WIPO NATIONAL SEMINAR ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the International Confederation of Societies of Authors and Composers (CISAC)
the International Federation of Reproduction Rights Organization (IFRRO)
and
the Intellectual Property Office of Serbia (IPOS)

Belgrade, September 15 and 16, 2009

THE INTERNATIONAL COPYRIGHT TREATIES AND COLLECTIVE MANAGEMENT – KEY ISSUES (BACKGROUND PAPER)

Dr. Mihály Ficsor, Chairman,
Central and Eastern European Copyright Alliance (CEECA), Budapest
I. INTRODUCTION

1. 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. 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 the performance of any act covered by the right; and if he does authorize such an act, under what conditions and against what amount of remuneration.

2. It goes without saying that an exclusive right may be enjoyed, to the fullest possible extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work\(^1\), and he may closely monitor whether his rights are duly respected.

3. Around 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 – in the case of which individual exercise of rights was very difficult. Later, with the advent of ever newer technologies, the areas in which individual exercise became equally difficult, and – in certain cases, even impossible – began widening. It was in those cases that owners of rights established collective management systems.

4. In a traditional, fully fledged collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, grant licenses under certain conditions, collect remuneration, and distribute it among the owners of rights. In such a system, many elements of the management of rights are standardized – and, in fact, even “collectivized:” the same tariffs, the same licensing conditions and the same distribution rules apply to all works which fall into a given category; and sometimes also social and/or “cultural” deductions are made, etc.

5. There are certain cases where owners of rights do not authorize an organization to carry out all the functions just mentioned but only some of them. For example, in certain countries, authors of dramatic works leave collective bargaining and the establishment of framework agreements (with the representatives of theaters, etc.) to their societies, but they, as a rule, directly conclude contracts with theaters, and only entrust their societies with monitoring performances, collecting remuneration and transferring it to them. This form of exercising rights is sometimes referred to as “partial collective management.”\(^2\) However, it may also be regarded as a kind of agency-type management of rights.

6. For corporate rights owners – producers, publishers, etc. – it is also inevitable or, at least, desirable in certain situations that, for exercising their rights, they form a collective management organization. Although some of them – for example, music publishers in several countries – are members of “traditional” collective management organizations and accept the rules thereof, some others prefer to choose other forms of exercising rights with as few “collectivized” elements as possible. This leads to a kind of agency-type system, where the only or main task of the jointly established organization is the collection and transfer of

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\(^1\) In this paper, unless the contrary follows from the given context, “copyright” means also related rights, and “work” also means objects of related rights.

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 systems – managed by so called “rights-clearance centers” – is where the tariffs and licensing conditions are individualized, but a single licensing source is offered with significant reduction of transaction costs for both owners of rights and users. Since, in this system, there are no real “collectivist” elements, it is usually referred to as “centralized management” in order to differentiate it from real, “traditional” “collective management.” In legal literature, the expression “joint management” has been chosen to cover both “collective management” and “centralized management” in contrast with “individual exercise” of rights.  

7. Fully fledged collective management organizations and such agency-type bodies function side by side, and sometimes they also establish alliances – “coalitions” – in order to pursue common interests or to exercise and/or enforce certain rights together.

8. There is a form of collective management 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 exclusive rights). It is important to note that there may be quite significant differences between the various rights to remuneration from the viewpoint of their roots and their copyright status. In some cases, what is involved is a limitation of an exclusive right to a right to remuneration (for example, as regards “private copying” and reprographic reproduction, where in several countries the exclusive right of reproduction – at least in certain cases – 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” of performers and/or producers of phonograms); and still in other cases, the right to remuneration is a “residual right” (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)).

