Study Guidelines

by Ari LAAKKONEN, Reporter General
Ralph NACK and Guillaume HENRY, Deputy Reporters General
Rafael ATAB, Johanna FLYTHSTRÖM, Linda LECOMTE and Lena SHEN
Assistants to the Reporter General

2023 – Study Question

Collecting societies

Introduction

1) Collecting societies manage and license copyrighted works and related rights on behalf of their owners to users such as broadcasters, digital service providers, public performance venues and individuals. They enable remunerated use of protected works where individual exploitation would be impractical or impossible, particularly in the musical, visual and audio-visual sectors. Collecting societies play an indispensable role in the global copyright value chain, collecting and distributing billions of dollars in license payments annually.

2) However, collecting societies do not exist in every jurisdiction and market. Without copyright collecting societies, enforcement of copyright by or on behalf of individual authors is the only option. This can make enforcement more fragmented and less effective. Thus, to ensure that enforcement is made consistently more comprehensive and effective, it could be an objective to introduce collecting societies in a harmonised fashion in markets that do not already have them. When doing so, it is useful to bear in mind the experiences that have been gained so far with collecting societies.

3) However, permitting the operation of collecting societies may involve making compromises. A better ability to collectively enforce rights for all rightholders brings with it a uniform approach that treats all works in much the same way, without necessarily apportioning to each a royalty/revenue model that may better address the specifics of the copyright work in question. For example, iconic and famous musical works may be licensed for the same rate as works that are much less prominent.

Why AIPPI considers this an important area of study

4) For all their ubiquity and market power, the legal position of collecting societies is often complex, contested and uncertain, and subject to significant differences between countries. In their relations with creators and owners of works, collecting societies face pressures in relation to accountability, transparency and financial management. In their relations with users, questions regularly arise around their mandate, both in terms of

which rightholders they represent and which uses they are willing and able to license. Even where such questions can be answered, licensing negotiations regularly generate additional issues in relation to transparency and non-discrimination, as well as the very basic question of how – i.e. on what basis and through what process – a license fee should be determined.

5) Accordingly, this proposed Study Question will consider a framework for the legal position and regulation of collecting societies, focusing on issues such as accountability and transparency, governance and supervision, and the principles and processes for the setting of rates and the distribution of revenues.

6) A harmonised framework is especially important when, as is the case with collecting societies, there is no existing framework in many jurisdictions which leaves the licensing of copyright works up to individual enforcement actions and may well – and probably will – result in differing rates of remuneration in different jurisdictions for exactly the same copyright work.

7) Some co-operation between collecting societies in different jurisdictions to harmonise levels of remuneration for the same copyright work may therefore also be desirable.

8) Even the remuneration of an author within a single jurisdiction can be a complex matter. As is noted by WIPO[1]:

> *"Performing rights organizations have to strike an appropriate balance between two conflicting interests, namely the interest of creating a reliable basis for the distribution of remuneration and the interest of avoiding costs as a result of which the amount to be distributed would be unreasonably decreased. As a consequence, an element of "rough justice" appears in the distribution system."*

9) It is not surprising that administrative burdens can be heavy when licensing musical and other copyright works, because the licensing of these types of works could generally be based on a "per use" basis where each use is a separate royalty-bearing licensing event. This necessarily entails keeping track of the use events. Other models, e.g. a subscription model for use over a single calendar year, would allow more aggregation of uses and rights but with greater aggregation the price differentials between different works become blurred.

10) A related and important topic is whether collective licensing should be mandatory for some categories of rights, with no opt out possible. This principle (which is espoused in some jurisdictions for specific rights) is highly "efficient" but has the regrettable drawback that the proprietor of the copyright work is deprived of a choice. When IP protection is subjected to this kind of compulsory licensing, the incentives to invest in creation suffer correspondingly. Furthermore, the basic right of an IP owner to decide whether to license or not is taken away in this form of compulsory licensing, and any author of a work that falls into a mandatory scheme will have to live with the fact that the world will be allowed (remunerated) access to his or her work, regardless of the author's own preferences as to *how, where and when* that copyright work should be exploited.

