

Foreign statutory regulations for alternative dispute resolution in copyright matters

Summary

This report contains a survey of several foreign statutory regulations for alternative dispute resolution in copyright matters. These statutory regulations are primarily concerned with cases in which the legislator has prescribed that copyright owners cannot prohibit the use of protected material, but are entitled to remuneration. On the side of the collection of the remuneration there are often large right holders: either per se (film-industry, publishers), or as so called collecting society (compare in the Netherlands: Buma and Sena).

On the side of the debtors there is sometimes some kind of centralisation (for instance broadcasters and cable operators) and often there is nothing of the kind.

In such a system primarily the level of the remuneration must be determined; furthermore also the way in which the payments must be made, the verifiability of the parameters etc.

The comparative survey has focused on Germany, the United Kingdom, the United States and Canada.

The survey focuses per jurisdiction on the following subjects:

- The *demarcation* of the types of special disputes for which ADR exists;
- *Institutional aspects* of the mechanisms and organisations involved;
- The regulation of the *modus procedendi*;
- *Enforceability* and possible order of declaring decisions binding upon all right holders and users;
- Possibility of *appeal* and the relation to ordinary judicial proceedings.

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1 *Demarcation*

1.1. It appears that the demarcation of the types of special disputes for which ADR exists, to a large extent coincide with (a) cases in which the right holder is entitled to remuneration and not to an injunction and/or (b) cases in which monopolistic or oligopolistic market parties (collecting societies; broadcasters; cable companies) are involved. In the United Kingdom (4.1) and the United States (5.1), the decision makers in alternative dispute are competent in more types of disputes than in Germany, presumably because in the former countries there are more situations in which the right holder is only entitled to remuneration and not to an injunction. The level of the remuneration for secondary use of phonograms and disputes concerning the right to cable transmission are always amongst the subjects.

1.2. It appears that both the special authority in the United States and the special authority in Canada have co-jurisdiction in disputes relating to the *distribution* of resources by collecting societies between individual right owners.

1.3. It appears that the disputes for which the special proceedings exist are specified accurately in all examined jurisdictions.

2 *Institutional aspects*

2.1. The alternative dispute resolution authorities operate with a high level of independence in each of the examined jurisdictions. Notwithstanding appeal (7.7), they are separate from any directorate of government agencies when it comes to the decision of disputes, even if they are embedded structurally in a government agency (Germany: Patent- und Markenamt (DMPA); US: Library of Congress).

2.2. In all cases there are always sufficient safeguards against entanglement of interests. It is not the case that persons that are involved as decision maker are regarded as representatives of the parties concerned, let alone with mandate and consultation.

2.3. Strict rules exist regarding the expertise and qualifications of not only the chairpersons, but also of the members of alternative dispute resolution authorities.

2.4. It is laid down explicitly in British statute law that the resolution authority (the Copyright Tribunal) is financed from general funds, except for minimal court registry fee like contributions. No contra indications

are found regarding any of the other jurisdictions, except for the possibility of an order to pay the other party's costs.

3 *Modus procedendi*

- 3.1. The manner in which litigation takes place is thoroughly (sometimes exhaustively) regulated. The right to hear and be heard is (of course) amply guaranteed.
- 3.2. Also, apart from Canada, fairly detailed rules exist regarding the periods in which parties must adopt their position, in general without the possibility of delay (let alone: repeated delay). Often the penalty for a late response is no response. No evidence has been found from examination of secondary sources that these statutory periods are not being upheld properly.
- 3.3. The examined regulations always provide for statutory mechanisms that promote a friendly settlement between the parties, subs. acceptance of a settlement proposed by the resolution authority: and not only in those cases where this is dictated by the Satellite and Cable Directive (83/93/EEC).
- 3.4. In accordance with the Anglo-Saxon tradition, British and American regulations elaborate on providing evidence through documents and witnesses. The German law contains similar rules, but on the explicit condition that the *Schiedsstelle* is not bound by a party's offer to produce evidence.
- 3.5. Both the German and the British as well as the American regulations provide for – albeit in different manners – a possible involvement of the competition authorities (Kartellamt resp. Competition Commission resp. Federal Communications Commission).

4 *Enforceability and possible order of declaring decisions binding upon all right holders and users.*

- 4.1. Notwithstanding appeal, the decisions of the alternative dispute resolution authorities in general constitute entitlement to enforcement between parties. In Germany however, this requires an acceptance (at least a non-dismissal) from the parties concerned.
- 4.2. Rules regarding any possible order of declaring their decisions binding upon all right holders and users by alternative dispute resolution authorities, have not been found, on the understanding that decisions on standard contracts from (in particular) collecting societies have effect on all (potential) contractors.
- 4.3. On the other hand, we did find other mechanisms to promote the highest percentage of cover possible. Indirect means are verification by the German *Schiedsstelle* whether according to it the percentage of cover of the collective parties involved with a collective agreement is sufficient. More direct means can be found in the United States, where requests for the appointment or adjustment of tariffs are published, along with an invitation to other parties to participate in CARP proceedings.