9. Digital technology, and in particular the ever widespread use of the Internet, on the one hand, has raised complex challenges to the owners of rights, and on the other hand, individual exercise of rights – through the application of technological protection measures (TPMs), electronic rights management information (RMI), and their combination as complex digital rights management systems (DRMs) – has become possible and practical in a broadening field. This influences the scope of those exceptions to and limitations of exclusive rights that may be justified and acceptable on the basis of the “three-step test” provided for in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT. For example, distribution of copies through interactive transmissions

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4 The expression “Article 12 rights” refers to the rights provided in Article 12 of the Rome Convention which reads 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.” (Article 16.1(a) of the Convention provides for the possibility of reservations to Article 12, which may go even so far as to no application of the Article.) It is to be noted that Article 15 of the WPPT also provides for similar rights to remuneration for performers and producers of phonograms.
supported by DRM – resulting in what is regarded now as “private copying” – is becoming a basic form of exploitation of works; therefore, in the cases where owners of rights apply DRM systems, and in particular TPMs, it would not be in accordance with the requirements of the “three-step test” to reduce the exclusive right of reproduction, in general, to a mere right to remuneration.\(^5\)

10. Since, as mentioned above, collective management – in particular, when it results in fully fledged “collectivization” of the various management elements – from the viewpoint of owners of rights goes along with inevitable restriction of exclusive rights, it is justified to raise the question of in which cases, and under what conditions, such restriction may be justified and acceptable. In this paper, this question is discussed in respect of two forms of non-voluntary collective management – mandatory collective management (Part II), and extended collective management (Part III) – on the basis of the international copyright norms and the “acquis communautaires” of the European Union.

II. MANDATORY COLLECTIVE MANAGEMENT

11. Before any analysis of the Berne Convention from the viewpoint of the question of when and under what conditions mandatory collective management may be permitted (of course, this analysis is relevant also from the viewpoint of the TRIPS Agreement and the WCT, which incorporate the substantive provisions of the Berne Convention by reference\(^6\)), it is worthwhile asking the following prior questions: (i) Is it determining/imposing a condition if somebody is in the position of doing something but it is provided in the law that he can only do so in a certain way? (ii) Is it determining/imposing a condition if somebody owns something but it is provided in the law that he can only use it in a certain manner? (iii) Is it determining/imposing a condition if somebody is granted a right but it is provided in the law that he can only exercise it through a certain system?

12. It seems obvious that an affirmative answer should be given to each of these questions.

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

- Article 11bis(2): “It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph\(^7\) may be exercised, but these conditions shall apply only in the countries where they have

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\(^5\) It is another matter, that, in some specific cases, such as copying of certain works, for example, in the framework of distant education program – with appropriate guarantees that only the intended beneficiaries may get access to the works – exceptions and limitations may be justified.

\(^6\) See Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT.

\(^7\) Under the “preceding paragraph – paragraph (1) of the same Article – “[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”
been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.”

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

14. In general, these provisions are regarded as a legal basis for the application of non-voluntary licenses, since they define the minimum requirement to be respected when such conditions are applied; namely that they must not, under any circumstances, be prejudicial to the right to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible “conditions” mentioned in those provisions; also other conditions of the exercise of the exclusive rights concerned may be applied.

15. Mandatory collective management of rights is such a condition, since, it means – referring to the questions in paragraph 11, above, (i) that, although the owners of these rights are in the position of doing something (namely, enjoying the exclusive right of authorizing the acts in question), it is provided that they can only do so in a certain way; (ii) that although they own such exclusive rights, it is provided that they can only exploit them in a certain manner; and (iii) although they are granted such rights, it is provided that they can only exercise their rights through a certain system (namely, collective management).

16. Since the possibilities of “determining/imposing conditions” are provided for in the Convention in an exhaustive way, on the basis of the a contrario principle, it can be deduced that, in general, mandatory collective management of exclusive rights may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration).

17. In the previous paragraph, the words “exclusive rights” are emphasized. It is necessary for pointing out that what is discussed above should not be interpreted as to mean that mandatory collective management may only be prescribed in cases where, in the provisions of the Berne Convention – or other international norms on copyright and related rights – the expression “determine/impose conditions” (under which the rights concerned may be exercised) is used. Mandatory collective management is permissible also in cases where

(i) a right is not provided for as an exclusive right of authorization but rather as a mere right to remuneration (as in the case of the resale right under Article 14ter of the Convention, or, speaking about related rights, the so-called “Article 12 rights” of performers and producers of phonograms);
(ii) where the restriction of an exclusive right to a mere right to remuneration is allowed on the basis of the international treaties (as is the case in respect of Article

8 See footnote 4, above.
9(2) concerning the right of reproduction⁹); and
(iii) where what is concerned is a "residual right"; that is, a right to remuneration
(usually of authors and performers) which “survives” the transfer of certain exclusive
rights (such a residual right is not in conflict anymore with the exclusive nature of the
right concerned, since it is only applicable after that the latter has been duly exercised.)

