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The GEMA-Presumption and the burden of non liquet (Germany)

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"The judgment casts a spotlight on a distinct feature of collective rights management in Germany and the difficulties that may ensue for creators and users of musical creations who want to license such material under an alternative licensing scheme."

The case that came before the Local Court Frankfurt/Main concerned a dispute between the German Society for musical performing and mechanical reproduction rights (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, GEMA) and a song contest organiser (defendant). In the course of a music contest, entrants were asked to submit a song through the defendant's website and permit for the song to being exploited (i.e. shall be added to a CD) under a creative commons license (CC-BY). Before the CD was produced the defendant notified GEMA of their intention to produce 2000 copies of it and further submitted a list containing the title of the songs as well as the names of artists, composers and other relevant information. This was to enable GEMA to verify that the songs were not part of its repertoire. For the song forming the subject-matter of the case, the defendants, unable to submit the artist's real name, put down the band name, i.e. an alias, which GEMA refused to accept. Instead GEMA invoiced the defendant according to its tariff, which in turn the defendant refused to pay.

GEMA is a legally authorised collecting society and represents approximately 65,000 registered members such as authors, music publishers and other copyright holders whose rights have been transferred to it. Once an artist has subscribed, GEMA is entitled to represent the rights in every musical creation of that artist. Furthermore it represents more than a million international copyright owners whose works are used in Germany. This vast repertoire has established a quasi-monopoly which, some decades ago, prompted the German Federal Court of Justice to accept a prima facie evidence to the effect that the collecting society is deemed to represent the rights of the right holder and thus the piece of music concerned is part of its repertoire.

In 1985 the GEMA-Presumption was framed into law and was to become an important asset of the

German Copyright Administration Act (Urheberrechtswahrnehmungsgesetz). Its § 13c (2) reads: "If a collecting society asserts a claim to remuneration as referred to in §§27, 54(1), 54c(1), 77(2), 85(4), 94(4) or 137l(5) Copyright Act, it shall be presumed that the collecting society represents the rights of all parties entitled". As a rebuttable presumption it reverses the burden of proof for the benefit of the collecting society, and since it became a legal presumption, the requirement that a quasi-monopoly (which is today increasingly challenged) really exists was abandoned.

To successfully rebut the GEMA-Presumption the user of the work would have to demonstrate that GEMA is not entitled to exercise the copyright on behalf of the right holder, which the defendant has failed to establish. According to the judgment it shall not suffice to assert that the song was submitted in a music contest held online and according to its terms should be submitted under a creative commons license. It further does not satisfy the requirement if the defendant only releases an alias (the band name) rather than the right holder's real name(s). This is because under German copyright law the creator is the owner of the work and with the exception of inheritance, copyright as such cannot be transferred from the creator to a third party. Although it is possible to grant exclusive and non-exclusive rights of use and exploitation to legal entities, the creator is always a natural person. In this context GEMA put forth that it would be impossible to clarify who the creator of that work is or whether that person has the right to use and exploit the work especially by permitting that the work may be used under a creative common license. The court accepted this argument and held that even if use and exploitation of the work were allowed under a creative commons license, the defendant could not produce sufficient evidence as to the copyright ownership of the person granting such license. Even if an alias would be deemed admissible the defendant cannot ensure that the songs uploaded on its website were in fact submitted by their copyright holder or with their permission. The court concluded that, if it was possible to rebut the GEMA-Presumption by internet users who under an alias and without any proof of their proprietorship, but rather by claiming to be the copyright holder upload pieces of music, § 13c CAA ratio legis would be compromised. That is to say, to represent the copyright holders' interests and exercise and enforce their rights effectively. This would be hampered or even rendered impossible if GEMA had to substantiate in every single case that it does represent the right holder, i.e. the right holder is a GEMA member or is otherwise associated with it. The court further held that there is no reason to treat creative commons licenses differently, as any copyright license, creative commons and ordinary licenses alike, must first of all be granted by the copyright holder.

The judgment casts a spotlight on a distinct feature of collective rights management in Germany and the difficulties that may ensue for creators and users of musical creations who want to license such material under an alternative licensing scheme. Although the ruling does not affect creative commons licenses as such, they are nevertheless indirectly targeted. This is due to the fact that creative commons licenses account for a growing proportion among "non-GEMA associated" licenses. On should also not underestimate the deterring effect to potential licensees, who might, due to an uncertain legal basis and the administrative burden coming with the prerequisite to have sufficient evidence at hand, refrain from purchasing music under such licenses. A tangible solution for this quandary does not appear to be in sight. It may already be helpful to soften the requirements to a successful rebuttal. Or perhaps one could reverse the presumption to the advantage of creative commons license users and deem it rebutted when a licensee of musical works that are protected under a creative commons license can, according to GEMA standards, produce sufficient evidence to the effect that the by far largest part of music it has used is not represented by GEMA. One would have to find another basis for that calculation though, as a repertoire on which GEMA can rely on may not be available.

The amount in dispute in this case was €68.00,- It is noteworthy that AG Frankfurt/Main admitted the appeal pursuant to Section 511(2)(2) Civil Procedures Act, according to which "the court of the first instance shall admit an appeal in cases in which the legal matter is of fundamental significance", to wit the question whether a user of a copyright protected work who argues that the right to use the work has been granted by an anonymous sources alleging to be the copyright holder can rebut the GEMA-Presumption. This case may thus be continued.

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