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THE ESTABLISHMENT AND FUNCTIONING OF COLLECTIVE MANAGEMENT ORGANIZATIONS: THE MAIN FEATURES

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I. INTRODUCTION

1. The model – or at least the basic structure – of *individual licensing* of copyright and related rights is relatively simple. The owner of rights authorizes the use of the work or object of related rights against the remuneration and under the conditions fixed by himself. (It is another matter that the authorization may involve quite complex stipulations, since the rights covered by copyright and related rights may be divided territorially or with respect to the languages used, the sequence of uses may be fixed, the number of copies to be made and their subsequent use may also be regulated; and sublicenses, representation agreements, and the like may also complicate what is referred to in a general way as "individual licensing".)

2. *Collective management* of copyright and related rights is justified where individual licensing is impossible or highly impracticable. In such a case, owners of rights trust collective management organizations (authors' societies, performers' unions, professional associations of producers, etc.) with exercising their rights on their behalf. The collective management organization monitors and authorizes uses, collects remuneration and distributes it among the owners of rights to whom it is due. This determines the basic structure of licensing in the field of collective management organizations: there is an *"upstream" phase,* in which the collective management organization -- through membership agreements, representation contracts or by other means – obtains the legal basis on which it may then grant licenses to users, and a *"downstream" phase,* where the licensing of uses of works and/or objects of related rights takes place. Since, however, genuine collective management requires that collective management organizations be in a position to grant blanket licenses for the use of practically the entire world repertoire of works or objects of related rights covered by the rights managed by them, there is a need also for an *inter-organization phase* where a given organization may receive authorization from other (typically foreign) organizations and may, thus, get into the position to be able to grant this kind of blanket licenses.

3. Fully fledged collective management was established for the first time for the exercise of *performing rights,*[1] in respect of "non-dramatic" uses of musical works, which are also frequently referred to as the category of "*small rights.*"[2] It is in this field where all the above-mentioned elements have been most fully developed and applied for a long time in many

[1] The concept of "performing rights" broadly corresponds to the definition of "public performance" in Article 1 of the CISAC Model Contract concerning "public performance" rights presented below (*see* paragraphs 19-27). It reads as follows: " Under the terms of the present contract, the expression '*public performances'* includes all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. 'Public performance' includes in particular performances provided by live means, instrumental or vocal ; by mechanical means such as phonographic records, wires, tapes and sound tracks (magnetic and otherwise); by processes of projection (sound film), of diffusion transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted etc...) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc... and similar mean and devices. etc...)"

[2] For this, *see* Dr. Mihály Ficsor: "Collective management of copyright and related rights", WIPO publication, Geneva, 2002.

countries. Therefore, in this paper, the collective management of these rights is used as a model. Following its presentation, also some other forms of collective management are mentioned, indicating in what aspects they are similar to, and in what aspects they differ from, the above-mentioned basic collective management model. Finally, the impact that digital technology and the Internet may have on collective management of copyright and related rights is briefly reviewed and, in particular, the licensing techniques that may be used concerning the use of works and objects of related rights in the global information network.

4. In this paper, mainly the collective management of exclusive rights is dealt with, since it is only in the case of such rights that it is appropriate at all to speak about full licensing mechanisms. It is to be noted, however, that, with the emergence of new massive – and partly "secondary" – ways of using works and objects of related rights, the limitation of copyright and related rights to a mere right to remuneration has become more frequent. These rights, in general, can only be exercised through collective systems. In certain cases, it is possible that the remuneration to be paid is set in the form of negotiations between the collective management organizations and the professional bodies representing the users. Nevertheless, this is not a genuine licensing process. Thus, only brief references are made.

II. THE BASIC MODEL: COLLECTIVE MANAGEMENT OF MUSICAL PERFORMING RIGHTS

"Upstream" phase: entrusting organizations with collective management of rights

Preliminary question: voluntary, obligatory or extended collective management?

5. The exclusive rights of authors to exploit their works or authorize others to do so form a basic element of copyright, and, where recognized, such rights are also important for the beneficiaries of related rights. The exclusive nature of a right means that its owner – and its owner alone – is in a position to decide whether he authorizes or prohibits any act covered by the right. An exclusive right may be enjoyed to the fullest possible extent if it is exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work, he can personally decide under what conditions, and against what remuneration, his work[3] may be used, and he may more or less closely monitor whether his rights are duly respected. It follows from the very nature of exclusive rights that the owner of such a right should have a freedom to chose in which way he wishes to exercise and exploit it: he himself, individually; transferring it to somebody else; trusting it to an agent; or including it into a collective a management system. Any provision under which owners of exclusive rights are deprived of the possibility of freely choosing in which cases, under what conditions, and against what kind of remuneration they authorize or not authorize the use of their works, is a limitation of such a right, and it – as any other limitation – may only be prescribed if the relevant international norms permit to do so.

6. The Berne Convention contains provisions – namely Article 11*bis*(2) and Article 13(1) Article 11*bis*(2) and Article 13(1) – under which it is a matter for legislation in the countries of the Berne Union to determine the *conditions* under which certain exclusive rights may be exercised. They read as follows (emphasis added):

[3] Hereinafter, in this paper, unless the contrary follows from the given context, "copyright" means also related rights, and "work" also means objects of related rights.

Article 11*bis*(2): "It shall be a matter for legislation in the countries of the Union *to determine the conditions under which the rights mentioned in the preceding paragraph*[4] *may be exercised*, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

Article 13(1): "Each country of the Union may *impose* for itself reservations and *conditions on the exclusive right granted to the author* of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

7. These provisions are regarded as a legal basis for the application of non-voluntary licenses, since they define the minimum requirement to be respected when such conditions are applied; namely that they must not, under any circumstances, be prejudicial to authors' rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible "conditions" mentioned in those provisions; also other conditions – practically, restrictions – of the exercise of the exclusive rights concerned may be applied. Obligatory collective management is also such a condition, since, it is clearly a *condition* that although the owners of these rights are in the position of doing something (namely, enjoying the exclusive right of authorizing the acts in question), it is provided that they can only do so in a certain way;

although they own such exclusive rights, it is provided that they can only use it in a certain manner; and

– although they are granted such rights, it is provided that they can only exercise their rights through a certain system (namely, collective management).

8. Since the possibilities of "determining/imposing conditions" are provided for in the Convention in an exhaustive way, on the basis of the *a contrario* principle, obligatory joint management of *exclusive rights* may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration).

9. In the preceding paragraph, the words "exclusive rights" are emphasized. This is necessary for pointing out that what is discussed above should not be interpreted to mean that obligatory joint management may only be prescribed in cases where, in the provisions of the Berne Convention – or other international norms on copyright and related rights – the expression "determine/impose conditions" (under which the rights concerned may be

[4] Under paragraph (1) of the same Article "[a]thors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

exercised) is used. Obligatory joint management is obviously permissible also in cases where (i) a right is not provided for as an exclusive right of authorization but rather a mere right to remuneration (as in the case of the resale right under Article 14*ter* of the Convention, or, speaking about related rights, the so-called "Article 12 rights"[5] of performers and producers of phonograms); (ii) where the restriction of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case in respect of Article 9(2) concerning the right of reproduction[6]); or (iii) where what is concerned is a "residual right"[7]; that is, a right to remuneration (usually of authors and performers) which "survives" the transfer of certain exclusive rights (such a residual right "by definition" cannot be in conflict with the exclusive nature of the right concerned, since it is only applicable *after* that the latter has been duly exercised.)

