

4. Practices by country

a) Germany

aa) CMO's and rights administered

The following chart shows which rights are held by which CMO's in Germany:

	Reproduction right in conjunction with making available (Art. 16 CA)	Right of making available to the public (Art. 19a CA)	Broadcasting right (Art. 20 CA) (Art. 78 par. 1, 81 CA)	Remuneration right for broadcasting (Art. 78 par. 2, 86 CA)	Reproduction right in conjunction with broadcasting (Art. 55 CA and contract concerning storage beyond limitations of Art. 55 CA)
GEMA	x*	x*	x		x
Music Publisher	x*	x*			
Music Publishers' Agencies (CELAS etc.)	x*	x*			
GVL			x	x	x
Producer	X	x			
Concert Promoter	X	x			
(Performing) Artist					

* see additional comments below in the text

The situation concerning licensing of authors rights (composers, lyricists) has become especially complicated in Germany throughout the past decade.

While in the past, the record company sold fully licensed CDs to retailers, today's online retailers (such as iTunes) need to conclude at least one contract with the authors' side and a second one with the record company (each of them covering each single sound recording to be sold non-physically) in order to legally conduct business. While this is relatively unproblematic on the producers' side (e.g. Sony Music can, as a

producer, grant licenses for pan-European or even worldwide online uses), this seems not to be true on the **authors' side**.

Encouraged by an official, yet non-binding recommendation by the EU Commission (DG Markt) (2005/737/EG) which was intended to facilitate and speed up pan-European licensing of rights, most of the big music publishing companies have **withdrawn** the mechanical rights for online use concerning the **US repertoire** from the network of European collecting societies, in order to administer these rights by themselves.

This fact has shown to have serious consequences – and not at all the ones intended by the EU Commission: While withdrawing US-repertoire from collective licensing, all other parts of the overall repertoire of music (especially all works created by European authors) remained within the collecting societies. The same applied to the “making available” right (strangely enough concerning US repertoire as well). If an online service like iTunes is interested in licensing a sound recording of a US author, he does not only require a license of the record company but needs to establish licensing relations with collecting societies, too (which, in the absence of the (a) valid reciprocal agreement, could mean: with all of them in each of the member states of the EU), and, last but not least, with the respective music publishers. In effect, not two, but **three different types of contracts** are required for using a single song in an online service (while not a single such contract was needed for a traditional retailer to re-sell CDs).

To make it even worse: Those music publishers who have withdrawn certain rights from collective licensing (or have retained such rights in the first place) are experiencing difficulties to administrate these rights by themselves. While they have founded **agencies** to facilitate administration, mostly as joint ventures with the same collecting societies who are no longer controlling these rights under the traditional deeds of assignment (e.g. CELAS, PAECOL, PEDL etc.), such agencies, too, are still bound by the legal framework of the copyright laws applicable in each of the EU member states.

Knowing that works of music are very often created by more than one author and knowing further that music publishers do often control only a certain percentage of all rights in a given work, this constitutes a copyright-related problem in itself. Most European copyright laws, such as the German Copyright Act in article 8 par. 2, require that all **co-authors** of a work (meaning also all music publishers concerned) must act jointly in order to validly grant rights (or issue licenses). This means in effect

that a single music publishing house such as Universal Music Publishing or EMI Music Publishing cannot grant, by virtue of using their own agencies, valid rights if they don't provide for a possibility to represent all the other owners of part-rights in the same piece of music as well. Only if 100% of the rights owners act jointly, a valid license can be issued. For obtaining this 100% quorum on a regular basis, presently no workable mechanism seems to exist.

In traditional collecting societies, all of this was irrelevant because all music publishers were members of collecting societies thus practically eliminating the **split-copyrights** issue.

Currently, there is no **one-stop-shop** for obtaining the necessary licenses of all the parties involved (authors of works of music, performing artists and producers of sound recordings). It seems unlikely such one-stop-shop will ever exist.

bb) Repertoires

(I) GEMA

As to end 2006, GEMA's repertoire comprised the so called "world repertoire." As of beginning of 2007, a number of rightholders have withdrawn certain rights from GEMA (as described above), effectively resulting in a loss of certain parts of repertoire. GEMA tries, by attachments to the contracts concluded with licensees, to give an overview concerning the repertoire concerned.

