

## DOCTRINE AND OPINIONS

### MANDATORY COLLECTIVE ADMINISTRATION OF EXCLUSIVE RIGHTS – A CASE STUDY ON ITS COMPATIBILITY WITH INTERNATIONAL AND EC COPYRIGHT LAW<sup>1</sup>

Dr. Silke v. Lewinski<sup>2</sup>

#### I. Introduction

In recent times, collective administration has been ever more loudly criticized – on the one hand by those who have always had a critical eye on it, namely antitrust lawyers and politicians who may have little regard to the particularities of authors' rights. On the other hand, one may observe that in particular those are critical of collecting societies who might be considered as their competitors regarding the administration or exercise of rights, such as exploiting businesses who have an own interest in acquiring and exercising certain author's rights. Also, among those who are under the legal obligation to pay a remuneration, in particular for private reproduction, some (as the hardware industry) have started to more strongly object to such obligation.

At the same time, the discussion all too often fails to mention – or at least does not express with an equally loud voice that collecting societies are much less, if at all, a threat to competition than the media conglomerates who dominate the markets, all the more since collecting societies (as opposed to such conglomerates) are mostly regulated so as to restrict the danger of an abuse of monopoly, for example through the obligation to conclude contracts with users and relevant right holders.<sup>3</sup> In this vein, the European Parliament has most recently recognized that the monopolies of collecting societies in principle do not affect competition, while “the increasing vertical concentration of the media is the real challenge in the area of access to and dissemination of works and

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<sup>1</sup> This contribution is based on a legal opinion rendered in 2003 that is to be published in June 2004 in Hungarian language in the review “Magyar Jog”.

<sup>2</sup> Head of Department, Max Planck Institute for Intellectual Property, Munich; Adjunct Professor, Franklin Pierce Law Center, Concord, N.H., USA.

<sup>3</sup> See for ex. Gyertyánfy, “Collective Administration of Authors' Rights. An Opinion from Eastern Europe” (talk at the Conference of the Croatian Copyright Society, 22 November 2002 (not yet published), p. 1, referring to the fact that 196 national collecting societies are faced with only a few international media giants, in particular in the sound recording and film business, so that a dominant position towards the users has become questionable.

services protected by copyright or neighboring rights”, and has called upon the Commission to monitor such concentration.<sup>4</sup>

Another important point is usually lacking in discussions on collective administration: the collecting societies’ function, or at least possibility, of strengthening the position of authors who are typically suffering from a weak bargaining position in their relationships with exploiting businesses. A right administered by a collecting society is likely to benefit the author more than an exclusive right assigned to the exploiting businesses. Mandatory rules on contract law in the field of authors’ rights, even if they exist, often are not sufficient to appropriately protect the individual author.<sup>5</sup> While mandatory collective administration is often looked upon as a restriction of the authors’ possibilities, it may in fact rather help authors to best benefit from certain rights. It is time that such a realistic view becomes generally accepted.

Mandatory collective administration has been introduced in many laws in respect of statutory remuneration rights, but yet less often in respect of exclusive rights, as is the case for example in Hungary. However, during the latest legislative procedure to amend the Hungarian Copyright Act the question was raised whether the existing provisions on mandatory collective administration of certain exclusive rights comply with international and EC copyright law.<sup>6</sup> The following analysis examines this problem.

## **II. The Problem**

### **1. The Hungarian Law**

The Hungarian Copyright Act provides for the mandatory collective administration of a number of exclusive rights of the author. Firstly, Sec. 25 of the Hungarian Copyright Act (CA)<sup>7</sup> makes the right of public performance of published musical and literary works subject to mandatory collective administration. Only the so-called small rights are covered, unlike the right of public performance of literary and dramatico-musical works on stage (Sec. 25 (3) CA). Public performance includes in particular the live performance by a performing artist, for example at a concert or public lecture, as well as public performance by technical means or procedures such as playing music from a CD to the public (Sec. 24 (2) CA). Secondly, mandatory collective administration has been

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<sup>4</sup> European Parliament Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighboring Rights of 15 January 2004, no. 2002/2274 (INI); A5-0478/2003, recitals 14-16 (quote from recital 15).

<sup>5</sup> Therefore, not surprisingly, exploiting businesses tend to argue in front of the legislator in favor of exclusive rights (which they would exercise, for example regarding private reproduction) instead of remuneration rights (exercised by collecting societies), and to exercise pressure on authors to revoke rights from the collecting society in order to assign them to the exploiting businesses.

<sup>6</sup> Law no. CII of 2004. The analysis refers to the legal situation before the latest amendments of the Hungarian Copyright Act 1999 of 2004. The relevant amendments modified the mandatory collective administration only insofar as the authors may leave the collecting society, and as the mandatory collective administration of rights in online-uses regarding non-dramatic literary works has been abolished. In this case, a step back to the preceding law would certainly be a step forward for the creators.

