REMUNERATIONS FOR AUTHORS AND OTHER CREATORS IN COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS*

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This text will analyse how the remuneration for authors and owners of related rights in music, film and similar entertainment industries should be determined. Since they can exercise their rights individually and collectively, the systems and criteria for setting the amounts of remuneration in individual and collective management will be examined. This analysis will be put in a traditional and in the online context.

Keywords: copyright, rights related to copyright, remuneration for authors and owners of related rights, individual management of copyright, collective management of copyright

1. INTRODUCTION

The rights of authors in relation to their works are today guaranteed worldwide within the copyright law. In the European Union (EU) all of economic progress is based on inventions and inventive work as an added value to every part of industry. Likewise, therefore, creative industries in the EU today seem to be a very important cog in the complex mechanism of incentives for economic growth and development, as they are in other most developed parts of the world. Therefore, authors deserve remunerations for the use of their works protected by copyright because nobody can expect that everyone shall benefit from their creative work except them. The same is true of the owners of

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rights related to copyright, such as rights of performers, phonogram producers, film producers and others.

This text will analyse how the remuneration for authors and owners of related rights in music, film and similar entertainment industries should be determined. Since they can exercise their rights individually and collectively, the systems and criteria for setting the amounts of remuneration in individual and collective management will be examined. This analysis will be put in a traditional and in the online context.

Collective management of copyright and related rights has for some time been in the focus of the interest of the European Commission[1] as well as other influential persons who benefit from the development of creative industries, such as music producers, but also others whose undertakings depend on the use of copyrighted works, such as ISPs and telecoms. To regulate this on the EU level, Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market[2] was issued and national legislators are obliged to implement its provisions in national copyright legislation by April 2016. This Directive is intended to improve the transparency of collective management for all collective management organizations (CMOs) but it also introduced a completely new legal framework for collective management in the online world.

2. COLLECTIVE MANAGEMENT – TRADITIONAL FEATURES AND NEW RULES

Traditionally, CMOs are construed as territorial monopolies. They generally operate on the basis of the rebuttable legal presumption of representation of the global repertoire (the opt-out possibility is available), which is regulated either expressly by the law or developed in jurisprudence. A similar effect can

[1] *See e.g.* Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, Brussels, 16 April 2004; Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright of 7 July 2005; Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), OJEU L 276 of 21 October 2005 (hereinafter Commission Recommendation of 2005).

[2] OJEU L 84 of 20 March 2014 (hereinafter Directive 2014/26/EU).

be achieved through the system of extended collective licensing. Those two principles – the principle of monopoly and the principle of representation of the global repertoire – rely on the network of reciprocal representation agreements among territorially organised CMOs.[3] Because of the CMOs' monopoly position, most national legislatures in the EU developed systems of control of CMOs whereby they are in general not allowed to operate unless the national official authority approves their existence and controls their activity. As a consequence thereof, the system of tariff-setting is also more or less intensively susceptible to the control of the national official authorities or the councils, boards or similar bodies which act on the basis of independent experts but are directly or indirectly appointed by the state, in most cases by the competent minister or even the government. Those systems and procedures should ensure that the monopoly position of the CMOs is not abused. Although the monopoly position of CMOs was not regulated by any of the European Directives or Regulations, the Court of Justice of the European Union (CJEU) has confirmed that it is not in contradiction with the EU law and general principles of the common market, as long as this monopoly position is not abused.[4]

It seems that Directive 2014/26/EU does not interfere within the traditional features of CMOs when it regulates off-line uses.[5] On the other hand,

[3] *See* also Gyertyánfy, P., *Collective Management of Music Rights in Europe after the CISAC Decision,* IIC - International Review of Intellectual Property and Competition Law, vol. 41, no. 1, 2010, pp. 59 – 89, who summarises eight essential traits of the European continental CMOs, pp. 66 – 67.

[4] *See OSA* (C- 351/12, [2014] ECR 00000), at 10 (with reference to Art. 98(6)(c) of the Copyright and Related Rights Act from 2000, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Czech CRRA), which regulates that the relevant ministry may grant an authorisation for performing the management of copyright). It further pointed out that the legal monopoly is consistent with Art. 16 of the Services Directive 2006/123/EC and Art. 56 and 102 of the TFEU.

[5] Directive 2014/26/EU does not preclude the CMOs from concluding reciprocal representation agreements (both for online and offline uses) if these are not of an exclusive nature (Recitals 11 and 12 of Directive 2014/26/EU). This is not a novelty since the exclusivity clauses were already abandoned among the CISAC (international umbrella organisation of authors' CMOs) members. Nevertheless, the abandonment of exclusivity as such did not change the *de facto* situation that exclusivity is tacitly applied. *See* also Gyertyánfy, *op. cit*. (fn. 3), p. 62, footnote 12. Furthermore, with the exception of multi-territorial licensing in an online environment, the Directive does not affect any type of extended collective licensing or similar schemes such as legal presumptions of representation. (*See* Recital 12 of Directive 2014/26/EU.).

where it concerns online licensing, it erases the explained mechanisms in relation to copyright in music (not related rights).[6] Types of licences introduced by the Directive 2014/26/EU for music copyright do not cover the global repertoire, and therefore the extended-licence schemes or legal presumptions on representation are not possible. By applying the new rules for online collective management to music copyrights, it turns out that the burden of proof concerning representation is on the CMO. It should be able at any given moment to define its repertoire and to prove the chain of title from the original right owner to the collective management organisation.[7] This refers not only to situations in which the CMO concludes licensing agreements, but also to situations in which it enforces the rights in works from its repertoire.[8] CMOs lose their monopoly position and compete with each other for right owners and for users on the whole European market. Therefore it is questionable whether the existing tariff-setting procedures regulated in national copyright laws can be sustained in relation to collective management music copyright in the online environment. Nevertheless, those new rules do not, at least for now, affect other fields of copyright, nor do they affect related rights.[9]

3. INDIVIDUAL MANAGEMENT – AN ADVANTAGE OR A DEFICIENCY?

Individual management of copyright and related rights substantially differs from collective management. Here, the right owner himself exercises his rights or entitles another person to do so on an individual basis. This other person might be an agency, a publisher, a lawyer or some other qualified person. The individual right owner is free to negotiate the remuneration for the use of his work or other subject matter on an individual basis, for every particular use.

Nevertheless, there are situations where the tariffs for particular types of right owners and for particular types of uses are issued by a guild or a tra-

6 *See* also Porcin, A., *The quest for pan-European copyright licensing solutions: A series of unfortunate events, Doctrines*, Concurrences Journal, no. 4, 2009, p. 61.

7 *Arg. ex* Art. 25 and 26 of the Directive 2014/26/EU.

