



Collective Management of Copyright and Related Rights



by Dr. Mihály FICSOR



WORLD
INTELLECTUAL
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FOREWORD

For a number of years, the influence of new technology and methods of communicating works over world digital networks such as the Internet has made itself felt in the field of copyright and related rights protection, and more specifically in the enforcement of that protection. The role of collective management of rights, the very nature of which has been tested partly by the sheer pressure of this technology, has now been strengthened and the need for it firmly established. Various types of national or regional systems, each tailored to a different category of protected works and designed to meet the needs of the owners of rights in such works, make it possible to distribute to those owners of rights the royalties payable for the use of their creations.

This work deals with the whole complex universe of copyright and related rights management, covering all the forms of joint and collective management of the rights of authors, composers, performers and producers of phonograms. From what is known as traditional management to centralized management, via the "one-stop shop" and "extended collective licenses", the many developments discussed acquaint the reader with some of the more specific aspects of the challenges represented by digital technology, and allow the consequences to be better understood. This book demystifies and clarifies certain modern conceptions of joint management of rights that have emerged with the growth of multimedia works, the development of new ways of transmitting works and of making them available for online public consumption, and the perceived trends of a world being swept along by globalization. Finally, it provides a thematic analysis for those who wish to go deeper into certain general questions that have to do with collective management itself and other systems for joint exercise of rights.

The challenging task of accommodating all these concepts, dispelling doubts and providing a clear picture of what the collective management of copyright and related rights actually means for stakeholders at the start of the twenty-first century, was one that came naturally to Dr. Mihály Ficsor, the author of this publication. His career as a lawyer and Director General of ARTISJUS, the Hungarian collective management society, combined with his many years of international experience, including five as Assistant Director General of WIPO, was what led me to suggest to him that he should write this book, which in fact complements the one that he wrote on the same subject ten years ago, itself still a useful reference.

I wish to thank him for having undertaken that task and applying to it his great talents, both legal and technical, and his literary generosity, all of which are well known to his friends and former colleagues alike.

This book will unquestionably serve as a valuable source of information for lawyers and specialists in copyright and related rights, and indeed for all those closely involved with the collective management of rights in all countries of the world.



Kamil Idris
Director General
World Intellectual Property Organization



Chapter 1

INTRODUCTION

1. In 1989, the competent assemblies of the World Intellectual Property Organization (WIPO) requested the International Bureau of WIPO to prepare a study in order to offer guidance to legislators and governments on what was referred to at that time as “collective administration” of copyright and “neighboring” rights.

2. The author of this book had the honor to prepare the study requested by the assemblies, under the title of “Collective Administration of Copyright and Neighboring Rights”. It described the main fields and typical forms of “collective administration” of copyright and “neighboring” rights, analyzed the basic questions concerning such “administration” and, in conclusion, summed up certain general principles for the establishment and operation of “collective administration” systems.

The study mainly concentrated on two questions:

- what are the necessary elements and conditions of an appropriate and efficient “collective administration” system?
- what conditions should be met in order that such a system be compatible with international obligations concerning the protection of copyright and “neighboring” rights, and in particular, with the minimum obligations and the principle of national treatment under the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: the Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter: the Rome Convention)?

3. The book was originally written, and published in 1990, in English (WIPO publication No. 688 (E)). It was then published in French (*"Gestion collective du droit d'auteur"*; No. 688(F)) and Spanish (*"Administración Colectiva del Derecho de Autor"*; No. 688(S)). With the authorization of WIPO, the study was also translated into, and published in, other languages such as Chinese, Japanese and Russian.

4. Since 1990, rapid and spectacular new developments have taken place in the field of copyright and "neighboring" – or "related" – rights. It would not be appropriate to overburden this preface with a detailed description of these – quite well-known – developments; it seems sufficient to refer to them by some key words: the advent of new technologies – or, at least, a stronger and more general impact thereof – in particular digital technology and new telecommunication technologies along with the spectacular result of their convergence in the Internet; the appearance of new creative genres and new ways of exploiting works and objects of related rights; globalization trends in commerce and trade, along with a number of economic, social and cultural consequences; the emergence of new international norms, in particular by virtue of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter: the TRIPS Agreement), and the so-called WIPO "Internet treaties": the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

All these developments also had an impact in the field of what is now called collective management of copyright and related rights. They posed new challenges in this field, and required a quick reaction in many respects, extending from the change of the scope and forms of collective management, through the establishment of new alliances and "coalitions", to the modernization of the technical and legal machinery.

5. Since digital technology – with the Internet – had brought about the most fundamental changes, attention was mainly directed to it. WIPO organized an "International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology", in Seville, Spain, in May 1997. The several hundred participants at the Forum discussed whether the principles published at the end of the above-mentioned 1990 study might still be regarded as applicable in the new environment, or

whether they had become out of date. The nearly unanimous answer to this question was that the principles, due to their general and technology-neutral nature, continued to be valid; and what might be necessary, at the maximum, was only to adapt or complete them to reflect the new realities and to respond to the new challenges.

6. Under the leadership of the new Director General, Dr. Kamil Idris, WIPO intensified its activities concerning all aspects of collective management – from advising governments and legislators on the regulation of the establishment and operation of collective management organizations, through “institution building” in developing countries and “countries in transition”, to the monitoring and studying of new technological and legal developments and offering guidance on how to respond to them.

It was as part of these intensified activities that the need to revisit the 1990 study emerged and that the author of this book received the invitation to prepare an updated version. It was agreed that the basic structure of the book should be maintained and that the updating should only consist of an adaptation rather than a complete rewrite. It was also suggested that the new version should not focus on a detailed description of the existing – but progressively changing – management systems, but rather concentrate on the more general social, economic, legal and cultural aspects that may remain relevant in the future.

7. It seems necessary to indicate the reasons for a somewhat new terminology: why the expressions “collective management” and “related rights” are used instead of the expressions “collective administration” and “neighboring rights” and why there is also a reference to other joint systems of exercising rights (although the title of the book, for the sake of brevity, only refers to the most well-known and most fundamental form of joint management; that is, collective management).

8. There are three reasons justifying the replacement of the word “administration” used in the 1990 study with the word “management”: first, it has an “official” connotation with the danger of being mixed up with state “copyright administrations” (an expression frequently used to refer to authorities responsible in the governmental structure for performing state functions in

the field of copyright); second, the word does not express sufficiently the necessary proactive nature of the operation of the organizations dealing with collective exercise of rights; and, third, in English, the expression “collective management” better corresponds to the quite uniformly used French expression “*gestion collective*” (as well as to the Spanish equivalent – “*gestión colectiva*” – which, in spite of the above-mentioned translation of the title of the 1990 study, is much more accepted and generally used than “*administración colectiva*”).

9. Although there is no reference to it in the title, another expression is used in the book as an alternative to collective management proper; namely “rights clearance” (and the organizations operating such a system of exercising rights are referred to as “rights clearance organizations” or “rights clearance centers”). In fact, this system of exercising rights existed already – although in a somewhat marginal manner – at the time of the publication of the 1990 study. In the meantime, however, it has emerged as a possible alternative – and, in certain cases, a challenge – to collective management proper. In this book, the term “collective management” only refers to those forms of joint exercise of rights where there are truly “collectivized” aspects (such as tariffs, licensing conditions and distribution rules); where there is an organized community behind it; where the management is carried out on behalf of such a community; and where the organization serves collective objectives beyond merely carrying out the tasks of rights management (this is typical in the case of the management of the rights of authors and performers). In contrast, “rights clearance organizations” are those which perform joint exercise of rights without any real collectivized elements in the system; simply a single source is offered for users to obtain authorization and pay for it; the remuneration may be – and quite frequently is – individualized, and what is involved may not be characterized as “distribution” but rather transfer to each owner of rights of what is owed to him (this is typical in the case of rights owned by producers and publishers).

10. In this book, the expression “joint exercise” or “joint management” has been chosen as a generic term covering both collective management and rights clearance, but also extending to some other new systems that would not fit easily into either of these two categories, such as the alliances or “coalitions” of different kinds of organizations, “one-stop shops”, or the

combination of state collecting bodies with private organizations taking care of distribution.

In legal literature, sometimes the expression “central management” or “central licensing” is used as a generic term. There are two reasons why, in this book, such a term is not used at the generic level: first, as is discussed in Chapter 5 below, the expression “central licensing” is also applied to refer to a specific form of joint management, namely the licensing of mechanical reproduction rights in the case of multinational phonogram producers; second, there are certain systems of joint exercise of rights where it would be misleading to speak about “centralized” management since many elements are of a decentralized nature.

11. The expression “related rights” was also used in the past – in legal studies, lectures, as well as in documents of intergovernmental and non-governmental organizations – as an alternative to “neighboring rights”. In its documents and papers, WIPO used mainly the latter one: “neighboring rights” (at least, in English, and in French: “*droits voisins*”, but, for example, in Spanish the expression “*derechos conexos*” was used which corresponds to “related rights”). What is important to note, however, is that no international treaty used either of the two expressions (for example, the basic instrument in the field – the Rome Convention – simply speaks about the rights of performers, producers of phonograms and broadcasting organizations). With the adoption of the TRIPS Agreement in April 1994, a new situation emerged. The Agreement refers to the term “related rights” – see the title of Section 1 of its Part II. Since, through this, the international community had selected an “official” expression, WIPO – rightly enough – also adapted its terminology (see, for example, the name of the new permanent WIPO body in this field: Standing Committee on Copyright and Related Rights). This terminology is followed also in this book.

12. In this book, first, the rationale and functions of collective management and other systems of joint exercise of rights are presented (Chapter 2); second, the objectives and activities of WIPO in the field of joint management are outlined (Chapter 3); third, the most typical forms of collective management and rights clearance are described (Chapter 4); fourth, the challenges raised by digital technology and, in particular by the Internet, and by concen-

tration, regionalization and globalization trends, along with the possible responses thereto, are discussed (Chapter 5); fifth, a brief thematic analysis is made of some general questions of collective management and other systems of joint exercise of rights (Chapter 6); sixth, certain general conclusions are offered concerning the establishment and operation of collective management and other systems of joint exercise of copyright and related rights.

13. The author of this book thanks WIPO for having offered him the possibility of updating the 1990 study and having made available all the necessary means for this. The author also thanks all those who have been ready to share with him their knowledge, experience and views in this field, as well as information about recent developments; in particular: Eric Baptiste, Ang Kwee Tiang (CISAC), Bernard Miyet (SACEM), Thierry Desurmont (SDRM), Eduardo Bautista, Francisco Aguilera and Antonio Delgado (SGAE), Tarja Koskinen-Olsson (KOPIOSTO), Jürgen Becker (GEMA), Marvin Berenson (BMI), Péter Gyertyánfy (ARTISJUS), David Lester (MCPS-PRS), Willem Vanrooij (STEMRA), Gerhard Pfennig (Bild-Kunst), Stephanie Faulkner (IFRRO), Jean Vincent (FIM), Miguel Pérez (AIE), Abel Martín (AISGE), Nils Bortloff (IFPI) and Hein Endlich (AGICOA).

Chapter 2

RATIONALE AND FUNCTIONS OF THE TWO BASIC SYSTEMS OF JOINT EXERCISE OF RIGHTS: COLLECTIVE MANAGEMENT AND RIGHTS CLEARANCE

Introductory Remarks

14. The exclusive right of authors to exploit their works or authorize others to do so is a basic element of copyright, and, where recognized, such a right is also important for the beneficiaries of related rights (as already mentioned above, this term covers the rights of performers, producers of phonograms and broadcasting organizations, but in a wider sense also other rights, such as the rights of publishers in the typographical arrangements of their publications recognized in certain countries with a common law tradition, the rights of producers of “first fixation of a film” introduced by directives of the European Community; as well as the *sui generis* rights of database makers provided for also in the relevant EC directive).

15. Exclusive rights are frequently characterized also as rights to authorize, or rights to authorize or prohibit, the performance of certain acts. These are practically synonyms. This is so since 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, and, of course, the right of authorization also involves the right of not authorizing – and consequently prohibiting – an act. It is also essential to note that exclusive rights – irrespective of the possibility of prohibiting some acts – basically are not of a negative nature. Their genuine purpose is not just that, on the basis of them, owners of rights may exclude others from the exploitation of works (or objects of related rights; hereinafter, a reference to “works”, when the contrary does not follow from the text, means also a reference to objects of related rights). The owner of an exclusive right may do so, but the real value of such a right is that it ensures that works are exploited in a way that corresponds to the

intentions and interests of the owner of the right. The objective of collective management, as well as other systems of joint exercise of rights is to offer ways and means to achieve this in certain situations.

16. It goes without saying that 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 control over the exploitation and dissemination of his work, he can personally decide under what conditions, and against what kind of remuneration, his work may be used, and he may more or less closely monitor whether his moral and economic rights are duly respected. However, this is only completely true if individual owners of rights – such as authors – exercise their rights directly. From this viewpoint, it is worthwhile to note that a new phenomenon is emerging as one of the results of concentration and convergence trends, namely the establishment of huge repertoires which are owned by big companies or complex media conglomerates. The management of such repertoires (“catalogues”, “libraries”, etc.), in certain cases, resembles joint management of copyright and related rights (for example, in some cases, uniform tariffs are used with a technique of authorization which is similar to blanket licensing, although such licensing only covers a proprietary repertoire and not the entire world repertoire). In this book, the management of such repertoires is not regarded as *collective* management or other system of *joint* exercise of rights, due to the fact that the ownership of the rights are *concentrated in one single hand*; the centralized source of authorization is not created by several (usually a great number of) owners of rights; it is the result of concentration of ownership.

17. At the time of the establishment of the international copyright system, there were certain rights – first of all, the right of public performance of non-dramatic musical works – where individual exercise of the rights did not seem possible, at least not in a reasonable and effective manner; and since then, with the ever newer waves of new technologies, the areas in which individual exercise of rights has become impossible, or at least impractical, is constantly widening. Until the advent of digital technology and the global interactive network, it seemed that there were an increasing number of cases where individual owners of rights were unable to control the use of their works, negotiate with users and collect remuneration from them.

18. In such cases, the idea emerges, time and again, that, if the exclusive rights concerned cannot be exercised in the traditional, individual way, they should be abolished or reduced to a mere right to remuneration. It is not, however, justified (it is a typical *non sequitur* situation) to claim that, if a right cannot be exercised in a way in which it has been traditionally exercised, it should be eliminated or considerably restricted.

19. The reason for which, in a number of cases, copyright and/or related rights cannot be exercised on an individual basis is that the works concerned are used by a great number of users at different places and at different times. Individuals, in general, do not have the capacity to monitor all such uses, to negotiate with users and to collect remuneration.

20. In such a situation, there is no reason to conclude that a non-voluntary licensing system is needed. There is a much more appropriate option, namely collective management (or some other system of joint exercise) of exclusive rights.

21. In the framework of a collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among the owners of rights. This may be regarded as a basic definition of collective management (however, as discussed below, the collective nature of the management may, and frequently does also involve some other features corresponding to certain functions going beyond the collective exercise of rights in the strict sense).

22. It is clear that, with collective management, the control by owners of rights over certain elements of exercising their rights becomes indirect. However, if the collective management system functions properly, the rights may still preserve some features of their exclusive nature and, although through collective channels, they may prevail under the circumstances that justify a reasonable level of "collectivization".

23. Although a collective management system serves primarily the interests of owners of copyright and related rights, such a system also offers great

advantages to users who, thus, may have access to the works they need in a simple manner from one single source, and – since collective management simplifies negotiations with users, monitoring uses and collecting fees – at low transaction costs.

24. In paragraph 21 above, the elements of a fully developed collective management system are outlined. There are certain cases, however, where owners of rights do not authorize the collective management organization to carry out all the functions mentioned but only some of them. For example, as described in Chapter 3, below, authors of dramatic works leave collective bargaining and establishing a framework agreement with the representatives of theaters, etc., to their societies – and that is one of the reasons for which such a system may be characterized as collective management, although a partial one – but, as a rule, they conclude contracts with theaters directly, and only entrust the collective management organization with monitoring performances, collecting remuneration and transferring it to them.

Functions of Collective Management Organizations

25. The first authors' societies were established in France. At the beginning, the functions of professional associations – fighting, *inter alia*, for full recognition and respect for authors' rights – were combined with the emerging elements of collective management of rights.

26. The foundation of the very first society of this type was closely linked to the name of Beaumarchais. He led the legal battles against theaters which were reluctant to recognize and respect authors' economic and moral rights. Those victorious battles led, on his initiative, to the foundation of the *Bureau de législation dramatique* in 1777, which was later transformed into the *Société des auteurs et compositeurs dramatiques* (SACD), the first society dealing with collective management of authors' rights (which still functions successfully to the satisfaction of its members and the cultural community).

27. Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French writers followed suit in the field of literature more than half a century later when they constituted the *Société des gens de lettres* (SGDL) whose general assembly met, for the first time, at the end of 1837 (another society which exists and flourishes).

28. These societies, however, were not fully-fledged collective management organizations in the sense in which the concept of such organizations is known at present. The events leading to fully developed collective management began in 1847 when two composers, Paul Henrion and Victor Parizot and a writer, Ernest Bourget, supported by their publisher, brought a lawsuit against les "*Ambassadeurs*", a "café-concert" in the *Avenue des Champs-Élysées* in Paris. They – and this is quite understandable – saw a flagrant contradiction in the fact that they had to pay for their seats and meals in the "*Ambassadeurs*", whereas nobody had the intention of paying for their works performed by the orchestra. They took the brave – and logical – decision that they would not pay as long as they were not paid as well. In the litigation, the authors won; the owner of the "*Ambassadeurs*" was obliged to pay a substantial amount of remuneration. Great new possibilities were opened for composers and text-writers of non-dramatic musical works by that court decision. It was clear, however, that they would not be able to control and enforce their newly identified rights individually. That realization led to the foundation of a collective agency in 1850, which was soon replaced by the still functioning – and functioning with brilliant success – *Société des auteurs, compositeurs et éditeurs de musique* (SACEM).

29. At the end of the 19th century and during the first decades of the 20th century, similar authors' organizations (so-called performing rights societies) were formed in nearly all European countries and in some other countries as well. Cooperation developed rapidly among those organizations through bilateral contracts of mutual representation of each other's repertoire, and they felt the need for an international body to coordinate their activities and contribute to a more efficient protection of authors' rights throughout the world. It was in June 1926 that the delegates from 18 societies set up the International Confederation of Societies of Authors and Composers (CISAC). The membership of CISAC has been constantly widening, and now includes, in addition to musical performing rights societies (which still form the core of the confederation), societies dealing with the management of other rights in different categories of works.

30. The fundamental objective of CISAC member societies – their basic rationale and very *raison d'être* – is collective management of authors' rights.

This is also reflected in the Statutes of CISAC. Under Article 5 of the Statutes, only societies managing authors' rights may be admitted as ordinary members.

31. According to this Article, a society managing authors' rights is an organization which

- "(i) has as its aim, and effectively ensures, the advancement of the moral interests of authors and the defense of their material interests; and
- (ii) has at its disposal effective machinery for the collection and distribution of copyright royalties and assumes full responsibility for the operations attaching to the administration of the rights entrusted to it; and
- (iii) does not, except as an ancillary activity, administer also the rights of performers, phonogram producers, broadcasting organizations or other holders of rights."

An organization which fulfills only the first or only the second of the above-mentioned conditions may only be admitted as an associate member of CISAC.

32. These provisions in the Statutes of CISAC indicate that authors' societies are more than just an "efficient machinery for the collection and distribution of copyright royalties". Their tasks extend, in general, to "the advancement of the moral interests of authors and the defense of their material interests". The fulfillment of the latter task is only possible if these societies have behind them a real community of creators, with well identified common goals, with an appropriate organizational structure to channel joint efforts, and with statutes and regulations expressing professional unity and solidarity and offering sufficient guarantees for fulfilling the noble objectives of "advancement of moral interests" and "defense of material interests" of creators.

These interests may sometimes be common with the interests of the owners of related rights, but in certain aspects conflicts of interests may also occur. That is the reason for item (iii) of the above-quoted provision of the CISAC Statutes.

33. The collective nature of the activities of CISAC societies (but in this regard, the activities of member organizations of other international non-

governmental organizations dealing with collective management of rights of individual creative people, rather than of legal entities – organizations such as IFRRO, FIM, FIA, AIDAA, etc. – are in many aspects similar) goes beyond collective management in the strict sense and beyond joint actions aimed at a better legislative and social recognition of the legitimate interests and rights of their members. It is frequently manifested in the fulfillment of certain common social functions and in the promotion of creativity, serving through this not only the interests of their own members but also those of the public at large.

34. The legislators and the governments of many countries explicitly encourage these kinds of organizations to fulfill such functions going beyond the operation of a mere legal-technical machinery for the management of rights. This is especially so in countries with a “continental”, “civil law” tradition where the copyright system is particularly creator-centric, where – in view of the close internal relationship between works and their creators – authors’ rights are recognized as part of human rights, and where the promotion of creativity based on the recognition of this special relationship is the *raison d’être* of copyright protection. In these countries, legislators also tend to intervene in order to ensure that this aspect of the copyright system may continue to prevail and to guarantee that the exercise and enjoyment of rights remain in the hands of the original individual creators or, at least, their collective bodies (rather than being transferred to corporate bodies in the management of which they do not have a real say). This is achieved, *inter alia*, through the restriction of the scope of rights that may be transferred (instead of granting mere licenses on the basis thereof), through the regulation of copyright contracts in order to protect the interests of individual creators as weaker parties, and even through the introduction of inalienable rights to remuneration (“residual rights”) for such creators – typically only exercisable through collective management systems – in cases where they transfer their rights or grant exclusive licenses to the exploiters of their creations.

35. The cultural and social functions of collective management organizations are particularly important in developing countries where frequently extra efforts are needed to strengthen creative capacity. In general, the same may be said about net importer countries (frequently smaller ones) where, through an efficient fulfillment of such functions, national collective management

organizations may achieve two important objectives: first, they may contribute to the preservation of national cultural identity; and, second, they may improve public acceptance of copyright where the copyright system, unfortunately, is frequently in quite a weak and very defensive “public relations” situation.

36. For all this, it is also necessary that foreign partners – sister collective management organizations, media conglomerates and, in general, owners of rights – recognize the importance of the above-mentioned more complex functions of authors’ and performers’ societies and be ready to cooperate with them. This may be more than just a matter of generosity or solidarity; this may be a matter of foresight or even that of a mere cool-headed calculation in recognizing that, through this, they may better and more efficiently achieve their overall objectives in a globalized world, where it would be a mistake to neglect the copyright situation in any single country.

Agency-Type Rights Clearance

37. For corporate rights owners – producers, publishers, etc. – it is also inevitable or, at least, desirable in certain situations that, to exercise their exclusive rights, or a simple right to remuneration, they form or join an organization that could take care of the joint exercise of their rights. Although some of them – for example, music publishers in several countries – are members of true collective management organizations and accept the traditions and rules thereof, others prefer to choose some other forms of exercising rights with as few “collectivized” elements as possible. This leads to a kind of agency-type activity, where the only or nearly exclusive task of the joint system is the collection and transfer of royalties as quickly and as precisely as possible, at as low cost as possible, and as much in proportion with the value and actual use of the productions involved as possible. The most developed form of such agency-type system is where the tariffs and licensing conditions are also individualized, and, thus, the only joint element of the system is that, through it, one single licensing source is offered with a significant reduction of transaction costs for both owners of rights and users.

38. The decision of rights owners to establish and operate such a system is fully understandable and legitimate. It also should be taken into account that the fact that they prefer such a strict, business-type regime does not

mean that they are not ready to invest in the promotion of their joint interests or in the recognition and encouragement of creative efforts; simply, they choose other ways and means of doing this, such as through their professional and/or trade organizations.

39. Genuine collective management organizations and such agency-type bodies may very well exist and function side by side in “peaceful coexistence”, and they may also establish alliances – “coalitions” – in order to pursue common interests or exercise and/or enforce certain rights together.

40. At the same time, conflicts may also occur between the two systems based on different philosophical and strategic concepts, fulfilling more or less different objectives, and, sometimes, based on different legal, economic and cultural-political considerations. Authors’ and composers’ traditional allies – such as music publishers – may change camps (sometimes due to the very simple fact that they are incorporated in bigger companies and/or media conglomerates which give their preference to an agency-type scheme rather than sharing the objectives and values of a true collective system). Individual creators may also find the presumed or real advantages of joining the other “club” so attractive that they give up solidarity with their peers and become parties in such an agency-type regime (although probably not directly; but rather through a contractual relationship with the corporate bodies operating the system). Such developments, in particular if they are widespread, may upset the balance in the field of protection, exercise and enforcement of copyright and related rights in a way that may raise the possibility of legislative or judicial intervention in certain countries with strong author-centric legal traditions, where – following those traditions – it may be felt necessary to grant protection to creators’ societies in order that they may maintain and strengthen their position and may continue fulfilling all of their complex economic, social and cultural functions as indispensable elements of those countries’ copyright policy. This may take place, for example, through making the collective management of certain rights obligatory, through prohibiting the transfer of rights which, as a consequence, may only be exercised on a collective basis; or through introducing a “residual right” for individual creators “surviving” the transfer of rights, which normally goes along with collective management of such “residual rights”.

Joint Management of Rights to Remuneration

41. There is a form of partial joint management system which needs special mention, namely the management of mere rights to remuneration (where the reason for which the management system is not full is that the rights themselves are not full since they are not exclusive rights).

42. It is important to note, however, that there may be quite important differences between the various rights to remuneration from the viewpoint of their roots and their role in copyright policy. In some cases, what is involved is a limitation of an exclusive right to a right to remuneration (for example, in the case of private copying and reprographic reproduction, where in many countries the exclusive right of reproduction is limited to a mere right to remuneration); in other cases, the right itself is established as a mere right to remuneration (such as the resale right or the "Article 12 rights" – as discussed in Chapter 4, below – of performers and/or producers of phonograms); and still in other cases, the right to remuneration is a "residual right" as mentioned above (for example, the European Community's Council Directive (EEC) No. 92/100 of November 19, 1992, on Rental Rights and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property has introduced such a right – an "unwaivable right to equitable remuneration" – for authors and performers in respect of the rental of phonograms and audiovisual works (into which their works or performances, respectively are incorporated)).



Chapter 3

WIPO ACTIVITIES CONCERNING COLLECTIVE MANAGEMENT AND OTHER JOINT SYSTEMS OF EXERCISING COPYRIGHT AND RELATED RIGHTS

Introductory Remarks

43. The growing importance of joint management of copyright and related rights was recognized in the middle of the 1970s by the competent bodies of WIPO and UNESCO dealing with new problems of copyright emerging with new technologies, bodies which at that time frequently held joint sessions and had joint projects and agenda items. (The intensive joint activities were due to the fact that the Universal Copyright Convention (UCC) administered by UNESCO had a much more important role in international copyright relations than now; for example, the United States of America and the Soviet Union, as well as several Latin American countries, were only party to that convention. Since then, however, the overwhelming majority of the countries party to the UCC has acceded to the Berne Convention, and since, between countries party to both conventions the Berne Convention applies, the importance of the UCC has decreased to a great extent).