18. As regards “residual rights,” the best example is the “unwaivable right to
rental right and lending right and on certain rights related to copyright in the field of
intellectual property” (hereinafter: the Rental Directive).¹⁰ Since it is mentioned here, it is
justified to begin the review of the acquis communautaires from the viewpoint of the issue of
mandatory collective management, with the provisions on this right.

19. First, paragraph 3 of the Article 4 of the Rental Directive provides that “[t]he
administration of this right to obtain an equitable remuneration may be entrusted to collecting
societies representing authors or performers;” then, paragraph 4 deals with the question of
possible prescription of mandatory collective management. Its relevant part reads as follows:
“Member States may regulate whether and to what extent administration by collecting
societies of the right to obtain an equitable remuneration may be imposed…”

20. This provision is significant from the viewpoint of the issue of mandatory collective
management not only because it indicates that, in the case of this “residual right,” collective
management may be imposed (that is, may be made mandatory), but also because it has an a
contrario implication. Since the directive has found it necessary to state that, in this case,
collective management may be imposed, by this it indicates implicitly that, under the acquis
communautaires – unless this possibility does not follow directly from the provisions of an
international treaty to which the Member States are party – there is a need for such a
permission; or in other words: mandatory collective management is not allowed where the
international norms on copyright (such as the provisions of the Berne Convention, as
discussed above) – or where, in respect of rights not covered by international norms (such as
the right of rental), the acquis communautaires – do not explicitly permit it.

rules concerning copyright and rights related to copyright applicable to satellite broadcasting
and cable retransmission” (hereinafter: the Satellite and Cable Directive) goes further: in the
case of cable retransmission, it not only permits the imposition of collective management, but
it makes such management mandatory. Article 9.1 of the directive provides as follows:
“Member States shall 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

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⁹ Article 9(2) uses the expression “to permit the reproduction of… works”. This may mean – subject to the said
test – either free uses or, as it is clarified in the report of Main Committee I of the 1967 Stockholm revision
conference (see paragraph 85 of the report), the reduction of the exclusive right to remuneration to a mere right
to equitable remuneration. It is on this basis, that, in case of widespread and uncontrollable private copying, in
certain countries, a right to remuneration is applied (usually in the form of a levy on recording equipment and
material) to which is, of course, the obligation to grant national treatment extends without any reasonable doubt
whatsoever.

¹⁰ Paragraph 1 of Article 4 of the Rental Directive provides as follows: “Where an author or performer has
transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram
or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the
rental.” And paragraph 2 of the same article adds that “[t]he right to obtain an equitable remuneration for rental
cannot be waived by authors or performers.”
only through a collecting society” [emphasis added]. The directive also regulates the legal technique through which it may be achieved that all such rights of copyright owners and holders of related rights may be concentrated in the repertoire of a collective management organization (or possibly more than one organization from which holders of rights may chose one).11

22. The provision of the directive just quoted is in accordance with the above-stated principle – namely that, in the case of an exclusive right, mandatory collective management may only be prescribed where the relevant international norms allows to do so, either through permitting the prescription of conditions for the exercise of exclusive rights (imposing collective management being obviously a condition) or through limiting it to a right to remuneration in certain cases (in which cases, the exclusive nature of the rights concerned disappears not only in respect of the decisive “upstream” stage – that is, in the relationship between the owners of rights and the collective management organizations – but also in respect of the “downstream” stage between the collective management organizations and the users). This is so since, in respect of authors’ “exclusive right of authorizing... any communication to the public by wire... of the broadcast of [their] works” granted by paragraph (1) of Article 11bis, paragraph (2) of the same Article provides that ”[i]t shall be a matter for legislation in the countries of the [Berne] Union to determine the conditions under which the rights mentioned in [paragraph (1)] may be exercised.” (In the case of related rights, neither the Rome Convention nor the acquis communautaires provide for exclusive rights of authorization concerning cable retransmissions. This situation has not changed with the adoption of the Satellite and Cable Directive. The international norms adopted in the meantime – the relevant provisions of the TRIPS Agreement and the WIPO Performances and Phonograms Treaty (WPPT) – also have not introduced such exclusive rights).

