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**COPYRIGHT AS MEANS OF PROMOTION OF CREATIVITY
AND PROTECTION OF CULTURAL DIVERSITY**

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Copyright and IP Offices

- Although, due to national traditions and the *inertia* of the existing organizational structures, there are also other systems, it is an ever more dominating trend that IP Offices, along with industrial property, are also in charge of copyright – at least as a matter of national IP policy, but quite frequently also concerning other governmental tasks related to copyright.
- Thus, when we celebrate the 90th anniversary of the successfully functioning Intellectual Property Office of the Republic of Serbia, this is also a celebration of a governmental copyright administration.

Срећан рођендан !

Srećan rođendan !

Happy birthday !

Joyeux anniversaire !

¡Feliz cumpleaños!

С днём рождения !

Boldog születésnapot !

Reasons for IP Offices to also deal with copyright

- **Growing number of borderline issues:**
 - Copyright protection of works of applied art – design protection
 - Copyright protection of works of fine arts – trademark protection of figurative elements
 - Copyright protection of computer programs – patent protection of software-implemented inventions.
- **Similar problems raised by, and necessary means of, fighting counterfeiting and piracy.**
- **The same legal instruments (TRIPS Agreement, EU Enforcement Directive, etc.) and the same organizations (WIPO, WTO, WCO, European Commission, etc.) dealing with both industrial property and copyright.**
- **Need for well-harmonized national IP strategy.**
- **Efficiency and costs/benefits advantages.**

Copyright tasks of IP offices

- Dealing with copyright **as part of national IP strategy** with due attention to the **social, economic and cultural interests and impacts**.
- Preparation of **draft laws and regulations** in accordance with the international obligations and national interests.
- **Representation of the country** at the international copyright organizations and forums.
- **Awareness building, information and training.**
- Operating **voluntary registration systems.**

Copyright tasks of IP offices (cont.)

- Accreditation/registration and supervision of **collecting management organizations**.
- Coordinating the **fight against copyright piracy**.
- Providing organizational basis for **expert, dispute settlement and advisory bodies** in the field of copyright.
- **New functions emerging in the digital online environment** (licensing of the use of „orphan works,” possible „graduated-response” systems and the operation of related databases, etc.)

The status of copyright – international norms

Three layers of international norms:

- **Basic conventions** administered by WIPO: **Berne Convention, Rome Convention.**
- **TRIPS Agreement; modest updating of substantive norms, but detailed obligations concerning the enforcement of rights** and the inclusion of IP rights, including copyright, under an **efficient dispute-settlement system.**
- **WIPO „Internet Treaties”** (WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT)) **adapting copyright to the digital online environment.**

General characterization of the „Internet Treaties”

- *Legally*: no revisions of the Berne Convention and the Rome Convention, but “special agreements” (under Berne Article 20 and Rome Article 22).
- *Concerning the level of protection*: „Berne & Rome *plus* TRIPS *plus*,” that is, what is provided in the Berne and Rome Convention *plus* what is provided in the substantive provisions of the TRIPS Agreement *plus* what is still included on the basis of the “digital agenda” of the preparatory work.
- *From the viewpoint of economic and legislative burdens*: no real extension of the scope of protection; clarification of the application of the existing norms and, in certain aspects, their adaptation to the new environment, and new means of exercise and enforcement of rights.
- *Politically*: the Treaties are well-balanced, flexible and duly take into account the interests of the different groups of countries and stakeholders.

Provisions of the „Internet Treaties” included on the basis of the „digital agenda”

The so-called „Berne/Rome plus TRIPS plus” elements included in the **WIPO Treaties** on the basis of the „digital agenda:”

- **clarification of the application of the *right of reproduction*** in the digital environment, in particular as regards the **storage** of works, performances and phonograms **in electronic memories**;
- **recognition/clarification of the existence** – as an inevitable corollary to the right or reproduction – **of an exclusive *right of first distribution*** of copies of works, fixed performances and phonograms;
- **through a combination and adaptation of existing rights, recognition of the *exclusive right of (interactive) making available*** of works, fixed performances and phonograms;
- **clarification of the application of *exceptions and limitations*** in the new environment;
- obligations regarding the **protection of *technological measures and rights management information***, as means of exercising and enforcing rights.

