INTRODUCTION TO COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

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I. BACKGROUND

1. The experience of recent years has increasingly confirmed that the individual exercise of rights is impractical; there are cases in which users need rapid access to a vast mass of works. Collective management is an essential tool for the efficient exercise of rights; collective management societies therefore play an important and very useful role, both for authors/creators and for users. This is definitely why they have experienced considerable development in parallel to the increased use of works made possible by new technology. The importance and usefulness of collective management is such that many national legislators have taken that aspect into account in the drafting of laws.

2. With the ever more widespread application of digital technology, including the advent of multimedia productions and the use of digital networks like the Internet, the conditions, the exercise and the management of rights are facing new challenges. New technological solutions (encryption technology, digital identification numbers, rights management information systems, etc.) have been worked out in response to those challenges, and are still being developed. The freedom of owners of rights to choose between individual and collective management of their rights and among various possible forms of collective management ("traditional" collective management, "clearing houses," "one-stop-shop" systems, etc.) seems to have grown. New methods of licensing and monitoring use and collecting and distributing remuneration have been introduced. It should be mentioned that the International Bureau of WIPO convened the WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology to consider and examine those new developments; the Forum took place in Seville, Spain, from May 14 to 16, 1997.

3. The collective management of copyright and related rights has acquired an additional dimension. New data and new challenges will be put in the hands of authors' societies of developing countries, which tomorrow will be confronted with the same wave of new technologies as the authors' societies of more advanced and industrialized countries are facing today. Strategic developments are already taking place to enable collective management organizations to offer effective protection and management of rights to the owners of rights in the electronic commerce environment. Technical machinery embodying the latest in digital technology is being developed to form the infrastructure for electronic copyright management. Some non-governmental organizations are already working very hard on the establishment of a new global system for managing information about works, creators and owners of rights. The collective management of copyright and related rights in developing countries is set to benefit from these emerging technical applications of digital technology.

4. Information management systems are raising questions of adaptation of the present basic structure of collective management, if there is one. The problem is different when there is no existing structure, as it is directly concerned with policy decisions on the creation of such a structure on an appropriate legal and administrative foundation.

5. Another important development has to do with the new subject matter introduced with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement). The TRIPS Agreement contains general provisions whereby Members should comply with Article 1 to 21 of the Berne Convention (with the exception of Article 6*bis*) and the Appendix to it, as well as affording the specific protection provided by the TRIPS Agreement itself. By acceding to the TRIPS Agreement, Members undertake to give effect to the provisions of the Agreement. That means granting the minimum protection provided for in the substantive provisions of the Berne Convention and also complying with the specific provisions on copyright and related rights of the TRIPS Agreement.

6. It follows from the above that certain rights that will be introduced by national legislation (such as the right of representation or the right of broadcasting) would for all practical purposes remain meaningless and ineffectual if a collective management system were not properly put in place in such countries for their exercise. It is most likely therefore that, in the very near future, national legislators and policy makers will be confronted with the practicalities of the exercise of the rights by means of collective management.

7. While many developing countries have already taken steps towards the legal implementation of the TRIPS Agreement, it is clear that work remains to be done on the collective management of copyright and related rights. Governments may have been aware of the importance of this area of concern, but it has not always been possible, at least for some of them, to put in hand specific action to build up or develop the proper copyright infrastructure desired by national creators. Certain countries have had to give priority to other areas of activity on account of economic constraints; others have had to deal with the legal adjustments required by the TRIPS Agreement in order to meet the obligations under it by the current year 2000 deadline; still others are not yet ready to tackle the issue for a variety of reasons, especially the least developed countries (LDCs).

8. What is more, the development of an intellectual property culture in an LDC needs to be assiduously and deliberately promoted in order to encourage innovative and inventive activity linked to market needs and help establish and modernize intellectual property infrastructures and management, both private and public, attuning them more and more to the changes that are taking place internationally. Much more awareness-building on the social-economic impact of strong intellectual property systems is essential. Here it is in the interest of authors, composers of music and creators of literary and artistic works and also performers from LDCs to set up collective management organizations, which will help them by collecting and distributing the royalties due to them. New and improved copyright legislation in LDCs should include provisions on the establishment of such organizations.

9. In the framework of previous WIPO programs, the questions of collective management were, as a rule, only discussed as one of the aspects of more general themes (such as new uses, problems relating to different categories of works, model provisions of a more global nature, etc.). When, on the other hand, collective management itself was the central theme, the contributions by various experts only dealt with certain particular aspects of that theme, and no real synthesis was made.

10. The purpose of the present document is that collective management, as a typical way of exercising copyright and related rights, is discussed in a comprehensive manner covering all basic questions of the structure and operations of management of such rights. In this context, the main characteristics of collective management of rights are considered important which are relevant from the viewpoint of two fundamental questions, namely:

– what are the necessary elements and conditions of an appropriate and effective collective management system?

