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Industrialised Music Brokers as Competing Market Players: The Administration of Music Rights in Germany (ca. 1870-1930)

Upon the recognition of a comprehensive copyright in Germany in 1870, the assignment and exploitation of copyrights and also the rights of music works were regulated uniformly. New playback and recording technologies around 1900 placed a considerable pressure to adapt not only on the trading processes that linked music creators and the music market, but also on the legislature. The establishment of so-called collecting societies led to new forms of “cultural brokers”. This paper analyses the legal causes of these processes of radical change and examines the exploitation regimes of these new companies, especially for example GEMA, which was able to prevail successfully on the market under competitive conditions due to an efficient corporate constitution. Louis Pahlow is Professor and Chair of Intellectual Property Law, Modern Legal History and Civil Law at the Goethe University, Frankfurt.

Keywords: music copyright, music brokers, GEMA, music marketplace in Germany, collecting societies, musicians’ rights, 1870 Copyright Act

Introduction

The comprehensive recognition of copyright in the 19th century meant that the achievements of writers, composers and artists were not only assigned to their creator as an intellectual property right, but also made accessible to commercial trade as tradable goods (property right). Since the last third of the 19th century this copyright regime has been subjected to considerable media-related upheavals. The conventional model of written works, which was initially conceived to protect authors and prevent reprinting, came under pressure to adapt as a result of new recording and playback technologies, which also affected legal players and necessitated new systems for exploitation and participation. This is especially apparent in the area of musical performance rights: instead of an individual contractual mediation of works between “music

creators” and the “music market”, so-called collecting societies emerged from the 19th century onwards.¹

Today, these represent an indispensable institution in the trading of cultural goods, a commercial version of “cultural brokers”. For example, without their consent and the payment of the relevant royalties, the public performance of music works is illegal in Germany and in many other copyright regimes, and breaches are punished accordingly. In Germany, the system of collective rights administration, even through legally tolerated monopoly companies in the market, was stipulated in 1965 by the legislature.² This monopoly position was justified with the special significance of the societies for the protection and assertion of the rights of the copyright owners on the one side. Therefore the societies were able to use obligations to contract with the commercial music consumers like broadcasting companies, television channels or theatres on the other. Some assign a public function to the companies, charging them with an “obligation to provide a social and cultural service”, or allocating them a duty to protect intellectual property, as the individual copyright holder would be unable to protect his rights without them.³ Competition of the companies, although legally possible, is usually rejected for “functional” or practical legal reasons.⁴ Aside from those justification narratives, the outlined exploitation model raises questions.⁵

Its characteristics are contradictory in a market economy based on fair competitive conditions, which is shaped by the freedom of contract and property and indeed by legislation and state courts. A glance at the first half of the 20th century shows that initially, collecting societies certainly did have to operate under competitive conditions in the market, such as the intervention of domestic and foreign rivals, some able to gain a monopoly position and others failing. How did collecting societies as a special type of “cultural brokers” operate under competitive conditions? Which governing structures do collecting societies as “cultural brokers” cultivate? How is the distribution of royalties to the rights holders organised?

The following paper aims to examine the origins and working conditions of collective rights exploitation in the area of music works in Germany between 1870 and 1930. “Cultural brokers” in the area of music established a new kind of an industrialised “brokering”, which was organised and managed by special business companies or “societies”. The focus here is on the relationship of the rights’ holders to “their” society. It will be shown that a decisive aspect for the success of individual collecting societies in the market was a corporate constitution that was characterised on the one hand by a mostly autonomous organisation of the management and decision-making structures, and on the other hand by a royalties system that was aimed at the interests of the society. It was only this professionalisation that enabled collecting societies to prevail successfully in the market as “cultural brokers”.

Composers and concert organisers in the 19th century

Lawyers acting between music creators (copyright owners) and the music market (organisers) have been shown to have existed as early as the first half of the 19th century,⁶ and their importance increased considerably after 1870 due to changing technical and legal framework conditions. The Copyright Act of 11 June 1870 was the first to provide uniform protection to “music works” in Germany. Composers were granted a range of exploitation rights, in particular the right to the reproduction and dissemination (§ 45), adaption (§ 46) and performance (§ 50) of their works. Of particular commercial importance was the right to reproduction and dissemination, the exploitation of which was traditionally taken on by publishers and music traders, who then paid the composers. The anchoring of a limited and unlimited transferability of the rights, which were allocated to the copyright holder (§ 3 UG 1870), as well as the broadly interpreted principle of contractual freedom, in line with the liberal *Zeitgeist*, granted those affected a “principle of the most free possibilities” to dispose of copyright.⁷ This opened up further creative scope for the exploiters of cultural goods in the last third of the 19th century. For the most part, legislators refrained from legislative interventions and restrictions on this contractual freedom.