General and specific aspects of enforcement in the digital, online environment

- **The enforcement provisions of the TRIPS Agreement are applicable** also in the new environment **in respect of certain acts** performed through the Internet that are covered by rights protected under the Agreement (such as the right of reproduction or certain forms of communication to the public).
- However, **there are special aspects of enforcement of copyright in the digital environment, in particular on the Internet:**
 - **strong anti-copyright movements and lobbying** based on „copyleft” ideologies and sheer economic interests, in particular concerning the **„file-sharing” systems, „user-generated content (UGC)” platforms, and the like;**
 - **remedies, and administrative and criminal sanctions in case of violation of prohibitions concerning technological measures and electronic rights management information;**
 - **liability of Internet service providers (ISPs) and other intermediaries** for the infringements committed through the use of their services.

Anti-copyright ideologies and lobbying (1)

- **New industries with great economic power and political influence which are – or at least believe that they are – interested in weaker protection and enforcement of copyright .**
- **„Man in black” at the WIPO African regional consultation:** representatives of super-rich IT companies speaking about the interests of consumers and public-interest establishments.
- **Birth and flourishing of improbable alliances;** consumer and „public interest groups” acting in close cooperation with huge IT industries against „greedy” copyright owners.
- A recent typical example: **Reflection Document** issued by the Information Society (read: IT Industry) Directorate and the Internal Market Directorate of the European Commission exclusively dictated by the interests of IT industry with slogans about consumers’ interests to have free access (or at least „feeling free”) access to any works, anywhere, any time – and with **no word about the need for and the means of fighting online piracy.**
- Thesis: **it is also against the long-term (or even medium-term) interests of the IT industries, consumers and public-interests establishments to try to undermine copyright protection.**

Anti-copyright ideologies and lobbying (2)

Populist, ultra-libertarian, neo-anarchist theories and movements.

- **„The cyberspace must remain the realm of complete freedom** where international treaties and national laws have nothing to do.”
 - **There is no „cyberspace” in reality; it is a metaphor;** and legislators should not regulate a metaphor, but rather the reality to which it relates.
- **„There is no need for legislative intervention,** everything may be settled through a ‘netiquette.’”
 - This might sound reasonable around the birth of the Internet (ARPANET), but **turned out to be unrealistic when the global network became a major marketplace and a favorite channel of mass infringers.**
- **„There is no chance to enforce copyright on the Internet;** the freedom fighters of ‘darknet’ will make it sure.”
 - **Charles Clarke: „The answer to the machine is in the machine.”**
- **„Copyright only serves the interests of copyright industries.”**
 - Only?! A series of WIPO and other studies prove that **copyright industries are among the most important contributors of employment,** more important than several „traditional” industries and, in certain countries, the entire agricultural sector. **Does free access to the productions of cultural industries serve the interests of authors, performers, technical staff, etc, whose creative and other contributions are embodied therein?**

Anti-copyright ideologies and lobbying (3)

- False presentation of “free software/open source,” “creative commons” “wicket” systems, the „online democratization” of creativity, etc. as “revolutionary” alternatives to mainstream copyright.
- **Richard Stallman’s free software movement and anarchist slogans:** no authorship, no work, no originality, no creations, no intellectual property; **exercising economic rights by copyright owners is a matter of greed.**
- **„Forking” between ideology-based free-software and „open source software”** as a business method.
- **The „creative commons” movement:** adapting the free-software licenses model to traditional categories of literary and artistic works:
 - CC licenses are **useful, since offer a uniform system** for those who do not want to exercise their economic rights;
 - the system is **suitable for those for whom copyright as a source of living is irrelevant or negligible** (academics, researchers, accidental authors, vanity publishers), for government-owned productions and for those who use it as a stepping stone to enter the world of mainstream copyright , **but it is irrelevant for typical owners of copyright;**
 - CC licenses are **problematic due to its rigid and irrevocable terms** (conflicts with the system of authors’ societies);
 - **As a „revolutionary” movement „to replace traditional copyright,” it is false..**

Anti-copyright ideologies and lobbying (4)

Ultra-“balancers of interests,,

- **Legends about „constant extension of copyright protection:”**
 - **reality: TRIPS Agreement; nothing much more than some guarantees for prevailing of the principle of *pacta sunt servanda*;**
 - **reality: WIPO „Internet Treaties:” changes in order that the essence of copyright may remain unchanged;**
 - **reality: WIRED report on the results of the 1996 Diplomatic Conference adopting the WIPO „Internet Treaties” three months after it: „Africa 1 – Hollywood 0.”**
- **„Copyright is a private right and it should be deemed to be always as of an inferior importance when faced with public interests, human rights and freedoms, privacy considerations , competition principles, and the like.”**
 - **Under Article 27(2) of the Universal Declaration of Human Rights, authors’ rights are also human rights.**
 - **Under Article 17 of the Universal Declaration, the right to property (and its due protection) is also a human right.**
 - **Balancing by standing only on one end of the see-saw?**