8 *See* also the observations of Gilliéron, P., *Collecting Societies and Digital Environment*, IIC - International Review of Intellectual Property and Competition Law, vol. 37, no. 8, 2006, pp. 951 – 952.

9 The European Commission advocates the idea that Directive 2014/26/EU is just a beginning and that in the future, after analysis of the effects of the Directive, the new system based on the principles introduced by the Directive for the online environment should be introduced for the non-digital environment as well.

de union. Nevertheless, those tariffs are not obligatory, neither for the right owners nor for the users, except for the ones who contractually bind themselves to apply them.

Even though it might seem that the right owner is in a better position when negotiating the remuneration individually, there are examples where whole groups of right owners are threatened by this practice, especially in online licensing. For example, Directive 2014/26/EU does not affect the rights of music performers in online licensing. Namely, the European Commission deems that their rights are indispensably connected with the rights and interests of their publishers and phonogram producers due to specific and very intensive contractual relations among them. Therefore, it is assumed that music performers should license their rights together with the rights of phonogram producers, which means individually and directly European-wide. Nevertheless, this solution seems far from being perfect and far from being satisfactory for music performers. We are witnessing their struggle to overcome this perception.[10] It seems that they are interested in managing their rights through the CMOs because they expect more income from this side. In Croatia, for example, the national CMO for music performers has issued tariffs for online uses, declaring that the online rights of the music performers are not transferred to phonogram producers but remain with the music performers. Finally, it has brought lawsuits against *Deezer* and *Croatian Telecom* claiming that performers' rights are not acquired tacitly in contracts between the performers and phonogram producers / publishers and therefore should be administered collectively.[11]

4. PROCEDURES FOR TARIFF-SETTING IN COLLECTIVE MANAGEMENT

As shown *supra*, in the situation where individual management is not possible or where it cannot guarantee fair remuneration for right owners, collective management looks like the satisfying solution. Nevertheless, while in indivi-

[10] Four international associations of performers are running the campaign for a better position of musicians in the digital environment called "FAIR INTERNET". Those associations represent together over half a million performers in Europe: The Association of European Performers' Organisations (AEPO-ARTIS), The International Federation of Actors (FIA), The International Federation of Musicians (FIM) and The International Artists Organisations (IAO). *See* http://www.fim-musicians.org/posts/musicians-denounce-industry-practices and http://www.aepo-artis.org/pages/176_1.html (last visited on 10.09.2015).

[11] *See* http://www.huzip.hr/novosti/obavijest-clanovima-huzipa-i-hgua (last visited on 10.09.2015).

dual management the right owners and their agents or other representatives are free to negotiate remunerations for the use, in collective management the rules on imposing remunerations for use, *i.e.* setting tariffs, are strict and non-negotiable rules which apply by virtue of the law. Very often official state authorities or quasi-official bodies (such as councils, committees or boards of experts) are also involved in tariff-setting procedures.

Here the tariff-setting procedures will be examined. This examination includes Central and Eastern Member States of the EU, with a focus on Croatia. Moreover, since its legal system is under strong influence of the German and Austrian ones, especially as concerns private law, those systems will also be examined. First of all, the European law shall be presented since all of the Member States of the EU are obliged to apply it.

4.1. European law

The legal regulation of tariff-setting systems in the EU is left to the national legislatures, which organise them by taking into consideration the national economic environment, the culture of negotiation, the historical background and other relevant issues. This question has been touched upon only sporadically in European law. For instance, in the Satellite and Cable Directive 93/83/EEC[12] Member States were invited to introduce in their national laws mediation mechanisms for the settlement of disputes in which independent and impartial mediators should assist the parties in negotiations and propose the solution to the dispute, though the parties are not obliged to accept those proposals.[13] This non-binding mediation was introduced to facilitate negotiations on tariffs and other licensing conditions for cable retransmission rights, since the collective management of those rights is obligatory (except for broadcasting organisations), but it was also intended to serve as a kind of "inspiration" for Member States to introduce mediation mechanisms for tariffs disputes in other fields as well, as shown *infra*. Furthermore, the InfoSoc Directive 2001/29/EC[14] in its preamble also adverts to the mediation mechanisms

[12] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJEU L 248 of 6 October 1993 (hereinafter Satellite and Cable Directive).

[13] *See* Recital 30 and Art. 11 of the Satellite and Cable Directive.

[14] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJEU L 167 of 22 June 2001 (hereinafter InfoSoc Directive).

as a tool to help users and right holders to settle disputes, but without giving any further instructions.[15] The Commission Recommendation of 2005 also encourages the Member States to provide for effective dispute resolution mechanisms, in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.[16] Nevertheless, except for the cable retransmission right, none of the mentioned provisions regulates the procedure for tariff-setting. Thus the Member States in Central and Eastern Europe developed different solutions. The Directive 2014/26/EU is also silent on that issue.

4.2. Hungary

Hungary is an interesting example in which the system for setting the tariff is a combination of private parties' negotiations and state intervention. According to the Hungarian Copyright Act[17], there are several state institutions involved in tariff-setting whereby the Hungarian Intellectual Property Office (HIPO) is competent for the negotiation procedure. Tariffs are set every calendar year but previously published tariffs are to be applied until the procedure for new tariffs is finalised, even if the period for which that tariff was in force has since expired.[18] First, the CMO determines the amounts of respective remunerations by taking into account all relevant circumstances of the particular use and the agreement between the parties reached in the mediation procedure before the Mediation Board, if it exists.[19] This provision implies that the negotiations between the CMO and users should take place before the tariff-setting procedure formally starts and that there is the possibility of prior voluntary, non-binding mediation.[20] When the CMO submits the proposal of the tariff

15 *See* Recital 46 of the InfoSoc Directive.

16 *See* Recital 15 of the Commission Recommendation of 2005.

