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**EU-China Roundtable on Copyright Protection
in the Digital Environment
中欧数字环境下版权保护研讨会**

**Harbin 哈尔滨
2023年12月 13-14日**

**European Union
Intellectual Property Office
欧盟知识产权局**

**National Copyright
Administration of China
中国国家版权局**

**STRUCTURAL ISSUES OF COLLECTIVE MANAGEMENT OF
COPYRIGHT AND RELATED RIGHTS
版权及相关权集体管理结构性问题**

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PRELIMINARY QUESTIONS: RAISON D'ÊTRE AND CONCEPT OF COLLECTIVE MANAGEMENT

前置问题：集体管理的基本原理及概念

Raison d'être of collective management 集体管理的原理

- **Collective negotiation with users 与用户进行集体谈判**
 - Beaumarchais ; 1777; SACD
- **Professional forum; representation of authors' interests 专业论坛; 代表作者利益**
 - Balzac, Dumas, Victor Hugo, 1837, SGDL
- **Full collective management of rights 权利全部集体管理**
 - Henrion, Parizot, Bourget, 1847-1850, SACEM

Basic functions of collective management – possible additional tasks

集体管理基本功能 - 可能存在的额外任务

- Negotiations with users on remuneration and other licensing conditions 与用户协商费用及其它授权条件
 - Setting and publishing tariffs 设定并发布费率
 - Licensing uses 使用授权
 - Monitoring uses 监督使用情况
 - Enforcement of rights 权利保障
 - Collection of remuneration 收取报酬
 - Distribution of remuneration 分配报酬
-
- + Promotion of (national) creativity 宣传 (国家) 创意
 - + Role in national cultural (and financial) policy 在国家文化 (及财政) 政策中发挥的作用
 - + Social assistance for members 为成员提供相关社会支持

Proliferation of rights managed collectively

集体管理权利的传播

- Public performance right of authors of musical works 音乐作品作者的公共演出权
- Broadcasting right of authors of musical works 音乐作品作者的广播权
- Authors' musical „mechanical” right 作者的音乐“机械”权
- Authors' „synchronization right” 作者的“同步权”
- Right of performers' and producers of phonograms' to a single equitable remuneration concerning broadcasting and communication to the public of phonograms published for commercial purposes 出于商业目的出版的录音节目演出者和制片人在广播传播时单次报酬收费权
- Cable retransmission right 有线再传播权
- Satellite to cable rights 卫星到有线权

Proliferation of rights managed collectively

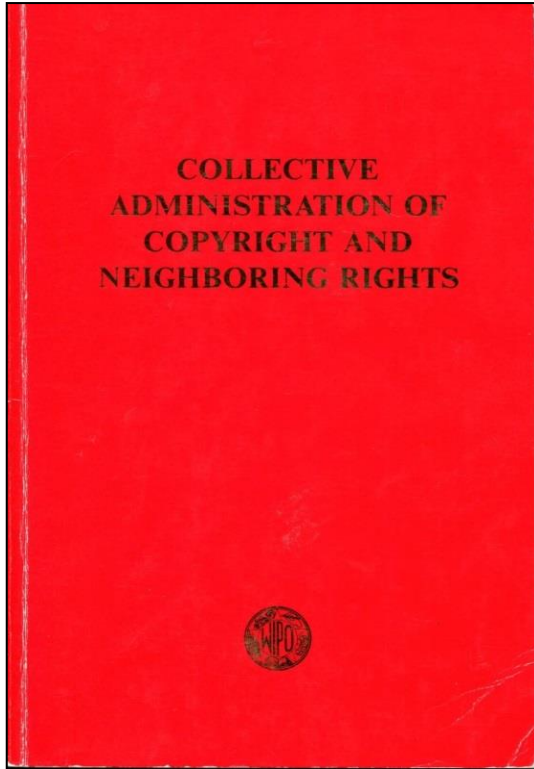
集体管理权利的传播

- Interactive right of making available to the public in musical works and such rights of performers (but possibility of individual exercise of rights)
音乐作品向公众传播的互动权及演艺人员的此类权利（但是也有个人有可能行使此类权利）
- Reprographic reproduction right Reprographic再复制权
- Right to remuneration for private copying 对于私有复制的报酬权
- Resale rights (*droit de suite*) 再销售权 (*droit de suite*)
- Authors' and performers' „residual” rights to remuneration after the transfer of their rights to producers 作品转移给制片人之后作者和演艺人员报酬的“剩余权”
- Use of orphan works 孤儿作品使用
- Use out-of-commerce works 商业以外作品的使用