Current normsetting activities of WIPO (1)

- **Treaty on the rights of audiovisual performers:**
 - **Rome Convention (1961):** Article 19: no rights in audiovisual fixations;
 - **WPPT (1996) and Diplomatic Conference of 2000:** failure due to the issue of transfer of rights;
 - **at present:** compromise solution is ready concerning transfer of rights, but certain anti-copyright forces would like to use the Treaty to revise the standards set by the WIPO Internet Treaties, and certain countries oppose it to avoid obligations to transfer remuneration to film producing countries.
- **Treaty on the rights of broadcasting organizations:**
 - **2005:** a reasonable, well-balanced draft Treaty was ready, but it became the victim of a political shift in WIPO' norm-setting activities;
 - **chance for a compromise** based on signal protection of the rights in „traditional” broadcasting and cablecasting programs, but only if it also extends to protection against unauthorized simulcasting;
 - **however, still victim of a linkage** with badly founded and unreasonable demands for treaties on mandatory (obligatory) exceptions and limitations.

Current normsetting activities of WIPO (2)

Exceptions and limitations:

- **False populist demands for „a2k” (access to knowledge) treaties.**
- **Such treaties do exist: Berne Convention, TRIPS Agreement, WIPO Internet Treaties;** they include specific provisions to guarantee due access to knowledge and the three-step test offers further flexibilities for such purposes.
- **Exeptions for the visually impaired: the best solution, from the viewpoint of the visually impaired, and only reasonable solution, from the viewpoint of international norms, is a joint recommendation as proposed by the EU, combined with the operation of the WIPO stakeholders platform to guarantee practical availability of special-format works.**

Current normsetting activities of WIPO (3)

- **Problems with international norms on mandatory exceptions:**
 - **uniformization in the face of widely differing national conditions?**
 - **the existing copyright treaties provide minimum obligations to protect rights (with the possibility of exceptions), and not obligations not to protect rights (see Article 19 of the Berne Convention);**
 - **all exceptions must be subject to the three-step test** (which means that, at the international level, any exception is conditional);
 - **in the digital online environment, it is impossible to reduce availability to the beneficiaries of exceptions without DRM (TPM) protection** which is, however, opposed by the advocates of mandatory exceptions;
 - **the issues that a WIPO Treaty would cover are relevant also from the viewpoint of the TRIPS Agreement; is it a meaningful idea to consider that a WIPO Treaty would also modify the TRIPS Agreement?, etc., etc. , etc.**

Issues that may have to be on the WIPO agenda

- Promotion of further accessions and appropriate implementation of the **WIPO Internet Treaties** as **inevitable international standards**.
- **Liability of service providers** for infringements committed by their customers, including adequate notice-and-take down systems.
- **Liability of other online intermediaries** (p2p system operators and software providers, UGS platforms, etc.).
- **Filtering** out and **blocking** access to infringing material as efficient means of fighting piracy.
- **Due balance between the protection of privacy and the fight against piracy** through providing adequate right to information for owners of rights.
- **Special measures against repeat online infringers** (such as a „graduated response system“).
- **Updating preferential treatment for least developed countries** taking into account the basic principles of the Berne Appendix.

The *acqui communautaire*

Directives (some of them modified in the meantime):

- 1991: **Software** Directive;
- 1992: **Rental, Lending and Related Rights** Directive;
- 1993: **Satellite and Cable** Directive;
- 1993: **Terms** Directive;
- 1996: **Database** Directive;
- 2000: **Electronic Commerce** Directive;
- 2001: **Information Society (Copyright)** Directive;
- 2001: **Resale Right** Directive;
- 2004: **Enforcement** Directive

New EU copyright norms?

- **(Wrong) ideas about a possible European Copyright Code:** needless; useless; potentially harmful; conflicting with cultural diversity.
- Proposed Directive on the **extension of the terms of protection of performers and producers of phonograms** (justified objectives, weak drafting – still deserving support).
- Possible Directive on **collective management** (welcome initiative as a hope to get out of the unnecessary chaos created by the Commission – as recognized finally).
- **A recent welcome announcement:** „Internal market commissioner Michel Barnier is the only commissioner responsible for copyright, his acting chief-of-staff [Kerstin Jorna]... told an audience of commercial broadcasters in Brussels, hinting at future policy proposals in the area.”

