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THE IMPORTANCE OF COPYRIGHT AND RELATED RIGHTS FOR ECONOMIC DEVELOPMENT WITH SPECIAL REFERENCE TO THE POSITION OF SME'S

Prepared by Dr. Mihály Ficsor, Director,
Center for Information Technology and Intellectual Property (CITIP), Budapest

I. INTRODUCTION

1. During the seminar, several presentations have been made on the international system of the protection of copyright and related rights. In this paper, first it is summarised what kind of role copyright and related rights may have in the promotion of literary, musical and artistic creativity and economic development, and then it is reviewed how all this may be manifested in the activities of small- and medium-sized enterprises which are particularly important, from this viewpoint, in developing countries.

II. COPYRIGHT AND CREATIVITY

2. The role the protection of copyright and related rights is above all the promotion literary, musical and artistic creativity, the enrichment of national cultural heritage and the dissemination of cultural and information products to the general public. Such protection offers the indispensable incentives for the creation of new valuable works and for the investment into production and distribution of cultural and information goods. This is done through granting appropriate economic and moral rights to authors, performer, producers and publishers, through establishing adequate framework for the exercise of these rights, and through providing efficient mechanisms, procedures, remedies and sanctions that are necessary for their enforcement in practice.

3. The international norms and national laws on copyright and related rights, while recognizing that the promotion of creativity and cultural and information production is an important public interest, also take into account other public interests, such as those which relate to the availability to the public of all the information necessary for the participation in social and political activities; public education; scientific and scholarly research; etc. For these purposes, these norms and laws contain appropriate exceptions to and limitations on the rights of copyright and related rights owners.

4. An efficient and well-balanced system for the protection of copyright and related rights is necessary for the preservation of national culture and identity. Experience shows that for this, it is not sufficient to grant protection to national creators, producers and publishers. Without adequate protection also for them, foreign works and cultural products may inundate the markets of the given country and create a kind of unfair competition for any domestic creations and publications. This may happen very easily so since publishers may prefer well-known works proved to be successful at the international level -- for the publication of which they do not need any authorization and do not have to pay any remuneration to the authors and original publishers – rather than investing in local creations in the case of which they have certain obligations and, at the same time, may not be sure how they will be received by the public.

5. In addition to all this, an appropriate copyright system is also indispensable for the participation of international cultural and economic cooperation. Without this, a country may not be able to attract foreign investment in a number of important fields, and may not get access to certain cultural and information products and services in such an obstacle-free manner as it would be desirable for the acceleration of the social and economic development.

6. In developing countries, small and medium-sized enterprises (SMEs) have a particularly important role in the field of cultural and information production. Therefore, in this paper, it is analyzed in detail what kinds of chances SMEs have and what kinds of difficulties they may have to be faced with in the field of the application of copyright and related rights.

III. SMALL AND MEDIUM-SIZED ENTERPRISES AND COPYRIGHT: OBJECTIVES, CHALLENGES, DANGERS AND OPPORTUNITIES

Objectives: success stories through well-balanced copyright and related rights protection; some positive examples

7. There are many examples to prove that an appropriate, well-balanced copyright regulation may contribute both to the survival and to the success – sometimes spectacular success – of smaller and medium-sized enterprises. Here only three will be used ; they are, however, quite typical. One is an old story, the other two are more recent; one is from a country which is now a leading industrialized country – in fact, the biggest economy of the world – but the example is from an early period of its history when, on the basis of the present criteria, it still could have been regarded a kind of developing country: the *United States of America*; one is from a developing country, and quite a huge one, which just as a consequence of the success story involved, is emerging as one of the most important players in the field concerned: *India*; and one is from a country which, at the time of the story was still a reluctant member of the group of the so-called socialist countries (although, as the Western press put it, the merriest barrack in the camp), which then happily became a "transition country", and which last year, in 2004, became a member of the European Union: *Hungary*.

8. Let us take then the example from the *United States*. The story is from the period when it had just obtained its independence and was in the stage of establishing its own economic, social and legal system. As far as copyright was concerned *the first idea* – which, at the first sight, perhaps seemed to be attractive and clever – *was to promote local culture and creativity through granting copyright protection for the works of domestic authors, leaving, however, foreign works* – first of all works published in England – *unprotected***.** The results proved to be *catastrophic from the viewpoint* of what the isolationist approach to copyright was believed to serve; from the viewpoint *of national culture and creativity*. Those publishers – according to our present comparative scale, certainly small or, at least, medium-sized ones – that had chosen to invest in the publication of some still less well-known American authors were unable to compete with the others which achieved easy and safe success by publishing unprotected works of famous and popular English writers and poets without any need whatsoever for bothering with obtaining authorization and paying remuneration to them. *The then "SME" publishers supporting local creativity either went bankrupt or changed publishing policy* in abandoning their patriotic extravaganza.

