Study group: Hanna Ekqvist, Rainer Oesch, Juhani Sinkkonen, Jennika Sucksdorff, Ilari Talman, Pamela Lönnqvist

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 ("**CSs**") are subject to the Act on the Collective Management of Copyright (1494/2016) (hereinafter "**Act**") which came into force on 1 January 2017. The Act is based on Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

2) What can be the legal form of a CS?

According to the Government Proposal to the Act (HE 119/2016), the definition of collecting societies must be understood broadly to cover a legal entity practicing collective management of copyright, regardless of its legal form. Based on Section 4 Subsection 1 Paragraph 3 and Section 16 of the Act, the forms of legal entities mentioned in the Act are association, co-operative, limited liability company, European co-operative, European company and foundation. The applicability of the Act to the operations of other types of legal entities, such as general or limited partnerships, remains thus unclear based on the Act and the Government Proposal. The Directive 2014/26/EU on collective management of copyright does not require the CSs to have a specific legal form.

Therefore, there is no absolute prohibition on the legal form of the CSs, as long as they fulfil the requirements laid down in Section 4 Subsection 1 Paragraph 1 of the Act. Said Paragraph defines a collective management organization as "a legal person owned or controlled by its members, or a non-profit organization, the sole or main purpose of which is, under due authorization, to manage copyright or rights related to copyright for the collective benefit of right holders".

a. Public administrations?

No. Public administrations as a part of the legal subject of the State of Finland does not have own rights and obligations and therefore are not considered as legal persons that could function as a CS.

b. Private companies?

Yes. Similarly when using other legal forms, a CS can be organized as a private limited liability company if 1) it is owned or controlled by its members while it can either function for-profit or for non-profit or 2) if it is not owned or controlled by its members it can function only for non-profit and 3) its sole or main purpose is to manage copyright or rights related to copyright for the collective benefit of right holders. (Section 4 Subsection 1 Paragraph 1 of the Act)

The applicability to other types of legal persons, such as general or limited partnerships, remains open on the basis of the Act and the Government Proposal.

c. Other?
Alongside with private limited companies, other applicable legal forms specifically named in the Act are associations, co-operatives, European co-operatives, European companies (*Societas Europea*) and foundations.

Natural person or an organization without legal personality, such as an unregistered association, cannot act as a CS.

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

All the CSs in Finland are registered associations who function on a non-profit basis.

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

In principle, all natural and legal persons can act as a partner or stakeholder in the CS either by ownership or membership of the CS. In practice, however, all CSs in Finland are non-profit associations not owned, but controlled by its members and require in their rules of association for the member to be either a right holder or an association representing the relevant right holders.

5) Are CSs subject to control by public authorities?

According to Section 54 of the Act, the Finnish Patent and Registration Office supervises the CSs compliance with the Act. In addition to administrative monitoring measures the Finnish Patent and Registration Office's role is to give guidance and promote good practices in line with the Act.

Finnish Patent and Registration Office's monitoring duty is done in cooperation with the Ministry of Education and Culture and include monitoring of the development of collective management in Finland, and providing any information required by the European Commission on collective management and on the development of collective management and taking part in other cooperation between the authorities in the European Economic Area (Section 54 Subsection 1 Paragraph 4).

The activities of a CS may also be subject to investigation of the Finnish Competition and Consumer Authority.

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?

There are currently seven copyright organisations in Finland (Gramex, Kopiosto, Kuvasto, Sanasto, Teosto, APFI and Näyttelijäliitto), which together represent thousands of domestic and foreign right holders. These CSs represent authors and other right holders such as composers, music publishers, performing artists and producers of sound recordings (Teosto, Gramex), authors of literature, journalists, and publishers (Kopiosto, Sanasto), visual artists and painters (Kuvasto), audiovisual content creators and producers (APFI), performing artists (Näyttelijäliitto). These CSs manage economic rights and neighboring rights of authors and performing artists through, in most cases, exclusive licenses granted by the rightholder. These rights include a general right to perform or present a work, right to make copies of a work, right to make a work publicly available and distribute the work to the public and right to retransmit a work.

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

The rightholders cannot prohibit photocopying (FinnCopAct Section 13) or retransmission (FinnCop Act Section 25 h and i).

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?

No, not if it is mandatory collective management. However, if there is an extended collective licensing scheme in place that has been approved by the Ministry of Education and Culture under Section 26, an author that is not directly represented by an organization may opt-out.