Road towards instability of collective management in the EU

The roots in the traditional analogue environment (lightly announced principles without any wrong consequences *at that time*): **Decision of the ECJ of July 13, 1989 in *Ministère public v. Tournier* (case 395/87)**

- In the EU, a national CMO may refuse to grant direct access to its own national repertoire to users established in another Member State only for efficiency reasons (e.g. for the reason that it would be too difficult to organize the management of rights in another Member State).
- The refusal by a CMO to grant domestic users -- instead of blanket licenses – licenses limited solely to a certain foreign repertoire (managed on the basis of a bilateral contract with the corresponding CMO) is not prohibited under Article 81 of the EC Treaty, unless the interests of owners of rights could be safeguarded , also in case of such licenses, without increasing the costs of management.

Road to instability in the EU – neglected principles (1)

- Excerpt from Chapter 4 (Conclusions) of WIPO publication No. 688 (E): „Collective Administration of Copyright and Neighboring Rights” (Geneva, 1990):

„(f) As a rule, there should be only one organization for the same category of rights in each country. **The existence of two or more organizations in the same field may diminish or even eliminate the advantages of collective administration of copyright.**” (Emphasis added.)

- „Collective administration organization” is **abbreviated as CAO**; and pronounced as „keio.” It means nothing just a CAO.

If CAO is put in plural as CAOs to refer to CAOs (CMOs) to manage the same category of rights for the same category of owners of rights in the same country how it is pronounced? (Answer to follow on the next side.)

The road to instability in the EU – neglected principles (2)

CAOs is pronounced as „keios.”

Exactly the same way as CHAOS.

Not just by chance.

Since what usually emerges is just that.

Chaos.

The road to instability in the EU – eliminating the Santiago (and Barcelona) Agreements (1)

- On April 17, 2001, **European CMOs** BUMA, GEMA and SACEM **notified the EC a number of so-called Santiago Agreements** . Later, all other EU and EEA (European Economic Area; including, in addition to the EU Member States , also Switzerland) joined the notification with the exception of the Portuguese SPA.
- The Santiago Agreements (bearing that name since they were worked out at the CISAC Congress in Santiago de Chile) had been used since 2000. **They made it possible** (through certain amendments to the CISAC model bilateral agreement on „performing rights”) **to grant non-exclusive licenses for worldwide on-line use of musical works** -- to put it in simple way -- **by the CMO of the country to which the content provider had the closest relationship.**

The road to instability in the EU – eliminating the Santiago (and Barcelona) Agreements (2)

- On the basis of the comments received from third parties, **on April 29, 2004 the EC issued „Statement of Objections” (SO)** addressed to the 16 notifying CMOs on an (unjustified) antitrust basis, referring to the problem of what was regarded to be a so-called **„customers allocation clause.”**
- When the original term of the agreements expired on December 31, 2004, **the interested EU (and EEA) CMOs, in we of the SO, did not renew them.**
- The intervention of the EC, **in parallel also eliminated the applicability of the Barcelona Agreements** (similar BIEM agreements on **mechanical rights**).

Deepening instability – the online Recommendation (1)

- After a not sufficiently well balanced, not sufficiently transparent and not sufficiently professional preparation, **on October 18, 2005, the EC issued the** controversial and --from the viewpoint of copyright expertise and legal drafting -- of quite a low quality **Recommendation No. 2005/737/EC „on collective cross-border management of copyright and related rights for legitimate online music services.“**
- The provisions of the Recommendation, in respect of on-line licensing of music, were **intended to eliminate the well functioning system of national CMOs** granting licenses for domestic users for the use of – practically – the world repertoire **and to replace them with a few strong societies only representing their members** (that any owner of rights from any country may join) **but granting multi-territorial cross-border (all-European) licenses.**

Deepening instability – the online Recommendation (2)

- **Confusion has emerged in the EU. Certain „all-European” licensing platforms have been established:** such as CELAS (MCPS/PRS, GEMA, EMI), an the SACEM-Universal, MCPS/PRS-SGAE-Peer Music , Sony-GEMA alliances.
- **But national CMOs – fortunately – continue existing. Can it be still called collective management where a domestic user, which used to be able to obtain blanket license from one national CMO, now should contact 27, 35 or even more organizations in different languages?**

Warning by the European Parliament (1)

On March 13, 2007, the European Parliament adopted a Resolution on the EC Recommendation

Statements in the Resolution (emphasis added):

- **„the Commission failed to undertake a broad and thorough consultation process with interested parties and with Parliament before adopting the Recommendation; ... all categories of right-holders must be consulted on any future regulatory activities in this area so as to ensure a fair and balanced representation of interests,”**
- **„it is unacceptable that a ‘soft law’ approach was chosen without prior consultation and without the formal involvement of Parliament and the Council, thereby circumventing the democratic process, especially as the initiative taken has already influenced decisions in the market to the potential detriment of competition and cultural diversity,”**