9. This negative effect of the introverted copyright policy was recognized quite early. *Copyright legislation was changed***,** updated and – through appropriate agreements – extended to English works. The result of this step is well known: *the dying "SME" publishers specialized in publishing works of domestic authors received a huge doze of new opportunities for competing in the market and succeed*. This wise decision to change copyright policy might even be regarded as the beginning leading to the enormous success

story of the U.S. cultural industries (about which, of course, it would be difficult to say that they are now dominated by SMEs).

10. The stories about *India* and *Hungary* are much newer. *At the end of the 70s and the beginning of the 80s, there were still a lot of heated debates at the international level on what kind of intellectual property protection might be adequate for computer programs***,** the growing importance of which at that time was becoming evident. During those debates, patent protection – which now, in certain countries, has started a spectacular, although in some aspects controversial, new carrier – was, in general set aside and rejected as a major option. The possibility of a *sui generis* system was considered more or less seriously (of which still there are some very much articulate *arrière-guard* advocates), but copyright was emerging as the most ready-made and most easily applicable option. *The breakthrough towards copyright as a generally accepted option took place in February 1985, at a meeting organized in Geneva at the WIPO headquarters*. It was due to the excellent working paper, to the thorough discussion at the meeting, but also to the existing positive examples to which the working paper had been able to refer. At that time, in addition to some positive developments in the case law of some countries, *there were already five countries where statutory law explicitly recognized the copyright protection of computer programs.*

11. It may not be a surprise that the United States of America was among the first five. In the case of that country, the contribution of copyright protection might not be so easily and evidently identified as the single key factor for the enormous success of the software industry, although its important role could hardly be neglected. However, *India and Hungary were also among those first five countries,* and, in the case of these countries it is easier to identify what kind of impact copyright protection had made.

12. It seems needless to describe *the great success of the Indian software industry* which has even started its dynamic extension also to the European and U.S. markets (and not only through "exporting" its excellent experts). There is general agreement that, *in the success story of the numerous software SMEs* of that huge country – some of which, of course, in the meantime, have grown out this category – in addition to certain other factors (such as a well-thought governmental development strategy and an advantageous educational structure), *the early introduction of a well-balanced copyright protection for computer programs played a decisive role.*

13. The same was the case *in Hungary* where *copyright protection was recognized in the statutory law (the first time in Europe) in 1983*. This alone would not have been sufficient in a so-called socialist country to become the basis for an SMEs success story. By that time, however, certain economic and political changes allowed the establishment of small private enterprises (or sometimes even medium-sized ones). *The carrier of the small software houses established in that period became truly a great success story*, bringing Hungary into the frontline of software development in Central and Eastern Europe and *contributing – along with many other factors – to a smooth transformation of the (ever less) centrally planned economy into a full-fledged market economy.*

Dangers for SMEs by overprotection of copyright: The example of decompilation of computer programs

14. There is no need to elaborate on some very well known examples where the *breathtaking success of certain software enterprises* – which at the beginning were born even not just as small or medium-sized ones but as *micro*-enterprises – has led. They have obtained quite an *extensive market dominance with the possibility of* their proprietary products obtaining the status of *de facto* world-wide standards *relegating by this their potential competitors (among them all software SMEs) into the depending status of simple clients***.**

15. This evolving scenario was *recognized and duly taken into account in the European Community in* the framework of the preparation and adoption of *the directive on the legal protection of computer programs*. The directive (Council Directive No. 91/250/EEC of 14 May 1991) contains certain provisions to protect users of computer programs against the dangers of overprotection in favor of software developers: such as the ones guaranteeing for the lawful owners of copies of computer programs to be able to use it for the intended purpose, including error protection (Article 5(1)), to make back-up copies (Article 5(2)) and to observe, study or test the functioning of the program in order to determine the ideas and principles underlining any element of the program (Article 5(3)).

16. The latter provision has already quite a substantial relevance also for the possible competitors – among them many SMEs -- in the software markets. However**,** *what is particularly important for them – especially for the more vulnerable SMEs of the field – is the regulation of the issue of "reverse engineering" or "decompilation"* of programs in Article 6 of the directive.

