Questionnaire for the ALAI congress 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

Response of the Israeli ALAI Group

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A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

i. Offering of hyperlinks to works

- The Israeli Copyright Act does not specifically address the issue of hyperlinks. Case law (the District Court case of C.C. (Dist. Mer.) 567-08-09 A.L.I.S. v. Roter.Net) has held that a hyperlink on its own does not constitute an act of "making available" under section 15 of the Act (or any other act that is considered an exercise or infringement of the rights of the copyright owner). Nonetheless, knowingly providing a link to infringing copies posted on the internet may be considered an act of contributory infringement.

ii. Offering of deep links to works

- The same case law as referred to in Sec i. (A.L.I.S V. ROTER.NET) would appear to apply to deep linking, thus meaning that a deep link would not be considered to be an act implicating the rights of the copyright owner.

iii. Framing/embedding of works

- The case law referred to in Sec i. above as well as the more recent case of NMC United Entertainment Ltd. v. Bloomberg, Inc., left open the question of whether a framed or embedded link may be considered an act of making available.

iv. Streaming of works

- Streaming comes within the statutory definition of "broadcasting" under Section 14 of the Act ("the transmission by cable or wireless means of sounds, images or a combination of sounds and images, contained in a work, to the public).

v. Download of works

- Downloading of a work is clearly an act of reproduction under Section 12 of the Act.

vi. Upload of works

- Uploading of a work is an act of "Making Available" under Section 15 of the Act (the performing of an act in regard to a work such that members of the public will have access to it from a place and at a time of their choosing).

vii. Supply of a platform for ‘user-generated content’

- The supply of a platform for user generated content is not of itself an act limited by copyright. However, the case law referred to in Section i. makes clear that the supply of such a platform may be considered an act of contributory infringement if either (i) the supplier encourages or induces users to use it for infringements; or (ii) the platform does in fact serve for infringement in such volume as to constitute it a "non-legitimate forum". In this respect, and in referring to links to infringing content, the court proposed adopting a "rule of thumb" under which a "closed forum" containing at any given time more than 10 links to infringing content, or in which more than 25 percent of the total links contained in the said site are to infringing content would be considered an illegitimate forum. However, an "open forum" would only be considered illegitimate if the links to infringing content total more than 50% of the links contained in the site. The court considered adoption of such a rule justified because of the potential of such a platform to contribute to copyright infringement. The more recent case of NMC United Entertainment Ltd. v. Bloomberg, Inc. also makes clear that supplying a platform coupled with inducing or encouraging users to use it for infringement is an act of secondary infringement (where a primary infringement occours).

viii. Other novel forms of use on the internet.

- The Israeli courts are yet to address such forms of use.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address rightowners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

- YouTube has concluded a licensing agreement with ACUM, the largest Israeli copyright collective.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

- Israeli courts have recognized the doctrine of contributory liability for copyright infringement. This arises when the following exist: (1) a primary infringement*; (2) Knowledge by the contributory infringer of the primary infringement; (3) Substantial and real involvement of the contributory infringer in the infringement, including the refraining of taking action which the contributory infringer could reasonably have taken to cease the infringement after he or she has become aware of it. This liability is not dependent on whether the primary infringer may be identified or addressed. As stated above, this doctrine has been invoked in the internet arena.

  *The first Supreme Court case to adopt this rule (C.A. 5977/07 The Hebrew University of Jerusalem v. Shoken Publishing House, Ltd.) held that liability for contributory infringement can attach even if the primary actor is exempt from liability, such as when his act is considered a permitted fair use. In the later case of C.A. 5097/11 Telran Communications (1986) Ltd. v. Charlton Ltd., the court held that where there is no direct infringement, due to the fact that the act in question is permitted under the Act, no contributory liability can arise either.

- for content providers

  - a content provider will normally be a direct infringer. If that is not the case, he or she could be held to be a contributory infringer if the above conditions exist.