(continues)

Warning by the European Parliament (2)

Statements in the Resolution (continued; emphasis added):

- the Recommendation seeks merely to regulate the online sale of music recordings, but could – owing to its imprecise wording – also be applied to other online services (e.g. broadcasting services) containing music recordings; whereas **the resulting lack of clarity as to the applicability of differing licensing systems leads to legal uncertainty,**”
- „**music is not a commodity and collective rights managers are mainly non-profit-making organisations,** and... introducing a system based on controlled competition serves the interests of all right-holders and of promoting cultural diversity and creativity,” (continues)

Warning by the European Parliament (3)

Statements in the Resolution (continued; emphasis added):

- **national CRMs should continue to play an important role in providing support for the promotion of new and minority right-holders, cultural diversity, creativity and local repertoires, which presupposes that national CRMs should retain the right to charge cultural deductions,”**
- **„there is concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, and whereas the impact of any initiative for the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversity.”**

Further deepening instability: the „CISAC decision”

- **The Commission has not paid too much attention to the Resolution of the European Parliament.** Just the contrary, **it has launched new attacks against the existing and well functioning system of national CMOs** further increasing the existing confusion.
- **Complaint by the RTL Group against GEMA** because it had refused multi-territorial broadcasting licence, **and by „Music Choice Europe” against CISAC** alleging that it prevented its member societies to grant such licenses for the use of music (i) on Internet, (ii) for satellite broadcasting; and (iii) by cable retransmission.
- **The Commission adopted a decision on July 16, 2008, founding in favor of the complaining users** alleging that the practices of the CMOs infringed Article 81 of the European Treaty.
- CISAC and 22 of the attacked societies appealed to the ECJ on October 3, 2008. The decision is still pending.

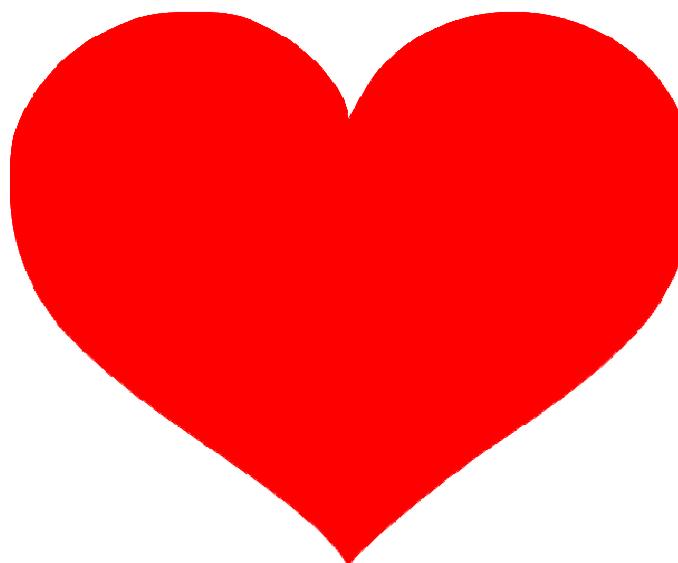
The possible way out

- It is quite clear now that **the Commission committed a mistake when it unnecessarily – and in an inadequate way – intervened** into the well functioning system of collective management. **The result is instability and confusion. Everybody**, who can see clearly and who is sincere, **recognizes now that the application of the Santiago and Barcelona Agreements would have been the right choice**
- However, **there is hardly any hope to revive that system possibly with some improvements**. If nothing else then the so-called „institutional pride” of the Commission would not allow it.
- **The intervention of the Commission was unnecessary and useless**. It seems, however, that **in the meantime, the intervention of the Commission and other EU instances has become necessary and would be useful (to help CMOs to get out of the chaos created by itself)**. The hope: **the Commission has announced the intention of the preparation of a directive** (as proposed by the European Parliament).

Summary of copyright tasks

The short outline of the copyright tasks of IP Offices and the current status of copyright at the international and European levels shows that **this smaller and (from the viewpoint of IP administration) far less „lucrative,“ but – considering its subject matter – more beautiful branch of intellectual property will also give quite a big amount of work for the Intellectual Property Office of the Republic of Serbia in the forthcoming period.**

**WE WISH GREAT SUCCESS TO BRANKA,
HER COLLEAGUES AND THE SERBIAN IP COMMUNITY**



**ON THE ROAD TOWARDS THE 100TH ANNIVERSARY OF THE
INTELLECTUAL OFFICE OF THE REPUBLIC OF SERBIA !**

ХВАЛА ЛЕПО

HVALA LEPO

THANK YOU