17 Act LXXVI of 1999 on Copyright as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Hungarian CA).

18 Art. 92/H (1) of the Hungarian CA.

19 Art. 92/H (2) of the Hungarian CA.

20 The Mediation Board's role is to facilitate the conclusion of an agreement between the parties and propose the content of the agreement, which parties may accept expressly or tacitly or simply refuse. For details *see* Arts. 102-105 of the Hungarian CA. The members of the Mediation Board are appointed from among the members of the Council of Copyright Experts, which operates attached to the HIPO giving advisory opinions on specific issues arising in copyright-related legal disputes, on request of courts and other authorities. The members of the Council of Copyright

to HIPO, HIPO is to invite significant users[21] and associations of users[22] to submit their observations on the proposed tariff. At the same time, it invites the Minister of Culture and the Minister of Trade[23] to submit their opinion. The whole opinion procedure must be carried out within 60 days. Finally, the tariff is approved in a resolution issued by the Minister of Justice, based on the proposal by the HIPO, but only if it is in accordance with the Hungarian CA.[24] Moreover, if the tariff increases remunerations exceeding the customers' price index established by the Hungarian Central Statistical Office for the previous calendar year or if it extends the range of users obliged to pay, the Minister of Justice approves the tariff only on the basis of the Government's decision.[25] A resolution based on an approval issued by the Minister of Justice is non-appealable[26] and the tariff must be published. Nevertheless, there is a possibility for a review of this resolution with reference to violation of legislation, on the initiative of any party which is entitled, in the tariff-setting procedure, to give an opinion, as well as the CMO.[27] During the review procedure the court may order the requesting party to pay a deposit according to the tariff under review or less.[28]

4.3. Austria

According to the Austrian Collecting Societies Act[29], the tariffs and other conditions of use of works are set in collective agreements.[30] Those agreements

Experts are appointed by the Minister of Justice and Minister of Culture. *See* Art. 101 of the Hungarian CA.

21 Those which pay 5% of all remunerations on the basis of the respective tariff. Art. 92/H (7) of the Hungarian CA.

22 Those whose members pay at least 10% of all remunerations on the basis of the respective tariff. Art. 92/H (8) of the Hungarian CA.

23 The Minister of Trade, Tourism and Catering shall be consulted only for tariffs related to public performance. Art. 92/H (5) of the Hungarian CA.

24 Art. 92/H (10) of the Hungarian CA.

25 Art. 92/H (10) of the Hungarian CA.

26 Art. 92/H (10) of the Hungarian CA. Approval procedure is not considered an administrative procedure. Art. 92/I (1) of the Hungarian CA.

27 Art. 92/J (1) of the Hungarian CA.

28 The Budapest Metropolitan Court may decide to decrease the amounts of remuneration by taking into account all circumstances of the case. Art. 92/J (2) of the Hungarian CA.

29 Collecting Societies Act from 2006 as amended, used here is the unofficial consolidated text from March 2014 (hereinafter Austrian CSA).

30 Art. 21 of the Austrian CSA.

are applied as general terms and conditions in individual contracts between CMO and individual users in the respective field. Where remuneration rights are prescribed by the law and there is no need to sign individual contracts, amounts of remunerations regulated in the collective agreement apply to individual users even without the signing of individual contracts.[31] Collective agreements are negotiated between the CMO and users' organisations[32], for an undefined period of time, but each of the parties is entitled to initiate new negotiations.[33] On the other hand, if there is no collective agreement, the tariff is set in a Regulation issued by the Copyright Council[34] on request of any interested party. The Regulation stays in force until it is replaced by the collective agreement.[35] Nevertheless, the request for issuance of a Regulation may be filed only if the prior mediation procedure before the Mediation Committee[36] has failed. The Mediation Committee is supposed to assist the parties to reach an agreement and optionally propose the tariff and other licensing conditions which should replace the collective agreement. If the parties agree expressly or tacitly, this proposal will replace the collective agreement.[37] If not, they are allowed to approach to the Copyright Council, as previously described. The Regulation of the Copyright Council is in fact the final decision on tariffs.

4.4. Germany

In Germany, CMOs are obliged to conclude inclusive agreements with one or more associations of users in which appropriate conditions for use of the protected subject matters should be regulated. The amounts of remunerations

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31 According to Art. 22 of the Austrian CSA they are applied as part of every individual contract concluded between the CMO and the individual user. Where tariff relates to the right to remuneration, they are applied also to the members of the users' organisation which didn't conclude an individual contract.

32 Also with the national broadcasting organization ORF. *See* Art. 26 of the Austrian CSA.

33 If it is initiated earlier than 2 years after entry into force of the existing collective agreement, the approval for new negotiations of the Copyright Office is needed.

34 The Copyright Council is established within the Ministry of Justice. The members of the Copyright Council should be highly competent. For details *see* Arts. 30-33 of the Austrian CSA.

35 Art. 27 of the Austrian CSA.

36 The Mediation or Conciliation Committee consists of three members, two of them are elected by each of the parties and these two are entitled to elect an independent chairman. For details *see* Art. 36 of the Austrian CSA.

37 Art. 37 of the Austrian CSA.

set in those agreements should serve as tariffs.[38] If there is no inclusive agreement concluded, each of the parties is entitled to approach the Mediation Board. The Board is to assist the parties in negotiations[39] and is entitled to present a substantiated proposal of the inclusive agreement[40], which may be accepted tacitly or expressly, or refused.[41] During the proceedings before the Mediation Board, it is the provisional tariff, which is issued by the Mediation Board on request of one of the parties, that applies.[42] A request regarding the tariff dispute may be presented[43] to the court only after the proceedings before the Mediation Board are completed. The court then issues a decision which replaces the inclusive agreement and the tariff. In addition to the described procedure, in the case of a dispute on tariffs regarding the private copy remuneration, the parties may bring the case before the Conciliation Board[44], instead of the Mediation Board. The conciliator discusses the dispute with the parties and mediates in negotiations. He works towards the amicable resolution of the dispute. On the basis of the negotiations, he presents to the parties a proposal for dispute settlement which the parties may accept or refuse. Nevertheless, each party is entitled at any time to declare that the conciliation has failed and turn to the Mediation Board.[45]

4.5. Poland

Poland in 2009 introduced a new system[46] for tariff-setting. As from that

[38] Art. 12 and Art. 13(1) of the Act on Administration of Copyright and Related Rights from 1965, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter referred to as German AACRR).

[39] The Mediation Board is formed by the Deutsches Patent- und Markenamt and appointed by the Minister of Justice. For details *see* Art.14 of the German AACRR. The members of the Mediation Board should meet the requirements for judges.

[40] *See* Art. 14c (1) of the German AACRR.

[41] Art. 14a of the German AACRR.1

[42] Art. 14c (2) of the German AACRR.

[43] Request should be presented in the form of a lawsuit. *See* Art. 16(1) of the German AACRR.

[44] The conciliator shall be appointed by the Minister of Justice.

[45] Art. 17a of the German AACRR.

