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The author, or another copyright holder who wants to protect or exercise his/her right, can do it in individual or collective manner. Certain rights are in principle exercised individually, while for others due to their specifics only a collective method of management is provided, through specialized organizations established precisely for the purpose of performing the activity of collective management of copyright and related rights, to which the competent intellectual property institution has entrusted all necessary powers for performing the specified activity. Individual management is the most comprehensive type of protection, with the largest volume of offered requirements available to authors, in situations when it is practically feasible and adequate. On the other hand, collective management is especially relevant in the market of musical copyright works, i.e. in the market where, in addition to authors, producers of phonograms, videograms and performers also appear as entities. Given the problems that occur in practice in both management alternatives, we will present the analysis of each of the respective segments separately.

Also, the analysis will first provide an overview of the current situation and shortcomings, and then point out the potential solutions that are applied in comparative law, and which would improve the current solutions in the positive law of the Republic of Serbia and in practice.

# ANALYSIS OF CURRENT REGULATIONS IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS AND THE PRACTICE

## COLLECTIVE MANAGEMENT

Law on Copyright and Related Rights<sup>1</sup> (hereinafter: LCRR or the Law) stipulates that copyright and related rights are collectively managed through organizations for the collective management of copyright and related rights (hereinafter: Organizations), which are not of a lucrative nature and which specialize in managing rights related to certain subject matters of protection<sup>2</sup>.

In order for a certain Organization to be able to perform the activity of collective management of copyright and related rights, it is necessary to obtain a permit from the competent authority, i.e. the Intellectual Property Office. The amendments to the Law from 2019 define the documentation that the Organization must submit<sup>3</sup>, as well as the conditions that the Organization needs to meet in order to be able to perform a specific activity<sup>4</sup>.

There are currently six organizations in the Republic of Serbia for the collective management of copyright and related rights, namely:

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1 Law on Copyright and Related Rights ("Official Gazette of the RS", no. 104/2009, 99/2011, 119/2012, 29/2016 - AC decision and 66/2019)

2 *Ibid*, 152

3 *Ibid*. 157, para. 3

4 *Ibid*, 158. and 159.

- Organization of Music Authors of Serbia - SOKOJ;
- Organization of Phonogram Producers of Serbia - OFPS;
- Organization for Collective Management of Performers' Rights - PI;
- Organization of Photography Authors - OFA;
- Organization for Management of Reprographic Rights - OORP;
- Organization of Film Authors of Serbia - UFUS AFA ZAŠTITA.

Holders of copyright, or related rights, will exclusively confer their rights on the Organization, and instruct it to conclude contract on non-exclusive assignation with persons who will use copyright works, or subject matters of related rights, in its own name and on their behalf<sup>5</sup> (hereinafter: Users), as well as to collect remuneration from the Users in its own name and on behalf of the right holders. Also, only one Organization may obtain a permit from the competent authority for collective management of rights in relation to the same type of rights over the same type of subject matter of copyright or related rights<sup>6</sup>, which means that this particular Organization has a monopoly position in terms of collective management of a particular type of right on a particular type of work or subject matter of related right.

Regarding the rights that their holders assign to the Organization, LCRR prescribed the mandatory collective management of certain rights, while for the other type of rights the holders have the freedom to choose whether to manage them collectively, i.e. through the Organization or individually.<sup>7</sup>

Some of the rights for which the legislator has prescribed collective management as mandatory are the following: the rights of the performer to the fee for broadcasting and rebroadcasting the interpretation from the recording issued on the sound/sound and image carrier, for public announcement of the interpretation broadcast from the recording issued on the sound/sound and image carrier, for public

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5 *Ibid*, 153, paras. 2 and 3

6 *Ibid*, 157, para. 2

7 *Ibid*, 150.

announcement of the interpretation from the recording issued on the sound/sound and image carrier; the rights of phonogram producers to the fee for broadcasting and re-broadcasting of phonograms, public announcement of phonograms and public announcement of phonograms that are broadcast, etc.

Furthermore, the LCRR stipulates that each Organization must have a General Assembly, Administrative Board, Managing Director and Supervisory Board as its bodies, and concerning the general enactments of the Organization, the Statute, Tariff and Distribution Plan will be necessary, with the possibility of other general enactments that more precisely define certain matters concerning the Organization's business activity<sup>8</sup>. The Statute constitutes the highest enactment of the Organization and other general enactments must be aligned with it, the Distribution Plan will clearly and unambiguously set the criteria on the basis of which the Organization distributes the amount of remuneration collected from the Users. The Tariff will be a very important enactment of the Organization because it determines the amount and manner of determining the remuneration that Users will be required to pay for the use of copyright or related rights. The Organization initiates negotiations on the tariff by inviting representative associations of Users and individual Users<sup>9</sup>. Following the call for negotiations, the two parties seek to conclude a tariff agreement. In case of impossibility to find a solution that would suit both parties, i.e. impossibility to conclude a tariff agreement within 60 days from the invitation to negotiations, the proposed tariff will be determined by the Administrative Board of the Organization and submitted to the competent authority for approval<sup>10</sup>.

Further, Article 184 of LCRR stipulates that the Organization is obliged to pay by the end of the calendar year, i.e. by 31 December, to the holders of copyright or related rights who have concluded a contract with it or who have not informed it that they will individually exercise their rights, the amount collected from the Users for their use of the subject matter of protection in the previous year minus the funds for covering the justified costs of collective management of rights. It should also be noted

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8 *Ibid*, 164. and 165.

9 *Ibid*, 173.

10 *Ibid*, 176.

that the Organization may, for justified and elaborated reasons, extend this period. Therefore, holders of copyright or related rights who have concluded an exclusive assignment contract with the Organization are fully equated with those rightholders who have not entered into a contract, but have not informed the Organization that they will exercise their rights individually<sup>11</sup>, as there is a presumption that the Organization has the authority to act on behalf of all national and foreign rightholders with respect to any subject matters of protection that are within the scope of its business activity<sup>12</sup>.

As far as the Users are concerned, in accordance with the law, before they begin to use the subject matter of protection they are obliged to acquire from the Organization the rights to use the copyright or the subject matter of the related rights in a certain way, and to inform Organization within 15 days about all the circumstances of relevance for the calculation and distribution of funds<sup>13</sup>.

Article 188 of the Law also stipulates the supervision over the work of the Organization by the competent authority that supervises whether the Organization operates in compliance with the license granted to it and in compliance with legal provisions. In order to conduct supervision, the competent authority will have the right to have its representative attending the sessions of the Organization's bodies and to state opinions concerning the collective management, to demand a written answer to its questions, and to inspect business documents. In case it establishes irregularities in the work, the competent authority will indicate them to the Organization, and order the implementation of measures and a deadline for elimination of irregularities<sup>14</sup>.

In the process of conducting supervision, the Organization will have certain obligations towards the competent authority in terms of submitting documentation that includes: annual business reports, annual account of remunerations and certified auditor's report; agreements between the organization and representative associations, and amendments to the statute, tariff and other general enactments

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11 *Ibid*, 180, para. 4

12 *Ibid*, 180, para. 1

13 *Ibid*, 187, para. 1 -3

14 *Ibid*, 191.

of the Organization<sup>15</sup>. In addition, the Organization is obliged to adopt within six months from the end of the business year the annual reports of its bodies on paid amounts and allocation thereof, reports on operations of the Organization, execution of agreements concluded, certified auditor's report on annual business report, calculation of remunerations, as well as the proposal of the financial plan of the Organization for the following year<sup>16</sup>.

The Law also prescribes the content of complete documentation that the Organization should submit to the competent authority or which should be adopted.

## EXPLANATION OF THE EXISTING LEGAL SOLUTIONS OF THE AUTHORS OF THE AMENDMENTS TO THE LAW ON COPYRIGHT AND RELATED RIGHTS FROM 2019

in the Draft Law on Amendments to the Law on Copyright and Related Rights<sup>17</sup>, its authors stated in the explanation certain reasons for enacting the Law, as well as the explanations of legal solutions, some of which we will present below.

One of the goals of the amendments to the Law on Copyright and Related Rights from 2019 was to establish a more efficient, or improve the existing system of collective management of copyright and related rights, according to the standards set by relevant international enactments regulating the subject matter, but also according to EU standards.

Furthermore, one of the most important amendments to the Law refers to Article 127, paragraph 10 of the previous Law, which provided for the single remuneration for public communication of interpretations and phonograms to be charged together with the author's remuneration for public communication of musical works. Also, Article 156, paragraphs 5 and 6 determined the manner of collecting that single

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15 *Ibid*, 188, para. 2

16 *Ibid*, 189

17 Draft Law on Amendments to the Law on Copyright and Related Rights ([http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi\\_zakona/2019/225-19%20-%20LAT.pdf](http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2019/225-19%20-%20LAT.pdf))



remuneration. During the process of amending the Law, these provisions of the Law were amended because they were not in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works<sup>18</sup> (hereinafter: the Berne Convention) and the TRIPS Agreement<sup>19</sup> adopted by the World Trade Organization. Namely, by prescribing the obligation to collect a single remuneration, the author's exclusive right to public communication of his/her work is encroached upon, but also the right of phonogram producers and interpreters to remuneration for public communication of their phonograms, or interpretations. The encroachment on the rights of these persons is reflected in the fact that they cannot independently deliver the invoice to the Users, which would lead to the fact that if the Organization representing the rights of music authors does not function for any reason, or does not collect remuneration, neither the phonogram producer nor the performer could collect a remuneration for the use of the subject matter of protection. Such a solution was unacceptable, taking into account that the right of phonogram producers and the right of performers are separate rights in relation to copyright, and their exercise cannot be conditioned by the exercise of the copyright. Also, such a provision could ultimately lead to the monopoly position of the Organization in terms of collecting remuneration for public communication of musical works, interpretations and phonograms, which is absolutely unacceptable and contrary to the *acquis communautaire*. In connection with the aforementioned amendment, the provisions of Article 156, paragraphs 5 and 6, referring to the uniform manner of collecting the remuneration for public communication of musical works, phonograms and interpretations, as well as to the allocation of the remuneration thus collected, in the way that 50% of the total remuneration, after deducting the costs, went to the Organization representing the authors of musical works, while the other half of that revenue was distributed to the Organizations representing performers and phonogram producers, were deleted. These provisions were deleted for several reasons, primarily because they are not in accordance with Article 8, paragraph 2 of EU Directive 2006/115<sup>20</sup> regulating a single collection and allocation of remuneration

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18 Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, amended in Paris on 4 May 1896, amended in Berlin on 13 November 1903, amended in Bern on 20 March 1914, amended in Rome on 2 June 1928, in Brussels on 26 June 1948, in Stockholm on 14 July 1967 and in Paris on 24 July 1971)

19 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

20 Directive 2006/115/EU of the European Parliament and Council

for public communication of phonograms and interpretations, without mentioning the authors. By interpreting that Article, it is concluded that the remuneration for public communication of musical copyright works must be charged independently. Another reason for deleting these provisions is their non-compliance with Article 3, paragraph 1 of the EU Directive 2001/29<sup>21</sup> which determines the exclusive right of the author to independently and freely, through negotiations with the User, agree on the amount of remuneration for public communication of his/her work, and that right must not be limited to fair remuneration, as regulated by law. Finally, the provisions in question were not harmonized with the Berne Convention either, which stipulates that states may regulate the issue of remuneration for public communication of copyrighted works, but only in case of impossibility to conclude an agreement between the author and the User.