- for host providers

  - Under the above case law of C.C. (Dist. Mer.) 567-08-09 A.L.I.S. v. Roter.Net (see A.1.i above), as well as the case of NMC United Entertainment Ltd. v. Bloomberg, Inc. (see 1.iii above), a host provider is generally exempt from liability for copyright infringement but could be held liable for contributory liability if the conditions set out in that case exist. See also the case of

- for access providers

  - No case has held an access provider liable. In the partly analogous case of C.A. 5097/11 Telran Communications (1986) Ltd. v. Charlton Ltd. the distributor of equipment used to illegally access satellite signals was held not liable for infringement

- for others?

  - None to date

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b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

- In regard to conditions for liability, see above. The Supreme Court in the case of C.A. 9183/09 The F.A. Premier League Ltd. v. Ploni has held that

the courts do not have the authority to order ISP's to divulge indentifying details of suspected infringers. However, the recent case of NMC United Entertainment Ltd. v. Bloomberg, Inc., the court ordered ISP's to block access to a site that had been serving to assist online infringement.

4. In these cases of infringement, who has standing to sue:

- the author: Yes, if he is the copyright owner. If not, then the copyright owner.

- the exclusive licensee: Yes (but he must join the copyright owner unless exempted by the court. So, too, if the copyright owner has granted an exclusive license, he must join the exclusive licensee unless exempted by the court)
- the non-exclusive licensee: No
- the employer of the author: If he is the copyright owner (which will be the case if the work was created during the course and scope of the author's employment and in furtherance of the employment.

- the CMO that manages the exclusive right? If it has received an assignment of the rights or an exclusive license.

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

- as a general rule for all kinds of contracts;

- Except in the case of publication contracts in the literary field, the law does not intervene with the parties contractual arrangements. Theoretically, in extreme cases the courts could hold a grossly unfair remuneration arrangement to be unconscionable, and thus unenforceable, but, since a mistake as to the economic benefits of a contract is not actionable under law this would be unlikely.

- In regards to literary publishing contracts, the newly enacted Law for the Protection of Literature and Authors in Israel (Temporary Order) 2013 mandates that, subject to certain exemptions and provisos, publishers must pay Israeli authors a minimum royalty in regard to sales of their works in the first eight-and-a-half years from the work's first printing. The minimum is as follows: In the first 18 months, 8% of the catalogue price* on the first 6000 copies and 10% on every copy thereafter; for the following seven years, 16% of the sums actually received by the publisher ("publisher's net").

  * This must be set by the publisher and may not be amended for those 18 months. A separate price may be set for printed books and ebooks
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- as regards 'best-seller' situations (i.e., when parties did not presume that the

work would become a best-seller);

- There are no provisions that apply to such a situation.

- in the case of oppressive contracts;

- See answer to B.1. above. If the contract is a contract of adhesion, the author may have a better chance of succeeding in a challenge. Additionally, it is believed that a contract that binds an author for an excessive period would be counter to public policy. However, in a recent district court case, a an author-performer was unsuccessful in challenging the legality of recording-publishing-management contract that bound her for potentially 18 years.

- in other cases;

- No

and if so, under what conditions?

- N/A

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

- See Answer to B.1.
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3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

- It is too early to determine whether the new law will be efficient in practice.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

- The Performers and Broadcasters Rights Act 1984 provides a statutory remuneration right for performers for the audio playing or the showing of their performance. This has been interpreted by a District Court to mean basically "public performance".

- Additionally, Section 3D of the Copyright Ordinance provides for a statutory compensation for "Copyright Owners and Performance Right Owners" for the loss of income and harm to their rights caused by private copying of their works on ‘tape’".* The compensation is a sum equal to 5%

of the sales of "tapes". It is paid in three equal parts to the CMO's representing the most Copyright owners, the most performers rights owners and the most audio and visual producers and they are charged with distributing to the eligible copyright owners, performers right owners and producers.

The definition of the term "tape" excludes devices designed for use in a computer, thus excluding hard discs and discs-on-key. *the term "harm to their rights" is an anomaly, since the private copying is permitted by the Ordinance. It is non-private or commercial copying that harms the rights of the copyright and performers rights holders.