But even in light of these efforts there remains a certain degree of uncertainty that GEMA or the Agencies (see below) will always try to deal with individually once negotiations on licensing music services in Germany have started.

(II) GVL

As GVL represents primarily claims for remuneration based on legal licensing schemes, GVL generally represents the world repertoire published on sound recordings.

cc) Reciprocal Agreements

Generally speaking, the reciprocal agreements in the field of online licensing have been the other weak spot of collective licensing in this field (the other weak spot being the Anglo US repertoire being split

IV. Rights' management – practices by country

Associated with PRS for Music (UK), STIM (Sweden), SACEM (France), SGAE (Spain), SABAM (Belgium), BUMA/STEMRA (Netherlands)

- **DEAL**

Founded and operated by SACEM (France) by means of a memorandum (“DEAL”) concerning multi-territorial use in the fields of online and mobile services and Universal Music Publishing concerning the Anglo-American repertoire

- **ARMONIA**

Founded and operated by SACEM, SGAE and SIAE in Europe and Latin America concerning Anglo-American repertoire

In the (unlikely) cases – basically where repertoire of smaller publishers might be in question – that the repertoire to be licensed is neither represented by collecting societies nor one of the major agencies, the respective music **publishers** need to be addressed **directly**.

As to the rights of **producers** of sound recordings and the performing artists represented by them, there are neither collecting societies nor agencies representing their rights (with the exception of the equitable remuneration regime based on a legal license in the field of broadcasting).

There are three major **labels** in Germany: Universal Music (including the larger Part of EMI), Sony Music, and Warner Music. Furthermore, there is a vast number of independent labels, among them large companies like BMG Rights Management and a number of content aggregators like *finetunes* or *Zebralution* and a huge number of small independent companies (more than 1,300 active companies mainly organized in their own Trade Association VUT: <http://www.vut.de/vut>). The larger companies (and all majors) are organized in the German National Group of IFPI called BVMI (<http://www.musikindustrie.de/>).

ee) Defining or limiting criteria applied by licensors

The limiting criteria are always dependent on the **type of license** sought. Generally speaking, all licenses readily available at fixed tariffs are – due to the reasons explained in Section 3.4 – limited to the territory of Germany (“the German Market”). The scope in time it always determined by the procedures of application for the license and proper reporting according to contracts concluded with collecting societies on basis of

published tariffs, general agreements of trade associations to which the licensee is a member or individual agreements.

As to the rights acquired via **producers** of sound recordings (also representing performing artists whose rights are vested in the sound recordings) the situation is much **easier**. Usually, record companies are able to negotiate multi-national deals in which all the terms and conditions are negotiated individually.

ff) Obligation to enter into contract

According to Art. 11 par. 1 Administration of Copyright Act, any German **collecting society** is under an **obligation to license**. The provision, in par. 2, also contains the possibility of obtaining licenses without explicit authorization (by paying the disputed part into escrow). Art. 11 Administration of Copyright act reads as follows:

(1) Collecting societies shall be required to grant exploitation rights or authorizations to any person so requesting on equitable terms in respect of the rights they administer.

(2) Should no agreement be reached with respect to the amount of remuneration to be paid for the grant of exploitation rights or of an authorization, the rights or authorization shall be deemed to have been granted if the remuneration demanded by the collecting society has been paid subject to reservation or has been deposited in favor of the collecting society.

The obligation according to par. 1 is suspended only in **exceptional cases** where the circumstances make it justifiable to refuse licensing (e.g., where the proposed licensee has no justified interest in obtaining the license because there is no legal basis for the exploitation sought in the individual case, see Higher Regional Court of Munich (GRUR-RR 2007, 186).

As to **individual rightholders**, they are, in the general limitations provided by antitrust law, free to refuse licensing.