Another important amendment to the Law relates to Article 162, paragraph 1, item 3 of the Law, which, after the amendments, enables the competent authority to revoke the Organization's operating license in cases when the Organization "gravely or repeatedly violates the provisions of this Law, the provisions of its statute and the distribution plan." Namely, before the amendment of the Law, the competent authority was authorized to decide on revoking the Organization's license, among other things, if it finds that it "gravely and repeatedly violates the provisions of this law". Therefore, there was a dilemma whether the repeated violation of the Law must at the same time refer to a grave violation. The new definition clarifies the intention of the legislator to revoke the license of the Organization in case it gravely violates the law, but also when it repeatedly violates the law, regardless of the severity of that violation. Also, in addition to the provisions of the LCRR, the Organization must now strictly comply with its statute and distribution plan, under the threat of revoking the license.

Further, Article 167 of the Law, regulating the distribution plan, as a general act of the Organization, was amended and paragraph 2 was added. It stipulates that the provisions of the distribution plan must be "clear, unambiguous, applicable and for-

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21 Directive 2001/29/EU of the European Parliament and Council

mulated in such a way as to preclude any arbitrariness in the distribution of collected revenue". This provision is extremely important, as the distribution plan is the legal basis for the payment of collected revenues, and as such must be clear and guarantee security to the members of the Organization in terms of providing information about the amount belonging to them, how remunerations are calculated, and how to exercise their rights if they consider that they have not received the due amount.

One of the most important things with regards to the collective management of copyright and related rights is the definition of the tariff. Prior to the adoption of the amendments to the Law, when determining the tariff, the tariffs of countries whose gross domestic product is approximately equal to the gross domestic product of the Republic of Serbia were taken into account. The problem in practice was the fact that certain countries, with a gross domestic product close to that in the Republic of Serbia, do not have some of the organizations for collective management of copyright or related rights that exist in the Republic of Serbia or that the tariffs of organizations in those countries are higher than the tariffs of the developed countries' organizations with a significantly higher standard of living than the Republic of Serbia. The new provision of the Law refers to the comparison with the tariffs of the organizations in other European countries, to the extent determined by comparing the gross domestic product of the two countries.

## STATEMENTS AND RECOMMENDATIONS FROM THE STRATEGY FOR THE DEVELOPMENT OF THE PUBLIC INFORMATION SYSTEM IN THE REPUBLIC OF SERBIA FOR THE PERIOD 2020-2025

on 30 January 2020, the Government of the Republic of Serbia adopted the Media Strategy<sup>22</sup>, whose authors, among other things, pointed out the shortcomings of the current system and regulation related to the collective management of copyright

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22 Strategy for the Development of the Public Information System in the Republic of Serbia for the period 2020-2025

and related rights in the Republic of Serbia, as well as a number of problems faced primarily by the media outlets in the Republic of Serbia.

Primarily, it was pointed out that the media, and partly the operators, often criticize the existing way of submitting data to the Organizations, which was determined by the Organizations themselves, citing the overregulation of the prescribed obligation of the User, creating high additional costs. Regarding the above, especially the high unjustified costs, the Media Strategy stresses the need for strict compliance with the Decree of the Government of the Republic of Serbia<sup>23</sup>, which refers to keeping electronic records of broadcast works, without prescribing significant engagement of resources or additional costs.

Furthermore, the authors of the Media Strategy criticize the process of negotiating the Organization's tariff, pointing out that the Organizations abuse their monopoly position in negotiations with the Users, and that they do not show interest in the tariff developing as a result of compromise between the parties in the negotiations, which was intended by the legal provision prescribing negotiations. Such a conduct of the Organization in practice is particularly erroneous when taking into account that the Organizations aim exclusively at protecting the interests of the rightholders, and that the Organizations are of a non-profit character. As mentioned earlier, when determining the tariff, an Organization negotiates with representative associations of Users, and in this regard the Media Strategy authors point out that the Law did not clearly set criteria for determining unambiguously which Association of Users is a representative one, i.e. which could be considered a legitimate representative of a certain group of Users when negotiating with the Organization.

The Media Strategy also points out the objections of electronic media outlets as a type of user of copyright works, which refer to the insufficiently precisely defined way of determining the basis for the so-called minimum author's tariff, which is currently set, on a basis determined independently by the Organizations, significantly higher than the basic tariff.

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23 Decree on the manner of keeping electronic records of broadcasting and rebroadcasting of copyright works ("Official Gazette of the RS", No. 108/204)

Finally, the Media Strategy authors proposed certain measures, with the aim of improving cooperation between the media outlets and Organizations, i.e. with the aim of general improvement of legislation. These measures include, but are not limited to, the following activities:

- providing a more flexible model for submitting data on the use of copyright and related rights, which would be simpler and easier for users, without unnecessary generation of additional costs, and which would be harmonized with the Decree of the Government of the Republic of Serbia on the manner of keeping electronic records of broadcasting and rebroadcasting of copyright works;
- specifying basic elements of the minimum tariff for the use of the subject matters of protection that will not be higher than the basic tariff;
- modifying the system of collective negotiations about the tariff, in such a way that the interests of the Users and the holders of copyright or related rights are equally taken into account;
- changing the position of the Organization, as well as enabling the free organization of holders of copyright and related rights.

It should also be noted that the Media Strategy indicates that the Organizations' monopoly position violates equal market conditions, as it restricts the media outlets, as users of copyright and related rights, to negotiate tariffs with only one Organization. Also, the authors point out that in that way the rights of the holders of copyright and related rights are violated because they are prevented from associating in order to protect their interests.

## INDIVIDUAL EXERCISE

According to the existing rules of the LCRR, if the author or copyright holder decides to exercise his/her right before the competent court, the Law provides for a number of mechanisms for protecting their interests, i.e. submitting a large number of different motions before the competent court<sup>24</sup> requesting:

- establishment of infringement of right (or a serious threat that the right will be infringed);
- prohibition of actions infringing the right or actions that pose a serious threat that the right will be infringed, as well as prohibition of repetition of such or similar actions under the threat of fine to the plaintiff;
- compensation for economic and non-economic damages;
- removal from the channels of commerce, seizure or destruction, alteration without any compensation of infringing objects, including the copies of subject matter of protection, their packaging, master copies, negatives and the like;
- prohibition of the sales, seizure or destruction, without any compensation, of materials and objects predominantly used in creation or manufacture of infringing objects;
- publication of the verdict at the expense of the defendant;
- providing information about the third parties who participated in the infringement of rights.

From the aspect of problems that arise in practice, both in relation to the legal solutions and in relation to their application, the most interesting issue is compensation for damages due to copyright infringement. Also, damages are one of the most common requirements that stand out in the procedures for individual exercise of copyright. Compensation for economic damage is reflected in the loss in the property of the injured party, i.e. in the lost profit.

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24 *Supra* Note 1, Article 205

## **A. Problem of determining the economic copyright infringement**

In order for an entity to be obliged to pay damages, it is necessary for the court, within the same procedure, to previously determine the existence of a copyright infringement. Therefore, in order to resolve such a request, it is necessary to assess two legal issues based on the facts, the existence of infringement, and the existence of damage and its amount.

The problem of determining the merits of the motion for determining the infringement and, based on that, the compensation for damage, also depends on the form of the copyright work for which the determination is requested.

Namely, it is much easier to determine for a photography whether there was an unauthorized download of that copyright work, rather than for copyright works composed of words (literary, journalistic, etc.) when it is necessary to compare texts and establish the scope of infringement by determining the number of taken or paraphrased words/characters.

For this reason, lawsuits for damages due to infringement of a copyright in photograph have a significantly larger share in practice than proceedings dealing with infringement of textual copyright works.

Another reason for the absence of more intensive exercise of copyright on textual copyright works is the lack of clearly adopted and recognized parameters for determining the amount of economic damage.

## **B. Relationship between authors and media publishers and the assignment of rights to media publishers**

Unlike moral copyrights, which are non-transferable, the author may assign his/her economic copyright to another person, natural or legal, by contract or other legal transaction. Such assignment may be permanent or temporary, may be territorially limited or limited in terms of the manner of use. Also, the person acquiring the economic copyrights may pay a remuneration for them or the assignment may be free of charge.

Another important division of assignments is to exclusive and non-exclusive ones. Exclusive assignment of copyrights has effect on third parties, i.e. authorizes the

acquirer, in addition to the agreed upon active acts of usage, to take other actions such as prohibiting all other entities from using a particular copyright work. The acquirer also has at its disposal all legal means for protecting and exercising its rights. As for the author, in the case of exclusive assignment, he/she no longer has the right to use his/her work, but is left with only personal legal powers, i.e. moral copyrights.

