TYPICAL FEATURES OF COPYRIGHT IN COUNTRIES IN TRANSITION: REVIEW OF THE TRANSITION PROCESS – GUIDANCE FOR ITS COMPLETION WHERE IT MAY STILL BE NEEDED

Version One

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WIPO
WORLD INTELLECTUAL PROPERTY ORGANIZATION

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I. INTRODUCTION

1. From 1989-1990, in the majority of the Central and Eastern European countries and in the former republics of the Soviet Union becoming independent countries, political and economic changes took place, in the framework of which those countries began and continued their transition from centrally-planned economy to market economy and from the system of "democratic centralism" to pluralist democracy. Similar developments were taking place also in the West Balkans. These changes also concerned intellectual property and, within it, copyright and related rights.

2. WIPO paid special attention to the transformation of the copyright legislation and institutional system that became necessary in connection with these political and economic developments. Several national and regional meetings, seminars and workshops were held on these issues. One of the most important of such programs was the WIPO Seminar for Central European Countries on the Adaptation of the Copyright and Neighboring Rights Systems of the Conditions and Requirements of Market Economy held in Prague in September 1993, where a WIPO document[1] summed up the tasks of the transformation process in the following way:

- In parallel with modernizing the laws on copyright and neighboring rights and adapting them to an appropriate interpretation of the existing conventions and to the newly emerging international standards, those elements of the laws which followed from the centrally-planned, collectivist system (certain free uses and compulsory licenses) should be eliminated;

- Appropriate provisions should be adopted for the protection of neighboring rights;

- The dogma of full inalienability of copyright should be dropped, and the question of transfer of rights should be regulated in a more flexible way;

- The new norms should more appropriately reflect the legitimate interests of employers and producers;

- The over-regulation of copyright and neighboring rights contracts should be eliminated;

- The collective administration system should be transformed in a way that preferably private organizations fulfill the tasks, and its structure should be changed in order that all the interest groups may be duly represented; at the same time, measures should be taken to maintain the efficiency of collective administration under the new conditions; and

- The system of enforcement of rights should be made much more complex and efficient, and its proper functioning should be guaranteed.

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[1] WIPO/CNR/PRG/93/Inf.3; p. 19.

3. This paper deals with those special features of the copyright laws and institutions of "transition countries" which relate to the above-mentioned tasks from the viewpoint of the four major topics listed in paragraph 15 and covered by titles IV to VII, below. A separate WIPO paper has been prepared reviewing the accession to and implementation of the two WIPO "Internet Treaties"[2] by "transition countries."

4. The last task mentioned in paragraph 2, above, on the basis of the analysis made at the beginning of the 1990s – to make the enforcement mechanism more efficient – is of a "horizontal" nature requiring similar measures and institutions regarding both copyright and industrial property. This paper does not cover this issue.

II. CONCEPT OF COUNTRIES IN TRANSITION; COMMON AND DIFFERING FEAUTURES

5. The term "transition country" – or "country in transition" – is a shortened version of what Article 65.3 of the TRIPS Agreement refers to as any Member of the 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." Under this provision of the TRIPS Agreement, such transition countries Members of the WTO, similarly to developing country Members, were allowed to benefit from a period of five years of delay concerning the obligation to apply the Agreement (as provided for in paragraphs 1 and 2 of the same article).

6. The five-year delay was to be counted from the date of the entry into force of the TRIPS Agreement; that is, from January 1, 1995. This delay was not extended for the countries in transition, which seems to suggest that these countries were supposed to be more or less over the transition period prescribed in Article 65.3 of the TRIPS Agreement by 2000.

7. It should be seen, however, that there were, and still there are, significant differences among the countries covered by the category "countries in transition". For example, there are ten countries to which the above-described concept of "country in transition" applied in the first half of the 1990s, but which, in the meantime, have become Member States of the European Union (EU). Due to their accession to the Union, they have had to transpose the EU norms on copyright, related rights, electronic commerce, data protection, competition, etc. into their national legislation. Now these countries participate in the various governing bodies of the Union. There seems to be good reason to consider that, for them, the "transition" is practically over.

8. There are also countries – those that are Members of the WTO or in negotiation to accede to the WTO and/or to the European Union and also others – that have made great progress in the transition process too, and several of them, therefore, may not consider themselves as truly belonging to the category of "countries in transition" anymore.

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2 The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva in 1996.

9. At the same time, it seems that, in some countries in transition, the process of transition, at least in certain aspects of the copyright system, has not been fully completed yet.

10. This paper, however, is not supposed to deal with the political, economic and social categorization of the countries that used to become known as "transition countries" in the early 1990s. As used in the paper, the expression "transition countries" covers all such countries in Central and Eastern Europe, the Baltic area, the West Balkans, the Caucasus region and Central Asia (some of which emerged as independent states after the dissolution of the Soviet Union and Yugoslavia, respectively) irrespective of how they have gone through, or have progressed in, the transition process in the meantime, and whether or not they still truly correspond to the criteria of "countries in transition" as originally determined.

11. In view of the differences of the – past and present – "transition countries," the purpose of the paper is (i) to outline the special features of the copyright laws and institutional systems of "transition countries" the way they existed at the beginning of the transition process; (ii) to review the transition process and its results; and (iii) to offer guidance for those "transition countries" which, in certain aspects, may not have fully completed yet the transition process.

12. The paper is based on a detailed analysis of the national laws and institutions of the countries concerned and on consultations with government officials and the representatives of interested stake holders of selected countries in the various regions where these countries may be found. The purpose is not to point out in which of these countries the transition process seems to have been completed in a successful way and in which ones it still requires further efforts. The analysis offered and the suggestions made in this paper rather serve the objective of describing typical challenges and problems, and outlining solutions and best practices. This is the reason for which the paper does not specifically identify the countries where certain problems may exist, neither those which have applied commendable solutions.