23. Article 10 of the Satellite and Cable Directive provides for an exception to mandatory collective management of cable retransmission rights; namely for such rights of broadcasting organizations.12 This refers to one of the basic principles concerning collective management, according to which collective management, even if it might be possible from the viewpoint of the international norms and the acquis communautaires, is only justified where individual exercise of rights – due to the number of owners of rights, the number of users or other circumstances of uses – is impossible or, at least, highly impracticable. Broadcasting organizations are relatively less numerous (in contrast with authors and the owners related

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11 Article 9.2 and 3 of the Satellite and Cable Directive provide as follows:
“2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.”

“3. A Member State may provide that, when a right-holder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.”

12 Article 10 of the Satellite and Cable Directive provides as follows: “Member States shall ensure that Article 9 [prescribing mandatory collective management] 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.”
rights other than the rights of broadcasting organizations); they are able to manage their rights individually.\(^{13}\)

24. The Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (hereinafter: the Resale Right Directive) does not prescribe mandatory collective management for the collection and distribution of the royalties due for the resale right, but allows Member States to do so. Its Article 6.2 reads as follows: “Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.” As discussed above, in this case, the prescription of mandatory collective management is allowed under the international copyright norms, since it corresponds to the nature of the resale right (droit de suite) under Article 14ter of the Berne Convention; namely that it is a mere right to remuneration (and it is also only such a right under Article 1 of the Resale Right Directive).

25. As emphasized above, it may be deduced from the a contrario principle that, where the international copyright norms and/or the acquis communautaires provide for an exclusive right that can be exercised individually and the relevant norms do not allow the prescription of conditions for its exercise (nor permit its limitation to a mere right to remuneration), it would be in conflict with those norms to submit the exercise of such a right to the condition that it may only be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and, consequently, under the acquis communautaires) in the case of the right of public performance (Article 11 of the Berne Convention), the right of public recitation (Article 11ter) or the right of “making available to the public” (Article 8 of the WCT and Articles 10 and 16 of the WPPT).\(^{14}\)

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\(^{13}\) It is another matter, that broadcasting organizations still have found collective management of their cable retransmission rights advantageous. They have established the Association for the International Collective Management of Audiovisual Works (AGICOA) of which one of the most important tasks is exactly the collective management of cable retransmission rights.

\(^{14}\) Articles 10 and 16 of the WPPT provide separately for “rights of making available” of fixed performances and phonograms, while, under Article 8 of the WCT, such a right is provided for as a “sub-right” of the right of communication to the public in the following way: “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(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 (the text relating to the right of “making available”, as a sub-right of the right of communication to the public, is emphasized). It is to be noted that the 1996 Diplomatic Conference having adopted the WCT has also adopted an agreed statement concerning the above-quoted Article 8 which states as follows: “It is... understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)” [of the Berne Convention]. Article 11bis(2) provides for the possibility of countries of the Berne Union “to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised”. The rights mentioned in that “preceding paragraph” – paragraph 11bis(1) – are the right of broadcasting and the rights of retransmissions and certain “public communications” of broadcast works; that is, sub-rights of the right of communication to the public clearly other than the right of making available to the public. Thus, Article 11bis(2) obviously is not applicable in respect of the right of “making available”. It is another matter that paragraph (26) of the Information Society Directive contains the following statement: “With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.” This is another matter since encouraging collective management does not mean making it mandatory.
26. This does not mean that owners of rights may not, and do not, create collective
management systems where it is not mandatory, since, for example, the oldest and the most
efficiently functioning collective management system, both at national level and – through the
International Confederation of Societies of Authors and Composers (CISAC) – at
international level, has been established exactly for the management of the public
performance right. In such cases, also extended collective management systems may be
applied (see below). However, in the case of voluntary collective management, any owner of
rights may decide not to authorize the collective management organization to represent and
exercise his rights, and, also in the case of extended collective management, as discussed
below, there is the possibility of any owner of right to “opt out” from the collective system.

III. EXTENDED COLLECTIVE MANAGEMENT

27. One of the most important advantages 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 or other protected subject matter
concerned as regards the given right of the given category of owners of rights.

