REPORT
ON
FUNCTIONING OF THE SYSTEM OF COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN BOSNIA AND HERZEGOVINA FOR THE PERIOD 2005-2010

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CONTENTS

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Legal Basis

By this report, the Institute for Intellectual Property of Bosnia and Herzegovina fulfils its obligation under:

- Article 12 of the Law on the Collective Management of Copyright and Related Rights (Official Gazette of B&H voulme 63/10);

- conclusion of the 80th session of the House of Representatives of B&H Parliamentary Assembly held on 30/06/2010, adopted along with items 4 and 5 of the Agenda – Copyright and Related Rights Bill and Bill on the Collective Management of Copyright and Related Rights, reading: **"Constitutional-Legal Commission of the House of Representatives of B&H Parliamentary Assembly shall consider, one year after adoption of the Laws referred to in items 4 and 5, the effects of the amendments thereto and possibly propose amendments»;**

- conclusion of the 48th session of the House of Peoples of B&H Parliamentary Assembly, held on 13/07/2010, adopted along with items 5 and 6 of the Agenda - Copyright and Related Rights Bill and Bill on the Collective Management of Copyright and Related Rights, reading: **„The House of Peoples of B&H Parliamentary Assembly requests the Council of Ministers of Bosnia and Herzegovina to submit to the House of Peoples of B&H Parliamentary Assembly, one year after the date of adoption of the Law on the Collective Management of Copyright and Related Rights, a report on the effects of application of said Law»;**

- conclusion of the 130th session of the Council of Ministers of Bosnia and Herzegovina, held on 19/08/2010, **obligating the Institute for Intellectual Property of Bosnia and Herzegovina to produce a report on the effects of application of said Laws, one year after adoption of the Copyright and Related Rights Law and the Law on the Collective Management of Copyright and Related Rights, and submit it to the Council of Ministers of Bosnia and Herzegovina.**

I. Introductory Notes on the System of Collective Management of Copyright and Related Rights

Subjective copyright and subjective related rights fall under the category of private rights. The essence of economic entitlements contained in such subjective rights is the entitlement of the right holder to derive economic gain from the use of the subject matter of protection in the sphere of public communication. Such entitlements are property of the right holder and are

managed by the right holder in accordance with his/her wishes and interests. The basic act of such management is the act of will to prohibit or, under certain conditions, authorize the use of the subject matter of protection. The prohibition has an *ex lege* effect, as the economic rights belonging to the right holder are exclusive and *erga omnes* rights. Authorizing others to use the subject matter of protection is formalized by the right holder by means of entering into agreement with an interested person (the user of the subject matter of protection). If the right holder executes an agreement by himself or if he does it through a representative who acts on behalf of the right holder by virtue of the power of attorney, we speak of individual management of rights.

Individual management of copyright and related rights has a systemic problem in itself. For some types of subject matters of protection (e.g. musical works, interpretations, phonograms), and for some forms of the use thereof (e.g. broadcasting), authorized and lawful use involves permanent negotiation and entering into many agreements with many interested users, collecting remuneration from many entities, as well as monitoring the implementation of such agreements, and seeking judicial protection in case of infringement of rights. Therefore, not only right holders, but also the users of the subject matter of protection incur transaction expenses that are large enough to make dealings unreasonable and imposibble to perform in that manner. A response to this challenge has been contained in the concept of collective management of copyright and related rights since the 19th century.

The purpose of collective management of rights is to allow the massive lawful use of subject matters of protection of many right holders to a large number of users, by entering into one or maximum two to three agreements in order to reduce transaction costs. The essence of collective management of rights is that right holders authorize an agent to establish, in its name and for the account of right holders, legal relations with users and collect remuneration from them. In order to be able to act in its name in dealings with users, such agent must concentrate in its portfolio the rights to the use of subject matters of protection of all the right holders who authorized it. Right holders therefore transfer their exclusive authority to use their subject matters of protection to such agent, and the agent cedes the same authority to users by contract. In this way, when a user (e.g. RTV station) enters into agreement with such agent, the user secures, for the entire term of the agreement, the right to use all the subject matters of protection of all the right holders for whose account the agent acts. The technical name of such agent is the «organization for the collective management of rights» (hereinafter: the organization).