<sup>7</sup> Act LXXVI/1999 on Authors’ Rights of 22 June 1999.

provided for the exclusive rights of terrestrial and satellite broadcasting (Sec. 26 (2) CA),<sup>8</sup> transmission of cable-originated programs (Sec. 26 (7) CA)<sup>9</sup> and of making available works to the public other than by broadcasting or cable-originated programs (Sec. 26 (8) CA).<sup>10</sup> Likewise, the mandatory collective administration is limited to the small rights in respect of musical and literary works (Sec. 27 CA).

## **2. The Relevant International and EC Law**

The following relevant international and EC law will be examined in this study with a view to the compatibility of the Hungarian provisions therewith: The Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) (*BC*); the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (*TRIPS-Agreement*); the WIPO Copyright Treaty (*WCT*); the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and certain rights related to copyright applicable to satellite broadcasting and cable retransmission (*EC Satellite and Cable Directive*)<sup>11</sup> and the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (*EC Information Society Directive*).<sup>12</sup>

None of these international and EC legal instruments address the question whether or not the mandatory collective administration of an exclusive right covered thereby would be in compliance with them. The only case where a mandatory collective administration of an exclusive right has been explicitly laid down is Art. 9 (1) of the EC Satellite and Cable Directive in respect of the exclusive cable retransmission right. Apart from that, mandatory collective administration in respect of exclusive rights seems to be a rather recent phenomenon also at the national level. Accordingly, legal doctrine has hardly dealt with this question so far.

## **3. Basic Questions under International and EC Law**

In respect of the relevant international law, the following basic questions arise: firstly, the Berne Convention, followed by the TRIPS Agreement and the WCT, establishes a system of exclusive minimum rights which may be limited only according

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<sup>8</sup> The right of satellite broadcasting is further defined as follows: the satellite program must be directly receivable by the public; this is deemed to be the case, if, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced into an uninterrupted chain leading to the satellite and down towards the earth with the aim that the public may receive the signals (Sec. 26 (2) CA).

<sup>9</sup> The right of transmission under Sec. 26 (7) CA covers the transmission of an own program to the public via cable or any other, similar means.

<sup>10</sup> Sec. 26 (8) CA on the exclusive right of transmitting a work to the public other than by broadcasting or transmission of cable-originated programs explicitly extends this right to the making available of a work to the public by wire or other means, so that the members of the public may individually choose the place and time of access; this right reflects in particular Art. 8 of the WIPO Copyright Treaty (WCT) and Art. 3 (1) of the EC Information Society Directive which focus on on-demand and similar internet- uses.

<sup>11</sup> OJ EC L 248/15 of June 10, 1993.

<sup>12</sup> OJ EC L167/10 of June 22, 2001

to the permitted exceptions and limitations. The study will examine whether the mandatory collective administration of the relevant exclusive rights may be qualified as an exception or limitation, and if so, whether it would be permitted under the relevant international provisions (1). In addition, the question may arise whether or not the mandatory collective administration constitutes a formality in the meaning of Article 5 (2) BC which would not be permitted thereunder (2). Finally, if the examination shows that the mandatory collective administration is in compliance with the principles of minimum rights and “no formalities”, a question in respect of national treatment will have to be dealt with (3).

In the context of the relevant EC Directives, questions may arise in particular in respect of Art. 3 of the EC Satellite and Cable Directive which contains a number of conditions for the acquisition and exercise of the exclusive satellite broadcasting right. In addition, Art. 5 of the EC Information Society Directive contains a comprehensive list of permitted exceptions and limitations beyond which the EC Member States are not allowed to limit the exclusive right of communication to the public in the meaning of its Art. 3 (1); this question is relevant for the rights of transmission of cable-originated programs and of making available under Sec. 26 (7), (8) CA. Again, the question would be whether or not the mandatory collective administration represents an exception or limitation in the meaning of Art. 5 of the EC Information Society Directive and, if so, whether it is covered thereby. Also, questions of non-discrimination of other EC citizens (assuming the full membership of Hungary to the EC) may have to be touched upon.

### **III. Analysis of the Relevant Questions under International Law**

#### **1. Compatibility with Minimum Rights/Exceptions and Limitations**

The Berne Convention establishes a number of minimum rights to be granted to foreign works under the conditions specified in Art. 5 (1) 2<sup>nd</sup> half phrase BC in connection with Arts. 3 and 4 BC. The right of satellite broadcasting of programs that are directly receivable by the public in the meaning of Sec. 26 (2) CA is covered as a minimum right under Art. 11bis (1) 1<sup>o</sup> BC; the right of public performance of musical and literary works covered by Sec. 25 (1) CA is a minimum right under Arts. 11 (1) 1<sup>o</sup> and 11ter (1) 1<sup>o</sup> BC. The right of transmission of cable-originated programs as set out in Sec. 26 (7) CA constitutes a minimum right under the Berne Convention only in respect of musical, dramatic, dramatico-musical and literary works (Arts. 11 (1) 2<sup>o</sup> and 11ter (1) 2<sup>o</sup> BC). These provisions on minimum rights under the Berne Convention have been incorporated into the TRIPS Agreement (Art. 9 (1) Phrase 1) and into the WCT (Art. 1 (4)) by way of the so-called compliance clauses which oblige the respective contracting parties to comply with Arts. 1 – 21 and the Appendix of the Berne Convention in the version of 1971. In other words, the granting of these minimum rights is also an obligation under the TRIPS Agreement and the WCT.