13. The proposed solutions may not be equally needed for the countries in various stages of the transition process (or even being over it). The extension of the coverage of the paper to those countries which have more or less completed the process may, however, be useful for offering advice to those countries which are still faced with certain problems that have been duly solved elsewhere.

III. GENERAL CHARACTERIZATION OF THE COPYRIGHT LAWS AND INSITUTIONS OF COUNTRIES IN TRANSITION; SUBJECT MATTER OF THE PAPER

14. The 1971 Paris Act of the Berne Convention contains a fairly comprehensive and complete regulation on the rights to be protected, on the possible limitations and on other basic aspects of copyright protection. In Central and Eastern Europe and the West Balkans, the majority of countries in transition – or their predecessor countries – were party to the Convention already at the time of the beginning of the transition process, and at the time of the preparation of this paper, with the exception of one Central Asian country, all of them are party to this Act. The Soviet Union was not party to the Berne Convention; the accession to the Paris Act by the new independent States formed from the former republics of the Soviet Union took place during the 1990s. Nevertheless, the Soviet Union was party to the Universal Copyright Convention (UCC) administered by UNESCO which was regarded as a bridge to

lead to Berne Union membership,[3] and although the minimum obligations under the UCC were determined in a more flexible way than under the Berne Convention, during the regular joint sessions of the Executive Committee of the Berne Union and the Intergovernmental Committee of the UCC, their joint Subcommittees and at the meetings of the joint WIPO-UNESCO Committees of Experts and Working Groups held in the 1970s and 1980s a certain convergence emerged between the interpretations of the two Conventions regarding the basic aspects of copyright (works to be protected, rights to be granted, possible exceptions an limitations, answers to the challenges raised by digital technology).[4]

15. Therefore, it may emerge as an obvious question where was any room for special features of the copyright laws of countries in transition? The answer to this question is that, even where the countries in transition duly implemented the above-mentioned international standards in their national legislation, there were three areas where specific elements could, and as a rule did, exist in the national laws of these countries: first, where the Convention allowed room for differing interpretations; second, where the Convention left the regulation of details to national laws; and third, where certain aspects of copyright protection were not covered by the Convention.

16. The most typical features of copyright laws of countries in transition emerged in the above-mentioned third category; that is, in respect of the issues not directly regulated by the international treaties. This paper also deals mainly with these issues; namely with the following ones:

- state administration of copyright (governmental tasks and organizational structure, including relevant provisions in the copyright laws);

- provisions of the copyright laws on original ownership of rights (in particular as regards works created by employed authors) and on the issue of transferability of economic rights;

- legislative regulation of copyright contracts;

- collective management of copyright and related rights and the regulation thereof in the copyright laws.

IV. GOVERNMENTAL COPYRIGHT ADMINISTRATION

16. In the period of centrally planned economies, in the majority of the countries covered by the paper, the functions of state copyright administration and collective management of authors' rights were combined. The organizations fulfilling both kinds of tasks were either

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[3] *See* Mihály Ficsor "Guide to the Substantive Provisions of the Copyright and Related Rights Treaties Administered by WIPO," WIPO publication 891(E), 2003, p. 12, para. 35.

[4] For the reasons of the dramatic diminishing of the importance of the UCC (which led to the abandonment of joint WIPO-UNESCO copyright meetings), *see* the WIPO publication mentioned in footnote 3. For those reasons, although in principle 100 countries were party to the UCC at the time of the completion of this paper, it was only applicable in the relation of two of them Cambodia and Lao People's Democratic Republic, since all the others were also party to the Berne Convention and, in their relation, only the substantive provisions of that Convention was applicable.

independent agencies within the governmental structure or subject to the supervision of the Ministries of Culture (where, in general, the Vice Minister in charge of publishing was responsible for the supervision of authors' societies[5]).

17. Among the governmental functions, the regulation of copyright contracts and the fees to be paid for the various categories of works was of a paramount importance. This took place not necessarily in laws adopted by legislative bodies but much more often by lower-level norms and regulations, such as decrees issued by the ministers of culture.

18. The tasks of fighting piracy and other infringements received much less attention. In fact, in the overly centralized systems with strict governmental control of all aspects of social life, piracy and other infringing activities did not exist as a widespread phenomenon. For the publication of works not only the authorization of the authors but also that of the publishing authorities was needed which, in general, applied strict ideological control. It was forbidden to publish a book even with the authorization of the author – or by himself – that has not received official (censorship) clearance. Those who violated such prohibitions (in the form of "samizdat") usually were liable for serious administrative and/or even criminal consequences as copyright infringers.

19. It is another matter that the use of foreign works that have passed the censorship control (which, in certain cases, took the form of "editorial censorship" applied by the publishers themselves on the basis of written or unwritten ideological principles), for various reasons – for example, due to the absence of treaty relationship – at least in certain countries, frequently took place without the authorization of the owners of rights and without payment of remuneration.

20. The political, economic and legal developments that have taken place in the transition period in the last two decades have transformed the role and tasks of governmental copyright administration to quite a great extent. This was due, in particular, for the following reasons and in the following ways:

- separation, in the majority of countries, of the functions of state administration and collective management (direct governmental management has been replaced by the tasks of guaranteeing lawful establishment and operation of collective management organizations);
- decrease of interventions into the contractual system (and where still such intervention has still been found justified, the transfer of regulation from government authorities to legislative bodies);
- increasing contribution of copyright-based activities to national economy (which has been the result partly of the transition to market-economy, and partly of the spectacular technological and business-model developments having taken place globally in the same period);

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[5] Collective management, in general, was limited to the management of authors' rights since in the centrally-planned economy period, in the countries covered by the paper, there was no protection, or only limited protection of related rights. Only one country, Czechoslovakia – the predecessor state of the present Czech Republic and Slovakia – was party to the Rome Convention. This situation has fundamentally changed since then. At present, the great majority of the countries covered by the paper are party to one or more treaties providing for related rights, the Rome Convention, the TRIPS Agreement and/or the WPPT.