On the other hand, if the assignment is non-exclusive, the acquirer is authorized only to use the specific copyright work in the manner specified in the contract, but not to influence whether others use it and in what way, since only the author is still authorized to prohibit the use to others and to exercise his/her rights through the available legal mechanisms.

The media outlets, i.e. media publishers, are obliged, before using a certain copyright work, to acquire economic copyrights for it, which is mostly done by way of copyright contracts, or contracts on the assignment of economic copyrights. The LCRR prescribes that the copyright contract must be in writing, with the possibility of convalidation of the contract that is not made in the prescribed form, but the obligations arising from it are performed in whole or in part. Also, Article 74 of the LCRR prescribes another exception that directly concerns the work of the media outlets, so it allows the conclusion of a copyright contract that is not in writing if its subject matter is the publication of articles, drawings and other author's contributions in newspapers or periodicals.

Common case in practice is that authors, primarily photographers, are employed by media publishers. Therefore, the media outlets directly instruct their employees, i.e. journalists or photographers, to create copyright works by doing their job, which will then be published in the media outlet. In this regard, the LCRR, in its Article 98, establishes special criteria for copyright works created in the course of employment. Namely, paragraph 1 of the said Article stipulates that in case the author, by performing his/her work duties, creates a copyright work, the employer will be authorized to publish such work, and also to hold economic copyrights on its use within the scope of the employer's registered business activities, for a period of 5 years from the moment the work was created. After the above mentioned term the author will acquire all economic copyrights. However, we emphasize that this legal norm is of



a regulating character, i.e. the legislator also allowed the contracting of a different relationship through an employment contract.

So, since, in this case, publishers as employers are holders of economic copyrights for a period of 5 years from the creation of the copyright work, they have complete freedom to use it within that period and publicly communicate it in their media publications. The fate of copyrights after the expiry of the 5-year period depends on the manner in which the contracting parties agree on their rights and obligations, or on the fact whether they regulated those rights by contract at all. Namely, if the contracting parties do not mention in the employment contract the issue of copyright for works created in the course of employment, by force of law those rights will belong to the author after the expiry of the said term. On the other hand, if the contract emphasizes that the economic copyright will be retained by the employer after the expiry of the 5-year period, this provision will have such effect.

In practice, the fact that one or the other party is not sufficiently aware of its rights and obligations may be problematic, since the lack of regulation of this issue in the contract can lead to potential dispute in case the employer continues to use the content after the expiry of the 5-year term if the rights after that term belong to the author. Such proceedings can also escalate into mass litigation with high dispute value, because media publishers often continue to use the works of their former employees even after the expiry of 5 years from the creation of the work due to organizational reasons or ignorance concerning regulations.

Conversely, if the author signs an employment contract with a waiver or assignment clause without a time limit, he/she must be aware of losing control over his/her works and that he/she will not be able to assign them for compensation to other interested parties after the statutory period of 5 years.

Thus, the legislator allowed for a regulating possibility for the author as the assignor of the rights and the publisher of the media as the employer to regulate these rights differently by contract. On the one hand it could result in a complete waiver of the author regarding his/her future rights to the produced works, while in case of the absence of the clause on the indefinite duration of the rights belonging to the employer, it may be in a situation to be sued by the author, after the expiry of the

legal term of 5 years, if it continues to use his/her works.

### **C. Problem of determining the amount of economic/ material damage**

The amount of economic damage usually ranges in the level of the value of the subject use of the copyright work, i.e. the question arises as to how much the author would have received if the publication had been a consequence of a legal transaction. If such value cannot be proven by inspecting a contract or other evidence of the market value of the publication of that or similar work, it is necessary to present the evidence by expertise, where an expert or institution will assess the amount of damage, which is often a challenge in practice as the expertise price often exceeds the required amount for damages.

In order to overcome the problem of determining the amount of economic damage, it is common for the court to accept tariff schedules or opinions of competent organizations. Such data can serve as a parameter for determining the amount of damage, and thus beside the facilitated procedure for exercise of the rights it contributes to the so-called legal certainty and harmonization of case law.

For that reason the professional association ULUPUDS<sup>25</sup>, which brings together professional photographers, presented to the public its tariff schedules, the application of which over the last decade was widely accepted by the competent courts as a guide for assessing the market value of photographs, especially for professional photographers.<sup>26</sup> As such, the mentioned tariff schedules are widely accepted by the courts. Even their changes from 2017, which brought a significant increase in remuneration, also resulted in an increase in the remunerations rendered by the courts, as relevant values.<sup>27</sup> In practice, the Opinion of the Media Association exists in parallel<sup>28</sup>, and thereby this professional association determined its own prices for the use of photographs in the media outlets, which are significantly lower in relation to

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25 <http://www.ulupuds.org.rs/pdf/2017/Cenovnik%20foto%20sekcije%20ULUPUDS-a%202017.pdf>

26 Judgement of the Higher Court in Belgrade, P4 165/15, dated 15 July 2016, confirmed by the decision of the Court of Appeals Gž4 28/16, dated 16/12, D. Popesku, Bulletin of the Court of Appeals in Belgrade, No. 9/2017, p. 44

27 For example, instead of the previous EUR 40 in dinar exchange rate for publishing a photo on the Internet for up to a year, in 2017 the remuneration was increased to EUR 150.

28 Opinion of the professional association, Media Association of Serbia, 22 July 2016

the remunerations prescribed by ULUPUDS. However, the application of this opinion has never taken root in court practice, and the courts, at the suggestion of the author as a plaintiff, use mainly the tariff schedules of the photographers' association.

On the other hand, the lack of a widely accepted tariff schedules for works manifested in textual form, beside the problems with establishing the infringement, is an additional reason why authors and copyright holders find it more difficult to decide to exercise their rights in court.

Therefore, due to uncertain standards for the calculation of remuneration for economic damage (price of the taken character of a certain type of content) in litigation where the subject matter is determining the amount of economic damage for unauthorized take-over of a text, there is a need for expertise in most cases. The expertise can also be applied in the circumstance of determining whether the subject matter of the dispute is a copyright work, and only then for the purpose of determining the amount of damages.

It should be noted that there are price lists adopted by journalists' and media associations, which are not significantly represented in case law in the form of widely accepted standards, because disputes initiated by journalists for exercising their rights on written copyright works are not so common. In practice, a price list issued by the Independent Association of Journalists of Serbia is used to calculate remuneration for the use of journalistic texts<sup>29</sup>, but it did not take root in the case law.

It is important to point out that such an official overview of remunerations issued by a professional association is only a guideline for calculating royalties, with the author being free to negotiate other amounts at his/her own discretion when negotiating remuneration.<sup>30</sup>

The fact is that disputes over the exercise of subjective copyrights on textual copyright works authored by journalists are not widely represented in the Republic of Serbia, but we cannot say that copyright regulations are the only culprit for such a

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29 Price list of journalistic works and services, NUNS, dated 7 March 2018

30 Judgement of the Higher Court in Belgrade, P4 165/15, dated 15 July 2016, confirmed by the decision of the Court of Appeals Gž4 28/16, dated 16/12, D. Popesku, Bulletin of the Court of Appeals in Belgrade, No. 9/2017, p. 44

situation, if the problem even stems from legal provisions. In addition to the reasons we have pointed out, which concern the problem of determining the infringement and the amount of damages, such results are also influenced by the insufficiently developed awareness of journalists and media workers about which content meets the requirement to be considered a copyright work or to be subject to copyright protection. Also, we should not forget that journalists are people hired by publishers, or media owners, and that their will to exercise their rights largely depends on the readiness of the media outlet as a copyright holder or a dominant entity in relation to the journalist to initiate proceedings against another media outlet.

All these reasons together have led to the extremely poor case law in cases that as subject matter have the establishment of copyright infringement on works expressed in text, but also in the views of higher instances that could be used as guidelines. Part of the "guilt" lies in the fact that judges themselves often lack knowledge and experience to freely assess whether a particular journalistic report is just a current event reporting or it possesses a necessary dose of originality required by the Law. If we add to that the uncertain parameters for calculation of remuneration for economic damage (the price of the taken character from a certain type of content), we end up in most cases with the need for expertise in such litigations, in order to determine primarily whether the subject matter of the dispute is a copyright work and then the amount of economic legal remuneration.

Also, the case law is very poor in terms of infringement of copyright and related rights on musical works, i.e. audio or audio-visual content. The largest number of proceedings refers to litigations conducted in order to determine the rights of phonogram producers for further management of those rights through the competent organization. Proceedings concerning damages related to these types of copyright works are very rare for very similar reasons as with texts as copyright works, which are listed in the previous paragraph.

#### **D. Problem of determining infringement and the amount of non-economic / non-pecuniary damage**

As for non-pecuniary damage, for which, in addition to the economic one, a claim can be made, it is reflected in rendering a monetary amount as a form of reward to the injured party (author), who will thus be provided with a form of satisfaction to compensate for the loss in a form of emotional distress. Current case law implies

that the amount of remuneration for non-pecuniary damage due to infringement of the author's moral rights is assessed in each specific case, and there are no uniform tariff schedules based on which objective parameters the damage could be precisely determined, so the amounts are within informally determined limits.