In addition, the WCT provides in its Art. 8 a comprehensive communication right which includes, in particular, the right of transmission of cable-originated programs in the meaning of Sec. 26 (7) CA in respect of all kinds of works (rather than only in respect of

those kinds of works covered by Arts. 11, 11ter BC) and the so-called “right of making available” as referred to in Sec. 26 (8) CA. Accordingly, all exclusive rights under examination in this study are covered at least by one of the three treaties and have to be provided in the international context as minimum rights.<sup>13</sup>

As a principle, the exclusive rights, which are rights to prohibit or authorize specific uses, must be granted unconditionally; exceptions or limitations must not exceed the extent permitted by the Berne Convention, the TRIPS Agreement and the WCT respectively. Mandatory collective administration is not explicitly mentioned in the relevant provisions. The first question to be analyzed in this part is whether at all the mandatory collective administration represents an exception to or a limitation of the relevant exclusive rights. If it does not qualify as such and, accordingly, is not dealt with by these international treaties, a problem of compliance does not even arise. However, if the mandatory collective administration represents an exception or limitation, one will have to examine whether it is covered by one of the permitted exceptions or limitations.

In general, exceptions to and limitations of exclusive rights have been permitted under the Berne Convention and the other international instruments in the interest of the public at large. For example, specified uses may be permitted by law for purposes of education, research, quotation, and information on current events under Arts. 2bis (2), 10 and 10bis BC. In these cases, the author may no longer prohibit certain uses. The mandatory collective administration however does not affect the exclusive right itself; the covered uses are not authorized by law. Rather, the author is only restricted in the options of exercising the right: he is left with the only possibility to exercise the exclusive right through the collecting society, whereas the right itself is not limited as such, in particular not in favor of any such interest of the public at large.

The other kind of restrictions to the author’s minimum rights addressed by the Berne Convention are permitted restrictions in favor of particular groups of users, as reflected in Arts. 11bis (2) and 13 BC. In these cases, national legislation is permitted to determine “the conditions under which the rights...may be exercised” (Art. 11bis (2) BC). Such provisions have been introduced with a view to allow member countries to establish compulsory licenses in favor of broadcasting organizations and record companies respectively. Historically, in both cases, the potential users, namely broadcasting organizations and record companies, were afraid of being hindered by the right owners from obtaining the necessary broadcasting and recording licenses, in particular where they were represented by collecting societies. They claimed unimpeded access for the purposes of their uses.<sup>14</sup> Consequently, these provisions allow in particular the replacement of the exclusive right by a right to equitable remuneration. Although the mandatory collective administration may be covered by the wording of Art. 11bis (2) BC, a “condition under which the right...may be exercised”, it becomes clear from the

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<sup>13</sup> One should add as a clarification that the obligation to grant minimum rights under these three treaties applies only in the international context and does not affect domestic situations that are exclusively covered by domestic law. In particular, the obligation to grant full minimum rights does not arise in the country of origin of the work; in the latter country, protection is governed by domestic law (Art. 5 (3) BC and, regarding the definition of “country of origin”, Art. 5 (4) BC).

<sup>14</sup> Ricketson, *The Berne Convention: 1886 – 1986*, Oxford 1987, Note 9.48 and Note 9.41 et seq.

purpose of the above-mentioned provisions that the Berne Convention thereby addresses only restrictions of the exclusive rights in favor of the users (broadcasting organizations, record producers). As the historical background of Art. 11bis (2) BC reveals, the potential conflict was seen between collecting societies (as the representatives of authors) and broadcasting organizations rather than between authors and collecting societies. Indeed, the relationship between the author on the one hand and the user on the other hand is not at stake in the cases of mandatory collective administration to be examined in this study.

