

AIPPI question Copyright - Q286 – Collecting societies

Af Jens Schovsbo (ankerperson), Rasmus Korsgaard, Johnny Petersen og Therese Pretzmann og med tak til Morten Rosenmeier

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.*

YES.

Collecting Societies (CS) in the EU are governed by the EU Collective Rights Management Directive (Directive 2014/26/EU). The aim of the directive is to modernise and improve the rules governing the governance, transparency, and financial management of collecting societies in respect of remuneration of rights, and to encourage and promote the spread of multi-territorial licensing of musical works with the purpose of creating a genuine digital single market.

The EU Collective Rights Management Directive is implemented in Danish law by the Collective Management of Copyright Act. In addition, the Danish Copyright Act contains a number of provisions that form the basis for the collecting societies' concessions and regulate how they must be approved and what rights they may manage.

KODA manages the public performance rights of composers, lyricists, and music publishers. The basis for KODA's concession is the Danish Copyright Act s 75 a (1). Under this section, a CS that enters into contracts for the public performance of a musical work protected under the Act must be approved by the Ministry of Culture.

NCB (Nordic Copyright Bureau) manages KODA's member's right to fixation as well as the right to distribute copies of the recordings.

Gramex manages the public performance rights of performing artists and record companies. The basis for Gramex' concession is the Danish Copyright Act s 68, which provides a compulsory licensing rule. Under this section, published sound recordings may be used for radio and television broadcasting and other public performances (except on-demand provision), but record companies and performing artists are entitled to payment. The claims for payment must be enforced through a CS approved by the Ministry of Culture, cf. s 68(2), which is Gramex.

Copydan-organizations manage most of the extended collective licences provided for in the Danish Copyright Act. The organisations are approved by the Minister of Culture, cf. s 50(4), and there are six of them in total. The different Copydan-organizations are as follows:

- **World TV** manages, i.a., rights relating to cable retransmission and other reproduction of radio and television broadcasts, in accordance with the extended collective agreement licence provided in the Danish Copyright Act s 35.
- **AVU media** manages rights to radio and television broadcasts and other audiovisual content in relation to schools, other educational institutions, museums, and libraries.

- **Archive** manages agreements on digitisation and making available of cultural heritage, cf. the general extended collective agreement licence in the Danish Copyright Act s 5(2), in the audio-visual field, including the re-use of radio and television broadcasts, cf. s 30 a.
- **CulturePlus** manages the remuneration program for private copying of, i.a., films and music, cf. Danish Copyright Act s 39-46a.
- **Text Note** manages rights relating to photocopying and digital exploitation of books, periodicals, newspapers, etc. in schools and other educational institutions, in accordance with the extended collective agreement licence in the Danish Copyright Act s 13, and in business, public administration, etc., cf. s 14, and interurban lending, cf. s 16 b.
- **VISDA** manages rights for the reproduction of works of art (including photographs) in all digital and analogue contexts, including in educational institutions, museums, archives, and publishing houses, such as websites, databases, books and e-books, etc., cf. Danish Copyright Acts s 24 a. It also manages rights to broadcast works of art on television and to rebroadcast and make available on demand television productions, cf. s 30-30 a. It also administers the remuneration programme for the art resale proceeds provided in s 38.

The Authors' Management Society manages various rights on behalf of authors, including the recitation of literary works in DR (Danish Broadcasting Corporation), cf. Danish Copyright Act s 30.

Filmex manages performers' rights to acting performances in audiovisual works. Filmex distributes remuneration from the Copydan associations to rightsholders and collects and pays remuneration directly to rightsholders on the basis of agreements or collective agreements.

Performex distributes music performers' share of the remuneration from Copydan World TV and Archives.

CAB represents producers of cinematographic works in relation to Copydan funds from cable distributors and antenna associations and others who must pay for retransmission of radio and television broadcasts.

Filmret represents producers of cinematographic works both in connection with individual clearance of rights and in connection with the receipt of remuneration from, i.a., Copydan AVU media for copying for educational purposes.

Filmkopi represents film producers vis-à-vis Copydan CulturePlus, which administers the remuneration program for private copying of, i.a., films and music.

2) *What can be the legal form of a CS? Public administrations? Private companies? Other?*

Under Danish law, there are no specific rules on what legal form collecting societies may take. Thus, collecting societies may be structured in many ways, i.e., as an association, a limited liability company, a foundation etc.

For many years, Extended Collective Licenses (ECLs) (in Danish 'aftalelicens') have been used in Nordic copyright law to facilitate mass-use of copyright protected material such as texts, pictures or music by schools, universities business enterprises, broadcasting companies or cultural institutions etc.

extended collective licenses allow for agreements made by collective management organisations (CMOs) which represent a 'substantial amount of rightholders for works which are being used in Denmark' to have effect also for rightholders who are NOT members of the association. It is the binding effect for non-members – what is known as the 'outsider-' or 'extended-' effect – that is special. For non-members it is a compulsory rather than voluntarily system.