While the Copyright Act of 1870 provided for an exclusive right to the public performance of music works (§ 50.1 UG 1870), it yet standardised a remarkable condition in § 50.2 S. 2 UG: whereby printed and published music works could be performed publicly without the permission of the copyright owner if the composer had not reserved the performance right on the print for himself. Thus, if printed music works were made available to the public without this statutory imprint, the exclusive right to public performance expired. Legislators accepted this disadvantageous position for dramatic and dramatic-musical works and aimed by these means to make it easier for composers of purely musical works to approve performances of their works, because they were anyway generally unable to attach conditions to their permission to perform.⁸ It was also in the composers’ own interests to achieve a dissemination of their works as widely as possible by means of public performance.⁹ As publishers were generally uninterested in this caveat of § 50.2 S. 2 UG, it was usually excluded from the publishing contract, and the performance right that was legally allocated to the composer was ceded to the publisher.¹⁰

Upon release, the composers were no longer able to legally prohibit public performances. It was therefore possible for music works to be played in inns, music halls and other places without the event organiser having to fear claims by the copyright holder. As publishing contracts were often concluded for an unlimited period of time, copyright owners principally had no further possibilities to participate in the revenues and couldn’t get any money from the performance exploitation after making the contract with the publisher. A publisher’s note even served as a receipt for a one-off lump-sum payment, cutting off later participation claims by the copyright owner.¹¹ Only famous composers could exert an influence on the drafting of contracts and secure royalties for themselves when granting performance rights.¹²

Thus, in the area of musical performance rights, publishers and music traders favoured by the legislation of 1870 benefited from the exploitation of music works that were for the most part legally independent of the copyright owner. The decisive instrument of exploitation was the individually negotiated contract, soon also supplemented by standard terms and conditions. As a means of self-regulation, publishers of music works developed contractual provisions, for example, such as the “Publisher’s rules for the music trade” passed in 1891, which granted the exclusive and unrestricted exploitation rights to musical works uniformly to the publishers rather than the composers. Performance rights were generally given by the publishers in return for a share of the revenue.¹³ The liberal system of rights’ exploitation by the right owner was upheld in principle. Special protective measures to the benefit of the copyright owner and creator of the work were solely a matter of individual agreement between the parties.

New media of the Industrial Revolution

Towards the end of the 19th century, this traditional system of music exploitation underwent considerable pressure to adapt. With the development of new recording and playback technologies, for example in the form of so-called speaking machines (phonograph, gramophone), music became accessible to everyone, outside of the concert halls and opera houses. Furthermore, the printed note lost its position as the only medium for publishing and recording music works; for the most part, publishers and their associated exploitation chains lost their economic monopoly in the provision of music works. This economic loss was accompanied by a gradual recognition of the competing rights of practising musicians and manufacturers to sound recording devices.

Two fundamental innovations took on a “pace-making” function here in the creation of further exploitation rights: the Civil Code (Bürgerliches Gesetzbuch, BGB) of 1900 not only established legal unity, i.e. in contractual and property law, but also provided for special general clauses (e.g. § 826 BGB) or catch-all elements (§§ 823 ff. BGB), which could also be used by the judiciary for the further development of the law. Furthermore, the recognition of legal protection for fair business transactions, respectively the penalisation of so-called disloyal competition, as expressed in the competition law acts of 1896/1909, enabled the mobilisation of further rights of defence. The judiciary in particular used the regulations mentioned to provide the new players in the music market, as well as publishers and composers, with appropriate protection. Singers gained protection with respect to record producers by means of new “rights over one’s own voice”,¹⁴ while the record producers, in turn, were protected by the general clause § 826 BGB, respectively, § 1 UWG 1909, against the counterfeit of their recordings, which breached “the common decency of fair business transactions”.¹⁵

In its wake, copyright law also liberated itself from the traditional concept of written reproduction and the idea of reprinting. The jurisdiction, which was facing the problem of reprinting, and specifically the question of mechanical reproduction, also took account of overall economic considerations and the

“correct mediation between the interests of the intellectual originator and those of the industry”, and thus excluded other participants.¹⁶ Legislation reacted to the new challenges with two revisions of the Copyright Act of 1901 and 1910, in part only as a result of pressure from the development of law internationally. Not only were the rights of composers expanded, but independent exploitation rights were also created for performers and manufacturers of sound recording devices.

The Berne Convention, passed in 1886, established international legal standards for the protection of copyright. This also included the performance rights of composers (Art. 9.2).¹⁷ Legislators removed the caveat of § 50.2 UG 1870 in 1901, when the new copyright act was enacted, but continually formulated special restrictions and exemptions for folk festivals, charitable events and musical society festivals (§ 27 LUG 1901). After the legal changes of 1901 it was ultimately up to the parties to arrange an appropriate share for composer’s works in the revenues from performances of their works.¹⁸

The new technologies and their successful implementation in the market necessitated a new revision as early as 1910. The LUG of 1901 still excluded the reproduction of music works on “discs, records, roles, tapes and similar components of instruments [...] that serve the mechanical reproduction of music pieces”, (§ 22 LUG 1901). The results of the international Berlin Conference on the Revision of the Berne Convention of 1908 invalidated these exceptions, which were also incorporated in the LUG in 1910¹⁹. In contrast to the previous § 22 LUG 1901, the concession of the exclusive rights of copyright owners to the transfer of their works to recording mediums (§ 12.2 No. 5 LUG 1910) was established, and at the same time there was a provision for an accompanying compulsory licence in favour of every additional manufacturer of sound recording devices, if the composer had permitted this manufacture once (§ 22 LUG 1910). Finally, the right of a performing artist to his recital was recognised in § 2.2 LUG 1910.²⁰ By these means, additional rights holders were created after 1910, who could also avail themselves of the respective rights granted to them.

Market players without “market prices”. Collecting societies as industrialised companies

This pluralisation of rights and rights’ owners placed adaption pressure on the traditional players, who reacted by forming new, industrialised forms of music exploitation, specifically the exploitation of rights. Around 1900, new non-state players emerged between copyright owners and the market, in the form of privately and autonomously organised collecting societies. Having originated in France in the mid-19th century, collecting societies asserted themselves in the 20th century in many parts of Europe and the USA as new forms of an industrial exploitation of cultural goods.²¹ This meant at the same time a new form of company, with the aim of uniting composers, publishers, librettists and others into a legal collective, and also of channelling and organising the exploitation and assertion of these rights. In particular, the “Genossenschaft zur Verwertung musikalischer Aufführungsrechte” (GEMA, the Society for the Exploitation of Musical Performance Rights) developed an efficient corporate and exploitation regime after 1918, allowing it to claim a dominant position in the market.

