

MILE-CEPIC WORKSHOP
ORPHAN WORKS IN PRACTICE
(Dresden, 5th June 2009)

**Extended collective licensing arrangements and their practicality for
dealing with orphan works**
(Background paper)

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I. INTRODUCTION

1. This background paper (i) analyses the legal conditions for the application of mandatory and collective management at international and community level; (ii) outlines certain basic principles that should be respected in any forms of collective management and that are particularly relevant from the viewpoint of such management of the rights in orphan works; (iv) describes and reproduces those provisions of the E.U directives which are relevant from the viewpoint of the same issues; (iii) discusses briefly the questions of applicability and practicality of collective management of copyright in orphan works, with special attention of the management of copyright in image-based works; and (iv) presents the main features of the new Hungarian legislation on orphan works.
2. The background paper does not deal with the concept and definition of “orphan works” and the general legal and practical considerations concerning the regulation of their use. It is taken as granted that the participants in the workshop are very well aware of all those aspects.

II. COLLECTIVE MANAGEMENT: VOLUNTARY, MANDATORY,
“EXTENDED”

3. The exclusive rights of authors to exploit their works or authorize (or prohibit) others to do so is a basic element of copyright, and, where recognized, such a right is also important for the beneficiaries of related rights. The exclusive nature of a right means that its owner – and its owner alone – is in a position to decide whether he authorizes or prohibits the performance of any act covered by his right; and if he does authorize such an act, under what conditions and against what kind of remuneration.
4. An exclusive right may be enjoyed to the fullest possible extent if it is exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation of his work, and he may closely monitor whether his right is duly respected.
5. In certain cases, collective management is the most efficient way of exercising rights from the viewpoint of the interests of all the stakeholders: the owners of rights, the users and the

public. In such cases, owners of rights normally establish *voluntarily* collective management systems.

6. In order that a collective management system may duly function, many elements of the management of rights are standardized – and, in fact, even “collectivized.” The same tariffs, the same licensing conditions and the same distribution rules apply to all works that fall into a given category. It is also frequent – or rather it is quite general – that the tariffs of collective management organizations are approved by some dispute settlement bodies or governmental authorities, and that the collective management organizations are obliged to grant license to any user who asks for authorization and is ready to pay remuneration according to the established tariffs. The owners of rights who join a collective management organization *must accept all this*.

7. As long as the system is established and functions *voluntarily* on the basis of free decisions of owners of rights, all this is in order from the viewpoint of the international norms. Prescription of *mandatory collective management is, however, another matter*. In that case, owners of rights are not able to act as owners of *exclusive* rights; the law does not allow them to decide in which cases they authorize the use of their works and in which cases they prohibit it; and they cannot decide anymore under what conditions and against what remuneration authorization is granted. Others decide about all this.

8. In certain cases – but only in certain exhaustively determined cases – mandatory collective management is allowed under the international copyright norms as well as under the *acqui communitaire* which seems to be in accordance with those norms.

9. Under the international norms, in the case of *rights to remuneration* – both those rights which are originally provided as such (e.g., resale right under Article 14^{ter} of the Berne Convention or the performers’ and phonogram producers’ right to a “single equitable remuneration” under Article 12 of the Rome Convention and Article 15 of the WPPT) and those which consist in the limitation of exclusive rights in accordance with the international norms (e.g., limitations of the exclusive right of reproduction on the basis of Article 9(2) in certain cases of private copying and reprographic reproduction) – mandatory collective management may be prescribed. This is so since these rights are not – or are not anymore – exclusive rights, and due to their nature, this may be the best, or even the only possible, way of exercising them.

10. In contrast, the prescription that an *exclusive right* may only be exercised through a collective management organization is obviously a *condition* of exercising such a right (along with other conditions, such as compulsory licenses). The Berne Convention does allow the imposition of such *conditions*; however, only in respect of certain exhaustively identified exclusive rights; namely, in respect of the right of broadcasting and other related acts under Article 11^{bis}(2)¹ and the right of reproduction concerning recording of musical works under Article 13.² It follows from this *a contrario* that the Convention does not allow the prescription of such conditions in respect of other exclusive rights.

1. Article 11bis(2) provides as follows: “*It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised...*” (Emphasis added.)

2. Article 13(1) reads as follows: “Each country of the Union *may impose* for itself reservations and *conditions* on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any...” (Emphasis added.)

11. It is possible to preserve the exclusive nature of an exclusive right, but to provide for an unwaivable right to remuneration (so-called “*residual right*”) maintained for the original owners – typically for authors and performers – *after the transfer of the exclusive right*.³ Since such a “residual right” is a right to remuneration, for its exercise – in contrast with the exercise of the underlining exclusive right itself, where it is not allowed – it is possible to prescribe mandatory collective management.