10. While prescribing obligatory collective management, in the case of exclusive rights, such as the public performance right, is not allowed under the Berne Convention, it is generally believed that extended collective management may be in accordance with the Convention and the other international copyright norms (such as those provided for in the TRIPS Agreement and in the WCT and the WPPT). Extended collective management is applied where a collective management organization has obtained a sufficiently representative repertoire, which means that at least the majority of domestic owners of rights have authorized the organization to manage their rights. In such a case, the statutory law may provide that the organization may grant blanket licenses extending to all works covered by the right collectively managed by it. Without any further measures, this, however, would be a kind of obligatory collective management from the viewpoint of those who have not authorized the organization to manage their rights. To avoid this effect, there is a need for the possibility, provided by in statutory law, of "opting out" from the collective management system in a way that is relatively simple and does not discourage owners of rights from doing so if they prefer individual exercise of their rights.

Legal forms of authorization by owners of rights

11. Collective management organizations have to obtain such a broad repertoire of works to be managed collectively as it is necessary for being able to grant *blanket licenses* to users. In a few countries, the law provides for a monopolistic position for collective management organizations in order to facilitate this kind of concentration of repertoire; that is, only one organization may be established for the management of a given right in favor of a given category of owners of rights. Even in such a situation, however, as regards exclusive rights, a collective management organization normally needs the authorization of owners of rights to manage their rights (in the case of extended collective management, at least to the extent that its repertoire may already be recognized as being sufficiently representative).

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[5] For the expression "Article 12 rights", *see* paragraph 87 below.

[6] Article 9(2) – "the mother of all 'three-step test' provisions" – uses the expression "to permit the reproduction of… works". This may mean – subject to the said test -- either free uses or, as it is clarified in the report of Main Committee I of the 1967 Stockholm revision conference (see paragraph 85), the reduction of the exclusive right to remuneration to a mere right to equitable remuneration. It is on this basis, that, in case of widespread and uncontrollable private copying, in certain countries, a right to remuneration is applied (usually in the form of a levy on recording equipment and material).

[7] As regards "residual rights", the best example is the "unwaivable right to remuneration" under Article 4 of Council Directive 92/100/EEC of 19 November 1992 "on rental right and lending right and on certain rights related to copyright in the field of intellectual property" (the "Rental Directive").

12. The authorization given by owners of rights, in general, takes the form of *transfer* of the rights to be managed collectively (however, the nature and form of the contract depends on the national law of the county concerned – meaning not only copyright law, but also civil law norms on contracts). There are some countries where the authorization is based on some other concept – such as *legal representation* or *fiduciary management*; in such cases, however, there may be some undesirable complications in respect of collective management organizations' ability to represent owners of rights in their own name, and this may undermine the efficiency of the management system. Through transfer of rights, these problems may be avoided, and the organization may obtain a strong position which it can use in favor of all owners of rights.

13. Such a transfer of rights, as a rule, is part of an *association, membership or management agreement* which contains quite complex stipulations and description of the collective system, which the owner of right has to accept if he joins the collective management organization. The transfer is limited in time; and, at least, at the end of their membership in the organization, the owners of rights recover their rights. It is also possible to limit the authorization for a certain – renewable – time period.

14. Taking the example selected for the presentation of a fully fledged collective management system – the management of musical performing rights -- the assignment or transfer of rights, in general, extends to *all musical works of the given owner of rights*. It may happen, however, that the owner of rights has transferred the rights in some of his works to a third party. The owner of rights should declare this, and the collective management organization should respect that its management does not extend to such works.

15. It is quite a general practice that authors and other owners of right transfer their rights to the collective management organization also in *future works*. There are, however, certain countries where the transfer of rights in future works is not valid; in such countries, each time when the author declares to the organization a newly-created work, he has to transfer his rights in it separately.

16. The transfer of rights to the organization, in general, extends to use of the works concerned *anywhere in the world*. This enables the collective management organization of each country to conclude mutual representation contracts with its foreign counterparts and through this it may be achieved that, in principle, each organization may grant blanket licenses for the use of practically the entire world repertoire. It is possible, nevertheless, that an owner of rights becomes a member of different societies in different countries. In such a case, of course, not the entire world territory is covered by the authorization granted to the organizations concerned. There is a *territorial division* between the organizations; this, however, does not create any problem in the operation of the collective management system, since there is no parallel management in any country.

17. It is to be noted that, in the case of musical performing rights, not only composers and text writers and their successors-in-title have rights that are relevant from the viewpoint of collective management. In general, *music publishers* also do. The basic subject matter of a publishing contract is the reproduction and distribution of the musical work in sheet music format. Nevertheless, the publication of the work may contribute to its more frequent performances. In addition, music publishers also actively promote the use of the works published by them. As a counterpart, music publishing contracts normally provide for a share of the publishers in the remuneration collected for performing rights. Thus, any collective

management system of musical performing rights may only be complete and efficient if music publishers also transfer these rights (although, in the case of exclusive rights, they cannot be obligated to do so). Music publishers are, in general, members of performing rights organizations, and play an active role in them.

Inter-organization phase: ensuring world repertoire for each collective management organization

18. It is not sufficient that the various national organizations obtain the repertoire of domestic owners of rights for the entire world, since they would hardly be able to exercise the rights concerned in all the other countries. In addition to the practical difficulties, it is also an obstacle that, in certain countries, only national collective management organizations enjoying *de iure* monopolistic position may operate. Therefore, collective management organizations may only get in the position of being able to offer blanket licenses – also for the use of foreign works – if they conclude *bilateral contracts of mutual representation* with each other.

19. Although what are involved are bilateral contracts, they fit into a *multilateral cooperation system*. Musical performing rights societies and other collective management organizations representing authors are members of the International Confederation of Societies of Authors and Composers (*CISAC*). CISAC organizes legal and technical cooperation among its members and, as part of this cooperation, also model contracts have been worked out and adopted. One of them is the "*Model Contract of Reciprocal Representation between Public Performance Rights Societies*". The basic version of this model contract was adopted a long time ago, but since then it has been updated several times to follow new forms of using works.

20. The nature of the Model Contract is duly characterized in its introductory notes which read as follows:

"The Model Contract of Reciprocal Representation meets the need to ensure in the international field, in a practical way, the best possible protection of authors' rights and interests through harmonizing the conditions in which the Authors' Societies represent each other in their respective territories.

"In this context, it is a model recommended to the Societies for their use whenever that is possible, but obviously it is subject to such adjustments as may be necessary.

"However, when the terms of the Model Contract of Reciprocal Representation cannot be employed in relations between two national Societies it is recommended to the Societies that they adopt as far as possible in the agreements they are called upon to conclude the essential general principles contained in the Model Contract."

21. The contents of the Model Contract reveal that such a bilateral contract is *a fully fledged licensing agreement* serving as a basis for subsequent licensing of users (which from the viewpoint of foreign societies may also be regarded as a special kind of sub-licensing).

22. By virtue of the model contract, "[Society A] confers on [Society B] the exclusive right, in the territories in which this latter Society operates to grant the necessary authorizations for all public performances (as defined [in the model contract]) of musical works, with or without lyrics, which are protected under the terms of national laws, bilateral treaties and multilateral international conventions related to the author's right (copyright, intellectual property, etc...) now in existence or which may come into existence and enter into effect while the present contract is in force."

