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SESSION 2 - CULTURAL, SOCIAL AND ECONOMIC ASPECTS OF AUTHOR'S
RIGHTS

LEGAL AND PRACTICAL CHALLENGES IN A COUNTRY IN TRANSITION

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Legal Tradition in Serbia and Montenegro

Conventional obligation for all member countries of *The Paris Union for the Industrial Property Protection* (former Yugoslavia was one of the 11 member states, founders of this Convention in 1883.), was establishing of the national offices for the protection of IPR. In November, 1920, first national office in former Yugoslavia was established, named *Patent Office* (*henceforward*: The Office), dealing particular with the scope of the industrial property rights.

First Law on Copyright was enforced in 1929. (Kingdom of Jugoslavija) and in 1930, Yugoslavia has ratified *Bern Convention for the Protection of Literary and Artistic Works*. From that time on, there were brought up seven laws for the copyright and related rights protection, and current *Law on Copyright and Related Rights* (*henceforward*: CRRL) was enforced in 2005.

From 1995, The Office has involved into its scope of activities, also copyright and related rights, in the following aspects-

- as authorised governing body *for the introducing of the new draft law proposals* in CRR, and in IPR in general;
- as authorised governing body for the *monitoring and supervision of the work of registered CMO, to whom the same body issues the licences* for their work in the form of Decisions;
- as authorised governing body *for running the non-mandatory procedure for depositing of copyright and related rights works*. This procedure is run and closely engaged with the *Decree for Depositing of the Works of Copyright and Related Rights* , from 1999.

Authorised Bodies and Offices in Serbia and Montenegro for Enhancing of the IPR and their Enforcement

- *Intellectual Property Office of State Union of Serbia and Montenegro;*

- *Ministries of Culture, Media and Informations of Republic of Serbia and Republic of Montenegro* (proposals for the Law on Audiovisual Works, and new Law of the Optical Discs Protection);
- *Custom authorities of Serbia and Custom authorities of Montenegro;*
- *Ministry for the Internall Affairs* - specialised units for counterfighting the commercial crimes - pirated goods.
- *Public Prosecutor* - possibility to fill the criminal denunciation for the offences of IPR.
- *Authorised courts (District and Commercial courts)* - Need for further specialisation, specialised courts, specialised judges, or both.
- *Former Federal Inspectorate of Trade* - whose obligations were cancelled by the forming the State Union of SMN, and transferred to the republican Ministires for Tourism, Trade and Services, who have to establis units for inspectional monitoring in the scope of forgery goods (TM infringements) and pirated goods (copyright infringements).

Competences of the State Union of Serbia and Montenegro

On behalf of SMN, following international agreements and treaties in the field of copyright and related rights (IPR), were signed and ratified:

- *Convention Establishing of the World Intellectual Property Organization* (1967), (membership from 01.10. 1973)
- *Berne Convention for the Protection of Literary and Artistic Works* (1886), (membership from 17.06. 1930)
- *Universal Copyright Convention* (1952), (membership from 1966)
- *Convention Relating to the Distribution of Programmed-Carrying Signals Transmitted by Satellite* (1974), (membership from 25.08.1979)

In December 2002, four new Laws on ratification were brought up in the field of copyright and related rights:

- **Rome Convention** (from 1961), *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*;
- **Geneva Convention** (from 1971) - *Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Recordings*;
- **WIPO Copyright Treaty** (from 1996);
- **WIPO Performances and Phonograms Treaty**, (from 1996), all acknowledged in the Federal Parliament in December 16, 2002.

Countries in Transition

First step which was about to be made in each transitional country, was defined as transition from *centrally (state) planned economy to the market economy*.

The vast number of the institutions and bodies in charge, were also with dominant and certain socialistic features, and brotherly speaking, we can say that former socialistic countries in mainly Central and Eastern Europe, all have had an *socialistic IPR approach – and socialist copyright systems*.