To rely on the ECL-system collecting societies must be approved by the Ministry of Culture, and consequently. In practice, the Ministry is, therefore, able to indirectly regulate the form of collecting societies by imposing conditions on authorizations.

Moreover, for ECL-based societies the Ministry of Culture may decide that in certain areas an approved CS must be a joint organisation consisting of representative rightholders organisations, cf. Danish Copyright Act s 50(4).

According to the Collective Management of Copyright Act collecting societies that operate with individual members must have a democratic structure, where members can participate in general meetings and elect a board. The tradition in Denmark is that boards are not professional boards composed on the basis of qualifications, but rather the members themselves are eligible for election to the boards. Thus, boards are composed of rightholders and not external board members.

In Denmark, many collecting societies are joint organisations where several categories of rights are included in the licences granted. In these situations, the underlying organisations play a significant role in the management of the collecting societies and often each underlying organisation appoints board members from the underlying organisations' own boards.

3) *Are CSs for-profit or non-profit organizations?*

Under the Collective Management of Copyright Act s 2, No. 1, a CS, in order to be considered as such, must either be owned or controlled by its members, or be organised on a not-for-profit basis.

4) *Who can be a partner/stakeholder in a CS?*

A CS can either consist of individual members or be a joint organisation consisting of representative rightholders organisations.

5) *Are CSs subject to control by public authorities?*

Under the Collective Management of Copyright Act s 38(1), the Ministry of Culture supervises collecting societies covered by the Act in the areas that do not fall within the competence of the Danish Copyright Licensing Tribunal .

The Copyright Licensing Tribunal makes final administrative decisions in cases referred to it under the rules laid down in the Danish Copyright Act. Among other things, the Tribunal has authority to decide disputes on the size of payments to KODA, Gramex and Copydan World TV.

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?*

In principle, all types of copyrights, including economic and moral rights, can be managed by collecting societies. In practice, the scope of the rights transferred to the CS is typically regulated by a declaration of membership and/or by the statutes of the CS.

7) *Please indicate whether certain copyrights are subject to mandatory collective management?*

Public performances of published sound recordings (except on-demand provision) and blank media levies are subject to mandatory collective management, cf. Danish Copyright Act s 68, which is managed by Gramex.

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?*

As a starting point, a rightholder may choose between individual and collective management of his or her copyrights.

However, in many areas, the Danish Copyright Act provides the possibility of extended collective licensing. Several of the extended collective licenses are managed by Copydan-organisations, which are representative right holder's organisations, i.e. organisations which include a substantial part of the rightholders of the relevant type of work. The contracts which Copydan enters into with users are not only binding on the rightholders represented by the organisation, but also on unrepresented rightholders. Thus, the extended collective license imposes on unrepresented right holders a certain administration of their rights.

In Denmark ECLs were first used in 1960/61 for broadcasting and are now in place regarding the following areas. Sometimes it is possible for the rightholders to 'opt out', i.e. to state that they do not want their works or other protected matter to be covered by the relevant ECL. In other areas, however, opting out is not an option:

Specific ECLs

- reproduction within educational institutions (Danish Copyright Act (DKCA) Section 13) (no opt out);
- reproduction by business enterprises (DKCA Section 14) (no opt out);
- digital reproduction by libraries (DCA Section 16b) (no opt out);
- recordings of works in broadcasts for the hearing and visually impaired etc. (DKCA Section 17(4)) (no opt out);
- reproduction of works of art which have been made public (DKCA Section 24a) (opt out);
- reproduction and making available to the public of press publications and included works (DKCA Section 29a) (opt out);
- broadcasts by certain national Danish TV companies (DKCA Section 30) (opt out);
- broadcast by certain national TV companies of works in their archives (DKCA Section 30a) (opt out);
- cable or wireless retransmission to more than two connections (DKCA Section 35(1)) (no opt out)

- reproduction and making available on demand of works broadcast via radio or television (DKCA Section 35 (4) (opt out); making available on demand by works already made available on demand by radio or television entities (DKCA Section 35(5) (opt out); and

General ECL

- ‘other forms of use’ within specific areas covered by an agreement between an organisation which represents a significant number of authors and users (DCA Section 50(2) (opt out)).