23. The exclusive right referred to in the preceding paragraph is conferred in so far as the public performance right in the works concerned has been, or will be, during the period when the contract is in force, transferred or granted by whatever means, for the purpose of its administration to Society A by its members, in accordance with its Articles of Association and Rules (these works constitute collectively the repertoire of the Society A).

24. Society B transfers the rights in its repertoire to Society A in the same way.

25. Under Article 2 of the Model Contract, the "[t]he exclusive right to authorise performances as referred to in Art. 1 entitles each of the contracting Societies, within the limits of the powers pertaining to it by virtue of the present contract, and of its own Articles of Association and Rules, and of the national legislation of the country or countries in which it operates: a) to permit or prohibit… concerned, public performances of works in the repertoire of the other Society and to grant the necessary authorisations for such performances; b) to collect all royalties required in return for the authorisations granted by it…; to receive all sums due as indemnification or damages for unauthorized performances of the works in question; c) to commence and pursue…any legal action against any person or corporate body and any administrative or other authority responsible for illegal performances of the works in question; to transact, compromise, submit to arbitration, refer to any Court of Law, special or administrative tribunal; d) to take any other action for the purpose of ensuring the protection of the public performance right in the works covered by the present contract."

26. The Model Contract also regulates such issues as equal treatment for the works and rights of the societies concerned, exchange of documentation, the obligation of granting mutual information about the tariffs and documents serving as a basis for collection and distribution of royalties, certain standard distribution rules, etc. Each society has the right to consult the other society's records concerning the collection and distribution of remuneration to enable it to check the management of its repertoire by the other society.

27. By virtue of the provisions in the Model Contract, each society is entitled to deduct from the sums it collects on behalf of the other society the percentage necessary to cover its effective administration expenses. Furthermore, up to 10% may be deducted for social purposes of the members of the society concerned and/or for the promotion of national creativity and culture.

28. It is to be noted, however, that this is only a *model contract*. When two societies negotiate and conclude a *concrete bilateral contract* between each other, they are not obligated to apply all the provisions in the Model Contract. For example, the level of the just mentioned social and cultural deductions is an issue about which there are frequently complex negotiations.

"Downstream" phase: licensing to users of works

*Desirable licensing form: blanket lic**ense***

29. The usual instruments of licensing musical "performing rights" are *blanket licenses* which, as a rule, authorize users to use any musical work in the repertoire of the collective management organization (which, on the basis of the legal techniques supporting such licenses may mean more or less the entire world repertoire) for the purposes, and within the period, indicated in the license. The transfer of rights in the national repertoire – or the authorization on some other legal basis to represent those rights – and the network of bilateral agreements enable national organizations to grant such licenses.

30. There are, however, some cases where certain protected works do not belong to the repertoire managed by the organization (since, in some countries, there are no appropriate partner organizations to conclude reciprocal representation agreements, or because certain authors withhold their works from the collective system). In such cases, various legal techniques exist which can guarantee the operation of the blanket license system without creating legal insecurity for users or unreasonably restricting the freedom of rights of the authors concerned. In the regulation and application of these techniques, it is taken into account that, in many cases, the whole system of collective management would be undermined if collective management organizations were not allowed to grant blanket licenses and were obliged to identify, work by work, and rights owner by rights owner, their actual repertoire and – what would be even worse – to prove the legal basis on which they are authorized to manage the rights in respect of each individual work and individual right owners. Therefore, if there is an organization that represents a sufficiently wide repertoire of works in respect of which the best way of exercising a certain right is collective management, *it is desirable to ensure that such an organization may grant blanket licenses.*

31. There are *two basic legal techniques* for this:

32. The first legal technique is the application of a *presumption* – either provided for in statutory law or based on case law – according to which, until the contrary is proved, it should be regarded that a given musical work forms part of the authors' society repertoire and, thus, it may be the object of blanket licenses. Such a presumption normally goes along with a *guarantee* to be granted by the collective management organization that individual rights owners will not claim anything from users to whom blanket licenses are granted or, if they still do, that such claims will be settled by the organization, and, that any user will be indemnified for any prejudice and expense caused to him by possible individual owners of rights. The organization also should guarantee that it treats, in a reasonable way, those owners of rights who have not delegated their rights for collective management, taking into account the nature of the rights involved.

33. The other legal technique for ensuring the conditions for blanket licenses is what is called the system of *extended collective management*. As discussed above, the essence of such a system is that, if there is an organization authorized to manage a certain right of a large number of owners of rights and, thus, it is sufficiently representative in the given field, the effect of such collective management is extended by law also to the rights of those owners of rights who have not entrusted the organization to manage their rights.

34. In an extended joint management system, there should be special provisions for the protection of the interests of those owners of rights who are not members of the organization. They should have the possibility of claiming individual remuneration and/or "opting out" (that is, declaring that they do not want to be represented by the organization). (Of course, in the case of "opting out" from the joint system, a reasonable deadline should be given to the organization in order that it may exclude the works or objects of related rights concerned from its repertoire.)

35. In certain countries – mainly in those where this follows as an obligation from the application of anti-trust laws (such as in the United States of America) – performing rights organizations also offer *licenses other than blanket licenses*; for example, "per program licenses" which are, as their name indicates, licenses for particular programs. Furthermore, users may decide to operate outside the collective management scheme and try to obtain *direct licenses from authors*. It shows the obvious advantages of blanket licenses that, even where such alternative licensing forms are available, in general, neither owners of rights nor users tend to make use of this possibility, and they prefer blanket licenses.

Tariffs and other licensing conditions; guarantees against possible misuse of monopolistic position

36. Since collective management organizations, in general, are in a de facto – or and sometimes even in a de iure – monopolistic position, their contractual freedom is more limited than that of individual owners of rights. An individual owner of an exclusive right, as a rule, is free to authorize or not to authorize the use of his work for a given user, and, in general, he is even not obligated to indicate any specific reason for which he may not wish to grant authorization in a given case. A collective management organization normally is not allowed to do so; if a user is ready to pay the tariff and accepts the conditions established by the society for the given type of use of works, it is obligated to grant a license to that user – without any discrimination among users. This contractual obligation follows from the monopolistic position of the society (and a logical corollary of another obligation following from the same position, namely that the society to must undertake the management of the rights of any owner of rights in the field of its operation provided that that owner of rights is ready to accept the conditions set in a uniform way for the given category of owners of rights).

37. The *tariffs and other licensing conditions* set by the collective management organization should be reasonable, and should not involve any kind of misuse of the monopolistic position of the society.

38. There are two kinds of *guarantees* for this: First, before establishing the remuneration to be paid and other conditions, there are, in general, *negotiations* with the representatives of users; and, second, there are *legal procedures* available *in case of disputes*, including the case of any alleged misuse of the monopolistic position of the collective management organization. In certain countries, specific *copyright tribunals* or *mediation/arbitration bodies* deal with such disputes, while in other countries, the settlement thereof is left to *ordinary courts*. In general, courts may also be involved also where the disputes between collective management organizations and users are submitted to obligatory or voluntary mediation/arbitration, and one of the parties is not satisfied with the outcome of the mediation or the arbitration award, respectively.