[46] Before 2009 it was optional to approach the Copyright Commission for approval of tariffs. *See* more in Bleszyński, J., *Die Rechtsbeziehungen zwischen Verwertungsgesellschaft und Nutzer – Das polnische Recht*, in: Riesenhuber, K., *Wahrnehmungsrecht in Polen, Deutschland und Europa*, De Gruyter Rechtwissenschaften Verlags-GmbH, Berlin, 2005, pp. 120 – 121.

time, CMOs are obliged to present the tariffs to the Copyright Commission[47] for approval.[48] The approved tariffs apply in contracts to which the respective CMO is a party. Any lower remunerations agreed between the parties are deemed invalid and replaced by the remunerations determined by the tariff as approved.[49] As previously stated, the Copyright Commission is entitled to approve or refuse the tariff in whole or in part. If it refuses the tariff, it must propose reasoned changes of the tariff and present them by a decision.[50] The party dissatisfied by this decision is entitled to approach the court.[51] The court's decision on approval or refusal of the tariff, in entirety or in part, is final and will be enforced. If no party approaches the court, the decision of the Copyright Commission containing the changed tariff is final and binding.[52] In addition to the described procedure, disputes regarding the finally and bindingly approved tariffs as well as disputes regarding the conclusion of the contracts on cable retransmission may be settled by means of mediatory proceedings between the parties. This mediation is voluntary. A mediator is selected from the list of the Copyright Commission's arbitrators by the chairman of the Commission or by the parties. The mediator proposes a settlement which the parties may refuse or accept, tacitly or expressly.[53]

4.6. Slovakia

According to the Slovakian Copyright and Related Rights Act[54], CMOs must set tariffs in negotiations with associations of users.[55] Collective agree-

47 The Copyright Commission is appointed by the Minister of Culture and National Heritage and consists of 30 arbitrators. It decides in Adjudicating Panels, which are groups of 5 members. *See* Arts. 110^{1}–110^{13} of the Polish Copyright and Related Rights Act from 1994 as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Polish CRRA).

48 Art. 110^{12} (1) of the Polish CRRA.

49 Art. 110^{16} of the Polish CRRA.

50 Art. 110^{13} (4) of the Polish CRRA.

51 The Minister of Justice may appoint one regional court competent for this type of procedure. For more *see* Arts. 110^{14}-110^{23} of the Polish CRRA.

52 Art. 110^{14}(4) of the Polish CRRA.

53 Art. 110^{18} of the Polish CRRA.

54 Act of 4th December 2003 on Copyright and Rights Related to Copyright, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Slovak CRRA).

55 *See* Sec. 49(1) and Sec. 81(1)(h) of the Slovak CRRA. Here, it is noteworthy to mention that the CMOs may conclude collective agreements; they are not obliged

ments between the CMO and the association of users are binding directly on the individual users, members of the respective association of users, as from the moment of its accession to the respective agreement.[56] If the parties fail to agree on an individual license contract or a collective agreement, any of them is entitled to approach to the court. The court determines terms of the contract or the agreement and the amount of the remuneration.[57] Nevertheless, any user who has commenced the use of the work without signing the license contract is obliged to submit the action before the court within 30 days from the date of the commencement of use and effect payment of the interim remuneration through escrow account, notary office or bank guarantee.[58]

4.7. Czech Republic

In the Czech Republic, when drafting the proposal of a tariff, the CMO is obliged to consult relevant associations of users.[59] Moreover, the CMO is not entitled to raise an enforcement procedure against an individual user if this user or the corresponding users' association enters, without undue delay, into negotiations for conclusion of needed agreements or if it agrees on mediation.[60] Nevertheless, this rule does not apply if it is obvious that the user or users' association does not intend to conclude a respective agreement. According to the Czech CRRA there are several types of agreements between CMOs and users. CMOs may conclude cumulative licensing contracts with individual users which regulate their relationships concerning the extended collective licence. On the other hand, they are entitled to enter into collective agreements with associations of users where the tariffs are set.[61] In both of those cases, any of the parties, where there is a dispute, may call upon the mediation of one or more mediators who are appointed by the Minister of Culture. The mediator(s) assist the parties in negotiations and, if necessary, submit to them proposals for settlement of their dispute. The proposal may be accepted expre-

to do so. It is possible to conclude individual licensing contracts with individual users only.

56 See Sec. 49(2) of the Slovak CRRA.

57 Sec. 82(1) of the Slovak CRRA.

58 Sec. 82(3) of the Slovak CRRA.

59 Art. 100(7) of the Czech CRRA.

60 Art. 100a of the Czech CRRA.

61 For details *see* Art. 101 of the Czech CRRA.

ssly or tacitly, or refused.[62] It is not regulated whether the parties are allowed to approach to the court if mediation fails.

4.8. Romania

Besides Hungary, Romania is another example of a country whose tariff-setting procedure looks like very complicated. According to the Romanian Copyright and Related Rights Act[63], the CMO initiates the negotiation procedure for tariff-setting by filing an application with the Romanian Copyright Office, accompanied by the methodology proposed for negotiations and the list of associations of users. The Copyright Office establishes the negotiation commission, made up of representatives of the CMO(s) and the association(s) of users.[64] The parties' agreement is registered in a protocol, filed with the Copyright Office and officially published. If so published, it represents the tariff and is applicable to all of the users in the respective field.[65] If such an agreement is not reached within 45 days, the Copyright Office initiates arbitration proceedings.[66] The Arbitration Panel issues the final decision on the tariff and the methodology within 30 (possibly 45) days, submits it to the Copyright Office and publishes it officially. After being published, the decision of the Arbitration Panel is applicable to all users in the respective field. Nevertheless, this decision is contestable before the court.[67] After the described procedure is completed, each of the parties is allowed to initiate a new negotiating procedure for methodology and tariffs, though not before the expiry of a period of three years (for private copying 2 years). The former methodology and the tariff remain in force until the publication of the new ones.[68] Nevertheless, the remunerations established as a lump sum are to be annually modified by the CMO on the basis of the inflation index established by the competent authority at the national level.[69] Concerning cable retransmission, the parties

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62 Art. 102 of the Czech CRRA.

63 Copyright and Related Rights Act from 1996, as amended, unofficial consolidated text from March 2014 (hereinafter Romanian CRRA).

64 *See* Art. 131 of the Romanian CRRA.

65 Art. 131^2 (1) and (2) of the Romanian CRRA.

66 A body of 20 arbitrators, appointed by the Minister of Culture and Religious Affairs, operates attached to the Copyright Office. For more *see* Art. 138^4 of the Romanian CRRA.