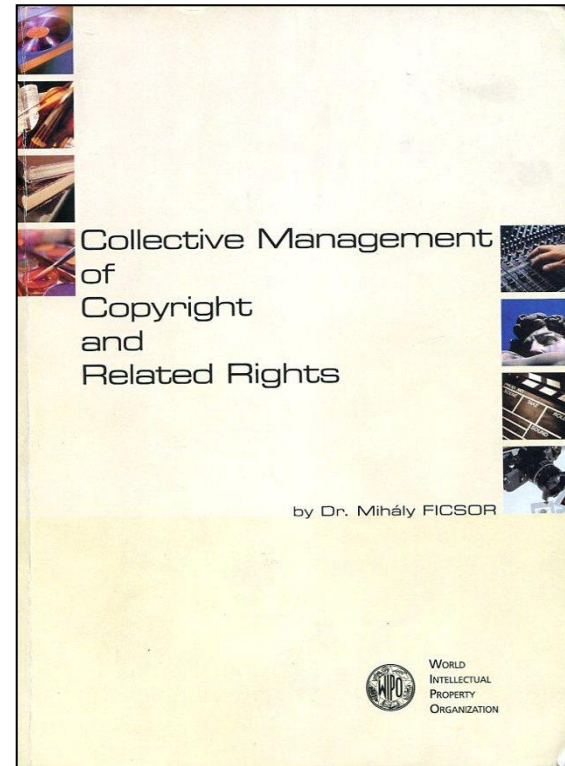
WIPO BOOKS ON COLLECTIVE MANAGEMENT

世界知识产权组织集体管理书刊

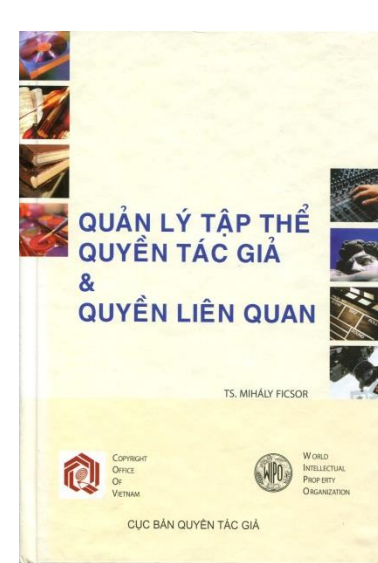
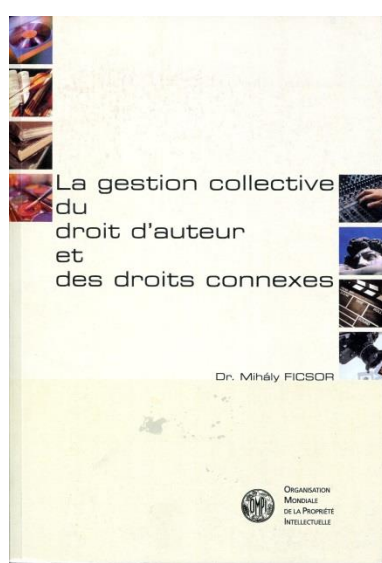
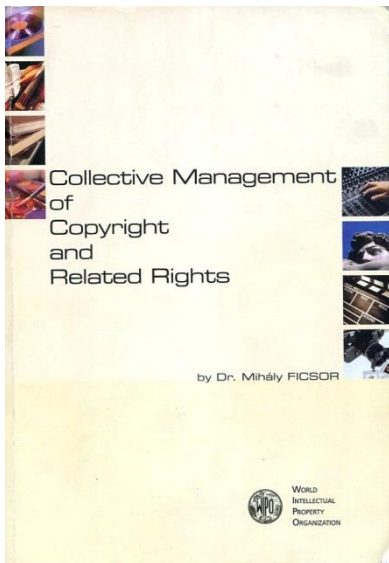
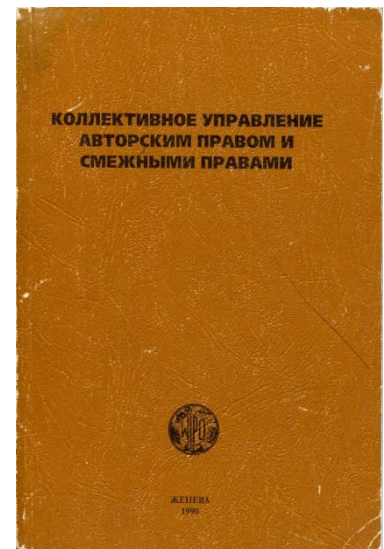
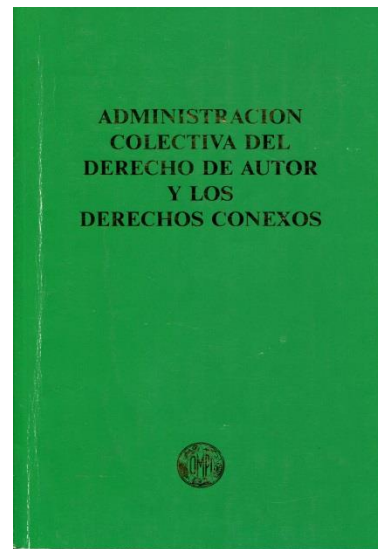
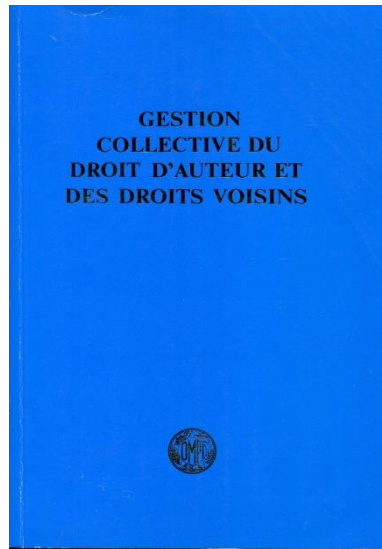
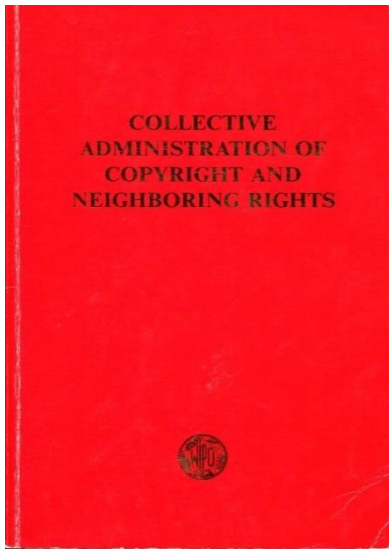
The three editions of the WIPO book 世界知识产权组织书籍的三个版本



1990: adopted by a WIPO Group of Governmental Experts (101 pages)
1990年: WIPO 政府专家组采纳 (101页)



2002: updated version of the 1990 WIPO book (176 pages)
2002年: 1990年版书籍的更新版 (176页)





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**Collective Management
of
Copyright
and
Related Rights**
Fourth Edition

**版权及相关权利
的集体管理
第四版**

by Dr. Mihály Ficsor

WIPO

?

**Is it time to begin preparing
immediately the fourth
edition?**

现在是否该准备第四版了呢?

**Or is it better to go online
and update it every year
or every month? (☺)**

**或者，
最好放到网上，每年或每月进行更新?**

?

VOLUNTARY, EXTENDED AND MANDATORY COLLECTIVE MANAGEMENT

自愿，延长及强制集体管理

Treaty obligations and collective management

协定义务及集体管理

- **Article 36 of the Berne Convention 《伯尔尼公约》第36条** „
(1) Any country party to this Convention **undertakes to adopt**, in accordance with its constitution, **the measures necessary to ensure the application of this Convention.**
该公约下的任何国家一方**负责**根据其宪法规定采取**必要措施以确保实施该公约**。
(2) **It is understood that**, at the time a country becomes bound by this Convention, **it will be in a position** under its domestic law **to give effect to the provisions of this Convention.**”
当一国受该公约约束，**该国则需要按照其国内法律来生效该公约中的条款**。
- Similar provisions in other treaties on copyright and related rights.
其它有关版权和相关权利协定中的类似条款。
- **Certain rights** provided in the treaties **can only be applied** appropriately through **collective management.**
15协定中的**特定权利**的实施仅能**通过合适的集体管理实现**。
- This is supposed to determine the attitude of governments concerning **the establishment (authorization/accreditation/registration), and the supervision of the operation, of CMOs.**
该条旨在确定各国政府对**CMO的建立（授权/认证/登记）及监督的运营**的态度。

Voluntary collective management (1)

自愿集体管理 (1)

Principles in the Conclusions chapter of the **2002 WIPO book on CMOs**:
根据**WIPO2002年对CMO的书**，其结论篇章中的有关原则：