44. The Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the UCC dealing with the copyright questions raised by reprographic reproduction, in Washington in June 1975, studied the various options worked out by a previous working group (such as contractual schemes, non-voluntary licenses, levies on equipment) but in the short resolution – beside the statement that it was up to each country to resolve the problems raised by this new form of reproduction by adopting appropriate measures in harmony with the international conventions – the Subcommittees identified concretely only one possible way of responding to those new challenges; they stated that, “States where the use of processes of reprographic reproduction is widespread, such States could consider, among

other measures, encouraging the establishment of collective systems to administer the right to remuneration”.

45. The WIPO/UNESCO Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, in Geneva in June 1984, confirmed the need for joint management regarding all types of private reproduction. It was stated that, in the case of “home taping” (that is, private copying of phonograms and audiovisual works), a right to remuneration should be recognized which should be exercised jointly.

46. The second session of the WIPO/UNESCO Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, at its June 1982 meeting in Paris, drew up recommendations regarding the rights concerned by storage in, and retrieval from, computer systems of protected works in which it was emphasized that such uses should be based upon contractual agreements concluded either on an individual basis or through a joint management system. However, it was stated in the discussion that, due to rapid technological developments, the exercise of authors’ rights on an individual basis was becoming extremely difficult in that field and that the real alternative to the introduction of non-voluntary licenses was joint management of rights. (As discussed below in Chapter 5, the possible options identified in the meantime have become more numerous and more diverse).

47. Much attention was paid to joint management in the “Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable” adopted by the meeting of the Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committees of the UCC and of the Rome Convention, respectively, in Geneva in December 1983, and approved subsequently by the three Committees. The Annotated Principles emphasized that, in the case of cable retransmission of broadcast programs, the clearance of rights on a program-by-program basis with every owner of rights was impracticable and, in such cases, joint management was the appropriate solution. Various principles dealt with the details, and the necessary guarantees for an appropriate operation, of such form of exercising rights.

48. The WIPO/UNESCO Group of Experts on Rental of Phonograms and Videograms, held in Paris in November 1984, stated in the conclusions adopted by it that “the soliciting and granting of licenses may, specially where the number of right holders is great, require legislative measures which facilitate the negotiations of licenses and their implementation measures preferably resulting in the collective administration of the rights.” There was, however, fairly strong opposition at the meeting to the idea of making the enjoyment of the rental right dependent on joint management (which was proposed as an alternative in the working document). The report of the meeting reflected, *inter alia*, the following: “Representatives of film producers and several other participants said that, with regard to the special conditions of producing and marketing cinematographic works, the film industry needs control over each form of using its productions, and the rental or lending of videograms should be exempted from collective administration of the rights therein. In their view, the film industry is in a position to control the rental or lending of each videogram individually Some experts felt that the authors cannot be obliged to entrust a society with the administration of their rights” and “expressed their concern that the system of collective administration may easily become a kind of non-voluntary licensing, in particular with regard to authors and producers who did not entrust the society giving collective authorization to represent them.” The debates at this meeting, as reflected in the above-quoted parts of the report, drew attention again to the fact that exclusive rights have a fuller value if they may be exercised on an individual basis by the owners of rights themselves, and also to possible conflicts between those who wish to maintain the possibility of such exercise and those who want to apply a joint management system for the same right.

Model Statutes for Collective Management Organizations

49. Partly in parallel with the above-mentioned meetings dealing with the various new uses emerging with new technologies, WIPO and UNESCO had a joint project which concentrated on collective management itself. The Committee of Governmental Experts on the Drafting of Model Statutes for Institutions Administering Authors’ Rights in Developing Countries met twice, in Paris in June 1980 and in Geneva in October 1983, and, at its second session, adopted two Model Statutes for organizations managing authors’ rights; one for public institutions and another for private societies. It followed

from the terms of reference of the Committee that it only dealt with the organizational aspects and legal status of collective management organizations, and, thus, it undertook no analysis of the substantive issues of such management.

50. In the field of related rights, it was a Subcommittee of the Intergovernmental Committee of the Rome Convention which, in Geneva in January-February 1979, discussed in detail the questions concerning joint management of such rights. The Subcommittee adopted a Recommendation which contained a subchapter on "Guidelines for the establishment and operation of collective societies for Article 12 rights." ("Article 12 rights", referred to above and discussed below, mean the right to an equitable remuneration under Article 12 of the Rome Convention for performers and/or producers of phonograms in respect of the broadcasting or any communication to the public of phonograms published for commercial purposes).

Intensive Analysis of the Issues of Joint Management

51. Starting from 1985, ever greater attention was devoted in WIPO's program to questions of joint management, and this time the more substantive and more general issues of this form of exercising copyright and related rights were in focus.

52. During the period between October 1985 and February 1986, seven comprehensive studies were published in WIPO's monthly reviews "Copyright" and "*Le Droit d'auteur*" under the joint title: "Collective Administration of Authors' Rights." The following subjects were covered by the following authors (in the order of the publication of the articles): "Collective Administration of Authors' Rights in the Developing Countries" by Salah Abada; "Development and Objectives of Collective Administration of Authors' Rights" by Mihály Ficsor; "Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints and Public Attitudes" by John M. Kernochan; "Collective Administration: The Relationship Between Authors' Organizations and Users of Works" by Michael Freegard; "Technical Problems in Collective Administration of Authors' Rights" by Ulrich Uchtenhagen; "The Relations between Authors and Organizations Administering Their Rights" by Gunnar Karnell; and "Collective Administration and Competition Law" by Jean-Loup Tournier and Claude Joubert.

53. The publication of the series of articles was part of the preparation for the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights which was held in Geneva in May 1986. The Forum was attended by some 160 participants (government representatives, observers from intergovernmental organizations and international non-governmental organizations, as well as members of the general public (in general, representatives and members of various national joint management organizations)).

54. Dr. Arpad Bogsch, the then Director General of WIPO, spoke about the objectives of the Forum as follows: "With galloping technological developments, collective administration of such rights is becoming an ever more important way of exercising copyright and neighboring rights. Taking into account its increasing importance, much more attention should be paid to it, both at the national and at the international levels. Guarantees should be worked out and applied for the correct functioning of collective administration systems to make sure that they will not lead to a disguised version of non-voluntary licensing or to the unjustified collectivization of rights."

55. During the three-day Forum, 21 invited speakers presented their papers. They were mainly the representatives of international non-governmental organizations interested in the field of joint management organizations (CISAC, FIM, FIA, IFPI, IPA, EBU) and such national organizations from all parts of the world: Africa, the Americas, Asia, Australia and the Pacific and Europe; from both developed countries and developing countries and from both market-economy countries and planned-economy countries (at that time, the latter categorization was still fully relevant). The presentation of the various papers was followed by discussions open to all participants.

56. At the end of the Forum, the participants adopted a Declaration in which they, *inter alia*, expressed the view that "the establishment of collective administration systems should be encouraged wherever individual licensing is not practicable and as a preferable alternative to non-voluntary licenses, even where such licenses could be admitted under the Berne Convention ... and the Rome Convention." The Declaration stated that the participants would welcome it "if WIPO were to continue to make governments and the concerned interested circles increasingly aware of the importance of

appropriate systems of collective administration of copyrights and neighboring rights and were to stimulate further international discussion in this field.” They considered it desirable that “WIPO collect, study and make available to governments and the concerned interested circles information” on various aspects of joint management of copyright and neighboring rights and that it “continue to pay particular attention to rendering assistance in the setting up or strengthening of collective administration systems in developing countries.”

57. The study of the legal and practical aspects of joint management continued in the same program period (1986-87) when WIPO, together with UNESCO, concentrated its program on the copyright and related rights questions concerning various categories of works. The results of the discussions on nine categories of works, by a series of meetings of committees of governmental experts, were then finalized by the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works in Geneva in June-July 1988. A number of principles – accompanied by detailed comments – had been worked out which were not considered to be binding but were intended to offer guidance to governments and legislators.

58. The categories of works in connection with which the questions of joint management were discussed were the following: audiovisual works, phonograms, dramatic and choreographic works, musical works, and works under the heading “the printed word” (practically all kinds of literary works other than computer programs). The principles regarding joint management related more specifically to the following issues: “home taping” of audiovisual works and phonograms, rental of such productions, cable distribution of such productions, performing rights relating to musical works (“small rights”), and reprographic reproduction of writings and graphic works. At the end of the meeting of the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, it was recommended that the results of the discussions on the principles be taken into account by WIPO in the then foreseen future work on model provisions for national legislation in the field of copyright.

59. In conformity with that recommendation, the draft Model Provisions prepared by the International Bureau of WIPO for the Committee of Experts on Model Provisions for Legislation in the Field of Copyright contained a chapter (Chapter 8) on "Collective Administration of Economic Rights." The Committee discussed the draft Model Provisions in three sessions. At the first and second sessions (in February-March 1989 and November 1989), discussions took place about all provisions, while at the third session (July 1990), only those provisions of what, at that time, was already called the "draft Model Law on Copyright" were discussed again in respect of which further consideration seemed to be necessary. The Model Law – the last version of which contained quite detailed provisions on collective management – was not, however adopted officially. The reason was that, by the time of its "third reading", an important new WIPO project had begun, the preparation of a "protocol to the Berne Convention" – which became six years later the WIPO Copyright Treaty (WCT), one of the two WIPO "Internet treaties" (the other one being the WIPO Performances and Phonograms Treaty (WPPT), the result of an important extension of the original project). Since the preparation of new binding norms was foreseen, there was agreement that it would not be timely to publish the Model Law.

60. This is the reason for which the study, of which the updated version is this book, became the most important "tangible" end-product of this period of intensive analysis of the issues of joint management.

The "Internet Treaties" and Joint Management

61. The working paper prepared by the International Bureau of WIPO and submitted to the second session of the Committee of Experts working on the proposed "protocol to the Berne Convention", held in February 1992, emphasized the increasing importance of joint management, and suggested that the protocol cover provisions on five issues in respect of which appropriate new norms on joint management might contribute to establishing better balanced and more transparent conditions in international copyright relations.

62. In the working paper, the following proposals were submitted: "First, it should be provided that government intervention in the determination of

fees and conditions of authorizations given by a collective administration organization is only allowed if, and to the extent that, such intervention is indispensable for prevention or elimination of *actual* abuse (particularly abuse of a *de facto* monopoly position) by a collective administration organization. *Second*, it should be prescribed that the fees collected by a collective administration organization be distributed to the interested copyright owners as proportionally to the actual use of their works as possible (after deducting the actual costs of administration). *Third*, it should be prohibited to use the fees collected by collective administration organizations on behalf of copyright owners without the authorization of the copyright owners concerned, or by persons or bodies representing them, for purposes other than distribution of fees to them and covering the actual costs of collective administration of the rights concerned. *Fourth*, foreign copyright owners should enjoy the same treatment as copyright owners who are members of the collective administration organization and nationals of the country where the organization operates. *Fifth*, it should be provided that national legislation may only prescribe (in an obligatory way) collective administration of those rights for which the Berne Convention allows the determination of the conditions of their exercise, that is, in cases where non-voluntary licenses are allowed by the Convention (broadcasting, recording, certain reproductions, *droit de suite*), because the condition that a right can only be exercised through collective administration is clearly a condition of that right."

63. Retrospectively, these proposals seem to be overly ambitious, and also too optimistic as to the chance for any possible agreement concerning such thorny issues (which have never been the topic of international treaties). It seemed that the Committee was somewhat relieved when it "had to" state, at the end of the session, that there remained no time for the discussion of this topic (which was the last one in the working paper), and the discussion thereon would take place at the third session. Before the third session of the Committee, however, the competent assemblies of WIPO reduced the terms of reference to an exhaustive list of ten issues, and joint management of copyright was not among them.

64. It had a certain importance from the viewpoint of joint management that two of the remaining issues on the agenda of the "Berne Protocol Committee" concerned the possible abolition and "phasing out" of non-

voluntary licenses for broadcasting (at least, as far as “primary broadcasting” and satellite communication were concerned) and for sound recording of musical works under Articles 11*bis*(2) and 13, respectively. The relevant proposals “survived” the preparatory work and were still included in the basic proposal (the draft of the treaty which became the WCT), but, at the Diplomatic Conference in December 1996, they were not adopted.

65. This, however, does not mean that the WCT and the WPPT have not brought about changes that may influence the future of joint management and other joint systems of exercising copyright and related rights. The treaties and the agreed statements have clarified the application of existing rights, as well as the permissible exceptions to and limitations on them, and also adapted some rights to the new requirements (recognizing some new aspects of the application thereof or even completing them with new ones). The new obligations on the protection of technological measures and rights management information – of course, along with the actual application of such measures and such information – however, are even more important; they may transform fundamentally the legal and technical conditions of protection, exercise and enforcement of copyright and related rights, including the collective and other joint forms thereof. The impact of all this is discussed in Chapter 5 below.

The Seville International Forum and Other “Brainstorming” Meetings

66. It was exactly in view of the new technical and legal possibilities of individual and joint exercise of rights that WIPO organized in Seville, Spain, in May 1997, in cooperation with the Ministry of Education and Culture of Spain and with the assistance of the General Authors’ and Publishers’ Society of Spain (SGAE), an International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology. It was attended by some 400 participants from about 50 countries.

67. The Forum listened to four keynote presentations by Thierry Desurmont, Ralph Oman, Charles Clark and Tarja Koskinen-Olsson, and Santiago Schuster, and nine panel debates took place with the participation of representatives of authors, performers, publishers, producers of phonograms, producers of

audiovisual works, software makers, broadcasting organizations, cable distributors and Internet service providers. The topics of the nine panels were as follows: “the impact of digital technology on the protection and exercise of copyright and neighboring rights”; “the role of the state concerning the exercise and management of copyright and neighboring rights”; “exercise of rights in respect of ‘multimedia productions’”; “technological means of protection and rights management information”; “new alternatives for centralized management; ‘one-stop shops’”; “‘traditional’ collective management in the face of digital technology”; “overview of the present situation of collective and centralized management of rights”; “review of the principles [outlined in the 1990 study published by WIPO]”; “collective management in developing countries”. The rich material of the Seville Forum was published by WIPO in 1998 (WIPO publication No. 756(E)).

68. The Seville Forum identified the challenges raised by the digital, networked environment to joint management systems, and outlined those areas in which adequate responses should be sought (this is discussed in more detail in Chapter 5 below). WIPO was requested to establish a permanent forum where the representatives of all interested parties – sometimes with, at least partly, conflicting interests – could come together, exchange information, and, where appropriate, agree on joint actions. WIPO, in response, set up its Advisory Committee on Management of Copyright and Related Rights in Global Information Networks, which has had three sessions since then. The issues of the exercise of copyright and related rights in this new technical environment – including through joint management and other joint systems – were also the topics of some presentations at WIPO’s successful First and Second International Conferences on Electronic Commerce and Intellectual Property held in Geneva in September 1999 and September 2001, respectively.


WIPO’s Development Cooperation Program

69. WIPO’s development cooperation programs extended, also in the past, to advising governments concerning legislative and administrative aspects of collective management, to assisting in the establishment of new collective management organizations and further developing the existing ones, as well as to training the officials of state copyright administrations who supervise collective management organizations and the officials of such organizations

themselves. During the last two biannual programs – 1998-1999 and 2000-2001 – these activities have become more intensive and have extended to new areas of cooperation. Not only have the regional bureaus and the WIPO Academy dealt with the various aspects of the relevant programs, but a separate collective management division has also been set up to take care of the coordination and carrying out of the specific projects in this field.

70. The program of WIPO for 2002-2003 indicates that these activities are to continue in the same intensive manner in this biennium. The relevant program item, foresees, in particular, the following specific activities:

- Analysis of emerging trends and issues, at the international level, in the field of collective management of copyright and related rights, and identification of policy options to address those issues.
- Cooperation with relevant collective management organizations or federations of organizations at the national, regional and international level, to strengthen collective management systems in developing countries, particularly in light of the fast-evolving digital environment.
- Development of appropriate programs to (i) facilitate compatibility of rights management systems in developing countries with international technical standards and systems; (ii) effectively integrate digital technologies in collective management operations in developing countries; and (iii) facilitate access to international databases and data distribution networks.
- Assessment of the need for effective mediation mechanisms to address issues arising in the context of collective management.
- Development of curricula for training in collective management and mechanisms for appropriate follow-up of training activities.



Chapter 4

MAIN FIELDS AND TYPICAL FORMS OF COLLECTIVE MANAGEMENT, CENTRAL LICENSING AND OTHER FORMS OF JOINT EXERCISE OF RIGHTS

Introductory Remarks

71. In response to new technological developments which led to the birth of new categories of creations and new ways of using protected works, as well as to the recognition of certain related rights, new types of joint management organizations were formed and they established new international non-governmental organizations. This does not, however, change the fact that the activities of authors' performing rights societies still represent the fullest system of joint – and within the joint systems, collective – management of rights (*inter alia*, from the viewpoint of the level of collectivization of the various elements of management). Several organizational solutions and methods have been taken over from this system by joint management organizations established in other fields. It is, therefore, not only for historical reasons that, in the present book, the description of the various fields of joint management begins with the presentation of collective management of "performing rights" in the so-called "small rights" musical works.

Collective Management of "Performing Rights" in "Small Rights" Musical Works

72. As mentioned in Chapter 2, the first full collective management systems were established for the exercise of certain rights in certain categories of musical works. The musical works concerned were the so-called "small rights" works and the rights involved were the so-called "small rights" or, in other words, the so-called "performing rights".

73. "*Small rights*" musical works are those which, as a rule, are managed fully collectively, and "*grand rights*" musical works are those which, as a rule, are licensed individually (it is another matter, that monitoring of presentations, collection of remuneration and its transfer to owners of rights are sometimes left not to private agencies, but rather to collective management organizations; which thus perform the tasks of "partial collective management"). The latter category consists, practically, of dramatico-musical works. The use of such works takes place in a relatively small range of locations; thus, direct licensing by authors is feasible. Non-dramatic musical works, on the other hand, are used much more frequently and in a much greater number of places; that is the reason for which their use can, from a practical point of view, hardly be exercised individually.

74. The delimitation of those categories is, however, more complex than just stating that non-dramatic musical works are "*small rights*" works and dramatico-musical works are "*grand rights*" works. Although this is basically true, there are some borderline questions in respect of which – in the authorization given by owners of rights to collective management organizations, as well as in the reciprocal representation contracts between such organizations – some further clarification is necessary. For example, non-dramatic performances of certain autonomous parts (such as arias and songs that may also be separately performed) of dramatico-musical works are considered "*small rights*" performances. Also, the question of how and under what conditions "*small rights*" non-dramatic musical works may become part of "*grand rights*" works – or form together, in a compilation, such works – raise a number of delicate legal problems. (It should be added that, although the traditional "*small rights*" and "*grand rights*" classification is still generally accepted, it may lose its significance to a certain extent with the widening of the scope of rights collectively managed).

75. At the time of the establishment of the first musical performing rights societies, "*performing rights*" simply meant the right to perform a work by performing artists in the presence of an audience. Since then however, the notion of "*performing rights*" managed by such societies has become much broader. The CISAC "*Model Contract of Reciprocal Representation between Public Performance Rights Societies*" (hereinafter referred to as the "*CISAC Model Contract*"), defined the relevant concepts in the following way: "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 and 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 means and devices, etc.)."

76. The above-quoted definition clearly reflects that the concept of "performing rights" is much wider now than it used to be when the first performing rights societies started operating. Such rights include, in addition to the right of public performance, the right of broadcasting and the right of communication to the public in general (through cable, loud-speakers, etc.).

77. Furthermore, it is to be noted that the WIPO Copyright Treaty (WCT) has included a provision on the making available of works to the public in interactive networks (the chief example of which, for the time being, is the Internet) in its Article 8. It reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." Although, at the Diplomatic Conference – in harmony with a compromise agreed upon on the basis of the famous "umbrella solution" – it was emphasized that the obligation to grant an exclusive right for "making available" works in an interactive manner may also be fulfilled through the recognition of another right (which meant basically the right of distribution) or a combination of different rights, it seems that the majority of Contracting Parties chooses the more or less direct application of Article 8 of the WCT, and, thus, they extend

the concept (and the right) of communication to the public to such interactive transmissions (combined with the application of the right of reproduction – with appropriate exceptions in the case of certain temporary copies – in respect of the copies made in the receiving computers as a result of such transmissions). The Directive 2001/29/CE of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (the “Information Society Directive”), for example, has accepted this option.

78. It should be added to the concepts described above, that the adjectives “small” and “grand,” in the expressions “small rights” and “grand rights,” do not necessarily indicate the economic importance of the rights involved. In many countries, the amounts collected on the basis of “small rights” are much higher than those collected on the basis of “grand rights.” Those adjectives only reflect the historical fact that “grand rights” had already been exercised when “small rights” were recognized and enforced in practice through collective management organizations, and, initially, the category of “grand rights” was considered more important.

79. Performing rights organizations are, in general, societies of authors (in addition to the already mentioned SACEM in France, for example, ASCAP in the United States of America, PRS in the United Kingdom, GEMA in Germany, SIAE in Italy, SGAE in Spain, SUISA in Switzerland, ARTISJUS in Hungary, ZAIKS in Poland, SADAIC in Argentina, etc.). The status of these societies differs in various respects; for example, in respect of the form and extent of government supervision; in respect of whether they manage exclusively performing rights (such as SACEM or PRS) or also deal with so-called mechanical rights (such as GEMA or ZAIKS), or they are general societies of authors managing rights in practically all categories of works (such as SIAE or SGAE); in respect of whether they are the only collective organization in the countries concerned to deal with performing rights (which is the case, in general) or there are more than one such organization in the field (for example, in the United States of America where there are three such organizations: ASCAP, BMI and SESAC).

80. There are also private bodies other than societies of authors administering performing rights in certain countries (for example, BMI, in the United States

of America which is a corporation originally founded by broadcasting organizations).

81. In some developing countries – mainly in Africa – public or semi-public copyright organizations manage performing rights, along with other rights in practically all categories of works (for example, ONDA in Algeria, BMDA in Morocco, BSDA in Senegal).

82. In countries with planned economy systems, there were also mainly public or semi-public organizations (ZAIKS in Poland was an exception), such as VAAP in the Soviet Union, ARTISJUS in Hungary, JUSAUTOR in Bulgaria. In the transition period to market economy systems and pluralist democracy, private organizations were also established in these countries. In some of the newly independent countries which used to be republics of the Soviet Union, the transformation process has not been fully completed yet, but, for example, in the Russian Federation, a private society, RAO, carries out the tasks of collective management. In some of the “transition” countries, the public structure was simply discontinued, and the establishment of collective management organizations was left to the freedom of association of authors and other owners of rights. Sometimes this created temporary confusion, because several organizations were founded which started competing and, in certain cases, even fighting with each other. For an example of well-guided, smooth transformation, Hungary may be mentioned, where ARTISJUS was transformed from a semi-public organization into a real authors’ society with no governmental functions, in a way that, as far as its tasks strictly related to collective management were concerned, it received appropriate legislative and administrative support so that it could maintain its previous strong position and preserve the integrity of its repertoire.

83. Although it is in the field of musical “performing rights” where the network of collective management organizations is the most complete, there are still several developing countries where no organizations exist or, even if they exist in principle, they do not function in practice. Both CISAC and WIPO have intensive “institution building” programs and “incubator” projects in order to establish appropriate organizations in those countries and to improve the operation of the existing ones.

84. Composers and text-writers, as a rule, transfer their “performing rights” to collective management organizations either for a certain period or without a time limit, and this transfer usually also covers future works. The transfer is made on the basis of the conditions laid down in the statutes and regulations of the organization which the authors either explicitly or implicitly accept when they join the organization. (There is, however, a trend in state regulation in the direction of establishing limits to the period of transfer of rights, and introducing rules in order to maintain freedom for owners of rights to transfer certain rights without being obliged to transfer certain other rights that they may, and do want to, exercise individually.) Generally, the organization is in an exclusive position to license the use of the works included in its repertoire; authors themselves cannot, in general, exercise their performing rights thus transferred. There are, however, several countries – mainly those where anti-trust legislation is applied to collective management organizations – where quite a lot of attention is paid to guaranteeing alternative possibilities of individual licensing for authors.

85. In a few countries, collective management organizations do not have membership but act as representatives of composers and text-writers whose “performing rights” they manage on the basis of statutory law. This is mainly the case in some countries where public or semi-public organizations manage such rights.

86. Irrespective of the legal basis of collective management of “performing rights”, the repertoire of a collective management organization is, as a rule, at the outset, a national repertoire, which, in itself, is not sufficient to license the use of protected musical works in general. Authorizations to manage foreign “performing rights” are obtained by means of bilateral agreements with performing rights organizations of other countries. In certain countries (such as the Nordic countries), statutory-law-based “extended collective management” schemes, and in the countries mentioned in the preceding paragraph, direct statutory provisions, guarantee the full coverage of such rights. Thus, all national organizations may license the use of, practically, the entire world music repertoire.

87. Bilateral agreements are based on the CISAC Model Contract. Under Article 3(1) of that Model Contract, “each of the contracting parties

undertakes to enforce, within the territory in which it operates the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the limits of the legal protection afforded to a foreign work in the country where protection is claimed, unless, by virtue of the present contract, such protection not being specifically provided in law, it is impossible to ensure an equivalent protection. Moreover, the contracting parties undertake to uphold to the greatest possible extent, by way of appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity, as between the members of both Societies, even where, by the effect of local law, foreign works are subject to discrimination. In particular, each Society shall apply to works in the repertoire of the other Society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire.”

88. The usual instruments of licensing “small rights” performances and broadcasts are blanket licenses which, as a rule, authorize users to use any musical work from the 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 global licenses. There could, however, be some exceptional cases where certain protected works still do not belong to the repertoire managed by the organization. In such cases, various legal techniques exist – discussed, in more detail in Chapter 6, below – which can guarantee the operation of the blanket license system without creating legal insecurity for users and without unreasonably restricting the rights of the authors concerned.

89. In certain countries – mainly in those where this follows as an obligation from the application of anti-trust laws – 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 elect 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 if these other licensing forms are available, in general, neither owners of rights nor users tend to make use of this possibility, and they keep choosing blanket licenses.

90. Normally, tariffs and other conditions of licenses are negotiated with associations of users. The effect of the negotiated agreements depends on the extent to which an association of users may legally bind its members. If the agreement concluded by the association binds its members, the tariffs and conditions agreed upon are directly applicable; otherwise, the agreement is considered as a model contract which, in certain cases and in certain respects, may be set aside. There may be users that are not members of the association and, thus, individual negotiations are needed with them. If the collective management organization has a framework agreement with the association of users of the category to which such "dissident users" belong, that framework agreement has, at least, an indirect influence when the tariffs and other conditions are set in separate agreements. There are, however, certain important users, for example, national broadcasting organizations, in the case of which individual negotiations take place and individual tariffs and conditions are applied.

91. As discussed more in Chapter 6, in the majority of cases, there is some kind of state control of the licensing practice of performing rights organizations. It is relatively rare that only normal civil law courts deal with disputes that emerge between such organizations and users. Although there are some intermediary forms, two basic means of state control may be distinguished. The first is a kind of government approval of contractual agreements (either by an administrative body or by a special conciliation and arbitration forum), and the second is control through special tribunals (mainly in countries with a common law tradition). In certain cases, such control may be regarded as a guarantee against possible abuses of a *de facto* or *de jure* monopoly position of collective management organizations, but fairly frequently it goes further and may involve regular and active interference in the licensing practice and tariff system of such organizations.