New forms of organisation

After a number of unsuccessful attempts, composers became organised—just after the reform of the LUG in 190—into the “Genossenschaft Deutscher Tonsetzer” (GDT, Society of German Composers), founded in 1903, and created its own “Anstalt für musikalisches Aufführungsrecht” (AfmA, Institution for Musical Performance Rights), which aimed to make the public performance rights to the works it administered available and to forward the resulting incoming royalties to the rights’ owners.²² These societies were primarily concerned with safeguarding a sufficient share of the profits from the works for their copyright holders, who should be able to live on the proceeds of their works. But the interests of the musicians were also organised in order to forestall the agents of foreign societies, such as the Austrian AKM and the French SACEM²³ and to secure the influence of German composers, publishers and librettists.

Outwardly, the collecting societies attempted to counteract the impression that they were merely organisations obliged to profit-oriented, capitalistic interests. The collection of royalties owed to the AfmA was deliberately modelled on state-bureaucratic institutions.²⁴ The development of pension funds and the support of members in need underlined these objectives and the “humanitarian purposes” of the organisation.²⁵ The collecting societies thus legitimised themselves as anti-capitalist, even “ethical instances” in a music market that was oriented towards the pursuit of profit and economic competition, as it showed itself to be especially in the copyright regime after 1870 and also due to the new phonograph and recorded media industry. But with their criticism of capitalism, the collecting societies also got into legitimisation difficulties with choral and concert societies, which also advocated an ethical and non-commercial care of music and which therefore also battled against the yield-oriented royalty policy of the collecting societies.²⁶

Despite its social-ethical aspiration, the interests of the AfmA were already shifting towards an entrepreneurial exploitation of rights. The “Anstalt für mechanisch-musikalische Rechte” (Ammre, Institution for Mechanical Music Rights)²⁷, which was founded in 1909 by the Association of German Music Traders and the Société générale et internationale de l’Edition phonographique et cinématographique in Paris, was organised under the regimes of business and company law, i.e. as a capital company. Constant conflicts²⁸ between Ammre and AfmA led in 1913 to the departure of 51 publishers, composers and librettists from the GDT/AfmA, and the foundation of the “Genossenschaft zur Verwertung musikalischer Aufführungsrechte” (GEMA), which opted for a mixed form as a cooperative with limited liability under §§ 125 ff. Genossenschaftsgesetz.

With GEMA, composers, publishers and librettists as rights’ owners created an organisational unit with legal capacity. It was not allowed to make any profit of its own (e.g. § 34.1 GEMA statutes 1915); rather, the surpluses were paid out to the members at the end of the year. However, the cooperative cover was supplemented by an efficient organisation constitution, and the democratic say of individual members was cleverly restricted; special management organs

faced up to the general assembly of members (comrades). The cooperative combination of copyrights, both legally created and allocated, and the distribution of the royalties could be administered autonomously and efficiently by the management organs of the company (especially the board). Since its foundation, it was not the general assembly that decided on the occupation of the board and the supervisory council, but rather a special curia system of members. Special “curiae” of composers, of publishers and of librettists each selected their representatives for the board, separately from each other (§ 11 GEMA statutes). By these means, the publishers, who represented the majority of the company initially, but who soon became a minority in terms of numbers, managed to secure an equal influence on the management of the society.²⁹ Together with the “adapters”, who were also represented in GEMA as part of the copyright holders, they exerted considerable influence; this resulted in the 1920s in GEMA earning its reputation as a “capitalistic purchasing company”.³⁰

External competition and internal conflicts

Since 1915, AfmA, Ammre, GEMA and AKM have been competitors in the German market not only with regard to the rights of the composers, publishers and librettists, but also for users, respectively commercial “music consumers” like theatres, restaurants or cinemas who had to pay the agreed royalties. The competitive pressure impelled each of the companies to try to offer a comprehensive and seamless collective of music rights that would safeguard an appropriate remuneration for the rights’ owners. For this purpose, on the one hand an organisation had to be created that would provide the management with sufficient powers for the professional exploitation and assertion of rights. On the other hand, the rights’ owners would have to receive an appropriate and fair share of the fees, in correspondence with the value of their contribution, which limited the financial room for manoeuvre of a competitive administration and exploitation of rights from the very outset.

The societies first tried to counter external competition by means of cooperation, in order to expand their own repertoire of rights and thus improve their market position. As early as 1916 the German GEMA and the Austrian AKM merged to become an “association for the protection of musical performance rights”, which would become a bilateral contractual organisation of GEMA and AKM that was founded “for the purpose of concluding contracts and collecting fees due”.³¹ The self-declared goal of the association was that no concert entrepreneur or broadcasting society should be able to manage in the long term without the repertoire of the association.³² And in fact GEMA did win a monopoly position in the area of entertainment music by the mid-1920s, which effectively made the rival GDT “insignificant”.³³