As the kinds of exceptions and limitations addressed in the Berne Convention relate only to certain interests of the public at large and specific interests of particular groups of users, it is well possible that the mandatory collective administration of the exclusive rights in question is beyond the concern of the Berne Convention and is not considered at all as a restriction to the minimum rights. The following arguments may be developed in favor of this thesis:

The mandatory collective administration under the Hungarian Copyright Act has the following effects for the author, as compared with an exclusive right not made subject to mandatory collective administration: the author himself can no longer prohibit public performance, satellite broadcasting, transmission of his work as a part of a cable-originated program or by “making available” (except in cases of the infringement of his moral rights); it is only the collecting society which has the power to do so. Also, he can no longer individually negotiate terms and conditions including licensing fees for these uses. Instead, the respective collecting society exercises his exclusive rights on behalf of and in the interest of the author.<sup>15</sup> In most cases, the author has given a mandate to the collecting society to exercise his rights. In addition, the law presumes that the collecting society is also empowered to exercise the rights of authors who have not given their mandate; they will be treated in the same way as the other authors and hence, will benefit from the same conditions and remuneration. In other words, the collective administration is extended by law to those who have not in fact given their mandate. They cannot object to the authorization of the relevant uses by the collecting society (Sec. 91 (2) phrase 3 CA). The question to be examined here is whether this situation is a restriction of an exclusive right that would not be permitted under the Berne Convention and the other international instruments.

For this purpose, it seems useful to consider what other options for the exercise of these exclusive rights would be available. In respect of the public performance and satellite broadcasting that constitute mass uses of a large number of works, there is no doubt that an individual exercise of these rights would in fact not be possible.<sup>16</sup> Indeed, the establishment of the very first collecting society, which took place in France, was a

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<sup>15</sup> The fact that the collecting society has the right to assert the author’s right in a legal procedure in its own name only constitutes a procedural facilitation of its work; it does not, however, affect the contractual relationship between the author and the collecting society.

<sup>16</sup> See for ex. Boytha, “Where do authors need to be represented by a professional organization in exercising their copyrights?” In: WIPO (ed.), *WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights*, Geneva, May 12 – 14, 1986, in particular para. 4/p. 31 et seq; Karnell, *The relations between Authors and Organizations administering their rights*, Copyright 1986, 45, at 50.

consequence of the recognition of the fact that the public performance right would exist only on paper if there were no collecting society exercising this right on behalf of authors. In respect of the transmission of works as a part of cable-originated programs, the situation looks similar. In sum, the mandatory collective administration does not seem to take away from the author any realistic possibility of individually exercising at least the three first-mentioned exclusive rights, and possibly also the making available-right.<sup>17</sup> Given that the Berne Convention and the other relevant treaties aim at protecting authors' rights "in as effective and uniform a manner as possible"<sup>18</sup>, it would even seem self-contradictory to consider the mandatory collective administration in such cases, where individual administration is hardly possible, as unduly restricting the exclusive rights granted as minimum rights.

In addition, it should be pointed at the fact that the author is not prevented from exercising an influence either on the terms and conditions of a license to be granted to the users, or on the rules on distribution of the remuneration to the different right owners. Unless the author has a negligible income from the use of his work, he has a right to become a member of the relevant collecting society. Moreover, the statutes of the relevant collecting society guarantee that the authors themselves have the decisive influence on the tariffs and the keys for distribution of the remuneration, as opposed to publishers; the relevant board of the musical collecting society consists of nine authors and one publisher. Furthermore, the Hungarian Copyright Act lays down a number of mandatory rules on collecting societies which aim at protecting the authors in their interests of an appropriate exercise of their rights. For example, according to Sec 88 (1) f. no. 3. CA, the collecting society must not exercise the collective administration as an entrepreneurial activity. In other words, it must act exclusively on behalf and in favor of the authors.<sup>19</sup>

Finally, one may consider the question of whether the potential obligation of the collecting society itself to conclude contracts with users and, therefore, ultimately the loss of the exclusive character of the relevant rights would render the mandatory collective administration incompatible with the international treaties. Firstly, such an obligation is

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<sup>17</sup> Ricketson "Exceptions and limitations to copyright: international conventions and treaties", in: Baulch/Greene/Wyborn (eds.), ALAI Study Days: The boundaries of copyright and its proper limitations and exceptions, 1999, p. 4) mentions in the context of technological developments, that "transaction costs become overwhelming and individual right owners are incapable of identifying and negotiating with those who are using their material. Hence, collective solutions and/or compulsory licenses appear to be the most acceptable way of resolving this problem."

<sup>18</sup> Preamble, BC, partially taken over by the WCT; the Preamble of the TRIPS Agreement in general mentions "the need for more effective and adequate protection of intellectual property rights" and "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights".