67 Art. 131^2 of the Romanian CRRA.

68 Art. 131^3 of the Romanian CRRA.

69 Art. 131^4 of the Romanian CRRA.

are entitled to agree to mediation, should they fail to establish the methodologies and the tariff by negotiations, but before the initiation of the arbitration proceedings. Mediation is optional and represents an additional step, in comparison to the tariff-setting procedure for other types of exploitation. The mediators assist the parties in negotiations and propose solutions, which might be accepted tacitly or expressly, or refused. If the proposal of the solution is refused by the parties, the arbitration proceedings should be instituted, as described above.[70]

4.9. Bulgaria

According to the Bulgarian Copyright and Related Rights Act[71], the tariffs are to be proposed by the CMO and approved by the Minister of Culture.[72] Nevertheless, the proposal may be submitted to the Minister of Culture only after a preliminary discussion with the respective users' organisations, where possible.[73] If a preliminary discussion results in an agreement on tariff, the Minister approves it. If not, the Minister appoints an expert commission for each particular case which is entitled to decide on the proposal of the tariff filed by the CMO. The expert commission submits its written report, wherein the amounts of remunerations are proposed to the Minister. He then approves or refuses the report.[74] Until the new tariff is set, the existing one applies, but where no such tariff is available, the remunerations are paid according to the agreement between the parties and deposited in an escrow account.[75] In any case, in every tariff dispute, apart from the described procedure, each party is entitled to call upon mediation.[76] The mediator may submit written proposals to the parties. The parties may accept those proposals expressly or tacitly, or refuse them. During the mediation proceedings, the existing tariffs apply.[77]

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70 Art. 121 of the Romanian CRRA.

71 Copyright and Related Rights Act from 1993, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Bulgarian CRRA).

72 Art. 40f (3) of the Bulgarian CRRA.

73 Art. 40f (5) of the Bulgarian CRRA. Where the preliminary discussion is practically impossible, the Minister of Culture carries out the public consultation by publishing the proposal of the tariff on the web, inviting the interested parties to submit their reasoned opinions. Art. 40f (11) and (12) of the Bulgarian CRRA.

74 Art. 40f (9) and (10) of the Bulgarian CRRA.

75 Art. 40f (14) of the Bulgarian CRRA.

76 Requirements for mediators are regulated in Art. 40g (2) of the Bulgarian CRRA.

77 Art. 40g of the Bulgarian CRRA.

4.10. Estonia

In Estonia, CMOs are entitled to determine tariffs by way of negotiations with the association of users.[78] Tariff disputes may submitted to the Copyright Committee appointed by the government. The Copyright Committee is an expert mediation body within the meaning of the Mediation Act.[79] This implies that there are no binding effects of the proposals or decisions of the Copyright Committee if the parties do not accept them.

4.11. Lithuania

In Lithuania, the tariffs are set by a collective agreement between the CMO and the association(s) of users. If there is no agreement, each of the parties may call for mediation[80] before the Copyright Council or other mediator. The Council proposes the tariff. [81] If the parties do not accept this proposal, each of them is entitled to approach the court for setting the tariff.

4.12. Latvia

In Latvia, the tariffs are negotiated between the CMO and association(s) of users.[82] According to the Latvian Copyright Act mediation is available only in tariff disputes related to cable retransmission.[83] If the parties cannot agree on the election of the mediator, the mediator is to be appointed by the Minister of Culture. The mediator is entitled to propose a solution, which the parties may accept, tacitly or expressly, or refuse. The mediation procedure does not influence the right of each of the parties to approach the court.[84]

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78 Sec. 77 (1) (2) of the Estonian Copyright Act; used here is the unofficial consolidated text from March 2014 (hereinafter Estonian CRRA).

79 *See* Sec. 87 of the Estonian CRRA.

80 Art. 68(2) of the Copyright and Related Rights Act from 1999, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Lithuanian CRRA).

81 The Council is appointed by the institution authorised by the Government. For details *see* Art. 72 of the Lithuanian CRRA.

82 Sec. 65(1) of the Copyright Act from 2003, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Latvian CRRA).

83 It is also regulated that the mediation is available also for disputes concerning free use vs. technological protection measures.

84 *See* Secs. 67^1-67^3 of the Latvian CRRA. There are no details on the court procedure, so the general rules should apply.

4.13. Slovenia

In Slovenia, the tariffs are negotiated between the CMO and users' association(s) in an inclusive agreement.[85] If there is no association of users due to the nature of the respective field, an inclusive agreement may be concluded with the individual user.[86] During the negotiations, the existing tariff applies, and if there is no tariff, the CMO may itself fix a provisional tariff.[87] If the negotiations on the tariff fail[88], the tariff must be set by the Copyright Board[89], which is appointed by the Minister of Economy.[90] Also, anyone who demonstrates legal interest is entitled to submit to the Copyright Board a request to examine whether the existing tariff is appropriate, unless the Board has already decided on this issue.[91] In this case, the Board may approve, amend or annul the contested tariff in whole or in part.[92] During the proceedings, when necessary, the Copyright Board may fix the provisional tariff, which will apply until the final decision is issued.[93] The final decision of the Board may substitute for an inclusive agreement or constitute a part of it.[94] The decision of the Copyright Board may be contested before the Supreme Court, which must examine it within the bounds of the lawsuit submitted by the dissatisfied party.[95] In addition to the described tariff-setting proceedings, there is also a possibility of mediation, regarding the dispute on tariffs related to cable retransmission. The mediator shall in those cases be appointed by the parties from the list of mediators published by the government on the proposal of the Minister of Economy. The mediator must ensure that the parties conduct negotiations in

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85 Art. 156(2) of the Copyright and Related Rights Act from 1995, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Slovenian CRRA).

86 Art. 157(2) of the Slovenian CRRA.

87 Art. 156(2) and (4) of the Slovenian CRRA.

88 The negotiations should be concluded within four months. Art. 157a (1) of the Slovenian CRRA.

89 Arts. 156(2) and 157a (1) of the Slovenian CRRA.

90 For details on the organisation of the Board and its other competences *see* Arts. 157e and 157f of the Slovenian CRRA.

91 Art. 157a (2) of the Slovenian CRRA.

92 Art. 157b (1) of the Slovenian CRRA.

93 Art. 157b (2) of the Slovenian CRRA.

94 Art. 157b (3) of the Slovenian CRRA.

95 For details on the court proceedings *see* Art. 157d of the Slovenian CRRA.

good faith and is entitled to submit a proposal to solve the dispute which may be refused or accepted, expressly or tacitly.[96]

4.14. Croatia

In Croatia, the tariffs are set by the CMO. The CMO is obliged to submit the proposal of the tariff for observations to the Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts and the Association of Broadcasting Organisations. If the CMO does not accept their observations, it is obliged to approach to the Council of Experts (an independent expert body, appointed by the Minister of Science, Education and Sports)[97] for a non-binding opinion. This opinion must contain the evaluation of whether the remunerations conform to the tariff-setting principles provided for in the Croatian CRRA. After this procedure is accomplished, the tariff is officially published. During the procedure, the due remuneration must be paid in accordance with the existing tariff or, if there is no existing tariff, as an advance in accordance with the proposed tariff.[98] In addition to the described procedure Croatian CRRA provides for mediation for cable retransmission agreements. If the negotiations on the agreement for cable retransmission fail, each of the parties is entitled to call upon the mediation of the Council of Experts. In this case, the Council assists the parties to achieve the agreement and may submit proposals for solutions, which the parties may refuse or accept, expressly or tacitly.[99]

4.15. Results of the comparison of national copyright laws

Analysis of the data laid out above shows that the first and most welcomed way of setting the tariff is by negotiation between CMO and association(s) of users. Two of the analysed countries (Hungary and Romania) provide for the negotiations on tariffs to be conducted through state executive bodies, such as the intellectual property office or copyright office. Here, the involvement of

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96 *See* Art.163 of the Slovenian CRRA. The Government shall define by a decree the details on the mediation procedure and the conditions for being appointed as a mediator.