From the aspect of civil law, the relation between the right holder and the organization is based on two types of agreements. One type of agreement is about the exclusive assignment of economic entitlements to the organization for the subject matters of protection of a particular right holder. The organization thus becomes a subject of several types of economic entitlements over many subject matters of protection of many right holders. The other type of agreement is the commission agreement, by virtue of which each right holder instructs the organization to put into circulation, in itsown name and for the account of the right holder, the economic entitlements it acquired, i.e. cede it to any interested user with the payment of remuneration. As it acts for the account of the right holder, the organization has to distribute to right holders the remuneration collected from users, after deducting its commission fee (service fee).

This basic concept of the organization may function under general provisions of contract law, without specific regulations on the collective management of rights. Historically, developed countries faced the same situation in the second half of the 19th century and the first half of the 20th century. Bosnia and Herzegovina actually faced the same situation until the passage of the Law on Collective Management of Copyright and Related Rights (Official Gazette of B&H, volume 63/10), in fact until the commencement of its application on August 11, 2010. The purpose of specific regulations on the collective management of rights is to reduce, by imperative norms, autonomy of the will of the parties to the agreement, and thus reduce the

room for the escalation of problems that are immanent in such system. The essential characteristics of the modern system of collective management of rights are:

- nonprofit character of the organization,
- the organization is specialized for the collective management of certain rights in certain types of subject matters of protection,
- *de iure* or *de facto* monopoly position of the organization (since the practice of collective management showed that competition among organizations does not yield favorable results in respect of reduction of transaction costs and legal security of users; one of the first matters to have been regulated by specific regulations on the collective management of rights was the introduction of the monopoly position of the organization).
- democratic approach to the organization management,
- transparency of its work,
- prohibition of discrimination against some right holders and some users,
- fairness in the distribution of collected remuneration to right holders,
- efficiency in material transactions,
- state-level supervision of organizations.

II. Functioning of the System of Copyright and Related Rights in B&H in the Period 2005 – 2010

Analyising the situation in Bosnia and Herzegovina in the period 2005 – 2010, it must be noted that the collective management of rights was not adequately regulated. With the exception of conferring upon the Institute the authority to grant authorizations to organizations, as well as to supervise their work under the conditions specified in the Regulations Concerning Criteria for Carrying Out Activities Related to the Collective Management of Copyright and Related Rights (Official Gazette of B&H volume 10/02), the Copyright and Related Rights Law in Bosnia and Herzegovina (Official Gazette of B&H volume 7/02 and 76/06, hereinafter: the Law of 2002) left unregulated some specific issues of the system of collective management of rights. Furthermore, in the 2002 Law, there is no mention whatsoever of the collective management of rights, but the term «management of rights through a representative» was used instead. Albeit it is in direct contradiction with the notion of the collective managemet of rights, that term was construed as the collective management of rights in practice, whereas the term «representative» was construed as the «organization». The regulation of the elements specific to the system of collective management of rights was completely left out.

On the basis of the competence mentioned in Articles 87,106,109 of the 2002 Law, the Institute for Standardization, Metrology, and Intellectual Protection of B&H (legal predecessor of the current Institute for Intellectual Property of B&H) granted authorizations to the following specialized legal entities

1. **„Sine qua non" d.o.o. Sarajevo**, Agency for Representation and Protection of Copyright, for the management of:
   - authors' rights on grounds of the power of attorney granted by authors, authors' organizations or other copyright holders,

- performers' rights on grounds of the power of attorney granted by performers, performers' organizations or another holder of performers' rights.