- growing role of international cooperation (due to the globalization trends both in trade relations and the creation and use of cultural and information goods and services);
- the need to fight piracy which has become much more widespread with the advent of market economy and deregulation of certain aspects relevant from the viewpoint of copyright and related rights (basically for three reasons (i) as a reaction to the overregulation of the centrally-planned-economy period, even those rules were suddenly regarded as unnecessary which – as those on copyright protection – were socially and legally justified; (ii) at the end of egalitarian income policy and in the euphoria of new opportunities, many people wanted to obtain as much financial gains as soon as possible without too much regard to what is a legal way and what is not; (iii) the legal machinery, organizational structure and experience necessary for effective fight against piracy were missing).

21. The place of state copyright administration within the governmental structure has also changed in a number of countries in transition. One of the trends is that, in various countries, the coordination of intellectual policy making has been trusted to one organization; in general, to the Intellectual Property Offices or the Patent Offices (that latter with unchanged names but with broadened competence). This seems to have been the recognition of certain converging trends between the two main branches of intellectual property: industrial property, on the one hand and copyright and related rights, on the other, concerning legal and organizational aspects of the protection and enforcement of rights.

22. One of the reasons for this organizational trend is that the borderline area and the overlaps between the two main branches of intellectual property have been widened. To the "traditional" questions of overlaps between copyright protection of works of applied art and design protection or the problems of figurative elements of trademarks that in other contexts might also be regarded as works of art, important new issues have been added. For example, in respect of the protection of the important category of computer programs, both copyright and patent law issues have emerged for policy makers, legislators and the judiciary. It is also an important aspect that, as also reflected in the provisions of Part IV of the TRIPS Agreement, similar procedures, remedies and sanctions seem to be necessary to fight piracy and other copyright infringements, on the one hand, and counterfeiting and other infringements of industrial property rights, on the other hand.

23. Leaving the task of coordination of intellectual property policy making to one office may also be regarded as a reaction to similar converging organizational trends at the international level. Both WIPO's and the WTO's activities extend equally to industrial property and copyright, and, for example, the TRIPS Agreement covering all relevant intellectual property rights is administered by the same governing bodies and is subject to the same dispute settlement mechanism.

24. It seems particularly typical for the new independent states born from the member republics of the former Soviet Union and the former Yugoslavia that intellectual property offices have been established in a way that they are responsible both for industrial property and copyright.

25. The reference to the above-mentioned converging trends only serves the description of a certain organizational trend. It is not intended to suggest that this model is the best or preferable one. The same tasks may be fulfilled on the basis of different organizational models. Furthermore, it is also possible, and as a model does exist in practice, that various functions are fulfilled by different ministries and/or governmental offices. For example, it is quite general that the Ministries of Justice have coordination tasks in respect of the preparation of any draft laws, including copyright laws, that Ministries of Cultures play a role in those aspects of copyright protection that are relevant for the production and access to cultural goods and services, and for the Ministries responsible for information technology, certain copyright issues are also relevant; such as the protection of computer programs and databases, and the Internet-related copyright issues. Furthermore, due to the growing importance of copyright-based industries for national economies and international trade, it is also understandable, that the protection, exercise and enforcement of copyright are equally of interest for Ministries of Economies and Trade.

26. Much depends on certain national traditions. No organizational model may be suggested that might be equally suitable for all countries in the colorful category of "transition countries." What seems to be important is that there be a ministry or an office in the position of coordinating the various aspects of copyright policy and administration – in accordance with the general intellectual property policy of the country concerned – and that one organization or more organizations in cooperation be able to fulfill all the indispensable governmental tasks concerning copyright and related rights.

27. The usual tasks of governmental copyright administration that should normally be fulfilled in countries in transition, irrespective of which organizational structure is applied, are as follows:

- granting advise to the government in respect of copyright policy and decision making (for this, the governmental organization responsible for copyright should have appropriate staff with due expertise; it is also advisable to set up advisory bodies – such as Copyright Councils – composed of copyright experts and practitioners and the representatives of the various stakeholders interested in an efficient but well-balanced copyright system);
- suggesting and preparing draft laws necessary for updating the copyright law in accordance with international obligations;
- representing the country in the international organizations, such as WIPO, the WTO and the UNESCO, as well as in the competent bodies of those regional organizations in which the country is a member or otherwise participates; taking part in negotiations of possible new international, regional and bilateral agreements;
- authorizing the establishment of collective management organizations and monitoring their activities in order to guarantee that they function in accordance with the law and the international norms with due respect for the interests of both the owners of rights and the users of works and objects of related rights; acting as a catalyst in order to establish collective management organizations where they are missing and would be necessary for appropriate exercise of certain rights;
- establishing and operating dispute-settlement (such as mediation or arbitration) systems; in particular for the purpose of settling disputes between collective management organizations and users of works and objects of related rights in respect of tariffs and other licensing conditions;

- where necessary, offering expert opinions for courts, enforcement agencies and other state bodies (for this purpose the same organization – such as a Copyright Council – may be applied as the one which acts as advisory body for the government, which is the case in certain countries reviewed);
- coordinating and participating in the fight against piracy and other infringing activities;
- organizing awareness-building activities regarding the need for adequate protection of copyright and related rights.

28. There are countries covered by this paper where the governmental bodies in charge of copyright also perform other activities. Two of those activities are more or less typical and deserve being mentioned. The first one is not only coordinating anti-piracy activities but also fulfilling certain concrete tasks, such as issuing identification means (for example, holograms) to identify lawful copies; and, second, operating a registration system. In both respects – issuing identification means an operating a registration system – it is important to note that they must not function as a *de iure* or *de facto* formalities.