It is still open whether the **agencies** referred to above under Sec. 3.5 falls under Art. 11 par. 1 Administration of Copyright Act. Thus, based on the current legal situation in Germany, it cannot be determined to a sufficient degree of certainty whether such agencies are under an obligation to license. It is likely that this issue will be addressed with the implementation of the new collecting society directive referred to above.

gg) Sample case “DJ Mix”

To illustrate the difficulties of rights management we chose the case of “DJ Mix” as an example. This refers to a show including different elements: a DJ mixing multiple songs, spoken features, and verbal sequences by the presenter. The songs fade into each other. The “Mix” is streamed on-demand or can be downloaded as podcast.

(1) Exclusive rights affected

As DJ mixes consist of fragments of pre-existing works, performances and sound recordings, together with other elements, the **different rights** are affected as outlined in Sec. A.III.2.d). This includes authors' rights in modification, copying and making available, as well as rights of producers and performing artists.

In addition to this and the rights mentioned already, due to the shortening and re-combination of the works and performances in question, there are certain **moral rights** applicable that are not represented by CMOs (and partially not even by publishers or record companies for their respective authors/artists). These rights against alteration and mutilation of works and performances concerning musical authors are laid down in Articles 14, 39 German Copyright Act, and with respect to performing in Article 75 Copyright Act.

While in the field of broadcasting, rightholders are usually less keen on exercising these moral rights, it can be said generally, that with regard to all new forms of (online) exploitation, these rights will play a more significant role, mainly in **negotiating deals**. Generally speaking, deals would be easier to negotiate the more a service resembled traditional broadcasting and more difficult the more a service developed into the direction of a downloadable (“CD-like”) unit.

(2) Rights Management

In addition to the DJ having to acquire all the necessary **pre-existing rights** the service provider who offers a DJ Mix online has to secure the rights of the DJ which may include copyright, neighbouring rights as well as moral rights, with respect to the specific mix as well as any spoken or other contribution made by him or her. As the matching rights of performing artist and producers of sound recordings are not represented by their collecting society GVL, the rights for putting together such mixes need to be acquired via the labels.

Hence the provider must ensure licensing of the performing rights as well as mechanical rights from the CMO's as well as producers for **both** the mix itself as well as with respect to the works used in the mix the provider cannot be sure that the DJ has secured all necessary rights. In addition, In both respects moral rights may cause additional efforts which are mostly held by the publisher or the author herself or himself. In addition the labels have to be approached.

GEMA provides for certain tariffs for DJ's for using the mix as a work,⁵³ From the information available no distinctions with respect to specific types of mixes could be ascertained.

b) Austria

aa) CMO's and rights administered

Although the copyright framework is to some extent harmonized within the European Union, legal uncertainty still remains. The situation becomes worse, when it comes to the licensing questions. Depending on the size of the music catalogue, the territorial scope and the market position, music service provider will have to deal with **several licensing partners**. Currently, there is no one-stop-shop for obtaining the necessary licenses of all the parties involved (authors of works of music, performing artists and producers of sound recordings). It seems unlikely such one-stop-shop will ever exist. The music service provider faces two fundamental tasks: the identification of the rightholders and entering into agreements with the rightholders. Both produces transaction costs.

The situation is very difficult with the **authors' side** due to the involvement of publishers. As across Europe the situation concerning licensing of authors rights (composers, lyricists) has become especially complicated during the last years. The worldwide rightholder's market situation on the author's side is dominated by the four US major publishing studios that control 2/3 of the revenue generating world-wide repertoire, since the publishers become holders of exploitation rights (or copyright holders under different legal regimes) by virtue of granting exploitation rights or copyright by the authors.

The music service provider has to obtain licences for the **territories**, in which the music services can be consumed. This is in any case required

⁵³ <https://www.gema.de/musiknutzer/lizenzieren/meine-lizenz/online-anbieter/dj-mixe.html>. As to the pertinent tariff VR-OD 5 the only information is that the tariff has been invalidated as of Dec. 31, 2011.

for the making available and broadcasting rights. It is doubtful, whether the reproduction rights have to be obtained for each territory, too. The factual practice of collecting societies and agencies requires, however, the music service provider to do so.