(Act No.*: IP-5694/02-01SŽ of 04/06/2002*)

2. **UG „Uzus" Sarajevo**, Association of Independent Music Authors, Performers, Arrangers and Public Figures, for the management of:
   - performers' rights on grounds of the power of attorney granted by performers, organizations of performers or another holder of performers' rights.

   (*Act No.: IP-5472/03-01SŽ of 30/07/2003*)

3. **UG „Kvantum" Bijeljina**, Association for Protection of Phonographic Works of Bijeljina, for the management of:
   - rights of phonogram producers.

(*Act No.: IP-5333/05-04VL of 10/10/2005*)

4. **„Elta-kabel" d.o.o. Doboj**, Company for Cable Transmission of Sound, Picture or Other Information, for the management of:
- copyright and rights of broadcast organizations.

(*Act No.: IP-3905/06-04VL of 06/05/2006*).

The authorizations granted to the existing organizations show that their activities are partially overlapping, and it creates competition among them. From the aspect of the modern system of collective management of copyright, such unfavourable circumstance is due to the absence of the provision that would prohibit it. In that sense, the Institute did not have a legal basis to differentiate the spheres of activities of some organizations.

The first problem encountered was the legitimation of the organization to act in its name and for the account of right holders in dealings with users. The commission deal is valid if the commission agent has an exclusive right to cede to the user. It means that the organization must prove its identity to the user by the respective lists of right holders, subject matters of protection (the so-called repertoire), and concrete economic entitlements it acquired from right holders. There are several consequences to that. One is that the decision of the user to enter into agreement with the organization depends on the availability of what he needs; the other one is the possiblity of another organization offering to the user the repertoire of other right holders under more favourable conditions. In Bosnia and Herzegovina, the procedure concerning the grant of authorization to the organization was introduced with the passage of the 2002 Law. The organizations, like Sine qua non» d.o.o., used the authorization as identity document and each of them identified itself as the only commission agent of every right holder within the speciality specified in the authorization. Judging by the manner of carrying out their respective activities, it was not clear that they collectively managed the rights of a limited number of right holders, and that users, despite the agreements entered into with such organizations and the payment of remuneration established by the Tariff, still unlawfully used many subject matters of protection within the speciality of the organization. The practice that by membership in right holders' associations (e.g. music authors' association), economic entitlements are automatically and collectively ceded to the organization, and that commission agreement is automatically concluded with the organization is inadequate in terms of the provisions of the contract law, and no government authorization for the work of the organization can convalidate such shortcoming. In that sense, it happended that some organizations used to «cede» to users even the rights they did not have, so that the users who paid remuneration to the organization for the use of subject matters of protection within its speciality were mislead about the scope of the repertoire for which they obtained rights. This problem of inadequate legitimation had a negative impact on the readiness of users to enter into agreements with the organization.

The other problem is about the legal form of the organization, and it is related to the question whether the organization is a profit or nonprofit entity. According to the list of the organizations authorized by the Institute, it is clear that „Sine qua non" and „Elta-kabel" are limited liability companies, whereas „Uzus" and „Kvantum" are organized as associations. As the 2002 Law did not sipulate that the organization had to be a nonprofit entity, it is clear that there were no limitations as to the freedom of choice in respect of the legal form of the organization. Nevertheless, we should not overlook the fact that the organizational structure of a limited liability company and the manner of the management thereof is less consistent with nonprofit nature of the organization than it is the case with the association. This issue is important as it concerns the deepest meaning and purpose of the collective management of rights, and it is that right holders entrust the organization of their own free will with managing their rights for their account and with collecting remuneration for the use of subject matters of protection. In that sense, nonprofit character of the organization is its «natural» character whos preservation is taken care of by the right holders who created the organization for their own economic interests, and not for the organization itself. Where the organization has the character of a limited liability company, it is clear that right holders are neither its founders nor its managers, because such form of organization of a legal entity does not have bodies in which they would be represented.