V. ORIGINAL OWNERSHIP AND TRANSFER OF RIGHTS

29. The questions of who is recognized as original owner of copyright and whether economic rights may be transferred (alienated) are left by the international copyright norms to national legislation. The copyright laws of countries covered by this paper – referred to, in the centrally-planned economy period, as "socialist copyright laws" – had typical common features. Original ownership of copyright was granted consistently to authors (rather than to, for example, employers, producers or publishers), and not only moral rights but also economic rights were inalienable; normally only licenses were granted for the use of works.

30. By certain commentators, these aspects were regarded as inexplicable in view of the characteristic features of the social structure of those countries. There were certain typical elements of copyright law – such as detailed rules on contracts – that seemed to be harmony with the collectivist and overregulated nature of those societies. However, it may not be easily understood, why "socialist copyright laws" chose the civil law ("continental") model in respect of original ownership and transferability of rights rather than the "common law" ("Anglo-American") model. Why was it that employees and individual creators were declared original owners of rights and not state-owned companies? Why was the assignment of copyright, as a rule, not allowed? Why was there this apparently unnecessary "complication" with individualistic exclusive rights when practically all relevant rights could have been owned by the "community" through its state-owned companies?

31. These questions emerged emphatically in view of the fact that these "individualistic" solutions were originally devised in the Soviet Union much before it became party to international copyright agreements. Why did the Soviet Union, without the constraints of international conventions, recognize – although with many limitations – exclusive rights for authors? The answers to these questions require a more substantive analysis and a deeper understanding of how the Soviet-type "socialist copyright system" was born and how it developed and functioned.

32. *Inter alia*, the following aspects should be taken into account from this viewpoint: (i) the anti-capitalism of the system; (ii) the desire of the regime to be able to prove that socialism was superior to capitalism; (iii) the tendency to create dogmas and to insist that they be strictly applied; (iv) the sincere persuasion of experts dealing with copyright that an author-centric system is justified.

33. In Russia, before the 1917 October Revolution, publishers were the only important group of users of works. On the basis of the law in force in that time, as a rule, they owned the rights in the works published by them on the basis of contracts. As part of anti-capitalist measures, the revolutionary legislation declared that those contracts lost validity, confiscated the rights of publishers and gave them back to authors (first reducing the level of protection, but later gradually increasing it). After World War II, the so-called people's democracies faithfully followed these measures.

34. In principle, copyright could have been simply "nationalized," as happened in respect of many property rights and, in a number of "socialist countries," also for industrial property rights. Copyright escaped the fate of those other rights probably because of the desire of socialist ideologues to be able to prove that socialism was superior to capitalism and that it better served basic human needs and values. At the time when the principles of the "socialist legal system" were laid down, the romantic concept of author-genius was generally accepted all over the world and in particular in Europe. The socialist ideologues wanted to be in a position to indicate that the socialist system, in accordance with this concept, fully respected and promoted the creativity of authors.

35. There were two specific features of "socialist copyright laws" which followed from this. Those features were determined as basic principles of "socialist legal theory" and were quickly became parts of the system of dogmas.

36. First, since in the recognition of authors' rights, the romantic notion of author-genius played a decisive role, the personality of the author was recognized as the focus of the system. The reason for granting quite "individualistic" exclusive rights to authors was that the need for recognizing such rights followed from the inner relationship of the author to his work. As a result, "socialist copyright laws" were based, in general, on a fairly strict monistic theory which presented copyright (more precisely authors' rights) as a "dialectic and inseparable unity" of moral rights and economic rights. Within this unity, moral rights were, in general, very generously regulated, while economic rights, although they were also recognized, were fairly extensively limited to guarantee that they were in harmony with the interests of society.

37. Second, from this approach, it also followed that the "commodity" nature of copyright was emphatically rejected as a typical feature of "capitalist copyright laws." The recognition of exclusive economic rights was inseparably linked to what was characterized as special personal nature of authors' creativity. Thus, as a rule, authors – and not, for example, employers, producers and publishers – had to be recognized as the original owners of copyright; authors' rights had to be inalienable; and even the validity of licenses granted to users had to be limited in time and in other aspects. All this, as mentioned above, became part of legal dogma.

38. The strong author-centric nature of "socialist copyright laws" had certain advantages under the conditions of centrally planned economies. Authors' rights were limited in various respects, and many conditions – among them several being of an ideological, political nature

– were set for their exercise; however, to a certain not negligible extent, they still represented an island of privacy, "individualism" and private property (although intellectual property, in general, were not characterized as property; to avoid this, the expression "the law of intellectual creations" was used instead of the well know expression "the law of intellectual property"). The alternative – which might have consisted in granting original ownership to producers, publishers and employers and/or at least allowing the assignment of rights to them – would have meant indirect collectivization of authors' rights. Therefore, this aspect of "socialist copyright laws" was rather beneficial from the viewpoint of authors as intellectual creators.

39. The questions of original ownership and transfer of rights emerge in different way under the conditions of market economy. It is indispensable that employers, producers and publishers be able to exploit works and objects of related rights, into the creation and production of which they have invested, in a reasonably flexible way without the need to ask for authorization of the creative contributors repeatedly. Furthermore, there are certain complex works (such as films, computer programs, encyclopedias, databases, etc.) where it would be impossible or highly impracticable to exercise economic rights on an individual basis by the great number of creative contributors; decision making, negotiation, licensing and enforcement of rights should be concentrated.