<sup>19</sup> These guarantees show also the difference between the work of a collecting society for the author on the one hand, and the work of publishers, producers and other businesses to whom the author may have transferred his rights in other cases, on the other hand: the latter businesses have their own economic interests and certainly do not exclusively exercise the derived rights in the authors' interests. Consequently, if at all one has doubts about the compatibility of the mandatory collective administration in the cases examined in this study, one should in the first place question the compatibility of any legal presumptions of transfer of authors' rights to employers, producers and similar businesses with the relevant international law.

not explicitly stated in the Hungarian Copyright Act. Secondly, even if the Hungarian law could be interpreted so as to include such obligation of the collecting society to conclude a contract with the users, such rule would be rooted in anti-trust concerns which are not covered by the Berne Convention nor by the other treaties.<sup>20</sup>

The foregoing considerations are complemented by the rather recent general awareness of the fact that, depending on the circumstances, exclusive rights may well be far less beneficial to the authors than remuneration rights based on compulsory licenses and administered by collecting societies. This argument was made in particular by US authors in the context of discussions at the WIPO Diplomatic Conference 1996 on the proposal to no longer permit the application of compulsory licenses under Arts. 11bis (2), 13 BC. These arguments in the end were strong enough to convince governmental delegations to reject the respective proposals that were part of the “Basic Proposal”, the negotiation text at the WIPO Diplomatic Conference 1996 leading to the WCT. The background to the rejection of the proposal was the experience that an exclusive right which is individually exercised by authors usually is transferred by contract to the relevant exploiting businesses, such as publishers and producers, with a number of consequences. In particular, given the factual, typical imbalance of bargaining powers on both sides, it is not a secret that authors as a rule are not in a position to negotiate, nor to obtain, an equitable remuneration or adequate terms and conditions.

This typical situation of imbalance has been recently recognized in Germany by the introduction of mandatory contractual rules with a view to improving the possibilities of authors to obtain equitable returns from the exploitation of their works.<sup>21</sup> Under this law, the “equitable remuneration” can only be ascertained by collective negotiations between associations or other groups of authors and performers on the one hand and exploiting businesses on the other hand. A similar idea has been expressed in Art. 4 of the EC Rental and Lending Directive<sup>22</sup> which provides that the author and performer, after the transfer of the exclusive rental right to the film or phonogram producer, shall retain the non-waivable right to obtain an equitable remuneration for the rental. Initially, it had even been envisaged to make this remuneration right subject to mandatory collective administration; the opposition by certain producers’ organizations however did not allow

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<sup>20</sup> Indeed, it is well acknowledged that anti-trust regulations are covered by Art. 17 BC which leaves intact the possibility of Member countries to regulate this area; Ricketson, *op. cit.* notes 9.69, in particular 9.72 (most specifically on p. 548).

<sup>21</sup> Act on Strengthening the Contractual Position of Authors and Performers, BGBl. (Federal Law Gazette) of 28 March 2002, I p. 1155 et seq.; consolidated English translation in 33 IIC 842 (2002); see also Dietz, “Amendment of German Copyright Law in order to Strengthen the Contractual Position of Authors and Performers”, 33 IIC 828 et seq., (2002); Schippan, “Codification Contract Rules for Copyright Owners”, 24 EIPR 171 (2002).

<sup>22</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ EC L 346/61 et seq. of 27 November 1992.



such provision to be adopted.<sup>23</sup> Ideally, only the mandatory collective administration seems able to guarantee such benefits to authors and performers.<sup>24</sup>

Another important example for the recognition of collecting societies' role in strengthening the bargaining position of individual authors is the decision of the German Supreme Court (BGH) regarding press clippings where it was held that the existing statutory remuneration right for the reproduction of press clippings also applies in the digital environment and does not constitute an unjustified restriction of the authors' rights as a fundamental right of property guaranteed by the German Constitution.<sup>25</sup> In particular, the Court stated that, under certain circumstances, a remuneration right exercised by collecting societies may be even more beneficial for the author than an exclusive right.

To sum up these considerations, a modern view of the collecting societies' work must take into account their crucial role in being the only strong supporters for authors' rights and possibly the only ones who have, unlike the individual authors themselves, a sufficient degree of bargaining power to obtain some benefit in favor of their authors.<sup>26</sup>

This newly discovered role of collecting societies, which is the possible safeguard of individual authors from drawbacks of their weak bargaining position in individual contracts,<sup>27</sup> will certainly be better recognized in the near future, given the prospect of ever-increasing media concentration in a business-dominated world. Also, for a number of years, copyright has been criticized, in particular in the USA and increasingly in other parts of the world, as being overprotective; critics have pointed at the fact that the revenues from the exploitation of works benefit much more the industries than those who created the works, i.e. the authors. In a situation of typically unbalanced individual contracts, it may become even essential that collective administration in certain cases does not remain a mere possibility, but is rendered obligatory. Even if this may seem as a restriction of the author's exclusive right at first sight, it may instead more appropriately be seen as a form of protection of the author against the pressure of the businesses to transfer the right to them. It seems that all these potentially positive effects of mandatory collective administration have hardly been taken into account by those who have expressed certain principal doubts about the permissibility of mandatory collective administration.<sup>28</sup>

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<sup>23</sup> Cf. Reinbothe/v.Lewinski, *The EC Directive on Rental Right and Lending Right and on Piracy*, London 1993, p. 43; Art. 4 (3) of the Directive only states that the remuneration right may be entrusted to collecting societies of authors and performers.