Preexisting problems in copyright and related rights systems which were about to be noted and taken care of:

- Remains of the concept of the complete inalienability of rights / denial of appropriate rights to some categories of right holders, such as employers, producers etc/;
- Over - regulation of copyright contracts /having in mind that they are instruments inter vivos between negotiating parties/;
- Over-centralisation of proces of bringing the law Bills;
- Over-collectivisation in the scope of CMO collective management organizations;
- Absence of appropriate and effective mechanism for enforcement of rights;
- Objectives to introduce the market economy conditions and to resolve the legal uncertainty,
- Absence of appropriate and long term cultural policy,
- Fact that there is a lack of the fully conceived and truly complete national organizational system, legislation and infrastructure,

- Lack of the critical level of the public awareness towards the certain exercise of IPR in general and especially copyright and related rights...(R.R, performers, etc.)
- Rapid developments to be caught (Internet, e.commerce, reprography, satellite and cable broadcasting, optical discs technologies, importance of the computer programs, computer-generated works, electronic databases, Technological measures, Digital Rights Management – evolution and impact of digital technologies),
- In connection with previous one, new and sophisticated forms of global piracy (digital piracy and net theft)../

***Law on Copyright and Related Rights of Serbia and Monenegro
(from December 22, 2004, on force on January 1, 2005)***

The necessity for adoption of new Copyright and Related Rights Law arises from several basic circumstances:

- Political conditions for achieving our country's *aspirations towards full integration into international family* (especially joining the EU Stabilization and Association Process as well as becoming a member of World Trade Organization)
- *Signing of several international conventions* (as mentioned above) has imposed an obligation for domestic legislation harmonization with above-mentioned international documents.
- *Significant economical importance of intellectual property* in national and international trade on one hand, and extremely unsatisfactory situation related to copyright protection in our country on the other, impose the need for improving related regulation as it is, among other things, a cause of inadequate protection.
- *Almost seven years long experience in practical application of CRRL* (from 1998), has exposed certain weaknesses of the existing legal provisions, which require some improvements.

New CRRL included FURTHER "compliance" with following international legal sources: Directives of the European Union: Directive on computer programs, Directive on rental and lending, Directive on term of protection, Directive on satellite broadcasting and cable retransmission, Directive on databases, Directive

on information society, Directive on resale right, and World Trade Organization Conventions, in particular with the Agreement on Trade Related Aspects of Intellectual Property Rights) = TRIPS

Novelties in CRRL...

- **Article 139, *THE RIGHT OF THE FIRST PUBLISHER OF A FREE WORK***
- **Article 20, *Right to Affix or Reproduce*** (The author shall have the exclusive right to authorize or prohibit fixation or reproduction of his work in any tangible or intangible, permanent or temporary, direct or indirect manner).
- **Article 24, *The Right to Lend Computer Program***
- **Article 29, *The Right to Public Communication, including the Interactive Communication of the Work to the Public***
- **Article 67, *Copyright contract***, a copyright contract shall include the following: names of contracting parties, title and/or identification of the work of authorship, rights that the subject-matter of licensing or cession, amount of remuneration if any, and the method and terms for its payment, as well as limitations related to content, territory and time, if any.
- **Article 100 - 105, *Duration of Copyright***, Pecuniary rights shall last for the life of an author and 70 years after his/her death.
- **Article 106, *Persons to which the Law Applies***
- **Article 144, *Duration of related rights***, the rights of the first publisher of a free work shall last for 25 years from the date of the first publication or first communication to the public in any other manner.
- **Article 155, *License for CMO***, The operating license shall be issued to an organization that meets the following requirements: ...Has a corporate domicile in state of Serbia or in the state of Montenegro;

- Article 178, if the infringement of a pecuniary right was done intentionally or by gross negligence, the plaintiff may, instead of indemnity for material damage, *claim up to threefold amount of usual remuneration* that would have been paid had the concrete protected subject-matter been used lawfully.
- Article 179, if *the plaintiff's* name is stated on the copy or other form of materialization of the author's work and/or subject-matter of related right, he *will be considered to be the holder of copyright to that work* and/or related right to that subject-matter of protection, until proven otherwise

CMO (Collective management organizations) in Serbia and Montenegro

Under the current CRRL, The Office conducts operations regarding the collective management organizations, monitors their work in SMN, and also maintains the Register of these organizations.