39. The *negotiations* may take place *with some major users*, such as broadcasting organizations on a one by one basis – in the sense that *"tailor-made" licenses* are granted to them. In respect of the *majority of users*, however, a *standard tariff system* is applied, where the same tariff is used for the same kind of users for the same kind of use to the same extent. The collective management organization *may establish the tariffs in a "unilateral" manner* without any previous consultations or negotiations with the representatives of the users concerned; and it may be considered that this is in accordance with the exclusive nature of the rights collectively managed. It is to be noted that it is not in the interest of the organization to set unreasonably high tariffs, since in that way it may discourage users to ask for licenses, and thus the result may be just the opposite to the one the organization wishes to achieve: the overall amount of remuneration may decrease rather than increase, or, at least, it may not reach the desirable level. In this field too, it is not advisable to undermine the balance between offer and demand. Where users consider that the remuneration they are supposed to pay is unreasonably high and, in particular, where this may be regarded as a result of misuse of the organization's monopolistic position, they can use the above-mentioned dispute settlement procedures.

40. The question emerges, in such a case, whether the user may deny paying the remuneration he alleges to be excessive and may, nevertheless, use the organization' repertoire during the procedure (which with the appeal or appeals may take quite a long while). If this were accepted, users may misuse the procedures offering guarantees against possible misuse of the monopolistic position of the collective management organization. Should then be users obligated to pay the disputed remuneration to the society in spite of the dispute between them? This would mean that the user would have to pay the disputed amount in spite of the dispute brought by him to the court or the mediation/arbitration forum. Or during the procedure, the user should not be allowed to use the repertoire of the organization, which, from the viewpoint of the very objective of the system would hardly be regarded a desirable effect? The solution to this complex problem is either a *conditional payment* or an *escrow deposit* of the remuneration requested by the collective management organization (and it seems that the best basis for this may be a provision in the statutory law itself). In such a case, the user can use the repertoire of the organization and cannot be subject to any inappropriate pressure. At the same time, the user cannot use the dispute as an excuse for not paying any remuneration. If the court or the mediation/arbitration body finds that the remuneration requested by the organization is too high, it orders the organization to pay back the amount that is regarded to be above a reasonable level.

41. It is to be noted that, although the remuneration to be paid is the decisive issue of a license (in general, blanket license) granted by a collective management organization, it may, and as a rule do, cover some *other issues*; such as the possibility of monitoring uses, making available documents necessary for the calculation of the remuneration to be paid or for the distribution of the remuneration collected, etc.

Standard tariffs and conditions

42. In the field of collective management of musical performing rights, it is more typical that authors' societies establish *standard tariffs*. Such tariffs guarantee equal treatment to users wishing to use the collective management organization's repertoire in certain cases for certain purposes under certain conditions. They offer the great advantage to both the organization and users that they do not have be engaged in lengthy, costly and time-consuming negotiations before the conclusion of each concrete licensing contract.

43. The establishment of such tariffs are frequently preceded by *collective negotiations* with representative organizations of users (such as association of concert bureaus, restaurant owners, hotels, retail shops). The conclusion of a *framework agreement* between the collective management organization and such an association does not necessarily mean that the members of the association can automatically use the organization's repertoire, Depending on the underlining legal regulation and the conditions of the agreement, still *individual contracts* may be needed with each member of the users' association; simply the conclusion of individual contracts is simpler since the standard tariffs and other standard conditions are applied. The collective agreement between the collective management organization and a users' association, however, may also provide for an *automatic application* of the agreement for all members of the association (meaning that they are allowed to use the organization's repertoire without any separate authorization, provided that they pay to the society the pre-established tariffs and that they also fulfill the other conditions of the framework agreement (for example, concerning the obligation of offering appropriate information necessary for the organization to monitor the use of its repertoire and/or identify the works used)).

44. Where the negotiations do not lead to agreement or where the collective management organization sets standard tariffs without consulting and negotiating with the interested users, different forums and legal procedures are available in the various countries to settle possible *disputes between the organization and the association of users (or individual users)* and to *review the tariffs proposed or established* by the collective management organization; practically the same as those mentioned above concerning individual licenses against specific remuneration.

45. In the case of standard tariffs, it is also quite general, that they are submitted to *administrative review or approval* (by such bodies as, for example, the Intellectual Property Office or the Ministry of Culture). Frequently, collective management organizations themselves prefer such a review and approval system, since the approval and publication of the standard tariffs prevent subsequent disputes and strengthen their legal position.

Methods of calculation of remuneration and standard tariffs

46. It has been an age-old basic principle of calculating remuneration and standard tariffs that the *financial or other economic benefit* of the user should be taken into account as the most important criterion. It has also been accepted as a part of this principle that users should pay *around 10%* of their income derived from the use of works (for example, both the German Patent Office and the Swiss Federal Court have found that 10% of such income is to be considered a fair remuneration; and the Swiss Copyright Act itself provides that, in general, such a percentage is to be regarded as an upper limit of the remuneration).

47. The 10% rule is fine-tuned by the *pro rata temporis* principle. It means that, the 10% share is only applicable if all the works used in the program are protected and are parts of the repertoire of the organization concerned. The remuneration should be reduced in proportion with the works not protected or not covered by the organization's repertoire (more precisely, in proportion with the time of the performances of such works within the entire time of the program).

48. However, this 10% principle has always been applicable more or less easily only where there has been a *close relationship between the income and the use of the organization's repertoire.* For example, in the case of a concert, the remuneration may be calculated on the basis of the income derived from admission fees. A percentage-based remuneration may also be established in the case of broadcasting organizations – although through a more complex calculation system – taking into account the subscription fees, the advertising income and/or the subsidies, as well as the amount and nature of the use of works within the entire program of the broadcasting organization. Where the calculation of the financial or other economic benefit is difficult, or even completely impracticable, due to the fact that there is no direct relationship between the income of the establishment and the use of musical works – such as, in the case of shops, supermarkets, hotels and other places with "background music" – the percentage system is not suitable. In such cases, *lump sum tariffs* are set based on various criteria related to the user establishment and the nature and foreseeable impact of the use of the repertoire of the collective management organization.

49. With the advent of ever newer technologies facilitating the use of works and bringing down the costs of production and distribution of copies and communication of works to the public, *the general applicability of the above-mentioned 10% principle is questioned ever more frequently*, and it seems that, in the era of digital technology and global information networks, *it may become out of date*. There are two important reasons for this. First, with the decrease of the manufacturing and service costs, the value of the works protected by copyright within the overall value of the products or services proportionally increases. Second, the possibility of normal exploitation of works through certain distribution or communication channels may be undermined or, at least, dramatically reduced irrespective of the income of the users. Creators, publishers and producers will not be consoled by the information that they lose the opportunity to get a reasonable counter-value of their creative efforts and financial investments as a result of activities of those who also gain nothing from this. They have sufficient reasons to insist that only those should be allowed to engage in copyright-related activities (in cases other than those covered by exceptions – such as those for specific educational or informational purposes – allowed in accordance with the "three-step test"[8]) who are able to guarantee such a counter-value.

50. In view of this, it is foreseeable that, in many cases, lump sum tariffs will have to take over the role from the application of the 10% principle or from any other percentage-based system.