92. Distribution of royalties is based on two main elements. The first is an appropriate documentation system and the other is the data on the actual uses of works.

93. One of the most important purposes of the technical cooperation between CISAC member organizations is the standardization of the information to be regularly exchanged between member organizations. What is involved is an

enormous amount of data the handling of which may become a heavy burden, first of all to small societies. It should also be taken into account that the majority of such data belongs to so-called "sleeping repertoires," that is, to works that are not actually used. Several attempts have been made to try and simplify documentation exchange and rely on electronic data processing. For this purpose, certain narrower but much more practical lists of works and of right owners were prepared and made available through electronic systems, such as the CAE (the list of copyright owners – composers, authors and publishers – showing their membership in various societies), the WWL (the worldwide list of the most frequently used works) and the GAF (general agreement file). At present, CISAC is working on an even more ambitious project; namely the Common Information System (CIS) which, in fact, is more than a mere information framework; it is rather a "rights management information" system through which CISAC and the societies adapt their activities to the requirement of the digital, networked environment. It is discussed in detail in Chapter 5.

94. While the documentation of the world music repertoire is, in general, quite complete, the collection of data on the actual uses of works raises problems for collective management organizations; it is quite difficult to get these data, and they are not always available to a desirable extent.

95. Of course, the ideal solution would be to obtain all the data concerning all performances of all works and to distribute the collected remuneration accordingly. This is, however, impossible, or, at least, not feasible. While, in certain cases (such as television and radio programs, concerts, etc.), it is relatively simple to obtain full information on programs, in other cases, it is hardly possible. For instance, in the case of performances in hotels, dance halls, bars, discotheques, etc., either the users would have to be burdened with the obligation to follow all the performances by orchestras, disc jockeys, juke boxes, etc., and to prepare precise records with all the data necessary for collective management organizations, or the collective management organizations would have to employ a great number of inspectors to do the same job. The first solution may hardly be realistically proposed; users may – and should – be responsible for making available all the data they have, but could hardly be obliged to do such intensive and time-consuming work. The second solution would involve such high costs that, although all the data

might be ready for a perfect distribution, very little or no money would remain to be distributed thereafter.

96. Performing rights organizations have to strike an appropriate balance between two conflicting interests, namely the interest of creating a reliable basis for the distribution of remuneration and the interest of avoiding costs as a result of which the amount to be distributed would be unreasonably decreased. As a consequence, an element of "rough justice" appears in the distribution system.

97. In general, performing rights societies obtain full information on programs from broadcasting organizations (sometimes, mainly if there is a great number of such organizations in the country, only from the major ones) and in respect of concerts and recitals of classical music and of certain other live concerts and events. In other cases, usually, some kind of sampling system is applied. The sampling methods of certain organizations are fairly thorough; for example, the inspectors of the organization visit practically all the places where music is used (restaurants, music halls, bars, etc.) regularly, and collect information on programs in the form of lists of musical works actually performed. Other organizations apply a much more selective sampling system; only a relatively small amount of information is obtained which is considered to reflect the structure of the use of works by a specific category of users. In still other cases, practically no information is collected from certain categories of users (but the remuneration paid by such users is distributed on the basis of repertoire information furnished by selected professional organizations or, for example, sales charts, top lists and radio logs).

98. It is to be noted that, through the sampling system, performing rights societies may influence the distribution of remuneration in favor of certain categories of works and, consequently, to the detriment of others. They may, for instance, collect programs to a fuller extent and more frequently from users who use more works belonging to the national repertoire than from other users who mainly use foreign works. Such "protectionist" sampling systems are, however, in conflict with the principle included in Article 7(1) of the CISAC Model Contract which reads as follows: "Each Society undertakes to do its utmost to obtain programs of all public performances which take place in its territories and to use these programs as the effective basis for the distribution of the total net royalties collected for those performances."

99. The CISAC Model Contract also contains quite strict rules concerning deductions from the remuneration for purposes other than distribution. Its Article 8 provides as follows: "Each Society shall be entitled to deduct from the sums it collects on behalf of the other Society the percentage necessary to cover its effective administration expenses. This necessary percentage shall not exceed that which is deducted for this purpose from sums collected for members of the distributing Society, and the latter Society shall always endeavor in this respect to keep within reasonable limits, having regard to local conditions in the territories in which it operates.... When it does not make any supplementary collection for the purpose of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favor of any funds serving similar purposes, each of the Societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting Society 10% at the maximum, which shall be allocated to the said purposes." It is to be noted that this is included in a model contract the provisions of which are not automatically applied in the relationship between performing rights societies; in concrete bilateral agreements, it is possible to agree upon a lower limit of deductions or no deduction at all.

100. As regards administrative costs, in the case of performing rights organizations, they can go up to 30 percent or higher, especially in newly established organizations, but in established organizations they should normally not be significantly higher than 20 percent. There are certain societies which keep their costs below 20 percent, and there are still others which are more expensive: they use more than 30 percent of the royalties to cover their costs. However, the percentage of the administrative costs cannot be regarded in itself higher than justified or necessarily healthy if its is lower than the standard level; much depends on the intensity and the accuracy of the activities of the organization. The operations of some organizations are fairly simplified and what they do for the owners of the rights managed by them is only a very "rough justice", if any, while the collection and distribution systems of other organizations are much more thorough, ensuring that rights owners receive royalties in proportion to the actual use of their works.

101. A number of organizations make use of the possibility of deducting not more than 10 percent from all royalties collected for cultural and social purposes. In certain cases, the percentage of the deduction is lower. The

amounts thus deducted are used partly for health insurance and pension funds for national authors and partly for the promotion of national contemporary music (bonus payments for outstanding creative activity, prizes, fellowships, etc.).

102. The distribution rules of performing rights organizations are fairly complex. They include, in general, an elaborate point system to reflect the relative importance of works and performances. It is quite understandable – and usually accepted by all interested parties – that the number of points express, *inter alia*, the length of the work. The point systems, however, also include differences, in which aesthetic evaluation may play a decisive role. It is, for example, fairly general that “serious” works receive many more points than “entertainment” works of the same length.

103. Whatever point system is applied by a collective management organization, it is obliged to use exactly the same system in respect of the members of its sister organizations as in respect of its own members. This principle is, in general, respected. It is another matter that the percentage of the remuneration distributed to nationals, on the one hand, and to foreigners, on the other, may still be influenced through the point system; for example, by means of allocating more points to categories of works (for example, to folklore-based works) where there are more works created by the members of the organization than in other categories.

104. It should be added that the value of the remuneration distributed also depends on the frequency of distribution and on the promptness of transferring the amounts due to members and to sister organizations. Article 9(1) of the CISAC Model Contract contains a basic provision in this respect. It reads as follows: “Each of the contracting Societies shall distribute to the other the sums due under the terms of the present contract as and when distributions are made to its own members and at least once a year. Payment of these sums shall be made within 90 days following each distribution, barring duly ascertained cases outside the Societies’ control.” The CISAC Model Contract also includes provisions on possible sanctions against debtor societies that do not respect the above-quoted provision.

Joint Management of “Mechanical Rights”

105. 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.

106. As mentioned in paragraph 79 above, 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.

107. 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 performing rights societies, 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.

108. One of the differences follows from the relevant provisions of the Berne Convention itself. While, in the case of 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 (and, consequently also the TRIPS Agreement and the WCT into which the substantive provisions of the Convention are incorporated

by reference) allows, exceptionally, non-voluntary licenses under certain conditions (see Article 11 *bis*(2) of the Convention), the possibility of non-voluntary licenses plays a much more essential role in the case of “mechanical rights.” 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.”

109. Various countries apply non-voluntary licenses along the lines of the above-quoted provisions 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 countries, however, there is room to negotiate some elements of the royalty system.

110. Experience shows that phonographic industries can function smoothly and without any unreasonable obstacles as regards access to the rights needed by them also in countries where the exclusive nature of mechanical rights is not restricted and those rights are managed collectively. Therefore, it is suggested time and again that these kinds of non-voluntary licenses are not justified, collective management being a more appropriate option. There are various countries where concrete proposals have been made accordingly and, for example, the Copyright, Designs and Patents Act 1988 of the United Kingdom has eliminated the non-voluntary license system which existed previously in that country.

111. 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; which is an acronym derived 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.

112. The BIEM was created, under the leadership of Alphonse Tournier, as a French civil law society in 1929 with the idea of managing mechanical reproduction rights at the international level. First, it represented the French, German and Italian repertoires; later, it took over the management of more or less the entire European repertoire. Its role was actual management, not like the more general role of CISAC. A fundamental organizational reform took place in 1968, when the management of national repertoires was given back to the member societies of BIEM. At present, BIEM represents 41 societies of 38 countries.

113. Similarly to CISAC, BIEM also represents the interests of its member societies at international, regional and national levels, and organizes technical and legal cooperation among its members.

114. BIEM, however, also has a specific task: to negotiate standard contracts with the representatives of the phonographic industry and by this fixing the conditions 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.

115. The main negotiating partner of BIEM is the International Federation of the Phonographic Industry (IFPI) which was established in 1933. Traditionally, the standard contract was revised from time to time between BIEM and IFPI. Its latest version was originally concluded in 1975, and since then it has been amended seven times, in 1980, 1985, 1988, 1989, 1990, 1992 and 1997. This version expired on June 30, 2000. Negotiations have taken place between BIEM and IFPI, but the future of the standard contract is, for the time being, unclear, and views differ concerning the role of the expired version.

116. Some experts explain the problems around the renewal of the standard contract by the phenomenon of increasing media concentration and conver-

gence. In mechanical rights organizations, music publishers are usually in quite a strong position, and many music publishing houses have been bought by, or merged with, phonogram producer companies or complex media conglomerates, which quite frequently have also become the owners of both the publishing houses and the phonogram producer companies. These developments have created a new situation in the re-negotiation of the standard contract.

117. Nevertheless, it seems worthwhile to outline the main features of the standard contract since it indicates the issues to be covered and the framework within which the contracting parties, even if with some possible future modifications, should try to reach agreement. Furthermore, for the time being, the “law of inertia” prevails – in a way, inevitably and in a beneficial way – in this field in a number of countries; the standard contract is applied in spite of its expiry.

118. The standard contract, with the above-mentioned seven amendments, has become quite complex. Now, it amounts to 24 pages; and, in addition to this, it also has seven annexes. It covers, *inter alia*, the following issues: authorization to use the BIEM repertoire; precise identification of the rights granted and the exceptions; royalty rates and method of their calculation; mutual obligations of information; place and the time-schedule of the payment of royalties; conditions of exportation; monitoring by the society of the copies reproduced.

119. The latest amended version of the standard contract covers vinyl discs, compact discs, analogue cassettes, digital compact cassettes (DCC) and mini discs (MD). The producer must pay royalties to the mechanical rights society for each disc, tape and cassette reproducing one or more works of the repertoire of the society, the rate and the domain of application of which are fixed in the following way. In the countries of continental Europe, including Turkey, the rate of royalty per copy is 11 percent of the highest price of the copy in question as published by the producer (PPD), with a view to retail sale, on the day when the copies leave the depot. This price (PPD) is subject to a flat rate adjustment of 9 percent warranted by invoiced discounts. If, however, the producer has fixed or suggested retail prices in the national territory and such prices are generally paid by the public, the corresponding

royalty, in the countries mentioned above, is 8 percent of the price indicated in a list prescribed in the standard contract. Where the producer is not in a position to furnish the society with a list as just mentioned, the royalty is to be fixed by the society on the basis of the price most generally applied by other national producers for each type of disc, and for each configuration of tape and cassette. In Latin America, these rules do not apply; the rate of royalty is the one that is agreed upon between the society or its representative and national producers in those countries.

120. For the countries where the royalty is fixed through a non-voluntary licensing system, it is simply stated that the works of the society's entire repertoire must enjoy in all respects the conditions which are accorded to works in national repertoires by the producers in those countries. It is important, however, to emphasize that discs, tapes, cassettes and matrices manufactured in these countries and exported are subject to the conditions mentioned in the preceding paragraph.

121. The royalty system just outlined may appear to be quite complicated. It should be added, however, that the rules of the calculation of royalties extend also to certain other details, such 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, to returns, bargain sales, minimum royalties, etc.

122. The regulation concerning exported copies is also extremely complex, but it seems worthwhile presenting it, since it relates to a significant new phenomenon; namely to the concentration of the pressing and publication of discs; which in turn is one of the manifestations of regionalization and globalization trends and of increasing media concentration and convergence.

123. The relevant rules included in the standard contract seem to offer certain (although not full) protection for the societies of the countries where local production of phonograms is replaced by "central pressing" performed in another country but where the actual distribution of the copies takes place. The main rules – it shows the complexity of the regulation that these are only the main rules – are as follow:

- (i) in respect of exports to non-European countries, other than the United States of America and Canada, the royalties are to be calculated and paid in accordance with the applicable prices and other conditions agreed upon *in the country of destination* (nevertheless, the national group of IFPI and the society may agree to apply to such exports a royalty calculated in accordance with the prices applicable and all the terms agreed *in the country of origin*);
- (ii) in respect of exports to European countries, except shipments within the European Union, where the producer supplies an importer who is not a licensee nor an affiliate, the royalties are to be calculated and paid in accordance with the applicable prices and other conditions agreed upon *in the country of destination*;
- (iii) in respect of shipments within the European Union, where the producer supplies a distributor who is not a licensee or an affiliate, the royalties are to be calculated and paid in accordance with the applicable prices and other conditions agreed upon *in the country of origin*;
- (iv) in the case of exports to European countries not belonging to the European Union, where the producer is supplying an importer who is a licensee or an affiliate, statements of outgoing items relating to such exports may – unless the producer chooses to exercise the option mentioned in item (ix) below – be made by the producer by deducting from the number of discs, tapes and cassettes issued from his depot, the number of discs, tapes and cassettes remaining in stock in the depot of the importer at the end of each accounting period, it being understood that the outgoing items of the importer are to be treated in accordance with the applicable prices and other conditions agreed upon *in the country of destination* between the national group of IFPI and the national collecting society;
- (v) in the case of exports from European countries outside the European Union to countries belonging to the European Union, where the producer is supplying an importer who is a licensee or an affiliate, statements of outgoing items relating to such shipments may – unless the producer chooses to exercise the option mentioned in item (ix) below – be made in the manner described above;
- (vi) in the case of shipments within the European Union, where the producer is supplying an importer who is a licensee or an affiliate, statements of outgoing items relating to such shipments may – unless the producer

- chooses to exercise the option mentioned in item (ix) below – be made in the manner described above, but the outgoing items are to be treated in accordance with the *conditions agreed in the country of origin*, except that the *prices* applicable are to be those of the licensee or affiliate *in the country of destination*;
- (vii) in order to benefit from the possibilities mentioned under items (iv) to (vi) above, the producer must be able to show that the consignee is a signatory of a contract with a member society of BIEM similar to the standard contract and these shipments will be subject to the right of control by the two societies concerned;
 - (viii) the national group of IFPI and the society may agree to substitute a flat rate deduction for the above-mentioned system of deductions and for exports according to item (i) above, it being understood that national provisions for “returns” will not apply to outgoing items for which a flat rate deduction has already been applied;
 - (ix) nevertheless, subject to prior notice having been given by the producer to the two societies concerned, and in the absence of a joint objection being made for well-founded reasons by those societies notified within four weeks of such notice, the statements of outgoing items and the corresponding royalties which relate to shipments coming according to items (iv) to (vi) above shall be rendered and paid by the consignee to the society and/or the copyright owner or the copyright owner’s authorized representative *in the country of destination*, provided that the consignee is a signatory of a contract, similar to the standard contract, with that society and/or the copyright owner or the copyright owner’s authorized representative, in accordance with the prices applicable and all the terms in force *in the country of destination*.

124. The distribution system of mechanical rights societies also differs in various aspects from that of performing rights societies. For example, distribution is made on the basis of full data concerning the actual use of works and not on the basis of samples, and there is no point system where subjective elements could prevail. These features are, in certain aspects, favorable from the viewpoint of non-members and foreigners.

125. In respect of deductions from royalties before distribution, it was quite a widely followed practice that mechanical rights organizations applied some

standard deduction percentages, such as 15 percent, 20 percent or 25 percent. Those standard percentages were adapted basically to what was presumed to be the actual costs of management, but still there was a difference between actual costs and the amount deducted, the latter, usually, being at least slightly higher. This was counterbalanced by the fact that bilateral agreements between mechanical rights organizations, in general, do not contain the possibility of deductions for social and cultural purposes.

126. In this field, quite a dramatic new development has taken place recently, namely the adoption of the so-called “Cannes agreement” between the major music publishers (in general, belonging to big media conglomerates) and BIEM societies of the European Union and the European Economic Area, by virtue of which the deduction by mechanical rights societies must not be higher than 6 percent. This seemed to be yet another aspect of the impact of globalization, concentration and convergence trends (which are discussed in more detail in Chapter 5).

127. The big media conglomerates of which some major music publishing houses have also become part seem to intend to transform traditional collective management into a much more business-like clearing-house system. All this in itself, of course, is understandable; a more cost-effective machinery certainly may be attractive in a pure business model. Also, it seems to be true that the level of the costs of management of mechanical rights may be much lower than that of the management of “performing rights” (taking into account the much more extensive monitoring and law-enforcing activities that are needed in the latter case). There is, however, another side of the coin. From the previously deducted higher amounts, mechanical rights societies carried out those kinds of activities that in the traditional collective management systems are legitimate and, as discussed in Chapter 2 above, useful, not only from the viewpoint of the collective interests of the members of the societies and of the promotion of national creativity, but also from the viewpoint of an appropriate public relations policy in order to maintain or – since it seems dangerously diminishing and fading away – restore public acceptance of, and due respect for, copyright and related rights. Some of these functions may be taken over by publishers, producers and/or the media conglomerates to which they belong. Experience shows, however, that collectives of individual creators may perform these functions in a more effi-

cient way, and, in the eyes of the public (and public authorities), in a more persuasive manner. Forgetting about these aspects does not seem to be wise even if decisions are based on a simple financial “costs and benefits” calculation. Maintaining an appropriate balance seems necessary in this field taking into account all the interests involved. However, the freezing of the level of deductions by mechanical rights societies may also undermine the efficiency of their management system, since, as a result of this, they might not have sufficient resources to monitor the use of their repertoire, to fight piracy, and to invest in improving their technical equipment that would be desirable in the face of the challenges of digital technology and the Internet.

128. Some mechanical rights organizations also manage so-called synchronization rights (the right to authorize the inclusion of musical works in audiovisual works). In comparison with the management of musical mechanical rights, it may be said that similar principles apply to the management of “synchronization rights” but there is no general standard contract in this field and there are further differences in respect of certain details.

Collective Management of Rights in Dramatic Works

129. Collective management of rights in dramatic works is the most typical – and most traditional – example of a form of partial collective management, namely, an agency-type collective management (which is different from agency-type rights clearance without truly collective elements).

130. This form of collective management was originally developed by SACD, the French authors’ society referred to in Chapter 2, above, which, in fact, was the first ever authors’ society to deal with collective management.

131. It was as early as 1791, 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 the *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, specific contracts were concluded, and the General Agency of SACD collected and – after the deduction of costs – distributed the royalties to the authors. Although there are certain new elements in its activities, 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, specific contracts and the actual collection and distribution of royalties on the basis of the specific contracts.

132. 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 specific contracts, no conditions may be stipulated that are less favorable to authors, but better conditions can be agreed upon.

133. Specific 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 societies, to which the 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 specific contracts. The society acts only as a representative.

134. 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. Many authors choose this simplified system.

135. 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.

136. The society deducts from the royalties commission at an established 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.

137. 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.

138. 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 which 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, 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).

139. Irrespective of the scope of their activities, authors’ organizations managing rights in dramatic works cooperate under the aegis of CISAC, although this cooperation does not extend to so many details as those between performing rights organizations.

Joint Management of the Resale Right ("*droit de suite*")

140. 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."

141. Paragraphs (2) and (3) of the same Article, however, give quite a 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 to introduce it and whether or not to 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.

142. 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, which, in English, is called "resale right" (but which, is frequently referred to by its French name "*droit de suite*" in many countries), such as Algeria, Belgium, Brazil, Bulgaria, Burkina Faso, Chile, Congo, Costa Rica, Côte d'Ivoire, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Greece, Guinea, Hungary, India, Iceland, Italy, Latvia, Lithuania, Luxembourg, Madagascar, Morocco, Norway, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Senegal, Slovenia, Spain, Sweden, Togo, Tunisia, Turkey, Uruguay, Venezuela and Zaire. In the United States of America, the legislation of California recognizes 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").

143. The Resale Right Directive of the European Union, which will certainly have a harmonizing impact also in European countries that are not members of the European Union, in its recital (3), sums up the justification of granting a resale right eloquently: "The resale right is intended to ensure that authors

of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works”.

144. The resale right, in the majority of countries, only covers original works of art; in some countries, however, it also extends to original manuscripts. Nevertheless, in those countries also, it is in respect of works of art that this right is really practical. Article 2(1) of the Resale Right Directive, for example, defines “original works of art” as “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.” Article 2(2) of the directive adds that copies of works of art which have been made in limited numbers by the artist himself, or under his authority, are to be considered to be original works of art, noting that such copies are normally numbered, signed or otherwise duly authorized by the artist.

145. Usually, the resale right only applies to public auction and to sales through dealers. The reason is to restrict the scope of the right to cases where it can be realistically exercised and enforced. Under Article 1(2) and (3) of the Resale Right Directive, the right covers “all acts of resale involving as sellers, buyers or intermediaries, art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art”; member states, however, may provide that the right does not apply to resales where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed 10,000 euros.

146. In the great majority of countries, the royalty is to be paid by the seller (but there are also countries, such as Hungary, where it is to be paid by the buyer). Under Article 1(4) of the Resale Right Directive too, the seller is obliged to pay the royalty. However, member states may provide that the salesroom, art gallery or art dealer is liable, or shares liability with the seller, for the payment of the royalty.

147. The methods of calculation of resale right royalties fall into one of two categories: the first is where such royalties are calculated on the basis of the

increase in the price of the work at each resale, and the second is where the calculation is based on the sale price of the work. In the first group of countries, the rate (because it only covers the increased value attributed) is, in general, higher than in the second category. Basing the royalties on the sale price seems more appropriate; *inter alia*, due to the fact that, in the case of a great number of older works of art, in the absence of appropriate documentation, it is impossible or, at least difficult, to calculate the increase in price. Certain threshold prices, however, are fixed below which the resale right is not applicable.

148. The Resale Right Directive applies quite a high threshold price. Its Article 3 leaves it to the member states to set a minimum sale price, but provides that it may not be less than 3,000 euros. Some experts regard the 3,000 euro threshold as too high, since, if it is applied, the greater part of the sales, and many of them still at a relatively substantial price, are not covered by the resale right.

149. Under Article 4 of the directive, the royalty is to be set at the following rates:

- (a) 4 percent for the portion of the sale price up to 50,000 euros;
- (b) 3 percent for the portion of the sale price from 50,000.01 euros to 200,000 euros;
- (c) 1 percent for the portion of the sale price from 200,000.01 euros to 350,000 euros;
- (d) 0.5 percent for the portion of the sale price from 350,000.01 euros to 500,000 euros;
- (e) 0.25 percent for the portion of the sale price exceeding 500,000 euros.

The total amount of the royalty may not, however, exceed 12,500 euros. By way of derogation, member states may apply a rate of 5 percent for the portion of the sale price referred under item (a).

150. One of the reasons why 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 experience 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 joint management system.

151. The best example for resolving practical problems through joint management in this field is what took place in Germany.

152. In Germany, the resale right was introduced by the 1965 Copyright Law, to be applied in case of public auction sales and sales through art dealers. The law originally did not lay down any specific procedure for the application of this right. Auctioneers and dealers refused to pay resale right royalties on the grounds that they were not the true vendors and, at the same time, they used the requirement of professional secrecy as a pretext for not disclosing the name and address of the true vendors. Following a long legal battle, the Federal Supreme Court decided, in 1971, that auctioneers and dealers may decline to disclose the identity of the vendor, but only on condition that they themselves pay the levies. There was, however, no general obligation to provide information.

153. The Law of November 10, 1972, completed the provisions on the resale right. That law introduced a general obligation to provide information, and fixed the rate of royalties along with a threshold price. In the new legislation, collective management was given an important role. The law empowered an authors' society to request information, so as to save auctioneers and dealers from being overwhelmed with individual requests.

154. A further important development took place in 1980. An agreement was signed between BILD-KUNST, the authors' society administering the rights of artists, on the one hand, and the organizations of art dealers, on the other. The agreement covered twentieth century works. The art dealers undertook to pay 1 percent of their full turnover in sales of such works. This rate was based on an estimation according to which the art dealers' turnover was 100 million DM a year and the payments due in respect of the resale right and of social security payments to artists, introduced in 1980, amounted to 1.5 million DM. It was agreed that, if the lump sum thus calculated fell below the level based on that situation, further negotiations would take place. This agreement has offered a good example of how simple, yet effi-

cient collective management schemes can be established also in this field. BILD-KUNST has successfully managed the resale right. It also applies in this field such elements of a real collective management system as promoting creativity and social security for its members, with appropriately differentiated deductions for such purposes.

155. One of the key issues in the exercise of the resale right is the “right of information”, and it is particularly relevant from the viewpoint of joint management of this right. This is understandable since, without information about the resale of works of art, it would be simply impossible for authors to exercise their right.

156. In order for the right of information to be respected, art galleries and art dealers must register the necessary data; at least 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 joint management organization is the partner of art galleries and dealers.

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 through 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 joint management.

157. Joint management may increase the efficiency of the exercise of the resale right even domestically; in the international context, however, it is more or less indispensable. Joint management organizations, through 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 cases, the intervention of

joint management organizations is even more necessary; without their monitoring capacity and legal machinery, rights owners would not have a realistic chance of enforcing their rights.

158. The role of joint management organizations is getting more important in the field of works of art not only in respect of the resale right but also in respect of other rights of artists, in particular reprographic reproduction rights (and of course, such works are frequently used also in interactive transmissions through the global digital network, which is discussed in Chapter 5).

159. There are also specialized joint management organizations for the administration of rights in works of art in other countries, such as ADAGP in France, VBK in Austria, COPY-DAN BILLEDKUNST in Denmark, HUNGART in Hungary, DDG BEELDEFCHT in the Netherlands, VEGAP in Spain, DACS in the United Kingdom, or VAGA in the United States of America. A number of organizations with a more general repertoire manage the rights in works of art along with the rights in various other categories of works. All these organizations cooperate closely under the aegis of CISAC. There are also organizations that regroup explicitly those organizations which administer rights in works of art, such as European Visual Artists (EVA).

Joint Management of Reprographic Reproduction Rights

160. Reprography was the first major new technology after the 1971 Paris revision of the Berne Convention which raised serious copyright problems and in respect of which it was found that joint management of rights was the best possible solution.

161. While, in the case of the rights whose joint management has been discussed 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, certain questions have been raised as to the actual rights to be recognized and as to the very legal nature of such rights. It depends on the answers to those questions in which cases and under what conditions joint management may be applied in this field.