– what conditions should be met so that such a system be compatible with the international obligations of the countries where such systems exist, particularly with the minimum provisions and the principle of national treatment of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: "the Berne Convention") and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter: "the Rome Convention")?

11. The present document is based on the Report on Collective Management of Copyright and Related Rights prepared by the International Bureau of the World Intellectual Property Organization (WIPO) for a Group of Consultants convened, in March 1990, to consider what advice should be given to governments in respect of the collective management of certain rights in the field of copyright.* In preparing that report, a great amount of information received from various international non-governmental organizations and from collective management organizations has been used. The basis of that report was, however, much broader than the information made available by international non-governmental organizations.

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* This document takes into account a study whose author was Dr. Mihály Ficsor, former Assistant Director General, WIPO.

II. THE NOTION OF COLLECTIVE MANAGEMENT AND THE ROLE OF SUCH MANAGEMENT IN THE EXERCISE OF COPYRIGHT AND RELATED RIGHTS

12. The exclusive right of the author to exploit his work or authorize others to do so is the basic element of copyright and such a right, where recognized, is also important for the beneficiaries of the so-called neighboring or related rights (an expression used for the sake of brevity, traditionally covering the rights of performers, producers of phonograms and broadcasting organizations, but in a wider meaning also other rights, such as the rights of publishers in the typographical arrangement of their books).

13. It is essential to note that the substance of such an exclusive right is not merely of a negative nature; that is, its purpose is not just that, on the basis of it, the owner of the right can exclude others from the exploitation of the work (or the production protected by related rights; hereinafter, when reference is made to "works," that reference includes such productions, where applicable). He can, of course, do so but the real value of such a right is that, by means of it, it can be guaranteed that works are exploited in a way that corresponds to the intentions and interests of the owner of the right.

14. An exclusive right can be enjoyed, to the fullest extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the dissemination of his work, he can personally take decisions on the economic conditions of its exploitation and he can also closely monitor whether his moral and economic rights are duly respected.

15. As early as at the time of the establishment of the international copyright system, there were, however, certain rights—first of all, the right of public performance of non-dramatic musical works—that could, only with difficulty, be exercised individually, and since then, with the ever newer waves of new technologies, the field in which individual exercise of rights is impossible or, at least, impractical, has been constantly and rapidly widened. There are ever more cases where individual owners of rights are unable to control the use of their works, negotiate with users and collect remuneration from them.

16. In such cases, the idea emerges, time and again, that, if the exclusive rights concerned cannot be exercised in the traditional, individual way, they should be abolished or reduced to a mere right to remuneration. It is not, however, justified to claim that, if a right cannot be exercised in a way in which it has been traditionally exercised, it should be eliminated or considerably restricted.

17. The reason why, in a number of cases, copyright and related rights cannot be exercised by individual owners of rights is that the works concerned are used by a great number of users. Individuals, in general, do not have the capacity to monitor all those uses, to negotiate with users and to collect remuneration. In such a situation, there is no reason for drawing the conclusion that a non-voluntary license system is needed. There is a much more appropriate option, namely the collective management of exclusive rights.

18. In the framework of a collective management system, owners of rights authorize collective management organizations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licenses against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights. This can be considered as the definition of collective management.

19. It cannot be denied that, with such collective management, the control by the owners of rights over certain elements of exercising their rights becomes more or less indirect, but, if the collective management system functions appropriately, those rights will still preserve their exclusive nature and—although through collective channels—they can prevail in the fullest manner possible under the present circumstances.

20. Although a collective management system serves primarily the interests of owners of copyright and related rights, such a system also offers advantages to users who, thus, can have access to the works needed

by them in a simple manner, and—because collective management decreases the costs of negotiations with users, of monitoring uses and of collecting fees—fairly cheaply.

21. In paragraph 18 above, the elements of a fully developed collective management system are outlined. There are certain cases, however, where the owners of rights do not authorize the collective management organization to undertake all the functions mentioned there, but only some of them (e.g., the authors of dramatic works, as a rule, directly negotiate and conclude contracts with theaters, in the framework of which their remuneration is also fixed, and they only entrust the collective management organization with collecting the remuneration and transferring it to them).

22. There is a form of partial collective management schemes which needs special consideration, namely the case of non-voluntary licenses where the reason why the management chain is not full is that the rights themselves which are administered are not full; that is, they are not exclusive rights but mere rights to remuneration. Although collective management is considered the most appropriate alternative to avoid non-voluntary licenses, collective management organizations may—and in many cases do—play an important role, also when such licenses are inevitable (even if it is not the collective management organization which gives licenses, it may negotiate fees and, in general, it collects and, when appropriate, distributes those fees).

III. THE MAIN FIELDS AND TYPICAL FORMS OF COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

A. Introductory remarks

23. The first authors' societies that were more than mere professional associations of authors and also fought for the recognition of authors' rights in their works were established in France.