51. The *bases for the calculation of lump sums as standard tariffs* for the use of the repertoire of organizations managing musical performing rights include such criteria as whether live music or recorded music is used; whether music plays a decisive role in the establishment (such as in a discotheque or in a karaoke bar) or its is just "background" music (such as in hotels, shops, restaurants, etc.); the place where the establishment may be found (whether in a holiday resort, in a big city, in a smaller town or in a village); the nature and size of the establishment; the quality and corresponding price – category of the establishment;

[8] The "three-step test" providing the conditions for exceptions was included originally in Article 9(2) of the Berne Convention concerning the right of reproduction of copyright owners. Later, it was extended to all economic rights of copyright owners by Article 13 of the TRIPS Agreement and then by Article 10 of the WCT, and also to the economic rights of performers and producers of phonograms by Article 16 of the WPPT. The three conditions (three "steps") are as follows: (i) an exception may only be granted in certain special cases; (ii) it must not conflict with a normal exploitation of works or objects of related rights; and (iii) it must not unreasonably prejudice the legitimate interests of owners of rights.

in the case of events without admission fee where music is used (that is where the percentage-based system cannot be applied), the number of participants, etc., etc.

Standard tariffs normally only apply where the use of works in the repertoire of the collective management organization takes place in a lawful way (on the basis of an appropriate contract or, where it is sufficient to announce the use of the repertoire and the payment of the corresponding remuneration, on the basis of such announcement and payment). If the use of the repertoire of a collective management organization does not take place in such a way, in certain countries at least, the organization may demand and collect an amount higher than the remuneration calculated according to the standard tariffs (for example, the double of that amount). This right of the organization is based either on statutory law or on case law, and its justification is that the detection of such unlawful uses requires extra efforts and costs for the organization which are not taken into consideration when the normal standard tariffs are fixed.

III. OTHER TYPICAL FORMS OF COLLECTIVE MANAGEMENT

53. The limits of this chapter do not allow a full presentation of the various other forms – other than the management of musical performing rights – of collective management. What seems only possible is offering a brief review of such other forms, drawing attention to their similar and differing aspects in comparison with the collective management of musical performing rights, and identifying those elements, if any, where licensing may play a role.

"Mechanical rights"

54. The expression "mechanical rights" is generally understood to mean the rights to authorize the reproduction of works in the form of recordings (phonograms or audiovisual fixations) produced "mechanically" in the widest sense of the word, including electro-acoustic and electronic procedures. The most typical and economically most important "mechanical right" is *the right of composers of musical works – and authors of accompanying words – to authorize the sound recording of such works*.

55. Certain collective management *organizations managing musical performing rights also deal with "mechanical rights"* in musical works. In other countries, *separate organizations* have been set up for the management of "mechanical rights;" for example, AUSTRO-MECHANA in Austria or NCB for the Nordic countries which are societies administering the rights of both authors and music publishers, and the Harry Fox Agency in the United States of America which is the agency of music publishers. These separate organizations *cooperate very closely with musical performing rights organizations*. In some countries, performing rights societies and mechanical rights organizations form close alliances and share certain elements of management; for example SACEM and SDRM in France, PRS and MCPS in the United Kingdom and BUMA and STEMRA in the Netherlands.

56. The legal status and structure of mechanical rights organizations as well as the way in which they obtain the right to license national and international repertoires are *similar to what is described above in respect of musical performing right*s, and there are also a number of similar features in the methods and techniques used in the management of these two groups of organizations. At the same time, *there are some significant differences, too.*

57. One of the differences follows from the relevant provisions of the Berne Convention itself. While, in the case of the so-called performing rights, it is only in respect of one category of such rights -- namely, the right of broadcasting and simultaneous and unchanged retransmission of broadcast works -- that the Berne Convention, *in the case of "mechanical rights*," the possibility of *non-voluntary licenses plays a much more essential role.* Article 13(1) of the Berne Convention reads as follows: "Each country of the [Berne] Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

58. Various countries apply non-voluntary licenses along the lines of the above-quoted provision of the Berne Convention (for example, Australia, China, Germany, India, Ireland, Japan, Switzerland and United States of America). In those countries, as a rule, *the law itself or a competent authority fixes the royalties* to be paid for such recordings. In certain other countries, however, *there is room for negotiating* some elements of the royalty system *in the case of "mechanical rights*.", *and to license this kind of reproduction* accordingly.

59. A further important difference -- in relation to the collective management of “performing rights” -- can be seen in the *specific role of* the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (*BIEM*; this acronym derives from the original French name of the organization: *Bureau international des sociétés gérant les droits d’enregistrement et de reproduction mécanique*) which is an international non-governmental organization with mechanical rights organizations as its members. BIEM is to negotiate *standard contracts with the representatives of the phonographic industry* fixing the conditions and tariffs for the use of the repertoire of its member organizations by local producers of phonograms. These standard contracts are then to be applied by the member organizations in their relationship with individual producers, provided that there is no non-voluntary licensing system in the countries concerned.

60. The *main negotiating partner* of BIEM *is* the International Federation of the Phonographic Industry (*IFPI*). The standard contract has been revised several times between BIEM and IFPI, but its future is, for the time being, unclear, and views differ concerning the status and role of the last expired version.

61. The standard contract, with the subsequent amendments, has become quite complex. Now, its volume amounts to 24 pages; and, in addition to this, it also has several annexes. It covers, inter alia, the following issues: authorization to use the BIEM repertoire; precise identification of the rights granted and the exceptions thereto; royalty rates and methods of their calculation; mutual obligations of information; place and time-schedule of payments of royalties; conditions of exportation; monitoring the copies reproduced. The rules of the calculation of royalties extend also to such details as to remuneration in case of “mixed repertoires”, or to the influence of the number of works and fragments on the same disc, tape or cassette on the amount of royalties, and also to the issues of returns, bargain sales, minimum royalties, etc.

Rights in dramatic works

62. Collective management of rights in dramatic works is the most typical – and most traditional – example of partial collective management, namely, an agency-type collective management system. This form of collective management was originally developed by SACD, the French authors' society, which, in fact, was the first ever authors' society of all over the world dealing with collective management.

63. It was as early as in 1791 -- in the year when, with the adoption of the law on authors' rights, Beaumarchais and other French playwrights succeeded in the fight for the recognition of their rights -- that their *Bureau de législation dramatique* was transformed into the *Bureau de perception des droits d'auteurs et compositeurs*, that is, into an organization to collect royalties. It was then only a matter of formal transformation when in 1829 the organization got its final name: *Société des auteurs et compositeurs dramatiques* (SACD). Within SACD, a General Agency was set up in Paris with representatives in major provincial centers. The authors informed the society, and, through it, the theaters, of the *general conditions* (including, particularly, royalty rates) on the basis of which they were ready to negotiate about the authorization of the use of their dramatic (or dramatico-musical) works. Then, following those general contractual conditions, *individual contracts* were concluded, and the General Agency of SACD collected and -- after the deduction of the costs -- distributed the royalties to the authors. Although there are certain new elements in its activities, the structure of the collective management system of SACD – in the field of the rights in dramatic and dramatico-musical works – has remained more or less the same. This system contains three main elements: general contracts, individual contracts and the actual collection and distribution of royalties on the basis of the individual contracts.

64. *General contracts* are negotiated between the society and the organizations representing theaters. Such contracts include certain minimum conditions, in particular, the basic royalty rate. In individual contracts, no conditions may be stipulated that are less favorable to authors, but better conditions may be agreed upon.

65. *Individual contracts* are concluded theater by theater and work by work based on the minimum conditions of the applicable general contract (with possible more favorable conditions). Unlike musical performing rights organizations, to which authors' rights are transferred or which otherwise are in a position to exercise the rights in their repertoire, and, thus, to authorize the use of the works without separate consultation with their authors, SACD has to ask for the authors' agreement for all individual contracts. *The society acts only as a representative.*

66. For *amateur theaters*, there is a simpler system. Here, the costs of individual elements of exercising rights would be fairly heavy. Therefore, authors are invited to *transfer to the society* – with some restrictions, and under certain conditions – *the right to authorize performances* in the framework of a general contract concluded with the Federation of Amateur Theaters.