162. Reprographic machines have become ever more sophisticated during the last decades; they produce better quality and, at the same time, they are quicker and cheaper. Color copiers have opened new avenues for reprographic reproduction of protected works (not to mention the combination of reprography with the retrieval of works stored in computers – electrocopying – which, however, already concerns the so-called “digital agenda” of the 1996 Diplomatic Conference which adopted the WIPO “Internet treaties” and, thus, is discussed in Chapter 5 below).

163. The situation in the field of reprography is, in some respects, different from the one which prevails in the field of copying of audiovisual works and phonograms. This difference follows from the fact that, while private copying (that is, reproduction of audiovisual works and phonograms, at home, for private purposes) is a global phenomenon, the number of personal photocopying machines is still relatively small. Therefore, the control of reprographic reproduction of works may be organized more easily, and there are much better chances of avoiding heavy restrictions on the right of reproduction as an exclusive right.

164. It should, however, also be taken into account that the purposes of reprographic reproduction differ from those of private copying. While private copying concerns mainly works of entertainment, reprography is, typically, used for copying of material necessary for education, research and library services in respect of which special public considerations emerge.

165. 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 (and also under the TRIPS Agreement and the WCT, through the inclusion therein by reference of this and other substantive provisions of the Convention) which cannot be restricted – either allowing free use or in the form of non-voluntary licenses – except in cases which 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 what are the cases where exceptions or limitations may be allowed.

166. To answer this question, both the text and the drafting history of the relevant norms should be taken into account. Article 9(1) of the Berne Convention reads as follows: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." The possibilities of allowing exceptions or limitations to this right are regulated in Article 9(2) as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

167. The report of Main Committee I of the 1967 Stockholm Diplomatic Conference which adopted Article 9 also includes an explanatory statement as guidance for the application of Article 9(2), and it takes examples from the field of reprographic reproduction. It reads as follows:

"If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

168. It is to be noted that since 1967 the possibilities and conditions of normal exploitation of works that may be concerned by reprographic reproduction have changed quite fundamentally, and the same may be said about the situations where an exception or limitation may unreasonably prejudice the legitimate interests of owners of rights. Therefore, at present, the above-

quoted statement may be regarded truly relevant only as regards the *structure* of the test provided for in Article 9(2) of the Berne Convention; the 1967 *examples* are not necessarily valid any more.

169. The test under Article 9(2) of the Berne Convention is, in general, referred to as the three-step test, since the three conditions provided for in this provision are to be considered step-by-step, one after the other.

- The first condition is that an exception or limitation should be a special case. This means that the use to be covered must be limited – precisely and narrowly determined – and that no broadly-fixed cases are acceptable; furthermore, as regards its objective, in line with the drafting history of the provision, it must be specific in the sense that it must be justifiable by some clear and sound public policy considerations (for example, protection of fundamental freedoms; specific public interests, such as public education and access to information; the need to eliminate market failures; protection of consumers' legitimate interests; and protection against anti-competitive behavior).
- The second condition is that an exception or limitation must not conflict with a normal exploitation of works. This means that all forms of exploiting a work – that is, extracting value from the exclusive right of reproduction in the work through exercising it – which has, or is likely to acquire, considerable economic or practical importance must be reserved to the owner of this right, and that free uses or non-voluntary licenses granted as exceptions or limitations, respectively, must not enter into economic competition with the exercise of the right of reproduction by the right owner (in the sense that they must not undermine the market for protected works in any way whatsoever).
- The third condition is that an exception or limitation must not unreasonably prejudice the legitimate interests of copyright owners. Legitimate interests mean "legal interests" in the sense that it is in the interests of the owner of the right to enjoy and exercise the right of reproduction as fully as possible. An exception or limitation – inevitably; it may be said: "by definition" – prejudices these kinds of legitimate interests, but such prejudice may be allowed to occur in certain special cases not conflicting with any normal exploitation of the work; it must be, however, reasonable in the sense that it must not go beyond a cer-

tain level of prejudice which may still be justified in consideration of the underlying, special and well-founded public policy considerations.

170. After this description of the legal situation under the Berne Convention (as well as under the TRIPS Agreement and the WCT), the following part presents how the copyright problems of reprography were first tackled at the national level and, particularly, how joint management emerged as a solution in various national systems. The countries chosen as examples, are those where legal developments have produced certain typical elements of joint management in this field.

171. First, the example of Germany is mentioned because fairly detailed provisions on the right of reproduction and on exceptions and limitations thereto, were already included in the Copyright Act of 1965.

172. The legislators had taken into account a 1955 decision of the Federal Court of Justice on photocopying which concerned the reproduction of articles from scientific journals by an industrial firm to be used by its employees. The Federal Court of Justice found that this activity served the commercial objectives of the firm and, therefore, it was not a free use. This decision led to the conclusion of a contract between the Federation of German Industry (*Bundesverband der deutschen Industrie*) and the Association of the German Book Trade (*Börsenverein des deutschen Buchhandels*) on photocopying from periodicals for internal use by firms.

173. On the basis of the above-mentioned provisions, the copyright collecting societies of the Federal Republic of Germany concluded a series of licensing agreements. For example, in 1982, the general literary rights society WORT concluded an agreement with the ministries of culture of the provinces (*Länder*) concerning reprographic reproduction in schools for an annual lump sum. In order to distribute those sums, surveys were made in selected schools. WORT also started collecting substantial amounts under agreements concerning copying for commercial purposes.

174. The Copyright Amendment Act of June 24, 1985, made several changes to this system. Under the Act, it became permissible to make or to cause to be made copies of small parts of a printed work or of individual contribu-

tions published in newspapers for personal use, and for teaching in non-commercial institutions of education, in a quantity required for one school class or for state examinations in schools, universities and non-commercial institutions of education. In three cases, an absolute prohibition was imposed on reprographic reproduction without the author's consent, namely in respect of whole books or whole periodicals, graphic recordings of musical works (sheet music) and computer programs.

175. The most significant change was, however, that a statutory license was introduced for all cases where authors' consent was not needed for reproduction. The legislators found that, since 1965, technological development had led to private copying on a scale that such copying unreasonably prejudiced the legitimate interests of authors and that this prejudice should be eliminated or, at least, mitigated by means of provisions on an equitable remuneration for such use. Therefore, it extended the statutory license system also to private reprographic reproduction.

176. The new legislation differentiated between domestic and non-domestic reproduction. It had been taken into account that, for the time being, only few copying machines were available in private households and that they were less frequently used for copying of protected works than the machines functioning in libraries, educational institutions and similar places where protected works to be copied are available to a qualitatively larger extent. Therefore, a hybrid levy system was established. One of the elements of the system thus introduced consisted of an equipment levy to be paid by the manufacturer or importer. The law provided that the levy had to be paid for every machine irrespective of whether it was used in a domestic or non-domestic context as a lump-sum payment corresponding to the amount of copyright material normally copied by means of such machines. The fact that in non-domestic situations (in schools, universities, public libraries, copy-shops, etc.) protected works are reproduced to a greater extent was taken into account by the other element of the system; namely an operator levy to be paid in addition to the equipment levy.

177. The amount of the operator levy was determined on the basis of a sampling method: it was established how large the percentage of photocopies of protected works was in relation to all photocopies made in selected

institutions that were regarded as representative of their area, and these data were used when charging remuneration for photocopying in comparable institutions. The law provided that the right to photocopying royalties must be exercised through a collecting society.

178. Although this system might seem simple, it proved to be difficult to calculate the amount of copying for which remuneration had to be paid. Therefore, WORT chose to conclude agreements with organizations of operators of copying machines in which lump sum payments were agreed upon. The lump sum payments were based on statistical surveys reflecting the extent and structure of reprographic reproduction of protected works.

179. WORT decided that, after the deduction of the administration costs, it would distribute to the authors 70 percent of the remuneration in the case of works of fiction, and 50 percent of the remuneration in the case of scientific works; the rest was to be distributed to publishers. If, however, the contract between the author and the publisher provided for different distribution rates, they had to redistribute the payment between each other.

180. The other example for the beginnings of introducing joint management, taken from the Netherlands (which was also among the first countries to legislate on reprography), underlines how indispensable a well-functioning joint management system is for the exercise of reprographic reproduction rights.

181. In the Netherlands, the first provisions on reprography were adopted between 1972 and 1974 but they did not touch the limitation to the right of reproduction according to which, as a general rule, reproduction of a few copies for private use was free. The Copyright Act was even more generous towards government offices, libraries, educational institutions and other institutions representing public interests. Those institutions were allowed to make more than a few copies for their own internal use. Finally, commercial organizations and institutions were also allowed to make more than few copies, in fact "as many copies as are reasonably necessary". All these mass copiers, however, were obliged to pay an equitable remuneration. Nevertheless, libraries were allowed to make single copies of articles for users and for inter-library loans with no obligation to pay such a remuneration.

182. Foundation Reprorecht, the Dutch collecting society representing authors and publishers – which had been set up to collect photocopying fees – had difficulties in fulfilling this task for a fairly long time because it did not have any special status under the law and its membership was not wide enough. Therefore, copiers refused to deal with Reprorecht; only the government paid some nominal sums to the society to keep the system it had set up alive.

183. A new Royal Decree was needed to get out of this deadlock. The Decree of August 23, 1985, provided that remuneration for reprographic reproduction must be paid to a collecting society to be appointed by the Minister of Justice to the exclusion of any other society and even of the owners of rights themselves. On February 19, 1986, Reprorecht was appointed as the exclusive collecting society, and, with this, the system became workable.

184. In the copyright laws of the Nordic countries, from the very beginning, the strong, institutionalized legal position of collecting societies was the most important element.

185. The most typical feature of the Nordic copyright laws concerning reprographic reproduction rights (but also in respect of other rights) is the so-called “extended joint management” system which applies to the agreements concluded between collecting societies, on the one hand, and the competent state and municipal authorities, on the other hand, in respect of photocopying in schools and at universities. Under that system, teachers and professors of schools and universities which have received authorization from an organization representing a large number of national authors of a certain category of works also have the right to copy published works of the same category the authors of which (including foreign authors) are not represented by the association. Non-member authors whose works are thus reproduced are, as regards, for example, remuneration, treated in the same way as the members of the organization. However, they have, in general – for instance, if the contracting organization decides to use the remuneration for common purposes – a right to claim individual remuneration for the reproduction of their works. For non-members, there is a kind of compulsory licensing element in this system, but this is only a conditional element considering all the guarantees to safeguard the rights of authors outside the organization. For example, no reproduction may be made under the agreement if the author

has filed a prohibition against such reproduction with any of the contracting parties. There are also provisions in the laws for possible cases where users and the collecting organization are unable to reach agreement. In such cases, an arbitration system may be applied.

186. If the system of the Nordic countries offers good examples of how joint management organizations may work with legislative support and with some semi-compulsory elements insofar as owners of rights outside the organizations are concerned, the example of the United States of America shows that systems based on genuine exclusive rights are also workable.

187. The 1976 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).

188. 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.

189. The CCC was established following a recommendation by 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.

190. The original system for 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. After the deduction of the management costs, the fees were forwarded to individual publishers who then distributed a certain part of the fees to their authors in accordance with their contractual agreements.

191. 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.

192. 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 underlying contractual arrangements.

193. The Copyright, Designs and Patents Act 1988 of the United Kingdom introduced certain new norms having also taken into account the satisfactory contractual arrangements of the Copyright Licensing Agency (CLA) representing authors and publishers.

194. The Act provided for certain precisely determined free uses for libraries and archives and for photocopying by educational establishments of extracts from published works. Reprographic copies of extracts from published literary, dramatic or musical works, to the extent determined in the Act, were allowed

to be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work or the right in the typographical arrangement. Not more than 1 percent of any work was allowed to be copied by, or on behalf of, any establishment in any quarter of a year. What was important, however, was that such copying was not authorized if licenses (normally, under a joint management scheme) were available authorizing the copying in question and the person making the copies knew, or ought to have been aware of, that fact. The Secretary of State was empowered to take further measures to guarantee educational needs. In cases where, after considering any representations, he was satisfied that the refusal by an individual copyright owner to join an existing scheme was unreasonable, he was empowered to issue an order that the owner should be treated as if he were a member of that scheme (such orders were subject to appeal). Following a recommendation to that effect by an inquiry ordered by him, the Secretary of State was authorized to issue an order providing for non-voluntary licensing in respect of a particular class of works.

195. The presentation, above, of the various national laws and collective management or other joint exercise systems indicates that appropriate and practical ways and means may be applied to meet obligations under the international copyright norms without creating unreasonable obstacles to photocopying by users, and particularly that joint management of rights is a workable and efficient solution in this field.

196. There was one point, however, where further steps were still needed. It is essential that national treatment be applied also in this field, and foreign copyright owners enjoy the same rights as national ones. From this viewpoint, it was extremely important that collective management organizations as well as copyright clearance centers – which are referred to as “reprographic rights organizations” (RROs) – conclude reciprocal representation agreements providing equal treatment for the owners of rights represented by foreign societies. For this, the International Federation of Reproduction Rights Organizations (IFRRO) has offered an appropriate international framework. As a federation, it was established in 1988; but an informal group called the International Forum of Reprographic Organizations founded in 1984 was in a way its predecessor (which in turn had been born through the transformation of a working group of the joint Copyright Committee of the Internatio-

nal Publishers Association (IPA) and the International Group of Scientific, Technical and Medical Publishers (STM) set up in 1980). The Federation now has a number of members and associated members. Members include, for example, AIDRO in Italy, CFC in France, CEDRO in Spain, KOPINOR in Norway, KOPIOSTO in Finland, Literar-Mechana in Austria, Pro-Litteris in Switzerland, CAL in Australia and JRRC in Japan.

197. As has been shown through the examples above, these reprographic rights organizations manage reprographic rights on the basis of one of the following four legal regimes: first, on the basis of statutory licenses (as Foundation Reprorecht in the Netherlands or Pro-Litteris in Switzerland do); second, on the basis of a right to remuneration applied through a levy system (as in the case of WORT in Germany or CEDRO in Spain); third, on the basis of voluntary licensing with legislative support granted either in the form of “extended joint management” (as seen in the case of the reprographic rights organizations of the Nordic countries) or in the form of obligatory joint management (CFC functions in this way in France); and, fourth, on the basis of voluntary licenses (as CCC in the United States of America and CLA in the United Kingdom do).

198. Reproduction rights organizations manage the rights of both authors and publishers. Various solutions may be found in national laws, in collective agreements, and in individual contracts concerning the participation of publishers in the remuneration received for photocopying. However, the end result is practically the same: authors and publishers share the photocopying remuneration between themselves.

199. In general, it is the author who is indicated as the owner of the right, which is normal since photocopying is covered by authors’ right of reproduction. Authors then may – and fairly frequently do – transfer their reprographic reproduction rights, normally with the stipulation that they receive a certain percentage from such payments collected by the publishers. Some contracts, however, are silent about the entitlement to such remuneration. In such cases, it is useful if national legislation contains some guidance about the distribution of the amounts between authors and publishers. (In countries where, under the law, employers are the original owners of rights in works created by their employee authors, the legal status of such works is, of course, simpler).

200. It should also be taken into account that what is copied is not the work in general, but a specific published edition of the work. If users do not use published editions but replace them by photocopies, this conflicts not only with the authors' rights and interests, but also with the rights and the interests of the publishers. The interests of authors and publishers are, however, not always the same. For example, many academics and researchers are interested, first of all, in as wide and as free a dissemination of their works as possible rather than in getting remuneration for this, an attitude which, from the viewpoint of publishers, may be disastrous and may even lead to the bankruptcy and disappearance of scientific journals. This latter outcome then may be detrimental also to academicians and researchers because they lose a forum for publication of their works. These considerations – and, particularly, the objective of better protection of publishers against piracy – have led the legislators of some countries (mainly those with a common law legal tradition) to recognize new kinds of related rights for publishers (in the so-called typographical arrangements of their publications). This makes it even more desirable that reprographic rights organizations manage the rights of both authors and publishers.

201. The importance of reproduction rights organizations is further increased by the ever more widespread storage in, and retrieval from, computer systems of works, including electrocopying (copying of works published in a machine-readable medium, optical recording, downloading from databases, etc.). This new form of using protected works – where machine-readable material is disseminated through information and telecommunication systems and where hard copy reproductions may be made by adequate terminals – became part of the so-called “digital agenda”, and as such is discussed in Chapter 5 below.

202. Joint management organizations managing reprographic reproduction rights may also deal with certain other rights in published works. One of such rights is the public lending right, that is, the right to receive remuneration for public lending of books, etc. The legal nature of such a right is fairly controversial; it has been questioned whether it belongs to the field of copyright and related rights at all or is rather a cultural or social right of a more general nature. For this reason, this study, which concentrates on the most typical cases of joint management of copyright and related rights does not deal with the management of public lending rights.

Joint Management of Rights of Performers and Producers of Phonograms

203. The last two fields described in this chapter where new typical forms of joint management have been developed (namely, the fields of cable retransmission of broadcast programs and private copying) concern not only copyright but also related rights. Therefore, before dealing with these two fields, the special aspects of joint management of related rights are discussed.

204. Some basic rights that are recognized in the Rome Convention, the TRIPS Agreement and the WIPO Performances and Phonograms Treaty (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 joint 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 joint management is indispensable, namely, the rights of performers and phonogram producers in respect of broadcasting and communication to the public of phonograms. The word “specific” is emphasized because there are also some other rights where joint management is applied and in which performers and/or producers of phonograms are interested (such as the rights in respect of cable retransmissions and private copying mentioned above, and the so-called “residual rights” provided for, for example, in the European Community’s Rental and Lending Directive); but, in those cases, as discussed in particular in the following two subchapters, authors (and, as regards cable retransmissions, broadcasting organizations) are also interested.

205. Article 12 of the Rome Convention 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.” (The rights provided for in Article 12 of the Rome Convention are frequently referred to as “Article 12 rights”). Under

Article 16 of the Convention, however, 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.

206. As to the question of whether this provision also covers cable retransmission – and in respect of the legal consequences – see the following subchapter on joint management of copyright and related rights concerning cable retransmissions of broadcast programs.

207. Article 12 of the Rome Convention does not provide for an exclusive right in respect of broadcasting and communication to the public but only for a right to equitable remuneration (this is not a right that originally is granted as an exclusive right and then, in certain cases, limited to a right to remuneration; it is rather a right that is provided for directly as a right to remuneration). Countries party to the Convention are, of course, free to grant exclusive rights in this field. For example, certain countries have granted phonogram producers the right to authorize or prohibit the broadcasting and/or public performance of their phonograms (in that respect, it should also be noted that in some countries – mainly in those with a common law legal tradition – the rights of producers of phonograms is part of copyright according to the wider concept of copyright applied in those countries). In the majority of countries, however, at the maximum, a right to equitable remuneration is granted to performers and/or producers of phonograms for such uses.

208. Under Article 12 of the Rome Convention, Contracting States are free to grant such a right to performers alone, to producers of phonograms alone or to both, or to grant it to one of the two categories only, but with the obligation to share it with the other.

209. As far as the shares of the two categories of beneficiaries are concerned, the WIPO/ILO/UNESCO Model Law concerning Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in 1974 suggested that, unless otherwise agreed upon between performers and producers, half of the amount received by producers should be paid to performers.

210. The WIPO Performances and Phonograms Treaty (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 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 or 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.

211. The WPPT has also extended the scope of application of this right to remuneration in an indirect manner. It has done so in three respects. First, it has broadened the concept of "phonograms published for commercial purposes"; its Article 15(4) provides that, for the purposes of the Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them (that is, the making available of phonograms in an interactive system, as the Internet) must be regarded as if the phonograms had been published for commercial purposes. Second, its Article 2(a) has extended the definition of "performers" also to those who perform expressions of folklore. Third, its Article 2(b) and (d) have also somewhat widened the definitions of "phonogram" and "producer of a phonogram"; under these provisions, a phonogram means not only the fixation of sounds but also the fixation of representation of sounds (the fixation of electronically generated sounds), and the definition of producer of a phonogram has also been extended accordingly.

212. The right to remuneration or the exclusive right of performers and producers of phonograms in respect of broadcasting and communication to the public of their performances recorded on phonograms or their phonograms, respectively, is, from a practical point of view, of a nature that is similar to that of the so-called "performing rights" of composers and text-writers discussed above. It follows from this fact that this right of performers and producers may also only be exercised through an appropriate joint management system.

213. In several countries where such a right is recognized, performers and producers of phonograms have established joint organizations (for example, LSG in Austria, SOCINPRO in Brazil, GRAMEX in Denmark, Finnish GRAMEX in Finland, GVL in Germany or SENA in the Netherlands). In certain other countries, the two categories of beneficiaries have separate organizations (for example, URADEX in Belgium, ADAMI and SPEDIDAM in France, IMAIE in Italy, GEIDANKYO in Japan, AIE in Spain or SAMI in Sweden for performers, PPL in the United Kingdom, and IFPI national groups in other countries for producers of phonograms).

214. Joint management organizations dealing with related rights are, frequently, under the same state control as musical performing rights organizations. They negotiate contracts with users, but their tariffs, in certain countries, have to be approved by the competent authorities. In other countries, the competent authorities and special tribunals only interfere in cases of dispute, taking into account the *de facto* or *de jure* monopoly position of such organizations.

215. As far as the collection of the remuneration for the communication to the public of phonograms is concerned, the organizations of performers and producers of phonograms, in certain countries, have not established their own monitoring and collecting services, but entrust the performing rights organizations of authors with this job. An appropriate commission fee has to be paid for these services but such a fee is still considered to be lower than the costs of establishing a new monitoring and collection system. On the other hand, as far as the collection of the remuneration for broadcasting of phonograms is concerned, this task is usually carried out by the performers' and producers' organizations themselves.

216. The methods of distributing the remuneration among performers and producers differ from country to country. In respect of broadcasting of phonograms, the remuneration is usually distributed to individual rights owners (performers and producers of phonograms); while, in respect of communication to the public, individual distribution to performers is somewhat less frequent, although there is a trend towards the broadening of the cases where such distribution takes place; a smaller or larger part of the remuneration (as a minimum, that part which cannot be distributed) is used for cultural and/or social purposes (as far as producers of phonograms are concerned, individual distribution takes place also in the field of communication to the public).

217. The difficulty in obtaining satisfactory data on the repertoire used is not the only reason for not distributing the remuneration to individual performers. The other reason which is sometimes stressed by the representatives of performers' organizations is that the repeated and uncontrolled uses of recorded performances have detrimental effects on the employment opportunities for performers, and the remuneration is also considered to be a compensation for this.

218. Performers' organizations have two main international non-governmental organizations: the International Federation of Musicians (FIM) and the International Federation of Actors (FIA), which, *inter alia*, organize cooperation in the field of collective management. In the case of producers of phonograms, the International Federation of the Phonographic Industry (IFPI) deals with this task at the international level. There are also regional organizations, such as AEPO and ARTIS-GEIE in Europe or FILIAE for "Ibero-American" (that is, Spanish and Portuguese-speaking) countries.

219. Foreign performers and producers of phonograms are entitled to receive their share from the distribution of the remuneration under Article 12 of the Rome Convention in keeping with the principle of national treatment or, where applicable on the basis of Article 16 of the Convention, as regards material reciprocity. (The situation is similar under Articles 4 and 15 of the WPPT.) However, in respect of performers, this entitlement of foreign right owners is only taken into account in a limited manner, for two main reasons.

220. The first reason is that the network of appropriate collective management organizations and bilateral agreements between such organizations have not yet been fully established everywhere, although FIM and FIA and their member organizations work actively to promote wider and closer cooperation between national organizations.

221. The second reason for which, in many cases, foreign performers do not receive the share to which they are entitled is that certain principles jointly adopted by FIM and FIA accept the conclusion of bilateral agreements under which 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). This is the so-called "category B agreement" which is still more frequently used than the so-called "category A agreement" under which 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. However, even in the case of category A agreements, under which the shares due to performers in another country are transferred, the non-identifiable shares (and their percentage may be fairly high) remain in the country where they are collected, and are usually devoted to social or cultural purposes for the benefit of performers. There seems to be a certain trend towards an increase of cases where category A agreements are concluded; and also a third type of agreement has been introduced recently, called "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).

222. 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.

223. It is also mentioned sometimes that category B agreements, in the case of developing countries – whose balance of payments is still frequently fairly negative in this field – may facilitate the adherence of those countries to the

Rome Convention (and now also to the WPPT) and may contribute to the improvement of the legal and economic position of performers.

Joint Management of Rights in Respect of Cable Retransmission of Broadcast Programs

224. 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 which, in principle, may only be solved either by means of non-voluntary licenses or by means of a specific joint management system.

225. 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. 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.)

226. 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.

227. 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 (Satellites and Cable Directive) contains detailed regulations on cable retransmissions which also include specific provisions on joint 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).

228. Original broadcasters of programs are, in general, in a 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.

229. In view of this, in some countries, governments and legislators came to the conclusion that the operation of cable systems can only be guaranteed

by means of non-voluntary licenses. Such licenses were introduced, for example in Austria, Denmark (still before the adoption of the Satellites and Cable Directive) and – in respect of certain programs – in the United States of America.

230. Owners of copyright and related rights, through their national organizations and through the international non-governmental organizations founded by them, 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 joint management of such rights. The Satellites and Cable Directive also reflects this recognition.

231. Still in 1970, CISAC initiated joint actions of the interested international non-governmental organizations. After intensive negotiations, CISAC, the International Federation of Film Producers Associations (FIAPF) and the European Broadcasting Union (EBU) adopted a joint declaration in October 1979 on the basic principles of a future joint management system. Then these organizations, on the one hand, and the International Alliance for Distribution by Cable (AID), on the other, worked out a model contract for the same purpose in December 1981.

232. It was recognized that such a system could only be implemented in practice if an important link in the chain of joint management systems which was still missing was established. The link which was missing was an appropriate joint 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 generally the producers. Producers, however, did not have joint management organizations.

233. The way towards workable joint management of rights in respect of cable retransmissions of broadcast programs was opened by the establishment, in December 1981, of the Association for the International Collective Management of Audiovisual Works (AGICOA). The members of the Association 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 rights holders of the sums collected.

234. The first contract concerning the authorization of cable retransmission of programs on the basis of a general joint 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 would 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 have reduced their payments. This has led to a number of litigations between AGICOA, on the one hand, and the RTD and individual operators, on the other hand.

235. 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 rights 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 that which has emerged in Belgium. At the same time, joint management agreements have also been concluded in countries outside the European Union (such as the Baltic states, Bulgaria, Hungary and Slovenia).

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

237. 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.

238. It is to be noted, in particular, that there is an international organization of audiovisual creators – the International Association of Audiovisual Writers and Directors (AIDAA) – established in 1985, the members of which are those societies or associations which, *inter alia*, manage the rights of such creators on a collective basis. At present, its membership comprises 21 such societies and 20 such associations in 24 countries, among which, there are authors' societies with more general membership and repertoire (such as SACD in France, SGAE in Spain or SPA in Portugal), but also separate organizations of audiovisual authors, sometimes together with producers (such as DPRS (Directors and Producers Rights Society) in the United Kingdom, DGA (Directors Guild) in the United States of America or FILMJUS in Hungary). The member organizations of AIDAA deal not only with collective management of rights in respect of cable retransmissions, but – where such rights are recognized – also with the collective management of rights to remuneration for private copying and certain “residual rights” (such as these kinds of rights provided for in the Rental and Lending Directive of the European Community for the rental of audiovisual works). There are also regional organizations of such bodies; for example the Federation of European Film Directors (FERA).