In 2005. following collective management organizations were operational:

- “SOKOJ” - Authors society for the protection of musical authors works, CISAC member, with 55 years of unbreakable tradition in this field;
- “OFPYU” – Society of the phonograms producers, founded in 2002.

FACT is that well functioning CMO system in one country, plays a crucial role in enhancing the certainty of cultural development of each country, with successful results in members receiving reasonable amounts of royalties *in* return for the exercise and utilization of their works...Legal and economic certainty, serve as an economic inspiration and impact on the creators to produce more, and to produce with high quality.

FACT is that many successful CMO also make provisions for a cultural fund within their budget to promote their national values in arts and culture, and also prepare social programs for their members (pension, welfare, insurance schemes).

Solutions in the current CRRI, regarding the CMO's.

Authors' Right to Special Remuneration

Article 38

- (1) The authors of works, which in view of their nature, can be expected to be reproduced for personal non-commercial purposes on sound, picture and text carriers, shall have the right to a remuneration on the basis of import or sale of technical devices and sound, picture and text carriers, which are suitable for such reproduction.
- (2) The joint and several debtors for the remuneration referred to in Paragraph 1 of this Article shall be the producer, importer and seller of the technical device or sound, picture and text carrier.
- (3) In the case of works of authorship that are reproduced by photocopying or by a similar method, besides the right to the remuneration referred to in Paragraph 1 of this Article, the author shall also be entitled to remuneration from the legal entity or individual who provides photocopying services.
- (4) The parties referred to in Paragraph 2 of this Article need not pay remuneration for technical devices or sound, picture and text carriers, if they are intended to be exported.
- (5) Authors may exercise their right to the remuneration referred to in Paragraphs 1 and 3 of this Article only through an organization for the collective exercise of copyright and related rights.

Article 43 (Limitations)

Short excerpts from the disclosed works may be reproduced without the author's permission and without paying remuneration if used for non-commercial purposes in the field of education, examination or scientific research.

Article 45

- (1) Without prejudice to the provisions of Article 180, Paragraph 1, Items 4 and 5 of this Law, any natural person shall have the right to reproduce for personal non-commercial purposes a disclosed work without the author's permission and without paying remuneration.

- (2) The copies referred to in Paragraph 1 of this Article shall not be placed on the market or be used for any other form of public communication of that work.
- (3) The provisions of Paragraph 1 of this Article shall not apply to the following:
 - 1) Recording of the performance, presentation or showing the work;
 - 2) Three-dimensional realization of drawings for works of fine arts;
 - 3) Constructed works of architecture;
 - 4) Construction of a new building after an existing building, which is a work of authorship;
 - 5) Computer programs.
- (4) **The author shall have the right of remuneration in accordance with the provisions of Article 38 of this Law for the use of its work in a manner prescribed by this Article.**

Statutory License

Article 53

- (1) State authorities, educational institutions and public libraries shall have the right to reproduce works without the author's permission **but for remuneration, for educational or scientific research purposes, by means of photocopying or using any other kind of photographic technique or similar technique with the similar results, on a paper or any other similar medium.**
- (2) Provision of Paragraph 1 of this Article shall not apply to sheet music.

Article 155

The operating license shall be issued to an organization that meets the following requirements:

- 1) Has a **corporate domicile in state of Serbia or in the state of Montenegro;**
- 2) Its founders represent the majority of holders of copyrights and/or related rights which are residents or citizens of the state of Serbia or the state of Montenegro, in the field to which the organization's business relates;

- 3) Which, in terms of staff, finances, equipment and organization, is capable to efficiently exercise the rights of domestic and foreign holders of copyrights and/or related rights in the state of Serbia or state of Montenegro, and/or the rights of domestic holders of copyrights and/or related rights abroad in the fields to which its business relates.

Duties of the Organization
Article 167

- (1) In the conduct of the organization's business, **it shall be assumed that organization is authorized to act on behalf of all holders of the copyright and/or related rights with respect to any rights and any kind of subject-matters of protection that are within the scope of its business activity.**
- (2) Any holder of a copyright and/or related right that has not concluded the contract referred to in Article 150 of this Law with the organization may notify the organization of his/her intention to exercise the rights individually.
- (3) The organization shall notify the users of the names of the holders of copyright and/or related rights referred to in Paragraph 2 of this Article.
- (4) **Whit respect to the distribution of remuneration, the organization shall treat the holders of copyright and/or related rights who have not notified the organization of their intention to exercise their rights individually equally to the holders of copyright and related rights who have concluded the contract** referred to in Article 150 of this Law with the organization.