5 *Appeal and the relation to ordinary judicial proceedings*

- 5.1. The regulation of the United Kingdom provides for an appeal to the ordinary court, which must be limited to 'points of law'. Apparently, the ordinary court can thus neglect disputes on findings of fact. The court itself determines it, of course, what qualifies as a 'point of law'.
- 5.2. The German system takes a different approach. It is always possible to institute (full) civil court procedures without this being considered as 'appeal'. However, German statutory law leaves the allowability of the civil court procedure regarding those disputes (3.1) up to a mandatory previous procedure with the *Schiedsstelle* of the DMPA. The rationale behind this is a preference for regulation through the *Schiedsstelle* and – in the unlikely event that no settlement is reached before the *Schiedsstelle* – the possibility for the civil court to make use of the settlement proposal of the arbitration commission.
- 5.3. In the United States great influence is reserved for the Librarian of Congress above the – otherwise independently functioning – Copyright Arbitration Royalty Panels (CARP's). Therefore, there is great influence for an officer of the executive power that can follow, change or dismiss a CARP's decision. The Librarian must however limit itself to a test of reasonableness. The Librarian's decision subsequently can be appealed at the ordinary court: the US (Federal) Court of Appeals in Washington DC.

6 Concluding remarks

6.1. The different *rationes* for the special dispute resolution mechanisms cannot always be found explicitly in the examined countries. The *rationes* that were found however on the one hand seem to differ; on the other hand we find them to be somewhat in line. Mentioned are:

- extension of government surveillance on monopolistic organisations
- desired specialisation / expertise (hand in hand with relief of ordinary, not specialised courts)
- numerous opportunities for mediation / compromise (at least more than can be expected before an ordinary court)
- speed (compared to ordinary court proceedings).

6.2. The present survey does not include a satisfaction or dissatisfaction survey amongst interested circles regarding the examined systems. Not much can be told from the consulted literature. In any case, this literature does not express extreme opinions such as ‘strong dissatisfaction’ or ‘severe objections’. We did not find indications as to any coming important alteration of the relevant legislation in the examined countries.

Complaints that were heard are that the proceedings are (still) too expensive and prolonged. We do wonder however whether these unmotivated or barely motivated complains are not of all ages and all circumstances. It is remarkable however that the recent changes in the United States, meant for limiting costs, have made the costs rise. It also becomes apparent that the time an average procedure takes is quite long, sometimes very long. Where the US-legislator puts time limits to the decision making by the authority involved, this time limit seems to be met reasonably, measuring from ‘the beginning of the procedure’. However; ‘the beginning of the procedure’ appears to be a vague or postponable concept.

6.3. The present survey also does not include a formulated opinion on the desirability or applicability of alternative protection mechanisms as the present in the Netherlands. We will not comment on the desirability, but would like to make some remarks on the applicability. In the light of Article 6 ECHR, Article 17 Constitution and Article 112 Constitution, in our view the ordinary court must always have the final word in these cases. Concentration of court proceedings in one district is possible, in consideration of specialisation. Further specialist contribution is possible through participation of e.g. economic specialists, as laid down in Article 116 paragraph 3 Constitution.

A mandatory ‘preliminary round’ prior to access to a court, as in the German *Urheberrechtswahrnehmungsgesetz*, in our view fits in the Dutch system. Alternatively, one can think of a mandatory personal appearance of the parties to a (specialised) section of the court.

In the event of a mandatory ‘preliminary round’ it also fits to cancel – as some foreign examples show – the district court proceedings, necessitating parties to continue proceedings at a court of appeal, or the cancellation of the appeal after (preliminary round) and the district court phase.

Notes:

- (1) However, in the Dutch statutory negotiation societies on the tariffs for levies on blank sound- and vision carriers, resp. lending rights, this *is* the case (except for an independent chairperson).
- (2) This is different for members in the Netherlands (comp. previous footnote).
- (3) Art. 17 Constitution: No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.
- (4) Art. 112 par. 1 Constitution: The judgement of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.
- (5) In patent cases, community trademark cases and some copyright and neighbouring rights cases, the court in The Hague has exclusive jurisdiction. Opposite the advantage of specialization stands of course the disadvantage that all eggs are put in one basket, with a strongly reduced chance of healthy ‘chocs des opinions’.
- (6) Art. 116 par. 3 Constitution: In cases provided for by Act of Parliament, persons who are not members of the judiciary may take part with members of the judiciary in the administration of justice.

Rechtsvergelijking van auteursrecht-geschillenbeslechtsmechanismen

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