Joint Management of Rights in Respect of Private Copying of Phonograms and Audiovisual Works

239. In respect of reprographic reproduction, it has been discussed above that 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 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.

240. 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 the widespread domestic reproduction of audiovisual works for private purposes, similar, although less evident and, therefore, more disputed, prejudices have been identified.

241. As discussed above in respect of reprographic reproduction, it seems that 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.

242. 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.

243. 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 the right of authors under Article 9 of the Berne

Convention (also incorporated into the TRIPS Agreement and the WCT by reference).

244. Many countries which have introduced or are about to introduce a private copying royalty, have recognized that such a royalty is justified in respect of both audio and video recordings. As regards the basis of the royalty to be paid, for example, the Copyright Law of Germany only introduced royalties on hardware, that is, on recording equipment in 1965; in 1985, however, the obligation to pay private copying royalties was extended to recording media. In this respect, the national laws of countries where a right to remuneration exists for home taping still differ.

245. The obligation to pay royalties is imposed on the manufacturers and importers of recording equipment and/or recording material. Certain equipment and material are exempt from the obligation (exported items, equipment and tapes intended for use for professional purposes or which (such as dictaphones) are unlikely to be used for recording protected material). The amount of the royalties is fixed by the law itself or is left, under certain conditions, to an arbitration-type forum; it is either a flat fee or a percentage of the price of the equipment and/or the material, respectively.

246. 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.

247. In many countries, an existing joint management organization (in general, a collective management organization managing authors' rights) collects the royalties also on behalf of the organizations representing other owners of rights, and then it transmits the corresponding share to the latter organizations. In certain countries, however, there is a separate organization (a kind of "coalition" organization acting on behalf of all the organizations representing the various groups of rights owners), such as ZPÜ in Germany, or SORECOP to collect royalties for private copying of phonograms and COPIE FRANCE to collect royalties for private copying of audiovisual works in France.

248. The distribution of private copying royalties by the competent joint management organizations is made by means of one of the most widespread techniques which is also used by some musical performing rights organizations, namely by means of sampling. This technique involves an element of rough justice but it still guarantees a fairly correct distribution to individual owners of rights reflecting essentially the actual use of the works protected.

249. Various studies have proved that, in the case of audio home copying, the two main – almost exclusive – sources of recordings are records and radio broadcasts. On the basis of broadcasting logs, record sales figures and other available data, the actual structure of home taping may be identified and the remuneration may be distributed to individual owners of rights with nearly the same precision as in the case of certain categories of traditional performing rights royalties, and at the same time, with fairly low expenses. In the case of video recordings where copying is mainly made from television programs but where also tape-to-tape copying exists, the identification of the works most frequently used is somewhat more difficult but, with an adequate sampling technique, still a fairly correct rough justice may be obtained.

250. The distribution of private copying royalties, in general, is fairly cost-effective because the organizations dealing with it also manage certain other rights and the sampling methods – and, thus, the actual distribution – may also be easily connected to existing distribution systems.


251. The rate of distribution of the private copying royalties between authors, performers and producers is, in general, fixed in statutory law. For example, in France, (after the deduction of 25 percent for general cultural purposes), for private copying of phonograms, authors receive 50 percent, performers 25 percent and producers 25 percent, while for private copying of audiovisual works, the rate of distribution is equal for authors, performers and producers. In Spain, the same distribution rates are applied. In Hungary, in the case of phonograms, authors receive 50 percent, performers 30 percent and producers 20 percent, while, in the case of audiovisual works, producers receive 13 percent, audiovisual creators 22 percent, authors of works of art and photographic works 4 percent, scenario writers 16 percent, composers and text-writers of musical works 20 percent and performers 25 percent. In other

countries, there are even more complex distribution systems, and in certain countries with basic statutory regulation, it is possible to renegotiate and change the shares. For example, in Germany, the shares have been established in the following way: in respect of phonograms: authors 58 percent, performers 26.88 percent and producers 15.12 percent; while in respect of audiovisual works: film producers 50 percent, authors 29 percent, performers 13.44 percent and record producers 7.56 percent.

252. Although certain attempts have been made to try to offer some legal theories as a basis for avoiding the application of national treatment in respect of private copying royalties (which may undoubtedly involve, for the time being, some unilateral burdens in international relations), it can hardly be denied that the right to remuneration for such reproduction is a right of authors in their literary and artistic works and the rights of the beneficiaries of related rights in their protected productions. Therefore, it seems that granting national treatment to foreigners is an obligation of countries party to the Berne Convention (and/or to the TRIPS Agreement and/or to the WCT) and the Rome Convention (in the case of the TRIPS Agreement and the WPPT, the situation is more complex as regards related rights, and it would not be appropriate to elaborate on it here).

253. From the point of view of national treatment, the legal obligation, or the actual practice, in some countries, to use a large part of the royalties collected on the basis of such a right for cultural and social purposes – and usually only in favor of national owners of rights – may raise questions (although it is not necessary that such a part of the royalties is used only for national purposes). For example, in France where 25 percent is to be deducted for such purposes, SACEM also finances, from this source, activities that are in the interest of foreign owners of rights. A possible justification of the use of a certain reasonable percentage of royalties for such purposes may be found in the fact that the equipment and the recording material on the basis of which the royalties are to be paid are not always used for the reproduction of works protected by copyright and/or objects of related rights. This percentage of the royalties may be regarded as an adjustment of the system to take into account these irrelevant uses of the equipment and recording material (and, in fact, it may be used as a source of compensation to users – such as educational and cultural institutions – in the case of which the said

irrelevant uses are more typical). It is important to stress, however, that the amount of the remuneration that remains after the deduction of a limited percentage for such purposes should be sufficient, at least, to reduce, to a reasonable level the prejudice that the legitimate interests of owners of rights suffer from widespread private copying.



Chapter 5

**COLLECTIVE MANAGEMENT AND OTHER JOINT
SYSTEMS OF EXERCISING RIGHTS IN THE FACE OF
CHALLENGES POSED BY NEW TECHNOLOGICAL
AND ECONOMIC DEVELOPMENTS**

Introductory Remarks

254. The conditions of creation, production and exploitation of literary and artistic works and other cultural and information productions – and with this, also the requirements for the protection, exercise and enforcement of copyright and related rights – have gone through spectacular changes during the last decade. This is due partly to the advent of new technologies, first of all to the new advanced applications of digital technology and telecommunication systems, with their merger in the global information network, the Internet, and partly to the increasing concentration, regionalization and globalization trends in economy and trade.

255. This Chapter first discusses what kind of new possibilities emerge for individual exercise of copyright and related rights and how this may concern the choice between such exercise and collective management or other systems of joint exercise of rights; second, it analyzes how new technologies may help to solve the problems created by the same technologies as regards the protection, exercise and enforcement of copyright and related rights; third, it describes new management structures in the face of the phenomena of multimedia productions and on-line distribution of multi-genres contents; fourth, it reviews what kinds of new licensing techniques are applied to match the global nature of exploitation of works through the Internet; and, fifth, outlines the impact of concentration, regionalization and globalization trends on the exercise of copyright and related rights.

The Impact of New Possibilities of Individual Exercise of Rights on Joint Management

256. What will be more appropriate and more typical in the digital, networked environment: individual exercise, collective management or some other forms of joint exercise of rights? This question was the focus of attention at WIPO's Seville International Forum mentioned in Chapter 3 above. By the time the Forum took place – May 1997 – the WIPO "Internet treaties" had been adopted and the process of signature was on (until the December 31, 1997, deadline, at the expiration of which there were no less than 51 signatures for the WIPO Copyright Treaty (WCT) and no less than 50 signatures for the WIPO Performances and Phonograms Treaty (WPPT)).

257. The treaties offer adequate responses to all the forecasts predicting that copyright and related rights would not be applicable in the digital networked environment. They reflect the recognition that certain changes were needed in international norms, but that no fundamental transformation of the copyright and related rights system was justified. The level of protection of the treaties practically corresponds to that of the Berne and Rome Conventions *plus* (at least as regards the substantive norms on rights and exceptions to and limitations thereon) to that of the TRIPS Agreement *plus* to what has been added on the basis of the so-called "digital agenda" of the preparatory work and the 1996 Diplomatic Conference. This last *plus* level consisted of (i) the clarification of how the existing international norms should be applied in the digital environment (in particular, those on the right of reproduction and on exceptions and limitations); (ii) some adaptation of the existing norms to the new conditions (in particular, in extending the right of (first) distribution and the right of communication to the public to all categories of works, along with the recognition of appropriate rights for interactive "making available" of works, recorded performances and phonograms); and (iii) the introduction of some truly new obligations (in particular, concerning the protection of technological measures and rights management information).

258. At the Seville Forum, after the failure of the pessimistic forecasts about the applicability of copyright and related rights in the new environment, the representatives of the international copyright community were faced with a

new wave of sensational prophesies which were quite pessimistic from the viewpoint of the chances for survival of collective management and, in general, joint exercise of rights. Some experts had predicted that, since – with the assistance of technological protection measures (such as encryption systems) and electronic rights management information (such as digital identifiers) – individual exercise of rights would become possible through the Internet also in respect of rights (such as the right of communication to the public) that had been exercised traditionally on a collective basis, joint management would lose its importance and might disappear.

259. As a result of written and oral contributions of outstanding experts in this field, the International Forum identified certain challenges to joint management, raised by the digital, networked environment and outlined those areas in which adequate responses seemed necessary. The most important findings of the Seville Forum and the 1998 and 1999 sessions of the WIPO Advisory Committee on Management of Copyright and Related Rights (established following the recommendations of the Forum) may be summed up as follows.

260. First, the role of joint management will not necessarily decrease – rather the opposite, it will probably increase – in the digital world. There are some new fields where joint management may, and certainly will, have an important role, such as the licensing of “multimedia productions” (which quite frequently are created from a great number of pre-existing works and contributions of different categories) and the authorization of use of at least certain categories of protected material on the Internet.

261. Second, owners of rights have greater freedom to choose between individual exercise and joint management of rights, since they may exercise their rights directly on the Internet (through using technological measures and electronic rights management information systems). This does not mean, however, that it is necessarily in the interest of owners of rights to make use of this opportunity. The reasons for which, in certain fields – such as the exercise of “performing rights” – collective management is the best solution in the analog world also exist in the digital environment. It is, in principle, possible for some exceptionally well-known and popular authors and performers to choose an individual way. Experience shows, however, that, at

least in the case of traditional forms of collective management, this kind of “dissidence” and repudiation of the principle of solidarity may backfire and may be counter-productive not only for the community of creators but, in the long run, also for such “individualists.”

262. Third, new forms of exercise of rights are emerging which combine individual and joint elements of exercising rights, such as copyright clearance centers (for example, in the way some reprographic rights organizations have been established) which serve as a centralized source of licensing but apply different tariffs and licensing conditions individually fixed by owners of rights.

263. Fourth, digital technology and the Internet both pose serious challenges and offer new and promising opportunities for traditional collective management organizations (such as “performing rights” societies with collectivized licensing conditions, tariff systems and distribution rules). On the one hand, the new possibilities for individual licensing and the above-mentioned new alternative options of joint exercise of rights, in principle, may undermine the monopolistic position of such organizations also in those fields where their system used to be the only feasible option. On the other hand, on the basis of the technology that may create such problems for them, they may make their operation more efficient and more attractive both for owners of rights and for users. As a result of this, traditional collective management organizations may, and hopefully will, become strengthened and more efficient in this period of development.

264. Fifth, due to the phenomenon of “multimedia” – both in the form of off-line productions and in the way the different categories of works and objects of related rights are used together in the global digital network – there is a growing need to establish coalitions of various joint management organizations to offer a joint source of authorization (“one-stop shops”) or participate in an even more general co-operation which may extend also to individual owners of rights joining the coalition either just through including their licensing information or through also authorizing the coalition as an agent to issue authorizations on their behalf in harmony with their individual licensing conditions and tariffs. This does not mean that in such a coalition all the various licensing sources merge together. Traditional authors’ societies may, and certainly will, preserve their autonomy.

Technological Solutions to Solve the Problems Posed by the New Technologies; Electronic Rights Management Systems

265. It was recognized quite early during the preparatory work of the two WIPO "Internet treaties" – the WCT and the WPPT – that it is not sufficient to provide for appropriate rights in respect of the use of works and objects of related rights in the interactive digital network, the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and electronic rights management information. There was agreement that the application of such measures and information should be left to the interested rights owners, but there was also agreement that appropriate legal protection is needed for such measures and information when applied.

266. Articles 11 and 12 of the WCT oblige Contracting Parties to grant such legal protection. Under Article 11, Contracting Parties must provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

267. Article 12(1) of the WCT obliges Contracting Parties to "provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." Article 12(2) defines "rights management information" as meaning "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

268. An agreed statement was adopted by the Diplomatic Conference concerning Article 12 which consists of two parts. The first part reads as follows: "It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration." The second part confirms the principle of formality-free protection: "It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty."

269. Articles 18 and 19 of the WPPT contain practically the same provisions as Articles 11 and 12 of the WCT, and an agreed statement concerning Article 19 of the WPPT foresees the *mutatis mutandis* application of the above-quoted agreed statement also for that Article.

270. These provisions are of a sufficiently general nature, but contain the necessary elements on the basis of which appropriate provisions may be adopted at the national level. It follows from the general nature of these provisions that national legislators may have to go into more detail in order to offer efficient protection for technological measures and rights management information where technological developments so require and where such protection, taking into account all the legitimate interests, is justified.

271. In respect of technological measures of protection, it should be noted that it is impossible to provide "adequate legal protection and effective legal remedies" against the circumvention of technological measures of protection if only the act of circumvention is prohibited. The prohibition should extend to the importation, manufacture and distribution of illicit circumvention tools, as well as to services offered for unauthorized circumvention. Furthermore, both technologies that control access to protected material and technologies that control certain specific restricted acts (such as reproduction) should be protected, and not only complete devices but also their specific circumventing components and functions should also be covered. Finally, the similarity between traditional piracy and commercial importation, manufacture and distribution of circumvention tools is conspicuous; the latter, in fact, is a new form of piracy; therefore, meaningful sanctions, including criminal penalties must be available against it.

272. The application of technological measures, combined with appropriate rights management information, offers the possibility and guarantee for efficient exercise of rights in the digital networked environment. This makes it possible for joint management organizations not only to authorize (or prohibit) and monitor the use of the works and/or objects of related rights in their repertoire but also to offer a more precise and quicker distribution of the remuneration to their members. It also renders it possible to establish and operate various new systems of joint exercise of copyright and related rights.

273. What emerges as a result of the application of technological measures along with electronic rights management information is what is referred to, in general, as electronic rights management systems (ECMS). In its truly developed form, an ECMS includes complex electronic rights databases and advanced licensing engines. This, in principle, makes automated licensing and monitoring of uses possible, along with automated collection and distribution of remuneration; and, all this not only in a much quicker way, but also much more precisely than any existing traditional management system. The development of licensing engines is a complex process, in which organizations operating collective management or other systems of joint exercise of rights may, and sometimes do, participate. This is, however, usually the task of software developers. At the same time, in the establishment of appropriate identification systems combined with reliable databases – which are the basic elements of electronic rights management information – joint management organizations have to play a much more decisive role. Various organizations work on such systems; in the following description, the example of the Common Information System (CIS) of CISAC is used.

274. The CIS project is CISAC's response to the challenges of digital technology and the Internet. The objective of the project has been determined in the following way: "To administer rights across digital superhighways, societies must share information about musical works and other types of creations by implementing systems to enable their unique identification and to establish the current owner of the rights. Societies must also ensure that the solutions for the management of information and the controls in place to protect rights are not so restrictive as to discourage potential users from obtaining permission to exploit creations. CIS is a plan for standardizing and communicating data in an efficient and integrated way. It is designed to

replace the many duplicate sets of data managed independently by royalty collection societies and publishers or producers or broadcasters with their individual and unrelated numbering schemes. To become efficient and integrated, all parties need to be able to identify the same work by a single unique identification number no matter where in the digital world it is exploited”.

275. At the point of launching this project, CISAC was faced with two basic problems: first, the lack of sufficient standardization and, second, the lack of appropriate infrastructure for sharing rights management information. To address these and other problems, CISAC, in 1994, set up a Steering Committee and, under its direction, various working groups. In 1995, the chief administrative organ of CISAC, the Executive Bureau, approved a five-year development plan for the CIS system.

276. The methodology of the CIS project was outlined as follows:

- first, the analysis of the three principle data entities to which the plan related should take place; namely works (musical works, audiovisual works, literary works, works of visual arts, etc); interested parties (people and companies who create and/or own rights in works); ownership (agreements determining actual owners of rights);
- second, in order to provide a unique identification number for each of the data, appropriate numbering systems should be worked out;
- third, data standards should be introduced to codify any variable elements within each of the data entities and to define a data structure;
- fourth, a data exchange infrastructure should be designed and constructed; and
- fifth, the applications to provide the various tools and data flows should be developed.

277. On the basis of the five-year development plan, CIS made spectacular progress, so much so that the issues related to it were at the top of the agenda of the CISAC congress held in Santiago de Chile in 2000. It seems that CIS became the source of a spectacular rejuvenating impact on CISAC and acted as a catalyst to further strengthen cooperation between member societies giving a more important role to the central governing bodies and

the secretariat of the Confederation and increasing the binding effect of certain jointly adopted decisions. As part of these changes, the congress adopted amendments to the CISAC Statutes to introduce obligatory rules concerning CIS. The declarations made by key officials of the organization at the congress duly reflected the importance of CIS. (Eduardo Bautista, the President of the Executive Bureau said: "the main internal challenge is to develop CIS-based technological literacy that will enable us to achieve the integration of the individual societies in a system of electronic exchange of documentation (EDI)". Brett Cottle, the Vice President of the Bureau, stated that "the priority issue for CISAC over the next two years is the successful implementation...of...the CIS project". John Hutchinson, the Chief Executive Officer of the MCPS-PRS Alliance concurred: "The single most important decision in CISAC in recent years was the change in the CISAC Statutes to enable the organization to adopt binding rules in connection with CIS. This will enable us to bring the world of collecting societies into the 21st century". Thus, it was not a surprise that Eric Baptiste, Secretary General of CISAC, under whose leadership the General Secretariat (along with the CIS Supervisory Board) is to play a key role in managing CIS spoke about CIS deployment as a "critical mission" for CISAC and its societies).

278. In April 2001, CISAC organized a CIS Information Day in Nice, France, to which the representatives of CISAC's partners, users and the general public were invited. The reports presented really showed that CIS was heading towards its full operational phase, rendering it possible for CISAC and its members societies to become truly efficient intermediaries in the digital networked environment. This was true in respect of both basic pillars of the CIS: a global network of databases and standard identifiers (of works and interested parties). At that time, the Works Information Database (WID) contained about 1,250,000, and the parallel Audiovisual Index (AV Index) no less than 1,400,000 entries. The International Organization for Standardization (ISO) had adopted the International Standard Musical Works Code (ISWC) as a worldwide identifier of musical works (a dumb number with access to information on the titles, authors and composers of musical works). Some other identification standards (such as ISAN (International Standard Audiovisual Number), a joint project of CISAC with AGICOA, FIAPF and ISTC (International Standard for Textual Works)) were close to completion. Progress had been made also in the establishment of a major CIS sub-system:

the Interested Parties Information (IPI) which is to replace the present Composers, Authors and Editors (CAE) file system.

279. Using the momentum generated by the CIS project at the Santiago de Chile Congress, five big societies – SACEM (France), GEMA (Germany), SGAE (Spain), SIAE (Italy) and BMI (United States of America) – established a “Fast Track” alliance, a system in which the existing computing resources and databases of the five societies are connected in a decentralized but harmonized structure, guaranteeing that, along with pursuing common goals, the societies may still maintain their independence and special features corresponding to the legal and cultural traditions of their respective countries. There are three core Fast Track projects:

- establishment of a global documentation and distribution network to be constructed from the databases of the partner societies and the already existing centralized or regional sources, offering a wide-ranging facility for electronic exchange of information for royalty distribution;
- development of an on-line work registration portal;
- working out an on-line licensing system.

The statutes of Fast Track foresee the accession of other societies, and contain rules facilitating such enlargement. In fact, Frances Preston, President of BMI, one of the founders of the alliance stated that “all of the Fast Track partners hope that the ‘spirit’ of the Fast Track will spread throughout CISAC”.

280. The Fast Track project goes beyond the establishment of joint databases (although in a decentralized structure) and appropriate electronic identifiers and, by including also the element of on-line licensing, it foresees a complete electronic rights management system.

281. Other joint programs of authors’ societies have also been launched for the purpose of the development of electronic systems for exchange of information and joint databases (such as LATINAUTOR or MIS@ASIA). These are briefly described below in the subchapter on concentration, regionalization and globalization trends.

282. In addition to those mentioned above, there are also other identification number standards recognized by ISO, such as the International Standard Recording Code (ISRC), developed and managed by IFPI, identifying musical recordings; or several standards of the publishing industry, such as the International Standard Book Number (ISBN; the oldest and best known such identifier), the International Standard Serial Number (ISSN); and the newer ones, the Publisher Item Identifier (PII); the Serial Item and Contribution Identifier (SICI) and Book Item and Component Identifier (BICI; developed to identify any part of a publication).

283. The lack of inter-operation between the parallel and sometimes competing identifiers might emerge as an obstacle to the development of global electronic rights management systems. Computer and standardization experts have tried to work out some solutions to this problem, and, for the time being, the Digital Object Identifier (DOI) system seems to be the best known and most promising one.

284. The DOI project was initiated by the Association of American Publishers (AAP) based on the Handle System of the Corporation for National Research Initiatives, and it was launched at the 1997 Frankfurt Book Fair. An International DOI Foundation (www.doi.org) has been established which, as a non-profit organization, manages development, policy and licensing of DOI to registration agencies and technology providers, and also advises on usage and development of related services and technologies.

285. The DOI system takes into account two important trends: first, the increasing media convergence which necessitates the inter-operation, and sometimes the combination, of works of different genres and objects of related rights; and second, the ever more dynamic forms of exploitation with changing ownership of rights, complex systems of licenses and sub-licenses, and the multiple ways of distributing and using protected material. The DOI system provides a persistent identifier for any digital object (which may be an entire work or object of related rights, but may also be only a part of it with any possible level of granularity). This allows the identification of the digital object directly, irrespective of its location, in contrast with the well-known URL (Universal Resource Locator) system used to designate a location on the Internet.

286. In fact, a DOI is not just one more new identifier like the ones mentioned above, but allows those to create a new neutral identifier guaranteeing interoperation between them and facilitating the operation of electronic rights management systems. This is possible on the basis of the DOI system since the digital object identifiers (DOIs) are linked to a central directory and through it to databases, and thus connect users to the appropriate sources of ownership and licensing information. A DOI is composed of two parts separated by a slash. The part before the slash is the prefix, designated and administered by the authority that creates and manages DOIs assigned by a DOI registration agency, currently the International DOI Foundation itself. The second part after the slash, the suffix, identifies a work, a recording, or a part thereof (in fact, any kind of digital object). The users of the system, for the time being mainly publishers (but the circle of users may be widened without any limits), are responsible for assigning their own numbers, which may be in any format and linked to any kind of identification standards and databases.

New Management Structures in the Face of the Phenomena of Multimedia Productions and On-Line Distribution of Multi-Genre Contents

287. One of the challenges posed by digital technology to the protection and exercise of copyright and related rights is the convergence of various categories of works and objects of related rights in “multimedia productions” and in on-line systems made available through digital networks. The need for collective management or some other joint system for exercising rights in this field is obvious. For the creation of such productions, a great number of different works, objects of related rights – literary works, sound and video recordings, photographs, graphic works, etc, – and sometimes mere extracts therefrom are needed. It is a great challenge for both developers of multimedia productions and services and owners of rights to clear rights as simply and efficiently as possible.

288. In response to these converging trends, new organizational structures have been established in the form of coalitions of existing organizations, and even more complex new models of cooperation. One of the first coalition organizations established for this purpose is SESAM in France, while, for the

time being, one of the best known and most promising complex models is outlined in the VERDI (“Very Extensive Rights Data Information”) project. These are described briefly below.

289. SESAM was established in 1995-96 as a coalition – or, in other words, as a “second-level” – society to facilitate the management of rights in the repertoire of various French societies in respect of the authorization of multimedia productions and uses. Originally, it was based on the existing system of SDRM (the French mechanical rights society) which does not have a separate repertoire of its own but, as a kind of coalition or second-level organization, has traditionally managed the rights of reproduction (“mechanical rights”) concerning the repertoire of SACEM and SACD (the French societies administering musical “performing rights” and rights in dramatic works, respectively) and recently has also taken over the management of such rights in the repertoire of SCAM (the French society of multimedia authors). When SESAM was founded on this basis, ADAGP (the French society of authors of works of art) joined it soon after. The organization is open for accession also by others.

290. The Statutes of SESAM define a “multimedia production” as follows:

“A multimedia production (*‘programme’*), under the Statutes of the Society, means any fixation or production which, although in itself not constituting a computer program, includes, combines and activates among each other, due to a software making interactive use possible, data that constitute works by virtue of Article L. 112-J of the Code of Intellectual Property, provided that those data relate to different genres, such as: music or sounds, texts, moving or fixed images, irrespective of the support or the means of transmission (off line or on line, presently known or unknown).

“Broadcasting (*‘radiodiffusion ou télédiffusion’*) of works, even if the communication takes place on demand, does not constitute exploitation of the multimedia production (*‘programme’*) where these works or the conditions of utilization do not correspond to the characteristics defined in the preceding paragraph”.

291. SESAM is an example of a “one-stop shop” (“*guichet unique*”) system, where various societies create a single centralized source of authorization for multimedia producers and so-called on-line content providers. SESAM uses the existing databases of its member societies for this purpose; applies a tariff system adapted to the nature of the exploitations concerned (and in order to establish such systems, it is ready to negotiate with the organizations representing the relevant groups of users); possesses appropriate means for collecting and distributing remuneration quickly and at a low cost; and also has the capacity of monitoring exploitation of works and fighting piracy.

292. Similar “one-stop-shop” organizations have also been set up in other countries, such as CMMV in Germany or MCCI in Ireland. The structure and activities of CMMV, founded in 1996, differ in certain respects from those of SESAM. It was established by nine collecting societies representing authors and related rights owners (GEMA, GVL, VG WORT, GÜFA, GWFF, VG BILD-KUNST, VFF, VGF, AGICOA). Under the CMMV partnership agreement, the objective is to facilitate negotiations between multimedia producers and users, on the one hand, and rights holders, on the other hand. As a first step, CMMV functions as an information broker forwarding the multimedia producer’s requests to the respective member collecting society and providing information concerning the protected material back to the multimedia producer. As a second step, CMMV may – if so desired by rights holders – serve as a licensing center for rights holders and collecting societies. MCCI regroups no less than 19 Irish rights holder organizations representing both authors, other copyright owners and related rights owners.