[1] Paragraph 96, Collective management of Copyright and Related Rights, Dr. Mihaly FICSOR, 2002.

Relevant treaty provisions

11) The collective management of copyright and related rights is an area that has not been addressed by international treaties. For instance, drafts of WIPO's Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT) initially included collective licensing provisions, but in the Diplomatic Conference in 1996 those provisions were not approved. Thus this area remains very nationally focused with no comprehensive multilateral treaty.

12) There is, however, national/regional legislation that provides examples of collecting licensing schemes. In the EU, Directive 2014/26/EU of 26 February 2014 sets out rules for collective licensing. A specific objective of that Directive to set out multi-territorial licensing regimes of rights in musical works for online use in the internal market. In the absence of regulation, the bulk pricing of musical works in the EU (e.g. accessed via on-line platforms) could vary from jurisdiction to jurisdiction. This would leave the consumer-facing pricing to either mirror that variable bulk pricing (which would result in undesirable differential pricing) or not (which would result in undesirable cross-subsidies).

13) In relation to mandatory collective licensing, which is a form of compulsory licensing but used regardless of whether demand in a particular market has been satisfied or not, Articles 14(1) and (2) of TRIPs are quite clear that authors of musical works do have the right to prohibit the exploitation of their works:

> *1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.*
>
> *2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.*

14) It could be argued that it follows that authors should have the right to prohibit exploitation of their works, if they are not satisfied with the remuneration offered by a mandatory collective licensing scheme, or if the exploitation is not at a time which suits the author. Otherwise, the 'right to prevent' becomes devoid of meaning.

Scope of this Study Question

15) For the purpose of this Study Question, the term "Copyright" means the rights associated with copyright as set forth in the Revised Berne Convention 1979 (RBC). The term "Related Rights" means all other copyright-type rights, e.g. "related rights", "neighbouring rights", "sui generis rights", etc.

16) Potential questions that can be addressed by this proposed Study Question may include:

a. What types of collecting societies exist and how are they regulated?

b. Which rightholders do they automatically represent and which uses can they license?

c. Should collective licensing be mandatory for some kinds of rights (e.g. remuneration for private copying, remuneration for lending books in libraries)? Should rightholders be able to opt out?

d. Should collecting societies be non-profit organizations?

e. What should be the principles for determining the fees and the distribution among authors? Who should decide this?

f. Should collecting societies be able to bring infringement actions – in relation to the economic rights of authors – on the basis of copyright?

g. Should collecting societies be involved in enforcing moral rights of authors?

17) The objective of this Study Question is to discuss the more high-level considerations and principles listed above, rather than provide highly detailed rules on specific aspects of collective licensing.

18) The work product coming out of this Study Question could form a basis for an AIPPI model law on collective licensing, with additional detail added by future Study Questions.

Previous work of AIPPI

19) While AIPPI has had many study questions over the years focused on specific copyright topics, collecting societies have never been a subject that has been studied for possible harmonization opportunities on this level.

20) The determination of damages has, however, been subject to detailed consideration and in particular the determination and quantification of a reasonable royalty was considered in paragraph 9 of Q258 / Quantification of monetary relief, in 2017 in Sydney. Those considerations also apply to copyright and should therefore be applicable also in the context of reasonable royalties for collective licensing. For example, in the UK, the determination of a reasonable royalty for copyright licensing purposes is intricately linked to the determination of damages on a reasonable royalty basis.

Discussion

21) In Europe, the development of collective management of copyrights is old since it dates back to the 19th century (the SACD was created in 1829 and the SACEM in 1851[2]).

