The impact of the nature of rights on the way tariffs may be determined

- Copyright is basically a bunch of exclusive rights. Exclusive rights are also provided for beneficiaries of related rights at least in respect of key primary exploitations of objects of related rights
  - Definition of „exclusive right” in the WIPO Glossary of Copyright and Related Rights (WIPO publication, 2003, No. 891 (E)): „A right that is enjoyed by the owner of copyright or related rights, excluding the acquisition and enjoyment of the same right in respect of the same work or object of related rights by anyone else, on the basis of which the owner of rights — and nobody else — may perform a certain act and may authorize or prohibit the performance of that act by others.”
- The Berne Convention only exceptionally provides for a mere right to remuneration rather than to an exclusive right
  - see Article 14ter on resale right (droit de suite)
- Treaties on related rights do so for a broader scope of rights
  - see, e.g. Article 12 of the Rome Convention and Article 15 of the WPPT on the right of performers and producers of phonograms to a „single equitable remuneration” for broadcasting and communication to the public of phonograms published for commercial purposes.
The impact of the nature of rights on the way tariffs may be determined – exclusive rights

- Exclusive rights may be exercised in different ways – normally depending on the free choice of owners of rights
  - individually (through directly negotiated and concluded contracts); such as, e.g., in the case of book publishing
  - through agents or other representatives; such as, e.g., in the case of theatrical presentations
  - through collective management of rights; such as, e.g., in the case of musical performing rights
- It should be kept in mind that an exclusive right is supposed to prevail as an exclusive right also when a collective management organization exercise it on behalf of owners of rights

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009

The impact of the nature of rights on the way tariffs may be determined – exclusive rights (cont.)

- Article 17 of the Berne Convention: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

- Agreed statement adopted by the 1967 Stockholm revision conference which – anachronistically – has been added to Article 17, to the article on the possibility of applying censorship, with which it had nothing to do: “Each country of the Union is free to enact such legislation as is necessary to prevent or deal with any abuse, by persons or organizations exercising one or more of the rights in a substantial number of different copyright works, of the monopoly position they enjoy.”

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009
The impact of the nature of rights on the way tariffs may be determined – exclusive rights (cont.)

Principles (18) and (19) of Chapter 7 – Conclusions – of WIPO publication „Collective Management of Copyright and Related Rights“ (2002, WIPO publication No. 855 (E)):

“(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 positions 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.”

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009

The impact of the nature of rights on the way tariffs may be determined – rights to remuneration

• In addition to those cases where the international copyright and related rights treaties provide for mere rights to remuneration, they also allow exceptions to and limitations of exclusive rights in certain cases, under certain conditions
• Exception: „a thing that does not follow the rule“ (Oxford Advanced Learner’s Dictionary, 2000); that is, regarding a right, exception means that the right is not applicable (see, e.g. Articles 10 and 10bis of the Berne Convention, as well as Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT where the three-step test – provided in those provisions – also allow exceptions).
• Limitations: „a rule that limits something [including the application of another rule]“ (Oxford Advanced Learner’s Dictionary, 2000); that is, although a right – originally provided as an exclusive right – is still applicable, it is limited in some way.
• Forms of limitations of exclusive rights:
  ➢ Mandatory collective management (topic of another presentation)
  ➢ Compulsory licenses
  ➢ Statutory licenses

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009
The impact of the nature of rights on the way tariffs may be determined – rights to remuneration (cont. 1)

Compulsory licenses resulting in de facto rights to remuneration:

- Article 11bis(2) of the Berne Convention: (2) It shall be a matter for legislation... to determine the conditions under which the rights mentioned in the paragraph 1 [the rights of broadcasting, rebroadcasting and cable retransmission] may be exercised... 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... has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but... such reservations and conditions... 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.

- Appendix to the Berne Convention: compulsory translation and reprint licenses only applicable in developing countries.

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009

---

The impact of the nature of rights on the way tariffs may be determined – rights to remuneration (cont. 2)

- Statutory license means the limitation of a right – originally provided as an exclusive right – to a mere right to remuneration directly by the statutory law.

- Along with compulsory licenses, statutory licenses belong to the broader category of „non-voluntary licenses.”

  - WIPO Glossary (see slide 2): „the term ‘non-voluntary licenses’ covers both statutory licenses and compulsory licenses – ‘statutory license’ meaning a direct permission granted by the law, and ‘compulsory license’ meaning an obligation of the rights owners, under the law, to grant licenses, both against payment.”

- The most typical example of a statutory license combined with equitable remuneration is the application of the right of reproduction in case of copying for private purposes (usually based on „levy” systems).

Dr. Mihály Ficsor, Belgrade, Sept. 15, 2009
The impact of the nature of rights on the way tariffs may be established – rights to remuneration (cont. 3)

The difference between compulsory licenses and statutory licenses from the viewpoint of the way tariffs may be established:

- In case of a **compulsory license**, normally, first, the interested parties – owners of rights and users – are supposed to negotiate between each other, and a competent authority is only supposed to interfere where, and to the extent that, they are unable to reach agreement (see the close in Articles 11bis(2) and 13(1) of the Berne Convention: the remuneration „in the absence of agreement [only in the absence of agreement] , shall be fixed by competent authority”).