293. In some other countries, existing collective management organizations with a sufficiently broad repertoire (such as SIAE in Italy, SGAE in Spain (with “*Oficina Multimedia*” (OM) established within its framework) or SPA in Portugal) have undertaken to carry out the relevant tasks in this field, while, in still other countries, one of the existing organizations has been entrusted by other national joint management bodies to work as a kind of “one-stop-shop” (such as KOPIOSTO in Finland which represents no less than 44 member organizations of authors and of related rights owners). It should be noted that organizations representing owners of related rights, for example IFPI and its national groups, have also developed their own similar licensing systems.

294. The VERDI project, with the support of the European Commission, has been launched by six of the above-mentioned European organizations: KOPIOSTO, SESAM, CMMV, MCCI, SIAE and SGAE. The project coordinator is KOPIOSTO, with Tarja Koskinen-Olsson, the Chief Executive of this Finnish organization, as project leader.

295. At the very beginning of the project, three basic roles of multimedia rights organizations were identified:

- first, providing information on the sources from which users may obtain licenses;
- second, functioning as an intermediary or rights clearance center where licenses are issued by the organizations participating in the system; and
- third, issuing licenses on behalf of participating rights holders or their organizations.

296. At the beginning of the implementation of the VERDI project, it was agreed that a balanced approach to different licensing options was necessary. Where rights holders wish to grant individual licenses to multimedia product developers, the multimedia rights organization should only provide contact information. It has been taken into account that licensing through multimedia rights clearance centers is a new option in certain countries with a combination of individual licensing and joint management. In such a system, rights owners are, in some cases, able to set prices and other conditions for the use of their works, individually. Collective management organizations may form part of the system foreseen under the project, and they may operate normally with their own uniform tariffs and conditions.

297. Such rights clearance centers may also cooperate with groups of content providers, such as publishers, producers or picture agencies with the objective of establishing direct content delivery services. In such cases, not only are the necessary authorizations granted, but the protected material itself may also be delivered in electronic digitized form.

298. The objective of the VERDI project is to create a system built on the principle of voluntary participation. It takes into account the fact that there are different legal situations, different interests and different requirements

regarding multimedia rights clearing, and that, in harmony with this, it is essential to establish a flexible system with different options for rights management and licensing. Rights owners may decide freely whether they only wish to use the VERDI system as an information broker and maintain the right to grant licenses individually. They may also fix the fees and conditions for each piece of protected material separately and may engage the VERDI system to function as a rights clearance center accordingly. Furthermore, if it receives an appropriate mandate for this from joint management organizations, the VERDI system may also license multimedia producers on the basis of uniform tariffs and conditions established by such organizations.

299. In harmony with these considerations, the VERDI system follows a three-level approach: information, licensing and content delivery.

300. At the first level, VERDI is to function as a pure information broker. The multimedia producer contacts the VERDI server available online via the Internet with his request concerning the protected material he would like to use. The server transmits the request to the relevant joint management organization or an individual rights owner who may participate in the system. The reply of the organization or individual rights owner is then forwarded to the multimedia producer, again via the VERDI system. After this, it is up to the multimedia producer to contact rights owners or their representatives to obtain a license.

301. On the second level, the VERDI system may offer the possibility to obtain online licenses directly, if the rights owners or their representatives are ready to engage the system to do so.

302. The third level of the VERDI system is the delivery of digitally stored content to multimedia producers. With some databases of pre-cleared content licensed for test purposes within the VERDI project, this element has already been integrated into the pilot system.

303. The development of the various elements of the VERDI pilot system – which had to take into account a number of requirements, such as the need for adaptation to the multi-language environment, flexibility and system scalability, extensibility, transaction safety, communication privacy, user

friendliness and cost efficiency – has already reached a stage where work packages are sufficiently advanced to be able to operate in the global network and to serve in the future as a basis for multimedia rights clearing systems.

Licensing Exploitation of Copyright and Related Rights in the Global Information Network

304. In the past, joint management organizations normally worked as national organizations and were able to grant licenses for the use of the repertoires represented by them (national and international) in their own territories (with some well-known exceptions, such as BIEM in the first period of its operation or NCB, the joint mechanical rights organization of the Nordic countries).

305. In this respect, the first dramatic changes were brought about by direct broadcasting satellites, many of which started transmitting programs to the territory of several countries. Irrespective of the debates about some opposing theories (“emission theory”, “communication theory”, etc.), it was inevitable to recognize that, in the case of such broadcasting, communication to the public (broadcasting being communication to the public by wireless means) only starts in the country of emission, and it is only completed in the countries of the “footprint” of the direct broadcasting satellite. It is in the latter countries where the public may be found to which the communication is made (the program is made available for reception, actual reception not being a condition for the completion of the act of broadcasting), where the actual impact on the possibility of further exploitation of the works and objects of related rights concerned may be felt, and where the interests of certain rights owners – in particular, in those cases where the rights are territorially divided and the owner of rights in a country of footprint is not the same as in the country of emission – may truly be prejudiced. CISAC took this into account in the so-called Sydney principles, which are included in the “Addendum [to the Model Contract of Reciprocal Representation between Public Performance Rights Societies of CISAC] concerning direct broadcasting satellites (DBS)” adopted in Sydney in 1987 at a session of the CISAC Administrative Council.

306. Point 1 of the Sydney Addendum states that “[t]he responsibility for granting the necessary licenses to broadcast programmes is always that of the Society of the originating country.” Point 2 provides that, in relation to

the CISAC Model Contract, a distinction should be made between two situations:

- first, the broadcasts transmitted by direct broadcasting satellite only lead to marginal overspill in relation to the territory of the originating country: in this case, and by analogy with the situation which currently prevails in respect of certain terrestrial broadcasts, the Model Contract may apply without any particular problem;
- second, the broadcasts transmitted by direct broadcasting satellites are communicated to a footprint covering several countries: when the Model Contract is applied in such a situation, it needs to be supplemented by an addendum to be chosen from three “formulae”.

307. The three alternative formulae included in the Sydney Addendum are:

- first formula (the “Contract’s direct application” formula): “With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territory/ies in which a contracting Society operates”.
- second formula (the “prior agreement” formula): “With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territories in which a contracting Society operates, *subject to having acquired the other contracting Society’s agreement beforehand* as to the conditions under which the authorizations required for such transmissions may be delivered, insofar as the territories in which it operates are situated within the satellite’s footprint”.
- third formula (the “prior consultation” formula): “With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territories in which a contracting Society operates, *subject to having consulted the*

other contracting Society beforehand as to the conditions under which the authorizations required for such transmissions may be delivered, insofar as the territories in which it operates are situated within the satellite's footprint".

308. Point 3 of the Sydney Addendum also provides that, in the case of the second and third formulae, the prior agreement or prior consultation should necessarily concern the following points: (i) tariffs ("it is desirable to come to a harmonization of tariffs so as to avoid outrageous imbalances; such harmonization should be established at a level which will secure, in any event, a just remuneration for authors"); (ii) sub-right owners (such as sub-publishers; "the conditions for a possible participation of the sub-right owners should be determined pursuant to terms to be settled by bilateral agreement between the Societies concerned"); (iii) deduction for social and/or cultural purposes ("the conditions under which this deduction could be effected and, in conformity with the confederal Rule, within the limit of an effective maximum of 10% applied to the net distributable income, should also be determined according to terms to be settled by bilateral agreement between the Societies concerned").

309. The Sydney Addendum reflects two – not easily reconcilable, but equally important – objectives of performing rights societies: first, offering a reasonable and workable licensing system to users; second, duly taking into account the interests of, and the rights represented by, all the interested societies. When the societies found themselves faced with the phenomenon of the Internet, it was clear that, if they wanted to achieve the same objectives – and they certainly did, since this was inevitable from the viewpoint of the very *raison d'être* of collective management – they needed an even more complex contractual system, since no less than global world-wide licenses were needed (in the sense that the works transmitted through the Internet are made available to all those who are connected to the global network all over the world).

310. In a way, the Sydney Addendum was used as a model by those societies which proposed that the society of the country where the service provider is located, and from where the transmission emanates should be authorized to grant global licenses. Other societies, however, wanted to take into account

some other criteria which they regarded as better reflecting the actual place and impact of exploitation of works through the Internet. The possibility of easy dislocation of uses was also emphasized by the latter societies. Due to the differing positions of the member societies of CISAC, it has not been possible to reach a general agreement about a Sydney-type amendment to the Model Contract. Since, however, it became evident that the absence of a sufficiently simple licensing system for Internet transmissions might lead to the proliferation of unauthorized uses and to growing disrespect for copyright, five societies with big repertoires have decided to work out and apply a new licensing model.

311. Since the new licensing model (legally, an “amendment” to the existing contracts based on the CISAC Model Contract) was adopted at the 2000 Santiago de Chile Congress of CISAC by the five societies – BMI (United States of America), BUMA (Netherlands), GEMA (Germany), PRS (United Kingdom) and SACEM (France) – the agreements concluded according to this model are called “Santiago agreements”. Due to the complexity of the practical and legal problems involved, these agreements are regarded as being of an experimental nature and the first trial period thereof was to expire at the end of 2001 (with the possibility, however, of a renewal).

312. The model for a “Santiago agreement”, first of all contains a number of definitions:

- content provider: “the party responsible for deciding or approving the content of the database or other collection of works (including musical works) which is being made available (including by way of public performance) and being responsible for the business of making the works available (including by way of public performance) through the Internet or similar networks;”
- service provider: “the party providing the technical assistance for making the content, including musical works, accessible through the Internet or similar networks;”
- online exploitation: “the whole or any relevant part of the process by which protected musical works with or without any associated data such as text and/or visual images are exploited in the following manner whether these occur through downloading or streaming:

"a) the recordings or reproductions are stored on a computer storage medium by one or more users, and

"b) the recordings or reproductions are made available (including by way of public performance) by a user to consumers by means of telecommunication networks or cable networks (with or without a link through satellite or hertzian wave broadcasts or some other form of data-transmission), and/or

"c) a copy of the recording or reproduction is delivered to the consumer by such means after the consumer has accessed the service operated by a user which makes available copies of the stored recording or reproduction, and, where applicable,

"d) the consumer is able to determine which recordings and in what order they are delivered ('pull') or the user provides an individual and tailored service to each consumer which is determined by the consumers past usage or other profile ('push'), and, where applicable,

"e) a new copy of the delivered copy of the recording may be made in the consumer's receiving equipment";

- webcasting/streaming: "either... original webcasting or streaming services or non-simultaneous (re-broadcasting) online diffusion of the traditional terrestrial/hertzian, satellite and cable radio and television programs save for services where specific content is directed to a specific person on their demand";
- music on demand online:
 - "a) downloading (with or without the facility of listening during the downloading) of musical works on demand against payment,
 - "b) downloading (with or without the facility of listening during the downloading) of musical works on demand without payment,
 - "c) listening of musical works on demand without downloading against payment,
 - "d) listening of musical works on demand without downloading and without payment;"
- video on demand online:
 - "a) downloading (with or without the facility of watching during the downloading) of videos on demand (e.g. any motion pictures, TV programs, films) including musical works against payment,
 - "b) downloading (with or without the facility of watching during the downloading) of videos on demand (e.g. any motion pictures, TV programs, films) including musical works without payment,

"c) watching without downloading of videos on demand (e.g. any motion pictures, TV programs, films) including musical works against payment,

"d) watching without downloading of videos on demand (e.g. any motion pictures, TV programs, films) including musical works without payment".

- website:

"from a technical point of view, a destination on the World Wide Web with a Uniform Resource Locator (URL), which is comprised of related files, pages and hyperlinks;

"from a copyright point of view, the private, governmental or corporate presentation by any user of a content including musical works;"

- making available: "for the avoidance of doubt the words 'making available (including by way of public performance)' used in this Amendment shall not include public performance through the use in relation to public premises (e.g. restaurants, retail stores, etc.) of devices such as television or radio or any other contrivance or any similar form of public performance".

313. Since, according to the model agreement, all the acts defined above are regarded as being covered by "public performance rights", rather than copy-related rights (such as the right of reproduction and/or the right of distribution), it may be noted that, from these definitions, a broad concept of "performing rights" (and more particularly, that of one of such rights, the right of "communication to the public") emerges. Under this broad concept (which may be based on the text of Article 8 of the WCT, since it extends the concept of "communication to the public" to interactive, online making available of works), downloading (for example, in compressed format) without the possibility of listening to recordings of performances of musical works, or of watching audiovisual works, is also regarded as being covered by "performing rights". Views differ concerning the legal characterization of such kinds of downloading; and those owners of copyright (such as publishers) which hold rights of reproduction and distribution tend to favor the recognition and application of these rights (which, in certain countries, such as in the United States of America, are recognized in the case of such kinds of downloading; something that is allowed under the WCT as stated and recognized in the Records of the 1996 Diplomatic Conference). In order that

the Santiago agreements – after their experimental period – may continue to be applicable in the future without any major conflicts, *inter alia*, there seems to be a need for settling somehow the question of possible parallel or alternative application of “performing rights” (in particular, the right of communication to the public) and copy-related rights in respect of the above-mentioned kinds of downloading.

314. The Santiago Agreement identifies the society that is authorized to grant a global license in the following way:

- (i) if (a) the content provider uses the relevant country-code top level domain name (for example, “.fr” if the contracting society is SACEM, “.de” if the contracting society is GEMA, etc.), or, in the case of the United States of America the “.com” or “.net” generic top level domain name, and, (b) the primary language used at the site of the content provider is the primary language of the country indicated by the national identifier, then, the license shall be granted by the society operating in that country;
- (ii) in all other cases, the license shall be granted to the content provider by the society of the country among those mentioned in item (i) above where the content provider is incorporated;
- (iii) notwithstanding anything to the contrary set forth in items (i) and (ii) above, if the economic residence of the content provider is in a country among those mentioned in item (i) above and is different from the country set forth in items (i) or (ii) above, the society of that country may license the content provider (the economic residence of the content provider is deemed to be in a country if any two out of the following criteria are in one and the same country: (a) the country in which the main office of the content provider is situated; (b) the country where the content provider employs the majority of its employees; (c) the country where the audit of the annual accounts of the content provider is regulated);
- (iv) however, if the content provider is situated in a country without proper copyright legislation and/or without proper procedures for the administration of copyright in place, the parties must consult and agree the most appropriate actions to take in the relevant circumstances, including the grant of any appropriate license to any party involved in the process of online exploitation;

- (v) in the case of private and personal websites, the license is to be granted by the society operating in the country where the access and hosting service provider has its place of incorporation and may be granted either to the content provider directly or (to the extent permitted by law) to the access and hosting service provider for their benefit.

315. The license that may be granted on the basis of a Santiago agreement is for online exploitation in the entire world. This, however, is only possible if there are appropriate arrangements and guarantees to take into account the legitimate interests of partner societies. It seems that the model worked out corresponds to these requirements.

316. The Santiago model agreement provides that each party which has been granted a license for an online exploitation is required by the licensing society to provide the following details with respect to the musical works which are contained in the respective online exploitations: the titles of the works and the names of the owners of rights concerned, as well as any electronic identifier of the works (for example, ISWC, ISAN), if available; furthermore, where relevant and where available, the gross price which has been charged to the end user, and, in relation to on-demand content transmissions, the country where the end-user has received such transmissions. Also, each society must, when accounting to the other society, supply a list of the names, addresses and website domain names of each party to whom it has granted licenses since the previous accounting period.

317. Of course, these kinds of obligations to provide information are only valuable and meaningful if they are coupled with appropriate distribution rules. Such rules are included in the model contract. With respect to webcasting/streaming and on-demand content transmissions without payment, royalties are to be distributed to the same rights owners and in the same manner as would be the case for terrestrial radio or television broadcasting in the territory of the licensing society, irrespective of the location of the ultimate listener/viewer.

318. With respect to royalties for on-demand transmissions against payment, the following rules apply between two societies (in the example, society A and society B, from the viewpoint of society A):

- a) if the demand was from an end user within the territory of society A, then society A's distribution to society B is to be made for the same rights owners as would be the case in relation to terrestrial radio or television broadcasting in society A's territory;
- b) if the demand was from an end user within the territory of society B, then
 - (i) with respect to the use of society A's repertoire, society A must pay the royalties due to society A's authors and composers directly to these authors and composers, and must pay the royalties due to the publishers to society B for the benefit of sub-publishers, to the extent that these sub-publishers represent the rights in the respective works in society A's repertoire;
 - (ii) with respect to the use of society B's repertoire, society A must pay the royalties due to society B's authors, composers and publishers to society B;
- c) if the demand was from an end user in a country other than the territory of society A or society B ("the third country"), then
 - (i) with respect to the use of society B's repertoire, society A must pay the royalties payable to society B's authors and composers to society B and the royalties due to the publishers of society B to the society in "the third country" for the benefit of the sub-publishers in that country, to the extent that these sub-publishers represent the rights in the respective works in the society B repertoire;
 - (ii) with respect to the use of society A's repertoire, society A must pay the royalties payable to society A's authors and composers direct to them and the royalties due to the publishers of society A to the society in "the third country" for the benefit of the sub-publishers in that country, to the extent these sub-publishers represent the rights in the respective works in the society A repertoire.

319. Of course, the distribution rules are the same if, in the example of the preceding paragraph, the positions of society A and society B are reversed and the distributions rules are to be applied from the viewpoint of society B.

320. The Santiago model contract notes that, notwithstanding what is set out above, the parties accept that the present system may not yet allow the payment for the benefit of sub-publishers to be applied in practice, and states that the parties "will agree to pragmatic arrangements in the interim". It is also clarified that "in determining whether a sub-publisher represents the

relevant rights in a particular work or works which are another society's repertoire, the distributing society shall follow the directions of that other society, except where it has no such directions, and except where the sub-publishing agreement is clearly in contradiction with these directions" (it adds, however, that the application of this principle is also subject to the above-mentioned reservation concerning the payment of the benefit of sub-publishers).

321. In the model contract, it is declared that "[t]he parties will continue to examine the rules set out above with the object of trying to ensure that systems and procedures result in authors and composers and publishers/sub-publishers being paid their royalties in the most timely manner appropriate".

322. It goes without saying that the Santiago agreements – which, in the meantime have been concluded not only between the above-mentioned five societies since other societies have also decided to apply the same model – may only solve the issues of global licensing as regards the rights of copyright holders. The rights of related rights holders should also be taken into account.

323. From this viewpoint, it is interesting to note that, as far as "simulcasting" is concerned, phonogram producers have also worked out a global licensing system.

324. Producers of phonograms offer broadcasters, through their joint licensing bodies (IFPI national groups) global licenses to transmit phonograms over the Internet under a system of agreements announced in September 2001 by IFPI. Under this new system of reciprocal agreements, traditional broadcasters are able to transmit their terrestrial programs simultaneously on the Internet ("simulcasting") on the basis of a single license from record labels that is recognized internationally.

Concentration, Regionalization and Globalization Trends

325. Before describing how joint management organizations react to the concentration, regionalization and globalization trends in the field of creation and dissemination of cultural and information productions and how these organizations themselves tend to be concentrated, and integrated as part of

such trends, it seems necessary to refer to the fact that centralized, integrated management forms did and do exist for reasons other than the said trends.

326. NCB, the joint mechanical rights organization of the Nordic countries is a good example of this. NCB was formed as a joint sub-regional organization because it had been considered that the relatively smaller size of the repertoire of some of the Nordic countries simply would not allow the establishment of workable separate organizations in all of these countries. This is the reason for which NCB is not a merger of separate organizations but that it has been founded directly as a common system.

327. Recently, some new examples have emerged of joint systems where the setting up of common management structures for several relatively smaller countries of a region or sub-region seems to be the only viable possibility. WIPO is playing an important role in the establishment of these kinds of regional systems.

328. The best example of this kind of WIPO regional project is the creation of an integrated structure for countries in the Caribbean region. In June 1999, on the basis of a WIPO feasibility study, a broad agreement was reached on the desirability for such a regional approach. A business plan was then prepared by WIPO in which it was recommended that both national collective management organizations (where such organizations did not exist yet) and a joint regional center should be established. It was proposed that the regional center – called Caribbean Copyright Link (CCL) – should centralize documentation and royalty distribution for national authors' societies of the countries concerned, where necessary through the application of regional and international documentation standards; furthermore, that it should be authorized to conduct regional and international negotiations and to develop and implement regional policy with respect to legislation, rights management and market development for regional rights owners. The implementation of this project is progressing in a promising way.

329. Integration and concentration of economic and other activities have become a strengthening trend during the last decade. In general, the objective is eliminating certain parallel costs, rendering activities more efficient on the basis of joint resources, opening new possibilities for dynamic

development, and, of course, obtaining a stronger position in the given field of activities. Joint management organizations also seem to follow this trend. They do so since there are well-founded hopes that, through this, a higher share of the remuneration may be transferred to owners of rights, and – what is also important – more quickly and precisely. Such objectives seem to be the basis of some older national-level alliances, such as those of SACEM and SDRM in France and BUMA and STEMRA in the Netherlands, but recently new alliances have been formed in other countries, such as that of PRS and MCPS in the United Kingdom.

330. There are also regional forms integrating certain activities of joint management at different levels, such as LATINAUTOR and MIS@ASIA. The Montevideo-based LATINAUTOR (*Organización Iberoamericana de Derecho de Autor*) has been formed by collective management organizations in Latin America, Spain (SGAE) and Portugal (SPA). Its important task is the incorporation of the Ibero-American musical repertoire in a centralized database in harmony with (and part of) the CIS (Common Information System) of CISAC. LATINAUTOR is also ready to participate in the licensing of “mechanical rights” and “performing rights”. The Singapore-based MIS@ASIA also fits into the CIS system. A number of national societies in Asia participate in the program (but none from China and Japan for the time being). MIS@ASIA, when establishing and operating an appropriate database of the repertoire of the participating societies, also solves a difficult problem concerning the exercise and enforcement of rights of those musical works whose titles and texts are in scripts other than the Latin script. The MIS@ASIA system – *inter alia*, through Latin-script versions – makes these works identifiable throughout the world, including, of course, on the Internet.

331. The integration and centralization trends in the field of joint exercise of copyright and related rights is also necessary due to the fact that similar – and, in fact, even stronger – integration and centralization trends are taking place among content providers and the exploiters of these rights. The music industry – music publishers and producers of phonograms – has become part of half a dozen big media conglomerates which control about 85 percent of the international market. Furthermore, these big complex company-empires have also established two alliances in order to offer licenses for on-line use of music in as simple and workable a way as possible to the public,

which has been accustomed to absolute simplicity of obtaining and enjoying musical works through such music-swapping systems as Napster. Owners of rights whose works and objects of related rights are exploited by the member companies of these powerful media conglomerates obviously need their collective management organizations in order to achieve as favorable licensing conditions as possible (although collective organizations are, in general in a *de facto* or *de jure* monopoly position, in the face of such huge media groups, it would hardly be fitting to speak about their *dominant* position). However, the big media groups also need the cooperation of collective management organizations. Not only for the purpose of obtaining the necessary authorizations but at least as much for improving their public relations position. In the great majority of countries, the basis for legal-political justification and social acceptance of copyright is that it is necessary for the promotion of human creativity and for the recognition of creative activity. It seems that the "ideologues" of certain recent anti-copyright movements base their views on the less visible relationship between copyright protection and the enjoyment of copyright by individual human creators in cases where copyright is exercised by what are perceived as big and rich companies (they neglect, of course, the contractual relationship that these companies have with the said creators as a result of which creative people may get appropriate remuneration for their work). Harmonious and mutually advantageous cooperation with collective management organizations of creators certainly may strengthen the position of the big companies against the sometimes quite radical anti-copyright "ideologies".


332. It should be added that the independent publishers, producers and distributors who have not become part of the huge media groups, and the owners of rights whose works and objects of related rights are exploited by them, also need appropriate joint management systems. In their case, a situation exists which typically requires joint management of rights: there are a great number of parallel uses where, from the viewpoint of users, low transactions costs are very important, and where individual exercise of rights would hardly be possible.

333. There are certain side-effects of integration and concentration of copyright-related activities which deserve special attention. These side-effects follow from the fact that, due to integration, regionalization and globalization trends,

there are ever fewer – and, at the same time, ever bigger – companies engaged in the production and exploitation of works and objects of related rights. These companies tend to seek authorization in the countries where they have their headquarters or the centers of their relevant activities. The trend is that the joint management organizations of such countries grant licenses to these companies. This, however, changes the role of their partner organizations in the mere market countries (to which copies are exported or programs are transmitted).

334. Although they have become more accentuated with the use of the Internet as a channel for exploitation of works and objects of related rights, these trends were also present before, as a result of some concentration trends in the cultural industries. This was the case, for example, in the field of phonogram production. With the advent of CDs, the big phonogram producer companies started concentrating the manufacture of their phonograms in a few countries, and they distributed the necessary copies from there to the other market countries. This is called “central pressing”, and, in harmony with the centralization of the manufacture of copies, the producers request – and are given – “central licenses” (either by the society of the country where the actual manufacture of the copies takes place or by that of the country where the headquarters or the center of activities of the phonogram producer company may be found). All this has raised a number of complex questions in the relationship of the interested collective management organizations. What seems particularly important for the future of the management of “mechanical rights” in musical works is the status of the organizations of market countries and the owners of rights (such as sub-publishers) who own territorial rights in those countries. Two basic models have emerged. Under both models the remuneration is collected by the society of the country of manufacture; under the first model, it distributes royalties as if the exploitation of works had taken place exclusively in that country, and, under the second one, it transfers the remuneration to the societies of the countries of destination (market countries). This issue does not seem to be fully settled yet. It may be stated that regarding certain countries only as mere markets – with no attention to the role local owners of rights and their societies may play in copyright protection and enforcement – does not seem to be the right policy; it may lead to the marginalization and elimination of such societies, or, at least (where they are specialized not only in the management of

“mechanical rights”), to the weakening of their position; and this, in turn, may result in a decrease of social support and respect for copyright, or, at least, for those aspects thereof which are concerned with “mechanical rights”.



Chapter 6

**CERTAIN GENERAL ISSUES OF COLLECTIVE
MANAGEMENT AND OTHER SYSTEMS OF JOINT
EXERCISE OF COPYRIGHT AND RELATED RIGHTS**

Introductory Remarks

335. The description in the preceding chapters of the main fields of collective management and other joint systems of exercising copyright and related rights and the developments in the face of new technological and economic developments indicate that there are important differences between the various forms, methods and effects of such ways of exercising rights. When addressing certain general substantive questions, these differences should be kept in mind.

336. It seems sufficient to indicate the great variety of collective management and other joint exercise systems by referring to the different types from some basic viewpoints.

- (1) From the viewpoint of the level of collectivization:
 - (a) collective representation, individualized authorization, direct distribution (in the case of rights clearance systems and collective management of rights in dramatic works);
 - (b) full collective management, blanket licensing, distribution among right owners with certain "corrections" (musical "performing rights");
 - (c) joint exercise of rights to remuneration, no distribution among individual rights owners (certain organizations managing reprographic reproduction rights and performers' rights, respectively, follow this method).

