ALAI Congress 2019 in Prague Managing Copyright

Questionnaire

Answers for Germany by Daniel Klukas

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 German legal system does not set a monopoly for collective management organizations (CMOs). It allows competition between these organizations and other licensing entities.

However, the collective rights management market turned out to the current situation that CMOs have 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?

Our system distinguishes between voluntary and mandatory collective rights management.

In general, rightholders can choose if they want to exercise their rights individually or if they want to assign them to CMOs. Regarding certain types of rights it is required by law that the rights can be exercised by collective management organizations only (e.g. cable retransmission right and statutory remuneration claims). In the field of the cable retransmission right, CMOs are allowed to represent rightholders who did not transfer their rights to CMOs.

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.

As mentioned under 1.1, the German legal system allows a competition between CMOs. In some areas competition is curtailed. CMOs are under the legal obligation to establish tariffs and they are under the obligation to manage rights at rightholders' request. The conditions under which the CMO manages the rights have to be reasonable. The license fee has to be appropriate.

There actually is a competition between the CMOs for rightholders, especially in the field of online rights where the intervention of the European Commission led to a fragmentation of the musical repertoire.

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?

In case more than one organization can assert a statutory royalty claim it is prescribed that the existing organizations can only assert the claim together. Regarding the established statutory royalty claims (see 1.3) several organizations founded companies that assert the claim for them as an agent.

In the field of the cable retransmission right, CMOs are entitled together unless the rightholder selects one of them.

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)?

In Germany, CMOs are organised as private-law companies. They are non-profit organizations. The company shares must be hold by its members, the company must be at least controlled by its members.

So called independent management entities which are profitable entities, conduct direct licensing in Germany.

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?

In accordance with the legal regulations, the collective management organizations should promote cultural important works and performances. But it is not prescribed which measures the organizations have to take

to fulfil this obligation. Funding can be provided by a special consideration of culturally important works in the distribution of revenues.

The collective management organizations should also establish provident institutions and support facilities for their members. They can provide a retirement arrangement for the members or a support payment in case of financial distress.

The national law does not limit the cultural support and the establishment of such provident institutions and support facilities. It is just required that the benefits have to be provided according to fixed rules which are based on fair criteria, if they are financed through the revenues from licensing.

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

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

CMOs are obliged to administer rights upon rightholders' request provided that the rights and works are covered by the general activity of the organization. CMOs can only reject the administration of rights, if it is justified by objective reasons. Such reasons could be proven abuse like improper notification of a work.

Depending on the form of organization the rightholders can become members or stakeholders of the collective management organization. However, the organizations are not legally obliged to accept every rightholder as a member or stakeholder. The organizations are authorized to make the admission of members subject to predetermined conditions. These conditions just have to be objective, transparent and non-discriminating.

In case a CMO rejects the admission of a rightholder as a member, the rightholder can dispute the decision. If the organization does not remedy the appeal, the rightholder can take further legal actions, e. g. call the regulating authority or the national courts.

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?

The CMOs exercise the rights assigned to them in a fiduciary capacity. The organizations are not in charge of legal disputes regarding the authorship or participation of a work. The participation has to be clarified between the parties, if necessary by a court decision.

Nonetheless, GEMA provides an ADR for disputes between author and publisher concerning the participation of the publisher to a work. The decision of the arbitration board is just obligatory for the distribution, if the losing party does not take action before a national court within six months.

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?

The rightholders can participate in the activities of the collective management organization in the course of the annual general meeting. The extent of participation depends on the position of the respective rightholder within the organization. Rightholders who are members of the organization have the right to take part in the general meeting and to vote on its resolutions. Rightholders who assign their rights to the organization without being a member can elect a certain number of delegates in a separate meeting. These delegates are authorized to take part in the general meeting and to vote on its resolutions.

With regard to GEMA, only members of the organization (so called ordinary members) can be elected to the supervisory board. There are minimum amounts of remuneration to become an ordinary member. To become a member of the supervisory board ordinary members must have been members for at least five years.

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?

Royalties are distributed to the rightholders. GEMA distributes revenues to composers, songwriters and music publishers. The revenues are allocated on the basis of distribution keys which depend on the category of rights and the number of the participating rightholders.

The distribution plan is approved by the general meeting. Authors may file an application for changes in the distribution plan. They need the support of ten organization members. The general meeting will then decide on the request.

The grant of a licence to a user is subject to VAT. The licensee has to pay the tax together with the license fee to the CMO. In the course of the distribution the organization forwards the tax revenue to the rightholder who is obliged to pay the tax revenues to the finance office.

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.

By concluding the Deed of Assignment the rightholder assigns his rights exclusively to the collective management organization on a trustee basis. The rightholder is not any longer entitled to exercise his rights due to the assignment to the CMO.

However, regarding non-commercial uses rightholders are able to notify GEMA that they will exercise these rights individually. In this case, the rightholder is entitled to license his rights by special licensing agreements (cf. 1.11).

Regarding the cable retransmission right and statutory remuneration claims individual licensing is not possible by law. Only collective management organizations can administer these rights under the German Copyright Act.

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?

Due to legal obligations CMOs must allow rightholders to issue licences for non-commercial uses of their works on an individual basis. However, CMOs are authorized to define the conditions for the process of individual licensing. GEMA grants permission upon rightholder's application. The rightholder has to notify GEMA in case a non-commercial license is issued, since in this event GEMA has to abstain from licensing. Non-commercial licences mainly affect charity concerts. GEMA also offers a non-commercial license for the self-presentation of its members in the internet.

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)?

Following a change in law, there is no legal provision for the amount of the levy. The amount shall be determined by the extent to which the appliances and storage mediums are actually used as types for reproductions. The collective management organizations and user associations negotiate the amount on this basis.

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)?

Private copying in the internet is subject to the private copying levy as well. Large parts of the use of works in the internet are covered by the established statutory royalty claim against the producer or importer of devices for private copying or storage media like smartphones or tablets. However, this compensation payment requires a physical storage media. ”Clouds" as a storage possibility are therefore not covered. There are currently efforts by the German government to adjust the established legal provisions and to include the use of “clouds" for private copying. At the moment, there is no concrete legal proposal though. There were discussions about a cultural flat rate for uses in the internet, but the idea was abandoned.

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?

CMOs establish tariffs for the use of their works. In practice, tariffs are determined in general contracts negotiated between the CMOs and user associations. The determination of the tariffs should be based upon the commercial benefit of the use of the works, but it has to consider religious, cultural and social interests as well. Tariffs are not subject to approval by the regulating authority.

The users can call the arbitration board at the regulation authority to review the determined or negotiated tariffs. The standard of review is the adequacy of the tariffs. The arbitration board can submit a settlement proposal to the user and collective management organization in course of the procedure. If the settlement proposal is not accepted, it can be contested before ordinary national courts.

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?

Yes, CMOs are bound to competition law as well.

There was a lawsuit against several collecting societies in Europe with the subject of asserted action with regard to the transfer of rights between the CMOs. The CMOs won the case against the EC.

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 collective management organizations are obliged to publish tariffs including discounts on their websites. In addition they have to inform users about the criteria which are used for the determination of the tariffs. This obligation shall ensure that the user can verify the adequacy of the tariffs and contest them if applicable.

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