24. The foundation of the very first society of this type was closely linked to the name of Beaumarchais. He led the legal battles against theaters which were reluctant to recognize and respect authors' economic and moral rights. Those victorious battles led, on his initiative, to the foundation of the *Bureau de législation dramatique* in 1777, which was later transformed into the *Société des auteurs et compositeurs dramatiques* (SACD), the first society dealing with the collective management of authors' rights.

25. Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French writers followed suit in the field of literature more than half a century later when they constituted the *Société des gens de lettres* (SGDL) whose general assembly met, for the first time, at the end of 1837.

26. However, the events leading to a fully developed collective management started only in 1847 when two composers, Paul Henrion and Victor Parizot and a writer, Ernest Bourget, supported by their publisher, brought a lawsuit against "Ambassadeurs," a "café-concert" in the Avenue des Champs-Elysées in Paris. They saw a flagrant contradiction in the fact that they had to pay for their seats and meals in the "Ambassadeurs," whereas nobody had the intention of paying for their works performed by the orchestra. They took the brave—and logical—decision that they would not pay as long as they were not paid as well. In the litigation, the authors won; the owner of the "Ambassadeurs" was obliged to pay a substantial amount of fees. Enormous new possibilities were opened for composers and text-writers of non-dramatic musical works by that court decision. It was clear, however, that they would not be able to control and enforce their newly identified rights individually. That realization led to the foundation of a collecting agency in 1850, which was soon replaced by the still functioning "*Société des auteurs, compositeurs et éditeurs de musique*" (SACEM).

27. At the end of the last century and during the first decades of this one, similar authors' organizations (so-called performing rights societies) were formed in nearly all European countries and in some other

countries as well. Cooperation developed rapidly among those organizations and they felt a need for an international body to coordinate their activities and contribute to a more efficient protection of authors' rights throughout the world. It was in June 1926 that the delegates from 18 societies set up the International Confederation of Societies of Authors and Composers (CISAC). The membership of CISAC has been constantly widening since then and now also includes, in addition to the more traditional ones, societies dealing with other types of works (such as works of fine art and audiovisual works).

28. Authors' societies may be set up with different objectives; however, the most fundamental one—the very *raison d'être* of such organizations—is the collective management of authors' rights. This is also reflected in the Statutes of CISAC. Under Article 5 of the Statutes, only societies administering authors' rights may be admitted to CISAC as ordinary members.

29. By a society administering authors' rights, is to be understood, according to the same Article of the Statutes of CISAC, an organization which

> "(i) has as its aim, and effectively ensures, the advancement of the moral interests of authors and the defense of their material interests; and
>
> "(ii) has at its disposal effective machinery for the collection and distribution of copyright royalties and assumes full responsibility for the operations attaching to the management of the rights entrusted to it"; and
>
> "(iii) does not, except as an ancillary activity, administer also the rights of performers, phonogram producers, broadcasting organizations or other holders of rights."

30. An organization which fulfills only the first or only the second of the above-mentioned conditions can be admitted only as an associate member of CISAC. It is generally the second condition that certain authors' organizations are unable to meet.

31. The expression "authors' societies" is used traditionally not only when real societies fulfill those basic functions, but also in cases where, for example, public or semi-public organizations do the same.

32. Later—with the new technological developments which led to the birth of new categories of creations and to new ways of using protected works, as well as to the recognition of certain related rights—new types of collective management organizations were formed and they established new international non-governmental organizations. This does not, however, change the fact that the activities of the performing rights societies still represent the fullest system of collective management of rights (whose methods are often followed by collective management organizations also in other fields). It is, therefore, not only for historical reasons that, in the present report, the description of the various fields of collective management starts with the presentation of the collective management of "performing rights" in the so-called "small rights" musical works.

B. Collective management of "performing rights" in "small rights" musical works

33. The first full collective management systems, as mentioned above, were established for the management of certain rights in certain categories of musical works. The musical works concerned were the so-called "small rights" works and the rights involved were the so-called "small rights" or, in other words, the so-called "performing rights."

34. "Small rights" musical works are those which as a rule, are administered collectively, and "grand rights" musical works are those which, as a rule, are administered—or, at least whose use is licensed—individually. The latter category consists, practically, of dramatico-musical works. The use of such works takes place in a relatively small range of locations; thus, direct licensing by authors is feasible both practically and economically. Non-dramatic musical works, on the other hand, are used much more

frequently and at a much greater number of places; that is why their use cannot, from a practical point of view, be administered individually. The delimitation of those categories is, however, more complex than just stating that non-dramatic musical works are "small rights" works and dramatico-musical works are "grand rights" works. Although this is basically true, there are some borderline questions in respect of which some further clarification, and—in the authorization given to collective management organizations by authors, as well as in the reciprocal representation contracts between such organizations—some further precisions are necessary. E.g., the non-dramatic performances of certain autonomous parts (such as arias and songs) of dramatico-musical works are considered "small rights" performances; on the other hand, the questions of how and under what conditions "small rights" non-dramatic musical works can become parts of "grand rights" works—or form together, in a compilation, such works—raise a number of delicate legal problems. (It should be added that, although the traditional "small rights"-"grand rights" classification is still generally accepted, it may lose its significance within the widening of the scope of rights collectively administered.)