As the moral rights of the author represent the personal relation of the author with his/her work, the consequences of infringing the moral copyrights are manifested through the psychological suffering of the author due to diminished reputation, honour and personality rights. Therefore, non-pecuniary damage can be awarded only when the author through his/her personal relation with the work really suffered emotional distress due to the infringement of the moral right of the author, which justifies the award of remuneration within the meaning of Article 200 of the Law on Contracts and Torts. Thus, the right to remuneration for non-pecuniary damage in our law is derived from the provision of the mentioned Law which regulates contractual arrangements, while the application of the provisions of the Law on Copyright and Related Rights is limited only to determining the existence of moral copyright infringement as a tort.<sup>31</sup>

The fact that the defendant violated the moral copyright of the plaintiff does not in itself mean that the plaintiff suffered non-pecuniary damage in this case. The plaintiff, as the injured party, must prove that s/he suffered a harmful consequence in the form of emotional distress, as well as a causal link between the infringement of his/her moral copyright and the infringement of his/her personal rights, as one of the recognized forms of non-pecuniary damage.<sup>32</sup>

Non-economic and economic damage can be claimed independently of each other, i.e. in the form of cumulative claims. Thus, if the court finds that the circumstances of the case justify it, and especially the intensity and duration of distress, it will award a fair monetary remuneration for the emotional distress and for fear suffered, regardless of the remuneration for pecuniary damage, as well as in its absence. Also, when deciding on a claim for remuneration for non-pecuniary damage, and the amount of remuneration, the court will take into account the significance of the damaged

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31 Ruling of the Court of Appeals in Belgrade, Gž. 227/2013 dated 16 April 2014

32 *Ibid.*

property and the purpose of that remuneration, but also that it does not favour aspirations incompatible with its nature and social purpose.<sup>33</sup>

### **E. Usual amount of non-economic / non-pecuniary damage rendered**

When assessing the amount of compensation for non-pecuniary damage, in addition to the intensity of the emotional distress suffered, other circumstances are also taken into account. Thus, when making a decision on the amount of fair monetary remuneration for non-pecuniary damage due to infringement of the author's moral rights, for publishing disputed photographs without indicating the author's name, and the publication in incomplete form, the court will assess the circumstance of whether the plaintiff is a professional photographer and whether it is important for him/her to be signed as the author of the photographs, and that they are not altered, but presented as the author created them.

Thus, in one decision, the court took a position, having in mind the fact that the plaintiff is a photographer by profession, and that it is therefore important for her to be signed as the author of the photographs, and that they are not altered, while the disputed photos were taken out of the context in which they were recorded, in accordance with the provision of Article 200 of the Law on Contracts and Torts, in addition to the amounts already awarded for these types of non-pecuniary damage, that the plaintiff was entitled to another RSD 30,000.00 for each photograph, i.e. RSD 30,000.00 for the photograph "VV" and "VV1" respectively, because they were published without the indicated name or pseudonym of the author and additional RSD 30,000.00 for each of the photographs due to the communication in incomplete form. Thus, according to the opinion of the second instance court, with the already awarded amounts of RSD 10,000.00 each and now awarded RSD 30,000.00 each, i.e. RSD 40,000.00 in total for each of the above infringements for each of the mentioned photographs, the plaintiff would be able to obtain certain satisfaction and thus overcome the non-economic damage suffered due to the infringement of her rights.<sup>34</sup>

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33 Law on Obligations of the RS ("Official Gazette of the SFRY", No. 29/78, 39/85, 45/89 - decision of the CCY and 57/89, "Official Gazette of the FRV", no. 31/93 and "Official Gazette of SCG", no. 1/2003 - Constitutional Charter)

34 Ruling of the Court of Appeals in Belgrade, Gž4 159/2017 dated 19 October 2018

The court will take special care if the alteration of the work significantly affects the value of the photograph itself, i.e. if the integrity of the work is substantially compromised, and especially if the copyright work was published in a negative context and without respecting the legitimate interests of the author. There was a dispute before the High Court in Belgrade, because the defendants published a photograph of the plaintiff in a negative context, not respecting his artistic expression. They published the cut, shortened photograph, so that the legality of the form was changed, and the composition of the photograph that the plaintiff wanted to achieve was disturbed. The whole event also undermined the professional reputation of the plaintiff, which led to a justified feeling of discomfort, agitation and anxiety for the future. In that court decision, starting from the criteria prescribed in the provision of Article 200 of the Law on Contracts and Torts, and calculating the remuneration for the plaintiff, the court found that the plaintiff should be awarded a remuneration in the total amount of RSD 70,000, for the infringement of the author's moral rights due to the violation of the moral rights of the author by public communication of the copyright work in an altered form without author's consent. Therefore, when the alteration is of greater intensity, the amount of awarded damages may be higher than with the usual alteration of the work, for adapting it to the needs of the infringer.<sup>35</sup>

In our case law, the court will in most cases assess the intensity of emotional distress, i.e. appropriate remuneration at its discretion, taking into account the need for efficiency and economy of the procedure. Otherwise, each individual expertise by a psychiatrist would prolong litigation for moral copyright infringement by several hearings, and increase litigants' costs by a fairly high amount of money, bringing them to a level not comparable to the usual remunerations awarded in these types of disputes.<sup>36 37</sup>

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35 Ruling of the Higher Court in Belgrade, P4 119/13

36 *Ibid*, From the explanation: "This remuneration is measured at own discretion, and in accordance with the rule prescribed by the provision of Article 232 of the CAP"

37 Civil Procedure Law ("Official Gazette of the RS", no. 72/2011, 49/2013 - CC decision, 74/2013 - CC decision, 55/2014 and 87/2018), Article 232: "If it is determined that the party has the right to remuneration, monetary amount or a fungible item, but the amount or quantity of things cannot be determined or could be determined only with disproportionate difficulties, the court will determine the monetary amount, or the quantity of fungible items at its discretion."

The authors of the Media Strategy from 2020 expressed concern over the "high amounts of remunerations" awarded in copyright disputes when it comes to publishing photographs, on the one hand, but also "insufficient protection of copyright works created by journalists" on the other. Namely, according to the Media Strategy, awarding high remunerations to holders of subjective copyrights and authors represent "inappropriate pressure on the media outlets". The case law concerning copyright disputes related to photographs, as well as a large number of such disputes with remunerations awarded on the one hand, and on the other a negligible number of copyright disputes concerning other media content, and the practice of uncontrolled downloading of other's media content, has led to the impression in a part of media community that copyrights and related rights associated with media activities (journalistic texts, videos, etc.) do not enjoy the same level of protection as photographs, as stated in the wording of the Strategy. Problems related to copyright disputes are also reflected in the narrow interpretation of copyright restrictions for the purpose of satisfying interests in the area of public information (daily reporting on current events, parodies and satire, etc.). At the end of the part concerning copyright, the Media Strategy concludes that it is necessary to improve the regulatory framework in the area of protection of copyright and related rights with regard to the protection of journalistic content.<sup>38</sup>

Also, we note that in relevant professional circles, even after the adoption of the Media Strategy, it is still commented that awarding excessive amounts of damages to the plaintiffs, i.e. authors or holders of economic copyrights, represents a kind of pressure on the media and their work. A similar point was made at the round table "The role of the media outlets in the protection of copyright and related rights".

Finally, it should be noted that there are examples in the case law in which the courts, when deciding on the amount of remuneration for non-economic damage, determined rather low amounts of monetary remuneration. When passing one of such rulings, the High Court in Belgrade determined the amount of RSD 5,000.00 per public communication of the photograph, i.e. RSD 20,000.00 in total, as a fair amount for remuneration of non-economic damage due to infringement of the

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38 *Supra* Note 22



right to be named, as well as the amount of RSD 3,000.00 per public communication of the photograph, amounting to a total of RSD 12,000.00 for remuneration of non-economic damage due to infringement of the right to protection of the work's integrity by communicating it in an incomplete form<sup>39</sup>.

Namely, in the stated case, when determining the amount of damages for infringement of the right to protection of integrity, the court took into account the fact that the plaintiff infringed the moral copyright of the plaintiff, "by cutting the bottom part of the photograph, so the composition of the copyright work was slightly disturbed". Therefore, the court took the position that the intensity of the infringement of the right to protection of the work's integrity was not high, so in accordance with such assessment it awarded the amount of remuneration of RSD 3,000.00 for each individual public communication of the photograph that violated the integrity of the work.

Also, in the explanation, the court stated the reasons for which it awarded the stated amounts, i.e. the reasons for which it partially rejected the claim, and thus determined the following: "The court rejected as too high the part of the plaintiff's claim for non-economic damages due to infringement of the author's moral rights by public communication of the plaintiff's copyright work without indicating the author's name or pseudonym exceeding the awarded amount of RSD 20,000.00, up to RSD 30,000.00, as in paragraph VI of the wording, and the part of the plaintiff's claim for non-economic damages due to infringement of the author's moral rights by public communication of the plaintiff's copyright work in incomplete form exceeding the awarded amount of RSD 12,000.00, up to RSD 30,000.00, as in paragraph VII of the wording of the ruling, all with legal default interest starting from 24 January 2019, as the day of the ruling until the final payment. The court took into account the importance of the infringed property and the purpose of the remuneration, as well as that the remuneration did not favour aspirations that were incompatible with its nature and social purpose and that remuneration for non-pecuniary damage was redress, and not reparation for the committed infringement, by which the plaintiff should obtain certain satisfaction to alleviate the infringement of his/her moral copyrights."

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39 Final ruling of the High Court in Belgrade, operating number 15 P4 45/18, dated 24 January 2019

Therefore, when determining the amount of RSD 3,000.00 and RSD 5,000.00, the court took into account the significance of the infringed property, the purpose of the remuneration, as well as the fact that too high remuneration would not be compatible with the nature and purpose of non-pecuniary damages. So, those were the main reasons for determining the unusually low amounts of remuneration for non-pecuniary damages. Finally, considering the above, we can conclude that the courts in each individual case take into account the specific circumstances of the case, and accordingly determine the amounts of remuneration they consider appropriate and fair.

# RECOMMENDATIONS TO IMPROVE BOTH COLLECTIVE MANAGEMENT AND INDIVIDUAL EXERCISE OF COPYRIGHT AND THE RELATED RIGHTS

## COLLECTIVE MANAGEMENT

Bearing in mind that the Law on Copyright and Related Rights has not yet been fully harmonised with the European legal standards and solutions in the domain of the collective management, legal provisions entered into force via the Amended Law of 2019 are solely transitory solution towards the implementation of the EU Directive no. 2014/26 (hereinafter referred to as: Directive)<sup>40</sup>. This part of the text will focus on solutions stemming from the Directive and solutions from the Copyright and Related Rights Act of the Republic of Croatia<sup>41</sup> (hereinafter referred to as: the Republic of Croatia Act), as an EU member state from the neighbourhood, given that those solutions might in different fashion improve Serbian legislation focusing on the issue of the collective management of copyright and related rights, in case accepted and adapted.