- In the case of a **statutory license**, a competent authority – although it may (and preferably should) consult with the interested parties – may directly fix a tariff without the conditions (i) that, first, the parties have to negotiate, and (ii) that it may only intervene in the absence of agreement.

The impact of the nature of rights on the way tariffs are established - different levels of intervention may be justified

**Thesis** (based on the principles and provisions of the international treaties): the intervention by governmental bodies or by special tribunals/arbitration/mediation bodies should be narrower and less intensive along the sequence of

- **(i)** mere rights to remuneration provided as such or as a results of limitations of exclusive rights in the form of statutory licenses;
- **(ii)** limitations of exclusive rights in the form of compulsory licenses;
- **(iii)** exclusive rights left intact.

**Principle (8) in Chapter 7 of the WIPO publication** on collective management (mentioned in slide 5): „Collective 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, collective 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.”
European models with differing intensity of state intervention – “liberal” systems

“Liberal” systems, such as in France or Spain:

- **closest control of tariffs**, or special mediation-arbitration systems only in respect of rights to remuneration and cable retransmission rights where the Satellite and Cable Directive (93/83/EEC) prescribes mandatory collective management combined, at least, with a mediation system;
- only **some general guiding principles** in the IP Code for the establishment of tariffs;
- **normal court jurisdiction**;
- (however, impact of the decisions of the European Court of Justice and the competition directorate of the European Commission)

---

European models with differing intensity of state intervention – Copyright Tribunals

**Copyright Tribunals**, such as in particular in the United Kingdom.

- **Jurisdiction**: defined in Sections 149, 205B and Schedule 6 of the Copyright, Designs and Patents Act 1988 (as amended). **Anyone who** has unreasonably been refused a licence by a collecting society or **considers the terms of an offered licence to be unreasonable** may refer the matter to the Tribunal.
- **Function**: The main function of the Tribunal is to decide, where the parties cannot agree between themselves, the **terms and conditions of licences** offered by, or licensing schemes operated by, collective licensing bodies. Its decisions are **appealable** to the High Court only on points of law.
- **Members**: The Tribunal consists of a Chairman and two deputy Chairmen who are appointed by the Lord Chancellor, and not less than two, but no more than eight, ordinary members appointed by the Secretary of State for Trade and Industry.
- **Administrative support**: The Tribunal is administered by a Secretary, who is a civil servant working in the Intellectual Property Office.
Voluntary arbitration system, as in Germany. It is voluntary in the sense that, in principle (like in the case of Copyright Tribunals), the arbitration body only acts in case of disputes brought in front of it.

- **Jurisdiction**: based on Articles 14 to 17 of the Law on the Management of Copyright and Neighboring Rights of September 9, 1965 (amended). In disputes to which a collecting society is a party, any party may apply to the Arbitration Board where the dispute concerns: (i) the use of works or performances protected by the Copyright Law, or (ii) the conclusion or amendment of an inclusive contract.

- **Functions**: The Board proposes a settlement to the parties. It becomes enforceable if neither of the parties opposes it within one month. The parties may turn to the court, but only after a proceeding before the Arbitration Board.

- **Members**: the Chairman or his deputy and two assessors (appointed by the Ministry of Justice).

- **Supervisory authority and administrative support**: the Patent Office.

---

Tariffs are only applicable if they are approved by an arbitration board, like the Federal Arbitration Commission in Switzerland.

- **Jurisdiction**: based on Articles 55 to 60 of the Federal Law on Copyright and Related Rights of October 9, 1992 (amended). The tariffs are only valid if the Commission approves them.

- **Functions**: The Commission either approves the tariffs or changes them after consultation with the parties. The law prescribes that a tariff cannot be higher for authors than 10% and for owners of related rights than 3%, of the income or the expenses linked to the usage.

- **Members**: a President, the members and two standby members appointed by the Government, and other members delegated by collective management organizations and associations of users. The Commission takes decisions in five-member panels, in which two members are the representatives of the two interested sides.

- **Supervisory authority**: Ministry of Justice

- **Administrative support**: Federal Institute of Intellectual Property
**European models with differing intensity of state intervention – direct administrative approval or regulation in „transition countries“**

**Transition countries**: countries in transition from centrally planned economy to market economy. Some of them have, more or less, completed the transition process (e.g., many of them have also become members of the EU), while some of them still have to make some efforts. However, **certain features of the previous copyright system have left their impact**. From the viewpoint of collective management, in particular there were two typical features:

- the functions of collective management were carried out by governmental or semi-governmental bodies which also had regulatory role;
- tariffs and contractual conditions usually were established by law.

**Two models emerging in the „transition“ period:**

- **strong position of collective management organizations**, like in **Hungary** (they set the tariffs after negotiations; the Ministry of Culture consults with users, but it cannot reject the approval of the tariffs and cannot change them, except in case of conflict with the law);
- **direct governmental regulation**, like in **certain newly independent countries born from the republics of the former Soviet Union**: after some consultation; sometimes in the form of „minimum tariffs“ (which then are applied also as maximum tariffs).

---

THANK YOU FOR YOUR ATTENTION