22) Historically, each collecting society was alone in its country and granted licenses to users for its national territory only. Each collecting society was therefore, arguably, in

[2] SACD is the Société des Auteurs Compositeurs Dramatiques. SACEM is the Société des Auteurs Compositeurs et Editeurs de Musique.

a dominant position. The European Union controls the possible abuse of a dominant position by controlling the activities of collecting societies. On this basis, in the EU, tariffs[3] have been challenged as an abuse of dominant position. In the *OSA* case (CJEU, 27 February 2014, aff. C-351/12), the European Court of Justice stated that

> *"Article 102 TFEU must be interpreted as meaning that it is an indication of an abuse of a dominant position for that leading copyright collective management society to charge tariffs for the services it provides which are significantly higher than those charged in the other Member States, provided that the comparison of tariff levels was carried out on a homogeneous basis, or to charge excessive prices which bear no reasonable relation to the economic value of the service provided"[4].*

23) In addition, the European Union has also adopted the Directive 2014/26/EU of 26 February 2014 that provides rules for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, methods for their governance, and their supervisory framework.

24) For instance, Article 5.2 provides that:

> *"Rightholders shall have the right to authorise a collective management organisation 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 organisation or the rightholder. Unless the collective management organisation 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"*.

25) Article 16.2 § 2 provides that:

> *"Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, 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 other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs".*

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[3] It can also lead to questions relating to merger control (CASE M.6800-PRSfM/ STIM/ GEMA/ JV , C(2015) 4061 final approving a proposed concentration between PRSfM, STIM, and GEMA.

[4] See. also CJEU, Sept. 14, 2017, Case C-177/16, admitting the possibility of correcting tariffs applicable in other EU Member States by means of the purchasing power parity index.

26) Furthermore, the EU directive provides a set of rules prescribing conditions for the provision by collecting societies of multi-territorial collective licensing of authors' rights in musical works for online use.

27) With respect to the setting of royalties collected by collecting societies from users, the situations vary from jurisdiction to jurisdiction:

- Section 38, German Collecting Societies Act, 2017, provides that: *"The collecting society shall set tariffs in respect of that remuneration which it claims for the rights it manages. If inclusive contracts have been concluded, the rates of remuneration agreed in them shall constitute the applicable tariffs."*
- Article 13 of the Japanese Law on Management Business of Copyright and Neighboring Rights provides that: *"A management business operator shall specify royalty rules (…) and make a previous report thereof to the Commissioner of the Agency for Cultural Affairs. The same shall apply in the case where the operator intends to change the rules".*Article 105(5) of the Korean Copyright Act states that: *"The rate and amount of usage fee that a copyright trust service provider receives from users shall be determined by the copyright trust service provider after he/she obtains approval from the Minister of Culture, Sports and Tourism".*

28) With regard to the use of the royalties collected and in particular the administrative expenses and the sums devoted to social action, Article 98(16) of the Brazilian Law on Copyright and Neighboring Rights and article 20, Decree no. 9.574, of November 22, 2018 provide that

> "*Associations, by decision of their maximum decision-making body and as provided for in their bylaws, may allocate up to twenty percent (20%) of all or part of the resources resulting from their activities to cultural and social actions that benefit their members collectively."*

29) In China, Article 28 of the Regulations on Copyright Collective Administration provides that:

> *"A copyright collective administration organization may deduct a certain proportion of the licensing fees which it has collected, as administrative costs to maintain its regular business activities. The proportion that a copyright collective administration organization may deduct as administrative costs shall gradually decrease with the increase of the amount of collected licensing fees."*

30) Regarding the distribution of the royalties collected from the users to authors, some legislations contain particular provisions. For instance, Article 14.5, Columbian Law no. 44 of 1993 provides that:

> *"The amount of remuneration collected by* [CSs] *shall be distributed among the owners of rights in proportion to the actual use of their rights."*

31) Article 98 of the Intellectual Property Law in Chile provides that:

> *"The distribution systems will contemplate a participation of the owners of works and productions in the collected rights, proportional to the use of these."*

32) However, more internationally there is no real harmonisation, and the basis for assessing reasonable royalties is not uniform.

33) There is thus no uniform method of determining the remuneration of an author, and in particular it is unclear whether an individual author's remuneration will be determined in line with the remuneration paid to others, or according to the circumtances of the individual.