<sup>24</sup> Indeed, the German legislator, when implementing Art. 4 EC Rental Directive, made this remuneration right subject to mandatory collective administration and applied the same structure even to the cable retransmission right; as an additional safeguard both rights were stated not to be transferable in advance other than to a collecting society for the purpose of collective administration.

<sup>25</sup> BGH of 11 July 2002, ZUM 2002, 740.

<sup>26</sup> This was already alluded by Boytha, op. cit., para. 10. However, the general awareness of this role still needs to be promoted.

<sup>27</sup> On this role of collecting societies, see v. Lewinski, "Introduction", in: Roussel (ed.), *Actes du XLIIe Congrès de l'ALAI*, Montebello, p. 10 et seq.

<sup>28</sup> Ficsor, "Principles covering the establishment and operation of collective administration", in : WIPO (ed.), *WIPO international forum on the exercise and management of copyright and neighboring rights in the face of the challenges of digital technology*, Sevilla, May 14 – 16, 1997, p. 267 (lit. b)).

In conclusion, in considering the prevailing conditions of the exercise of authors' rights, the mandatory collective administration of the rights covered by this study are to be considered to be in compliance with the system of minimum rights under the Berne Convention. In this respect, the situation is not different for the TRIPS Agreement and the WCT.

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Even for those who might not want to follow the above conclusion, and consider the mandatory collective administration as being an exception or limitation of authors' rights to be permitted by the treaties, the result would only partially differ from the above conclusions: in particular, the satellite broadcasting right would be justified under Art. 11bis (2) BC on the basis of the argument *e maiore ad minus*. Since Art. 11bis (2) BC even permits compulsory licenses, and hence the replacement of the exclusive right by a remuneration right, such restriction is certainly broader than the mandatory collective administration of the – unaffected - exclusive right. In respect of public performance, collective administration has taken place since ever and been laid down as mandatory in the Hungarian copyright law No. III. of 1969. As the difference between the mandatory and the facultative collective administration in the case of public performance is negligible, it is certainly, if at all one considers it as an exception or limitation, a minor exception from an economic point of view. Mandatory collective administration may therefore be covered by the so-called minor exceptions that are permitted under the Berne Convention in particular in respect of the public performance right.<sup>29</sup> It may be less evident that also the mandatory collective administration of the rights under Sec. 26 (7) CA (transmission of cable-originated programs) and Sec. 26 (8) CA (making available works to the public other than by broadcasting or cable-originated programs) would be covered by any of the explicit or implied exceptions and limitations under the Berne Convention.

In the framework of the TRIPS Agreement and the WCT, the same considerations apply, because the substantive provisions (including the implied exceptions, as has been clarified by the WTO Panel decision 160) have been incorporated therein (see Art. 9 (1) TRIPS Agreement and Art. 1 (4) WCT). In addition, both treaties prescribe the application of the three-step test (Art. 13 TRIPS Agreement, Art. 10 WCT<sup>30</sup>): Firstly, the Hungarian law has limited the mandatory collective administration to “special cases” as determined in Secs. 25 – 27 CA. Secondly, the mandatory collective administration must not conflict with the normal exploitation of the relevant rights. As the rights of public performance, satellite broadcasting and transmission of cable-originated programs usually are, and partially can only be, collectively administered, the mandatory nature of collective administration cannot possibly create any conflict with the normal, namely collective, administration. Even the making available-right which has been administered collectively since its introduction into the Hungarian Copyright Act 1999 does not give

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<sup>29</sup> Ricketson, *op. cit.*, notes 9.59 et seq., in particular 9.63.

<sup>30</sup> Art. 10 (2) WCT applies to the minimum rights covered by the Berne Convention, and Art. 10 (1) WCT to those contained only in the WCT, namely the transmission right of cable-originated programs regarding works not covered by Arts. 11, 11ter BC, and the “making available”-right.

rise to the assumption that the exploitation of this right on the market would have been affected in any way by the mandatory (rather than facultative) collective or individual exercise of this right. Thirdly, the legitimate interests of the author consist in particular in the possibility to prohibit or authorize the relevant use, not least in order to financially benefit from the exploitation. These interests are well taken care of on behalf of the author through collecting societies and possibly so in a more beneficial way than by voluntary collective or individual administration. Accordingly, mandatory collective administration cannot possibly constitute a prejudice, and even more so not an unreasonable prejudice to the legitimate interests of the authors. In conclusion, the three-step test does not constitute an obstacle to the mandatory collective administration in the covered cases.<sup>31</sup>

## 2. Compatibility with the “no-Formalities”-Principle

Art. 5 (2) BC incorporates the so-called principle of “no formalities”. Accordingly, Member countries are not permitted to require the fulfillment of any formalities as a condition for the genesis or existence of copyright protection in respect of “foreign” works. In the case of the mandatory collective administration under the Hungarian law, an author does not need to fulfill any formality. He does not even need to become a member of the relevant collecting society, since the latter is obliged to exercise rights even of non-members. Secondly, the genesis and existence of copyright is not affected thereby; it is only the way of exercise which is regulated.<sup>32</sup>