Section 50(2) was introduced in 2008 and contains what is called the general (or generic) ECL-rule. Unlike the other specific ECL rules, section 50(2) is applicable to the use of copyrightable works if only a ‘specified field’ has been defined. The provision was designed primarily to deal with orphan works and, in particular, to make possible the digitization of the cultural heritage in libraries, museums and the archives of the public Danish broadcasting company (‘DR’). The result, however, is a general rule that can be used as a supplement to the specific rules on ECLs, and in all cases where rightholders’ organisations and users find the use of an ECL agreement to be helpful and can agree on the terms for use. Consequently, ECLs may potentially be available within all areas of copyright licensing without involving the legislator directly.

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?*

In principle, yes, but in practice most collecting societies must be approved by the Ministry of Culture. For ECL-based societies they must be “representative” for rightholders whose works are being exploited in Denmark. This in itself limits the potential of number of organisations so in practice the authorization leads to the acceptance of just one CS within each copyright area.

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.*

EU competition law has for long considered national collecting societies as being “dominant undertakings” and as such to fall within the ambit of TFEU Article 102 and national rules which prohibit the abuse of a dominant position. The EU Collective Rights Management Directive the EU Collective Rights Management Directive in part aims to make sure that CS do not misuse the market power neither vis-a-vis members nor users.

The directive has not preempted the use of competition law and the Danish and EU Competition Authorities monitor that the collecting societies do not abuse their dominant position to impose unfair conditions, including the size of the payment.

In a judgement of 30 August 2021 (BS-19951/2018-SHR) the Maritime and Commercial High Court ruled on certain issues in relation to collecting societies and competition law. The case concerned an agreement regarding movies for educational purposes between Local Government Denmark and Copydan AVU media, Filmret, Nordic Film Distribution and Filmbank. The action was brought by an independent management organisation, MPLC, which amongst other things claimed that Copydan AVU media, by concluding the agreement, had abused a dominant position and concluded an anti-competitive agreement in breach of the Danish Competition Act s 6 and 11 and the TFEU art. 101 and 102. In its ruling, the Maritime and Commercial High Court found no basis for delimiting the relevant market to the market for the licensing of film and TV rights for public performance in schools in

Denmark, or to the market for the licensing of film rights for public performance in schools in Denmark, as claimed by the plaintiff. Also, the Court did not find that AVU media held a dominant position on the markets referred to. Moreover, the Maritime and Commercial High Court did not find that the agreement was an anti-competitive agreement in breach of the Danish Competition Act s 6 and the TFEU art. 101. Consequently, Copydan AVU media was discharged of these claims.

11) *What is the legal form of entrusting the management of an author's rights to a CS?*

KODA: A mandate. When a copyright holder joins KODA, he/she grants KODA the exclusive right to manage his/her rights to perform, record, reproduce and distribute his/her works.

NCB: A mandate. KODA transfers the management of its member's rights to fixation, reproduction, and distribution to the NCB.

Gramex: Compulsory licensing rule in Danish Copyright Act s 68.

Copydan: Probably best described as a mandate: Copydan consists of organisations such as trade unions to whom the right holders have transferred the right to administer their copyright by contract. In this way there is no direct contractual relationship between Copydan and individual right holders whose rights they represent in negotiations with users (the principle of "indirect representation").

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

Yes.

The Danish Copyright Act does not prohibit a copyright holder from granting a CS the right to enforce his/her copyrights. Consequently, an agreement between a CS and a right holder may include a provision providing that the copyright holder grants the CS the right to enforce the managed copyrights, including the moral rights.

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?*

Different forms of licenses exist in collective management in Denmark, including:

Blanket license - a license that grants a user the right to use the repertoire of works administered by the CS.

License for (a) specific use/work- it may be possible to be granted a license for a specific work. By way of example, VISDA (CS for visual rights in Denmark) conclude agreements on an individual basis for certain types of works and for specific use.

Extended Collective Licensing ("ECL") - is widely used in Denmark. From a user's perspective, ECL is an advantage as only one license is needed and as the license covers not only the right to exploit

works administered by the CS, but also other works of the same nature. As explained above, ECL was initially introduced in Denmark for specific uses and sectors. Subsequently, a generic ECL was introduced.

Compulsory licenses - is less used than previously in Denmark. The most relevant compulsory license is found in Section 68 of the Danish Copyright Act (remuneration for use of phonograms) (and see also the provisions on blank media levies).

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

Licensing terms may be set by law. This is so for the artist resale right (Section 38 of the Danish Copyright Act), in which case the rate for payment for resale is prescribed by law. Some CSs have standard contracts and royalty schedules/tariffs, which may be available on their websites (see further below).

Other CSs in Denmark operate with fixed fees. By way of example KODA (a music CS) offers a tool for calculating a royalty rate. The royalty rate charged by KODA depends on numerous factors, including the intended use and the potential number of listeners.

Licensing contracts may - and are often - negotiated.