35. At the time of the establishment of the first musical performing rights societies, "performing right" simply meant the right to perform a work by performing artists in the presence of an audience. Since then, however, the notion of "performing rights" administered by such societies has become much broader. The CISAC "Model Contract of Reciprocal Representation between Public Performance Rights Societies" (hereinafter referred to as the "CISAC Model Contract"), e.g., contains the following definition: "Under the terms of the present contract, the expression 'public performances' includes all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. 'Public performance' includes, in particular, performances provided by live means, instrumental or vocal; by mechanical means such as phonographic records, wires, tapes and sound tracks (magnetic and otherwise); by processes of projection (sound film), of diffusion and transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted, etc.) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc., and similar means and devices, etc.,)."

36. As the above-quoted definition also reflects, the notion of "performing rights" is much wider now than it was when the performing rights societies started operating. Such rights include, in addition to the right of public performance, also the right of broadcasting and the right of communication to the public in general (through cable, loudspeakers, etc.).

37. It should be added to the notions described above, that the adjectives "small" and "grand," in the expressions "small rights" and "grand rights," do not necessarily indicate the economic importance of the rights involved. In many countries, the amounts collected on the basis of "small rights" are much bigger than those collected on the basis of "grand rights." Those adjectives only reflect the historical fact that "grand rights" had already been exercised when "small rights" were recognized and, through collective management organizations, enforced in practice, and, initially, the category of "grand rights" was considered much more important.

38. Performing rights organizations are, in general, societies of authors (in addition to the already mentioned SACEM in France, e.g., the American Society of Composers, Authors and Publishers (ASCAP) in the United States of America, the Performing Right Society Limited (PRS) in the United Kingdom, the Musical Performing and Mechanical Reproduction Rights Society (GEMA) in Germany, the Italian Society of Authors and Publishers (SIAE) in Italy, the General Society of Authors in Spain (SGAE), the Swiss Society for Authors' Rights in Musical Works (SUISA) in Switzerland, the Argentine Society of Authors and Music Composers (SADAIC) in Argentina, etc.). The status of those societies differs in various respects, e.g., in respect of the form and extent of government supervision; in respect of whether they administer exclusively performing rights (such as SACEM, PRS) or also administer so-called mechanical rights (such as GEMA, SUISA) or they are general societies of authors administering the rights in practically all categories of works (such as SIAE, SGAE); in respect of whether they are the only

collective organizations to deal with performing rights (which is the case, in general) or there are more such organizations in this field (e.g., in the United States of America where there are three such organizations: ASCAP, the Broadcast Music, Inc. (BMI) and SESAC).

39. In certain countries, there are private bodies administering performing rights other than societies of authors (e.g. BMI, in the United States of America which is a corporation founded by broadcasting organizations).

40. Still in other countries—namely in some Eastern European countries and in a number of developing countries, mainly in Africa—public or semi-public copyright organizations administer performing rights—along with other rights in practically all categories of works—(e.g. the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS) in Hungary, the Bulgarian Copyright Agency (JUSAUTOR) in Bulgaria, the National Office of Copyright (ONDA) in Algeria, the Moroccan Copyright Bureau (BMDA) in Morocco, the Senegalese Copyright Office (BSDA) in Senegal, the Copyright Society of Cameroon (SOCADRA), etc.).

41. Although it is in the field of musical performing rights where the network of collective management organizations is the most developed one, there are still a number of countries where no such organizations exist or, even if they exist in principle, they do not function in practice.

42. As a rule, composers and text-writers transfer their "performing rights" to the collective management organization either for a certain period, or, and that is more frequent, without time limit, and this transfer also covers future works. The transfer is made on the basis of the conditions laid down in the statutes and regulations of the organization which the authors either explicitly or implicitly accept when they join the organization. Generally, the organization is in an exclusive position to license the use of the works included in its repertoire; the authors themselves cannot, in general, exercise their performing rights thus transferred. There are, however, certain countries—mainly those where anti-trust legislation is applied also in respect of collective management organizations—where the possibility of individual licensing is maintained for authors. It is also in those countries that sometimes the minimum period of transfer of rights is restricted to a certain number of years (three to five).

43. In still other countries, collective management organizations do not have membership but only act as representatives of the composers and text-writers whose performing rights they administer. That is the case, *inter alia*, in countries where public or semi-public organizations administer such rights.

44. Irrespective of the legal basis of the collective management of performing rights, the repertoire of a collective management organization is, as a rule, at the outset, a national repertoire, which, in itself, is not sufficient to license globally the use of protected musical works. An authorization to administer foreign performing rights is, however, obtained by means of bilateral agreements with the performing rights organizations of other countries. Thus, all national organizations can license the use of, practically, the entire world music repertoire.