17. This regulation became necessary in order *to eliminate the possibility* of some *anti-competitive practices* of owners of certain widely used computer programs based on the exclusive right of reproduction and/or the exclusive right of adaptation (and translation) granted to them by Article 4 of the directive. In the absence of an appropriate regulation, owners of rights in such programs would have been able to prohibit the transformation of the programs (only made available by them in object code form) into source code form (this transformation is called "decompilation" – or "reverse engineering" of the program). And *without* such *decompilation, the potential competitors would not have been able to develop and make any computer programs that would have been able to function together – "interoperate"* -- with the existing and widely used, quasi standard programs. Such a consequence would have been, of course, particularly disastrous for SMEs of the software development sector.

18. The regulation was not easy. There was quite an important resistance against any specific rules authorizing decompilation, since some major software houses were afraid that the new norms may be used also for simple piratical activities. It seems, however, that *the provisions in Article 6 of the directive have established an appropriate balance between conflicting legitimate interests and eliminated the possible dangers as much as possible.*

19. The said Article of the directive provides that the authorization of the rightholder is not required where reproduction of the code and "translation" of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that certain conditions are met. These

conditions serve as *guarantees* that the limited freedom granted in this field does not prejudice the legitimate interests of owners of rights. (The conditions are as follows: (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so; (b) the information necessary to achieve interoperability has not previously been readily available; (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability; (d) the information obtained must not be used for goals other than to achieve the interoperability of the independently created computer program; (e) it must not be given to others except when necessary for the interoperability of the independently created computer program; and (f) must not be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.)

20. This well-balanced and precise regulation *has made it possible* – not only in the European Community but also in other countries where this model has been taken over and applied **–** *for software-developer SMEs to continue and extend their creative activities with a chance to succeed***,** and many of them have used this opportunity with great efficiency.

Dangers of piracy: SMEs as candidates to become the first victims

21. Piracy may have *a number of possible negative and even disastrous consequences*: such as completely neglecting copyright and related rights which, if not duly countered, may not only deny rights to creators and producers, but now, with the teeth these rights have obtained through the TRIPS Agreement, eventually may also lead to serious trade sanctions against the country concerned, or such as the distribution of low-level quality products without any follow-up service whatsoever, tax evasion and contribution to financing other forms of organized crime or subversive activities.

22. A further – and, from the viewpoint of national culture, the most detrimental – consequence is that *the commercial activities of pirates undermine the chance on the market for those who publish and distribute works in a legitimate way, and take the risk to invest into the promotion of new, still less known talents, mainly national authors*. They have no real chance to succeed since the market is inundated with cheap pirated publications (cheaper for at least three reasons: first, because pirates do not take any risk; they simply publish those works and recordings which have turned out to be great success; second, because they do not have administrative costs emerging in connection with obtaining authorization from the right owners; and, third, of course, because they do not pay remuneration) with which they are unable to compete. *In general, SMEs operating in copyright-related fields are among the first enterprises to lose and go bankrupt as a result of wide-spread piracy.*

23. The great problem from the viewpoint of national culture is that pirates tend to publish and distribute foreign works having proved to be successful and gotten famous on the ever more globalized world market. National creativity and local authors are promoted by lawful publishers – many of them in the SMEs category – and it is just that category which is on the losing side. This *may very much result in poorer and stagnant national culture and the fading away of the diversity of national identities.*

24. Therefore, it should be seen clearly that *an appropriate enforcement mechanism and an efficient system to fight piracy are necessary* not only in order to respect the important values represented by copyright and related rights protection, and not only because the TRIPS

Agreement prescribes this, but at least as much, and perhaps even more, in order *to avoid these dangers* to national culture and identity. And it should also be seen that *SMEs are among those who gain the most* from the existence and application of such a mechanism and such a system.

Opportunities offered by collective management of rights: special benefits for SMEs

25. The exclusive right of the author to exploit his work or authorize others to do so is the basic element of copyright, and such a right, where recognized, is also important for the beneficiaries of related rights. An exclusive right can be enjoyed to the fullest extent if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the dissemination of his work, he can personally take decisions on the economic conditions of its exploitation and he can also closely monitor whether his rights are duly respected. As early as at the time of the establishment of the international copyright system, *there were,* however, *certain rights that their owners were unable to exercise individually, and later, with the ever newer waves of new technologies, the field in which individual exercise of rights was impossible or, at least, impractical, became constantly wider.*