Yet this did not protect the rights’ owners from having their royalties considerably diminished to the benefit of the board and distribution functionaries. The association led to GEMA distancing itself even further from its members. Information asymmetries between the leadership and the composers led to conflicts between the management organs within GEMA. As a company under civil law, the association did not have its own legal status, and was based

ultimately on the statutes of the two national societies. Accordingly, for example, under § 14.2 of its statutes the GEMA supervisory board could appoint executive directors for a fixed salary. At the association level, this meant that the profits gained were distributed in a manner that was heavily disadvantageous to the composers and advantageous to the association functionaries and representatives. In the 1920s, the directors' salaries were linked to "commissions of 1% of each gross profit made by the association". By these means the Managing Director of the association and GEMA founding member, Berlin publisher Hermann Rauh, was able to increase his salary between 1920 and 1927. The 15 main representatives in the metropolises like Berlin, Hamburg or Frankfurt also drew a commission of 15% for the conclusion of contracts and another 15% for each fee collection in the name of the association.³⁴ Contemporary comparisons with the GDT also show just how low GEMA's annual payouts were compared to other societies.³⁵

While such remuneration rates were not illegal and did not infringe the statutes, they were nevertheless barely compatible with the basic idea of the cooperative association constitution. Therefore, at the extraordinary general meeting on 4 March 1927, the management board and supervisory board of GEMA were compelled to resign; and Hermann Rauh, the "most expensive cashier that ever was"³⁶, was rejected. The newly elected management of GEMA reacted with a demonstrative new start under the slogans "Peace for GEMA", "Thrift" and "Improvement to the income of all comrades".³⁷ This also involved a fundamental reform of the royalty administration.

Market-oriented music valuation

The revised copyright regime of 1910 safeguarded not only the composers' right to public performance (§ 11.2 LUG), but also the right to mechanical reproduction by manufacturers of sound recording devices (§ 12.2 No. 5 LUG), as well as the right to appropriate remuneration for subsequent reproduction or required of compulsory licences (§ 22 LUG). The exploitation of music therefore was no longer just a matter for publishers, but instead required a seamless registering of users, particularly in light of the large number of public performances and possible compulsory licences, and the due royalties that also had to be collected. This raised the question as to how "appropriate remuneration" should be measured and "fair distribution" to the copyright owners be organised. It can be seen from the performance royalties that collecting societies calculated and distributed, that the royalties were very efficiently collected and in a market-oriented manner in the interest of the society, although less so in the interests of the individual composers.

Along the lines of the French SACEM, GEMA had introduced a so-called programme system, which demanded a playlist from concert organisers and conductors after every performance and then paid the respective rights owner in a complicated process (§ 34 GEMA Statute 1915). Outwardly, the dismantling of this programme system in 1927, which "swallowed enormous amounts" and according to which "a fair distribution to the beneficiaries could NEVER succeed using this model"³⁸, was justified in the 1920s by cost savings and the frequent

misinformation about the played music titles provided by concert organisers and conductors. Yet the proximity to the “Rauh system” and the conflict in spring 1927 rather suggest internal pressure from the rights’ owners to also rationalise the royalty distribution, in order to minimise “the sums that have been eaten up so far by the administration”.³⁹

In addition, in 1927 GEMA introduced an estimating system, which divided its members into categories and distributed the income accordingly.⁴⁰ The estimating system thus dissociated the collecting societies further from the rights’ owners, who now, upon joining, also subjected their payment to the autonomous decision-making power of the collecting societies. From that point on, an estimation commission categorised the registered members into eight groups, according to their repertoire of works.⁴¹ Each of these groups was in turn divided into sub-groups and given a certain points system (§ 34.1 new version GEMA Statute 1927). It can be seen from the points scale just how unequal the royalty distribution was between the individual “groups”.

Another problem was the less than satisfactory transparency. Although the bases for calculating the royalty distribution was openly disclosed, the categorisation in the relevant groups and the criteria on which this was decided were mostly in the hands of the influential estimation commission. Ultimately, therefore, despite the disclosure of the methods of calculation, the fee estimates remained opaque⁴² and by no means undisputed. In the first business year after the introduction of the estimating system (1926/1927) alone, 234 of the 749 estimated members appealed to the so-called appeals commission against their estimation, of which 140 were rejected and 68 placed indeed in a higher category.⁴³ Complaints were also common later on. In 1930, therefore, the estimation and appeals commission was supplemented by an internal control commission, which aimed to draw attention to “erroneous estimations”.⁴⁴

Thus performance rights for music works were neither calculated according to the parameters of measurable performance time, nor were they left solely to market forces. Instead the author was estimated and categorised annually by GEMA in accordance with the “material value” or “commercial value” of his works⁴⁵. Members were divided into composers, librettists, adapters, pseudonyms and new members, and their personal details were recorded systematically.⁴⁶

Behind this there was an entrepreneurial business strategy that rigidly valued its own offer of music genres and their “stars” according to the demands of the market. Prominent composers and the holders of rights to popular songs and “hits” were an important commercial resource for GEMA and the decisive factor for their business success; they were kept onside by an attractive distribution formula. Accordingly, a world-renowned composer also had “great value, even if the compositions of this comrade at times did not bring any large performance income”.⁴⁷ The mode of valuation favoured older and more established members, but it also had to endeavour to capture future prominence in the repertoire. The business strategy also included “commercial music consumers” such as concert organisers, as well as the upcoming radio and film

industries in its valuation. The aim now was to cultivate an economically valuable overall repertoire.⁴⁸ The more attractive GEMA managed to design its repertoire, the greater was its negotiating power towards music consumers and, correspondingly, the more tempting it was for upcoming “stars” and performers. The estimation thus took account of the “general significance (prominence) of the individual comrade”, in other words professional seniority, length of membership and the repertoire made available to GEMA. According to GEMA, the classification should include current creative work as well as the total production of a member.⁴⁹