Rightholders not directly represented by an organization may opt-out in the following cases that are subject to ECL *per se*:

- Use for internal communication (FinnCopAct Section 13 a)

- Use of works for educational activities and scientific research (FinnCopAct Section 14)

- Use of works in archives, libraries and museums by virtue of extended collective licence (FinnCopAct Section 16 d)

- Use of Out-of-Commerce works by virtue of extended collective license (FinnCopAct Section 16 g) (as amended on 3 March 2023)

- Use of works of art in catalogues and in information and pictorial representation of a building (FinnCopAct Section 25 a)

- Original radio and television transmissions (FinnCopAct Section 25 f)

- A reuse of a television programme or a newspaper or periodical stored in archives (FinnCopAct Section 25 g Para 1 and 2)

- Direct transmission of radio and television programmes (FinnCopAct 25 m) (as amended on 3 March 2023)

- Use of a work included in a journal publication (FinnCopAct Section 25 n) (as amended on 3 March 2023

ECLs provided by for instance Kopiosto, entitle the publisher rightsholders to opt-out also on a title (such as a newspaper title) basis, should they prefer direct licensing in some cases.

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 Finland there is no competition between CSs for the management of the same copyright. The author may entrust the management of his/her copyright to a foreign CS.

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.

According to the Government Proposal to the Act (HE 119/2016), CSs usually have a dominant market position in the area of copyright they manage. It is specifically stated in Section 3 Paragraph 2 of the Act that this Act shall not affect the application of the Competition Act (948/2011). Therefore, competition law is applicable to the CSs. The Finnish Competition and Consumer Authority found already in 1994 that Kopiosto ry was in a dominant position in the market for the control of the re-use of works they manage. In 1995 the Competition Council found Teosto and Gramex to be in a dominant position on the market for the management of copyright in musical works.

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

a. A mandate?

The legal form is a direct mandate given by the rightholder or an association representing the rightholder to the CS.

b. A contribution to a company?

c. A contract?

d. Other?
-

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

This depends on the nature of the author's or their successor's (such as for example a publisher) contractual arrangements with the CS and in whose name and on whose account the copyrights are enforced. There is currently also an ongoing court case before the Supreme Court in Finland regarding the CSs ability to enforce copyrights in their own name and a number of questions have been referred to the CJEU in this regard (please see below).

The procedural status of CSs and other organizations is determined by the general principles of procedural law (Government Proposal HE 26/2006 vp., p. 7). According to these principles legitimacy as the proper party belongs to the parties of the disputed legal relationship. Therefore, the main rule in the absence of special provisions is that the CS may enforce economic rights related to the managed copyrights provided that these rights have been transferred to the CS in sufficient extent to create legitimacy as the proper party. According to the prevailing, established opinion the CS needs an exclusive license to be allowed to enforce the rights in their own name (the Supreme Court's decision to request a preliminary ruling in case S2019/486, paragraph 18, Market Court's judgment MAO:85/19). In addition, it would be possible to assign a certain claim, e.g., a claim for compensation and damages based on a certain past infringement. Since moral rights cannot be assigned, the CS may not enforce moral rights in its own name.

In the absence of sufficient assignment of the managed copyrights and specific provisions allowing enforcement in the CS's own name, the main rule is that the CS may not enforce the managed copyrights in its own name. This is based on general principles of Finnish procedural law, according to which it is not possible to create legitimacy as the proper party by a mere agreement on the CS's right to enforce the managed copyrights unless the CS has such a right under the law (the Supreme Court's judgments KKO:2004:18 and KKO:2018:8, the Supreme Court's decision to request a preliminary ruling in case S2019/486 and Market Court's decisions MAO:55/17, MAO:285/19 and MAO:115/20).

The government proposal regarding the implementation of the Enforcement Directive (2004/48/EY) into Finnish law does not include any specific provision that entitle CS to act as a party in its own name in intellectual property cases automatically/directly (Government Proposal HE 26/2006 vp., pg. 7). However, as mentioned above there is currently a case pending in the Supreme Court, where a CS has argued that the CS has the right to enforce copyrights in its own name under article 4(c) of the Enforcement Directive. The CS has argued, for example, that in situations where there is mass use of protected works, individual rightsholders don't have an actual possibility to enforce their rights and the CS's right of action would secure the effective enforcement of their rights (the Supreme Court's decision to request a preliminary ruling in case S2019/486, paragraph 12). The Market Court previously dismissed the CS's action but the Supreme Court granted the CS a leave to appeal and referred the case to the Court of Justice of the European Union (Case C-201/22 *Telia Finland*). The questions referred to the CJEU concern

- interpretation of Article 4(c) (whether a general capacity to sue and be sued is enough to establish legitimacy as the proper party or whether recognition as the proper party to enforce copyrights in the CS's own name is required),
- interpretation of the expression "direct interest" (as used in paras. 34 and 38 of the CJEU's judgment of 7 August 2018 in Case C-521/17) in cases of (a) representation based on extended collective licensing and (b) representation based on contract or a mandate to manage copyrights without an assignment of the rights, and
- the meaning of Articles 17 and 47 of the Charter of Fundamental Rights of the European Union in case existence of an extended collective management scheme gives a CS legitimacy as the proper party but the law does not expressly provide for such legitimacy.

