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SESSION 10: COPYRIGHT/COMPETITION LAW

COLLECTIVE MANAGAMENT: THE LIMITS OF REGULATORY INTERVENTIONS (OUTLINE)

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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 the right; and if he does authorize such an act, under what conditions and against what kind of remuneration.

An exclusive right may be enjoyed, to the fullest possible extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work, and he may closely monitor whether his right is duly respected.

In certain cases, collective management of rights is the most efficient way of excising rights from the viewpoint of the interests of all the relevant stakeholders: the owners of rights, the users and the general public. In such cases, owners of rights normally establish voluntarily collective management systems.

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 which 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 organizations are obliged to grant license to any users who ask for authorization and is ready to pay according to the tariffs. The owners of rights who join a collective management organization have to accept all this, and there are not in the position anymore to act as owners of exclusive rights.

As long as the system is established and functions on the basis of free decisions of owners of rights, all this is in order from the viewpoint of international norms. Prescription of mandatory collective management is, however, another matter.

The paper identifies those cases where mandatory collective management is in accordance with the international copyright norms – and the EU directives which seem to be in complete accordance with those norms – and the limits beyond which prescription of mandatory collective management would conflict with such norms.

In the case of rights to remuneration – both those which are originally provided as such (e.g., resale right or Rome Article 12/WPPT Article 15 rights), and those which consist in the limitation of exclusive rights where allowed by the international norms (e.g., such limitations of the right of reproduction on the basis of Article 9(2)) – since they are not, or are not anymore, exclusive rights, mandatory collective management may be prescribed (and, due to the nature of those rights, it is the best or even the only possible way).

The prescription that an exclusive right may only be exercised through a collective management organization is a condition of exercising such a right (along with other conditions, such as compulsory licenses). The Berne Convention allows the imposition of such conditions in respect of certain exclusive rights; namely, the right of broadcasting and other related acts under Article 11*bis*, and the right of reproduction concerning recording of musical works under Article 13. It is submitted that it follows from this *a contrario* that the Convention does not allow the prescription of such conditions in respect of other exclusive rights.

The paper also deals with the possibility of maintaining the exclusive nature of an exclusive right, but providing for an unvaivable right to remuneration for original owners of rights; typically authors and performers as in the case of the right of rental under the EU Rental, Lending and Related Rights Directive.

It is submitted that – in view of existing contractual relations – such a solution may truly be applied where a new right is introduced or an existing right is applied in a new situation. This was the case regarding the rental right. 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 fulfill, in the case of the making available right, 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 does not allow the "exportation" of such a system to countries where no such statutory provisions exist.

The paper also deals with the so-called extended collective management schemes applied under certain copyright laws. In the case of "extended collective management" of exclusive rights, 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 an organization is adequately, broadly representative; and second, the possibility of "opting out" from the system should be guaranteed under reasonable conditions.

In respect of interventions for competition reasons, the paper expresses the view that the *de facto* or *de iure* monopoly of a collective management organization should not be regarded as a situation the elimination of which would be desirable. Several advantages of collective management may only prevail if an organization can offer blanket licenses for the users. It seems only truly justified to intervene for competition reasons where this is necessary to prevent the misuse of a *de facto* or *de iure* monopoly position.

The paper expresses the view that, from this viewpoint, the European Commission's intervention concerning the "Santiago Agreements" has not been truly justified, and that the way the 2005 Recommendation was presented and the manner in which the Commission launched the "CISAC inquiry," have not been fortunate. It seems, however, that an unclear situation and unintended confusion have emerged, for the elimination of which now the Commission's assistance sems indispensable.

[End of outline]