45. Bilateral agreements are based on the CISAC Model Contract. Under Article 3(I) of that Model Contract, "each of the contracting parties undertakes to enforce, within the territory in which it operates, the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the limits of the legal protection afforded to a foreign work in the country where protection is claimed, unless, in virtue of the present contract, such protection not being specifically provided in law, it is possible to ensure an equivalent protection. Moreover, the contracting parties undertake to uphold to the greatest possible extent, by way of the appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity, as between the members of both Societies, even where, by the effect of local law, foreign works are subject to discrimination. In particular, each Society shall apply to works in the repertoire of the other Society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire."

46. The main instrument of licensing "small rights" performances and broadcasts is the blanket license which, as a rule, authorizes users to use any musical works from the world repertoire for the purposes, and within the period, indicated in the license. The transfer of rights in the national repertoire—or the authorization on some other legal basis to represent those rights—and the network of bilateral agreements enable national organizations to grant such global licenses. There could, however, be some exceptional cases where certain protected works still do not belong to the repertoire administered by the organization. In such cases, various legal techniques exist and can guarantee the operation of the blanket license system without creating legal insecurity for users and without unreasonably restricting the rights of the authors concerned.

47. In certain countries—mainly in those where this follows as an obligation from the application of anti-trust laws—performing rights organizations also offer licenses other than blanket licenses; e.g. "per program licenses" which are, as their name indicates, licenses for particular programs. Furthermore, users may elect to operate outside the collective management scheme and try to obtain direct licenses from authors. It shows the obvious advantages of blanket licenses that, even if the above-mentioned other licensing forms are available, users, in general, do not make use of them and keep choosing blanket licenses.

48. Normally, tariffs and other conditions of licenses are negotiated with associations of users. The effect of the negotiated agreements depends on the extent to which the association of users may legally bind its members. If the agreement concluded by the association binds its members, the tariffs and conditions agreed upon are directly applicable; otherwise the agreement is considered as a model contract which, in certain cases and in certain respects, may be set aside. There may be users that are not members of the association and, thus, individual negotiations may be needed with them. If the collective management organization has a global agreement with the association of users to the category to which such "dissident users" belong, that global agreement has, at least, an indirect influence when the tariffs and other conditions are set in separate agreements. There are, however, certain important users, e.g., national broadcasting organizations, in the case of which not only individual negotiations take place but also individual tariffs and conditions are applied.

49. In the majority of cases, there is some kind of State control on the licensing practice of performing rights organizations. It is relatively rare that it is only normal civil courts which deal with disputes that may emerge between such organizations and users. Although there are some intermediary forms, two basic means of government control may be distinguished: The first is a kind of government approval of contractual agreements and the second is the functioning of special tribunals to deal with conflicts between collective management organizations and users. In certain cases, such a control may be considered as a guarantee against possible abuses of the *de facto* monopoly position of collective management organizations, but fairly frequently it goes further and may involve regular and active interference in the licensing practice and tariff system of the collective management organization.

50. The distribution of royalties is based on two main elements. The first one is an appropriate documentation system and the other is the data on the actual use of works.

51. One of the most important purposes of the technical cooperation between CISAC member organizations is the standardization of the "international fiches" and other forms of information to be regularly exchanged between member organizations. What is involved is an enormous amount of data the handling of which may become a heavy burden, first of all to small societies. It should also be taken into account that the majority of such data belongs to the so-called "sleeping repertoire," that is, to works that are not actually used. Several attempts have been made to try and simplify documentation exchange and rely on electronic data processing. For this purpose, certain narrower but much more practical lists of works and of right owners have been prepared and are regularly up-dated and made available through an electronic support system, such as the CAE (the list of copyright owners (composers, authors and publishers) showing their membership in various societies), the WWL (the worldwide list of the most

frequently used works), the WID (the musical Works Information Database) and the IPI (the Interested Party Information) respectively administered by ASCAP and SUISA.

52. While the documentation of the world music repertoire is, in general, sufficient, or even disturbingly abundant, the collecting of data on the actual use of works raises just the opposite problem for collective management organizations; namely, it is fairly hard to get those data.

53. The ideal solution would be to obtain all the data concerning all performances of all works and to distribute the royalties accordingly. This is, however, impossible, or, at least, not feasible. While, in certain cases (such as television and radio programs, concerts etc.), it is relatively simple to collect full information on programs, in other cases, it is only theoretically possible. For instance, in the case of performances in hotels, dance halls, bars, discotheques, etc., either the users would have to be burdened with the obligation to follow all the performances by orchestras, "disc jockeys," juke boxes, etc., and to prepare precise records with all the data necessary for the collective management organization, or the collective management organization would have to employ inspectors to do the same job. The first solution cannot be realistically proposed as a general one; users may—and should—be responsible for making available all the data they have, but could hardly be obliged to do such intensive and time-consuming work. The other solution would need the employment of a sufficient number of inspectors to follow and note all details of all musical programs and would involve such high costs that, although all the data might be ready for a perfect distribution, practically no money would remain to be distributed (not to mention the further costs that would arise from the processing of the great amount of data).