12. As regards “residual rights,” the obvious example is the “unwaivable right [of rental] to remuneration” under Article 4 of the Rental Directive.⁴ First, paragraph (3) of the article provides that “[t]he administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers”, and, then, paragraph (4) deals with the question of possible prescription of mandatory collective management. Its relevant part reads as follows: “Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed...”.

13. This provision is relevant from the viewpoint of the issue of mandatory collective management not only because it confirms that, in the case of this “residual right,” collective management may be imposed, but also because it has an important *a contrario* implication. Since the Directive finds it necessary to state that, in this case, collective management *may* be imposed, by this itself, it indicates implicitly that, under the *acqui communautaire* - unless this possibility does not follow directly from the provisions of an international treaty to which the Member States are party – there is a need for such a permission. In other words: *mandatory collective management of exclusive rights may only be prescribed in those cases where the international norms, and, in accordance with them, the rules of the acqui communautaire explicitly allow to do so*.

14. The Satellite and Cable Directive⁵ goes further. In the case of cable retransmission, it *not only allows but prescribes mandatory collective management*. Article 9(1) of the Directive provides as follows: “Member States *shall* ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society [emphasis added].” The Directive also regulates the legal technique through which it may be achieved that all such

3. It is submitted, however, that – in view of existing contractual relations – such a solution may be applied mainly where a new right is introduced or an existing right is applied in a new situation. This was the case as far as the rental right was concerned. The right of (interactive) making available is not necessarily the same case, since it, depending on the nature of interactive transmissions, quite frequently may be regarded as a new incarnation of the right of communication to the public and/or the right of distribution. Three conditions seem to be necessary to be fulfilled, in the case of the making available right, for such a legislative solution. First, the exercise of the exclusive right by its actual owners (assignees, licensees) should be guaranteed. Second, the existing contractual arrangements should be taken into account in order to avoid double payment. Third, the relevant international norms do not allow the “exportation” of such a system to countries where no such statutory provisions exist.

4. Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Paragraph (1) of Article 4 of the Directive provides as follows: “Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.” And paragraph (2) of the same article adds that “[t]he right to obtain an equitable remuneration for rental cannot be waived by authors or performers.”

5. Council Directive 93/83/EEC of 27 September on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

rights of copyright owners and holders of related rights may be concentrated in the repertoire of a collective management organization (or possibly more than one organization from which holders of rights may chose one).⁶

15. This provision is in harmony with the above-stated principle – namely that, in the case of an exclusive right, mandatory collective management may only be prescribed where the relevant international norms allow it, either through permitting the prescription of conditions for the exercise of rights (the imposition of collective management being obviously a condition) or through limiting it to a right to remuneration in certain cases (in which cases, the rights concerned are not of an exclusive nature anymore).

16. This is so since, in respect of authors’ “exclusive right of authorizing... any communication to the public by wire... of the broadcast of [their] works” granted by paragraph (1) of Article 11^{bis}, paragraph (2) of the same article provides that “[i]t shall be a matter for legislation in the countries of the [Berne] Union to *determine the conditions under which the rights mentioned in [paragraph (1)] may be exercised* and, since in the case of related rights, neither the provisions of the Rome Convention, the TRIPS Agreement and the WPPT nor the *acqui communautaire* provide for *exclusive* rights of authorization concerning cable retransmissions.

17. Article 10 of the Satellite and Cable Directive provides for an exception to mandatory collective management of cable retransmission rights, namely for such rights of broadcasting organizations.⁷ This confirms one of the basic principles of collective management; namely that collective management, even if it might be possible from the viewpoint of the relevant international norms and the *acqui communautaire*, is *only* justified where individual exercise of rights – due to the number of owners of rights, the number of users or other circumstances of uses – is impossible or, at least, highly impracticable.⁸ Broadcasting organizations are relatively less numerous (in contrast with authors and owners of related rights other than the rights of broadcasting organizations); they can manage their rights individually.

6. Article 9(2) and (3) of the Satellite and Cable Directive provide as follows: “2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and a collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.”

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

7. Article 10 of the Satellite and Cable Directive provides as follows: “Member States shall ensure that Article 9 [prescribing obligatory collective management] does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.”

8. See Dr. Mihály Ficsor: „Collective Management of Copyright and Related Rights,” WIPO publication No. 855(E), 2002. p. 157, principle (1).