Having defined the rights to be obtained, it is necessary to find the right-holders in order to enter into the necessary license agreements. Pieces of music are very often created by more than one author and music publishers often control only a part of the rights of work. This leads to an additional legal uncertainty since Austrian copyright law requires that all **co-authors** of a work (meaning also all rightholders, including the music publishers) must **act jointly** in order to validly grant licenses. This means that a music publishing house cannot grant rights to a music service provider if they are not entitled to represent all the other rightholders of the same piece of music. Only if all rightholders act jointly, the granting of rights. There is no factual possibility to ensure that the granting of rights will be valid. Music service providers might face therefore the risk of being sued for injunction by omitted rightholders.

It is generally necessary to enter into **two agreements** in order to conduct business legally: one agreement with the authors' side and a second one with the record producer. This is rather easy with the producers (who are legally entitled to grant licenses to every territorial scope whatsoever).

In general, the **author's rights** in Europe as well as in Austria were to a huge extent controlled and administered by the collecting societies in case authors became members of these organizations. However, authors were and still are free to administer their rights for online uses themselves. In Austria, the collecting societies for the authors and publishers are the Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM) registrierte Genossenschaft mit beschränkter Haftung and austro mechana, controlling the rights of their members.

bb) Repertoires

European repertoire

- The rights for the exploitation of musical works by public performance, by broadcast (radio/TV) and by making them available in the web and in mobile networks are administered by the collecting society AKM, if the author / arranger has become a member of AKM. Otherwise, the rights are with the authors.

- The collecting society Austro mehana administers the rights for mechanical reproduction and distribution.
- AKM administers the rights of 20.000 members in Austria and due to agreements of reciprocal representations the repertoire of 2 million rightholders worldwide. Due to the withdrawal of rights by US major labels, a degree of uncertainty exists that AKM or the Agencies are the right contacts for negotiations. As a collecting society, AKM is required to inform any person, on a written request, whether they administer exploitation rights in a given work or given authorization rights or claims to remuneration on behalf of an author or a holder of neighboring rights. In practice, the formal access to information about the scope of representation of rights in detail is one of the problematic fields of rights administration.

US-repertoire

- Based on the recommendation 2005/737/EG by the EU Commission which was intended to facilitate and speed up pan-European licensing of rights, most of the record company withdrew the mechanical reproduction rights concerning online use concerning the US repertoire from the network of European collecting societies, in order to administer these rights by themselves.
- However, this applies only to the US repertoire. All other parts of the overall repertoire of music (especially all works created by European authors) apart from the US-repertoire remained within the collecting societies. The same was done with the right of making available regarding the US repertoire. The music publishers who withdrew certain rights from collective licensing founded agencies to facilitate administration, mostly as joint ventures with the same collecting societies who were controlling these rights under the traditional deeds of assignment before. The major agencies are CELAS, D.E.A.L., PAECOL, P.E.D.L, peermusic, Alliance Digital and ARMONIA. In meantime, these agencies entered also in assignment agreements with the collecting societies, so that at the end some of the collecting societies are currently administering the online rights again.
- These agencies grant licenses according to the destination principle on a non-exclusive basis. Tariffs and fees are however not public

In case, the rights of the **producers** of sound records are with the collecting society Leistungsschutzgesellschaft (LSG), LSG might enter into agreements for webradio, webcasting and simulcasting services on

an **individual agreement**. Performing artists just have an entitlement to adequate remuneration towards the producers of sound recordings.

cc) Other rightholders to be addressed

IFPI Austria – Verband der Musikwirtschaft Österreich has 18 members (Austrian subsidiaries of major labels and independants) and represents around 90% of the Austrian labels. The Austrian Association of Independent Lables, Music Publishers and Producers has 21 members. According to our experience, both institutions represent more or less the relevant players in the market. The Austrian Trade Register however, lists 707 persons having the trade license for music labels.

dd) Sample case “DJ Mix”

In the sample case of a “DJ mix,” the following exclusive rights are touched upon under Austrian copyright law:

- 1) Music: Copyright: Reproduction rights, making available right of composers and lyricists
- 2) Music: Neighbouring rights: Performer’s rights of singers and musicians; Producer’s rights of record producers (labels)
- 3) Spoken Features (including verbal sequences):

If the spoken features consist of already existing works of literature, reproduction rights and making available rights of the author are concerned. In case of the creation of the spoken features by the DJ (or a third person) during the music mix reaching the barrier of minimal creativity, the reproduction rights and making available rights of the DJ (or the third person) have to be acquired.