40. For these reasons, it has become necessary for the countries in transition to review the rigid dogma of inalienability of authors' rights, along with the related questions of original ownership of rights. It should be taken into account, however, that these issues have emerged also in traditional market-economy countries, and their copyright laws also contain provisions under which, in general, authors are recognized as original owners of rights and sometimes there are limits and conditions also in respect of assignment of economic rights. Such provisions have been adopted on the basis of the recognition that they are necessary in order to strengthen the position of authors – and, in the field of related rights, performers – in the negotiations with employers, producers and publishers which, in general, are regarded to be in a stronger position. It is considered that, without appropriate provisions on original ownership and transfer of rights, authors and performers might be constrained to give away their rights without the chance of exercising them again.

41. On the basis of the development of copyright legislation in various transition countries the following trends and principles may be identified, which may also be taken into account in certain other countries where the related issues may not have been completely settled in the transition process:

- the rigid principle of inalienability of economic rights as a dogma should be abandoned; the provisions concerning original ownership and transfer of rights should rather be adapted to well balanced application of three principles: first, that it should be possible to duly exploit cultural goods and services in the market taking into account certain rules applicable to goods and services in general; second, it should, however, be taken into account that cultural goods and services are of a double nature also relevant from the viewpoint of the protection and promotion of cultural identity and diversity; and, third, the interests of authors should be duly guaranteed also in case of any transfer of rights;
- it follows from the traditional "civil-law" orientation of countries in transition that original ownership of rights, in general, should be granted to authors as intellectual creators; this principle, however, may not be an obstacle to provide

for limited exceptions where its application would be impracticable (for example, in the case of certain "complex works" – frequently called as "collective works" – where it is impossible or highly impracticable to identify the contributions of creators working together in big teams);

- both assignment (alienation) and licensing of economic rights should be made possible, where appropriate with rebuttable presumption of transfer, with adequate guarantees in favor of authors and performers, and where the principle of inalienability of rights is still maintained to a certain extent, it should be counterbalanced with provisions under which assignment of rights is still allowed due to the specific requirements of certain cases; such the cases of works created by employed authors, commissioned works, audiovisual works, works made for the purpose of advertizing, computer programs, databases, etc.;
- where, and to the extent, this is in accordance with the international norms, provisions may be applied according to which authors and performers maintain a right to remuneration when they assign or otherwise transfer their rights;
- even where national laws allow the assignment and other transfer of economic rights, certain limitations to this principle may be justified; for example, in respect of the assignment of rights in future works and in respect of certain uses not known at the moment of assignment or other transfer of rights;
- due guarantees may also be included in favor of intellectual creators in the protection of their freedom of expression; for this purpose, provisions may be included into national laws on the right of authors to obtain back the rights in certain uses which are not exploited by the assignees and licensees within a certain relatively long period without well founded reasons.

VI. STATUTORY REGULATION OF CONTRACTS

42. The overregulation of copyright contracts was another typical feature of "socialist copyright laws." There were two main reasons for this. First, in a centrally-planned economy, everything was planned and regulated in detail; and, second, copyright fees were also governed by the income policy of the countries with such social and economic system. No significant differences were allowed in personal income; due to this principle, brutally regressive fee charts were provided in decrees on the various types of copyright contracts. There were several thresholds in the fee systems determining both the minimum and the maximum of the remuneration to be paid, and, for example, beyond a certain number of copies made and distributed, authors received considerably lower fees.

43. The overregulation of contracts is incompatible with the conditions and requirements of a market economy. Thus, it was clear from the very beginning of transition to a market economy that the provisions on copyright contracts had to be fundamentally revised.

44. As in the field of economy in general, countries in transition have chosen either a shock therapy or a gradual approach in the field of copyright, abolishing or liberalizing the regulation of contracts. It would not be appropriate to discuss here which of those approaches may be regarded better. It is clear, however, that, in the new copyright laws of these countries, the provisions on copyright contracts should be much less numerous and should be mainly of interpretative and dispositive nature; the number of binding provisions, if any, should be substantially reduced.

45. It is to be noted, however, that the unlimited application of the principle of contractual freedom may not be in accordance with the interests of authors and performers as individual creators. Also in traditional market-economy countries, at least in those which follow the "civil law" tradition, there are some provisions on contracts that, in general, try to protect the interests of authors as presumed weaker parties in negotiations. Similar consideration may be taken into account in this respect as in the case of the general issues of original ownership and alienability of economic rights discussed above.

46. In view of the experience of updating the regulation of contracts in the various countries in the framework of the transition period, the following principles may be identified:

- in general, only the regulation of those general aspects of contracts is justified that are indispensable for the operation of the contractual system without undesirable legal uncertainty and for due respect for the legitimate interests of the contracting parties;
- it is necessary to differentiate between contracts depending on whether they are about assignment or only licensing of rights, and in the case of licenses, whether an exclusive or a non-exclusive license is granted; the level of details and the desirable statutory guarantees may depend on the extent of transfer of rights by these categories of contracts;
- presumptions are needed under which, if the contract is not clear in such respects, a contact should be qualified as licensing contract rather than a contract on assignment of economic rights, and where the nature of license is not clear, as a non-exclusive rather than an exclusive license;
- dispositive norms are desirable for those cases where the contracts do not regulate certain important details, such as the scope of the rights transferred, the duration of the validity of the contract; territorial application and certain deadlines; such norms should provide for presumptions and limitative interpretation rules guaranteeing the application of contracts in due harmony with the interests of authors and performing artists;
- at least, in the case of assignment of rights and exclusive licenses – but also in other cases, with certain exceptions dictated by practical considerations – the prescription of written form seems necessary for the validity of contracts;
- guarantees are needed for authors in order that their works may be made available to the public also in those cases where their contracting parties do not exploit the transferred economic rights the way foreseen in the contract without valid reasons in a relatively longer period; in such a case, the authors should be able to terminate the contract;
- beyond the general rules, detailed regulation of the various categories of contracts, such as publishing contracts, is not indispensable; even if provisions are included on such contracts, they should be limited to the most important aspects and should not enter into minor details;