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40 EU Directive 2014/26/EU of the European Parliament and Council.

41 Copyright and Related Rights Act of the Republic of Croatia (NN 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17, 96/18)

The major change the Directive prescribes, which among other things relates to problems caused by the monopoly position of the Organisations, is establishment of the so called independent managerial entities used as a vehicle for the holders of power to manage their rights (hereinafter referred to as: Independent Entities). Namely, in line with the Directive, Independent Entities act as commercially oriented communities, unlike non-profit organisation nowadays present, such as SOKOJ<sup>42</sup>, and also Independent Entities are not owned by, nor under the control of holders of copyright and related rights, which further enables their independent work when providing services they charge for. By the introduction of Independent Entities, Organisations would no longer have monopoly position over the collective management of rights concerning a specific type of rights over a specific type of subject matters of copyright or related rights. Also, Independent Entities would ensure through their operations a high level of transparency in terms of collection and distribution of funds, and thereby a low level of costs of their operation in relation to the operation of the Organizations.

By the Republic of Croatia Act, an Independent Entity that intends to perform the activity of collective management of rights is obliged to inform the State Intellectual Property Office (Intellectual Property Office in the Republic of Serbia, hereinafter: the Office) thereof, and provide the Office with data on the type of rights and the category of rightholders, as well as on the number of rightholders for which it intends to perform collective management<sup>43</sup>. The Independent Entity must also notify the Office of any changes to the information it has stated when submitting the request<sup>44</sup>. However, the introduction of the possibility of managing rights through Independent Entities is not enough, it is also necessary to provide supervision over their work. The Republic of Croatia Act has given the authority to the authorised inspectors of the Office<sup>45</sup> to conduct supervision over the work of Independent Entities, distinguishing between planned supervision conducted on an annual basis and unplanned supervision carried out at the proposal of the inter-

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42 Organization of music authors of Serbia

43 *Supra* Note 41, Article 171.b, paragraph 1

44 *Ibid.* 171.b, paragraph 2

45 *Ibid.* 171.c, paragraph 1

ested party<sup>46</sup>. During the inspection control, the authorized inspector of the Office has the right to request access to the business records and other documentation of the Independent Entity, and in case s/he finds any deficiencies or irregularities, s/he will order their removal by a decision, and in case of non-compliance with the decision, s/he will prohibit the work of the Independent Entity by a new decision<sup>47</sup>. The stated decisions of the authorized inspector of the Office cannot be appealed, but an administrative dispute may be initiated. Therefore, if the Republic of Serbia would enable the existence of Independent Entities, with its legal solutions, their work in the field of collective management of copyright and related rights could contribute to the general reduction of the costs of collective management of rights. In addition, Organizations would no longer have their current monopoly position, and thereby would be motivated to optimize their operations in order to compete in the market.

Furthermore, as regards the organization of the operations of the Organizations, the introductory provisions of the Directive, under number 22 state that Organisations should act in the best collective interests of the rightholders they represent and should not impose additional obligations on rightholders, enabling their participation in the decision-making processes of the Organization. Organizations that have different categories of rightholders among their membership (e.g. producers and performers) should ensure equal representation of these categories in decision-making bodies. Likewise, the Directive stipulates that the Organisation should under its Statute or any other publicly published enactment set objective and non-discriminatory criteria for admitting rightholders, i.e. persons representing rightholders in its membership, and in case of rejection it has to explain to that person the reasons for the rejection<sup>48</sup>. In order for the work of the Organization to be efficient, persons with management functions must not be in a conflict of interest, and the obligation of EU member states to monitor the likely possibility of a conflict of interest is prescribed by the Directive<sup>49</sup>. The introductory provisions of the Directive, under number 25, stipulate that it would be efficient for persons such as direc-

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46 *Ibid.* 171.c, paragraph 3

47 *Ibid.* 171.c, paragraph 4 -6

48 *Supra Note* 40, Chapter 2, Article 6, paragraph 2

49 *Ibid.*, Chapter 2, Article 10, paragraph 2

tors or members of the supervisory board to declare that there is no conflict of interest immediately before taking office, and once a year thereafter. Also, Organizations should be able to make these statements publicly or to submit them to government agencies. In case of introduction of such a mechanism in our legislation, it would be most effective to make the supervisory board of the Organization competent for control and for sanctioning the existence of conflicts of interest.

Furthermore, the Republic of Croatia Act indicates that the Organization may entrust a natural or legal person to perform administrative, technical or supporting works under its supervision, all in order to reduce costs and optimize the functioning of the Organization<sup>50</sup>. Therefore, by harmonizing the regulation with the Directive or taking over the mentioned legal solutions from the Republic of Croatia Act, the Republic of Serbia would ensure greater efficiency and transparency in the work of the Organizations, equal representation of all categories of members in the bodies of the Organization, and thereby the provisions on conflict of interest would provide additional protection to rightholders, Users and the Organizations respectively.

Although the legislator, as explained earlier in the text, amended the provisions of the Law related to the tariff and adjusted them to European standards, one of the most problematic provisions in the LCRR still refers to negotiations regarding the tariff and the adoption of the tariff. As mentioned earlier, in case of impossibility to find a compromise, the tariff is determined by the Organization, i.e. its administrative board and it is submitted to the competent authority for approval. The Republic of Croatia Act refers primarily to the execution of a contract between the Organization and the User, i.e. between the Organization and the Association of Users, and in case of impossibility to execute a contract, the tariff is determined by the Organization, but with a number of restrictions. First of all, it is necessary to submit the tariff to the Association of Users, which has a period of 30 days to provide comments, otherwise it would be deemed they accepted the proposed tariff. In the event that there are objections by the Association, the two parties may negotiate an arbitration agreement on the basis of which the tariff will be determined in the arbitration pro-

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50 *Supra Note 41*, Article 158, paragraph 3

ceedings. In case the two parties do not reach an agreement on the arbitration proceedings, the Republic of Croatia Act instructs the Organization to ask the expert body for an opinion on the subject matter of disagreement (the expert body consists of 5 persons from among prominent experts in the subject matter, appointed by the Ministry upon the proposal of the Director of the Office)<sup>51</sup>. The tariff-setting procedure set out above prevents the Organization from conducting negotiations without the intention of accepting compromises and thus from abusing its dominant position vis-à-vis Users. The introduction of this or a similar procedure would beyond any doubt improve the position of the Users when negotiating the setting of tariffs, and that was one of the objections of the authors of the Media Strategy. In order to achieve greater objectivity of the expert body and reduce control over it to the minimum, clear criteria for the selection of persons should be prescribed in advance by law, and the procedure for its formation should be transparent and subject to public discussion.

Furthermore, the deadline for payment of collected funds provided for by the LCRR is 31 December of the current year for the amounts collected for the previous year, while the Directive and the Republic of Croatia Act indicate a shorter period of maximum 9 months from the end of the year for which the amounts are paid<sup>52</sup>. According to the solution from the Republic of Croatia Act, in case the Organization cannot pay the funds because the rightholder is unknown, specific amounts are kept in separate accounts of the Organization, while the Organization itself must take all necessary measures to find those rightholders<sup>53</sup>. In the event that after the expiration of the period of 3 years the stated amounts are not distributed to the rightholders, these amounts are deemed non-distributable, and their further use will be decided upon by the General Assembly of the Organization<sup>54</sup>. Also, it is necessary to legally establish certain rules concerning revenue management by the Organization. Namely, the Organization should have a legal obligation to keep its own assets separately in its business registers, on the one hand, and revenues from rights, i.e. revenues generated by investing revenues stemming from rights on the

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51 *Ibid*, Article 162

52 *Supra Note 40*, Chapter 2, Article 13 and *Ibid* 167, paragraph 4

53 *Supra Note 41*, Article 167, paragraphs 5 and 6

54 *Ibid*. 167, paragraphs 7 and 8

other hand, following the example of the Republic of Croatia Act<sup>55</sup>. Also, according to the Republic of Croatia Act, the Organisation cannot use revenues stemming from rights, including revenues acquired by investing revenues from rights, for purposes other than distribution to rightholders, except to cover the costs of collective management<sup>56</sup>. All the aforementioned solutions, as well as deadlines, are prescribed in the interest of rightholders, which is in line with the goal for which the Organizations deal with collective management in the first place, which is to protect the interests of holders of copyright or related rights.

As per the supervision over the work of the Organization, although the LCRR prescribes the possibility and specifics of supervision by the competent authority, it should be regulated in more detail in order to be harmonized with the Directive. Following the instructions from the Directive and the Republic of Croatia Act, planned supervision and unplanned supervision upon the reasoned proposal of the interested party should be separated<sup>57</sup>. Also, what constitutes an important difference compared to the LCRR is a more precise definition of the possibility of adopting appropriate measures by a person conducting the supervision, primarily the decision to rectify identified deficiencies, and later possibly the decision to revoke the license to conduct the activities of collective management of copyright and related rights<sup>58</sup>.

In order to harmonize regulations with the Directive, rightholders should be legally allowed to object to the Organization, for all aspects of the activities performed by the Organization on their behalf, and in particular in terms of membership criteria, powers of attorney issued to the Organisation and their withdrawal, and distribution of the amounts collected<sup>59</sup>. In addition, the Directive refers to the possibility of alternative dispute resolution among the Organization, its members, rightholders or the Users<sup>60</sup>, in addition to the possibility of resolving the dispute before the court

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55 *Ibid.* 165.b, paragraph 2

56 *Ibid.* 165.b, paragraph 3

57 *Ibid.* 170, paragraph 2

58 *Ibid.* 170, Articles 3-5

59 *Supra* Note 40, Chapter 4, Article 33 and *Ibid.* 168.p

60 *Supra* Note 40, Chapter 4, Article 34



in civil proceedings. By providing a procedure to file an objection to the Organization, and enabling an efficient alternative way of dispute resolution, the Republic of Serbia would protect its judiciary to a great extent, which is currently overwhelmed by various proceedings concerning the determination of holders of copyright and related rights. Various internal enactments of the Organization also contributed to that, such as the Rulebook on registration of phonograms and resolution of disputed and duplicated phonograms of the Organization of Phonogram Producers of Serbia - OFPS, which stipulates that when registering phonograms only contracts, invoices and the like are accepted as proof that a certain person is the rightholder of phonogram producers, while previously it was allowed for persons to submit various types of evidence, including statements of other persons<sup>61</sup>. The current situation is not sustainable, considering that a large number of rightholders have been prevented from exercising their rights.