97 For structure and competences of the Council of Experts *see* Art. 164 of the Copyright and Related Rights Act from 2003, as amended; used here is the unofficial consolidated text from March 2014 (hereinafter Croatian CRRA).

98 Art. 162 of the Croatian CRRA.

99 Art. 163 of the Croatian CRRA.

the state authorities is the most intensive and direct. They serve as a kind of surety that the negotiations will be conducted in the right direction.[100]

Further, in three of the analysed countries (Hungary, Poland and Bulgaria) the tariffs are proposed by the CMO but already previously negotiated with the relevant organization(s) of users. The negotiated tariffs are analysed by the expert authorities (minister or commission appointed by the minister) which approves or refuses the tariff. In those cases the involvement of the state is also very intensive and direct since the approval comes from the executive state authority or the commission appointed by the executive state authority and without the approval there is no tariff.

All of the analysed countries, except Slovakia, have some kind of mediation, at least for cable retransmission rights (Poland, Romania, Latvia, Slovenia and Croatia). Other countries (Hungary, Austria, Germany, Czech Republic, Bulgaria, Estonia and Lithuania) have optional mediation for all types of disputes related to tariffs. The mediators are in most cases appointed by the competent minister, as a board or committee or simply as an independent mediator. The mediator assists the parties to reach an amicable settlement for their dispute and is also entitled to give his own proposals for solving the respective problem. Nevertheless, the mediation is in most cases optional and in all cases the proposals of the mediator are non-binding for the parties in a tariff dispute. Nevertheless, if the parties accept the proposal of the mediator, it becomes binding and enforceable.[101] In Croatia, instead of pursuing mediation, in every tariff-setting proceeding, the CMO is to approach the Council of Experts for a non-binding opinion. So, it might be concluded that almost all of the analysed countries do have some kind of mediation whereby the mediation

[100] State intervention in setting the tariffs is a kind of restriction of the rights of the right owners. *See* Gyertyánfy, *op. cit*. (fn. 3), p. 63.

[101] On the contrary, the European Commission in its Staff Working Document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market of 11 July 2012, COM(2012) 372 final, SWD(2012) 205 final, Brussels (hereinafter Impact Assessment) described the German system as a combination of arbitration and litigation since the proposal accepted by the parties in the mediation procedure becomes enforceable. It also concludes that in Hungary there is no specific alternative resolution mechanism and that in most of the European Member States there are no mediation systems covering all kind of disputes; *see* p. 119 and footnotes 258 and 259. The analysis here shows different results.

body is appointed by the state authority. In those cases the involvement of the state in the tariff-setting proceedings is very low and indirect since the proposals of the mediators are non-binding. Nonetheless, once the parties accept the proposal of the mediator(s) expressly or tacitly, this tariff becomes binding and enforceable.

In four of the analysed countries (Austria, Romania, Bulgaria and Slovenia) there are arbitration bodies, such as a copyright committee, arbitration panel, expert commission or copyright board. Those arbitration bodies are appointed by the competent state executive authority but have the status of independent expert bodies. Their task is to impose the tariff if previous negotiations or mediations have failed and the tariff was not established within a certain period of time. This means that the involvement of the state in the tariff-setting procedure is indirect but intensive. It is qualified as indirect because the arbitration bodies do have the status of independent experts although they are appointed by the state authority. It is qualified as intensive because the decisions of the arbitration bodies are binding or final, although in some countries contestable before the competent court.

And finally, eight of the analysed countries (Hungary, Germany, Poland, Slovakia, Romania, Lithuania, Latvia and Slovenia) provide in their copyright acts for court proceedings, either civil or administrative, as the final step in the tariff-setting procedure. In all of those countries, on request of a non-satisfied party, the competent court issues a final and non-contestable decision on the tariff. In fact, the court sets the tariff. In the five remaining countries, which do not provide for court intervention in the tariff-setting procedure in their copyright acts, it might be assumed that the court proceedings could be possible according to the general rules regulating civil procedure. Since the judicial authorities should be strictly separated from the executive state authorities, here the influence of the state is circumvented.

It should also be concluded that all of the national rules regarding tariff-setting procedures are non-negotiable strict rules which apply by virtue of the law. The parties are not entitled to change or circumvent them. So far, they have been an expression of the territorial nature of collective management of copyright and related rights and therefore they applied to all tariffs of national CMOs and disputes related to those tariffs.[102]

[102] The results of this research were also used in the text Matanovac Vuckovic, R., *Implementation of Directive 2014/26/EU on Collective Management and Multi Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern*

5. CRITERIA FOR SETTING TARIFFS

5.1. European law

In EU law there is no systematic approach to the criteria for setting tariffs. This issue is regulated only sporadically in some of the directives. An example is the Satellite and Cable Directive, where some criteria for tariffs for broadcasting are given: all aspects of broadcast, such as the actual audience, the potential audience and the language version.[103] In the Rental and Lending Directive[104] there are also some directions for establishing criteria for setting the amount of remuneration.[105] In the preamble of the InfoSoc Directive there are provisions which regulate the criteria for setting fair compensation for private copying.[106]

The CJEU has also taken standpoints on criteria for setting tariffs in several judgements. Although those judgements are relevant for particular situations and problems (such as the problem of CMOs' territorial monopoly), some general principles might also be derived. For instance, in the *Lagardère* case[107] it is pointed out that each of the Member States of the EU is free to determine the criteria for tariff-setting as well as to decide on the methodology by which the amounts of the remunerations are to be calculated. In *SENA*[108] the CJEU concluded that the concept of equitable remuneration appearing in the Rental and Lending Directive must be regarded as an autonomous provision of EU law and must be interpreted uniformly throughout the EU.[109] The CJEU stated that in defining the criteria for determining equitable remuneration, in particular the value of the use in trade should be taken into account.[110] The value of

Europe, IIC - International Review of Intellectual Property and Competition Law, vol. 47, no. 1, 2016, pp. 28 – 59.