- where national laws still provide for fees to be applied in case of certain contracts (which otherwise does not seem necessary under the conditions of market economy), this should be limited to the minimum level of fees.[6]

VII. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

47. In September 1990, WIPO published a study on collective administration of rights.[7] It was originally presented in English, French and Spanish, and then, with the authorization of WIPO, it has been translated into a number of other languages, including Russian.[8] In 2002, an updated new version of the study was published by WIPO.[9]

48. It was not by chance that WIPO has been devoting great attention to the questions concerning collective management of rights. With the advent of new technologies that have made possible new forms of mass "secondary" uses, there are a growing number of cases where individual exercise of rights is impossible, or at least not quite practicable; and collective administration is the only realistic and workable alternative by which the basic objectives of copyright can still be served adequately. Thus, the scope of collective management has been extended, and it has become even more important than before that collective management systems function efficiently and in accordance with the international norms.

49. The above-mentioned study describes the main areas and typical forms of collective management of copyright and related rights; it analyzes the basic conditions and requirements of the establishment and operation of collective management systems; and its last chapter offers conclusions summarizing the most important principles of collective management. Due to the availability of this WIPO publication, the task of this part of the paper is mainly to present how the general principles of collective management are applicable in countries in transition. For this purpose, references are made to those principles summed up in the Conclusions chapter of the 2002 updated version of the study which are particularly relevant from the viewpoint of transition countries.[10]

50. In the countries of centrally planned economy and so-called "democratic centralism," it was quite typical that domestic authors' rights were managed in a mandatory way by one organization. In those cases, there was no freedom to choose individual exercise of rights or to join another organization. From this viewpoint, principles (1), (4), (14) and (15) of the study should be taken into account. They read as follows:

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[6] The position of authors in the various "transition countries" differs regarding the question of whether or not provisions on the minimum level of fees are beneficial from their viewpoint. Some of them are of the view that such provisions are dangerous, since the minimum fees tend to become also maximum fees. In contrast, others consider the determination of minimum fees helpful, since it, at least, guarantees that users are not allowed to pay even less.

[7] Dr. Mihály Ficsor, "Collective Administration of Copyright and Neighboring Rights," 1990, WIPO publication No. 588 (E, F and S).

[8] "Kollektivnoye upravleniye avtorskim pravom i smezhnymi pravami" (translator A. V. Turkin; editor V. S Dunin); published by the Russian Authors' Association (RAO) in 1999.

[9] Dr. Mihály Ficsor "Collective Management of Copyright and Related Rights," WIPO publication No. 855 (E, F and S).

[10] The principles – altogether 26 – may be found in Chapter 7, paragraph 432, of the book mentioned in the preceding footnote.

"(1) Collective management… is justified where individual exercise of such rights – due to the number and other circumstances of uses – is impossible or, at least, highly impracticable…"

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

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

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

51. These principles address the question of whether collective management should be a matter of voluntary decision of the owners of rights concerned or it may be made mandatory – obligatory – or at least the effect of existing collective management schemes may be extended to those owners of rights who have not joined the system. Stating from another viewpoint, the four principles quoted above outline what kind of role legislation and governmental supervision may and should play in respect of the establishment and operation of collective management organizations.

52. As stated in the principles, the general rule is that collective management should be of a voluntary nature. Principle (4) refers in a general way to the strictly limited scope of applicability of mandatory collective management. As pointed out in the corresponding part of the study,[11] it is undeniable that, in case of collective management, an exclusive right

[11] Paragraphs 371 to 394.

cannot prevail as fully as when it is exercised individually by the rights owners themselves. A provision providing for obligatory collective management of a right is to be seen as a *condition* under which the right may be exercised; a kind of restriction, although less strong than a non-voluntary license (this is, of course, only true if the system is regulated and operated properly and does not become a disguised form of non-voluntary licensing). The Berne Convention provides for cases where it is a matter for legislation in the countries of the Berne Union to determine the "conditions" under which certain rights may be exercised (see Article 11*bis*(2) and Article 13(1)). In general, the relevant provisions are considered as a possible legal basis for the introduction of non-voluntary licenses, because they define the bottom line of the possible conditions in providing that those conditions must not, under any circumstances, be prejudicial to the authors' rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible "conditions" referred to in those provisions; also other conditions – practically, restrictions – of the exercise of exclusive rights concerned may apply. Mandatory collective management of rights is clearly such a condition. Since the possibility of providing for such conditions is determined in the Convention in an exhaustive way, on the basis of the *a contario* principle, national laws of countries in transition are not allowed to provide for mandatory collective management of exclusive rights in any other case.

53. Nevertheless, what is stated in the preceding paragraph should not be interpreted to mean that mandatory collective management may only be introduced in cases where the text of the Berne Convention uses the expression "determine the conditions" under which the rights may be exercised. Obligatory collective management is permissible also in cases where a right is established as a mere right to remuneration (as in the case of the resale right or the so-called "Rome Article 12 rights" of performers and producers of phonograms) or where the restriction of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case of Article 9(2) concerning the right of reproduction). In such cases, there are two reasons for which obligatory collective management not only allowed under the international norms but it is the only way to exercise such rights. First, the rights involved are not exclusive rights; the owners of rights are not in the position to be able to decide whether or not they authorize the use of their works or objects of related rights; their only right is to receive remuneration for the uses concerned authorized by the law itself. Second, such rights usually cover certain massive uses in respect of which individual exercise of rights would be impossible or highly unrealistic.