The issues of democratic approach, transparency, and efficiency of the organization's work merge with it. There is a risk that the organization may distance itself from its clients (right holders) and start giving priority to the interests of its founders (if they are not clients) or employees. In order to prevent that, it is necessary to establish mechanisms that would enable right holders to control the work of the organization in a democratic manner through appropriate management bodies. All the organizations in Bosnia and Herzegovina manifetsed a considerable lack of transparency and democratic approach in their work, thus bringing their respective original missions into question.

As it is perfectly clear that the organization must cover its operating expenses from the collected remunerations, the issue of the relation between the funds/remunerations distributed to the right holders on one side, and operating expenses of the organization on the other side is an indicator of its efficiency, or justification of its existence. Albeit all the organizations in Bosnia and Herzegovina manifested a large degree of economic inefficiency (some spend all or almost all the money to cover their operating expenses), it is obvious that right holders have not addressed that issue through the management mechanisms of the organization, but only sporadically through media. It only confirms the fact that the organizations in Bosnia and Herzegovina have distanced themselves from the right holders who are supposed to be the reason of their existence, and that they follow particular interests of their founders, managers or employees.

Finally, the lack of democratic approach and transparency raises doubts over fairness that is a logical principle of the distribution of collected remunerations to right holders. The obvious lack of information on the criteria for determining the amount to be distributed to individual right holders, as well as on distributed amounts, leads to the conclusion that such information are kept as the secret that might, in case of its disclosure, compromise the organization.

When appraising the work of organizations operating in Bosnia and Herzegovina in the reporting period, as well as the activities of the Institute concerning the supervision of their work, the following must be taken into account:

- all information on organizations' work have been obtained from them, and not through an independent and a proper reserach. It means that this report is limited to the analysis of unchecked pieces of information provided by organizations themselves at the Institute's request, and some conclusions are made on the basis of such information;

- the Institute's competence in terms of supervising the work of organizations was rather limited and it only included the authority to grant authorization, provided that the requirements specified in the Regulations have been met, or to revoke authorizations if the requirements are no longer met. As it concerns technical and personnel conditions, the real supervision was not within the competence of the Institute.

III. Conclusion

Judging by inadequate economic effects of the organizations' work, it may be concluded that the system of collective management of rights in Bosnia and Herzegovina hardly existed In the reporting period. The model of the organization is not set in logical order – from right holders up to the management of the organization, but vice versa – several natural persons or legal entities setting up the organization that subsequently acquires legitimacy from those for whom it exists. Where there is an obvious lack of transparency and democratic approach to work, there is enough room for doubting about the true aims of existence of the organization.

All the organizations in Bosnia and Herzegovina operated in legal vacuum in the reporting period, without some specific rules defined by law. Therefore their work that is, anyway, mainly incompatible with the principles of the modern system of collective management of rights cannot be defined as unlawful. This constatation does not relieve organizations of liabilty for their failure to observe the regulations on the status of legal entities, accounting, book-keeping, tax liabilities and contractual obligations.

Entering into force of the Law on the Collective Management of Copyright and Related Rights in Bosnia and Herzegovina finally filled the mentioned legal vacuum and created a solid and modern framework for the implementation of the system of collective management of rights in accordance with its original mission: serving the economic interests of right holders who become the main agent of the system, along with taking care of the legitimate interests of users.

IV. Effects of Application of the Law on the Collective Management of Copyright and Related Rights (Official Gazette of B&H volume 63/10)

Article 44 of the Law on the Collective Management of Copyright and Related Rights (Official Gazette of B&H volume 63/10) stipulates that «the organizations of authors and other right holders, and other legal entities specialized in the field of the collective management of rights that had performed the activities related to the collective management of rights before entering into force of this Law shall continue to operate».

Furtermore, according to paragraph 2 of the said Article, «all the existing collective organizations have to harmonize their legal status and their work with the provisions of the new Law, and file an application for new authorization for the collective management of rights, accompanied by proof of completion of requirements under the new Law, within two years from entry of this Law into force (or by 11/08/2012).

