

**„Collective Management of Copyright
and Related Rights. Third Edition”**

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**INTRODUCTION AND PRESENTATION
OF THE MAIN FINDINGS. PART II**

Dr. Mihály Ficsor

**Member of the Hungarian Copyright Council,
former Assistant Director General of WIPO**

The third edition



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***Chapter 7. Collective
management in the countries
in transition from a centrally
planned economy to a
market economy***

Description in the Introduction to the book

Chapter 7 outlines the history of the **former centrally planned economies of Central and Eastern European countries**, during which period governmental or semi-governmental bodies took care of the collective management of copyright within a heavily regulated framework of contractual rules and tariffs. It is reviewed **how these organizations have been transformed within new market economies into private CMOs** – smoothly, in some places, and with difficulty, in others – and **the kinds of problems that remain where the transition is not yet complete.**

The scope of the Chapter

- The term „**countries in transition**” or „transition countries” was a **shortened version of what Article 65.3 of the TRIPS Agreement** referred to as any Member of the World Trade Organization (WTO) “which is in the process of transformation **from a centrally-planned into a market, free-enterprise economy** and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations”.
- **The following 28 countries are covered in the Chapter:** Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kirgizstan, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

Similarities, differences, common features inherited (1)

- **There were important differences** at the beginning of the transition and **the transition process have produced further ones**. For several CEE countries – first of all for EU members – **the „transition” is practically over**, but **there are some others** where **the transformation has not taken place smoothly** enough or it even have **not truly completed**.
- In the centrally planned period, **the CMOs were, in general, governmental or semi-governmental organizations**. By now, the **great majority has become private**, but there are **still some governmental elements** in the collective management system of certain Caucasus and Central Asian countries.

Similarities, differences, common features inherited (2)

Typical problems of the transition period:

- **distorted concepts about competition; chaos** with too many – and many of which rogue – „CMOs,
- in the euphoria of newly gained freedom, **low-level law abidance of users**
- **misunderstandings of certain concepts** (such a mandatory and extended collective management)
- **missing or not truly applied anti-piracy procedures**
- **inappropriate tariff-setting systems,**
- **non-existent or not duly functioning dispute settlement mechanisms**

Chapter 8. Proper functioning of CMOs – from the viewpoint of rightholders and partner organizations

Description in the Introduction to the book

In the **next two chapters**, there is **analysis of the activities of CMOs** in detail in the light of regional norms, national legislation, professional rules and codes of conduct. In this, **the chapters draw richly from WIPO's *Good Practice Toolkit for CMOs* (the Toolkit)**.

Chapter 8 opens with **an outline of** the nature, objective and structure **of the Toolkit**. It goes on to **discuss such topics as rightholders' adherence to and withdrawal from CMOs, their membership rights, the governance and financial administration of CMOs, the distribution of revenues and relationships between CMOs.**

The Toolkit

- **Star WIPO publication** on collective management.
- „**Working document**” to be **updated regularly**; at the time of writing the book (and of preparing this presentation), the **last version was/is of 2021**.
- It is stressed that it **should not be perceived as being normative**.
- **National provisions, regional norms and codes of conduct** from around the world **compiled and destiled into examples of good practice**.
- Its use is **facilitated by a clear structure** of the presentation and analysis of the information on each topic: (i) „**Explanation:**” **outlining the issues** to be covered; (ii) **Examples** of regional and national norms and codes of conduct; (iii) „**Good practice tools:**” the results of the analysis which are suggested to be considered by Member States and interested stakeholders.

Contents of the Chapter (1)

Chapters 8 and 9 of the third edition of the book **follow the order of the current topics of The Toolkit** in accordance with the structure of the publication **with frequent references to its contents** – „explanation,” examples, „good practice tools” – **along with certain comments.**

Contents of the Chapter (2)

Chapters 8 covers the first ten topics:

- 1. Providing information about the CMO** and its operations
- 2. Membership:** information, adherence and withdrawal
- 3. Members' rights** to fair treatment; their position in the CMO
- 4. Particular issues** concerning the **CMO-member relationship**
- 5. Governance**
- 6. Financial administration,** distribution of revenue and deductions
- 7. Relationship between CMOs**
- 8. Processing of members' and users' data;** importance of **IT infrastructure,** and development of **staff skills and awareness**
- 9. Complaints and dispute resolution** procedures
- 10. Supervision and monitoring** of CMOs

Chapter 9. Relationship between CMOs and users

Description in the Introduction to the book

Chapter 9 deals with the **relationships between CMOs and the users**, and it is structured similarly to Chapter 8, covering issues such as the **contractual aspects, licensing, tariffs, users' obligations and dispute settlement**.