Similar estimation systems also became established in the UK and USA. The British Performing Rights Society (PRS) divided authors, composers and arrangers into no less than 10 categories, based on the estimations of publishers with regard to popularity and sales figures.⁵⁰ The American ASCAP used the methods of empirical social research as early as the beginning of the 1930s: it used a programme analysis technique based on a quarterly sample on a predetermined survey day.⁵¹ This produced a points list that projected the percentage share of every single member in the income of the ASCAP. The list was only accessible to the members of the estimation commission, and was otherwise strictly confidential. The compulsory licence system, introduced almost simultaneously in Germany, the USA and Great Britain, facilitated not only the mutual transfer of rights⁵², but also the exchange of experiences among the societies with regard to their royalty administration. The network of mutual rights’ exploitation was expanded globally with the foundation of the European “International Confederation of Societies of Authors and Composers” (CISAC) in Paris in 1926 and its union with the American ASCAP; by now it was a matter of managing a “world repertoire”.⁵³

On the way to a monopoly

The societies reacted to the competition for rights and users with an increasing rationalisation of their royalty administration towards the maintenance of resources and by means of a cooperative expansion of their repertoire. Music rights had long become a business resource. This also made the legal safeguarding and defence of one’s own repertoire all the more important. By now GEMA, together with AKM, had gained a monopoly position, particularly in the area of light entertainment music, which was asserted rigidly.⁵⁴ In order to defend this position, it was necessary to protect the repertoire legally. Under § 5 of the GEMA statutes, the society was entitled to continue to exercise the performance rights of a departing member for two years after his departure, under the previous conditions. GEMA could not legally prohibit the right of termination, nor could it enforce the two-year deadline of § 5 in the Berlin Court of Appeal.⁵⁵ However, no further consequences arose from the accusation of an abuse of monopoly⁵⁶. The Berlin Court of Appeal rejected the claim that GEMA had a cartel character, because the individual members were not companies, and the obligations agreed did not come under § 1 of the Cartel Ordinance (“KartellVO”).⁵⁷ In contrast, the lower courts attempted, albeit unsuccessfully, to justify an obligation to contract at the expense of GEMA and to the benefit of the UFA, with the help of an analogy to railway provisions (§ 453. 1 HGB or § 6

EisenbahnVerkehrsVO), in order to “remove the worst damages caused by the unbridled exploitation of monopoly positions”.⁵⁸

The increasing strength of GEMA and AKM led in 1929 to negotiations about a cooperation between the GDT and the “Reichskartell der Musikveranstalter Deutschlands” (Reich Cartel of Music Organisers in Germany), which could not be legally prevented by GEMA⁵⁹ and which increased the competitive pressure on the players. GEMA reacted immediately and approached the GDT/AfMA. The result was the foundation of a “Zentralverbandes zum Schutze musikalischer Aufführungsrechte für Deutschland (Musikschutzverband der GEMA, GDT und AKM)” (Central Association for the protection of musical performance rights for Germany, Music Protection Association of GEMA, GDT and AHM) in Berlin in 1930. The central association was by no means a merger of equal partners, but rather was considered by GEMA to be only the first step in expanding its dominant position among the collecting societies by controlling its former competitors.⁶⁰ The foundation of the central association was also a reaction to the external pressure from the so-called music consumers, who had also become organised in the meantime. In 1930 the Reich Cartel demanded a “single central exploitation centre in Germany, which controls the entire world music repertoire based on reciprocal contracts with foreign collecting societies, so that every music event organiser in Germany can purchase the rights for his company to play all pieces of music that are protected by copyrights by concluding a remuneration contract with this one centre”.⁶¹ In 1932, the “Arbeitsgemeinschaft der Verbreiter von Geisteswerken” (Working Group of Disseminators of Intellectual Goods), which comprised an alliance of influential associations, including the film, restaurant, radio and phonographic industries, demanded the introduction of a state approval requirement for collecting societies, and thus state monitoring.⁶²

The state was to ensure clarity and to remove any conflicts, disputes and ambiguities. Private contracts and the jurisdiction of the courts no longer seemed to provide a sufficient guarantee in the eyes of the associations. Music consumers wanted action from the state, they wanted legally prescribed royalties or even a “nationalisation of the royalty system”.⁶³ The degree of animosity between the collecting societies and the music market at the beginning of the 1930s can also be seen from the numerous copyright drafts by the interest groups involved, which had been circulating since 1932.⁶⁴ The Nazi regime was able to solve the conflict in 1933 by means of state force and the creation of a legal monopoly to the benefit of the “staatlich genehmigte Gesellschaft zur Verwertung musikalischer Aufführungsrechte” (STAGMA, State-approved Society for the Exploitation of Musical Performance Rights). Naturally, political motives were pursued in the first instance. Since then, however, any return to competition between collecting societies has been defied vehemently by the exploitation industry after 1945.

Summary

Collecting societies as an industrialised interface for the provision of musical performance are the result of media-related upheaval and legal adaption

processes. Success was enjoyed primarily by those who faced the market rigidly as companies, who made their association legally independent, who balanced the different interests of composers, publishers and librettists by means of a clever organisational constitution, and who determined and distributed royalties using an autonomous valuation and distribution regime in a market-oriented manner, according to the interests of the society. GEMA operated its royalty administration rigidly as a means to strengthen its negotiating position with music consumers (especially the film, radio and phonographic industries) and to drive the expansion of its rights to the use of music (to new adaptations, new locations and new media). This system was certainly market-oriented, but by no means market-transparent.