„(1) Collective management... of copyright and related rights is **justified where individual exercise of such rights** – due to the number and other circumstances of uses – **is impossible or, at least, highly impracticable.**”

版权和相关权利的集体管理适用情形是...由于使用数量或者其它使用情形导致**个人无法行使该等权利，或至少是不实际可行。**

„(4) As regards the choice of rights owners between individual exercise and collective management of rights, their **freedom of association should be respected. Collective management should not be made obligatory in respect of exclusive rights** which, under the international norms on the protection of copyright and related rights, must not be restricted to a mere right to remuneration, and, **in the case of which individual exercise is possible.**”

至于权利所有人在个人行使权利或集体管理权利之间的选择，**应尊重其结社自由。不应是强制要求专有权须集体管理**，根据版权和相关权利保护的国际准则，专有权不应被限制为仅仅是费用权，及**在可能的情况下个人行使权利的情形亦是如此。**

Voluntary collective management (2)

自愿集体管理 (2)

CMO Directive (Directive 2014/26/EU), Article 5(2):

CMO指令 (2014/26/EU指令) 第5条 (2) :

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 right holder. 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.

权利持有人有权自主选择授权给集体管理组织来管理其权利、权利类别或作品类型及自主选择的其它主题、自主选择的地域，与集体管理组织所在地或权利持有人所属的成员国国籍、居住所在地无关。只要符合该等集体管理组织的业务范围，该组织有义务管理该等权利、权利类别或作品类型及自主选择的其它主题。除非，该集体管理组织客观有正当理由拒绝该等管理。

General provisions in EU Directives on mandatory and extended collective management

欧盟指令在强制和延长集体管理一般性规定

Recital (12) of the CMO Directive (Directive 2014/26/EU):

CMO指令第 (12) 条 (欧盟2014/26指令) (12) 该指令,

„(12) **This Directive**, while applying to all collective management organisations, with the exception of Title III, which applies only to collective management organisations managing authors’ rights in musical works for online use on a multi-territorial basis, **does not interfere with arrangements concerning the management of rights in the Member States such as individual management**, the extended effect of an agreement between a representative collective management organisation and a user, i.e. **extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights** to collective management organisations.”

该指令适用于所有集体管理组织，但第 III 篇除外，该篇仅适用于在多领土基础上管理作者音乐作品在线使用权的集体管理组织。该指令**不干涉成员国的权利管理安排，如个人管理、代表集体管理组织与使用者之间协议的扩展效力，即：扩展集体许可、强制集体管理、法律推定称述以及向集体管理组织转让权利。**

Mandatory collective management (1)

强制集体管理 (1)

- **In the case of mere rights to remuneration, mandatory collective management is a normal way of exercising rights** (there is no need for authorization, just the remuneration is to be collected and distributed).
就单纯报酬权而言，强制性集体管理是行使权利的正常方式（无需授权，只需收取和分配报酬）。
- **In the case of an exclusive right** – where the owners of rights have the right to authorize or prohibit the acts covered by such rights and to determine the conditions of authorization – **mandatory collective management is a limitation of such a right.**
在专有权的情形下，权利所有者有权授权或禁止该权利所涵盖的行为，并有权决定授权条件 - 强制性集体管理就是对这种权利的限制。

Mandatory collective management (2)

强制集体管理 (2)

- **(i) Is it determining/imposing a condition if somebody is in the position of doing something but it is provided in the law that he can only do so in a certain way?**
如果某人能做某事，但法律规定只能以某种方式做某事，这是否是决定性条件/施加了条件？
- **(ii) Is it determining/imposing a condition if somebody owns something but it is provided in the law that he can only use it in a certain manner?**
如果某人拥有某物，但法律规定他只能以某种方式使用该物，这是否是决定性条件/施加了条件？
- **(iii) Is it determining/imposing a condition if somebody is granted a right but it is provided in the law that he can only exercise it through a certain system?**
如果某人被赋予某项权利，但法律规定他只能通过某种制度下行使该权利，这是否是决定性条件/施加了条件？
- **The answers are obviously affirmative to these questions.**
这些问题的答案显然是肯定的。

Mandatory collective management (3)

强制集体管理 (3)

Article 11bis(2) of the Berne Convention 《伯尔尼公约》第 11 条(2):

“It shall be a matter for legislation in the countries of the Union **to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised**, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.”

"应由欧盟各国立法**确定行使上款所述权利的条件**，但这些条件只适用于规定了这些条件的国家。这些条件在任何情况下均不得损害作者的道德权利，也不得损害作者获得公平报酬的权利，如无协议，报酬应由主管当局确定”。

- The “preceding paragraph” – paragraph (1) of the same Article – provides for the exclusive right of authorizing broadcasting and certain other related acts.

“前款”--该条第(1)段--规定了授权广播和某些其他相关行为的专有权。

Mandatory collective management (4)

强制集体管理 (4)

Article 13(1) of the Berne Convention 《伯尔尼公约》第 13 (1) 条:

“Each country of the Union **may impose** for itself reservations and **conditions on the exclusive right granted to the author** of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, **to authorize the sound recording** of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.”

"欧盟各国可就音乐作品作者和任何文字**作者的专有权设立规定保留和条件**，录制这些文字与音乐作品时已经授权，如有，**可授权**将该音乐作品和这些文字一起**录音**；但，所有这些保留和条件只适用于规定了这些保留和条件的国家，而且在任何情况下都不得损害这些作者获得公平报酬的权利，在没有协议的情况下，应由主管当局确定公平报酬"。

Mandatory collective management (5)

强制集体管理 (5)

Since mandatory collective management is a limitation of exclusive rights, its application is subject to the three cumulative conditions of the three-step test under:

由于强制性集体管理是对专有权的限制，其适用须符合以下三步检验法的三项累积条件：

- Article 9(2) of the Berne Convention 《伯尔尼公约》第 9(2)条
- Article 13 of the TRIPS Agreement 《与贸易有关的知识产权协议》第 13 条
- Article 10 of the WCT WCT 第 10 条
- Article 16 of the WPPT WPPT 第 16 条

Mandatory collective management (6)

强制集体管理 (6)

Mandatory collective management under the EU Directives:

欧盟指令规定的强制性集体管理:

- **The Rental, Lending and Related Rights Directive** (Directive 2016/115/EC) on the „unwaivable right to remuneration” for rental in favor of authors and performers when they transfer their exclusive right of rental to producers:
《出租、出借及相关权利指令》（第 2016/115/EC 指令），当作者和表演者将其专有出租权转让给制片人时，有利于他们的出租 “不可放弃的报酬权”：
 - Article 4(3): „The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.”
第 4(3)条：“这一获得公平报酬的权利可委托代表作者或表演者的收费协会管理”。
 - Article 4(4): “**Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed...**”
第 4(4)条：“会员国可规定是否以及在何种程度上由作品收费协会管理获得公平报酬的权利.....”
- **„May regulate”**: a permission (*a contrario* !)
“可以规定”：许可同意（相反！）。
- **This is in accordance with the international norms**, since it does not concern the exercise of exclusive rights itself directly.
这符合国际准则，因为它并不直接涉及专有权本身的行使。

Mandatory collective management (7)

强制集体管理 (7)

Mandatory collective management under the EU Directives:

欧盟指令规定的强制性集体管理：

- **Satellite and Cable Directive (Directive 93/83/EEC):**

《卫星和有线指令》（指令 93/83/EEC）：

- Article 9(1): “Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission **may be exercised only through a collecting society.**”

第 9(1)条：“成员国应确保版权所有者和相关权利持有者**仅可通过收费学会**行使向有线电视运营商授予或拒绝授权进行有线电视转播的权利”。

- **This is in accordance with the international norms, due to Article 11bis(2) of the Berne Convention.**

根据《伯尔尼公约》第 11条 (2)款，**这符合国际规范。**

Mandatory collective management (8)

强制集体管理 (8)

Mandatory collective management under the EU Directives:
欧盟指令规定的强制性集体管理：

- **Resale Right Directive (Directive 2001/84/EC):**
《转售权指令》 (第 2001/84/EC 号指令) :
 - **Article 6(2): “Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.”**
第 6(2)条： “成员国可对第 1 条规定的使用费进行强制性或可选性集体管理 ”。
- **„May provide...”: a permission (*a contrario!*)**
“可规定.....”： 许可同意（相反! ）。
- **This is in accordance with the international norms, since both the Directive and the underlining provision of the Berne Convention (Article 14ter) only provides for a right to remuneration.**
这符合国际规范，因为《指令》和《伯尔尼公约》的基本条款（第 14 条之三）都只规定了获得报酬的权利。

Mandatory collective management (9)

强制集体管理 (9)

Mandatory collective management under the EU Directives:

欧盟指令规定的强制性集体管理:

- **Terms Directive (Directive 2006/116/EC), Article 3:**

《条款指令》 (第 2006/116/EC 号指令) 第 3 条:

2b Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer... The right to obtain such annual supplementary remuneration may not be waived by the performer...

2b 如果转让或让与合同规定表演者有权索要非经常性报酬，表演者应有权从录音制品制作者处获得年度补充报酬.....表演者不得放弃获得这种年度补充报酬的权利.....

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2d. 会员国应确保第 2b 段所述获得年度补充报酬的权利由收费协会管理。

- **In accordance with the international norms (a right to remuneration which does not limit the application of any exclusive right).**

根据国际准则 (获得报酬的权利不限制任何专有权利的适用) 。

Mandatory collective management (10)

强制集体管理 (10)

Mandatory collective management under the EU Directives:
欧盟指令规定的强制性集体管理：

- **CabSat Directive (Directive (EU)2019/789), Article 4(1) concerning online retransmission and parallel direct injection :**

CabSat指令 (第(EU)2019/789号指令) 第4(1)条涉及网络转播和平行直射：

Member States shall ensure that rightholders may exercise their right to grant or refuse the authorisation for a retransmission only through a collective management organisation.

成员国应确保权利人只能通过集体管理组织行使批准或拒绝转播授权的权利。

- **In accordance with the international norms (including with the three-step test).**

根据国际准则 (包括三步检验法) 。

Presumption-based collective management with an effect similar to extended 效果同等扩展、基于假设的集体管理

Principle (13) in the Conclusion chapter of the **2002 WIPO book on CMOs**:
2002 年世界知识产权组织集体管理组织一书，结论篇章中的第(13)条原则：

„(13) **The operation of blanket licenses granted by duly established and sufficiently representative collective management organizations should be facilitated by a legal presumption that** such organizations have the power to authorize the use of all works covered by such licenses and to **represent all the rights owners concerned**. At the same time, such collective management organizations should give **appropriate guarantees to their licensees** against individual claims of rights owners who are not represented by the organization but whose works are also covered by a blanket license.”

"(13) **经正式成立并具有充分代表性的集体管理组织授予的一揽子许可应有法律保证**，即：该类组织有权授权该类许可下所涵盖的所有作品**并代表所有相关权利人**。与此同时，这些集体管理组织应向其许可接受方提供适当保证，使其免受未被该组织代表但其作品也在一揽子许可范围内的权利所有人的个人索赔”。

Extended collective management (1)

集体管理扩展 (1)

- Extended collective management is based on voluntary collective management. **The effect of licenses granted by the collective management organization on behalf of the owners of rights represented by it is extended by law also to those who are not represented.**

延伸集体管理以自愿集体管理为基础。集体管理组织所代表的权利所有者所授予的许可效力经法律延伸的，也适用于未被代表的权利所有者。

- In the case of exclusive rights, extended collective management is **in accordance with the international norms**
- 就专有权而言，延伸集体管理是**符合国际惯例的**
 - **if collective management is the normal way of exercising the right concerned;**
如果集体管理是行使有关权利的正常方式；
 - **if the repertoire of the organization is sufficiently representative; and**
如果集体管理组织的曲目被充分代表的；及
 - **if the owners of rights may „opt out” (leave the collective system) under reasonable conditions.**
如果权利所有人可以在合理的条件下可以"选择退出"（脱离集体系统）

Extended collective management (2)

集体管理扩展 (2)

An example for extended collective management under the *acqui communautaire*: 根据集体收购扩大集体管理的案例 **Satellite and Cable Directive**: 《卫星和有线指令》:

- Article 3(2): “A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:

第 3(2)条: “成员国可规定, 收费学会与广播组织就某类作品达成的集体协议可扩展延伸至未被收费学会代表的同类作品权利人, 条件是:

– the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

通过卫星向公众传播的节目与同一广播公司的地面广播节目同步, 而且

– **the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works** and of exercising his rights either individually or collectively.”

未被代表的权利人在任何时候都可以排除将集体协议延伸到其作品并单独或集体行使其权利”。

- Article 3(3): “Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography.” **(In this case, collective management is not a normal way of exercising rights.)**

第 3(3)条: “第 2 段不适用于电影作品, 包括以类似电影摄制过程创作的作品。**(在这种情况下, 集体管理不是行使权利的常规方式)**。”

Extended collective management (3)

集体管理扩展 (3)

Principle (14) in the Conclusion chapter of the **2002 WIPO book on CMOs:**
2002 年世界知识产权组织关于集体管理组织一书结论篇章中的原则(14):

„(14) The other possible form of settling the problem of non-members is the system of extended collective management. The essence of such a system is that, if there is an organization that is authorized to manage a certain right by a large number of owners of rights, and thus it is sufficiently representative in the given field, the effect of such collective management is extended by the law also to the rights of those owners of rights who have not entrusted the organization with the management of their rights. In an extended collective management system, there should be provisions for the protection of the interests of those owners of rights who are not members of the organization. They should have the possibility of “opting out” (that is, declaring – with a reasonable deadline – that they do not want to be represented by the organization) and/or claiming individual remuneration.”