28. It is to be noted, however, that, even where the system of bilateral agreements is fairly
developed (such 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 do not include their works in a collective system).

29. There are two basic legal techniques for ensuring the operation of blanket license
systems. The first one is the “guarantee-based” system which involves the following
elements: (i) the lawfulness of authorizing the use of works not belonging to the repertoire of
the given organization is recognized by law (either by statutory law or by case law); (ii) the
organization guarantees that individual rights owners will not claim anything from users to
whom blanket licenses are granted; that, if they still try to do so, such claims will be settled by
the organization; and that any user will be indemnified for any prejudice and expense caused
to him as a result of justified claims by individual owners of rights; and (iii) the organization
also guarantees that it treats owners of rights who have not delegated their rights to it in a
reasonable way, taking into account the nature of the right involved. In this system, there is an
“automatism” that may not be fully compatible with the exclusive nature of the rights
involved. If it does not extend to the possibility of “opting out” (see below), its compatibility
with the relevant international norms may be doubtful.

30. The other legal technique for ensuring the conditions for blanket licenses seems to be
more appropriate in the case of exclusive rights, since it avoids the paradox situation of
leaving the solution to the problem of those owners of rights who do not wish to participate in
the collective system to the very collective management organization in which they do not
wish to participate (as in the case of the “presumption-based” systems). This legal technique
is the so-called extended collective management. The essence of such a system is that, if there
is an organization authorized to manage a certain right by the overwhelming majority of – nn
both domestic and foreign – owners of rights and, if it is sufficiently representative in the
given field, the effect of such collective 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; however, with the possibility of the latter to “opt out” from the collective system.

31. In an extended collective 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 and who do not wish to participate in the collective system. Those owners of rights should have the option of freely choosing between either claiming individual remuneration (as in the case of the application of the guarantee-based system) or “opting out” (that is, declaring that they do not want to be represented by the organization). (In the former case, of course, they are supposed to take care of the exercise of their rights.) As regards “opting out” from the collective 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, but the procedure of “opting out” should be simple and should not be burdensome (for example, an owner of right should be able to “opt out” in a simple declaration with all his present and future works, without being obliged to offer an exhaustive list, since without this, the “opting out” system might be transformed into a de facto formality).

32. The fact that an extended collective management system better corresponds to the exclusive nature of rights – and to the related requirements of the international copyright norms and/or the acquis communautaires – than a simple “guarantee-based” system is duly recognized also under the acquis communautaires.

33. This is clearly reflected in the provisions of Articles 2 to 4 of the Satellite and Cable Directive. After that Article 2 provides that “Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works...”, and Article 3.1 adds that “Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement” (that is, it must not be subject to a non-voluntary licensing system), Article 3.2 outlines what may be regarded as an extended collective management system. It reads as follows:

“A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:

– the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

– the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively [emphasis added].”

34. This provision authorizes (the “may” language indicates this) Member States to introduce an extended collective licensing system, which reflects the position that such an authorization is needed, and that, where it is not granted, in the fields expressly covered by
the acquis, no extended collective management may be appropriate (not mentioning, of course, mandatory collective management).\textsuperscript{15}

35. This is confirmed by Article 3.3 and 4 which indicate that even extended collective management may only be justified where it is truly indispensable, and where owners of rights usually do not intend to – or could hardly – exercise their exclusive rights on an individual basis. Article 3.3 identifies a category of works where this is not the case. It provides that “[p]aragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography,” while Article 3.4 underlines the exceptional nature of extended collective management by introducing a specific notification procedure.\textsuperscript{16}

36. There is one more directive in which mention is made of extended collective management; namely Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: the Copyright Directive), which, in paragraph (18) of its preamble, states as follows: “This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses.”

37. It seems obvious that this may hardly be interpreted as an authorization for applying any kinds of arrangements – including extended collective management systems – in respect of any uses and any category of protected subject matter. The principles reflected in Article 3 of the Satellite and Cable Directive certainly must be duly taken into account.

[End of paper]

\textsuperscript{15} For example, the right of public performance of authors is not covered by the acquis communautaires. In the case of that right, for example, extended collective management may be justified (but, since it is an exclusive right, mandatory collective management obviously is not permitted).

\textsuperscript{16} Article 3.4 provides as follows: “Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the Official Journal of the European Communities (C series).”