Furthermore, Sections 60 a–e FinnCop Act contain several special provisions on enforcement in case of an infringement on the internet. The wording of these provisions gives *prima facie* CSs legitimacy to enforce copyrights (both economic and moral rights) in their own name in the cases covered by Sections 60 a–e FinnCop Act. In addition, some Market Court decisions point to the same direction (e.g. MAO:55/17), while a more recent Market Court decision (MAO:115/20) and a recent doctoral thesis on the topic (Jussi Päivärinne: "Siviiliprosessuaalinen asiavaltuus tekijänoikeuden loukkaustapauksissa", Suomalainen Lakimiesyhdistys 2022) concluded that these provisions would not constitute exceptions to the main rule according to which the CSs cannot enforce copyrights in their own name without an assignment of the rights.

In addition, District and Appeal Courts have allowed CSs to present monetary claims in their own name in connection with criminal cases. However, the reasoning of these courts does not generally include details on the CSs' contractual arrangement with the right holders, which the Supreme Court stated in the above-mentioned pending case weakens their guidance value (the Supreme Court's decision to request a preliminary ruling in case S2019/486, paragraph 19). The Supreme Court has not previously evaluated the right of the CS to take action in its own name.

A CS may act as a representative of the right holder and enforce the rights in the right holder's name and on his account based on a power of attorney.

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?

- There are various types of licenses. The types of existing licenses vary across different types of works and uses of the works. Some licenses cover all works licensable through a particular CS, while others concern only a specific work. Typically, the coverage in terms of the licensed works is wider e.g. in licenses concerning rights to music, whereas licenses limited to particular works are more common e.g. in the licensing of literal works. Some licenses are service specific (for example a digital service or a platform is licensed), event specific (for example a specific concert or exhibition) or otherwise limited to a very specific use (for example in a certain publication). There are also wider licenses in place with, for example, congregations and municipalities, covering use of works in their premises under certain circumstances. In addition, it is often possible to negotiate a user specific license if the types of licenses generally offered by a CS do not fit the intended use of the copyrighted works, bearing in mind, however, the general principles and rules discussed below in section 14.

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

- Finnish law outlines general principles that the terms of the licensing contracts must comply with. CSs are bound by competition law rules, and the Act requires that the terms are based on objective and non-discriminatory criteria.
- Many licenses have publicly available standard terms and royalty schedules and may be purchased easily through the websites/customers services of CSs. However, licenses that are more complex, that allow distribution to a wider public than the standard licenses, or that are otherwise meant for such use that the relevant CS has no standard license available for it, are negotiated separately.

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?

- Royalty rates must comply with the general principles discussed under question 14. In addition, the Act requires that royalties shall be reasonable, taking into account:
    - the economic value of the use of the rights in trade considering the nature and scope of the use of the work and other protected subject matter,
    - the economic value of the service provided by the CS, and
    - other factors contributing to the reasonableness of the royalties.
- The variety of royalties reflects the vast variety of different licenses for different types of works and different types of use. Most price lists are in some way proportional to a wide variety of criteria depending on the specifics of the use, and often the criteria are combined (there are, for example, different royalty schedules for different types of use, but all the schedules are proportional to the size of the audience or number of copies). Criteria used in different types of licenses and in different combinations are, for example:

- the number of events,
- the number of people who may see or hear the work,
- the number of copies,
- the size of copies,
- the number of artists whose works are used,
- the number of works used,
- the sales price of product including a copy of a work,
- ticket revenue,
- the user's turnover,
- the commercial/non-commercial nature of the use,
- whether the work is performed live or from a recording,
- online features (for example live-streaming, downloadable copies, etc.),
- the role and significance of the copyrighted works in a particular type of trade or use case (for example background music, shows based on performance of copyrighted works, a publication inside a publication or in connection with the most noteworthy contents of the publication/on the cover etc.),
- the type of the user (for example a company or a public entity)
- the industry of the user.