- (2) From the viewpoint of rights owners' freedom of choice between individual and joint forms of exercising rights:
 - (a) rights owners may choose freely (at least, there is no obligatory joint management, even if owners of rights may, in practice, have no other realistic choice);
 - (b) the law subjects the exercise of rights to the condition of joint management (for example, in the case of "private copying");
 - (c) the law also determines the only organization through which rights may be managed jointly.
- (3) From the viewpoint of the scope of rights and rights owners covered:
 - (a) the joint management organization may only manage its members' rights;
 - (b) in the field determined by the law, the organization also manages the rights of non-members (extended joint management), but non-members may opt out from such management under certain conditions;
 - (c) extended joint management without the possibility of opting out.
- (4) From the viewpoint of the freedom of the joint management organization to set tariffs and other conditions of licenses:
 - (a) free negotiations; in case of dispute, a court or an arbitration body decides;
 - (b) negotiations between the organization and the users but any agreement may only be applied if a supervisory administrative body approves it;
 - (c) tariffs and other conditions are fixed by legal provisions.

337. With the examples referred to in the preceding paragraph, the typology of joint management is far from being exhausted. These examples are, however, sufficient to illustrate that, when a reference is made to collective management (or other systems of joint exercise of rights), it may mean many differing ways and forms of such exercise of rights. If, for example, from the various types of systems mentioned above, a (1)(a)-(2)(a)-(3)(a)-(4)(a) variant is taken, it is fairly obvious that what emerges is really an appropriate way of exercising exclusive rights. At the same time, a (1)(c)-(2)(c)-(3)(c)-(4)(c) variant is only a very small step away from a non-voluntary licensing system. In fact, there is a need for a fairly great amount of benevolence for speaking even about that small step. Such schemes may be accepted, without serious doubts, only in cases where international norms and national laws do not provide for unrestricted exclusive rights and, thus, such a restrictive form of exercising rights may be considered as allowed.

338. Therefore, when, in this chapter, an attempt is made to give answers to some general substantive questions concerning collective management and other systems of joint exercise of rights, it is always taken into account whether what is involved is a right that, under international norms, is recognized as an exclusive right or a right which, under the same norms, is granted as, or may be reduced to, a mere right to remuneration.

Fields Where Collective Management or Other Systems of Joint Exercise May Be Justified

339. In Chapter 4, the collective management and other systems of joint exercise of copyright and related rights in respect of the following rights, and in respect of the following uses, were discussed: “performing rights” (or “small rights”, that is, the right of public performance, the right of broadcasting and the right of communication to the public by other means, now – at least, in certain situations – also including, under the law of many countries, the right of interactive “making available”) in musical works with or without words; “mechanical rights” (that is, the right to authorize sound recording) basically in musical works; the right of public performance in dramatic and dramatico-musical works; the resale right in works of fine art; the right of reproduction in respect of reprographic reproduction of literary and graphic works; the so-called Article 12 rights (that is, the right of broadcasting and the right of communication to the public by other means of phonograms, and of performances included in phonograms); the right of communication to the public by cable of broadcast programs and the right of reproduction in respect of private copying of phonograms and of audiovisual works. Then, in Chapter 5, the impact of new technological and economic developments were described and analyzed, presenting, *inter alia*, certain emerging new fields of collective management or other systems of joint exercise of rights (such as the authorization of multimedia productions and the use of works and objects of related rights on the Internet).

340. The reasons for collective management or other systems of joint exercise of rights are common in certain respects, but do differ in other respects, in the above-mentioned cases.

341. In the case of “performing rights”, reprographic reproduction rights and rights in respect of simultaneous and unchanged retransmission of broadcast programs, joint management is an indispensable means of exercising exclusive rights; joint management is the condition for maintaining at least some elements of the exclusive nature of the rights concerned, as the only workable alternative to non-voluntary licenses. The number and circumstances of uses and the number and variety of works and objects of related rights used make it practically impossible for users to identify rights owners in due time, ask for authorization negotiate the remuneration and other conditions, and pay remuneration on an individual basis. It is also impossible, or at least highly impractical, for individual rights owners to monitor all such uses.

342. The operation of joint management organizations has proved, beyond any doubt, that such a system may replace non-voluntary licenses – even in such complex cases as simultaneous and unchanged retransmissions of broadcast programs – without creating any unreasonable obstacles to access to the rights needed by users and without prejudicing any justified interests that have to be taken into account in regulating the protection of copyright and related rights.

343. Collective management or some other system of joint exercise of rights, however, is also needed in the majority of cases where mere rights to remuneration are recognized, namely, in those cases where mass uses are involved or where it is otherwise particularly difficult to monitor uses. It is under such conditions that reprographic reproduction rights, the so-called “Article 12 rights”, and the rights in respect of simultaneous and unchanged cable retransmission of broadcast programs are managed in countries where those rights are reduced to a right to remuneration (although, as indicated above, the examples of other countries show that joint management may be an appropriate alternative to non-voluntary licenses). A further example is the joint management of the right to remuneration in respect of private copying.

344. There are certain exclusive rights (such as “mechanical rights” and the right of public performance in dramatic and dramatico-musical works), and perhaps also certain rights to remuneration in respect of which joint management does not seem to be an absolute necessity (experience shows that

those rights, although with some difficulties, may also be exercised on an individual basis), but such management may facilitate the exercise of these rights, and it seems to be in the interest of both rights owners and users.

345. Some elements of joint management of rights (such as negotiations about collective agreements with users and joint collection of fees) may and do exist, in certain cases, even where the rights concerned could be fully and relatively easily exercised by individual owners of rights. In such cases, the consideration (which of course, is more or less always present in respect of joint management) that authors and other rights owners are stronger in their relation with users if they are united seems to be decisive. Uniting forces in negotiations with users may, however, have some consequences in the field of the application of anti-trust laws, which is discussed below.

346. It should also be taken into account that, although joint management, in certain cases, is indispensable and, in other cases, facilitates the exercise of copyright and related rights, it is not justified to extend its application to fields where its advantages are not significant. Exclusive rights may, in such fields, prevail to the fullest extent if they are exercised by the owners of rights individually; when such exercise is possible, it is advisable to preserve it as much as possible. From this viewpoint, however, it also seems necessary to take into account the contents of paragraph 40, above.

One Organization or Separate Organizations for the Management of Different Rights and for Different Categories of Rights Owners?

347. The description of the main types of joint management of copyright and related rights in Chapter 4 may suggest that the first option indicated in the title above might be appropriate. There are various organizations that manage different rights or, although they manage only one category of rights, they do so for the benefit of different categories of owners. Nevertheless, it seems worthwhile discussing to what extent such a cumulative system of management of rights is justified.

348. The majority of the strongest and oldest collective management organizations – musical “performing rights” societies – represent not only the rights of authors, but also those of publishers, and the same is, in general,

true in respect of reprographic reproduction rights organizations. Publishers are admitted as members of such organizations and, sometimes, they play a decisive role in their governing bodies.

349. The alliance between composers and text-writers, on the one hand, and music publishers, on the other, is traditional. It should not be forgotten that, when in 1847 Henrion, Parizot and Bourget started the famous lawsuit referred to in paragraph 28, above, they enjoyed the full support of their publisher, Jules Colombier and, without him, their chance for victory would have been minute. Publishers are managers and patrons of their composers, and their interests are generally in harmony with the latter. Therefore, it was quite understandable that they joined forces and tried to enforce their rights and represent their interests in the framework of the same societies.

350. It should not be forgotten, however, that publishers are businessmen also; they cannot neglect such factors as income and profit. As discussed above, there is also an increasing trend that music publishers are purchased by, or merged with, producers of phonograms, and that, along with their partner phonogram producers, they become parts of huge media conglomerates. This increases the possibility that certain conflicts of interests may emerge between publishers and authors (for example, when negotiating contractual stipulations or fixing authors' and publishers' shares in the distribution rules, and also in respect of some broader aspects of a collective management system, such as the issues relating to the level of expenses, including the possibility of deductions for cultural and social purposes).

351. Authors (as well as performers) may need protection as possible weaker partners in contractual relations with the exploiters of their rights. In several countries, statutory law includes some basic contractual rules (which may also cover the issue of transferability or non-transferability of rights) protecting authors, which are not allowed to be set aside in any contract. There are countries, where publishers may get only restricted licenses for precisely defined exploitation of works. Also, in some countries, publishers are not admitted as ordinary members of authors' societies. It is another matter that, in international relations, certain publishers' and sub-publishers' rights are applied and are managed by authors' societies.

352. It is not necessarily against the interests of authors if publishers are admitted as members and even if they are allowed to play an active role in the governing bodies of collective management organizations. Experience shows that appropriate methods may be found and applied to avoid abuse of dominant positions and, as a result, authors and publishers may work together harmoniously and efficiently in the joint management of their rights. Such a conclusion may be drawn from the example of the management of musical “performing rights”, and it has also been reconfirmed by the experience of reproduction rights organizations.

353. The structure and operation of reproduction rights organizations are different since, as a rule, they are normally established as a special kind of “coalition”. Such coalition organizations carry out those tasks (such as monitoring uses, collecting remuneration) which can only be fulfilled by one single organization, frequently according to a clearing-house model; the actual distribution of remuneration is done usually by the member organizations of such coalition organizations, such as societies of authors and organizations of publishers.

354. Coalition-type forms of joint management clearly dominate in the case of certain rights, such as the so-called “Article 12 rights” (in particular, where the rights of performers and producers of phonograms are managed together), the rights in respect of simultaneous and unchanged retransmission of broadcast programs and the rights in respect of private copying. As discussed above, for the purpose of licensing multimedia productions and online use of different categories of works and objects of related rights, some coalition organizations have also been set up (in certain cases, quite complex ones). The monitoring of uses and the collection of remuneration is done either by a joint organization set up for this purpose or by one of the member organizations in the coalition which – in that respect – represents the others. In both cases, each member organization receives its share from the collected remuneration (a share which is sometimes agreed upon through intensive and difficult negotiations), and they distribute it to individual owners of rights or, where this is appropriate under the given system, use it for common (social, professional or general cultural) purposes.

355. The cases analyzed so far have been those where the need for a joint organization, or a coalition of various categories of rights owners follows from the very nature of the uses involved. Another possible basis for combining the management of different rights is that, although the rights are related to different kinds of uses, they concern the same category of works, and, consequently, the same categories of rights owners. This is the case, for example, in respect of “performing rights” and “mechanical rights” in musical works which are sometimes managed by separate organizations but quite frequently by one organization (as discussed above, there is a trend that, where separate societies have been established for these two categories of rights, these societies combine their forces in close alliances). In the case of other categories of works and objects of related rights, it is also fairly frequent that the same organization manages all rights in the category of works concerned. Furthermore, in order to fulfill the requirements of quick and simplified licensing for multimedia productions and uses in the Internet, some even more complex macro-coalitions are emerging where collective management organizations and rights clearance centers may work together based on a common information structure of the system.

356. In some countries, there are still collective management organizations – in general, public or semi-public ones – that manage practically all categories of rights, or, at least, many of them, irrespective of whether or not they are connected by the nature of the uses, by the works concerned or by the rights owners.

357. It is difficult to offer generally applicable answers to the question of which solution is better: to set up separate organizations for the management of different rights owned by different owners or to entrust one global organization with the management of all these rights.

358. What seems to be the most important criterion here is that all categories of rights owners whose rights may only be managed jointly should have an appropriate organization to represent them. It is easier to avoid the subordination of the interests of certain groups to others if each group of owners of rights forms a separate organization. At the same time, the existence of parallel organizations does not exclude coordinated action wherever they have joint interests that may be asserted more successfully if they join forces.

359. There may, however, be significant arguments in favor of concentrating collective management in one large organization representing various categories of rights and owners of rights. Under the present circumstances where ever more new ways of exploitation emerge with new technologies, it seems easier for one organization to manage the various interconnected rights. It is true that, in organizations assembling several or all kinds of rights, the reconciliation of internal conflicts needs much more care and tact, but the experience of several organizations shows that appropriate methods and guarantees may be found to tackle this problem. At the same time, comprehensive organizations may have a stronger position and better chances for success when negotiating with users and in the field of representing the interests of owners of rights vis-à-vis governmental authorities responsible for intellectual property policy, as well as vis-à-vis legislative bodies.

360. On the basis of the considerations mentioned above, all that can be said is that the question of which of the outlined solutions might be the best one can only be decided country by country and case by case. Much may depend, for example, on such criteria as the size of the country and its cultural industry, or the level of its overall economic development. For example, it seems fairly obvious that, in those developing countries (in particular, in least-developed ones) which are in the stage of establishing their copyright infrastructure and which can hardly afford several organizations for collective management, a centralized, global organization may be more appropriate.

One Organization or Several Organizations for the Management of the Same Right and for the Same Category of Rights Owners?

361. As the description of the main fields of joint management in the preceding chapters indicates, in the overwhelming majority of cases, a given category of rights (either alone or together with other rights) is managed by one single joint management organization. Exceptions to this rule are very rare.

362. Many of the basic advantages of joint management (easy and legally safe licensing, possibility for authorizing the exploitation of the entire world repertoire in one single license, substantial decrease of transaction costs, etc.) may be obtained only by means of one single organization. Therefore, it seems desirable to avoid parallelism and to establish only one organization for each category of rights for each category of rights owners.

363. It is another matter that the absence of alternative organizations may create a *de facto* monopoly position for the organizations concerned (or even a *de jure* monopoly position where the law itself creates such a position). For this reason, some defensible arguments may also be forwarded for the establishment of competing societies. It seems however that, by the very nature of copyright and related rights, certain categories, such as "market", "competition" and "monopoly" cannot be applied directly in this field (the ways and means of resolving the possible problems raised by a *de facto* or *de jure* monopoly position of joint management organizations are discussed below).

364. In harmony with the considerations referred to above, there are national laws (for example those of Switzerland and Hungary) that explicitly provide that only one organization may be authorized to manage the same right for the same category of rights owners.

Public or Private Organizations for the Management of Rights?

365. Are public or private organizations more appropriate for managing copyright and related rights? This question can hardly be answered in general terms. Much depends on the political, economic, cultural, social and legal circumstances in which a management system has to be set up. Furthermore, as in many other fields, tradition is an important factor here, too.

366. In market-economy countries, private organizations dominate (although some of them have a semi-governmental character, others function with government participation, and still others work under fairly close supervision by public authorities). In planned-economy countries, public institutions were in the majority, but some of them were of a mixed nature with author-dominated governing bodies. In developing countries, both private societies and public institutions can be found. It is mainly in Africa that public organizations are fairly frequent.

367. The reasons for which public law entities seem to be more suitable in developing countries – at least, in those where the copyright infrastructure is still in a relatively early stage of development – may be found in the special conditions of those countries. The number of owners of rights is, in general,

still relatively small, and they do not have sufficient income to undertake the initial expenses needed for the establishment of a joint management organization; therefore, government contribution is necessary. Furthermore, it is fairly frequent that some important users (such as national broadcasting organizations) are also public institutions with strong government support, in relation to which a public management organization may have a better chance to negotiate and enforce the payment of appropriate remuneration than a private organization.

368. In other countries, however, private organizations seem to better suit the nature of the rights to be managed – which are normally private rights – as well as the very purpose of joint management.

369. At the same time, it should be noted that neither the private element nor the public one is exclusive in the great majority of cases. The activities of private societies are supervised by public authorities or they even have semi-public characteristics. And the public nature of an organization does not necessarily mean that right owners are unable to take part or even have a decisive role in the joint management of their rights.

370. In this respect, two acceptable alternatives seem to exist. The first and basic alternative is joint management of rights by private organizations, while the second alternative, which may be justified under specific conditions in certain countries, is joint management by a public organization but with appropriate guarantees for rights owners to be able to influence the way in which their rights are managed.

Obligatory Joint Management

371. In Chapter 4 above, reference is made to some cases where the exercise of certain rights has been made conditional on joint management; such as the management of the resale right, reprographic reproduction rights, rights in respect of private copying, and rights concerning cable retransmission of broadcast programs.

372. Joint management is frequently used for exercising rights. In certain cases, it is the only possible workable alternative to non-voluntary licenses,

and, in general, it is the only way in which rights to remuneration may be exercised. Still, it is undeniable that, through joint exercise of rights and in particular through collective management, an exclusive right cannot prevail as fully as when it is exercised individually by the rights owners themselves. A provision providing for obligatory joint management of a right is to be seen as a *condition* under which the right may be exercised, a kind of restriction, although less restrictive than a non-voluntary license (this is, of course, only true if the system is regulated and operated properly and does not become a disguised form of non-voluntary licensing).

373. For the above-mentioned reasons, the prescription of obligatory joint management as a condition of exercising copyright and related rights should be avoided wherever it is possible and the possibility of individual exercise of rights should be maintained.

374. The Berne Convention provides for cases where it is a matter for legislation in the countries of the Berne Union to determine the “*conditions*” under which certain rights may be exercised (see Article 11*bis*(2) and Article 13(1)). In general, the relevant provisions are considered as a possible legal basis for the introduction of non-voluntary licenses, because they define the bottom line of the possible conditions in providing that those conditions must not, under any circumstances, be prejudicial to the authors’ rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible “*conditions*” referred to in those provisions; other conditions – practical restrictions – concerning the exercise of exclusive rights concerned may also apply. Obligatory joint management of rights seems to be such a condition. Since the possibility of providing for such conditions is determined in the Convention in an exhaustive way, on the basis of the *a contrario* principle, it seems that, in general, obligatory joint management may only be prescribed in the same cases as non-voluntary licenses.

375. What is stated in the preceding paragraph should not be interpreted to mean that obligatory joint management may only be introduced in cases where the text of the Berne Convention uses the expression “*determine the conditions*” under which the rights may be exercised. Obligatory joint management is permissible also in cases where a right is established as a mere

right to remuneration (as in the case of the resale right or the so-called “Article 12 rights” of performers and producers of phonograms) or 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 of Article 9(2) concerning the right of reproduction).

376. A new field of collective management is the exercise of “residual rights”; that is, rights to remuneration which are provided for (usually for authors and performers) in the case of transfer of certain exclusive rights (such as in the case of the right of rental under the Rental and Lending Directive of the European Community).

377. It may be stated, in general, that obligatory joint management is justified in a situation where the individual exercise of rights would be impossible or extremely impracticable.

Joint Management for Rights Owners Who Have Not Given Power to the Organization to Represent Them

378. One of the most important elements of fully developed collective management systems is the possibility that collective management organizations may grant blanket licenses to users for the use of the entire world repertoire of works concerned by the right thus managed. In fact, if blanket licenses could not be applied, the advantages of collective management would be very limited or, in certain cases, even eliminated.

379. However, even where the system of bilateral agreements is fairly developed (as in the case of musical “performing rights”), the repertoire of works in respect of which a collective management organization has been explicitly given the power to manage exclusive rights is, practically, never an entire world repertoire (since, in certain countries, there are no appropriate partner organizations to conclude reciprocal representation agreements, or because certain authors withhold their works from the collective system).

380. 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 individual works and individual rights owners. Therefore, if there is an organization which represents a sufficiently wide repertoire of works (works which are available for collective management under reasonable legal and practical conditions) in respect of which a certain right can only be managed collectively, such an organization should be guaranteed the possibility of granting blanket licenses.

381. There are two basic legal techniques of ensuring the operation of blanket license systems.

382. The first involves the following elements: the lawfulness of authorizing the use of works not belonging to the organization's repertoire is recognized by law (either in legislation governing the activities of such organizations or by case law) with certain guarantees, such as proper supervision of the activities of the organization. The organization must guarantee 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 owners of rights who have not delegated their rights for collective management in a reasonable way, taking into account the nature of the right they are granted (this also means that "dissident" owners of rights should not raise unreasonable claims).

383. Such a legal technique necessitates that there be a legal presumption that the organization is authorized to manage the right concerned in every work covered by the blanket license and to represent owners of rights in legal proceedings.

384. The other legal technique for ensuring the conditions for blanket licenses is what is called the system of extended joint 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

joint management is extended by the law also to the rights of those owners of rights who have not entrusted the organization to manage their rights.

385. 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.

Government Supervision Concerning the Establishment and Operation of Joint Management Organizations

386. As discussed in the preceding chapters, the overwhelming majority of joint management organizations are in a *de facto* – or even *de jure* – monopoly position and such a position is, in practical terms, a necessary condition for the appropriate operation of joint management systems. This kind of monopoly position, in general, exists *vis-à-vis* both rights owners and users. Without appropriate guarantees, such a monopoly position might be abused. In this subchapter, those guarantees are discussed which seem to be necessary concerning the establishment and operation of joint management organizations and their relationship with rights owners. The guarantees that may be needed in respect of the relationship of such organizations with users are discussed in the following subchapter.

387. Although, in certain cases, rights owners have a theoretical possibility of choosing between individual exercise and joint management of their rights, it is rare that such options may be realized freely in practice. The fact is that, in the typical fields of joint management, rights owners, in general, do not have any realistic choice other than entrusting the management of their rights to an organization that is in a *de facto* or *de jure* monopoly position in the country concerned.

388. If the given organization does not operate properly, such a situation may lead to the neglect, or to a practical denial or restriction, of the rights of

rights owners. Therefore, under the present circumstances, when ever more rights are managed jointly, it seems to be justified to introduce and apply appropriate legal provisions to ensure the proper operation of joint management systems. This seems, in fact, to be an obligation of countries party to the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO "Internet treaties" (in the same way as they are obliged to take appropriate measures against other possible violations of rights which they are supposed to protect under these instruments).

389. Some countries legislated on the conditions of establishment and operation of joint management organizations a relatively long time ago (such as the Federal Republic of Germany in 1965). Later, it became more common that specific – and fairly detailed – provisions on joint management of rights were included in national laws (for example, in the Law of July 3, 1985, in France or the Law on Intellectual Property of November 11, 1987, in Spain). In some other countries, where private organizations exist, the general provisions of civil law and administrative law still apply as regards the supervision of such organizations.

390. The special provisions on joint management of copyright and related rights, in general, make the establishment of a joint management organization conditional upon the approval by a competent authority (for example, by the Ministry of Culture, the Ministry of Justice or the Patent Office). There are some countries where mere registration is sufficient. In France, the court decides on the question of incorporation of such organizations if the Ministry responsible for culture (to which the draft statutes and other general regulations of these organizations must be presented) finds that there seem to be serious and real reasons to oppose the establishment of the organization, and submits the case to it. In deciding on the approval of the establishment of a joint management organization, such factors are taken into account as the suitability of the statutes of the organization to ensure appropriate management, the reliability of the persons entitled to represent the organization; the availability of the necessary repertoire and of economic means, etc.

391. A check before the approval of the establishment of a joint management organization, is not a sufficient guarantee in itself for the appropriate operation of the management administration system. Therefore, the

competent authorities, although they should not unnecessarily interfere with the actual management of rights, should regularly supervise certain key elements of the joint management systems, such as whether the actual activities correspond to the approved statutes; whether the rules of collecting and distributing fees are correct; whether the costs of management administration are reasonable; and whether the distribution and transfer of remuneration in fact take place as prescribed. Several national laws prescribe that joint management organizations must employ independent financial controllers. It seems a consequence of the broadening fields and growing importance of joint management that, in certain countries, commissions or other permanent bodies are set up to monitor the activities of joint management organizations and to present reports to legislators or to the government authorities (for example, such a commission was recently established in France).

392. The supervision of the establishment and operation of joint management organizations may guarantee, *inter alia*, the following things: the availability of the system for all rights owners who need it; reasonable terms of membership; an appropriate role for rights owners, or bodies representing them, in important decisions that may concern the management of their rights; correct monitoring, collection and distribution systems which do not contain any elements of discrimination between rights owners, members or non-members, nationals or foreigners; and availability of concrete and detailed information for rights owners and for foreign partner organizations about certain basic data on the management of their rights.

393. If a joint management organization no longer complies with the conditions fixed when authorization was granted to it to operate, the competent authority should apply appropriate measures and, as a last resort, the authorization should be withdrawn. National laws that include special provisions on joint management organizations usually do contain provisions to this effect. The role of the supervisory authorities is similar here to the one in respect of the approval of the establishment of the organizations.

394. In countries where public organizations deal with joint management of rights, the establishment of such organizations, of course, presupposes the adoption of appropriate statutes which, as a rule, also provide for the conditions and supervision of the operation of such organizations. All that has

been discussed in respect of the purpose of supervision and the necessary conditions of operation of private organizations, *mutatis mutandis*, applies to the relevant aspects of the supervision and operation of public organizations.

Government Supervision to Prevent Possible Abuses of a *de facto* or *de jure* Monopoly Position of Joint Management Organizations

395. It follows from the very concept of exclusive rights that owners of such rights are free to decide about the use of their works and, *inter alia*, free to fix the remuneration to be paid for, and the conditions of, every use. In general, there is no reason and no legal basis for restricting this right. The laws of supply and demand may settle possible conflicts; it is in the interest of rights owners that their works be used as widely and as frequently as possible; if they set unreasonable tariffs and conditions, users may not conclude contracts with them but rather with somebody else.

396. Where exclusive rights are managed jointly, this way of exercising rights, in general, is not supposed to fundamentally influence the exclusive nature of rights. This is so since, after all, the laws of offer and demand may also prevail in such cases. If the tariffs and conditions are set in an unreasonable way, the optimum number of uses cannot be ensured; therefore, the organization, in general, is constrained not to set such tariffs and conditions.

397. The possibility does exist, however, that a joint management organization in a *de facto* or *de jure* monopoly position may abuse that position. Three main cases of such abuses may exist, at least in theory. The first case is the refusal to license certain uses without any valid reason. The second case is unreasonable discrimination between users in the same category. The third case consists of setting tariffs and other licensing conditions in an arbitrary way. In the first two cases, the abuse may be fairly clear; in the third it is difficult to determine what tariffs and conditions may follow from the normal and reasonable exercise of exclusive rights and what are to be regarded as arbitrary.

398. Although it is difficult to define what is a reasonable tariff for a license, certain principles and general practices have been developed in respect of various categories of rights that are managed jointly. There are, for example, two basic forms of tariffs, namely, a percentage of the receipts which the use of the works or objects of related rights concerned provides (which is mainly applied when the uses relate to the main activities of users, such as in the case of theater performances, concerts, publication of protected works, etc.) or a lump-sum payment (which is more typical in respect of uses not belonging to the users' principal activities but being rather of a secondary nature). Concerning tariffs expressed in percentages, international practice has produced certain fairly generally accepted standards (such as the "10% rule" which, however, should not be considered applicable everywhere; for example, in the case of certain "grand rights", the percentage is higher). Lump sums are fixed on the basis of many specific factors which differ from country to country, but still, here too, there are some generally accepted principles of calculation (although in certain fields – such as in the field of reprographic reproduction – there is a more significant diversity of methods).

399. It seems evident that, if a tariff or condition corresponds to internationally accepted standards or does not differ from such standards to a substantial extent, it can hardly be alleged that, in applying such a tariff or condition, there is an abuse of the *de facto* or *de jure* monopoly position. If, however, in a certain country, the tariffs are higher than in other countries, this does not indicate in itself that any abuse has been made of the monopoly position of the joint management organization in question. All the circumstances should be thoroughly considered and it is quite possible that, in the country concerned, the tariffs are far from being too high, if the value of the repertoire, the level of copyright and/or related rights protection, the services offered by the joint management organizations to users and owners of rights, as well as the economic situation and the income structure in the country are duly taken into account.