26. The reason for which, in a number of cases, copyright and related rights cannot be exercised individually is that the works and/or the objects of related rights are used by a great number of different users. An individual author or other rights holder, in general, does not have the capacity to monitor all the uses, to negotiate with users and to collect remuneration. *In such a case, collective management of rights is the appropriate solution. It is obviously a great advantage also for users since it decreases their administrative costs and facilitates lawful use***.**

27. In view of the increasing importance of collective management, WIPO devoted growing attention to it (in an earlier period, in English, the expression “collective administration” was used). In May 1986, a WIPO International Forum took place on this topic; between 1986 and 1989, model provisions on the establishment and operation of collective management organizations were discussed; and, in 1990, the preparatory work culminated in the publication of **a** comprehensive *WIPO study* (the author of which is the author of this paper) *on “Collective Administration of Copyright and Related Rights”* (WIPO publication No. 688 (E)) which described the main fields of collective management, analysed the most important issues of this form of exercising rights, and, at the end, offered some *basic principles for the establishment and operation of collective management organizations***.**

28. The principles and practical details worked out in the above-mentioned period have been applied in WIPO’s activities for advising governments, in particular governments of developing and “transition” countries, and for “institution building” in such countries. In the meantime, however, with the ever more widespread application of digital technology, and with such new developments as the advent of “multimedia” productions and the spectacular increase in the use of copyright-related material on the Internet**,** *the conditions of protection and enforcement of rights have changed*. New challenges emerged for the exercise and management of rights, and, at the same time, using the same technology, also some new solutions (encryption, digital “fingerprints,” “watermarks” and identification numbers) were worked out in response to those challenges. As a result, a new situation arose in the field of exercising and managing rights which seemed to concern a number of aspects.

29. In response to these developments, WIPO convened, in May 1997 in Seville, an *International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology* to review what changes may be needed in the principles and practical aspects of the establishment and practical operation of collective management systems (the material of the Forum is available in WIPO publication No. 756(E)).

30. The Seville Forum agreed that the 1990 principles should not be changed, and that they could be applied appropriately also in the digital environment. At the same time, the Forum identified the challenges raised by this environment to the collective management systems, and outlined those directions in which adequate responses may be found. WIPO was requested to establish a more permanent forum where the representatives of all interested parties – sometimes with, at least partly, conflicting interests – may come together, may exchange information, and, where appropriate, may agree on joint action. WIPO, in response, set up *its Advisory Committee on Management of Copyright and Related Rights in Global Information Networks***,** which had its first, very successful session in December 1998 and hold its second session in December 1999. The 2002-2003 program foresaw, and the 2004-2005 program also foresees, extensive activities for dealing with the questions of collective management. It was also in the framework of this that, in 2003, a new updated version of the above-mentioned 1990 was published in several official languages of WIPO.

31. It seems obvious for what reasons it is indispensable for SMEs to know about the advantages offered to them by collective management schemes and to follow the above-outlined developments in this field quite closely.

32. *Collective management is advantageous to SMEs* no matter whether they participate in collective management organizations as owners of rights and, thus, are members thereof, or they use the services of such organizations as users of works and objects of related rights. *For SMEs as owners of rights in certain fields it is simply indispensable to join the competent collective organization*, since otherwise they could not exercise and enforce their rights, but also, in cases, where there is a certain room for freedom of decision between collective management and individual exercise of rights, SMEs should see that collective bodies may help them in, at least three important ways: first, *they may enjoy the know-how and experience accumulated in the collective administration organization*, something which is rarely available at the same level in a small or medium-sized organization trying to act alone; second, through collective licensing***,*** *they may substantially decrease their administrative* ***costs*****,** and, third, *the joint power* of the owners of rights regrouped in the collective body *may guarantee a better position in negotiations* with bigger uses.

33. WIPO has recognized the importance of collective management, and under the last two programs it has increased its activities to give assistance in the establishment and further development of collective management organizations, first of all in developing and "transition" countries, on the one hand, and in new fields where technological development has led to the need for new collective schemes, on the other hand.