54. In market-economy countries, at least in the traditional fields of collective management, as a result of organic development of copyright, a *de facto* situation has emerged that collective management of exclusive rights, where such management is desirable from the viewpoint of owners of rights, (with the exceptions allowed by the Berne Convention as mentioned above) is performed on a voluntary basis even if there is no provision in the national laws stating this principle. However, in countries in transition due to the widespread obligatory forms of collective management in their centrally-planned-economy period, it is highly advisable to clarify this principle in explicit terms in the copyright laws.

55. There is also a need for precise legislative norms on extended collective management – as referred to in principle (14) quoted above – where it is applied in countries in transition. Particular attention should be paid to the condition that only the effect of sufficiently representative collective management systems may be extended to non-members. This should be understood in a way – and the regulation should be in accordance with this – that such extension of the effect of collective management may only be justified where collective

management is, in general, accepted as a desirable, efficient way of exercising rights, and only certain groups of owners of rights do not participate in it. This principle should be applied not only from the viewpoint of domestic owners of rights but also from the viewpoint of foreigners (whether the organization has mutual representation contracts with corresponding foreign organizations). As principle (14) also points out, the rules regarding "opting out" from such extended collective management systems should be duly practicable with realistic option for owners of rights who intend to choose other ways of exercising their exclusive rights.

56. The above-mentioned aspects of collective management are closely related to the question of what role legislation and governmental control should play in respect of the establishment and operation of collective management organizations. As the above-quoted principle (15) suggests, positive answer should be given to this question. There are various reasons for which in countries in transition adequate and sufficiently detailed statutory provisions are needed in this respect. Some of them are mentioned in the preceding paragraphs; namely that it should be guaranteed that obligatory collective management may only function where it is in accordance with the international norms and that the conditions of possible extended collective management systems be also precisely set.

57. In addition to this, it should also be taken into account that collective management has become an important form of exercising rights, for the adequate operation of which governments are responsible also under the general obligations of countries party to the international copyright treaties to adopt measures to ensure the applicability of the provisions binding them (in particular, the applicability of the rights they are obliged to grant).[12]

58. It is another important aspect that the overwhelming majority of collective management organizations are in a *de facto* – and sometimes even *de iure* -- monopoly position (as such a position is, in practical terms, a necessary condition for the appropriate operation of joint management systems). This kind of monopoly position, in general, exists *vis-à-vis* both rights owners and users. Without appropriate guarantees, such a position might be abused. It should also be considered that, if a collective management organization does not function properly, it may result in mismanagement of rights. For these various reasons, there is a need for adequate legislative regulation of the conditions of establishment and operation of collective management organizations. Only the establishment of those organizations should be authorized in the case of which there are guarantees that they have the necessary staff, technical means and information systems for appropriate operation in accordance with the national laws and international norms.

59. As part of the regulation, it is highly advisable to subject the establishment of collective management organizations to prior scrutiny and to the condition of accreditation and registration by a competent governmental authority. The statutory provisions should also foresee regular monitoring of the operation of such organizations along with possible sanctions – such as suspension of operation or withdrawal of accreditation – in those cases where an organization does not function in accordance with the conditions set by the law.

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[12] *See*, for example, Article 36 of the Berne Convention, Article 26(1) of the Rome Convention, Article 14(1) of the WCT and Article 23(1) of the WPPT.

60. Principle (12) of the WIPO study concerns certain issues that have emerged with great emphasis in the transition period from centrally planned economy to market economy. It reads as follows:

> "(12) Whether public or private organizations are more appropriate for joint management of copyright and related rights … depends on the political, economic and legal conditions and traditions of the countries concerned. In general, private organizations are preferable. The conditions of certain countries… may, however, make the setting up of public organizations desirable in order to safeguard rights owners' interests. In the case of such public organizations, appropriate organizational forms and guarantees are needed in order that the rights owners concerned may participate in the direction of the management of their rights."

61. In the centrally-planned system, in the majority of the countries covered by this paper, governmental or semi-governmental organizations performed the tasks of collective management, and, as discussed above in connection with the issues of governmental copyright administration, these organizations also had some genuine governmental tasks. During the transition period, the two functions have been, in general separated and the collective management organizations have been transformed into real private societies.

62. Nevertheless, there are a limited number of countries in transition where such transformation has not taken place, and still governmental or semi-governmental organizations deal with collective management. In such cases, the above-quoted principle should be applied. It should be recognized that, under the specific conditions of the countries concerned, in the given stage of the transition process, the maintenance of such a system may be justified. When this is the case, the application of two principles seems desirable. First, what is also stated in principle (12) quoted above; namely, that also in such organizations, the owners of rights concerned should have appropriate role in the management system,[13] and, second, that the organization should function in accordance with the international norms and the general principles of collective management (as stated in the WIPO study).

63. The application of principle (11) of the WIPO study has become particularly relevant in countries in transition too. It reads as follows:

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

64. In the overwhelming majority of cases, a given category of rights of a given category of owners of rights (either alone or together with other rights) is managed by one single joint management organization. Exceptions to this rule are very rare.

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[13] From this viewpoint, it is necessary to also take into account principle (16) of the WIPO study, which reads as follows: "Decisions about the methods and rules of collection and distribution of remuneration, and about any other important general aspects of joint management, should be taken by the rights owners concerned or by bodies representing them under the statutes of their organization."

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

66. It is another matter that the absence of alternative organizations may create a *de facto* monopoly position for the organizations concerned (or even a *de iure* monopoly position where the law itself creates such a position). For this reason, arguments may also be presented for the establishment of competing societies. Furthermore, in the case of those countries which are members of the European Union also the community legislation requires the respect of certain competition and other rules that may result, in principle, in the establishment of parallel organizations.