67. The representatives of SACD regularly monitor theater performances in the areas for which they are responsible and collect the royalties. The royalties are distributed directly to the authors – without any specific distribution pools or point systems similar to the ones existing in the field of musical "performing rights" – who own the rights in the works for the performance of which they have been paid.

68. The society deducts from the royalties an established commission rate, depending on geographic areas to be covered, and a social security contribution. When the financial results of a current accounting period become known, a part of the amount deducted may be paid back to the authors concerned because SACD follows the principle that only the actual administration costs should be deducted.

69. SACD also administers rights in works broadcast on radio and television and in audiovisual works. In this field, in general, full collective management applies. Authors give full authorization to SACD to exercise their exclusive rights. SACD negotiates general representation agreements with broadcasters and with audiovisual producers, collects royalties and distributes them to individual owners of rights.

70. As mentioned above, collective management of rights in dramatic works may not be regarded as full collective management: it is an agency-type management. In harmony with this fact, in many countries, it is not authors' societies or other copyright organizations that manage such rights but rather real agencies (in many cases, several agencies -- with their own repertoires -- in the same country). Still, there are a number of countries where collective management organizations deal with the said rights. Those organizations, however, in the majority of cases, are not so specialized as SACD is; most of them have a wider repertoire, often also covering musical “performing rights” and “mechanical rights” (such as SIAE in Italy or SGAE in Spain).

Resale right ("droit de suite")

71. Under paragraph (1) of Article 14*ter* of the Berne Convention, "[t]he author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work." Paragraphs (2) and (3) of the same Article, however, leave broad liberty to countries party to the Convention in respect of the recognition and regulation of such a right. They are free to decide whether or not they introduce it and whether or not they subject its enjoyment to reciprocity. It is also provided that the procedure for collection and the amounts to be paid are matters for regulation by national legislation.

72. In spite of the non-obligatory nature of Article 14*ter*(1) of the Berne Convention (as other substantive provisions of the Convention, it has also been incorporated by reference into the TRIPS Agreement and the WCT), *a number of countries recognize this right*. Granting such a right has become *obligatory for all member countries of the European Union* with the adoption of “Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an official work of art” (the “Resale Right Directive”).

73. One of the reasons for which the resale right is not recognized in other countries is that there is a *fear of possible practical problems* that may emerge in the exercise and enforcement of this right. The example of several countries where such a right exists shows, however, that they *may be avoided or solved by means of an appropriate regulation* of the exercise thereof *and, in particular, through the application of an appropriate collective management system.*

74. One of the key issues of the exercise of the resale right is the "*right of information*", and it is particularly relevant from the viewpoint of collective management of this right. This is understandable since, without information about the resale of works of art, it be would simply impossible for authors to exercise their right. In order that the "right of information" may be respected, art galleries and art dealers must register the necessary data; as a minimum, the name of the author, the title of the work and the resale price. It is, however, not irrelevant in which way and by whom such information is requested. If this is left to individual owners of rights, at least, two problems may emerge: first, they will be unable to monitor all the possible places where the resale of their works may take place; and, second, this creates quite a great burden for arts galleries and dealers since they have to fulfill several sporadic and differing requests for information. It is obvious that these negative effects may be quite easily eliminated if a collective management organization is the partner of art galleries and dealers.

75. It is certainly due to this recognition that, for example, Article 26(5) of the Copyright Law of Germany provides that requests for information may only be presented though a collective management organization. The Resale Right Directive does not contain a similar provision, but its Article 6(2) allows member states to provide for compulsory or optional collective management.

76. C*ollective management* may increase the efficiency of the exercise of the resale right even domestically; *in the international context,* however, it *is practically indispensable*. Collective management organizations, through a well-established bilateral and multilateral cooperation between them, may guarantee to owners of rights that their rights prevail also in foreign countries. It should also be taken into account that works of art are sold ever more frequently through Internet auctions, and, in such a case, the intervention of collective management organizations is even more necessary; without their monitoring capacity and legal machinery, rights owners would not have a realistic chance to enforce their rights.

77. The resale right is a *mere right to remuneration*. Therefore, *neither the "upstream" phase nor the "downstream" phase of the licensing chain exist the way it is discussed in the case of collective management of musical performing rights*.

Reprographic reproduction rights

78. While, in the case of the rights whose collective management has been discussed or at least mentioned so far ("performing rights" and "mechanical rights" in musical works, rights in dramatic works, the resale right), it is fairly clear and practically undisputed to what extent and under what conditions they had to be recognized under the Berne Convention, *in respect of reprography, there have been certain questions raised as to the actual rights to be recognized and to the possible legal nature of such rights*. It depends on the answers to those question in which cases and under what conditions joint management may be applied in this field.

79. From the viewpoint of the legal situation in respect of reprography, the first and most important fact is that the right of reproduction is an exclusive right under Article 9(1) of the Berne Convention which cannot be restricted – either by allowing free use or in the form of non-voluntary licenses – except in cases that correspond to the "three-step test" under Article 9(2) of the Convention. It has never been questioned that reprographic reproduction (photocopying, etc.) is a form of reproduction which is covered by the said exclusive right. Therefore, the question is not what rights authors should have in respect of reprographic

reproduction of their works, but rather which are the cases where exceptions or limitations may be allowed.

80. In certain cases – such as reprographic reproduction for limited specific educational and research uses – *exceptions* may be applied. In some other cases, the exclusive right of reproduction, with a due application of the "three-step test", may be reduced to a *mere right to remuneration* (for example, in the form of a levy on reproduction equipment and/or an operator fee to be paid by certain operators of photocopying machines, such as copy shops). It is *inevitable that the exercise of such a right to remuneration take place through collective management organizations.* In such a case, however, *no real "upstream" and/or "downstream" licensing takes place*. What may be a similarity to the collective management of musical performing rights is that, *where it is not the statutory law itself which provides for the remuneration to be paid, but this is left to the collective management organization to establish it, normally negotiations take place* with the associations representing equipment manufacturers, importers and distributors, operator organizations and certain user groups, *along with the possibility of submitting possible disputes to a court or to a mediation/arbitration body, or,* irrespective of any dispute, *with the condition of administrative approval.*

81. The example of the United States of America shows, however, that reprographic reproduction rights *in the form of genuine exclusive rights may also be workable*, if they are managed though a centralized licensing system which applies, at least, certain elements of collective management.

82. The Copyright Act of the United States of America provides for various exceptions to the right of reproduction in respect of reprography (fair use for purposes such as teaching, scholarship or research, free photocopying by libraries and archives in certain cases which, however, must not amount to related or concerted reproduction of multiple copies of the same material or to systematic reproduction or distribution). Along with such exceptions, the exclusive right to authorize reproduction still applies as a general rule. Individual exercise of this right is, however, impossible in general, and joint management is the only workable way. In the United States of America, the *Copyright Clearance Center (CCC)* has been set up in order to take care of the management of such reprographic reproduction rights.

82. The CCC was established following a recommendation by the Congress that an appropriate clearance and licensing mechanism be developed with the support of bodies representing authors and other rights owners. The goal of the CCC was to ensure that the publishers of scientific, technical and medical journals receive compensation for copies reproduced by colleges, universities, libraries, private corporations, etc.. The CCC represents, on a non-exclusive basis, in addition to the rights owners of journals, also those of magazines, newsletters, books and newspapers.

