Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

FINLAND (Rainer Oesch, Petteri Günther, Taina Pihlajarinne) (15.3.2015)

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 Finnish Group response: Not specifically covered by the Finnish Copyright Act. Finnish copyright law is to be interpreted in this regards in line with the relevant EU law and CJEU case law concerning the concept of 'making available to the public' (Art. 2 of the FinnCopAct).

Hyperlinks hardly are to be regarded as ways of making available to the public, because the user is transferred to another page. The link is like an address to another page.

If reproduction right is involved is also unsure (in the sense of Art 2 of the FinnCopAct).

ii. Offering of deep links to works

Not specifically covered by the Finnish Copyright Act.
Finnish copyright law is to be interpreted in this regards in line with the relevant EU law and CJEU case law concerning the concept of 'making available to the public'.

Deep links serve the user in a slightly more precise manner than so called hyperlinks.

iii. Framing/embedding of works

Not specifically covered by the Finnish Copyright Act.
Finnish copyright law is to be interpreted in this regards in line with the relevant EU law and CJEU case law concerning the concept of 'making available to the public'.

Framing is more near attached to the relevant use from copyright point of view as stated in an expert opinion of the Finnish Copyright Council (2001:8 – framing of the articles). In another case the Council later (2014:4) stated with reference to and inspired by the Svensson case of the (EUCJ – 466 /12) that it was regarded to be allowed to place a clicking link of the picture to a non-commercial discussion page, if the right holder had given his permission to use the picture freely on the Internet. (See already also the Finnish Copyright Committee 2002:5 p. 2, and the Finnish Copyright Committee 2012:2 separate study by Taina Pihlajarinne about commercial linking especially in situations where new services are built for economic advantage based on automated linking (e.g. news aggregations services).

iv. Streaming of works

Yes, it is regarded to be one kind of communication to the public, and falling under the 'making available to the public' leg of communication, if it is organized in such a way that the user/recipient instigates the streaming.

v. Download of works

Yes, it is to be held as 'reproduction' (downloading content).

vi. Upload of works

Yes, 'reproduction' (uploading content to a server); and 'making available to the public' (offering downloads).

vii. Supply of a platform for 'user-generated content'

Yes, considered an information society service and 'safe harbour provisions for 'hosting' service providers, as well as the provisions concerning a 'notice and takedown' procedure are included in The Information Society Code (Tietoyhteiskuntakaari). It is regarded to be one form of making available to the public. This activity may concern several right holders.

viii. Other novel forms of use on the internet.

E.g. nPVR services (Network Personal Video Recorder): an amendment to the Copyright Act, adopted by the Parliament in March 2015, to extend the applicability of extended collective licensing (in Finnish: sopimuslisenssi) to nPVR services.

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))?

E.g. the licensing arrangement between Teosto (the Finnish Composers' Copyright Society) and YouTube.

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

Yes.

- for host providers

Yes.

- for access providers

Yes.

- for others?

Actors who are directly in causal relationship with the infringing act.

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)?

See above.

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

- the author

Yes.

- the exclusive licensee

Yes, it is in the interest of the the exclusive licensee a parallel (with the author) right to take action against the infringer.

- the non-exclusive licensee

Yes, if the non-exclusive licensee has been given the right to take action against an infringer.

- the employer of the author

Yes if the rights are regarded to be transferred or totally assigned to the employer

- the CMO that manages the exclusive right?

Yes, if the contractual arrangement between the CMO and the rightholder provides the right to sue.

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

New provisions in Art. 29 of the FinnCopAct, These provisions were adopted by the Parliament in March 2015. These provisions provide for the possibility to adjust contractual terms to make them equitable. They.are applicable to contracts of transfer by the original rightholder. The Finnish Contract Act Art. 36 is applicable to all subsequent transfers.

Fair remuneration must be paid in all kinds of infringements (Art. 57 of the FinnCop Act).

   - as regards ‘best-seller’ situations (i.e., when parties did not presume that the work would become a best-seller);

Concerning copyright, the Finnish Parliament has adopted the proposed amendment to the Copyright Act on the possibility to adjust the contractual terms between the original rightholder and user pertaining to copyright assignments to make them equitable. Finnish Contracts Act Art 36 (Laki varallisuusoikeudellisista oikeustoimista) provides for the possibility to adjust contractual terms to make them equitable afterwards

   - in the case of oppressive contracts;

   See the responses above under B. 1.

   - in other cases;
     and if so, under what conditions?

Might be.

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?

There is no specific statutory level of remunerations.

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

Yes.

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)?

Public lending rights: yes; resale rights: yes.
Private copying: (from 1.1.2015- onwards the the fair compensation for private copying - from the state budget) (Finn Cop Act 26 a 11 §). There is no individual subjective right to claim fair compensation for private copying.

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

There are two cases: 1) use of published works in educational activities by photocopying or by corresponding means; use of works made public in educational activities by using other technical means, 2) retransmission f broadcasts (concerning other than the so-called must carry channels). The compulsory license may be awarded by arbitration or by the court (Art 54 FinnCopAct).

3.

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

E.g. resale remuneration, public lending remunerations, remunerations for performers and producers of phonograms for the use of phonograms in public performances and broadcasting as well as retransmission of broadcasts

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?

No such cases.

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)?

Resale remuneration: the seller or the intermediary.
Public lending remuneration: the tax payers (resources allocated from the state budget).
Remunerations for performers and producers of phonograms: users of phonograms.

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

There are no fixed tariffs. Remunerations of performers and producers are agreed normally by the respective CMO and users in free negotiations.

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

No. But there is a general control of the activities of CMO's by the Ministry of Education and Culture.

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.)?

Time lapse and questions of interpretation are always problematic, if the goal is fast and fair remuneration.

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)?

The remunerations for performers and producers of phonogram, when there is the risk that the remuneration cannot be paid; a court may prohibit the use of phonograms or require that the user poses an acceptable security for the payment (Art. 54 b of FinnCopAct)

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.)?

No.

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

No.

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?

No such mechanisms; the matter is up to the CMO.

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?

These are matters for the CMO. The Finnish rightholders control their CMO's most attentively.

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

No. See the response to 4.

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?

With "TV-highway" (Tv-kaista) you can download contents of 14 tv-channels to your disposal from a cloud.

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

These exist in Finland too.

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 owners and the lawyer of the TV.kaista (TV Channel) have been prosecuted on criminal basis.

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.

No, there hardly exist models like Netflix

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

Voluntarily according to the possibly existing agreements

Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March 2015