(14) **“解决非成员问题的另一种可能形式是扩大集体管理制度。这种制度实质上是，如果有一个组织被许多权利所有人授权管理某项权利，从而在特定领域具有足够的代表性，那么该种集体管理的效力通过法律也扩展到那些没有委托该组织管理其权利的权利所有人的权利。在扩大的集体管理制度中，应规定保护那些不是该组织成员的权利所有者的利益。他们应可以“选择退出”（即在合理的期限内宣布他们不想被该组织代表）和/或要求个人报酬”。**

Extended collective management (4)

集体管理扩展 (4)

In addition to Recital (12) of the Collective Management Directive stating in general the applicability of (mandatory and) extended collective management **and Articles 3(2) and (3) of the Satellites and Cable Directive** providing for extended collective management in a concrete case, **the applicability of extended collective management has been also confirmed**):

除了《集体管理指令》序言 (12) 一般性地说明了 (强制性和) 扩大集体管理的适用情形, 《卫星和有线指令》第 3(2)和(3)条规定了具体情况下的扩展集体管理, **扩展集体管理的适用性也得到了确认**):

- **in Recital (18) of the Information Society Directive** (Directive 2001/29/EC): „This Directive is **without prejudice to** the arrangements in the Member States concerning the management of rights such as **extended collective licences.**”
《信息社会指令》序言 (18) (第 2001/29/EC 号指令): "本指令不妨碍成员国关于权利管理的安排, 如**扩展集体许可**。
- **in Recital (24) of the Orphan Works Directive** (Directive 2012/28/EU): „This Directive is **without prejudice to** the arrangements in the Member States concerning the management of rights such as **extended collective licences...**”
在《孤儿作品指令》序言 (24) (第 2012/28/EU 号指令) 中: "本指令不妨碍成员国关于权利管理的安排, 如**扩展集体许可.....**"

Directive on copyright and related rights in the Digital Single Market (1)

电子单一市场版权及相关权利指令 (1)

Directive on copyright and related rights in the Digital Single Market

(Directive (EU) 2019/790), **Article 12. Collective licensing with extended effect:**

《数字单一市场版权及相关权指令》(第(EU)2019/790号指令) **第12条**。具有扩展效力的集体许可：

1. Member States may provide,... subject to the safeguards provided for in this Article, **that where a collective management organisation...** in accordance with its mandates from rightholders, **enters into a licensing agreement for the exploitation of works or other subject matter:**

成员国可以规定,在符合本条规定的前提下, **如果一个集体管理组织.....**根据其从权利人处获得的授权, **就作品或其它主题的开发利用签订许可协议:**

(a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them... ;
or

该协议可以扩大适用于那些未授权该集体管理组织代表其权利人的权利.....; 或者

(b) ... the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.

.....**该组织有法定授权或被推定代表那些未授权**该组织的权利人。

Directive on copyright and related rights in the Digital Single Market (2)

电子单一市场版权及相关权利指令 (2)

Digital Single Market Directive, Article 12:

《数字单一市场指令》第 12 条:

2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.

会员国应确保第 1 段提及的许可机制仅适用于明确界定的使用领域，即由于使用的性质或作品或其它有关主题的类型，从权利人那里获得单独授权通常是繁琐和不切实际的，无法进行所需的许可交易，并确保这种许可机制保障权利人的合法权益。

Directive on copyright and related rights in the Digital Single Market (3)

电子单一市场版权及相关权利指令 (3)

Digital Single Market Directive:

《数字单一市场指令》：

3...Member States shall provide for the following safeguards:

会员国应规定以下保障措施：

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

集体管理组织根据其授权，在相关会员国中充分代表相关类型作品或其它主题的权利人，及许可涵盖对象的权利；

(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;

保证所有权利人享有平等待遇，包括在许可条款方面的平等待遇；

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism...; and

未授权许可组织的权利人可随时方便有效地把其作品或其它主题退出许可机制.....;

(d) appropriate publicity measures are taken... Publicity measures shall be effective without the need to inform each rightholder individually.

采取适当的宣传措施.....宣传措施应当有效，而不必逐一通知每个权利人。

Directive on copyright and related rights in the Digital Single Market (4)

电子单一市场版权及相关权利指令 (4)

Digital Single Market Directive:

《数字单一市场指令》

3...Member States shall provide for the following safeguards:

会员国应规定以下保障措施:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

集体管理组织根据其任务授权, 在相关会员国充分代表相关类型作品或其它主题的权利人, 及许可涵盖对象的权利;

(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;

保证所有权利人享有平等待遇, 包括在许可条款方面的平等待遇;

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism...; and

未授权许可组织的权利人可随时方便有效地把其作品或其它主题退出许可机制.....;

(d) appropriate publicity measures are taken... Publicity measures shall be effective without the need to inform each rightholder individually.

采取适当的宣传措施.....宣传措施应当有效, 而不必逐一通知每个权利人。

Directive on copyright and related rights in the Digital Single Market (5) 电子单一市场版权及相关权利指令 (5)

Article 8 to 11 on out-of-commerce works: response to Soulier and Doke which gave an opportunity to clarify the conditions of extended collective management in Article 12 (which, in turn, are provided in Articles 8 to 10 for a specific case). The provisions of Article 10 on publicity measures seems to be worthwhile referring to:

关于非商业作品的第 8 至第 11 条：对 Soulier 和 Doke 案的回应，该案能更进一步澄清第 12 条中扩展集体管理的条件（而第 8 至第 10 条对具体情况作了规定）。可以参考第 10 条关于宣传措施的规定：

1. Member States shall ensure that information... for the purposes of the identification of the out-of-commerce works or other subject matter, covered by a licence [with extended effect]... as well as information about the options available to rightholders... and, as soon as it is available and where relevant, information on the parties to the licence, the territories covered and the uses, is made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation...

成员国应确保.....有关[具有扩展效力的]许可所涵盖的非商业作品或其它主题的信息.....以及权利人的选项信息.....在其作品或其它主题按许可或例外情形或限制情形的规定向公众发行、传播或向公众公开之前，就有关许可的相关方、所涵盖地区和使用情况信息在拿到该类信息时应尽快在某单一公共在线门户网站上公开此类信息，且此类信息公开是永久、方便和有效地查阅，并至少提前六个月公开.....