[103] *See* Recital 17 of the Satellite and Cable Directive.

[104] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEU L 376 of 27 December 2006 (codified version) (hereinafter Rental and Lending Directive).

[105] *See* Recital 13 and Art. 6(1) of the Rental and Lending Directive.

[106] *See* Recitals 35, 36, 38, and 39 of the InfoSoc Directive.

[107] CJEU case C-192/04 *(Lagardère)*, [2005] ECR I-07199.

[108] CJEU case C-245/00 (*SENA*), [2003] ECR I-01251.

[109] *See SENA*, at 22 and 24.

[110] *See SENA*, at 37.

the use in trade was also highlighted in *Kanal 5 Ltd*[111], where the CJEU found that the abuse of a monopoly position may lie in the imposition of a price which is excessive in relation to the economic value of the service provided.[112] This was repeated in the *OSA* case[113], confirming the position the Court had taken even before, in the landmark cases *Tournier*[114] and *Lucazeau*.[115, 116]

While Directive 2014/26/EU is silent on tariff-setting procedures, it regulates the criteria for setting the tariffs. According to this Directive licensing terms must be based on objective and non-discriminatory criteria[117] and tariffs must be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use, as well as in relation to the economic value of the service provided by the CMO.[118] Those criteria were already instituted by the CJEU, as explained *supra*. According to Directive 2014/26/EU, there are no differences in criteria for setting the tariffs for online and offline uses.[119]

5.2. National laws

In most of the analysed countries, with the exception of Austria, Estonia and Lithuania, criteria for setting tariffs are provided for in the relevant copyright acts. They are regulated generally, for all types of usage, on the principle of non-exhaustive lists of elements which should be taken into account

111 CJEU case C-52/07 (*Kanal 5 Ltd*), [2008] ECR I-09275. This case is also the referral case for the Commission, *see* Impact Assessment, p. 66.

112 *See Kanal 5 Ltd*, at 28 and 37.

113 *See OSA*, at 85, 87, 88, 92 and 93.

114 CJEU case C-395/87 (*Tournier*), [1989] ECR 02521.

115 CJEU case C-110/88, 241/88 and 242/88 (*Lucazeau)*, [1989] ECR 02811).

116 *See Tournier*, at 38, 43, 46; *Lucazeau,* at 33. *See* also: Frabboni, M. M., *Collective management of copyright and related rights: achievements and problems of institutional efforts towards harmonisation,* in: Derclaye, E. (ed.), *Research handbook on the future of EU copyright*, Edward Elgar Publishing, Cheltenham, 2009, p. 380; Guibault, L., van Gompel, S., *Collective Management in the European Union*, in: Gervais, D. (ed.), *Collective Management of Copyright and Related Rights*, 2nd edn., Kluwer, Alphen aan den Rijn, 2010, pp. 141 – 142.

117 Art. 16(2) and Recital 31 of Directive 2014/26/EU.

118 *See* Art. 16(2)(2) and Recital 31 of Directive 2014/26/EU.

119 Except for online services, it is specially regulated that the licensing terms already agreed upon for a new type of online service that has been available to the public in the EU for less than three years may not be used as a precedent for the creation of other tariffs. *See* Art. 16(2)(1) and Recital 32 of Directive 2014/26/EU.

while setting the tariffs. In Hungary, for example, it is regulated that all relevant circumstances of the use concerned shall be taken into account.[120] As relevant criteria most of the countries mention economic income from the use (Germany[121], Poland[122], Czech Republic[123], Romania[124], Bulgaria[125], Latvia[126], Slovenia[127], Croatia[128]), but also other circumstances of the use, such as: type or nature or manner of use; place, scope or extent of use; purpose and period or number of use; specific features and characteristics of the place or the region where the use takes place; difference in prices in the business of the user (Germany[129], Poland[130], Slovakia[131], Czech Republic[132], Latvia[133], Croatia[134]). Particular complexity of collective management due to certain types of use is also taken into consideration while setting the tariffs (Slovenia[135]), and sometimes also indirect economic benefit of the use (Czech Republic[136], Latvia[137]). In cases where the use does not provide income, the criteria mentioned are non-economic benefit or even costs of the use (Latvia[138], Slovenia[139], and Croatia[140]). Some of the copyright acts regulate that European practices (Romania[141], Slovenia[142]) as well as the neighbouring countries' practices (Slovenia[143]) are rele-

120 *See* Art. 92/H (2) of the Hungarian CA.
121 *See* Art. 13(3) of the German AACRR.
122 Art. 110 and Art. 110^{13} (5)(1)of the Polish CRRA.
123 Art. 100(6) of the Czech CRRA.
124 Art. 131^{1}.of the Romanian CRRA.
125 Art. 40f (4) of the Bulgarian CRRA.
126 Art. 66^{*} of the Latvian CRRA.
127 Art. 156(3) of the Slovenian CRRA.
128 Art. 165 of the Croatian CRRA.
129 *See* Art. 13(3) of the German AACRR.
130 Art. 110 and Art. 110^{13} 5(1) of the Polish CRRA.
131 Sec. 82(1) of the Slovak CRRA.
132 Art. 100(6) of the Czech CRRA.
133 Art. 66^{*} of the Latvian CRRA.
134 Art. 165 of the Croatian CRRA.
135 Art. 156(3) of the Slovenian CRRA.
136 Art. 100(6) of the Czech CRRA.
137 Art. 66^{*} of the Latvian CRRA.
138 Art. 66^{1*} of the Latvian CRRA.
139 Art. 156(3) of the Slovenian CRRA.
140 Art. 165 of the Croatian CRRA.
141 Art. 131^{1} of the Romanian CRRA.
142 Art. 156(3) of the Slovenian CRRA.
143 Art. 156(3) of the Slovenian CRRA.

vant criteria. In some of the countries, the tariffs should be proportionate to the use of the protected subject matters as a whole (Germany[144], Slovenia[145]), to the repertoire (Romania[146]), to the total amount paid by users to all CMOs in the respective field (Poland[147]) or to individual right owners (Romania[148], Slovenia[149]). The Polish CRRA[150] also mentions justified public interest as a criterion for setting the tariffs. In Germany it is regulated that due care should be given to the religious, cultural and social significance of the use as well as youth welfare.[151] And finally, the Polish CRRA[152] furthermore regulates yearly valorisation of the tariffs expressed in a lump sum.