GEMA was able to assert itself successfully in the market, and even dominate; but in the process, “smaller” composers and librettists were disadvantaged in relation to their market value. Furthermore, information asymmetries, high transaction costs and conflicts between members and the organs of management were by no means ruled out. However, the existing competition between the societies ensured electoral freedom, albeit restricted, and thus the autonomy of the rights owners to leave the society in serious cases. Only when competing societies declined in significance in a certain genre did it become *de facto* unavoidable to remain in GEMA.

By cleverly exploiting their interests with the concerns of intellectual creators, the collecting societies used their influence on the legislators, who were supposed to expand the rights of the copyright owners and publishers and thus also safeguard the possibility of the collecting societies to exert influence and take action. Demands were made “on behalf of the copyright owner” to expand the copyright protection for all public performances or to extend the protected copyright period.⁶⁵ The service to intellectual property for the benefit of the copyright owner, but also publishing interests, which was propagated outwardly, was therefore due not only to the development of its own legal resources, but also, after 1945, to the protection of its own monopoly. Wenzel Goldbaum, for many years a lawyer for GEMA in the 1920s, polemicised in 1961 against the attempts of the legislators to also subject collecting societies to the competitive regulation of the Federal Cartel Office, and even spoke of a “nationalisation of copyright”, should such a regulation come about. The dispute at this time even included the commercial character of the collecting society itself, which was now placed fully at the service of cultural creativity and the disinterested protection of intellectual property, but which could by no means be connected with the trade in goods or with commercial services.⁶⁶

¹ To date, legal historians have only rarely addressed the level of the collecting societies in the origins of copyright protection in Germany: Manuela Maria Schmidt, *Die Anfänge der musikalischen Tantiemenbewegung in Deutschland*, (Berlin: Duncker & Humblot, 2005); Karl Riesenhuber and Frank Rosenkranz, „Das deutsche Wahrnehmungsrecht 1903-1933 - Ein Streifzug durch Rechtsprechung und Literatur“, *UFITA* (2005/II): 467-519. The fields of economic and cultural history discovered this topic at a much earlier stage, see Monika

Dommann, *Autoren und Apparate. Die Geschichte des Copyrights im Medienwandel*, (Frankfurt a. M.: Fischer, 2014); previously Cyril Ehrlich, *Harmonious Alliance. A History of the Performing Right Society*, (Oxford and New York: Oxford University Press, 1989); Russell Sanjek and David Sanjek, *American Popular Music Business in the 20th Century*, (New York: Oxford University Press), 1991; Russell Sanjek and David Sanjek, *Pennies from Heaven. The American Popular Music Business in the Twentieth Century*, (New York: Da Capo Press, 1988); John Ryan, *The Production of Culture in the Music Industry. The ASCAP-BMI Controversy*, (Lanham: Univ. Press of Amerika, 1985).

² According to the Act on Copyright and Related Rights (Urheberrechtswahrnehmungsgesetz, UrhWG), collecting societies protect the rights of owners and their claims for invoices “for shared exploitation” (§ 1.1 and 1.4 UrhWG), are subjects to a special advisory and licensing obligation (§ 1 ff. UrhWG), have at their disposal legally standardised arbitration boards (§§ 14 ff. UrhWG) and represent a so-called factual monopoly (§ 3.1 No. 3 UrhWG) with a double obligation to contract: on the one hand to the beneficiary, to which it owes a so-called obligation to protect under § 6.1 UrhWG, and on the other hand § 11 UrhWG obliges the societies to concede to everyone upon request usage rights to music works, under appropriate conditions.

³ Jürgen Becker, „Verwertungsgesellschaften als Träger öffentlicher und privater Aufgaben“, in *Recht und Praxis der GEMA. Handbuch und Kommentar*, 2nd edition, ed. R. Kreile et al. (Berlin: De Gruyter, 2008), 33-46.

⁴ Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz. Kommentar*, 4th edition, (München: Beck, 2013), vor § 1 UrhWG Rn. 5; Karl Riesenhuber and Alexander v. Vogel, „Europäisches Wahrnehmungsrecht. Zur Mitteilung der Kommission über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten im Binnenmarkt“, *EuZW* (2004): 519-523, 522.

⁵ In the past, therefore, there has been no lack of critical reform proposals and analyses from a juristic and economic perspective, e.g. Roger Wallis et al., “Contested Collective Administration of Intellectual Property Rights in Music. The Challenge to the Principles of Reciprocity and Solidarity,” *European Journal of Communication* 14 (1999) 1: 5-35; Martin Kretschmer, “The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments,” *EIPR* (2002): 126-136; Friederike Bing, “Die Verwertung von Urheberrechten. Eine ökonomische Analyse unter besonderer Berücksichtigung der Lizenzvergabe durch Verwertungsgesellschaften“ (PhD, University of Kiel 2002).

⁶ Friedemann Kawohl, *Urheberrecht der Musik in Preussen (1820-1840)*, (Tutzing: Schneider, 2002), 170 ff., 237 ff.

⁷ Ernst Rabel, „Die Uebertragbarkeit des Urheberrechtes nach dem österreichischen Gesetz vom 26. December 1895,“ *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 27 (1900): 71-182, 180; Alfred Dahlheimer, *Die Übertragung des Urheberrechts*, (Nürnberg: Sebald, 1910), 61. – See for the §§ of the „Urhebergesetz“: Bundesgesetzblatt (BGBl.) 1870, 339.

⁸ Report of the VI Commission, *Reichstags-Protokolle* (1867/70): No. 138, 536 ff., 545.

⁹ RT-Drucks. (Reichstag printed materials), Motive, 140.

¹⁰ Schmidt, *Anfänge*, 62-64 with further references.

¹¹ Schmidt, *Anfänge*, 75-79.