18. The Resale Right Directive⁹ does not prescribe mandatory collective management of collection and distribution of the remuneration due for the resale right, but *allows* Member States to do so. Its Article 6.2 reads as follows: “Member States *may* provide for compulsory or optional collective management of the royalty provided for under Article 1.”(Emphasis added.)

19. As mentioned, in this case, the prescription of mandatory collective management is allowed under the international copyright norms, since it corresponds to the nature of the resale right (*droit de suite*) under Article 14^{ter} of the Berne Convention; namely that it is a mere right to remuneration (and it is also only such a right under Article 1 of the Resale Right Directive).

20. To sum up: It follows from the application of the *a contrario* principle that, where the international copyright norms and/or the rules of the *acqui communautaire* provide for an exclusive right and do not allow the prescription of conditions of its exercise (nor permit its limitation to a mere right to remuneration), it is in conflict with those norms to submit the exercise of such a right to the condition that it may *only* be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and the *acqui communautaire*) in the case of the right of public performance (Article 11 of the Berne Convention), the right of public recitation (Article 11^{ter}) or the right of “making available to the public” (Article 8 of the WCT and Articles 10 and 16 of the WPPT).

21. In addition to the voluntary and mandatory forms of collective management, there is also a third one; namely the system of so-called extended collective management applied under certain copyright laws. In the case of “extended collective management” of exclusive rights, the copyright law provides that the coverage of license granted by a collective management organization on behalf of its members and those owners of rights who are represented by it otherwise, is extended, under certain conditions, to those owners of rights who are not its members or otherwise represented by it. In order to avoid its transformation into a *de facto* mandatory collective management, two basic conditions should be fulfilled: first, such a system may only be applied where a collective management organization originally established on a voluntary basis is adequately, broadly representative (both domestically and at the international level); and second, the possibility of “opting out” from the system should be guaranteed under reasonable conditions.

22. The *acqui communautaire* recognizes the applicability of extended collective management under certain conditions. This is reflected in Article 3(2) to (4) of the Satellite and Cable Directive. After that Article 2 states that “Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works...”, and Article 3(1) adds that “Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement” – Article 3(2) provides for an extended collective management system. It reads as follows:

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

9. Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art

- the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and
- the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.”

23. This paragraph includes an authorization (the “may” language clearly indicates this) for Member States to introduce such an extended collective licensing system. This seems to indicate the position under the *acqui communautaire* that such an authorization is needed, and that, where it is not granted, in the fields expressly covered by the *acqui*, no extended collective management is allowed.¹⁰

24. Article 3(3) and (4) of the Directive also indicate that even extended collective management may only be justified where it is truly indispensable, and where owners of rights usually do not intend to exercise their exclusive rights on an individual basis. Article 3(3) identifies a category of works where this is not the case; it provides that “[p]aragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography”, while Article 3(4) underlines the exceptional nature of extended collective management by introducing a specific notification procedure.¹¹

25. There is one more directive in which mention is made of extended collective management; namely the Information Society Directive¹² which, in recital (18) states as follows: “This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses.”

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

III. GENERAL PRINCIPLES OF COLLECTIVE MANAGEMENT OF COPYRIGHT

27. Excerpts from Chapter 7 (“Conclusions”) of the study on “Collective Management of Copyright and Related Rights” (by Dr. Mihály Ficsor) published by WIPO in 2002 (publication number: in English: 855(E); in French: 855(F), in Spanish: 855(S)) regarding *certain general principles equally applicable to the various forms of collective management* (voluntary, mandatory, “extended”) including those cases where copyright in orphan works is managed in this way:

10. For example, the right of public performance of authors is not covered by the *acqui communautaire*. In the case of that right, for example, extended collective management may be justified (but, since it is an exclusive right, obligatory collective management obviously is not permitted by the international copyright norms).

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

12. Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

“(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...”

“(16) 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.

“(17) For rights owners whose rights are managed by a joint management organization, regular and sufficiently detailed information should be available about the activities of the organization that may concern the exercise of their rights. Such information should also be available to foreign joint management organizations in mutual representation partnership with the organization concerned...”

“(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)...”

“(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.”

28. Although in the above-mentioned “Conclusions” chapter of the WIPO study, no separate principle is included about this, *transparency and accountability are primordial requirements* for legitimate and adequate collective management system.

29. The 2005 EC recommendation on cross-border licensing of online music services¹³ has raised a lot of controversies and – quite well deserved – criticism. However, nobody has questioned the importance and validity of what is stated in its recital (13):

“(13) Additional recommendations on accountability, rightholder representation in the decision-making bodies of collective rights managers and dispute resolution should ensure that collective rights managers achieve a higher level of rationalisation and transparency and that rightholders and commercial users can make informed choices. There should be no difference in treatment on the basis of category of membership in the collective rights management society: all right-holders, be they authors, composers, publishers, record producers, performers or others, should be treated equally.”