54. For the reasons mentioned above, performing rights organizations have to strike an appropriate balance between two conflicting interests, namely the interest of creating a reliable basis for the distribution of royalties, and the interest of avoiding costs as a result of which the amount to be distributed would be unreasonably decreased. As a consequence, an element of "rough justice," more or less, but necessarily, appears in the distribution system.

55. As a rule, performing rights societies obtain full information on programs from broadcasting organizations (sometimes, mainly if there is a great number of such organizations in the country, only from the major ones) and in respect of concerts and recitals of "classical" music and of certain other live concerts and events. Otherwise, in general, a sampling system is applied. The sampling methods of certain organizations are fairly thorough; e.g., the inspectors of the organization visit practically all the places (restaurants, music halls, bars, etc.) regularly where music is used and collect information on programs containing the list of musical works performed. Other organizations apply a much more selective sampling system; only a relatively small amount of information is obtained which is considered to reflect the structure of the use of works by a specific category of users. Still in other cases, practically no information is collected from certain categories of users (but the royalties paid by such users are distributed by reference to repertoire information furnished by selected professional organizations or on the basis of, e.g. sales charts, top lists and radio logs).

56. It goes without saying that, through the sampling system, performing rights societies may influence the distribution of royalties in favor of certain categories of works and, consequently, to the detriment of others. They may, for instance, collect programs to a fuller extent and more frequently from users who use more works belonging to the national repertoire than from other users who mainly use foreign works. Such "protectionist" sampling systems are, however, in conflict with the principle included in Article 7(I) of the CISAC Model Contract which reads as follows: "Each Society undertakes to do its utmost to obtain programs of all public performances which take place in its territories and to use these programs as the effective basis for the distribution of the total net royalties collected for those performances."

57. The CISAC Model Contract contains a strict regulation concerning deductions from the royalties for purposes other than distribution. Its Article 8 provides as follows: "Each Society shall be entitled to deduct from the sums it collects on behalf of the other Society the percentage necessary to cover its effective management expenses. This necessary percentage shall not exceed that which is deducted for this purpose from sums collected for members of the distributing Society, and the latter Society shall always

endeavor in this respect to keep within reasonable limits, having regard to local conditions in the territories in which it operates.... When it does not make any supplementary collection for the purpose of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favor of any funds serving similar purposes, each of the Societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting Society 10% at the maximum, which shall be allocated to the said purposes."

58. The administrative costs of the performing rights organizations are, in general, around 20-30% of the amount of royalties collected. There are, however, certain societies which keep their costs below 20%, and there are still others which are more expensive: they use more than 30% of the royalties for covering their costs. However, the percentage of the administrative costs cannot be regarded in itself higher than justified or lower than a standard level; much depends on the intensity and the precision of the activities of the organization. The operations of some organizations are fairly simplified and what they do for the owners of the rights administered by them is only a very rough justice, if any, while the collection and distribution system of other organizations is much more thorough, which really guarantees that the right owners receive royalties in proportion to the actual use of their works.

59. The majority of organizations make use of the possibility of deducting not more than 10% from all royalties collected for cultural and social purposes. In certain cases, the percentage of the deduction is only 2, 3 or 5% but it is more frequently 10%. The amounts thus deducted are used partly for health insurance and pension funds of national authors and partly for the promotion of national contemporary music (bonus payments for outstanding creative activity, prizes, fellowships, etc.).

60. The distribution rules of the performing rights organizations are fairly complex. Those rules generally include an elaborated point system to reflect the relative importance of the works and performances. It is quite understandable—and accepted by all interested parties—that the number of points express, *inter alia*, the length of the work. The point system, however, also contains differences on certain less objective bases in respect of which an aesthetic evaluation may play a decisive role. It is, e.g., fairly general that "serious" works receive many more points than "recreational" works of the same length.

61. It goes without saying that whatever point system is applied by a collective management organization, the organization is obliged to use exactly the same system in respect of the members of its sister organizations as in respect of its own members. This principle is, in general, respected. It is another matter, however, that the percentage of the royalties distributed to nationals, on the one hand, and to foreigners, on the other, may still be influenced through the point system (e.g. by means of "allocating" more points to the categories of works (e.g. to folklore-related works) where there are more works created by the members of the organization than in other categories).