400. The supervision of tariffs and other licensing conditions of joint management organizations are usually carried out in one of the following ways: first, through the settlement of possible disputes by ordinary civil courts; second, through procedures at special tribunals or other arbitration bodies

established for such purposes; and, third, through the approval of the tariffs and other licensing conditions by an administrative authority.

401. Of the three main forms of supervision, it is obviously the first one which suits, to the fullest extent, the exclusive nature of rights managed. The usual argument against this solution is that court procedures take a long time and do not correspond to the specific interests involved in joint management of rights. Special tribunals (mainly in countries with a common law tradition) or conciliation and arbitration bodies are set up, in general, to make the settlement of such disputes quicker and more cost-effective. However, depending on the concrete political, economic and legal conditions, approval by an administrative authority may also be acceptable.

402. In this respect, two basic principles should be taken into account. The first is that, where a tribunal or an administrative authority is competent to decide on these matters, the conditions for an impartial and unbiased decision should be guaranteed (through an appropriate composition of the competent body, by means of the possibility of appeal to courts, etc). The second principle is that, in the case of joint management of exclusive rights, the interference with the tariffs and other licensing conditions should be restricted to those cases where the danger of an actual abuse of a monopoly position is involved, and only to the extent necessary to prevent or eliminate such an abuse. The latter principle – as an obligation of the countries party to the Convention – follows from the Berne Convention itself and more precisely from the fact that, although it was agreed at the 1967 Stockholm Revision Conference (and reflected in its report concerning the discussions on Article 17 of the Convention) that member countries of the Berne Union may maintain copyright tribunals in this field, it was also made clear that such tribunals may only serve the purpose of taking measures against possible abuses of monopolies. (It is to be noted that this provision – along with its drafting history reflecting that this is the correct interpretation thereof – has been included by reference into both the TRIPS Agreement and the WCT).

Monitoring of Uses and Collection of Remuneration

403. There are three principles in this field which should be applied and which may be significant from the viewpoint of compliance with existing international norms.

404. The first principle is that the monitoring of uses and the collection of remuneration should be as comprehensive as possible, provided that the costs of these activities can be kept at a reasonable level. This is an indispensable condition for ensuring that rights owners enjoy their rights and receive remuneration as much in conformity with the actual use of their works as possible. Therefore, for example, it is unacceptable to give up monitoring uses and collecting remuneration in certain fields where these activities could still be managed with reasonable costs, just for the purpose of decreasing the general cost level and increasing the remuneration for other categories of uses.

405. The second principle is that rights owners should enjoy equal treatment in this respect. The extent and intensity of monitoring uses and collecting remuneration should be established in such a way that they do not prejudice the interests of particular categories of right owners.

406. Finally, the third principle is that appropriate legislative and administrative measures should facilitate the monitoring of uses and collection of remuneration by joint management organizations. The fullest possible cooperation of users in these fields should be prescribed as an obligation, and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of joint management organizations.

Costs of Management

407. What costs of management may be justified? Hardly any answer can be given to this question other than that only reasonable and indispensable costs may be deducted from the remuneration collected by joint management organizations.

408. In this respect, two further remarks should be made. First, it should be emphasized that not necessarily all the costs that may emerge as a result of the activities of a joint management organization may be considered as costs pertaining to joint management of rights as such, because the organization may also undertake some other activities (such as active agency-type promotion of its own repertoire or a part thereof; the costs emerging from such activities may only be covered from deductions for cultural purposes, where and to the extent that such deductions are authorized or from resources other than the remuneration collected for owners of rights).

409. The other remark is that the principle of equal treatment of rights owners should also be applied in respect of the deductions of costs. This principle contains two elements. The first one is that, in respect of owners of rights whose works or objects of related rights are utilized in the same manner, and, thus, the costs of the management of the rights concerned are the same, the same percentage should be deducted for the costs of management. The second element is that if, in the case of certain categories of uses, the management costs are higher, in general, the higher costs should be deducted from the remuneration destined for the rights owners concerned and other categories of rights owners should not be unreasonably burdened by such high costs.

Lack of Distribution of Certain Sums Collected for Individual Rights Owners

410. Both exclusive rights and possible rights to remuneration are, under the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO "Internet treaties", to be granted as rights of individual rights owners. Therefore, the basic principle may hardly be anything else but that the remuneration collected by joint management organizations should be distributed to those individual owners of rights whose works or objects of related rights have been used.

411. The fact that, in certain cases, individual uses cannot be fully identified with absolute precision, is not a sufficient basis for not distributing remuneration to individual rights owners. The experience of joint management of rights in various fields clearly shows that it is always possible to find

some basis on which, at least, a fairly reasonable rough justice may be achieved for the distribution of remuneration. In all the cases discussed above, there are such bases for distribution. And, of course, a reasonable rough justice is much better from the viewpoint of rights owners than no justice at all. It is another matter that, in such systems, there may be a need for a reserve fund from which certain claims not covered by the distribution may be satisfied if asserted within a reasonable deadline.

412. There is a case where it may be justified that the remuneration collected is not distributed and is used for common purposes; namely where the amount collected is extremely low and the costs associated with the distribution cannot be covered by a reasonable part thereof.

Using Sums Collected on Behalf of Rights Owners for Purposes Other Than Covering Actual Costs and Distribution

413. It follows from the fact that the owners of both exclusive rights and the rights to remuneration managed by joint management organizations are individual rights owners, that no portion of the remuneration collected by such organizations should be used – without the permission of the rights owners – for purposes other than covering the actual costs of management and for the distribution of the remaining amounts to the rights owners concerned.

414. Such permission may be granted in different ways: individually, case by case (which is not typical in practice), by accepting the conditions of membership in the organization (which is fairly frequent), through the decision of bodies representing rights owners (which is also fairly frequent) or in the framework of mutual representation agreements between joint management organizations (which is quite a common practice).

415. The purposes other than covering actual costs and distribution of remuneration to individual rights owners for which the use of a certain percentage of collected sums is authorized are, in general, cultural or social. Deductions for such purposes are quite typical in the case of traditional collective management organizations. Cultural purposes mainly mean the use of certain amounts for the promotion of creativity (through prizes,

competitions, fellowships, etc.), while social purposes usually involve the transfer of the money to health insurance or pension funds.

416. Collective management organizations frequently stress that they should be allowed to use a certain percentage of the collected remuneration for such purposes since this corresponds to the intention of rights owners, and rights owners should be free to dispose of the income derived from their rights. Of course, everyone is free to dispose of his remuneration as he wishes. But such disposal must be based on decisions of the rights owners concerned granted either directly or through the competent bodies of their collective management organizations (the latter is the case mainly in the relationship with foreign organizations).

417. Here the basic legal principle of *nemo plus iuris transferre potest quam ipse habet* (that is, nobody may transfer more rights than he himself has) should be fully respected. This means, for example, that the assembly of a collective management organization which essentially consists of rights owners who are nationals of the country concerned should not be regarded as being entitled to exercise its generosity (whether for social or cultural purposes) by also using the remuneration of foreign rights owners without an authorization by the competent bodies of the collective management organizations of the latter.

418. It should also be taken into account that it is fairly rare that rights owners may take part directly in the decision concerning the use of a part of their remuneration for cultural and/or social purposes. In the majority of cases, they rather only accept such a practice indirectly. It should not be forgotten either that the freedom of rights owners who might not agree with such deductions is fairly restricted (and one may hardly allege that all rights owners are equally altruistic and influenced by the idea of what is called the principle of solidarity between authors, performers, etc.). When they join, or are considered on the basis of statutory law as being members of, a collective management organization, such deductions are simply part of a take-it-or-leave-it package. It is difficult to speak about real freedom of choice, for example, in the case of foreign rights owners in whose name their collective management organizations agree to such deductions. Therefore, although the deduction of a certain percentage may be accepted, that percentage

should be quite low (normally, no more than 10 percent); otherwise serious doubts might emerge concerning the legality of such a practice.

419. It should be noted that, in the field of the so-called “Article 12 rights”, somewhat different considerations may be taken into account. One of the recognized purposes of these rights is to counterbalance the losses that performers suffer by losing employment opportunities as a result of widespread uses of performances included in phonograms. For this reason, social considerations may be more decisive here than in the case of authors’ rights and, thus, the use of a relatively higher percentage of the collected sums for social purposes may be justified.

420. Special considerations may emerge also in the case of collective management organizations of developing countries. Their foreign partner organizations may find it appropriate to allow an even higher level of cultural and social deductions in order to assist those organizations to establish an appropriate management system and copyright infrastructure and to encourage creativity.

421. It follows from the analysis above that there are limits for national laws to provide for such deductions. Under international norms – the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO “Internet treaties” – there is no obstacle to including any provisions concerning *national* owners of rights. Although this is not too elegant, such provisions may also fix a level of protection lower than that which the international norms would require. Such provisions, however, are not applicable in respect of *foreign* owners of rights, since, for their protection, at least, the minimum level prescribed by the relevant international norms applies.

422. There are two possible bases upon which a provision in a national law concerning deductions for cultural and/or social purposes from the remuneration due to foreign owners of rights may still be acceptable from the viewpoint of the above-mentioned international norms. The first possible basis is that, as regards foreign owners of rights, deductions are not regarded as automatic; the relevant provisions only oblige national collective management organizations to try to reach agreements with their foreign partners on such deductions (from which it follows that, without such agree-

ment, no deductions may be effected from the remuneration due to foreign owners of rights). The other possible basis is to regard such an obligatory deduction as a kind of tax or levy under fiscal law which may be imposed on the remuneration of both national and domestic owners of rights. In this case, international, regional and bilateral agreements concerning taxation (including agreements on the avoidance of double taxation) should be taken into account.

423. Recently, attempts have been made by some performing rights societies of CISAC to eliminate, from bilateral contracts between societies, the possibility of deduction for cultural and/or social purposes from the remuneration due to their members, or, at least, heavily reduce the level of deductions to well below the 10 percent level allowed under the CISAC Model Contract. Although this is legally possible, and although it is a legitimate wish of such societies to get as high an amount of remuneration, and with as few deductions, as possible, this in itself may not justify a heavy reduction of deductions for cultural and social purposes. If the sums obtained through such deductions are used in due harmony with the objectives thereof, this may contribute to a significant strengthening of the public relations position of copyright in the country concerned. Through grants for the promotion of creativity, prizes for the recognition of outstanding creative achievements, and/or financial support for young talent or for authors in need, it may be made more easily perceivable that copyright operates for those noble objectives that it is supposed to serve.

424. It is, however, even more important than such a direct public relations impact that, through all this, the creative community of the country will stand more firmly behind the collective management organization and the entire copyright system. With the readiness of this community to fight for its own interests and rights – and, through this, for efficient, high-level copyright protection, in general – it is easier to obtain the support of the government and legislators to create the necessary legal and practical conditions for such protection. This is particularly indispensable in countries that are net importers in the field of cultural and information productions, since it is obviously more difficult to get political and social support for a strong copyright system if the operation of national collective management organizations only, or nearly exclusively, benefits foreign owners of rights without any apparent results in

the country which might correspond to the “advertised” objective of copyright, namely the recognition and promotion of creative activities.

425. There is a case, where specific considerations seem to be desirable, namely the case of the right to private copying royalties. Certain national laws restrict the share to be distributed to individual owners of rights by providing for the obligation of the collecting organizations to set aside a certain percentage for common – in general, for cultural – purposes. Questions are sometimes asked whether such legislative provisions are compatible with the obligation to provide at least for a right to remuneration in respect of widespread private copying which unreasonably prejudices the legitimate interests of authors under Article 9(2) of the Berne Convention and with the principle of national treatment. However, as also pointed out above, the deduction of a reasonable percentage from such private copying royalties may be justified on the basis that the equipment and recording material on which the royalties are imposed are not always used for copying protected works or objects of related rights.

The Principle of Non-Discrimination in Respect of Non-Members

426. Is such discrimination permissible? The answer to this question must be obviously negative. This is so, *inter alia*, because granting national treatment to foreigners to be protected under the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO “Internet treaties” (although, as regards related rights, under the TRIPS Agreement and the WPPT, quite a limited national treatment) – with some strictly defined exceptions – is a basic obligation of all the countries party to these instruments. Nevertheless, it seems necessary to add two remarks to this answer.

427. The first remark concerns the scope of the elements of joint management in respect of which the principle of equal treatment of members and non-members, particularly foreigners, should be applied. It is obvious that the remuneration must be distributed to non-members and foreigners in the same manner as to members and nationals. In addition to this, equal treatment should also be fully respected, *inter alia*, in the fields of monitoring uses, collecting remuneration and deducting costs, as discussed above. However, in respect of using remuneration for purposes other than covering costs and

distribution to rights owners, the principle of equal treatment should not be applied formally. Such deductions are only allowed if non-members and foreigners, directly or indirectly (through their representatives), approve them. Of course, it would also be in a grave conflict with the principle of equal treatment to try to introduce higher deductions from the remuneration of non-members and of foreigners than from members and nationals.

428. The other remark refers to what is discussed above from another viewpoint, namely from that of deductions for cultural and/or social purposes. If there is an appropriate legal basis for such deductions – that is, if they are duly authorized by foreign authors, or (and this is more typical) by the organizations representing them, or if, in the case of private copying royalties, the deductions do not go beyond a level that may still be regarded as reasonable (taking into account the fact that the recording equipment and material on which the royalties are imposed are also used for the recording or copying of non-protected material) – it is not necessarily against the principles of non-discrimination and national treatment if the sums obtained through such deductions are used only or mainly for domestic purposes. (Much depends on the contents of the agreement in which the authorization for such deductions is included; but usually the relevant provisions of such agreements, as a minimum, imply domestic purposes.)

Functions Other Than Joint Management of Rights

429. There are some joint management organizations which also undertake activities other than rights management proper, such as agency activities for the promotion of the national repertoire and certain other general cultural activities.

430. The fulfillment of such other functions, in general, is not in conflict with the special interests involved in joint management of rights. It is important, however, to note that the costs of such activities should not burden – either directly or indirectly – the remuneration collected for rights owners in the framework of joint management. For example, the costs of the promotion of the use of certain works by means of agency activities should either be covered by the commissions to be paid by the rights owners directly interested in such an activity or by some other sources (for example, from a

fund-in-trust or government subsidy), rather than from the remuneration collected for the use of the works or objects of related rights in respect of which certain rights are jointly managed.

431. It should be added, however, that it is not justified to interpret the scope of activities directly connected to joint management of rights in too restrictive a way. Not only does it include the actual monitoring of uses, the collection and distribution of remuneration and enforcement of rights belong to such activities, but also, for example, the legal service the organization provides to rights owners, the educational and public relations activities for achieving better understanding and fuller respect of the rights jointly managed, and the like.

432. On the basis of the description and analysis of the traditional and new forms of collective management and other systems of joint exercise of rights, the following conclusions may be offered concerning the establishment and operation of joint management systems:

(1) Collective management or other systems of joint management of copyright and related rights is justified where individual exercise of such rights – due to the number and other circumstances of uses – is impossible or, at least, highly impracticable. Such joint management of rights should be chosen, whenever possible, as an alternative to non-voluntary licenses.

(2) The role of joint management does not seem to be decreasing – rather the opposite is the case; it seems to be increasing – in the digital networked environment. There are some new fields where joint management may, and certainly will, have an important role, such as the licensing of “multimedia productions” (which quite frequently are created from a great number of pre-existing works and contributions of different categories) and the authorization of certain online interactive uses.

(3) There are significant differences between collective management proper and other systems of joint exercise of rights. The term “collective management” refers to those forms of joint exercise of rights where there are certain true “collective” elements in the system (for example, in respect of tariffs, licensing conditions and distribution rules), there is a real collective behind it, the management is carried out on behalf of such a collective, and the organization also serves certain collective objectives beyond the tasks of mere rights management (this is mainly typical in the case of management of the

rights of authors and performers). The other basic system of joint exercise of rights is mere "rights clearance" which, in its fully fledged form, is without any collective elements; what is involved is simply offering a single source for users to obtain authorization and pay for it; the remuneration may be – and quite frequently is – individualized, and instead of a real "distribution", the remuneration, after the deduction of the management costs, is simply transferred to each owner of rights on behalf of whom it has been collected (this system is mainly typical in the case of rights owned by legal entities). The expression "joint exercise" or "joint management" is a generic term covering both collective management and rights clearance, but also extending to some other specific systems that may not fit easily into either of these two basic categories, such as the alliances or "coalitions" of different kinds of organizations, "one-stop shops", or the combination of state collecting bodies with private organizations taking care of the remaining management tasks.

(4) As regards the choice of rights owners between individual exercise and joint management of rights, their freedom of association should be respected. Joint management should not be made obligatory in respect of exclusive rights which, under the international norms on the protection of copyright and related rights, must not be restricted to a mere right to remuneration, and, in the case of which individual exercise is possible.

(5) In the digital networked environment, owners of rights have greater freedom to choose between individual exercise and joint management of rights, since they may exercise their rights directly on the global information network (through technological protection measures and electronic rights management information systems). This does not mean, however, that it is necessarily in the interest of owners of rights to make use of this opportunity. The reasons for which, in certain fields – such as the exercise of "performing rights" – collective management is the best solution in the analog world also exist in the digital environment. It is, in principle, possible for some exceptionally well-known and popular authors and performers to choose an individual way. Experience shows, however, that at least in the case of traditional forms of collective management this kind of "dissidence" and repudiation of the principle of solidarity may backfire and may be counter-productive not only for the community of creators but, in the long run, also for such "individualists".

(6) Digital technology and the Internet both pose serious challenges and offer new promising opportunities for traditional collective management organizations (such as “performing rights” societies with “collectivized” licensing conditions, tariff systems and distribution rules). On the one hand, the new possibilities for individual licensing and the new alternative options of joint exercise of rights, in principle, may put into question their monopoly in those fields where their system used to be the only possible or feasible option. On the other hand, on the basis of the technology that may create such problems for them, they can make their operations more efficient and more attractive both for owners of rights and for users. As a result, traditional collective management organizations may become strengthened, with a better and more efficient management system, in this period of development.

(7) Full collective management is based on exclusive rights and includes negotiation of remuneration to be paid for, and other conditions of, uses, licensing uses, monitoring of uses, enforcement of rights, collection of remuneration, and its distribution to rights owners. Partial collective management of exclusive rights is also possible (for example, the owners of rights give authorization directly within a collectively negotiated framework agreement with users, and the collective management organization collects and distributes the remuneration). As mentioned above, there are other forms of joint management of rights, such as “rights clearance”, where the system is simpler; certain elements (such as collective negotiation and other collective aspects) are missing.

(8) Joint management of a right to remuneration – either an originally exclusive right limited to a right to remuneration (such as in the case of private copying) or a right which is provided directly as a mere right to remuneration (such as in the case of the resale right) – is necessarily a partial form of management (since the authorization for uses is not given by the joint management organization). Even in the case of a right to remuneration, it seems more appropriate, at least in certain cases where this is feasible, not to regulate by law all the aspects of the exercise of the right. A more flexible system may be provided if, instead of such regulation, joint management organizations are also given a role, in addition to the collection and distribution of the remuneration, in the negotiations about the remuneration to be paid for,

and other conditions of uses, as well as about the distribution of the collected remuneration among the various groups entitled to have a share therein.

(9) Whether one single, general joint management organization or separate organizations for various rights and various categories of rights owners is more appropriate depends on the political, economic and legal conditions and traditions of the countries concerned. The advantage of separate organizations is that, through them, the particular interests of the different categories of rights owners may be more fully and directly taken into account. The advantage of a general organization is that it may settle more easily the problems of emerging new uses and may more efficiently enforce the general interests of rights owners. If there are separate organizations, there is a need for close cooperation between them, and, sometimes, for joint action in the form of specific "coalitions", while, in the case of a general organization, guarantees are needed to avoid neglecting the interests of certain categories of rights owners.

(10) Due to the phenomenon of "multimedia" – both in the form of off-line productions and in the way different categories of works and objects of related rights are used together in the global digital network – there is a growing need to establish "coalitions" of joint management organizations in order to offer a joint source of authorization ("one-stop shops") or to participate in an even more general cooperation which may also extend to individual owners of rights joining the coalition either through including their licensing information or through authorizing the "coalition" as an agent to issue authorizations on their behalf in harmony with their individual licensing conditions and tariffs. This does not mean that in such a "coalition" all the licensing sources should merge together. Traditional collective management organizations (such as authors' societies) may, and certainly will, preserve their autonomy.

(11) Usually, there should be only one organization for the same category of rights for the same category of rights owners in each country. The existence of two or more organizations in the same field may diminish or even eliminate the advantages of joint management of rights.

(12) Whether public or private organizations are more appropriate for joint management of copyright and related rights also depends on the political, economic and legal conditions and traditions of the countries concerned. In general, private organizations are preferable. The conditions of certain countries (in particular, of those developing countries which have not yet been able to fully develop their copyright infrastructures) may, however, make the setting up of public organizations desirable in order to safeguard rights owners' interests. In the case of such public organizations, appropriate organizational forms and guarantees are needed in order that the rights owners concerned may participate in the direction of the management of their rights.

(13) The operation of blanket licenses granted by duly established and sufficiently representative joint management organizations should be facilitated by a legal presumption that such organizations have the power to authorize the use of all works covered by such licenses and to represent all the rights owners concerned. At the same time, such joint management organizations should give appropriate guarantees to their licensees against the individual claims of rights owners who are not represented by the organization but whose works are also covered by a blanket license.

(14) The other possible form of settling the problem of non-members is the system of extended joint management. The essence of such a system is that, if there is an organization that is authorized to manage a certain right by a large number of owners of rights, and thus it is sufficiently representative in the given field, the effect of such joint management is extended by the law also to the rights of those owners of rights who have not entrusted the organization with the management of their rights. In an extended joint management system, there should be provisions for the protection of the interests of those owners of rights who are not members of a joint management organization. They should have the possibility of opting out (that is, declaring – with a reasonable deadline – that they do not want to be represented by the organization) and/or claiming individual remuneration. Unless such possibilities exist and may be applied in practice without any unreasonable difficulties, an extended joint management system is to be regarded as a form of obligatory joint management, and, thus, point (4) above is applicable to it.

(15) Government supervision of the establishment and operation of joint management organizations seems desirable. Such supervision may guarantee, *inter alia*, that only those organizations which can provide the legal, professional and material conditions necessary for an appropriate and efficient management of rights may operate; that the joint management system be made available to all rights owners who need it; that the terms of membership of the organizations be reasonable and, in general, that the basic principles of an adequate joint management (for example, the principle of equal treatment of rights owners) be fully respected.

(16) Decisions about the methods and rules of collection and distribution of remuneration, and about any other important general aspects of joint management, should be taken by the rights owners concerned or by bodies representing them under the statutes of their organization.

(17) For rights owners whose rights are managed by a joint management organization, regular and sufficiently detailed information should be available about the activities of the organization that may concern the exercise of their rights. Such information should also be available to foreign joint management organizations in mutual representation partnership with the organization concerned.

(18) Government supervision of, and interference in, the establishment and operation of tariffs and other licensing conditions applied by joint management organizations which are in a *de facto* or *de jure* monopoly position *vis-à-vis* users, is only justified if, and to the extent that, such supervision or interference is indispensable for preventing abuse of such a monopoly position.

(19) A certain level of tariffs (for example, a higher level than in other countries) should not be regarded in itself as a sufficient basis for presumption of abuse. In that respect, it should be taken into account that the tariffs should correspond to the exclusive nature of rights and should represent an appropriate remuneration to owners of rights which, in certain countries, may be ensured in a much fuller way than in others, and the actual value of the repertoire and service offered by a joint management organization, as well as the economic and social conditions of the country concerned should also be taken into account.

(20) In harmony with general economic developments, and also in response to the new forms of exploitation of works and objects of related rights in the digital networked environment, there is a growing concentration and integration trend in the cultural and information industries. In certain fields, few big media conglomerates are able to control the overwhelming part of global markets. In this situation, the role of joint management organizations, and, in particular that of collective management societies, may become more important both for owners of rights and for the said media conglomerates. Owners of rights whose works and objects of related rights are exploited by the member companies of these powerful media groups obviously need their collective management organizations in order to achieve as favorable licensing conditions as possible. The media groups also need the cooperation of collective management organizations. They not only need this for the purpose of obtaining the necessary authorizations but also of improving their public relations position. In the great majority of countries, the basis for legal-political justification and social acceptance of copyright is that it is necessary for the promotion of human creativity and for the recognition of creative activity. Certain anti-copyright movements base their views and ideas on the less visible relationship between copyright protection and the enjoyment of copyright by individual human creators in cases where copyright is exercised by what are perceived as big and rich companies. Harmonious and mutually advantageous cooperation with collective management organizations of creators certainly can strengthen the position of the big media groups against the sometimes quite radical anti-copyright "ideologies".

(21) Partly in response to the above-mentioned trends, and partly in order to establish more efficient structures, there are also integration, concentration and regionalization trends – both horizontal and vertical – in the field of joint management of copyright and related rights. The bulk of licensing global or regional exploitation tends to be concentrated in the hands of a few organizations (for example, in the case of authorization for online use of works and objects of related rights on the Internet by big content providers or for central pressing of phonograms). While this seems inevitable and potentially beneficial for the entire system of joint management of rights, it is important to pay attention to the situation that may emerge as a result of these developments for joint management organizations, and in particular for collective management societies, of countries that tend to become mere

market countries. Appropriate multilateral and bilateral contractual solutions should be worked out and applied that may ensure the enjoyment of the rights of owners of rights, the survival and viability of collective management organizations, and – through this – the maintenance and strengthening of the indispensable political support and social respect for copyright and related rights in such market countries. This is particularly indispensable in the case of developing countries.

(22) Appropriate legislative and administrative measures should facilitate the monitoring of uses and collection of royalties by joint management organizations. The fullest possible cooperation by users – including application for licenses and supply of programs – should be prescribed as an obligation, and enforcement measures and sanctions should be applied against those users who create any unreasonable obstacles to such activities of joint administration organizations.

(23) No remuneration collected by a joint management organization should be used for purposes other than covering the actual costs of management and the distribution of the remuneration to rights owners, except where the rights owners concerned, including foreign rights owners, or bodies representing them under the statutes of their collective management organizations, authorize such a use of the remuneration (for example, for cultural or social purposes). It should, however, be taken into account that authorizing deductions for cultural and social purposes may establish a favorable basis for the operation of joint management organizations in an efficient way, as well as for sufficient political support and social respect for copyright and related rights (in particular in developing and other net importer countries).

(24) The remuneration collected by a joint management organization – after the deduction of the actual costs of management and of other possible deductions that rights owners may have authorized according to the preceding point – should be distributed among individual rights owners in proportion to the actual use of their works and objects of related rights as much as possible. Individual distribution may only be disregarded where the amount of remuneration is so small that distribution could not be carried out at a reasonable cost.

(25) Foreign rights owners represented by a joint management organization should enjoy, in all respects (such as the monitoring of uses, the collection of remuneration, the deduction of costs and, especially, the distribution of remuneration), the same treatment as those rights owners who are members of the organization and nationals of the country concerned.

(26) Joint management organizations may perform activities other than management of rights proper, but the costs of such activities should not burden the remuneration collected in the framework of joint management of rights.

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