30. The Resolution of the European Parliament¹⁴ that has expressed serious misgivings about many aspects of the Recommendation, as regards the need for *transparency and accountability* of collective management systems, has fully agreed with it – *along with the corollary principles of equal treatment and chance for representation* as also stated in the above-quoted Conclusions chapter of the WIPO study. This is reflected in recital R and in points 5 and 6 of the Resolution:

“R. whereas, especially with regard to possible abuses of monopolies, there is a need for better governance of some CRMs [CRM is an abbreviation in the Resolution standing for “collective rights managers”] through improved solidarity, transparency, non-discrimination, fair and balanced representation of each category of right-holders and accountability rules combined with appropriate control mechanisms in Member States; whereas CRMs should provide their services on the basis of the three key principles of efficiency, fairness and transparency,”

“5. Calls on the Member States and CRMs to ensure fair representation of all categories of the rightholders in CRMs and thus their balanced participation in the internal decision-making process;

“6. Stresses that the proposed directive should...

- guarantee right-holders a high degree of protection and equal treatment,...
- be based on solidarity and an adequate, equitable balance between right-holders within CRMs,...
- provide for democratic, transparent and accountable governance in CRMs, inter alia by establishing minimum standards for organisational structures, transparency, representation, copyright distribution rules, accounting and legal remedies,
- ensure comprehensive transparency in CRMs,...

IV. ORPHAN WORKS AND THE “NON-DISRIBUTABLE AMOUNTS” IN COLLECTIVE MANAGEMENT SYSTEMS

13. Commission Recommendation 2005/737/EC of May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

14. European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)).

31. The principles of transparency and accountability are of particular importance from the viewpoint of the owners of rights that are qualified as orphan works. In the distribution systems of collective management organizations, the remuneration due for the use of such works is included in the category of “*non-distributable amounts*.”

32. Such amounts usually are handled on separate accounts for a certain while and then they are added to those amounts that are distributed among the members of the organization and other owners of rights represented by them, or at least whose identity is known and/or used for other purposes. *There is a need for appropriate rules* – preferably not only in the distribution regulations of the organizations concerned but also in statutory law – *to guarantee that works do not too lightly end up in the category of works of unknown authors or authors with unknown residence (that is, orphan works)*. This is supposed to mean, *inter alia*, the requirement of extending the obligation of “due diligence search” to collective management organizations in a transparent and accountable manner along with equal treatment for those who are found as owners of rights of what were “candidates” to become orphan works.

33. *In many countries, extended collective management is regarded as the most attractive solution for licensing the use of orphan works*, since it is a system which has always taken care of the licensing of such works. It is considered that since collective management organizations already have the necessary machinery to deal with the rights of such works, the problem may simply be left to them in respect of those rights in those category of works to which their activities extend, and it is sufficient to work out some kind of legislative and practical solution for those rights in those orphan works that normally are not exercised through collective management.

34. Unfortunately, experience shows that the governments and legislators of such countries usually do not pay sufficient attention to those orphan works that are left to collective management; as result, *the above-outlined statutory guarantees in favor of the owners of rights of such works tend to be missing*.

AN EXAMPLE (FAR FROM PERFECT):
NEW HUNGARIAN LEGISLATION ON ORPHAN WORKS

35. *Act CXII of 2008 amending the 1999 Copyright Law of Hungary* (in addition to a fuller implementation of the Rental, Lending and Related Rights Directive concerning the lending right) *has introduced a complex regulation of the use of orphan works*. The Act was adopted on December 28, 2008, and entered into force on February 1, 2009; however, just in respect of the provisions on orphan works, it has only fully entered into force recently with the publication of a Government Decree (see below) that – on the basis of the authorization by the new Act – regulates certain procedural details.

36. Under the new Article 57/A of the Copyright Act inserted by the above-mentioned Act, the regulation covers any work in the case of which the person who intends to use it “has made all those measures to find the author which, in view of the nature of the work and manner of its use, are justified, and still has not succeeded to locate him.” This is regarded to be *a definition of both “orphan works” and “due diligence search.”* For the conditions to be fulfilled in order to prove that “due diligence search” has taken place, see paragraph 46, below.