62. Finally, the value of the royalties distributed also depends on the frequency of distribution and on the promptness of transferring the amounts due to authors and to sister organizations. Article 9(I) of the CISAC Model Contract contains the basic provision in this respect. It reads as follows: "Each of the contracting Societies shall distribute to the other the sums due under the terms of the present contract as and when distributions are made to its own members, and at least once a year." The CISAC Model Contract also contains detailed provisions on possible sanctions against debtor societies that do not respect the above-quoted provision. In general, that provision is respected, but not by all societies.

C. Collective management of "mechanical rights"

63. The expression "mechanical right" is generally understood as being the author's right to authorize the reproduction of his work in the form of recordings (phonograms or audiovisual fixations) produced "mechanically" in the widest sense of the word, including electro-acoustic and electronic procedures. The most typical and economically most important "mechanical right" is the right of the composers of musical works—and the authors of accompanying words—to authorize the sound recording of such works.

64. As mentioned in paragraph 38, above, certain collective management organizations administering musical performing rights also administer so-called "mechanical rights" in musical works. In other countries, separate organizations have been set up for the management of "mechanical rights," e.g., the Society for the Collection of Mechanical Rights for Musical Works (AUSTRO-MECHANA) in Austria, the Society for the Management of the Mechanical Reproduction Rights of Authors, Composers and Music Publishers (SDRM) in France, the Mechanical Copyright Protection Society Limited (MCPS) in the United Kingdom, the Nordisk Copyright Bureau (NCB) for the Nordic countries and AMRA in the United States of America which are societies administering the rights of both the authors and music publishers, and the Harry Fox Agency in the United States of America which is the agent of musical publishers. Those separate organizations cooperate very closely with the musical performing rights organizations.

65. The legal status and structure of mechanical rights organizations as well as the way in which they obtain the right to license the national and international repertoires are similar to what is described above in respect of performing rights societies, and there are also a number of similar features in the methods and techniques used in the management of those two groups of organizations. At the same time, there are some significant differences, too.

66. One difference follows from the provisions of the Berne Convention itself. While, in the case of the so-called "performing rights," it is only in respect of one category of those rights—namely, the right of broadcasting and the simultaneous and unchanged retransmission of the broadcast of works—that the Berne Convention allows, exceptionally, under certain conditions, non-voluntary licenses (see Article 11*bis*(2) of the Convention), the possibility of non-voluntary licenses plays a much more essential role in the case of "mechanical rights." Article 13(1) of the Berne Convention reads as follows: "Each country of the [Berne] Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

67. Various countries apply non-voluntary licenses along the lines of the above-quoted provisions of the Berne Convention (e.g. India, Ireland, Japan, Romania, Switzerland, United States of America). In those countries, the law itself or a competent authority, as a rule, determines the royalties to be paid for such recordings. In certain countries, however, there is room to negotiate some elements of the royalty system.

68. Experience shows that phonogram industries can function smoothly and without any unreasonable obstacles as regards access to the rights needed by them also in countries where the exclusive nature of mechanical rights is not restricted and those rights are administered collectively. Therefore, it is suggested ever more frequently that this kind of non-voluntary licenses is not justified; collective management is a more appropriate option. There are various countries where concrete proposals have been made accordingly and, e.g., the Copyright, Designs and Patents Act 1988 of the United Kingdom has eliminated such a non-voluntary license which existed before in that country.

69. A further important difference—in re lation to the collective management of performing rights—can be seen in the specific role of the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) which is an international non-governmental organization grouping mechanical rights organizations.

70. Originally, BIEM was created as a French civil law society in 1929. Since then, however, both its legal nature and its main functions have varied. In a certain period, it acted as a centralized agency for all its member organizations and negotiated royalties with phonogram industries and took care itself of the collection of those royalties. Presently, each member organization collects royalties due by national phonogram producers but the role of BIEM as a centralized negotiating body has been maintained.

71. One of the main negotiating partners of BIEM is the International Federation of the Phonographic Industry (IFPI) which was established in 1933. A standard contract exists between BIEM and IFPI which is revised from time to time and which is implemented by means of individual contracts between national BIEM societies and individual producers.

72. The centralized negotiating power of BIEM and the binding nature of the BIEM/IFPI standard contract may influence national organizations that do not agree with certain provisions of the standard contract not to join BIEM, or leave it if they are members, and conclude agreements directly with national associations of phonogram producers or with individual producers themselves. For instance, GEMA, which administers, *inter alia*, mechanical rights, left BIEM in 1986 for such reasons; but later—in 1988—it rejoined BIEM.

73. The BIEM/IFPI standard, originally concluded in 1975, contract covers, *inter alia*, the following subjects: the authorization to use the BIEM repertoire, the determination of the royalty rates and the method of their calculation, the place (whether in the country of manufacture or the country of sale) and time schedule of the payment of the royalties, conditions of exportation, certain exceptions to the obligation to pay royalties (free copies for promotion, returns, etc.), audit of the number of copies reproduced.

74. The distribution system of mechanical rights societies also differs in various aspects from that of performing rights societies.