It has been argued that a *cessio legis* or a compulsory assignment to a collecting society of exclusive rights would alter the substance of the right and therefore affect the genesis thereof.<sup>33</sup> Even if one followed this opinion, which is not beyond doubt, the mandatory collective administration under the Hungarian law would not be affected by this argument, since the exclusive rights are not assigned or deemed to be assigned to a collecting society, but the author only is deemed to have given his mandate to exercise the right on his behalf. Therefore, the mandatory collective administration cannot be regarded as a formality under Art. 5 (2) BC as such, nor as incorporated in the TRIPS Agreement and the WCT.

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<sup>31</sup> See also for the application of the three-step test under Art. 9(2) BC in respect of non-voluntary licenses Ficsor, *The Law of Copyright and the Internet*, Oxford 2002, note 5.58.

<sup>32</sup> Masouye, Guide to the Berne Convention, note 5.5, explicitly distinguishes between the recognition and scope of protection as such and the various ways of exploiting the rights. Nordemann/Vinck/Hertin/Meyer, *International Copyright and Neighboring Rights Law*, 1990, Berne Convention Art. 5 note 7, explicitly mentions the mandatory collective administration as being in compliance with Art. 5 (2) BC. Like v. Ungern-Sternberg, *Die Wahrnehmungspflicht der Verwertungsgesellschaften und die Urheberrechtskonventionen*, GRUR Int. 1973, 61, 62 (fn 2), he rejects earlier opinions by Bappert/Wagner (1956), Peter (1954) and others who considered mandatory collective administration as violating the no-formalities principle, on the arguments that Art. 5 (2) BC only prohibits formalities in respect of the genesis and existence of copyright and that the collective administration has shown to be a necessity for the exercise of at least a number of authors' rights. Only Ricketson, op.cit., note 16.33, considers the mandatory collective administration as an impermissible formality.

<sup>33</sup> Nordemann/Vinck/Hertin/Meyer, op. cit., Art. 5 BC note 7.

### 3. Aspects of National Treatment

As the mandatory collective administration prevents authors from individually exercising their rights, they are dependant on the possibility of having their rights represented by the collecting society. In this respect, the principle of national treatment as laid down in Art. 5 (1) BC (as well as in Art. 3 TRIPS Agreement and Art. 3 WCT in connection with Art. 5 BC) requires equal treatment for foreign and domestic works. In other words, authors of foreign works must have the same possibilities of access to, and influence on the decisions by, the collecting society as those of domestic works.

Firstly, as stated above, the mandatory collective administration does not require membership of the collecting society; due to the mandatory character of the collective administration, its effects are extended to non-members. At the same time, those who want to become members in order to influence the decisions on tariffs and distribution keys, will have to have the right to be admitted in the same way as domestic authors. In practice, a high number of reciprocal agreements has been concluded by *Artisjus* with foreign collecting societies, so that a large number of foreign works are already treated in the same way as domestic works. In addition, the law permits individual foreign authors who may not be covered by such reciprocal agreements to become a member of the Hungarian collecting society. Accordingly, equal treatment is guaranteed. As long as the law enables authors of foreign works the same treatment as to the possible participation in the collecting society as a member and as to the possibility to be represented by the Hungarian collecting society, there is no indication of any violation of the principle of national treatment.<sup>34</sup>

## IV. Analysis of Relevant Questions under EC Directives

### 1. EC Satellite and Cable Directive

Art. 3 (2) of the EC Satellite and Cable Directive provides that “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 right holders of the same category who are not represented by the collecting society, provided that [a] the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster and, [b] the unrepresented right holder 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.” This specific provision makes the extended collective administration, namely the extension of the collective administration to right holders who are not represented by the collecting society, subject to the possibility of unrepresented right holders to exercise their rights individually or collectively. This possibility currently is not granted under the Hungarian Copyright Act in respect of mandatory collective administration. Also, the satellite broadcasting right under Sec. 26 (2) CA is not limited to those satellite broadcasts that simulcast a terrestrial broadcast by the same broadcaster. In those two respects, the Hungarian law will have to be adapted by

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<sup>34</sup> See also, Traple/Barta, *Is the Berne Convention undergoing a crisis?* RIDA 1992, no. 152, p. 3 at 68, and v. Ungern-Sternberg, op. cit., 61 et seq.

introducing these two conditions for the mandatory collective administration.<sup>35</sup> Also, the obligation to indicate the entitled broadcasting organizations under Art. 3 (4) EC Satellite and Cable Directive, will have to be fulfilled upon accession to the EC.