34) In recent years, there has been an increase in the number of organisations that are active in the creation of copyright works and it is no longer limited to a small class of enterprises, e.g. a handlful of record companies publishing music. Would the licensing of works by record studios have been enough, and a genuine alternative to collective licensing? If that is more ideal as a model, it might be desirable to configure collective licensing schemes such that they provide the same pricing/remuneratiomn flexibility as conventional licensing by a number of record studios.

35) There has also been a huge increase in the number of ways that music, videos and other copyright works are used. It is seriously debatable, for example, whether record companies would now have the administrative capacity to handle all the licensing needs of the modern, diverse market. An example is the *"hair and beauty sector, including hairdressers, barbers, tattooists, nail bars, tanning salons"* sector licensed by the UK collective licensing organization PPL/PRS[5], which specifies in its rate card that the royalty rates for the hair and beauty sector are as follows, for playback of music licensed by PPL/PRS[6]:

Number of Stylist/Treatment Chairs	**Annual Royalty Rates (standard)**
Up to 5	£96.35
6–10	£127.11
11-15	£157.85
16-20	£188.59
21-25	£219.32
26-30	£250.08
31 and above	£426.15

[5] https://pplprs.co.uk/about-pplprs/.
[6] Data from https://pplprs.co.uk/business/other/.

36) In contrast, a licence from PPL for a "dance party" – for exactly the same music – is charged out at the following rates[7]:

> **3.1.1 For large events** (where the audience capacity exceeds 2,500 persons) taking place outdoors or in premises (such as warehouses) irregularly used for such events, the **daily charge** per event can be, at the applicant's option
>
> **either** (a) the royalty is 3% of gross receipts* from admissions.
> **or** (b) provided *PRS for Music* receives payment in full *at least seven days prior to an event,* a fixed sum as below:

audience capacity		royalty charge	
from	**to**	**current year**	**(previous year)**
2,500	4,999	£4,204	(£3,929)
5,000	7,499	£7,012	(£6,553)
7,500	9,999	£9,817	(£9,175)
10,000	12,499	£12,621	(£11,795)
12,500	14,999	£15,423	(£14,414)
15,000	17,499	£18,226	(£17,034)
17,500	19,999	£21,029	(£19,653)
20,000	22,499	£23,839	(£22,279)
22,500	24,999	£26,646	(£24,903)
25,000	27,499	£29,447	(£27,521)
27,500	29,999	£32,250	(£30,140)
30,000	and over	on application	

37) In neither case, does the type/popularity/age/other characteristics of the music being played back play any part in the calculation of the royalty. Therefore, if the remuneration paid to an individual artist is to reflect the open market value of the musical work produced by the artist, the allocation of remuneration *as between authors* will necessarily have to be carried out by the collective licensing body.

38) The ability of an author to challenge the formula used for allocating revenue (or even the rates charged) becomes critically important if the licensing scheme is mandatory and all works of a particular type become licensed on a compulsory basis.

39) There is also a question as to whether the enforcement of collectively licensed copyright works as against smaller market players – such as smaller entertainment venues – amounts to a disproportionate exercise of market power, if the venues will never be in a position to nor would it be economically sensible to contest the licensing royalties sought. It may therefore be useful to consider whether there should be a certain *de minimis* level of activity, before collectively licensed rights are enforced.

40) For a hairdresser in the UK with 5 stylist chairs, an annual royalty of £96.35 is always going to be cheaper to simply pay, rather than engage in litigation over – even if the stylist has no radio sitting on a shelf which plays music. In cases such as these, a suitable *de minimis* level would ensure that licensing considerations do not become a disproportionate or unwarranted burden on business.

[7] Data from https://pplprs.co.uk/business/other/.

41) Furthermore, the effects of exhaustion are not possible to account for, without harmonisation. This more detailed aspect is, however, not in scope of these Study Guidelines and is reserved for future study.

You are invited to submit a Report addressing the questions below.

Questions

I) Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

The legal regime applicable to collecting societies (CSs)

1) Are collecting societies subject to a special legal regime? Please answer YES or NO and explain.
2) What can be the legal form of a CS?
   a. Public administrations?
   b. Private companies?
   c. Other?
3) Are CSs for-profit or non-profit organizations?
4) Who can be a partner/stakeholder in a CS?
5) Are CSs subject to control by public authorities?