Furthermore, the Organizations should be given the opportunity to entrust to other Organizations certain works of collective management of rights on the basis of a written contract, while the performance of those works may be in the name and for the account of the Organization that entrusted performance of those works or in its own name, but for the account of that Organization<sup>62</sup>. Also, rightholders who have entrusted the Organization to collectively manage their rights should be able to issue licenses to various persons for non-commercial use of those rights, in which case the Organization should make public the clear criteria for issuing such licenses<sup>63</sup>. By transposing these or including similar provisions into the Law, the efficiency of the Organization would be significantly increased. However, the weak points of allowing rightholders to issue licenses for non-commercial use of copyright works or subject matter of protection, even after they have ceded their rights to the Organization for the purpose of collective management, could be the possible legal uncertainty that this could cause, that is, the confusion in which potential users could find themselves in terms of the persons to whom they should apply for a license to use.

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61 Rulebook on registration of phonograms and resolution of disputed and duplicated phonograms, Article 13.

62 *Supra Note 41*, Article 158, paragraph 2

63 *Ibid.* 159, paragraph 2

Finally, current development and advancement of technology can be used to improve the collective management of rights. Namely, there are already software that perform or at least facilitate the performance of collective management of rights by Organizations (e.g. *WIPOCOS* software). The states should encourage organizations, i.e. help and enable them to obtain software solutions that will enable a higher level of transparency, cost reduction and, in general, more efficient work of the Organization, all with the aim of having better protection of the interests of holders of copyright and related rights. However, it is necessary to point out that when choosing this type of software, Organizations must be very careful, since the software will be entrusted with the protection of the interests of other persons, i.e. rightholders.

## INDIVIDUAL EXERCISE

One of the measures prescribed by the Media Strategy is to reduce the number of disputes whose subject matter is to determine copyright infringements regarding the publication of photographs. This goal can be reached in several ways. Attempting to revoke the "original copyright work" status to a photograph, or to take a standpoint in the case law that allows the suspension of economic copyright when it comes to photographs, is certainly not a recommended way to reduce the number of the instigated litigation proceedings, as this would be contrary to legal norms and case law that have been developed for decades on the one hand, and to the interests of the content or photograph producers on the other. However, raising the level of awareness among media workers about the importance of respecting copyright, and reducing to an acceptable level the amount of remunerations that courts adjudicate would significantly relieve, first the courts and then potential defendants in these disputes as well.

Therefore, it would be suitable for as many professional associations of authors and media associations as possible, either independently or under the auspices of the competent authorities, to gather around a single tariff schedule that would precisely define the parameters for categorizing copyright works, assessing their value, and the amount for the damages appropriate for cases of unauthorized use of the copyright work. If such a harmonized enactment existed, authors on the one hand, as well as media publishers on the other, would have clear instructions for calculating and paying fees and there would be no need to initiate unnecessary and expen-

sive court proceedings, the costs of which often exceed the rendered amount for damages.

On the other hand, when it comes to possible amendments to the LCRR that would relate to the individual exercising of copyright, or the status of a photograph or journalistic text as a copyright work, we note that the provisions of the Law are clear and in line with the Berne Convention<sup>64</sup>, and EU directives<sup>65</sup> that regulate this segment of the copyright subject matter. Therefore, the solution should be sought in the application of the law, the case law, i.e. in an attempt to reach the necessary compromises through professional associations, which would in the end certainly result in a higher level of compliance with copyright and a reduction in the number of disputes.

To that end, the competent entities can clearly determine the criteria for categorization of copyright works, according to the manner and purpose for which they were created, according to the time and resources required for their creation and the properties and achievements of their author. Also, it is necessary to break down the proposed amount of damages according to the degree of infringement, which would also result in a much fairer redistribution of remuneration for the damages caused.

For example, photographs used to illustrate texts, taken in the usual environment, without prior preparation and with medium quality equipment, should not have the same market value, and therefore the same criteria for determining the amount of economic damage, as the photographs taken in a photography studio, on a location outside the author's place of residence or with the use of valuable photography equipment. Currently the ULUPUDS (The Applied Artists and Designers Association of Serbia) tariff schedule prescribes a remuneration of EUR 150 for one year of unauthorized use of each photo on the web. Thus, the extent of remuneration for economic damage can range from just a few euros for illustrative photographs of objects and common, everyday motifs, to several hundred Euro in the case of photographs of nudes, portraits where prior permission had to be obtained from the per-

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64 *Supra* Note 13

65 Directive 2004/48/EC on the enforcement of intellectual property rights

son whose image is recorded, or in the case of professional photographs of celebrities taken for special purposes.

On the other hand, it is not fair for the remuneration to be the same for publications on small portals with only a few hundred visits per day, or on pages that are open several thousand times, as in the case of mass exploitation of works on websites with millions of visits. Although there are no clear criteria for determining a visit, this can be done by submitting an excerpt from Google Analytics by the infringer or determining the rank that the internet portal occupies on platforms such as alexa.com, etc.

From all the above, we can conclude that by comparing the existing legal solutions concerning the individual exercise of copyright and related rights in the Republic of Serbia, with the EU solutions governing the same subject matter, specifically Directive 2004/48/EU of the European Parliament and Council, and Directive 2019/790/EU of the European Parliament and Council, it can be concluded that the regulation of individual exercise of copyright and related rights in the Republic of Serbia is harmonized with EU law, so improvement in individual exercise of these rights should not be sought in the amendments to the Law on Copyright and Related Rights, but rather in its consistent application.

## **BRIEF OVERVIEW OF ACTIONS TO BE TAKEN IN ORDER TO IMPROVE THE MANAGEMENT OF COPYRIGHT AND ESTABLISHMENT OF LEGAL CERTAINTY**

Given the above mentioned in sections 2.1. and 2.2, the proposed measures in order to improve individual exercise and collective management can be summarized as follows:

- For the needs of individual exercise of rights - adoption of uniform tariff schedules by a group of renowned professional associations that would serve as a parameter for calculating the amount of remuneration for economic damage due to subjective copyright infringement, on journalistic texts, photographs, videos, for determining the amount of remuneration fairly on the basis of multiple criteria.

- Standardization of case law vis-a-vis the standpoints for determination of infringement and the amount of economic and non-economic damage due to copyright infringement, which would contribute to legal certainty.
- Establishing transparency in the case law, which would make decisions whose subject matter is the determination of copyright infringement and remuneration for damages available to interested parties and other judges.
- Abolition of monopolies in the field of collective management in a way that will allow the work of Independent Entities, following the solutions from the EU, which would contribute to competition on the market and more efficient work of organizations for collective management.
- Implementation of software solutions in the work of organizations for collective management of copyright, thus making the process of reporting used works/phonograms and revenue distribution more efficient, economical and transparent.
- Amending the procedure for adopting the tariff for exercising the right, so that in case the agreement is not reached, the Legislator will prescribe the obligation to determine the final amount of the tariff with the help of arbitration or a group of independent experts. Setting clear and specific rules to determine the way to manage the revenues collected by organizations for collective management, in order to increase the transparency of their work.
- Ensuring supervision over the work of organizations for collective management, especially through empowering supervisory bodies to adopt appropriate measures.

## NEED FOR COMPLIANCE WITH THE PROVISIONS OF THE EU DIRECTIVE 2019/790 ON COPYRIGHT AND RELATED RIGHTS IN THE SINGLE DIGITAL MARKET

EU Directive 2019/790 on copyright and related rights in the digital single market (hereinafter: the Directive) is a regulation from the application of which much is

expected particularly when it comes to the regulation of copyright, and especially a fairer redistribution of revenues thereof, that come from digital distribution and the Internet. Therefore, from the aspect of media outlets and journalistic profession, this is an extremely important regulation, considering that technological progress has greatly influenced journalism and changed it by creating completely new types of media outlets that are becoming the dominant form of media outlet compared to the traditional form.

The adoption of the Directive by the EU Member States on 17 April 2019, formally ended one of the most controversial decision-making processes at the EU level, initiated in September 2016, when the proposal for this directive was submitted to the European Commission. The whole process of negotiations was monitored worldwide<sup>66</sup>, and the biggest dust was raised around two articles - Article 15, which introduces a new right of the press publishers in relation to the use of their publications on the Internet, the so-called hyperlink fee, and Article 17, the so-called article of the discrepancy in the value/setting of filters, which envisages the manner of use of protected content by the content sharing service provider via the Internet and determines the responsibility of the provider of that service. Rightholders in question, i.e. publishers, musicians and their representatives, provided the greatest and most significant support to these controversial Articles. On the other hand, criticism of these Articles was not absent and came from academia, experts and non-governmental organizations dealing with digital rights, and it was so intense in certain cases that civil protests were organized. However, a fact that both sides can agree upon is that the final version of the Directive represents a significant improvement compared to the initial draft text.

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66 <https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal>  
<https://www.eff.org/deeplinks/2018/09/today-europe-lost-internet-now-we-fight-back>  
<http://www.filmdirectors.eu/over-100-authors-professional-organisations-call-in-support-of-the-copyright-directive/>  
<https://www.youtube.com/watch?v=OXIFYE-w4Q0>  
<https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194>  
<https://www.create.ac.uk/blog/2019/03/24/the-copyright-directive-articles-11-and-13-must-go-statement-from-european-academics-in-advance-of-the-plenary-vote-on-26-march-2019/>  
<https://www.youtube.com/watch?v=ZyujNlpxu9k>

The application of the Directive at the EU level started on 7 June 2021, and the Member States are obliged to adapt their legislation to the solutions from this regulation, provided that the rules relating to agreements on licensing and transfer of rights between authors and performers will apply only as of 7 June 2022. Although the deadlines in question do not refer to the Republic of Serbia, it is certain that the implementation of the solution from the Directive into the national legislation should be a priority for our legislator in the medium term. However, it should be noted that, taking into account the quantity and scope of changes, as well as the complexity of implementing the solutions from the Directive in practice, the implementation process should be carried out under the supervision of the professional public and subject to the necessary public discussion.