Directive on copyright and related rights in the Digital Single Market (6) 电子单一市场版权及相关权利指令 (6)

Article 10 on publicity measures:

第 10 条有关宣传措施:

2. Member States shall provide that, if necessary for the general awareness of rightholders, additional appropriate publicity measures are taken...

成员国应规定, 如有必要提高权利人的普遍认识, 应采取额外的适当宣传措施.....

The appropriate publicity measures referred to in the first subparagraph of this paragraph **shall be taken in the Member State where the licence is sought...If there is evidence... to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.**

许可申请所在的成员国应采取本款第一项所指的适当宣传措施.....如有证据.....表明在其他成员国或第三国可以更有效地提高权利人的认识, 那么也应在这些成员国和第三国实施宣传措施。

COMPETITION ISSUES AND THE TARIFF SYSTEM

竞争问题及收费体系

Collective management: sometimes natural monopoly (1)

集体管理：有时是自然垄断的情形（1）

Natural monopolies 自然垄断

- *A natural monopoly* is a distinct type of monopoly that may arise **when there are... high fixed costs...**, such as exist **when large-scale infrastructure is required to ensure... supply**

自然垄断是一种独特的垄断类型，**当存在.....高固定成本.....时就会出现**，如**需要大规模基础设施确保... 供应**

In the case of natural monopolies, trying to increase competition by encouraging new entrants into the market creates a potential loss of efficiency. The efficiency loss to society would exist if the new entrant had to duplicate all the fixed factors - that is, the infrastructure.

在自然垄断的情况下，通过鼓励更多新主体进入市场以增加竞争，会出现潜在的效率损失。如新市场主体必须复制建立所有的固定因素，即：基础设施，那么社会上就会出现效率损失。

It may be more efficient to allow only one [organization] to supply to the market because allowing competition would mean a *wasteful duplication of resources*

有可能只允许一个[组织]向市场供应可能更有效率，因为允许竞争意味着资源的重复性浪费性。

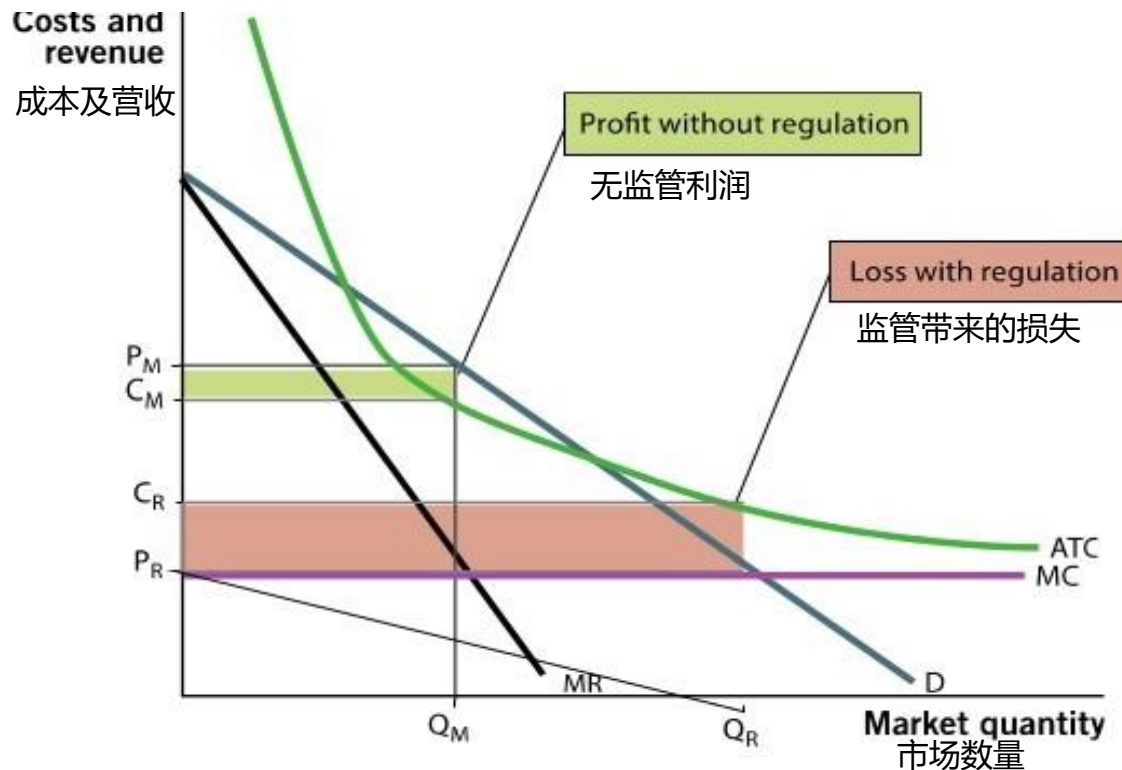
(See [请参见链接 economicsonline.co.uk/Business_economy/Natural_economics.html](http://economicsonline.co.uk/Business_economy/Natural_economics.html))

- ***Natural monopoly*: a situation in which one [organization] is able to supply the whole market for a product or service more cheaply than two or more [organizations] could.**

自然垄断：一个[组织]能够以比两个或多个[组织]能以更便宜的价格向整个市场供应某种产品或服务的情况。

(See [请参见链接 dictionary.cambridge.org/dictionary/english/natural-monopoly](http://dictionary.cambridge.org/dictionary/english/natural-monopoly))

Collective management: sometimes natural monopoly (2) 集体管理：有时是自然垄断的情形（2）



**Result of regulatory intervention to eliminate monopoly when it is natural
当垄断是自然出现时，监管干预消除垄断会出现的结果**

Collective management: sometimes natural monopoly (3)

集体管理：有时是自然垄断的情形（3）

- Excerpt from Chapter 4 (Conclusions) of „Collective Administration of Copyright and Neighboring Rights”, WIPO publication No. 688 (E), 1990:

- 摘自世界知识产权组织1990年第688(E)号出版物“版权及邻接权的集体管理”第4章(结论):

„(f) As a rule, there should be only one organization for the same category of rights in each country. **The existence of two or more organizations in the same field may diminish or even eliminate the advantages of collective administration of copyright.**”

“(f) 作为一项规则，每个国家的同类权利应只有一个组织。同一领域存在两个或两个以上组织的可能会削弱甚至消除集体管理版权的优势”。

- Excerpt from Chapter VII (Conclusions) of „Collective Management of Copyright and Related Rights”, WIPO publication No. 855 (E), 2002:

摘自世界知识产权组织2002年第855(E)号出版物《版权及相关权的集体管理》第七章(结论)：

„(11) Usually, there should be only one organization for the same category of rights for the same category of rights owners in each country. **The existence of two or more organizations in the same field may diminish or even eliminate the advantages of joint management of rights.**”

“(11)通常情况下，每个国家的同类权利人只应有一个同类别权利的组织。同一领域存在两个或两个以上组织的可能会削弱甚至消除权利联合管理的优势”。

Articles 101 and 102 of the TFEU
(ex Articles 81 and 82 of the TEC)
TFEU第101条和102条
(不包括TEC第81条和第82条)

The EC Treaty contains **two basic antitrust prohibition rules**.