Enforcement of rights – Criminal Code Laws

CRIMINAL CODE LAW OF SERBIA

(In Expecting of the Amendments and New Chapter - Criminal Acts against Intellectual Property)

Providing from 1 up to 8 years of imprisonment for:

- Unauthorized use of Copyright and Related Rights subject matters;
- Placing items into the trade channels and gain economic benefits;

- Perform, conduct these criminal acts in organized manner;
- Possibility to seize and destroy subjects and tools for these criminal acts, in accordance with Law.

CUSTOM CODE LAW OF SERBIA

Chapter VI

Border Measures Regarding the Infringement of IPR

(Articles 240. – 247.)

- Importation, exportation or transit of goods, which infringe IPR, shall not be permitted;-
- The custom authority shall, upon the request of the right holder suspend the customs procedures and withhold suspected goods;-
- Right holder should provide custom authorities upon the original goods, manufacturers, distributions and all assisting information;-
- Custom authority suspends ex officio the custom procedure and has to notify importer, right holder, and authority for IPR protection.

Border measures & IPR protection in Serbia and Montenegro

There was a lack in the legislation regarding the border measures towards the infringement of the IPR rights in our country, until the January 1, 2004.

New chapter VI. stipulates that importation, exportation or transit of goods, which infringe upon the intellectual property rights established by the related legislation and international agreements, shall not be permitted.

The customs authority shall, upon request of the intellectual property right holder, suspend the customs procedures and withhold the goods in case of imported, exported or transited goods suspected to be in violation of the intellectual property rights.

Problems in fully Accomplishing and Enforcement of the Copyright and Related Right Protection in Serbia and Montenegro

- *Lack of the broader public awareness* of IPR in general;

- *Enforcement problems* - The interpretation of the Constitutional Charter of the Union of Serbia and Montenegro led to the Recommendation which stipulates that penal offences are strictly within the jurisdiction of each republic. This means that the relevant norms are to be withdrawn from *lex specialis* federal law, and incorporated in each Republic's Criminal Code Laws;
- *Slow and expensive court proceedings and lack of the specialized courts;*
- Lack of the *education of the users regarding their obligations to pay the remunerations for the each form of using of the collective managements represented materials;*
- *Global piracy problem with local impact* (especially the fact of easy, speed, high quality of copying of digitized works and recordings, Internet as the market place, etc).FACT that local market is overloaded with counterfeiting and piracy goods, and necessity to establish system of the legal protection of IPR rights in EVERYDAY LIFE
- *Application of Internet treaties* in course of clarification of certain existing provisions which are to be applied in new environment, some new norms which are to be applied in new environment, and new obligations as the possibility for Contracting Parties to provide them in national legislation (granting the adequate legal protection and effective remedies towards circumvention of technological protection measures against the unauthorised removal or alteration of R.M.I), etc.
- FACT *that implementation process* is no less important than legislative activities, sometimes more difficult than passing the law, as a current problem in all countries in transition,
- *Right balance between the new challenges and flexible law solutions...*well-balanced policy, flexible licensing models, fully establishment of the CMO systems schemes guaranteeing the certainty of investments and control for owners of rights, better balance in guaranteeing various and fundamental social values and principles, etc.

Final Remarks

State Union of Serbia and Montenegro has just introduced all new IPR *lex specialis* laws, which are in further compliance with the *TRIPS Agreement* and *EU Directives*.

Still, there is a need for introducing an improved Criminal Code Law, Law on the Optical Disc Protection, new law on Audiovisual Works, etc.

Also, we are about to fill the gaps in scope of CMO, regarding R.R, P.L.R, performers right, etc.

Thus further means, that mentioned tasks are necessary for the purposes of the irreversible process of fully interfering of SMN into the international community.

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THANK YOU FOR YOUR ATTENTION!

HAPPY ANNIVERSARY KOPINOR