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

- Yes, the tariffs are public for most types of licenses, but there are also license types for which some CSs state that the tariffs are negotiated separately.

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?

Due to the variety of works represented by the different CSs, it is not possible to give a "one size fits all" answer to this question. On a general level, it can be stated that the distribution is governed by sets of rules and principles that have been approved by the appropriate entity within the CS (for example the Member's meeting). Typically a number of factors are included in the often complex calculations, for examples:

- Categories/areas of use;
- Genre and creativity;
- Coefficients can be used to give certain use of works more value in the calculations;
- The number of times the work has been used and the length of each may be taken into account; and
- The number of parties involved and their different roles (e.g. a producer and an artist that have shares in the same song, or an author and a publisher that have shares in the same musical work).

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

A part of the royalties collected and allocated by some CSs are used e.g. to provide training and grants for various purposes. It depends on the CS in question, but it is typically a low percentage (one digit percentage).

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

This is typically an issue that is considered in the rules and principles referred to in section 17 above and can, for example, mean that a reservation of funds is made while the matter is investigated further.

Section 27 of the Act states that if it has not been possible to distribute funds within three years, the funds are deemed undistributed funds, provided the CS has made sufficient efforts to identify the rightsholders.

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?

Generally speaking, with respect to enforcement procedures, the same principles should apply.

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

The answer to this question may vary depending on the type of work and/or sector, and whether the matter is looked at from CSs', different rightsholders' or users' point of view. For practical reasons, for some limited types of works and/or sectors a mandatory system works fairly well, whereas for a majority, key is subscriber and reader/listener income that is based on direct licensing. Where efficient voluntary licensing mechanisms exist, mandatory collective licensing should be avoided. However, as a starting point, the author decides about the use of their work.

Balancing between private interests of copyright owners and general interests is important. The limitations should be interpreted narrowly. Electronic use of written material by mass use institutions such as libraries is an important question that needs to be solved in a balanced manner, taking the interests of all relevant parties into account, e.g. by ensuring sufficient public funds to these institutions to acquire licenses directly from the right holders such as publishers.

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?

The general starting point is that the royalty rates should be determined according to the same pre-defined objective and non-discriminatory criteria in cases that are comparable, taking into account the principles set out in the Act: (a) the economic value of the use of the rights in trade considering the nature and scope of the use of the work and other protected subject matter, (b) the economic value of the service provided by the CS, and (c) other factors contributing to the reasonableness of the royalties. However, in some cases there can be variations due to the type of work, use case, users and other relevant circumstances.

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?**

No. Minimum thresholds should not be regulated by law. The starting point is that use of works requires a license, and then for example the CS may choose to apply certain thresholds.

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

No, such an exemption should not be included in legislation.

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.

YES. Harmonisation of general principles may be desired at a general level. However, reaching an international agreement may be challenging.

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?

Due to cultural, societal and economic differences, it seems difficult to create mandatory collective licensing for specific classes of copyright works/sectors on a global level.

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

According to similar criteria as those adopted in the CRM Directive:

- Licensing terms shall be based on objective and non-discriminatory criteria; and
- 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.

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

Yes.

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

No. The CSs have better opportunities to develop principles than the legislators.

In Europe, the CRM directive provides a framework within which the CMOs shall operate and there is therefore a certain extent of harmonisation. Full and complete harmonisation ("one size fits all") is not feasible because there are significant differences between different jurisdictions and markets that need to be taken into account**.**

In the CJEU case C-177/16 *AKKA/LAA v Konkurences padome*, the Court found that when comparing rates of CSs in different EU Member States, the reference Member States shall be selected in accordance with objective, appropriate and verifiable criteria and the comparisons shall be made on a consistent basis. This ruling thus supports the view that full harmonization between different jurisdictions is not feasible.

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

Specific, predetermined time intervals should not be regulated by law. The CSs are better equipped to review and adjust to changes.

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?

The answer to this question may vary depending on whether the matter is looked at from CSs', different rightsholders' or users' point of view, and whether the enforcement case at hand concerns a mass use situation or use of a single work, as well as the type of work and the environment where it is used. Generally speaking, IP laws should not unnecessarily interfere with and complicate the general framework of procedural law without weighty reasons. For legal certainty, clear procedural rules are desired and necessary and to some extent even international harmonization could be beneficial in this matter. Moreover, the CS's mandate from the rightsholders is also relevant for the

enforcement process, and if the mandate is vague, that could cause uncertainty. Clear and effective contractual arrangements between the CS and its members are thus also a key issue.

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.

Printing and digital media company and telecommunication, IT and digital services and media company.