## 2. Art. 5 EC Information Society Directive

The EC Information Society Directive regulates, *inter alia*, the exclusive right of communication to the public including the right of transmission of cable-originated programs and the right of making available which are covered by Sec. 26 (7), (8) CA (Art. 3 (1) EC Information Society Directive). Art. 5 contains a comprehensive list of permitted exceptions and limitations. Accordingly, if the mandatory collective administration represents an exception or limitation in the meaning of this article, it must be covered by one of its provision in order to be in compliance with the Directive.

As it has been set out in detail above (III. 1.) in respect of the Berne Convention, strong arguments favor the conclusion that the mandatory collective administration in the cases examined in this study do not qualify as exceptions or limitations and, therefore, are outside the scope of regulation of the Berne Convention. The same considerations may apply in the context of Art. 5 of the EC Information Society Directive. Indeed, it seems that mandatory collective administration has not even been discussed in this context, which may reflect the fact that it was not regarded as an exception or limitation.

It appears to have been the case even for non-voluntary licenses, which are not included in the list of Art. 5 EC Information Society Directive. In fact, the German legislator, when implementing the EC Information Society Directive, considered the non-voluntary licenses under the former Sec. 61 German CA in respect of mechanical licenses as not being an exception or limitation and therefore replaced this provision from the section on limitations of copyright into the section on licensing of authors' rights as the new Sec. 42a CA. It justified the qualification by the nature of the non-voluntary license which does not affect the substance of the exclusive right but only regulates specific questions of its exercise.<sup>36</sup>

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<sup>35</sup> See also Dreier, „Satelliten- und Kabel-RL“ Art. 3 note 2, in: v.Lewinski/Walter/Blocher/Daum/Dreier/Dillenz, *Europäisches Urheberrecht* (Walter, ed.), Vienna 2001.

<sup>36</sup> The governmental proposal for the implementation of the EC Information Society Directive also referred to recital 28 of the EC Satellite and Cable Directive. This recital relates to Art. 9 thereof regarding the mandatory collective administration of the exclusive cable retransmission right. Recital 28 explicitly states that “.. the authorization right as such stays intact and only the exercise of this right is regulated to some extent”. See in the governmental proposal for the implementation of the EC Information Society Directive the deliberations on the nature of the non-voluntary license, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft*, 2002, p. 40 ([www.urheberrecht.org](http://www.urheberrecht.org)); the proposal was so adopted as law: “Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft“ of 10 September 2003, O.J. (BGBl.) I no. 46 of 10 September 2003, p. 1774 et seq. This distinction is also made in the leading German commentaries in respect of non-voluntary licenses; see, for ex., Schack, *Urheber- und Urhebervertragsrecht*, 2<sup>nd</sup> ed. Note 435; Schricker/Melichar, *Urheberrecht*, 2<sup>nd</sup> ed., notes 6, 29 vor Secs. 45 et seq; note 1 to Sec. 61.

If this argument is true for non-voluntary licenses, where an obligation to conclude a contract with a user exists, it must be all the more true for a mandatory collective administration. Accordingly, and also for the reasons mentioned above in the context with the Berne Convention, the mandatory collective administration in the examined cases falls outside the scope of regulation of the EC Information Society Directive. Therefore, EC Member States are free to regulate matters of mandatory collective administration.

### **3. Article 12 EC Treaty**

As the “Phil Collins” case of the European Court of Justice has shown, Art. 12 EC Treaty on non-discrimination on the basis of citizenship, applies also to copyright and neighboring rights.<sup>37</sup> Accordingly, upon accession of Hungary to the EC, EC citizens who want to assert their rights under Secs. 25, 26 (2), (7), (8) in connection with Sec. 27 CA, must have the possibility to become members of the Hungarian collecting society and must be treated, in respect of the collective administration of their rights, in the same way as the domestic authors.

## **V. Conclusions**

Mandatory collective administration regarding the exclusive rights of public performance, satellite broadcasting and transmission by cable-originated programs, and arguably also that of making available, does not constitute any exception or limitation in the meaning of the Berne Convention, the TRIPS Agreement of the WCT, nor is it any other restriction that would contravene the principle of minimum rights under these treaties. Rather, as a rule, mandatory collective administration may have beneficial and protective effects. Also, neither the principle of “no formalities” nor the principle of national treatment under these treaties are violated by the mandatory collective administration under the Hungarian law.

Regarding EC law, the mandatory collective administration does not represent either an exception or limitation in the meaning of the EC Information Society Directive and, therefore, is not in conflict therewith. Finally, the Hungarian rules on the mandatory collective administration on the exclusive satellite broadcasting right will have to be modified so as to take account of the conditions of Art. 3 (2), (4) EC Satellite and Cable Directive.

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<sup>37</sup> ECJ of 20 Octobre 1993, C 92/ 92 and C 326/ 92, ECR 1993, 5145 – Phil Collins.