83. The original system for licensing, collection and distribution was established in the following way: publishers fixed photocopying fees which were printed in journals, and it was stated that copies could be made – for personal or internal use – if the indicated fees were paid to the CCC. Each user had to keep a record of photocopies or send in a copy of the first page of each article indicating the number of copies made. CCC billed users on the basis of those records and copies which were sent in.

84. This system (the so-called *Transactional Reporting Service*) was found to be too burdensome for certain users. Therefore, the CCC introduced a new plan, the *Annual Authorization Service.* The licenses granted in the framework of that service were based upon industry-wide statistical coefficients having taken into account estimated copying levels of various classes of employees. The copying coefficients were derived from 60-day surveys of photocopying conducted at sample locations for each licensee. They were applied in order to estimate total annual copying for each licensee taking into consideration their "employee population." Distribution to rights owners was based upon the survey information.

85. A specific feature of the joint exercise of rights through the CCC is that each publisher establishes his own fees for the licensing of the photocopying of his works. Therefore, the licenses offered by the CCC are *not real blanket licenses* with unified license fees, but *individualized licenses granted through an agency-type clearing house system*. The CCC only deducts administrative expenses and distributes fees to the publishers who then further distribute them to their authors in accordance with the underlining contractual arrangements.

86. Other organizations, for example, in the United Kingdom, the Copyright Licensing Agency (CLA) representing authors and publishers also manage reprographic reproduction rights, in certain cases and in certain aspects, based on similar licensing techniques.

Rights of performers and producers of phonograms

87. Some basic rights that are recognized in the Rome Convention, the TRIPS Agreement and the WPPT and in national laws for the owners of related rights (the rights of performers, producers of phonograms and broadcasting organizations) may be, and actually are, exercised on an individual basis without the need for specific collective management systems (although, for example, the conditions of employment contracts of performers are frequently the subject of collective negotiations between unions representing them and the representatives of their employers). There is, however, one *specific area of related rights where collective management is indispensable, namely,* the rights of performers and phonogram producers in respect of broadcasting and communication to the public of phonograms – *the so-called* "*Article 12 rights*".[9] The word "specific" is to be emphasized because there are also some other rights where joint management is applied and where performers and/or producers of phonograms are interested (such as the rights in respect of cable retransmissions and "private copying" mentioned above); but, in those cases, as discussed below, authors and other owners of copyright (and, as regards cable retransmissions, broadcasting organizations) are also interested.

88. The WPPT has introduced several changes. The most important one is that, under its Article 15(1), Contracting Parties must grant the right to a single remuneration both to performers and producers of phonograms (for the direct or indirect use of phonograms

[9] The expression "Article 12 rights" refers to Article 12 of the Rome Convention which provides as follows: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." (It is to be noted, however, that, under Article 16 of the Convention, Contracting States may make various reservations; *inter alia*, they may declare that they do not apply Article 12 or may make its application conditional on reciprocity.)

published for commercial purposes for broadcasting or for any communication to the public). That is, Contracting Parties are not allowed to grant such a right only to one of the two categories as under Article 12 of the Rome Convention. It is another matter that Article 15(2) provides that Contracting Parties may establish in their national legislation that the single equitable remuneration may be claimed from users by the performer, by the producer of phonograms or by both. If only one of the two groups claims the remuneration, it is obliged to share it with the other. The same paragraph also provides that Contracting Parties may enact national legislation that, in the absence of agreement between performers and producers of phonograms, sets the terms according to which performers and producers of phonograms must share the single equitable remuneration. (It is to be added that Article 15(3) of the treaty allows practically the same kinds of reservations to the obligation to grant such a right as Article 16 of the Rome Convention.)

89. Since what is involved is a *mere right to remuneration*, it may only be exercised through appropriate collective management system. In this system, following from the nature of the right, *there is no real "upstream" or "downstream" licensing, and the bilateral contracts concluded between organizations managing these rights cannot be characterized either as a kind of licensing agreement.* These contracts only regulate the order of transfer of payments, if any,[10] due to the owners of rights represented by the partner organizations.

Rights in respect of cable retransmission of broadcast programs

90. There are two basic categories of cable programs. The first category is that of *cable-originated programs*; that is, programs initiated by the cable operators themselves. The second category of programs is that of *simultaneous and unchanged transmissions of broadcast programs*. It is mainly in respect of the second category of cable programs that certain legal and practical problems emerge that, in principle, may only be solved either by means of non-voluntary licenses or by means of a collective management system.

91. In respect of authors' rights, simultaneous and unchanged transmission of broadcast works is covered by Article 11*bis*(1)(ii) of the *Berne Convention* (included by reference also into the TRIPS Agreement and the WCT), under which "[a]uthors ... enjoy the exclusive right of authorizing ... any communication to the public by wire ... of the broadcast of the work when this communication is made by an organization other than the original one." It is clear under this provision that such a right exists in all cases where an organization other than the original broadcaster transmits the broadcast program simultaneously and without change.

[10] The expression "if any" refers to the possibility of performers' organizations of choosing between so-called "category A" and "category B" agreements. In the case of a "category B" agreement, no payments are transferred between the contracting organizations; all the income remains in the country where it is collected, and is used in accordance with the rules of the organization of that country (it is either used for social or cultural purposes or is distributed to the performers of the country in order to "compensate" them for the remuneration they are entitled to in other countries but do not receive). Under a so-called "category A" agreement, the shares due to performers of the other country are transferred in one sum and the distribution is completed by the organization of that country according to its own distribution systems. There seems to be a certain trend towards an increase of cases where category A agreements are concluded; and also a third type of agreements has been introduced recently, called the "category C" agreements (which combine the elements of category A and category B agreements in the sense that, at least, a part of the remuneration is distributed according to the principles of category A agreements.) As regards "category B" agreements, they are mainly justified by the problems of identification and the related high costs, on the one hand, and the need for mutual solidarity among performers, on the other.

In such cases, however, under Article 11*bis*(2), non-voluntary licenses may replace the exclusive right of authorization. (In respect of cable-originated programs, Articles 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) apply, which provide for exclusive rights of communication to the public – by wire – and thus, in the case of such programs non-voluntary licenses are not allowed.)

92. The Rome Convention provides for rights of the beneficiaries of related rights only in respect of cable-originated programs which are covered by the general concept of direct communication to the public, and not in respect of cable retransmissions of broadcast programs. However, national laws may, and in many countries do, grant some rights (at least a right to remuneration) to the beneficiaries of related rights also for such retransmissions.

93. The European Community's Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter: Satellites and Cable Directive) contains detailed regulations on cable retransmissions which also include specific provisions on collective management. Article 8(1) of the directive provides, in general, that member states must ensure that, when programs from other member states are retransmitted by cable in their territory, the applicable copyright and related rights are observed and that such retransmission takes place on the basis of *individual or collective contractual agreements* between copyright owners, holders of related rights and cable operators. Under Article 9(1) of the directive, member states must ensure that *the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society*. Paragraphs (2) and (3) of the same article contain rules on what is actually *an extended joint management system*. At the same time, Article 10 of the directive provides for an exception to obligatory joint management of cable retransmission rights. Under this article, member states must ensure that Article 9 of the directive does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights (which means that the cable retransmission rights of broadcasting organizations may be exercised on an individual basis).