## WHAT WAS THE INTENTION OF THE DIRECTIVE

The Directive<sup>67</sup> is one of the most extensive acts in the history of copyright at the EU level, given that its text consists of as many as 86 recitals and 32 Articles. It is divided into 5 titles which, in addition to general provisions, include measures to adapt exceptions and limitations to the digital and cross-border environment, measures to improve licensing practices and ensure wider access to content, measures to create a functioning copyright market, and final provisions.<sup>68</sup>

The adoption of such an enactment was inevitable, as there is a need to harmonize the relevant regulations at the EU level with the rapid technological development that has changed the way of creating, producing and exploiting copyright works and related rights. Namely, the Directive was adopted in order to finally solve the problem of legal uncertainty during the digital and cross-border use of protected works, which refers both to the holders of copyright and related rights, and to the users of the subject matter of protection. The provisions of the Directive are designed to strike a balance between the conflicting interests of digital and cross-border market participants. As stated in the text of the Directive, it aims to:

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67 Directive on copyright and related rights in the Digital Single Market <https://eur-lex.europa.eu/legal-content/EN-HR/TXT/?uri=CELEX:32019L0790&from=EN>

68 Milić, D, *Trendovi i sudska praksa u domenu autorskog prava u novinarstvu*, / Trends and case law in the field of copyright in journalism/ IJAS, Belgrade, 2020, p. 15

- regulate the relations between the holders of copyright and related rights, and also the users of their works;
- ensure wide access to content;
- provide fair compensation for its creators;
- recognize the right to profit of the individual, but also to take into account the public interest and the importance that access to content has for the European cultural heritage, and in that sense prescribe exceptions;
- that its provisions create efficient licensing mechanisms, but also equally effective mechanisms for its revocation;
- that its provisions respect the right of the public to be informed, but also recognize the organizational and financial contribution of publishers in the production of news, as well as the importance that the survival of the publishing industry has for the availability of reliable information.

The Directive does not affect existing rules in the EU, except in explicitly stated cases, such as laying down rules on exceptions and limitations concerning copyright and related rights and facilitating licensing, or rules aimed at further securing the market for exploitation of works and other subject matters of protection.

## RULES INTRODUCED BY THE DIRECTIVE

### **A. Adapting exceptions and limitations to the digital and cross-border environment**

In this section, the Directive provides for several exceptions and limitations that Member States must not only provide for in their national legislation, but also ensure that these exceptions remain outside the autonomy of the will of the contracting parties (they must be found in national pieces of legislation as provisions of the coercive regulations that cannot be changed by the agreement of the contracting parties).<sup>69</sup>

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<sup>69</sup> *Ibid.* 16



The first two exceptions relate to the so-called text and data mining, i.e. "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations". Namely, text and data mining is extremely important nowadays for acquiring new knowledge and discovering trends because it represents a new method of discovering the data and their value. Thus, text and data mining is in fact the search for valuable information among a large amount of available data, in order to convert the raw information found in this way into useful one. However, text and data mining can very easily include actions that are under copyright protection, especially concerning databases, and it was therefore necessary to provide for some legitimate exceptions to this protection. Exceptions are provided in the case of text and data mining for scientific purposes in the case of scientific research, as well as in the case of reproduction and extraction of text that can be legally accessed for those purposes. The third exception concerns digital and cross-border teaching, which takes place on a non-commercial basis, with the aim of setting an example in teaching, while leaving the possibility for Member States to freely limit the scope of this provision at the national level. The last exception concerns the preservation of cultural heritage, i.e. the text and data mining for that purpose by the competent institutions.<sup>70</sup>

Although this section is mostly noticed by the public for its positive aspects, critics point out that the exceptions are set very narrow, and that set as such, they will not lead to harmonization of the system of exemptions in the EU, primarily because Member States are left with a lot of liberty to both interpret provisions relating to exemptions and prescribe these exemptions at the national level. Due to all the above, this section has been declared by a part of the public as yet another missed opportunity to provide legal certainty to stakeholders at the EU level.<sup>71</sup>

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<sup>70</sup> *Ibid.*

<sup>71</sup> <https://eua.eu/news/150:eu-copyright-reform-european-parliament-vote-is-a-missed-opportunity-to-bolster-r-i.html>

## **Significance of exceptions for media / freedom of information**

### **B. Improving licensing practices and ensuring wider access to content**

In this part, the Directive is divided into several chapters, the first of which deals with subject matters of the protection that are not available in the market. Namely, this chapter envisages the possibility for representative organizations for collective management of the rights to conclude an agreement with cultural heritage institutions on a non-exclusive license for works that are in the permanent collections of these institutions, all on a non-commercial basis. It is interesting that rightholders are given the opportunity to exclude their works not only from organisations for collective management, but also from this licensing mechanism, both in general and in individual cases. The chapter also provides for an exception related to the right of cultural heritage institutions to make available for non-commercial purposes other works and subject matter of protection that are not available on the market and that they hold in their permanent collections, as well as when there is no organization for the collective management of rights on a certain type of work (which meets the conditions in relation to representativeness or in relation to equal treatment of all rightholders over that type of work). It is also interesting that in the case of this exception, cultural heritage institutions are forced to operate exclusively within the borders of the state in which the institution is based, while in the case of the rule there is no such restriction, and cultural heritage institutions can allow the use of works in any Member States. Finally, in order to comply with this provision, it is envisaged to encourage dialogue between stakeholders, as well as the establishment of a single on-line portal under the competence of the EU Intellectual Property Office.<sup>72</sup>

The next chapter refers to the extended effect of collective licensing, and what is most important is that the conditions that a collective management organization must meet are finally listed exhaustively:

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<sup>72</sup> *Supra* Note 67, Article 10, paragraph 1

- representativeness;
- guarantees of equal treatment of all rightholders and equal licensing conditions;
- option for holders to exclude their works from the licensing mechanism;
- effective information rendering measures.

The third chapter determines the rules for access to audio-visual works on the so-called video-on-demand platforms, as well as for the availability of these works. Namely, the Member States are obliged to appoint authorized intermediaries, i.e. impartial bodies to provide assistance to interested parties in reaching an agreement regarding these works. Compliance with the provision of Chapter III of the Directive is in fact reflected in the provision of an effective mechanism that will further enable stakeholders to, first of all, negotiate and then conclude agreements on audio-visual works located on video-on-demand platforms. Finally, the chapter 4 contains a provision concerning the works of visual art in the public domain. Namely, this chapter refers to the works of visual art whose term of protection has expired, and it states that any material resulting from the reproduction of that work is not subject to copyright or related rights, but is in the public domain as well as the work to which it refers. The only exception mentioned is the situation in which the material created as a consequence of reproduction in itself represents the original, i.e. the author's intellectual creation. It is also interesting that this chapter was not included in the first proposal of the Directive, and it is one of the witnesses of the already mentioned progress of the final text in relation to its first proposal, because the existence of this provision is not only justified but necessary. Namely, the provisions of this chapter are envisaged primarily with the aim of striking the balance between the interests of institutions for the preservation of cultural heritage and the interests of the public to freely access works. This provision beyond any doubt contributes to the promotion of culture and the enrichment of Europe's cultural heritage. Certainly, the second value of this provision is that it really provides a uniform solution and thus brings legal certainty to the flow of works of visual art in the public domain, the reproductions of which will now be free to use in the EU. Therefore, the provisions of this chapter satisfy the interests of both institutions for the

preservation of cultural heritage, on the one hand, and also the public, i.e. the users of this type of work, on the other hand.<sup>73</sup>

This provision is of great importance precisely because of the practice of many countries (Italy, Germany, Sweden, etc.) to protect reproductions of works of visual art and thus render them an exclusive right, which actually means that works are withdrawn from the public domain in this way. The best example of the above is the widespread practice of museums to seek this type of protection for works in their collections (one example is the *Prado* Museum in Spain, which sought copyright protection over a work by an artist who passed away 350 years ago<sup>74</sup>). This provision means that digital reproductions of artistic paintings/sculptures will not be protected either (provided that it should be borne in mind here that sufficiently original works of this kind will still be protected).<sup>75</sup>

### C. Creating a functional market for the trade in subjective copyright

It is within this title that the most controversial Articles of this Directive are found:

#### Article 15:

This Article prescribes the exclusive right of publishers (established in the territory of the EU) to explicitly prohibit/allow the reproduction and making available to the public their online publication in respect of Internet use by information society service providers. It is also envisaged that the provisions establishing this right do not apply to individual users who use these publications privately and non-commercially, as well as that this right does not apply to hyperlinking, use of individual words or very short excerpts from press publications. The publisher's right is limited in time, and the publisher cannot invoke it when the two-year period from the publication has expired. In addition to this restriction, the publisher's right is limited by the right of the author of the publication, who has the right to share in the revenues

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<sup>73</sup> <https://eur-lex.europa.eu/legal-content/EN-HR/TXT/?uri=CELEX:52016PC0593&from=EN>

<sup>74</sup> <https://www.museodelprado.es/en/the-collection/art-work/judith-at-the-banquet-of-holofernes-previouslly/08f69e61-f7c5-43f9-a76d-b24fbdc63681?searchid=83276974-5ac1-9507-a0ec-9f755e87b0f1>

<sup>75</sup> *Supra* Note 68, p. 17

generated by the publisher under this right, and by the right of other users authorized by the author, in case the publisher does not have an exclusive license for the publication.

Among the explanations for the introduction of this provision in the Directive is the need to recognize publishers' organizational and financial contribution to the production of these publications, in order to ensure the sustainability of this profession, and thus the production of reliable information. The provisions of the Directive do not negate the great importance that free access to information has for public debate and the preservation of a modern democratic society. However, the explanation states the fact that in the current society, a large number of market participants build the entire business model on the exploitation of press publications, and on that basis make huge profits, while publishers and authors are left without any remuneration for usage.