The copyrights managed by CSs / relation between CSs and rightholders

6) Please indicate which types of works/copyrights (including moral and/or economic rights) are/can be managed by CSs?
7) Please indicate whether certain copyrights are subject to mandatory collective management?
8) Can a rightholder opt out (alternatively whether there is a default rule enabling so-called Extended Collective Licensing and whether a rightholder can opt out) and if so, whether that is limited to specific categories of rightholders/sectors and/or users?
9) Can/is there competition between several CS for the management of the same copyright? If so, is the author free to entrust the management of his/her copyright to the CS of his/her choice?
10) If for each copyright prerogative, there is only one CS that can manage it, is the CS considered to be in a dominant position on the market and is competition law applicable to it? Please cite case law if available.
11) What is the legal form of entrusting the management of an author's rights to a CS?
    a. A mandate?
    b. A contribution to a company?

c. A contract?

d. Other?

12) Can a CS enforce the managed copyrights? And moral rights of authors?

The licenses concluded with the users

13) Please indicate the different forms of licenses that exist in collective management.

a. General performance contract?

b. Contract of use for each work?

c. Others?

14) How are licensing contracts negotiated?

a. The terms of the licensing contracts are set by law (please specify which ones)

b. The CSs have standard contracts and royalty schedules

c. Each contract is/can be subject to negotiation

15) The CS tariffs: How are licensing contract royalties set?

a. What are the general principles for setting royalty rates?

b. Are the royalties flat or proportional? In which cases?

c. If royalties are proportional, are they proportional to the user's turnover? To the extent of the exploitation of the repertoire? To another criterion?

16) Are the CS tariffs public? If not, how do authors/artists know whether they would wish to join a CS?

Distribution of royalties collected by the SC to authors

17) How do CSs distribute royalties among authors?

a. According to the author's reputation/nature of works/duration, etc.?

b. According to the extent of exploitation of the author's works?

c. Other?

18) Do the CSs devote part of the collected royalties to social, cultural or other actions? If so, in what proportion?

19) For the collected royalties for which the authors are not known (non-distributable royalties), are there any rules?

II) Policy considerations and proposals for improvements of your Group's current law

20) Is it desirable to enforce collectively licensed copyright works using the same procedures as for non-licensed works, and if not, how should they be enforced?

21) Should collective licensing for particular types of works and/or sectors be mandatory?

22) Should individual royalty rates be determined according to the individual circumstances of each case, or should all royalty rates be determined according to the same criteria?

23) Should there be a certain minimum threshold of use (e.g. a bar with at least 50 customers, a dance party for fewer than 500 people, or a hairdresser with 12 stylist chairs), with any use below the minimum level being royalty free?

24) Should there be an exemption from collective licensing royalties for private, non-commercial use?

III) Proposals for harmonisation

25) Do you consider harmonisation regarding collecting societies as desirable in general? Please answer YES or NO and you may add a brief explanation.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

26) Should collective licensing be mandatory any specific class of copyright works/sectors and, if so, how is that class of works defined?

    If YES: Should authors/artists be allowed to opt out, if they do not agree with the licensing terms?

27) How should the licensing terms, especially the remuneration, be calculated?

28) Should authors of copyright works be allowed to choose between different licensing organisations?

29) Should licensing terms be harmonized across jurisdictions, and if so, how could different licensing terms as between jurisdictions be avoided?

30) Should the licensing terms (including remuneration) be reviewed and adjusted at specific time intervals, and if so, how should those intervals be defined?

31) Should the enforcement of a collectively licensed copyright be possible by the CS and if so:

    a. should the author be joined into the action as a party?

    b. if the answer to a. above is NO, how should any necessary evidence of originality be obtained for a copyright-protected work, and challenged by the defendant?

32) Please comment on any additional issues concerning any aspect of collecting societies that you consider relevant to this Study Question.

33) Please indicate which industry sector views provided by in-house counsels are included in your Group’s answers to Part III. consider relevant to this Study Question.