94. Original broadcasters of programs are, in general, in the position to obtain authorization for their programs from owners of copyright and related rights in due time. Cable operators who transmit broadcast programs simultaneously – and usually, not only one program – cannot obtain authorizations in the same way. Although, in respect of certain categories of works, authors' organizations are ready to offer appropriate blanket licenses, other categories of works, particularly audiovisual works, are not covered by such licensing systems. In addition, the rights of original broadcasters and other related rights should also be taken into account.

95. In some countries, governments and legislators have come to the conclusion that the operation of cable systems can only be guaranteed by means of *non-voluntary licenses*. However, owners of copyright and related rights, have proved that non-voluntary licenses are *not the only solution*; they are not the optimum solution either; there is another workable option which better corresponds to the objectives of the protection of copyright and related rights; namely, the *collective management* of such rights. The Satellites and Cable Directive also reflects this recognition.

96. It was recognized that such a system could only be implemented in practice if an important link in the chain of collective management systems which was still missing was established; namely, an appropriate *collective management network for the rights in audiovisual works*. The rights holders (not necessarily the original owners but the actual holders of rights) of such works – although on the basis of differing legal solutions – are, in general, the producers. Producers, however, did not have joint management organizations. The way towards workable collective management of rights in respect of cable retransmissions of broadcast programs has been opened by the establishment of the Association for the International Collective Management of Audiovisual Works (*AGICOA*). The members of AGICOA are national associations and societies of producers of audiovisual works for management of rights in such works. The Association has essentially two main tasks: *negotiations* (in cooperation with its national member organizations) in respect of cable retransmission of audiovisual works represented by it, and the *distribution* to right holders of the sums collected.

97. The first contract concerning the authorization of cable retransmission of programs on the basis of a general collective management system covering all rights involved was concluded in *Belgium* between SABAM (the authors' organization which already had a collective management agreement with cable operators in respect of its own repertoire), AGICOA with its Belgian member organization at that time (BELFITEL) and the broadcasting organizations concerned (individually represented), on the one hand, and the Professional Union of Radio and Teledistribution (RTD), on the other. In the contract, it was provided that cable operators would pay remuneration for the use of the repertoire represented by the rights owners' organizations, and the latter undertake guarantees against possible third party claims. (It is to be noted that, in 1993, SABAM left the agreement, and, from that moment, cable operators reduced their payments. This has led to litigation between AGICOA, on the one hand, and the RTD and individual operators, on the other hand.)

98. After the success in Belgium, there was a breakthrough also in the *Netherlands* where a general contract was agreed upon between BUMA (an authors' organization), AGICOA with its Dutch member organization (SEKAM) and the broadcasting organizations concerned, on the one hand, and the organizations of cable distributors, on the other hand. In *Germany* also, contracts were concluded between the interested rights owners and the *Deutsche Bundespost* for the cable retransmission of broadcast programs, where right owners were represented by GEMA. (In the meantime, *Deutsche Bundespost* has become *Deutsche Telekom*, and that organization has terminated the general contract. This may lead to a situation similar to what has emerged in Belgium.) At the same time, collective management agreements have been concluded also in *other countries* (such as in the Baltic states, Bulgaria, Hungary or Slovenia).

99. As regards the *distribution* of the remuneration collected within the three categories, in the case of broadcasting organizations, it did not raise any practical difficulties because of their limited number. Authors' organizations already had their established distribution system which they were also able to use for this purpose, although it was necessary to extend and adapt that system to certain categories of authors (scriptwriters, film directors, etc.). AGICOA, however, had to establish its own system. Such a system -- with a computer network and an international register of titles -- started functioning as early as in 1984. AGICOA has become a widely recognized organization since then with producers organizations in many countries as partners. It makes use of the experience of musical

performing societies in the field of the collection and distribution of the remuneration due by cable operators.

100. Within the basic categories of owners of rights interested in cable retransmission of programs (authors, performers, producers of phonograms, producers of audiovisual works, broadcasting organizations), there is a need for further distribution either directly or through the societies or associations of the various groups of owners of rights.

Rights in respect of private copying of phonograms and audiovisual works

101. *Reproduction* of works *for private purposes* is not recognized by Article 9(2) of the Berne Convention as a case where exceptions to the right of reproduction would be allowed without any further conditions. Any exception may only be allowed if the conditions of the "three-step test" set out in that provision of the Convention are met; namely if the exception only concerns a specific case, does not conflict with a normal exploitation of the works concerned and does not unreasonably prejudice the legitimate interests of authors.

102. Studies have proved, beyond any reasonable doubt, that wide-spread domestic reproduction of sound recordings for private purposes ("home taping" or, in a broader sense, "private copying") does seriously prejudice the legitimate interests of authors. In respect of widespread domestic reproduction of audiovisual works for private purposes, similar, although less evident and, therefore, more disputed, prejudices have been identified.

103. No reproduction which causes such a prejudice must be allowed under the national laws of countries party to the Berne Convention (and/or to the TRIPS Agreement and/or the WCT) unless the prejudice is eliminated, or at least mitigated so as to render it reasonable, by a *right to remuneration*.

104. It was Germany which, for the first time introduced such a right to remuneration in 1965. The second country, Austria, followed suit in 1980, and the third, Hungary, in 1982, and since then several other countries have taken similar steps.

105. The Rome Convention does not contain similar obligations concerning "private copying" in respect of related rights as the Berne Convention does in respect of copyright. It is, however, considered to be justified to extend this right to remuneration also to performers and producers of phonograms who suffer similar prejudices. The WPPT has changed the situation. Its Articles 7, 11 and 16 have assimilated the right of reproduction of performers and producers of phonograms to such a right of authors under Article 9 of the Berne Convention (also incorporated into the TRIPS Agreement and the WCT by reference).

106. The national laws that have introduced royalties for "private copying" provide that *claims to such a royalty may only be made through joint management organizations.* It follows from the very nature of this right to remuneration that it cannot be managed individually.

107. From the viewpoint of licensing, the same may be noted as in the case of the rights to remuneration for reprographic reproduction; namely that, in such a case, *no real "upstream" and/or "downstream" licensing takes place*. What may be a similarity to the collective management of musical mechanical rights is that, where it is not the statutory law itself which

provides for the remuneration to be paid, but this is left to the collective management organization to establish it, normally *negotiations* take place with the associations representing equipment manufacturers, importers and distributors and certain user groups, along *with the possibility of submitting possible disputes to a court or to a mediation/arbitration body, or,* irrespective of any dispute, *with the condition of an administrative approval.*

108. It is to be noted that, in the context of "private copying" through the Internet, a mere right to remuneration does not seem to be sufficient to satisfy the conditions of the "three-step test". Free "private" use through the Internet would undermine any possible normal exploitation of the works concerned. The solution is the application of appropriate technological protection measures and electronic rights management information, through which owners of rights may control access to and reproduction of their works. The WCT and the WPPT provide that their Contracting Parties must provide adequate legal protection and effective legal remedies against the acts of unauthorized circumvention of such protection measures (including the "preparatory acts" making circumvention possible) and of unauthorized removal or alteration of such information.

109. "Private copying levies", and technological protection measures may be applied together side by side, although obviously not for the same scope of reproductions. In harmony with this recognition, Article 5.2(b) of the Directive 2001629/EC of the European Parliament and of the Council "on the harmonization of certain aspects of copyright and related rights in the information society" (the "Information Society Directive") provides that, in granting "
fair compensation" (= a right to remuneration) for private reproduction, "the application or non-application of technological measures" must be taken into account.

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