¹² Wilhelm Altmann, „Das musikalische Aufführungsrecht. Ein Wort zur Aufklärung,“ *Die Musik* 32 (1903/04): 338-351, 344.

¹³ See for example Reichsgericht, judgement 14.2.1912 – I 354/11 – RGZ 78, 298 ff.; [Wolfgang] D’Albert, *Die Verwertung des musikalischen Aufführungsrechts in Deutschland*, (Jena: Fischer, 1907), 54 f.; in the German theatre, for example, the brokerage fees for guest appearances was 10% of the overall fee, for engagements 5% of the salary for many years, and often also 3%, see Otto Opet, *Deutsches Theaterrecht. Unter Berücksichtigung der fremden Rechte systematisch dargestellt*, (Berlin: Calvary, 1897), 452 note 18.

¹⁴ Landgericht Berlin, *GRUR* (1900): 131-132. – On the development of the rights of performing artists in Germany Simon Apel, *Der ausübende Musiker im Recht Deutschlands und der USA*, (Tübingen: Mohr Siebeck, 2011), 15-79; Simon Apel, „Die Entwicklung des Interpretenschutzes in Deutschland und den USA von 1877 bis 1945. Dargestellt am Beispiel des ausübenden Musikers,“ *ZGE/IPJ* 4 (2012): 1 ff.

¹⁵ Reichsgericht, judgement 7.4.1910 – VI 344/09 – RGZ 77, 294-298, 298; on this J. Cohn-Schmidt, „Die Entscheidung des Reichsgerichts in der Kopierfrage,“ *Phonos* 2 (1910): 145 f.

- ¹⁶ Reichsgericht, judgement 19.12.1888 – I ZR 287/88 – RGZ 22, 174, 181 ff. (183); Reichsgericht, judgement 31.1.1891 – I ZR 301/90 –, RGZ 27, 60, 67-69; Reichsgericht, judgement 24.2.1899 – 140/99 – RGSt 32, 41, 44-46.
- ¹⁷ Art. 9.2, printed in RGBl. 1887, 493, 500. – On this Isabella Löhr, *Die Globalisierung geistiger Eigentumsrechte. Neue Strukturen internationaler Zusammenarbeit 1886-1952*, (Göttingen: Vandenhoeck & Ruprecht 2010), 67-84; Isabella Löhr and Hannes Siegrist, „Intellectual Property Rights and Globalization,“ *Comparativ* 21 (2011): 7-28.
- ¹⁸ Otto Lindemann, *Urheberrecht, 3rd edition*, (Berlin: Guttentag, 1910), 49 f.
- ¹⁹ Act of 22 May 1910, RGBl., 793 ff.
- ²⁰ [Hermann] Dungs, „Die Novelle zum Urheberrechtsgesetz,“ *Deutsche Juristen-Zeitung* (1910): 733 f.; Gerhard Freiesleben, *Recht und Tonkunst. Eine gemeinverständliche Darstellung des musikalischen Urheber- und Verlagsrechts*, (Leipzig: Siegel, 1914), 70 ff.; [Johannes] Mittelstaedt, „Die mechanischen Musikinstrumente,“ *Markenschutz und Wettbewerb* 9 (1910): 361-365, 362.
- ²¹ Ehrlich, *Harmonious Alliance*, 1-8; Richard E. Caves, *Creative Industries. Contracts between Art and Commerce*, (Cambridge/Mass.: Harvard University Press, 2000), 297-313, 302-311.
- ²² Details on the history of the foundation of AfmA in Schmidt, *Anfänge*, 428-442.
- ²³ Genossenschaft Deutscher Komponisten, ed., *Materialien zur Begründung einer Deutschen Centralstelle für die Verwertung musikalischer Aufführungsrechte*, (Berlin: Baensch, 1910), 10.
- ²⁴ More in detail in Dommann, *Autoren*, 111 f.
- ²⁵ D'Albert, *Verwertung*, 85.
- ²⁶ Dommann, *Autoren*, 112.
- ²⁷ Freiesleben, *Recht*, 74.
- ²⁸ Reichsgericht, Urt. v. 18.9.1915 – I ZR 45/15 –, RGZ 87, 215-221.
- ²⁹ Walther Plugge and Georg Roeber, *Das musikalische Tantiemenrecht in Deutschland*, (Berlin: Hobbing, 1930), 34 f.
- ³⁰ Plugge and Roeber, *Tantiemenrecht*, 31; previously with reference to AfmA Georg Göhler, *Keine Konzert-Tantiemen! Ein Aufruf an alle Freunde der deutschen Musikpflege*, (Altenburg: Selbstverl., 1905), 26: “The [AfmA] is a purely economic, commercial company and should be treated as such.”
- ³¹ *GEMA-Nachrichten* 1 (1.2.1927): 3.
- ³² *GEMA-Nachrichten* 1 (1.2.1927): 3.
- ³³ Landgericht Berlin I, judgement 8.9.1927 – 38 Q 104/27 –, *Juristische Wochenschrift* (1928): 373, 375.
- ³⁴ *GEMA-Nachrichten* 1 (1.2.1927), [3]; *GEMA-Nachrichten* 3 (20.04.1927): 2.
- ³⁵ The accounts are printed in Plugge and Roeber, *Tantiemenrecht*, 39 f.
- ³⁶ Judicial Council *Drucker* at the extraordinary general meeting of 4.3.1927, *GEMA-Nachrichten* 3 (22.4.1927): 4; on the discussions about the old board see the abbreviated minutes of the ordinary general meeting of 30.4.1927, *GEMA-Nachrichten* 5 (30.6.1927): 4.
- ³⁷ General meeting of 30.4.1927, *GEMA-Nachrichten* 5 (30.6.1927): 4.
- ³⁸ *GEMA-Nachrichten* 4 (30.4.1927): 2, 5.
- ³⁹ Minutes (excerpt) of the general meeting 30.4.1927, *GEMA-Nachrichten* 5 (30.06.1927): 6.
- ⁴⁰ *GEMA-Nachrichten* 4 (30.4.1927): 2 f.
- ⁴¹ See § 34 of the GEMA-Statute 1927.
- ⁴² In 1928 GEMA even decided at its general meeting not to publish the estimation list, but instead to merely communicate the estimation results to the individual members, see Dommann, *Autoren*, 124.
- ⁴³ Report of the appeals commission, *GEMA-Nachrichten* 12 (10.6.1928): 6.
- ⁴⁴ *GEMA-Nachrichten* 33 (7.3.1930): 4-6.
- ⁴⁵ *GEMA-Nachrichten* 7 (5.11.1927): 1; *GEMA-Nachrichten* 8 (18.1.1928): 6.
- ⁴⁶ Incl. name, pseudonym, profession, address, day of registration, date of entry into the society register, suggestions by the programme commission to the estimation commission on categorisation, sums of the settlements and the number of works registered, see *GEMA-Nachrichten* 6 (14.9.1927): 4-5 (activity report of the programme commission).
- ⁴⁷ *GEMA-Nachrichten* 7 (5.11.1927): 2 (comments on the estimation system).
- ⁴⁸ Genossenschaft Deutscher Tonsetzer, ed., *Geschäfte gegen die Schaffenden. Eine Stellungnahme zu der Denkschrift der Arbeitsgemeinschaft der Verbreiter von Geisteswerken*, (Berlin: Felgentreff, 1933), 11 ff.
- ⁴⁹ *GEMA-Nachrichten* 9 (1.3.1928): 6 ff.; also above, fn. 41.