37. As a “general rule,” the Hungarian Patent Office has the right to grant a non-exclusive license for the use of such works. However, as it turns out from other provisions mentioned below this rule may only be regarded as a general rule from the viewpoint of legal technique, since it is not applicable in those cases where copyright is exercised through collective management, and the coverage of such cases may be quite broad. In fact, the new Act might have also provided that, *wherever there is a collective management organization for the exercise of a certain right in a certain category of works, that organization exercises that right also in respect of orphan works, and that, where there is no such organization, the Patent Office may grant a non-exclusive license.*

38. The license granted by the Patent Office is valid for five years, but it does not extend to the right of granting sub-licenses and to the making of derivative works. *When the Patent Office grants such a license, it also fixes the amount of remuneration due by the user of the work, taking into account the nature and extent of the use.* If the use of the work does not serve, either directly or indirectly, to obtain or increase income, the remuneration must only be paid after that the author (or other owner of copyright) is located. Where the use of the work, either directly or indirectly, has the objective of obtaining or increasing income, the use of the work may only be commenced after that the remuneration is deposited at the Patent Office.

39. As soon as the owner of copyright is located, the Patent Office, at the request of the owner of copyright or the licensee, withdraws the license. Nevertheless, the licensee is allowed to continue using the work – to the same extent as until the time of finding the owner of copyright and/or his location – for one more year or until the expiry of the license granted by the Patent Office, whichever period is shorter. The same applies for those users who, before finding the owner of copyright and his location had made serious preparations for the use of the work under the license.

40. *The owner of copyright may claim the remuneration established by the Patent Office for five years from the date of the expiry of the license or of the withdrawal thereof. After the expiry of the five-year period, the Patent Office has to transfer the remuneration deposited at it to the collective management organization which is authorized to manage the rights of the owner of copyright in respect of other uses of his works, and, in the absence of such organization, to the National Cultural Fund.* The latter has to use the amounts of remuneration thus transferred for the making available of cultural goods to the general public.

41. If the owner of copyright does not find the remuneration fixed by the Patent Office appropriate, he may turn to the court to establish its amount.

42. The above-described procedure is *not applicable in those cases where a collective management organization has the right to authorize the uses of “orphan works” or collect remuneration for them on the basis of obligatory or extended collective management.* In such a case, *the distribution rules of the organization are supposed to regulate how an owner of copyright may claim remuneration* after that his identity is established and his whereabouts is located.

43. *The new legislation, however, does not contain any provisions on the obligations of collective management organizations to make efforts in order to avoid falling works too easily into the category of “orphan works”* (which, in the collective management systems, usually just mean the category of those works for the use of which remuneration is collected

but then it is added to the “non-distributable amounts) *and subsequently to find their authors and/or their location*. There is no statutory rule either on the questions of for how long time such “non-distributable amounts” should be held on separate accounts, and then for what purposes it may be used. The absence of adequate provisions on these issues seems to be a *deficiency of the legislation*.

44. In practice, Hungarian collecting societies use “non-distributable amounts” due to “orphan works” in different ways: adding them to the amounts to be distributed, using them for general cultural purposes, or even to cover certain costs by them, and usually they keep these amounts separately only for a short while.

45. As mentioned above, Act CXII of 2008 has authorized the Government to regulate, in a decree, procedural details concerning the licensing of use of “orphan works” by the Patent Office. *The Government has adopted the detailed rules on May 8, 2009, in Governmental Decree 100/2009(V.8)*. Articles 3 and 8 of the Governmental Decree deserve special mention.

46. Article 3 contains provisions on how *the requirements of due diligence search* may be fulfilled and how it may be proved. Under those provisions, the person who submits a request for a license to the Patent Office, *depending on the nature of the work concerned*, should prove that it has used the following sources, where they are available: (a) search in the voluntary work registry of the Patent Office, in the databases of collective management organizations, in relevant databases available on the Internet, in databases suitable to find the address or other contact information of the owner of rights, and in the databases of public libraries and archives; (b) asking information from those organizations which and persons who usually deal with the publication and dissemination of works in the given category. Where such sources are not available, depending on the nature of the work and the intended use, due diligence search may be made also by publishing an advertisement in a newspaper of national distribution. Article 3 also provides that, in those cases where it may be presumed that the work concerned has been published in another country, unless it would create disproportionate burden, the same measures to fulfil due diligence search must be made also in that country.

47. Article 8 of the Governmental Decree obligates the Patent Office to maintain a *publicly available on-line database of those works which have been recognized as “orphan works”* and for the use of which the Patent Office has granted licence, and it must include all data that might be helpful for interested parties to find their owners of rights and/or the location thereof.

48. The new legislation is far from being perfect. It has just become fully applicable, and it may only be truly seen in practice in what aspects it will need improvements. Certainly, there are and will be several such aspects.

[End of background paper]