5.3. Results of the comparison

On the basis of the above analysis, it is possible to conclude that the criteria for setting tariffs are consistent throughout the analysed countries. Generally speaking, there are no significant or conceptual deviations among them.[153] Moreover, so far, the described criteria are in line with the criteria provided for by EU law, especially by the jurisprudence of the CJEU. It was undoubtedly concluded, both by the national legislatures and by the CJEU, that the principle of territoriality applies and that each of the Member States is free to determine the criteria for setting tariffs as well as to decide on the methodology by which the amounts of remuneration are to be calculated.[154]

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144 Art. 13(3) of the German AACRR.

145 Art. 156(3) of the Slovenian CRRA.

146 Art. 131^{1} of the Romanian CRRA.

147 Art. 110^{13} (5)(2) of the Polish CRRA.

148 Art. 131^{1} of the Romanian CRRA.

149 Art. 156 (3) of the Slovenian CRRA.

150 Art. 110^{13} (5)(5) of the Polish CRRA.

151 Art. 13(3) of the German AACRR.

152 Art. 110^{13} (8) of the Polish CRRA.

153 In this context it is worthwhile to mention a curiosity from Art. 23 of the Czech CRRA, which regulates maximum remuneration for all right holders, for communication to the public in hotel rooms and similar accommodation premises. This type of provision is unusual and was very much disputed. Namely, the total remuneration for all right holders in this case may not exceed 50% of the fee due for every device in hotel rooms or other accommodation premises. Another curiosity in this context is the provision of the Romanian CRRA which regulates that the maximum amount for neighbouring rights may not exceed 1/3 of the negotiated remuneration for copyright for the same category of users. *See* Art.134 (2)(g) of the Romanian CRRA.

154 See Matanovac Vuckovic, R., *op. cit.* (fn. 102).

6. CONCLUSION

The systems for setting the remunerations in individual and collective management differ significantly. Since in individual management the right owners, their agents or other representatives are completely free to negotiate the amounts of remuneration for the exploitation of their creations, in collective management the national copyright laws provide for strict procedures for setting the tariffs. Those procedures apply by virtue of law and the parties are not entitled to negotiate, change or circumvent them. Those national rules for tariff-setting are regulated in order to secure legal certainty and control over the national CMOs as monopolists in the collective management of rights. Since the creators and their CMOs are not free in setting the tariffs in collective management, their position in this respect can be qualified as a kind of limitation in exercising the rights of creators. Nevertheless, the intervention of the state or quasi-state authorities in tariff-setting procedures in collective management does not change the nature of copyright and related rights, which remain private rights.

It seems that Directive 2014/26/EU does not affect the existing tariff-setting systems for traditional means of exploitation of copyrighted works and subject matters protected by related rights, since it is neutral with regard to the monopolistic position of national CMOs and the representation of the global repertoire in the offline environment. This means that there are no obstacles for national legislatures to keep in force the existing rules with regard to traditional uses.

On the other hand, it is questionable whether those rules can be applied to online licensing for music copyright, since the provisions of Directive 2014/26/EU give up the paradigm of monopolistic CMOs and territoriality of collective management. Therefore, it seems that there is no need for state intervention in tariff-setting procedures and that CMOs which compete with each other for users and right owners are also entitled to compete on tariffs. In those circumstances, in order to encourage competition, it seems that CMOs should be completely free in determining the remuneration for authors. Nevertheless, this system where there is competition on tariffs could lead to the race-to-the-bottom and result in pure remunerations for creators.

Sažetak

Romana Matanovac Vučković *

NAKNADE ZA AUTORE I DRUGE STVARATELJE U KOLEKTIVNOM OSTVARIVANJU AUTORSKOG I SRODNIH PRAVA

Kreativne industrije danas su vrlo važan dio kompleksnog mehanizma poticaja gospodarskog rasta i razvoja kako u Europskoj uniji tako i drugdje u razvijenom svijetu. Stvaratelji autorskih djela i drugih intelektualnih tvorevina zato svakako zaslužuju naknadu za svoj autorski i drugi stvaralački rad. Ta se naknada može realizirati u individualnom ili u kolektivnom sustavu ostvarivanja autorskog i srodnih prava. Individualno ostvarivanje karakterizira neposredno pregovaranje između autora ili drugog nositelja prava, s jedne strane, i korisnika, s druge strane. Pregovara se o svakom pojedinačnom korištenju autorskog djela ili predmeta srodnog prava. Također, u slučaju individualnog ostvarivanja, nositelji prava mogu ovlastiti agenta, odvjetnika ili publishera da u njihovo ime i za njihov račun vodi pregovore i individualno ostvaruje njihova prava. Ako pregovori u pogledu individualnog iskorištavanja uspiju, sklapa se ugovor u kojem se određuje autorska naknada odnosno naknada nositeljima srodnih prava, u pravilu kao paušalan iznos koji dospijeva odmah ili u anuitetima ili kao postotak od prihoda od iskorištavanja. U svakome slučaju, nositelj prava potpuno je slobodan u određivanju iznosa naknade za korištenje svojeg autorskog djela ili predmeta srodnog prava. Za razliku od takve situacije, vrlo se često autorsko i srodna prava ostvaruju u kolektivnom sustavu gdje organizacija za kolektivno ostvarivanje ostvaruje prava za račun većeg broja nositelja prava. U tome slučaju naknada se utvrđuje kolektivnim pregovaranjem između organizacije za kolektivno ostvarivanje prava i nekog kolektivnog tijela koje predstavlja korisnike. Budući da su organizacije za kolektivno ostvarivanje prava do sada bile ustrojene na načelu teritorijalnih monopola i zastupale su na teritoriju na kojem su osnovane cijeli svjetski repertoar, uglavnom se u nacionalnim propisima uređivala procedura donošenja cjenika za korištenje autorskih djela, kao i kriteriji za određivanje predmetnih naknada. Ta procedura trebala bi biti jamstvo da će naknada koja se odredi biti primjerena i pravična kako s motrišta nositelja prava tako i s motrišta korisnika. Također, ona je do sada služila za kontrolu teritorijalnih monopola koje su uživale organizacije za kolektivno ostvarivanje prava. Budući da propisana procedura ograničava nositelje prava u pogledu kriterija i procedure određivanja naknade i budući da u kolektivnom pregovaranju pojedini autor odnosno drugi nositelj prava ne može

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ostvariti svoje partikularne interese i ciljeve, već mora djelovati zajedno sa svim drugim autorima i nositeljima prava, postupak određivanja naknade u kolektivnom ostvarivanju prava zapravo se može okarakterizirati kao svojevrsno ograničenje u izvršavanju odnosno ostvarivanju prava.

Ključne riječi: autorsko pravo, autorskom srodna prava, naknada za autore i nositelje srodnih prava, individualno ostvarivanje autorskog prava, kolektivno ostvarivanje autorskog prava