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

- The only compulsory license available to users in general is for recording of a musical work, and the lyrics especially written for it, in a sound recording (under Section 32 of the Act). The conditions for obtaining such a license are:
  (i) The work has been previously recorded, with the authorization of the copyright owner, in a sound recording that was published for commercial purposes ("the Former Sound Recording").
  (ii) The work is reproduced in its entirety, except for modifications which result from adaptation of the work, and modifications necessary for the reproduction, or that were made in the Former Sound Recording.
  (iii) The maker of the reproduction has notified the copyright owner in advance of the making of the reproduction.
  (iv) The maker of the reproduction has paid equitable royalties as agreed with the copyright owner, and, in the absence of agreement – as set by the Court.
  (v) The reproduction is not used and is not intended to be used in commercial advertising.

- Additionally, under the Communications (Telecommunications and Broadcasts) Act, licensed cable and satellite operators in Israel must carry broadcasts made under the Second Television and Radio Authority Act and by the Israel Broadcasting Authority. The licensees are exempted from paying any royalties to the owners of copyright or performers' rights in those broadcasts.

- Certain permits under the law have the effect of a free compulsory license, particular the permit for publicly performing a work in an educational institution under certain conditions.

3.
i. For which statutory remuneration rights does your law provide for obligatory collective management?

- Performers rights to equitable remuneration for the public performance ("Showing and audible playing") of their performances;
- Compensation to copyright owners and performers rights owners for private copying.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

- None

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

- Performers rights to equitable remuneration for the public performance ("Showing and audible playing") of their performances – the user;
- Compensation for private copying - tax payers (through money allocated from the public budget)

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

- Performers rights to equitable remuneration for the public performance ("Showing and audible playing") of their performances – by negotiation between the user and the CMO (in most cases *de facto* by the CMO).
- Compensation for private copying – by law.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

- Most CMO's operate under the supervision of the Antitrust Tribunal. The tribunal can intervene in tariffs that constitute an abuse of a dominant position held by a CMO or which are considered unreasonable. However, it is unclear if this power extends to the statutory remuneration of performers.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

- Sometimes a claim is rejected, in which case the CMO may bring a claim in court.

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

- Other than recourse to the courts, there is no such solution provided.

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

- In regard to the compensation for private copying, see C.1. above.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

- See C.1. above.

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

- N/A

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

- It is generally believed that the statutory remuneration rights of Performers are not transferable. The private copy remuneration rights are divided between the different sectors anyway by law. It has never been discussed in a judicial decision whether these statutory rights can be derived from an agreement or transferred. A court would probably hold that they cannot.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

- Under the law, disputes as to the distribution of private copy remuneration are to be referred to the Court.
- The Knesset Committee for Constitution, Laws and Jurisprudence has authority to set provisions for the distribution of the statutory Remuneration of Performers.
- CMO’s are also subject to the supervision of the anti-trust tribunal, but it appears that it does not authority over this matter.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

- Services run by the major broadcasters/cable/satellite operators as well as the major internet portals in Israel offer films and television programs for viewing via VOD by streaming over the internet. Some of these contents are supplied for free (funded by advertising), whilst others require a paid subscription and others are offered on a pay-per-view basis.
- Internet radio stations (some operated by traditional radio stations and others operated by webcasters offer music and other programs for free.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found.

- The operators of the models described above license their contents from the copyright owners or CMO's so do not cause legal problems. Illegal operators offering unlicensed contents have led to legal proceedings.

3. In your country, are there offers that are based on flat rates, 'pay-per-click' or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

- There are models that offer both flat rates (where the right to receive the contents is included in the subscription, others are on a pay-per-view basis.

4. Within these business models, how do authors and performers get paid?

- authors and performers are normally compensated through payments received from the CMO's who license their public performance/broadcast rights on a blanket-license or pay-per-stream basis (where each stream to an individual computer/other device is assessed at a given rate.

Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March