In order to establish the efficient system of management of copyright and related rights, including collective management, the Institute for Intellectual Property of Bosnia and Herzegovina prepared, within statutory deadlines, all the implementing regulations, in particular:

- Regulations Concerning Mediation for the Purpose of Conclusion of Mediation Agreements on Cable Retransmission of Broadcast Works (Official Gazette of B&H volume 11/11),

- Regulations Concerning the Manner and Form of Fulfilling Requirements for the Grant of Authorizations to Legal Entities for the Management of Copyright and Related Rights (Official Gazette of B&H volume 44/11),

- Decision on Remuneration Rates for Reproduction for Private and Other Private Use of Works of Authorship and Subject Matters of Related Rights (Official Gazette of B&H volume 77/11).

In order to animate the public, in particular authors and users, the Institute has undertaken many activities and has organized a series of workshops, *inter alia:*

1. In cooperation with WIPO – a national workshop on «Collective Management of Copyright and Related Rights took place in Sarajevo on 28/10/2010;
2. In cooperation with IPR Project of Intellectual Property Protection in Bosnia and Herzegovina – workshops on the legal framework for the collective management of rights in Bosnia and Herzegovina were organized in Sarajevo, Banja Luka, and Brčko, in the period of May to July 2011.

These workshops were attended by the representatives of the organizations operating in Bosnia and Herzegovina, authors, representatives of user associations (electronic media, RTV, restaurant owners, and many others).

The management of the Institute organized a number of meetings with authors, authors associations, and representatives of user associations.

The collective management of Copyright and Related Rights was discussed at several meetings of the Copyright and Related Rights Council, an advisory and coordination body of the Institute that organized, *inter alia*, a thematic session on the legal framework and operation of the Regulatory Communication Agency, and on the relations with the collective organization for the purpose of the preservation of evidence on copyright protection from users.

In order to make available to the public all the information concerning the system of copyright and related rights in accordance with 2010 Laws, the Institute prepared and published, in cooperation with EU and USAID IPR Project and with their technical support, the publications entitled:

- «Setting Up of Copyright Societies» (official WIPO publication, prof.dr Urlich Uchtenhagen, translated into three official languages of B&H;

- brochure „Copyright and Related Rights in Bosnia and Herzegovina" dealing with both Laws, on copyright and related rights, and the collective management of copyright and related rights (prepared by the Director of the Institute for Intellectual Property of Bosnia and Herzegovina) and

- affiche – Copyright Protection.

Despite the existence of the legal framework and many promotional activities, none of the associations and organizations has filed with the Institute the application for the authorization for the collective management of rights under the provisions of the Law.

Albeit the application of the Law on the Collective Management of Copyright and Related Rights is in early stages, some positive effects thereof have already been seen:

- authors and other copyright holders have been animated in terms of establishing collective organizations;

- representative users associations have got actively involved in the creation of a new system, in particular when tariffs are negotiated;

- the Institute has been entrusted with the supervision of the work of collective organizations that includes the right to request from the collection organization, at any time, a report on its work, as well as to inspect its business records.

The full effects of the application of the Law on the Collective Management of Copyright and Related Rights will be visible only after authorizations have been granted and collective organizations have started to operate under the system established by the new Law.

V. Proposed Conclusion

The Institute for Intellectual property of Bosnia and Herzegovina proposes the following

Conclusion

1. The Report on the System of the Collective Management of Copyright and Related Rights in B&H for the period 2005-2010 has been adopted.

2. The passageof the Law on the Collective Management of Copyright and Related Rights (Official Journal of B&H volume 63/10) and implementing regulations has established a solid legal framework for the collective management, and there is no need for amendment thereof.

3. Authors and holders of copyright and related rights are invited to intensify their activities in order to fulfil the requirements for the grant of the authorization for the collective management of their rights.

4. Relevant institutions in Bosnia and Herzegovina are required to determine that financial records accurately reflect the financial operations of the existing collective organizations.

VI. Annex: Operation of Existing Collective Organizations