In addition, it might be adviseable to obtain also the personality rights of the DJ in his voice.⁵⁴

Right of alteration/modification: According to the AKM general terms and conditions the right of alteration/modification of the pieces of music which is required for the mixing (fading in/fading out abridgement), is not covered by the licenses granted. According to experience, in most of the tape-lease-deals and artist agreements of the music labels the artists transfer the right of alteration/modification to the labels.

⁵⁴ Cf Austrian Supreme Court 6 Ob 270/10a.

Author's moral rights: Depending on the factual situation of the DJ-Mix, it cannot be excluded that the author's moral rights protecting the integrity of the piece of music, might be concerned, too.

In Austria, there is no specific license model for DJ Mixes. The AKM general terms and conditions always include only the non-exclusive license regarding the right of reproduction and the right for the required online service – background music on a website, non-interactive webcasting, interactive webcasting, podcasts, music on demand (simulcasting via the internet and live streaming). In case of an interactive webcasting license the right to skip within the programme is included. Within the other forms of online services, skipping is not a required feature (apart from the podcasts). For interactive webcasts, webcasting and simulcasting the necessary ancillary rights can be obtained from the LSG.

c) Poland

aa) CMO's and repertoires

In Poland, the following four **collecting societies** are active with respect to the following rights:

- a) SAWP (collecting society that comprises artistic performers of musical works);
- b) STOART (collecting society that also comprises artistic performers of musical works);
- c) ZAIKS (collecting society that comprises composers and authors of minor musical works, minor textual works as well as textual and musical works);
- d) ZPAV (collecting society that comprises phonogram and music videogram producers).

Additionally radio and television broadcasting organizations may **broadcast (webcasting)** minor musical works, minor textual works as well as textual and musical works and phonograms **exclusively on the basis** of a contract made with an organization for collective administration of copyright and neighbouring rights (i.e. ZAIKS, STOART, SAWP, ZPAV), **unless** the radio or television broadcasting organization is entitled to broadcast works commissioned thereby on the basis of a separate contract. The same rule – excluding phonograms (i.e. ZPAV) – applies to making minor musical works, minor textual works as well as textual and musical works publicly available in such a manner that anyone could access it at a place and time selected thereby (**on demand – streaming**

and downloading). An author may **waive**, in a contract concluded with a radio or television broadcasting organization, the right to representation by an organization for collective administration of copyright and neighbouring rights, such representation being referred to above. The waiver must be in writing, otherwise being null and void.

There is no **one-stop-shop** for obtaining the necessary licenses. However, it is worth noting that STOART, ZPAV and ZAIKS established one-stop-shop for DJ's who use works in the field of exploitation called: *“presentation of a work, it means providing access thereto either through sound, vision or sound and vision carriers on which the work has been recorded, or through equipment used for reception of radio or television programme on which the work is being broadcast.”*⁵⁵

bb) Reciprocal Agreements

(1) Copyright – author's economic rights

Just to give an example of the extent of need for reciprocal licenses we will display a list. ZAIKS concluded agreements with the following collecting societies:

- a) AEPI /Greece/ – 1973 (annex concerning on-line was concluded in 2009);
- b) AKKA/LAA/Latvia – 1996 (annex concerning on-line was concluded in 2009);
- c) AKM /Austria/ – 1959 (annex concerning on-line was concluded in 2009);
- d) ARTISJUS/Hungary/ – 1958 (annex concerning on-line was concluded in 2009);
- e) EAÛ/Estonia/ – 1997 (annex concerning on-line was concluded in 2009);
- f) GEMA/Germany/ – 1957 (annex concerning on-line was concluded in 2010);
- g) KODA/Denmark/ – 1958 (annex concerning on-line was concluded in 2009);
- h) LATGA-A/Lithuania/ – 1995 (annex concerning on-line was concluded in 2009);
- i) SACEM/France/ – 1973 (annex concerning on-line was concluded in 2009);

⁵⁵ Further information is available on webpage: http://dj.zpav.pl/main/dj_licences.