Challenges posed, and opportunities offered, by the digital networked environment and electronic commerce: SMEs at the crossroads of galloping changes

34. *The Internet and electronic commerce offer great opportunities for SMEs* in the various sectors, since, through the network, they may have access relatively easily, and at low cost, to the market – or at least to its certain segments --of the quickly growing Internet population. *For this, however, they need adequate information about these opportunities, along with the possible pitfalls; and they also need appropriate policy orientation and training. It is obvious that the SMEs of those developing counties that are on the negative side of the "digital divide" deserve special attention and support.*

35. *Intellectual property also has quite an important role in the emerging "Information Society" and in electronic commerce*. It is, therefore, understandable that, when Dr. Kamil Idris, was appointment to the post of Director General of WIPO in September 1997, in his acceptance speech, he also highlighted the Organization's increasing focus on the developments in information technology and the protection of intellectual property on the Internet. The three biannual programs of WIPO (for 1998-1999, 2000-2001 and 2002-2003) adopted and carried out since his appointment, as well as the present 2004-2005 program, duly reflect this recognition and intention, and the vision of Director General on how to bring WIPO fully into the information age to the benefit of its Member States was further developed in the*"WIPO Digital Agenda"* announced by him in September 1999 in conclusion of the successful *WIPO International Conference on Electronic Commerce and Intellectual Property*.

36. In the ten-point "WIPO Digital Agenda" several points that relate exclusively or *inter alia* to copyright issues. The special importance of copyright in the context of the Internet and electronic commerce is, to a great extent, due to what is discussed in the introductory part of this paper; that is, to the fact that works protected by copyright and objects of related rights are frequently transmitted and distributed in digital form through the Internet (and, in fact, mainly such works and objects are among those products in respect of which "direct", full-fledged electronic commerce takes place).

37. SMEs are interested in this kind of electronic commerce both as owners of rights and as users of works and objects of related rights. *On the owners of rights side, due to the easy market access and low distribution costs offered by the digital network, the opportunities for those SMEs which are involved in the creation and distribution of such works and objects are,* in fact *exceptional.* They may be able to do many things through the Internet with a reasonable chance for success in the case of which, in the "real world" of tangible products, they do not have any possibility to compete with more powerful, sometimes world-wide level, enterprises. *They may be particularly successful in the distribution of local creations, more closely related to the specific needs of national markets and in certain niche-oriented fields. Such SMEs are particularly interested in an adequate well-balanced copyright regulation of the Internet-related activities***,** since they cannot, in general, afford the same as what the bigger, richer enterprises can, namely making available material regularly free of charge (what, in the case of the latter, may only represent a fraction of their repertoires).

38. *The guarantee* for appropriate copyright and related rights regulation of the issues related to digital technology and the Internet *is the adherence, implementation and application of the so-called WIPO Internet treaties – the WIPO Copyright Treaty (WCT) and*

the WIPO Performances and Phonograms Treaty (WPPT). These treaties are well-balanced, flexible and do not represent any real legislative and economic burden to the Contracting Parties. At the same time, they clarify how the existing norms should be applied in the digital, networked environment; adapt those norms somewhat to this environment, and include provisions to ensure the applicability of technological protection measures and electronic rights management information (such as digital identifiers) without which it would not be possible to exercise and enforce copyright and related rights on the Internet. Therefore, *it is in the interests of all countries which wish to benefit from the great opportunities offered by the Internet to accede to these WIPO treaties and duly apply them. And, for the reasons mentioned above, it is very much in the interest of SMEs that their countries do so.*

39. *SMEs as users of protected material are interested in a mechanism that facilitates obtaining authorization for the material required by them* (for example, for multimedia productions which are to include a number of preexisting elements protected by copyright and/or related rights) in a relative simple way, at low administrative cost and against a reasonable remuneration. *In the case of certain categories of works and objects of related rights, this is only possible if adequate collective management schemes are available. The WIPO Director General's Digital Agenda also contains a point to take care of this task.* It reads as follows: "Promote adjustment of the institutional framework for facilitating the exploitation of intellectual property in the public interest in a global economy and on a global medium through administrative coordination and, where desired by users, the implementation of practical systems in respect of the interoperability and interconnection of electronic copyright management systems and the metadata of such systems."

40. *The WIPO Digital Agenda reflects the recognition that specific measures are needed also in the field of intellectual property to ease* – and as a long-term objective, to eliminate – *the "digital divide"*. Without this, the "Global Information Network" may not become "global" and may not function in a way in which it is supposed to. It is the very first point of the Agenda that indicates the Organization's objectives in this field:

> "Broaden the participation of developing countries through the use of WIPONET [WIPO's Internet network] and other means for
>
> -- access to IP information,
> -- participation in global policy formulation,
> -- opportunities to use their IP assets in eComerce."

41. There is a point in the Agenda which is particularly relevant for those SMEs of developing countries (but also of other countries): it indicates as an objective to facilitate "the online licensing of the digital expression of cultural heritage".

42. The program of WIPO contains a number of concrete projects in harmony with these objectives, and it is advisable for SMEs to follow the application thereof, since they may highly benefit from them either directly or indirectly.

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