《欧共同体条约》包含**两条基本的反垄断禁止规则**：

- First, ***agreements*** between two or more firms ***which restrict competition*** are prohibited by **Article 101 of the Treaty on the Functioning of the EU (TFEU) (ex Article 81 of the previous Treaty on the establishment of the European Community (TEC))**, subject to some limited exceptions.
- 首先, 《**欧盟运作条约**》 (TFEU) **第 101 条** (前《**欧洲共同体成立条约**》 (TEC) **第 81 条**) 禁止两个或两个以上公司之间**达成限制竞争的协议**, 但有少许例外情况。
 - The most typical example of illegal conduct infringing Article 101 (ex Article 81) is a ***cartel*** between competitors (which may involve **price-fixing or market sharing**).
 - 最典型案例是非法行为侵权了第101条 (前第 81 条) 的是, 竞争各方之间的**同业联盟** (可能会涉及价格操控和市场共享) 。
- Second, under **102 of the TFEU (ex Article 82 of the TEC)**, firms, ***organizations in a dominant position may not abuse that position***.

其次, 根据《**欧盟运作条约**》 (TFEU) **第 102 条** (《**欧共同体运作条约**》 (TEC) **第 82 条**), 处于支配地位的公司、组织不得滥用该地位。

CJEU judgment in the OSA case

欧盟法院对OSA案例的判断

Judgment of the CJEU in case C-351/12 Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s

欧盟法院对 C-351/12 Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s.案的判决

The Court has found that a **spa** which transmits protected musical works to its guests by means of devices located in their bedrooms **must pay copyright fees** to be collected by OSA, the Czech authors' society.

法院认定，一家**水疗中心**通过屋内设备向客人传输受保护音乐作品，**必须**向捷克作家协会 OSA **支付版权费**。

However, it has been a **more important finding of the CJEU that the territorial monopoly granted to copyright collecting societies is not contrary to the freedom to provide services under the EU law**. The Court has noted that the territorial monopoly provided under the Czech Copyright Act granted to OSA constitutes a restriction on the freedom to provide services inasmuch as it does not allow users of protected works to choose the services of a collecting society established in another Member State. It has emphasised, however, that the restriction in question is justified, **since that system is appropriate and necessary for attaining the objective of the effective management of intellectual property rights. (= Since natural monopoly is involved; and the right attitude is to leave it alone.)**

然而，**欧盟法院更重要的发现是，授予版权收费协会的地域垄断权与欧盟法律规定的提供服务自由并不冲突**。法院指出，捷克《版权法》赋予 OSA 的地域垄断权构成了对提供服务自由的限制，因为它不允许受保护作品的用户选择在另一成员国成立的收费协会的服务。不过，它强调，这种限制是合理的，因为**这种制度对于实现有效管理知识产权的目标是适当和必要的。（=由于涉及自然垄断，正确的态度是不予干涉）**。

The Collective Management Directive on remuneration (1) 集体管理收费指令 (1)

Article 16(2) of the Directive指令第 16(2)条

„Licensing terms shall be based on objective and non- discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.“

(Continues.)

"许可条款应基于客观和非歧视性标准。在许可权利时，不得要求集体管理组织将与用户商定的许可条款作为其它在线服务的先例，如果该用户提供的是一种新型在线服务，且在欧盟向公众提供该服务的时间不足三年。

(下一页继续)

The Collective Management Directive on remuneration (2)

集体管理收费指令 (2)

Article 16(2) of the Directive (continued) 指令第 16(2)条 (接上一页内容)

„Rightholders shall receive [1] appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be [2] reasonable in relation to, inter alia, [3] the economic value of the use of the rights in trade, taking into account the [4] nature and [5] scope of the use of the work and other subject-matter, as well as in relation to [6] 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.”

“权利人在其权利被使用时应得到[1]适当的报酬。专有权和获得报酬权的收费标准应[2]合理，特别是与[3]在交易中使用权利的经济价值有关，同时考虑到作品和其它主题的[4]性质和[5]使用范围，以及与[6]集体管理组织所提供服务的经济价值有关。集体管理组织应向有关用户通报制定这些收费标准所采用的标准。

CJEU case law on the establishment of remuneration (1)

欧盟法院收费判例法 (1)

Judgement of the ECJ of July 13, 1989, in *Ministère public v. Tournier* (case C-395/87):

欧洲法院 1989 年 7 月 13 日对 *Ministère public v. Tournier* 案 (C-395/87 号案件) 的判决:

A CMO may be regarded to impose unfair trading conditions... if its tariffs are appreciably higher than those charged in other Member States – unless the differences are justified by relevant objective reasons.

如果某 CMO 的收费明显高于其他成员国的费用, 则该 CMO 被认定为采用不公平的交易条件....., 除非有相关的客观原因解释价格差异的合理性。

CJEU case law on the establishment of remuneration (2)

欧盟法院收费判例法 (2)

The same criteria as in *Tournier* were applied in the judgment of the ECJ of July 13, 1989, in *Lucaseau and others v. SACEM* (joined cases C-110/88, 241/88 and 242/88): 欧洲法院在 1989 年 7 月 13 日对 Lucaseau 等人诉 SACEM 案 (合并案件 C-110/88、241/88 和 242/88) 的判决中采用了与 *Tournier* 案相同的标准:

„A national copyright management society... **imposes unfair trading conditions where the royalties** which it charges to discotheques **are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright management society in question were able to justify such a difference by reference to objective and relevant dissimilarities** between copyright management in the Member State concerned and copyright management in the other Member States.”