It is exactly the provision concerning the remuneration for downloading or "borrowing" Internet publications on the Internet that has sparked the dialogue among publishers, academia, politicians and persons relevant to the Internet sector and the civil sector in general. What is obvious is that the traditional journalistic profession is threatened - every year journalists lose their jobs both nationally and regionally, authors and publishers spend a huge amount of time and money, first in research and then in writing quality newspaper articles, and they fail to adequately charge for their work. One of the problems is the so-called online news collectors who are rarely willing to pay a fee for the use of newspaper articles, but their business model is based on collecting and communicating on their websites news and media coverage of various media outlets and authors, and thus allow users or readers to have access to various news at one place. However, in that way, they negatively affect the media outlets and publishers, that is, cause damage to them since, in that way, the media outlets lose users who are redirected to the websites of online news collectors. Media monitoring services create a similar problem for publishers, i.e. the media outlets, because they also generally do not agree to pay a fee for the use of newspaper and other similar articles.

Also, another relevant problem is the preferences of users who are less and less willing to pay and thus support quality journalism, but turn to information through

social networks or through cheap tabloids as direct competition. Namely, although the relevant public supported the idea to finally place beside the rights of users to wide access to quality and timely information, the interest of persons who produce such content, the question remains whether this provision was the best way to do so. The shortcoming of the provision that critics point out refers to the possibility that tabloids abuse this right and determine the fee for the use of their publications in a minimal amount<sup>76</sup>, or not even determine it at all, which would further lead to even bigger problems and widespread information disruption. This situation, in addition to being a problem for producers of informative publications, would also affect the public, as it would allow tabloids of certain interest groups to achieve even greater visibility, through news containing less verified or unverified information and through biased reporting in favour of these interest groups which they already profit from, and thus completely suppress producers who have determined an adequate fee for the production of quality and verified news, which would also be the "final nail in the coffin" of investigative journalism that would not have enough funds to remain in the race with the tabloids. Also, according to critics, another danger to the survival of journalists and publishers lies in the absolute monopoly that the Google platform has in the market. Namely, in their opinion, Google has at least two ways to abuse this provision of the Directive. First, it may refuse to pay a fee for the use of publications by certain producers if it considers it excessive, and as *Google* controls positioning on Google search, this may result in insufficient visibility of these producers, and thus large financial losses under the very provision that was supposed to generate them profit. This is exactly what happened when some countries tried to include similar provisions at the national level (the example of Germany and publisher *Axel Springer* that restricted access to Google search for their publications due to inability to adequately license their content, resulting in a drop of 40% on Google search and large material losses, as a result of which they were forced to suspend this restriction<sup>77</sup>). Another possibility of abuse, both by the *Google* platform and by other commercial platforms, lies in the exception which is abstractly set, and refers to the use of "single words and very short clips" for which no fee

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<sup>76</sup> <https://juliareda.eu/2018/04/fake-news-link-tax/>

<sup>77</sup> <https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IPIYT20141105>

is due. If countries do not define these terms precisely enough in their respective national regulations or set them too broadly, leaving room for different interpretations, it is this exception that will provide ample room to avoid paying a fee for the use of publications.<sup>78</sup>

Critics of the Directive see in this provision not only a danger for news publishers but also for users, other commercial platforms, and for the very authors of press publications.<sup>79</sup> Namely, it can be dangerous fact for users that commercial platforms are not defined precisely enough, so there is a possibility that this provision of the directive "hits" blogs or *Facebook* pages run by individuals with a large reach, i.e. a large audience. This provision could also mean an end for new commercial platforms that want to engage in media monitoring or online news collection, as they will find it difficult to cover licensing costs of the publisher, providing Google an even stronger position in the market and a complete monopoly while suppressing small entities from the market. As far as the authors are concerned, even if the publishers manage to obtain some share in the profit of the commercial platform, the question arises as to how much of that fee will ultimately belong to the author himself/herself.<sup>80</sup>

### **Article 17:**

This provision applies to providers of content sharing services via the Internet, i.e. to platforms that store copyrighted content for commercial purposes, and then allow their users to upload and share that content while they organize and promote it (e.g. *Facebook*, *Youtube*, *Vimeo* and other).

The Directive imposes an obligation to them to obtain from the authors, whose content they share on their platform, adequate authorisation for sharing activities in order to avoid liability. If, on the other hand, the platforms do not obtain the necessary authorisation from the author, it is prescribed that they are responsible for any unauthorized communication to the public, including making available to the public works protected by copyright and related rights on them.

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78 *Supra* Note 68, p. 18.

79 <https://www.ivir.nl/academics-against-press-publishers-right/>

80 *Supra* Note 68, p. 18

In addition to obtaining author's authorization (e.g. by license), platforms can avoid this liability only if they prove that they:

- have undertaken everything in their power to obtain approval from the author;
- have undertaken everything in their power, in accordance with high sectoral standards of professional care, to make protected works inaccessible;
- after receiving the notification from the author, have acted without delay in order to prevent further access to the protected content, and then have removed it, also without delay.

Content that represents a quote, critique, overview, as well as works of parody, caricature or pastiche is excluded from this provision. The so-called new Internet content sharing service providers whose services are available for less than 3 years, with an annual turnover of less than 3 million and an audience not exceeding 5 million people in one month are also excluded.

It is obvious that this provision is aimed at reducing the discrepancy in the value of the profit generated by authors on the one hand and large platforms on the other. What is stated in the Directive is that large platforms such as *Youtube* have revolutionized the diversity of content and the ease with which it can be accessed today, which is invaluable for the Internet as we know it today. On the other hand, while these platforms indirectly or directly earn huge amounts of money on their business models, it has become very difficult, even almost impossible, for today's content authors to determine whether their works are used and under what conditions. The Directive sees a solution to this problem in the development of a licensing market between copyright and related rights holders and the platforms for sharing their content, which would ensure that in addition to platforms, authors receive appropriate remuneration for the use of their works.<sup>81</sup>

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81 *Supra* Note 67, recital 61



It is this provision that has been subjected to the most intense criticism from the relevant public. First of all, according to critics, this provision would represent the end of the Internet as we know it today and the beginning of the Internet as a means of monitoring and controlling its users, i.e. such a provision would lead to a narrowing of Internet freedom of users.<sup>82</sup> Namely, having in mind the amount of content that moves on large platforms every day, as well as the number of their users, critics point out that the only way to avoid liability set by the Directive is the introduction of advanced technology capable of recognizing and filtering the content protected by copyrights and related rights. From the point of view of non-governmental organizations, such content monitoring represents, to say the least, a violation of the human rights of users.<sup>83</sup> As for smaller platforms, they will be destroyed by this provision, because they are the ones that will not have the means to obtain sufficiently advanced technology for content filtering, and will not be able to meet the requirements of the Directive, which means they will not be able to continue with the performance of their activities. From the point of view of users and the general public, if platforms invest money in new technology, what prevents them from using it for other purposes in the future, such as filtering content that offers a critical assessment of a government? Furthermore, from the point of view of technology only, how advanced must it be in order not to filter the parody/caricature works together with the copyright work to which they refer? According to experts, this would probably block them along with illegal content, possibly allowing for the holders of the right over that content to appeal to the platform, which further raises the question of how it will work and how effective the platform's mechanisms will be. Furthermore, critics of the text of the Directive question whether the insufficiently clear definition of the provisions ("did everything in their power", for example) will be detrimental or in favour of the platforms in certain countries. Namely, the provision set in this way, which will be further interpreted by each state and its courts, will lead to complete legal uncertainty for all interested parties and inconsistency in practice.<sup>84</sup>

Given that there is an obligation to organize a dialogue on the application of Article

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82 <https://fee.org/articles/europes-censorious-new-copyright-directive-is-the-end-of-the-internet-as-we-know-it/>

83 <https://openmedia.org/en/open-letter-57-ngos-ask-deletion-eu-copyright-censorship-filter>

84 *Supra* Note 68, p. 19

17 among stakeholders before the EU Commission, the world public can only wait for the results of these dialogues to see the best practices regarding this provision and all its real consequences.

The final part of this chapter regulates the obligation to pay fair remuneration in connection with exploitation contracts concluded with authors and performers, and this is precisely the issue in which critics see a real discrepancy in value in the world of copyright. What must be provided for in the contracts is a proportionate and appropriate remuneration for authors/ performers, transparency regarding these contracts, mechanisms for their adjustment after changed circumstances and the procedure for alternative dispute resolution arising from these contracts, as well as the right to revoke.<sup>85</sup>

#### **D. Future application and adaptation of the rules stemming from the Directive**

In addition to the implementation of the rules of the Directive, an important issue for our Legislator will be the guidelines for its implementation that are necessary for solutions to be applicable in practice, which will certainly best show whether both provisions have met their goal - to strike a balance between all participants in a market that use works protected by copyright and related rights. Certainly, the existing legal framework will be changed, adapted and harmonized with the needs of practice until an adequate balance and protection of the interests of all participants in this market is established, and time will show how the Directive has contributed to this process.

It is clear that the Directive is not aimed at the average user, although it will have an impact on it to a certain extent, but it is primarily aimed at creating and improving the digital single market at the EU level, which ultimately aims to encourage innovation, creativity and new content in the digital world. It should be noted that the freedom of expression of the average user will not be endangered in this way

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85 <http://copyrightblog.kluweriplaw.com/2019/01/20/unwaivable-equitable-remuneration-rights-for-performers-disruption-or-balancing-of-interests/>

because they will still be able to present their content through social networks and hyperlinks that lead to various websites and posts.

The adoption of such an enactment that regulates this subject matter was imperative, because it is necessary that European regulations keep pace with technological progress. Prior to the adoption of the Directive, the existing enactments regulating this subject matter were not sufficiently focused on the problems of copyright and related rights, or on publishers of press publications. Finally, the aim of such an enactment, through the regulation of the digital market, is to provide legal certainty to holders of copyright and related rights, average Internet users, but also providers of access to content on the Internet.