institution primarily responsible to supervise CMO's in the Netherlands pursuant to the DASC. This includes any decision of a CMO to increase a tariff. If the increase can be considered as 'excessive' the CSA will not approve the increase. The CSA has indicated that it deems several factors relevant to determine the excessiveness of an increase such as:

- the degree in which the increase is justified and whether the interests of the users have been taken into account (if the tariff is the result of negotiations with for instance a trade organisation, the increase will in principle be approved although it is not necessarily a prerequisite);
- the degree in which comparable categories of users are treated equally;
- whether any arbitrary discounts are applied or not.

Applications for approval of a tariff are administrative proceedings. The interested party may file an administrative objection to the decision with the CSA itself. If this does not lead to the desired result, an appeal may be lodged against the decision at an administrative court.

Note that the DASC is currently under review and that the government has proposed to remove from the act the requirement of prior approval for increases of rates. At this moment it is not clear yet whether this revision will indeed be implemented or not.

- Reasonable tariffs

Apart from the supervision by CSA on tariff *increases*, there is a tariff tribunal that is competent to rule on complaints that the license fee invoiced by the CMO is not reasonable (article 25). Complaints may also be filed by a CMO.

The approval of a new tariff by the CSA does not prevent the tariff tribunal from concluding that the tariff is unreasonable; the unreasonableness test is passed more easily than the excessiveness test.

The tariff tribunal is not exclusively competent to rule on matters regarding tariffs. Claimants are allowed to go directly to a court. However courts that are requested to rule on the reasonableness of tariffs applied by a CMO are obligated to obtain advice from the tariff tribunal. If a claimant goes directly to the tariff tribunal it is also possible to appeal the decision in a civil court.

In determining what can be considered "reasonable" the DASC implements criteria from the Directive on Collective Rights Management (no. 2014/26, hereinafter the "Directive"), such as that tariffs shall be:

- based on objective and non-discriminatory criteria;
- reasonable in relation to the economic value of the use of the rights in trade, taking

into account the nature and scope of the use of the work and the value of the services provided by the CMO.

Furthermore the government has clarified that tariffs agreed with users may also be a useful indication to determine what can be considered reasonable.

Up until now there have been very few cases in which the tariff tribunal was asked to rule on a matter.

b) Several specific legal regimes regarding levies

As noted there are specific legal regimes applicable to the determination of certain levies. The setting of levies applicable to home copying have already been discussed above (under 1). The setting of some of the other levies are briefly discussed below.

Public lending

Article 15c of the Copyright Act provides that the public lending of a work is not to be considered an infringement of copyright on the condition that the public library pays a reasonable compensation to the right holder. The compensation is set by a foundation (StOL) appointed by the Minister of Justice and the Minister of Education, Culture and Science. Rightholders and public lending representatives are equally represented in the board of the foundation.

Author's rights CMO's LIRA and Pictoright pursuant to a government supported industry agreement collect 50% of the fees paid by the Dutch Royal Library for public lending of e-books (in a 'one copy multiple user' model). The fees are negotiated between the Royal Library and the respective publishers.

Reprographic reproductions

Article 16h of the Copyright Act provides that a reprographic reproduction of an article from a newspaper or magazine or a small part of a book cannot be considered to infringe the rights of the author if a reasonable compensation is paid. The compensation is determined via a governmental decree. The compensation is collected by an organisation appointed by the Minister of Justice (Stichting Reprorecht). Stichting Reprorecht has entered into an agreement with a umbrella trade organisations setting the tariffs and other terms for photocopying and other digital uses within companies and institutions for internal purposes. This tariff includes the statutory tariff for reprography.

c) Conclusion regarding tariff setting

Insofar as the aforementioned general legal regime is applicable, CMO's generally set their tariffs pursuant to negotiations with individual users or trade organizations. In principle it is not prohibited for CMO's to set tariffs unilaterally but, as outlined above, CMO's have been subjected to an increasingly strict legal regime when it comes to tariff setting and whether tariffs are the result of negotiations or not is a factor that the relevant authorities will take into

account to determine if the relevant (increase of a) tariff can be considered as either excessive or unreasonable.

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?

As noted in the previous answer, competition law in the Netherlands does indeed recognize abuse of a dominant position by CMO's. There have been several cases in which the ACM had to rule on complaints from users regarding purportedly abusive tariffs imposed by Buma (the Dutch PRO for copyrights related to music) and SENA (the Dutch PRO for neighbouring rights related to music). None of these cases however led to the conclusion that the tariffs were abusive. As also noted in the previous answer, the ACM was of the opinion that competition law is not an adequate tool to adjudicate claims regarding tariffs of CMO's. In one case the ACM did however issue a consent decree regarding the membership agreements used by BUMA and STEMRA (the Dutch mechanical rights organisation for music copyrights) following a complaint by a member. The ACM concluded that BUMA/STEMRA should offer more flexibility to members as regards the categories of rights that are transferred by members under said agreements (i.e. it clarified that members should be able to easily exclude certain categories of rights from those agreements). Following commitments made by BUMA/STEMRA, the ACM did not find it necessary to initiate enforcement proceedings.

There have been two recent cases in the districts courts of Rotterdam[27] and Amsterdam[28] regarding respectively VIDEMA (the Dutch CMO for copyrights and neighbouring rights related to the closed circuit retransmission and screening of TV broadcasts) and BUMA/STEMRA. In the case concerning VIDEMA the case was first referred to the abovementioned tariff tribunal. The tribunal concluded that the tariff increase of 80% that VIDEMA had applied in relation to the transmission of TV-programmes in hospitals was excessive and therefore unreasonable. The court consequently concluded that VIDEMA had abused its dominant position. The court thus basically converted the tribunal's ruling that the tariff was unreasonable into the conclusion that VIDEMA had also abused its dominant position. It is questionable whether this is in conformity with the principles of competition law.

In the second case the district court of Amsterdam came to the conclusion that BUMA/STEMRA had imposed discriminatory tariffs on companies that provide so-called background music services to commercial users such as bars, restaurants and stores. The court was of the opinion that such background music providers compete directly with streaming services aimed at consumers such as Spotify. The court found however that the services were not entirely comparable and that it would not be appropriate therefore to apply the revenue-based tariff applicable to streaming services. Instead the court imposed on BUMA/STEMRA to apply fees far below the tariff for streaming services and held that

[27] Rb. Rotterdam 21 februari 2018, ECLI:NL:RBROT:2018:1037
[28] Rb. Amsterdam 12 december 2018, IEF 18202; ECLI:NL:RBAMS:2018:8995

BUMA/STEMRA acted unlawful for not having done so before. This ruling of the court is rather questionable. It is currently under appeal.

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?

The DASC contains several transparency requirements that are partly derived from the Directive. The most important ones are that the CMO has to:

- provide the user with information regarding the criteria that have been used to determine the applicable tariff (article 2l);
- notify the CSA in the event that a new tariff is introduced (article 5);
- publish on its website all standard license agreements, the normally applicable tariffs and related discounts (article 2p).

It is noteworthy that the CSA interprets “normally applicable tariffs” quite broadly. It has clarified that this not only encompasses tariffs designated as such by the CMO but also any tariff that has been applied several times to similar users. It also clarified that any tariff agreed upon with a trade organization for a particular group of users should also be considered as a normally applicable tariff in the sense of the DASC. This basically means that only tariffs that have been agreed upon with one user for a type of use relevant for that user alone will not have to be published by the CMO.