"一个国家的版权管理协会.....在其向迪斯科舞厅收取的版权费, 经同期持续比较, 如**明显高于其他成员国收费, 则为不公平交易条件**。如果所涉及的版权管理协会能够根据有关会员国的版权管理与其他会员国的版权管理之间存在的客观差异来证明价差的合理性, 则不属于不公平交易。"。

CJEU case law on the establishment of remuneration (3)

欧盟法院收费判例法 (3)

Tournier and *Lucaseau* were also confirmed in the judgment of the CJEU in *OSA v. Léčebné lázně Mariánské Lázně* (Case C-351/12) but a further criterion was added: „the economic value” criterion:

欧盟法院在 *OSA 诉 Léčebné lázně Mariánské Lázně* 案 (案件 C-351/12) 的判决中也确认了 *Tournier* 和 *Lucaseau* 案, 但又增加了一项 “经济价值” 标准:

„Article 102 TFEU must be interpreted as meaning that **the imposition by that copyright collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.**”

“《欧盟运作条约》第 102 条须解释为, 版权收费协会收取的服务费明显高于其他成员国的收费水平 (同期持续比较), 或者收取的价格与所提供服务的经济价值相比过高, 都表明其滥用了支配地位”。

CJEU case law on the establishment of remuneration (4)

欧盟法院收费判例法 (4)

Judgement of the EJC in *Kanal 5 v. STIM* (Swedish authors' society) (case C-53/07):
欧洲司法法院在 Kanal 5 诉 STIM (瑞典作家协会) 案 (C-53/07 号案件) 中的判决:

„[A] copyright management organisation... does not abuse [its dominant] position where, with respect to remuneration paid for the television broadcast of musical works..., it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.”

“[一个]版权管理组织.....在下面情形不存滥用[其支配]地位：该组织对为音乐作品在电视广播上收取报酬..... 的收费模式是版权费收费金额一定程度上与该商业电视频道的收入相关，这部分与实际播出或可能播出的受版权保护的作品的数量总体上成正比；除非有其它方法能更准确地确定该类作品的使用情况和观众，而管理合同和监督作品使用情况产生的成本不至于不成比例。”

CJEU case law on the establishment of remuneration (5)

欧盟法院收费判例法 (5)

An example of the adaptation of broadcasting tariffs following the ruling in *Kanal 5*:

在 *Kanal 5* 案裁决之后调整广播收费的案例：

- In Hungary, ARTISJUS (the authors' society), before *Kanal 5*, applied a very simple tariff system for broadcasting: 1% from subsidy; 2% from subscriptions; 4% from advertising).
- 在匈牙利，ARTISJUS（作者协会）在 *Kanal 5* 案之前采用了非常简单的广播收费制度：1%来自补贴；2%来自订阅；4%来自广告）。
- After *Kanal 5*, the following tariffs are applied: the simple tariffs are maintained, but broadcasters may choose the following alternative tariffs:
- 在 *Kanal 5* 之后，采用了以下费率：维持简单费率，但广播公司可选择以下其它收费方式：
 - music use up to 15% of the entire broadcast time: 1% from subsidy; 1,5% from subscription; 2% from advertising;
 - 音乐使用占整个广播时间的 15%情况下：1% 来自补贴；1.5% 来自订阅；2% 来自广告；
 - music use between 15% and 50% of the entire broadcast time: 1% from subsidy; 2% from subscription; 4% from advertising;
 - 音乐使用占整个广播时间的 15%至 50%情况下：1% 来自补贴；2% 来自订阅；4% 来自广告；
 - music use between 50% and 75% of the entire broadcast time: 1% from subsidy; 3% from subscription; 6% from advertising;
 - 音乐使用占整个广播时间的 50%至 75%情况下：1% 来自补贴；3% 来自订阅；6% 来自广告；
 - music use above 75% of the entire broadcast time: 1% from subsidy; 4% from subscription; 8% from advertising.
 - 音乐使用占整个广播时间的 75%以上的情况：1% 来自补贴；4% 来自订阅；8% 来自广告。

CJEU case law on the establishment of remuneration (6)

欧盟法院收费判例法 (6)

Judgment of the ECJ on *SENA* (related rights CMO) v. *NOS* (case C-245/00):

欧洲法院对 *SENA* (相关权利 CMO) 诉 *NOS* 案的判决:

„Article 8(2) of Directive 92/100 (Rental, Lending and Related Rights Directive) **does not preclude a model for calculating... equitable remuneration for performing artists and phonogram producers that operates by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters..., the tariffs... in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State concerned, and the amounts paid by commercial stations, provided that that model is such as to enable a proper balance [...and]reasonable.**

"第 92/100 号指令 (出租、出借和相关权利指令) 第 8(2)条**并不排除.....参照可变和固定因素计算表演艺术家和录音制品制作者公平报酬的收费模式, 如录音制品的播放小时数、电台和电视台收视情况和收听密度.....、在音乐著作权的表演权和广播权领域.....在受版权保护的音乐作品的表演权和广播权方面.....的收费, 与该会员国接壤的会员国的公共广播组织确定的收费, 以及商业电台支付的数额, 前提是这种收费模式能够平衡[.....并]合理。**

CJEU case law on the establishment of remuneration (7)

欧盟法院收费判例法 (7)

LAA/AKKA case (C-177/16); rulings of the CJEU:

LAA/AKKA 案 (C-177/16) 欧盟法院的裁决:

For the purposes of examining **whether a copyright management organisation applies unfair prices** within the meaning of point (a) of the second paragraph of Article 102 TFEU, **it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index**, provided that the reference Member States have been selected **in accordance with objective, appropriate and verifiable criteria**. [...]

为检查版权管理组织是否适用《欧盟运作条约》第 102 条第 2 款(a)项所指的不公平价格，可将其费率与邻近成员国适用的费率以及根据购买力平价指数调整的其他成员国适用的费率进行比较，前提是参考成员国是经客观、适当和可核查的标准选定的。[.....]

The difference between the rates compared **must be regarded as appreciable if that difference is significant and persistent**. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its **prices are fair** by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.

如果所比较的税率之间的差异显著且持续存在，则价差明显。该种价差表明存在支配地位滥用的情况，应由拥有支配地位的版权管理组织参照对管理费用或权利人报酬有影响的客观因素来证明其价格是公平的。

CJEU case law on the establishment of remuneration (8)

欧盟法院收费判例法 (8)

Stowarzyczenie „Olawska Telewizja Kablowa” case (C-376/15); ruling of the CJEU:
Stowarzyczenie "Olawska Telewizja Kablowa" 案 (C-376/15) 欧盟法院裁决:

Article 13 of Directive 2004/48/EC [...] on the enforcement of intellectual property rights must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.

第 2004/48/EC号指令第 13 条[.....]涉及知识产权的执法，须被解释为不排除国家层面法律，如主要诉讼争议法，根据该法，被侵犯知识产权的持有人可以要求侵犯该权利的人赔偿其所遭受的损失，同时考虑到具体案件的所有适当方，或者，在无需其证明实际损失的情况下，支付相当于在允许使用相关作品的情况下应支付的适当费用的两倍。

THANK YOU
谢谢

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