If a (new) licensing agreement cannot be reached, it may be possible for the parties to initiate a case before the Copyright Licensing Tribunal (in Danish: Ophavsretslicensnævnet).

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?

The Danish Copyright Act contains rules on the negotiation and setting of royalties, which mirror the rules found in the Collective Management Directive. Section 52 a (2) of the Danish Copyright Act contains two overriding principles (rooted in competition law considerations): (1) A prohibition against discrimination between users and (2) the obligation to apply objective criteria.

Section 52 a (4) stipulates that a rightsholder is entitled to receive reasonable remuneration for the use. It is stated in the preparatory works (heavily inspired by the wording of Article 16 in the Collective Management Directive) that the tariffs should be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into consideration the nature and scope of the use of the work as well as the economic value of the service provided by the CS. Such criteria are also reflected in judgements from the CJEU. It must be added that Section 52 a (4) does not cover all types of situations, e.g. the private copying levy.

From a practical point of view, the setting of royalties varies a lot. Royalties can be flat or proportional (running royalty), and they can be tied to and/or influenced by several factors. Sometimes, proportional royalty may be tied to the user's turnover.

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

See our response to question 15 above.

Not all CS tariffs are public. Before joining a CS, an author/artist may look into how royalties are administered and distributed. An author/artist must make a case-by-case assessment, also taking into consideration that concluding individual agreements would most likely be a worse alternative than joining 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?*

The rules on distribution of royalties are governed by various provisions in the Danish Act on Collective Management of Copyright, which mirrors provisions in the Collective Management Directive.

Section 15 of the Danish Act on Collective Management of Copyright includes some overall principles on the distribution that are reflected in Article 13 of the Collective Management Directive. CSs are required to distribute amounts owed to rightsholders regularly, carefully, accurately, and in accordance with the general distribution policy. The general distribution policy is decided by the general assembly of the CS, see Section 6(5)(1) of the Danish Act on Collective Management of Copyright.

Distribution policies vary a lot in practice, and societies have a wide margin to decide its distribution policies.

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

Yes, it can be decided that a CS devotes part of the collected royalties to social, cultural and/or other actions, see the Danish Act on Collective Management of Copyright Section 12, cf. 6(5), no. 4. If so, the CS must disclose information on this, see Danish Act on Collective Management of Copyright Section 14. By way of example, KODA allocates up to 10% of net earnings to cultural purposes each year.

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

Yes, the Danish Act on Collective Management of Copyright Section contains rules that mirror the Collective Management Directive. Royalties for unknown authors are, inter alia, regulated by Section 15 (2) and Section 16(1) the Danish Act on Collective Management of Copyright.

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?*

We think the same general principles should apply for enforcement both of collectively licensed and non-licensed works. Collective rights management involves a risk of abuse of market power in the relationship between CS and individual users (or member) and such abuse should be dealt with either in competition law, the general regulatory framework or via general principles of procedural law.

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

Generally speaking, it should be left to the market to decide the appropriate modality for rights administration. For Denmark the system of ECL has proven over the years to combine voluntarism and compulsion in a very successful way.

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?*

As it is explained above, point 15, practice has developed a system of rather precise and specific categories, which seems to be working well so we would leave it to the (well-regulated) market to continue to find its own ways..

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?*

Probably not. Whether a performance is "public" or not and thus requires the payment of a fee is determined by the substantive provisions in copyright law and the concrete negotiations between users and the CS.

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

As private non-commercial use does not constitute a copyright violation, it is free and there is no need for an exemption.

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.*

The answer is yes in general. However, harmonization should be based on a principle of subsidiarity and limited to issues of general interest such as good governance, the prevention of misuses of market power by collecting societies and cross-border uses.

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 in any specific class of copyright works/sectors and, if so, how is that class of works defined?*

Generally, we do not favor mandatory solutions and do not see any need for harmonized rules which make collective licensing mandatory. The Danish experiences seem to suggest that the model of Extended Collective Licensing generally provide a legal framework that nudges rights holders and users towards collective models in areas where this is preferable.

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

Generally speaking, opting-out should be possible.

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

We do not think that this matter can be determined in any single way. Generally, the fee should reflect the actual use of the work and its value to the user but other factors such as social or cultural ones could be relevant too.

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

We generally prefer rules which are flexible but accept that as flexibility comes at a price of efficiency which may limit authors' choice.

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

Harmonization should focus on the overall issues and structures. If the market is well regulated and the organizations abide by principles of good governance, the licensing terms will be determined by the market and the parties and no interventions would be needed.

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

No as per our response to Q 29.

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?

Yes, the enforcement of a collectively licensed copyright should be possible by the CS. Generally speaking, we think authors should have a say in any enforcement on their behalf.

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.

A.

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.

None.