

# Questionnaire for the ALAI Study Days 2015 in Bonn

## **Remuneration for the use of works**

### **Exclusivity v. other approaches**

## **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
  - ii. Offering of deep links to works
  - iii. Framing/embedding of works
  - iv. Streaming of works
  - v. Download of works
  - vi. Upload of works
  - vii. Supply of a platform for 'user-generated content'
  - viii. Other novel forms of use on the internet.
  
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 right owners 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))?
  
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:
  - for content providers
  - for host providers
  - for access providers
  - for others?

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)?

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

- the author
- the exclusive licensee
- the non-exclusive licensee
- the employer of the author
- the CMO that manages the exclusive right?

#### **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;
  - as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);
  - in the case of oppressive contracts;
  - in other cases;
- and if so, under what conditions?

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?

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are 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)?
2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?
3.
  - i. For which statutory remuneration rights does your law provide for obligatory collective management?
  - 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?
  - 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)?
  - iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?
  - v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?
  - 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.)?
  - 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)?

#### **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.)?
2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?
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?
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?
5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

#### **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.

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
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.

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

Please send your completed questionnaire to [elisabeth.amler@ip.mpg.de](mailto:elisabeth.amler@ip.mpg.de) by 15 March 2015