Contents of the Chapter (1)

Chapters 8 and 9 of the third edition of the book **follow the order of the current topics of The Toolkit** in accordance with the structure of the publication **with frequent references to its contents** – „explanation,” examples, „good practice tools” – **along with certain comments.**

For the presentation of the key aspects and structure of The Toolkit, see Chapter 8 above.

Contents of the Chapter (2)

Chapters 9 covers the following **remaining topics** with a big number of examples:

11. CMOs' information to users/licensees

12. Principles and criteria of licensing conditions and tariff setting

13. Negotiation and establishment of tariffs; dispute settlement systems

14. Obligations of users; their status in the application of tariffs

Chapter 10. Collective management in the online digital environment

Description in the Introduction to the book

In *Chapter 10*, there is a review of the **exclusive right of (interactive) making available to the public**, which is not provided in the same way in the WCT as it is in the WPPT and the Beijing Treaty on Audiovisual Performances (BTAP). It is outlined **what problems of interpretation have emerged** from this difference and **the impact it has on collective management of copyright**.

The chapter **analyses licensing download and streaming systems**, paying special attention to the use of musical works, and it **outlines how digital rights management systems** (i.e., technological measures and electronic rights management information systems) **can be used for the protection and exercise of rights** in the online digital environment. Since they are particularly relevant for the transborder multi-territorial use of works in the online digital environment, **there is also a review** in this chapter of the private international law aspects of collective management.

Contents of the nine subchapters

1. Assessment of **the impact of digital online technologies** on the exercise and collective management of copyright at the **1997 Seville Forum**.
2. Debating the **legal characterization of acts of interactive making available to the public** ; emergence of the “umbrella solution” and its distorted application in Article 8 of the WCT.
 - **Disagreement in the preparatory work about the rights**– the right of communication to the public or the right of distribution – **to be applied**.
 - **WIPO Secretariat eliminated the deadlock by the „umbrella solution”**: „**making available a work to the public**, by wire or by wireless means, in a way that the members of the public may access it from a place and at a time individually chosen by them” (**interactivity**).
 - **In the WPPT, correctly applied, but in the WCT, it was provided together with the right of non-interactive communication to the public** (Art. 8), which has led to some unfortunate misunderstandings.

Contents of the nine subchapters

3. Theories according to which, for an act of making available of a work to the public to take place, the making available of the work to the public is not sufficient.

4. Impact of legal characterization on collective management of the right of making available to the public.

- **Not taking into account that, irrespective of any kind of legal characterization** (communication to the public or distribution), **it is an act of interactive making available to the public**; the rules on non-interactive making available and on distribution (with exhaustion) do not apply.
- **Not taking into account that hybrid acts are involved**; in the case of **streaming**, also temporary copies occur, and **downloading** of copies are made possible by transmissions.

Contents of the ten subchapters

5. Licensing copyright in the digital online environment – from integration to fragmentation and partial integration again; the European experience.

- **Eliminating one-stop shop licensing** applied on the basis of the Santiago and Barcelona Agreements **by the E.C. for competition reasons.**
- The **2005 E.C. Resolution** on online musical licenses **creating chaos by leading to a great number of multiple parallel licensing sources.**
- **Title III of the Collective Management Directive** (Directive 2014/26/EU): **partial integration by high requirements** of CMOs to engage online licensing **and the „tag-on“ system** (as well as back office services) for smaller CMOs not being able to fulfill the high requirements.

6. Licensing copyright in the digital online environment – from fragmentation to integration; the US experience

- The **Music Modernization Act of 2018** setting up a kind of extended collective management system **for mechanical rights (!) aspects of streaming.**

Contents of the nine subchapters

7. „The answer to the machine in the machine”: CMOs and digital rights management.

- Presentation of **CISAC’s CIS-Net system** and the various **standards and tools to facilitate identification of works and distribution of remuneration.**

8. Repertoire databases of musical works for online uses.

- **Attempt to set up a Global Repertoire Database (GRD).**

9. Private international law aspects of collective management.

- **Reference to the Kyoto Guidelines** on Intellectual Property and Private International Law concerning collective management. **Guideline 27: organizational aspects** (authorization, etc.): **the law of the country of actual seat of the CMO; substantive law aspects** (mandatory and extended collective management, etc.): **where protection is claimed.**

Chapter 11. Cultural and social aspects of collective management

Description in the Introduction to the book

- The **final two chapters** of the book have characteristics in common in that **they cover issues that go beyond the merely economic aspects** of copyright and collective management of rights.
- ***Chapter 11*** spotlights the **twofold role of cultural productions and services**, including **the part played by CMOs in the protection of cultural diversity** and the rules of the **deductions for cultural and social purposes**.

Universal Declaration and Convention on the protection of cultural diversity

- **The Universal Declaration on Cultural Diversity (2001) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) of UNESCO:** different status, different objectives, different coverage.
- **The status of the Universal Declaration on Cultural Diversity is similar to that of the Universal Declaration of Human Rights** (it is not legally binding but – as a primary international articulation of fundamental principles and rights recognised by the international community – it serves as a general basis for any subsequent regulation)..