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- ⁵⁰ Ehrlich, *Harmonious Alliance*, 38-42.
- ⁵¹ Caves, *Creative Industries*, 297-307.
- ⁵² Richard R. Bowker, *Copyright. Its History and Its Law*, (Boston and New York: Houghton Mifflin Company 1912), 212.
- ⁵³ *GEMA-Nachrichten* 33 (7.3.1930): 3.
- ⁵⁴ See the examples from GEMA exploitation practice in the 1920s in Plugge and Roeber, *Tantiemenrecht*, 41 ff.
- ⁵⁵ Kammergericht Berlin, judgement 6.7.1929 – 10 U 3966/29 –, *Kartell-Rundschau* (1930): 36, 37; in contrast Landgericht Berlin I, judgement 15.2.1929 – 38 O 477/28 –, *GEMA-Nachrichten* 21 (28.2.1929): 2 ff., which prohibited the resignation from GEMA in the way of an extraordinary termination, because the cooperative law did not foresee such a termination.
- ⁵⁶ For example Landgericht Berlin I, judgement 8.9.1927 – 38 Q 104/27 –, *Juristische Wochenschrift* (1928): 373 ff.
- ⁵⁷ Kammergericht Berlin, judgement 6.7.1929 – 10 U 3966/29 –, *Kartell-Rundschau* (1930): 36, 37.
- ⁵⁸ Landgericht Berlin I, judgement 8.9.1927 – 38 O 104/27 –, *Juristische Wochenschrift* (1928), 374.
- ⁵⁹ Landgericht Berlin I, judgement 15.7.1929 – 38 O 208/29 –, BA R 3001, 6363, 200 ff.
- ⁶⁰ *GEMA-Nachrichten* 30 (27.12.1929): 3-8; *GEMA-Nachrichten* 37 (22.8.1930): 2-3; *GDT* (1931), Grundordnung der Anstalten für Musikalische Urheberrechte.
- ⁶¹ Cited from Wilhelm Nordemann, „Entwicklung und Bedeutung der Verwertungsgesellschaften,“ in *Gewerblicher Rechtsschutz und Urheberrecht. Festschrift zum hundertjährigen Bestehen der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht und ihrer Zeitschrift, Vol. II*, ed. F.-K. Beier et al., (Weinheim: VCH 1991), 1197-1210, here 1198; also Plugge and Roeber, *Tantiemenrecht*, 93 ff.
- ⁶² *Die Neugestaltung des deutschen Urheberrechts. Denkschrift der Arbeitsgemeinschaft der Verbreiter von Geisteswerken*, [Berlin 1932], 17; in contrast, from the GDT perspective: *Geschäfte gegen die Schaffenden. Eine Stellungnahme zu der Denkschrift der Arbeitsgemeinschaft der Verbreiter von Geisteswerken*, Berlin: Felgentreff, 1933.
- ⁶³ Plugge and Roeber, *Tantiemenrecht*, 132.
- ⁶⁴ Ralf-M. Vogt, *Die urheberrechtlichen Reformdiskussionen in Deutschland während der Zeit der Weimarer Republik und des Nationalsozialismus*, Frankfurt a. M.: Lang, 2004.
- ⁶⁵ See Albert Osterrieth, „Betrachtungen zur Revision der Berner Übereinkunft zum Schutze der Werke des Schrifttums und der Kunst,“ *GRUR* (1923): 25 ff., 27.
- ⁶⁶ Wenzel Goldbaum, *Urheberrecht und Urhebervertragsrecht. Kommentar, 3rd edition*, (Baden-Baden: Verlag für Angewandte Wissenschaften, 1961), 15-27, especially 24-26.