67. Nevertheless, the application of statutory rules regarding the conditions of establishment of collective management organizations (in particular, the requirement that the organization be duly representative with broad domestic and foreign repertoire) in themselves may, and usually does, lead to a situation where only one organization – or, at maximum, of a very limited number of organizations – may perform the tasks of collective management of the same category of rights. In the cases where two or more organizations are established for the same right, special provisions may be needed in order to guarantee the appropriate operation of the collective management system.[14]

68. At the beginning of the transition process, in some countries covered by this paper, governmental collective management (which, by definition, was performed by one single organization) was simply terminated in a way that it was left to owners of rights to set up voluntary private systems; even no specific conditions were included in the copyright laws for the establishment of such organizations. As a result of such an abrupt change, sometimes chaotic situation emerged with different competing organizations, many of them without real means to perform the tasks of collective management, and this created great problems also for the others that otherwise might have been able to do so. Time has been needed in such cases in order to settle these problems and, on the basis of a more appropriate statutory regulation and/or agreements between the competing societies, to establish a well functioning collective management system.

69. The transition from governmental or semi-governmental organizations to private societies has been much smoother in those countries where adequate transitional provisions were included in the copyright laws. Those provisions guaranteed that the repertoire, the staff and the technical means of the governmental organization could be "inherited" by the new private society in a duly regulated order with due respect to the international norms and

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[14] For example, at least in certain cases, it is indispensable to guarantee that only one organization may grant licenses and collect remuneration. In such cases, only the distribution system is separated. This requires agreement between the organizations concerned, and in the absence of agreement, the possibility of governmental intervention on the basis of strictly established conditions. Such kind of regulation is particularly important in national laws that provide for extended collective management, since only one of the organizations may operate an extended system (and only in respect of owners of rights not covered by the repertoires of either of the parallel organizations); otherwise there would be double, conflicting representation of the same owners of rights.

domestic legislation as well as to the legitimate interests of the different groups of stakeholders. In the few countries where the need of this kind of transformation of the system might still emerge, it is advisable to take into account the experience of these countries and apply this kind of transitional provisions.

70. In transition countries where the task has been not only the further development of the collective management system but the establishment of such a system from scratch (for example, because in the newly independent countries, such system did not exist before), principle (9) has been – and in some of them, still is – also relevant. It reads as follows:

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

71. In countries in transition – in particular in newly independent countries where previously there was no real collective management system – it is advisable to concentrate expert staff and technological means in one organization or in a smaller number of organizations with broad repertoire of rights. Where more organizations are set up to manage the rights of different categories of owners of rights, the concentration and efficient use of human and technical conditions may also be guaranteed through cooperation or representation agreements between such organizations, on the basis of which one of them (mainly the authors' society) performs certain tasks (such as licensing, monitoring of uses and collection of remuneration) and, after the deduction of the administration costs, transfers the corresponding amounts of remuneration to the other organizations which only have to take care of the distribution thereof.

72. The application of principle (18) of the study may also involve new kinds of governmental tasks in countries in transition:

> "(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."

73. In centrally-planned economy, the establishment of fees was, in general, a matter of governmental regulation. In case of private collective management, separate machinery is needed in order to ensure that the tariffs and other licensing conditions applied by collective management organization be established and applied in a way that the misuse of any monopoly position may be prevented. Different organizational and procedural systems are available for this purpose (and also applied in traditional market-economy countries), such as a mediation or arbitration system, or approval of the tariffs and licensing conditions by an

administrative body. Irrespective of which model is chosen what is important – in order to guarantee smooth and relatively conflict-free operation of collective management – is that appropriate procedural rules make it possible also for users of works and objects of related rights to present their position and try to protect their legitimate interests.

74. Finally, since in the collectivist systems of countries of centrally-planned economies, it also happened that certain amounts of remuneration due to owners of rights had to be used – either on the basis of some legislative provisions or as a result of direct administrative instructions – for purposes other than distribution, after the deduction of management costs, between those whose works have been used, also the following principles should be taken into account with special emphasis:

> "(23) No remuneration collected by a joint management organization should be used for purposes other than covering the actual costs of management and the distribution of the remuneration to rights owners, except where the rights owners concerned, including foreign rights owners, or bodies representing them under the statutes of their collective management organizations, authorize such a use of the remuneration (for example, for cultural or social purposes). It should, however, be taken into account that authorizing deductions for cultural and social purposes may establish a favorable basis for the operation of joint management organizations in an efficient way, as well as for sufficient political support and social respect for copyright and related rights (in particular in developing and other "net importer" countries).
>
> "(24) The remuneration collected by a joint management organization – after the deduction of the actual costs of management and of other possible deductions that rights owners may have authorized according to the preceding point – should be distributed among individual rights owners in proportion to the actual use of their works and objects of related rights as much as possible. Individual distribution may only be disregarded where the amount of remuneration is so small that distribution could not be carried out at a reasonable cost.
>
> "(25) Foreign rights owners represented by a joint management organization should enjoy, in all respects (such as the monitoring of uses, the collection of remuneration, the deduction of costs and, especially, the distribution of remuneration), the same treatment as those rights owners who are members of the organization and nationals of the country concerned.
>
> "(26) Joint management organizations may perform activities other than management of rights proper, but the costs of such activities should not burden the remuneration collected in the framework of joint management of rights."

75. Two comments seem to be necessary to these principles.

76. First, in respect of the application of principle (23) concerning deductions for cultural purposes, it should be noted that such deductions are also important from the viewpoint of the protection and promotion of cultural diversity, since the amounts thus obtained may be used for the promotion of domestic creativity in countries – including several countries in transition – where this is particularly important for obtaining indispensable financial sources.

77. Second, principle (26) is particularly relevant from the viewpoint of certain – in general governmental – organizations that functioned in centrally-planned economies. Those organizations also worked frequently as agencies promoting publication of domestic works abroad and obtaining licenses from foreign owners of rights for domestic publishers and other users. Principle (26) refers to such a situation stating that the costs of such activities must not be covered by the remuneration collected for and due to owners of rights others than those whose works are covered by such agency activities.