Universal Declaration on Cultural Diversity

Article 1 - Cultural diversity: the common heritage of humanity:

[C]ultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

Article 8. Cultural goods and services: commodities of a unique kind

[C]ultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.

Article 9. Cultural policies as catalysts of creativity

It is for each State [...] to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations.

Convention on the Protection and Promotion of Cultural Diversity (1)

Until now **150 countries and the European Union have ratified or acceded to the Convention.**

Nearly all European countries and developing countries are party to the Convention on the Protection and Promotion of Diversity of Cultural Exceptions.

The United States and the Russian Federation are not party.

Convention on the Protection and Promotion of Cultural Diversity (2)

Article 5(1) *General rule regarding rights and obligations:*

The Parties [...] **reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions** and to strengthen international cooperation to achieve the purposes of this Convention.

Article 6(1) provides as follows:

Within the framework of its cultural policies and measures [...] each Party **may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.**

Under **Article 6(2)** such measures may include **quotas and other advantages in favor of domestic productions and services** („including provisions relating to the language used for such activities, goods and services”) **or subventions** (“measures aimed at **providing public financial assistance**”).

Treaty on the Functioning of the European Union (TFEU)

Article 167(1)

The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

Article 167(4)

The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

The European Parliament for the protection of cultural diversity (1)

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

The European Parliament for the protection of cultural diversity (2)

Statements in the Resolution:

- „**music is not a commodity and collective rights managers are mainly non-profit-making organisations, and... serves the interests of all right-holders and of promoting cultural diversity and creativity,**”
- „**national CRMs should continue to play an important role in providing support for the promotion of new and minority right-holders, cultural diversity, creativity and local repertoires, which presupposes that national CRMs should retain the right to charge cultural deductions,**”
- „**there is concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, [...] the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversity.**”

Collective Management Directive (Directive 2014/26/EU) (1)

Recital (3)

Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public

Collective Management Directive (Directive 2014/26/EU) (2)

Article 12(4)

Where a collective management organisation provides social, cultural or educational services funded through deductions from rights revenue [that is, a CMO may do so] or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of, those services.

Chapter 12. Collective management in the developing world and the LDCs

Description in the Introduction to the book

Chapter 12 reviews the **specific needs of developing and the least-developed countries**, taking into account the relevant recommendations of **WIPO's Development Agenda**. There is analysis of the results of the various studies on the economic contribution of copyright and a look at the **role of CMOs in the protection and exploitation of expressions of folklore/traditional cultural expressions**. Finally, there is a review of **how online digital technology is used in technical cooperation programs** in the field of copyright management.

Contents of the six subchapters (1)

1. Preferential treatment, access to knowledge and collective management

- Review of the provisions of the **Appendix to the Berne Convention** on compulsory licenses for developing countries (valid principles, out of date rules).
- **Transitional rules** for developing countries in the **TRIPS Agreement; extended preferential status for LDCs.**
- **WTO panel on the need to take into account development considerations** – as stated in Articles 7 (Objectives) and 8 (Principles) of the TRIPS Agreement – **in the application of the three-step test** (panel report WT/DS/114/R).

2. Economic contribution of copyright industries, creativity and collective management.

- Reference to the **results of studies on economic contribution** on the basis of standard WIPO methodology and with the support of the Organization.

Contents of the six subchapters (2)

3. Protection and use of expressions of folklore (traditional cultural expressions) and collective management.

- **Article 15(4) of the Berne Convention** presented as a means of protection of folklore – but unsuitable for it.

- **WIPO-UNESCO Model Provisions** on the protection of expressions of folklore (and as implemented in a number of developing countries including **collection of remuneration for folklore music – as a kind *domain public payant* – by CMOs**).

- Preparatory work in the **WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**.

4. WIPO Development Agenda and collective management; recommendations with special attention to Africa and the LDCs.

Contents of the six subchapters (3)

5. Special aspects of **deductions for cultural and social purposes** in developing countries.

- Developing countries **need more patience and support** concerning the establishment and development of their collective management system.

- Partner **CMOs of industrialized countries should be generous in agreeing to higher deductions for cultural and social purposes** by the CMOs in developing countries.

- **Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties adopted in Madrid December 1978** (with the idea of allowing developing countries to **deduct a certain percentage of income tax as source countries with the rest remaining to the countries of the rightsholders** (failed at the resistance of industrialized countries)).

6. **WIPO Development Agenda** and collective management; recommendations with special attention to Africa and the LDCs.



**Thank you for your
attention.**

**Questions?
Comments?**

**E-mail: ficsor@t-online.hu
ceeca@t-online.hu**