75. The first difference concerns deductions from royalties before actual distribution. While performing rights organizations, as mentioned in paragraph 58, above, deduct the real costs of management, mechanical rights organizations use certain standard deduction percentages, such as 15%, 20% or 25%. Those standard percentages are adapted to the actual costs of the organizations, but still there is a difference between actual costs and the amount deducted, the latter, as a rule, being at least slightly higher. This is counterbalanced by the fact that the bilateral agreements between mechanical rights organizations, in general, do not contain the possibility of deductions for social and cultural purposes.

76. There is, however, a further peculiar aspect of the deduction rates applied by the mechanical rights organizations. Although bilateral agreements contain the principle of equal treatment of nationals and foreigners, this principle is not necessarily followed when it comes to deductions. In certain cases, the deduction from royalties due to foreigners is higher than the one from royalties due to nationals (e.g., sometimes, from nationals' royalties, 5%, and from foreigners' royalties 10 to 25% is deducted depending on the bilateral contracts).

77. The distribution system of mechanical rights organizations also contains certain elements that are favorable from the viewpoint of non-members and foreigners. Distribution is made on the basis of full data concerning the actual use of works and not on the basis of samples and there is no point system where subjective elements could prevail.

78. Some mechanical rights organizations also administer so-called synchronization rights (the right to authorize the inclusion of musical works in audiovisual works). The same principles apply to the management of such rights but there is no general standard contract in this field and there are further differences in respect of certain details.

D. Collective management of rights in dramatic works

79. The collective management of rights in dramatic works is the most typical—and most traditional—example of a type of partial collective management, namely, the agency-type collective management.

80. This form of collective management was originally developed by SACD, the French authors' society referred to in paragraph 24, above, which was the first authors' society dealing with collective management of its members' copyrights.

81. It was as early as in 1791 that, in the framework of SACD, a General Agency was set up in Paris with representatives in major provincial centers. The authors informed the society, and, through it, the theaters, of the general conditions (including, particularly, royalty rates) on the basis of which they were ready to negotiate about the authorization of the use of their dramatic (or dramatico-musical) works. Then, following those general contractual conditions, specific contracts were concluded, and the General Agency of SACD collected and—after the deduction of the costs—distributed the royalties to the authors. Although there are certain new elements in its activities, the collective management system of SACD has remained practically the same. This system contains three main elements: general contracts, specific contracts and the actual collection and distribution of royalties on the basis of the specific contracts.

82. General contracts are negotiated between the society and the organizations representing theaters. Such contracts include certain minimum conditions, particularly the basic royalty rate (which, e.g., in Paris, is 12% of gross receipts). In specific contracts, no conditions can be stipulated that are less favorable to authors, but better conditions can be agreed upon.

83. Specific contracts are concluded theater by theater and work by work based on the minimum conditions of the applicable general contract (with possible more favorable conditions). Unlike musical performing rights societies, to which the authors' rights are transferred or which otherwise are in a position to exercise the rights in their repertoire, and, thus, to authorize the use of the works concerned without separate consultation with the authors, SACD has to ask for the authors' agreement for all specific contracts. The society acts only as a representative.

84. There is a much simpler system in the field of amateur theaters. Here, the costs following from the elements of the individual exercise of rights would be fairly heavy. Therefore, the authors are invited to transfer to the society—with some restrictions, and under certain conditions—the right to authorize performances in the framework of the general contract concluded with the Federation of Amateur Theaters. Many authors choose this simplified system.

85. The representatives of SACD regularly monitor theater performances in the areas for which they are responsible and collect the royalties. The royalties are distributed immediately to the authors—without any specific distribution pools or point systems similar to the ones existing in the field of musical performing rights—who own the rights in the works for the performance of which the royalties are paid.

86. The society deducts from the royalties the established commission rate (8-9.5% depending on geographic areas) and a social security contribution. Depending on the financial results of the accounting periods, a part of the amount deducted may be paid back to the authors concerned because SACD follows the principle that only the actual management costs can be deducted.

87. SACD also administers rights in works broadcast on radio and television and in audiovisual works. In this field, full collective management prevails. The authors give full authorization to SACD to exercise their exclusive rights. SACD negotiates agreements with broadcasters, collects royalties and distributes them to individual owners of rights.

88. As mentioned above, collective management of rights in dramatic works is not a form of full collective management: it is of an agency-type management. In harmony with this fact, in many countries, it is not authors' societies or other copyright organizations which administer such rights but rather real agencies (in many cases, several agencies—with various repertoires—in the same country). Still, there are a number of countries where collective management organizations deal with the said rights. Those organizations, however, in the majority of cases, are not so specialized as SACD is; most of them have a very wide repertoire, often also covering musical performing rights and mechanical rights.

89. Irrespective of the scope of their activities, authors' organizations administering rights in dramatic works cooperate under the aegis of CISAC, although this cooperation does not extend to so many details as the one between performing rights organizations.

E. Collective management of the "*droit de suite*"

90. Under paragraph (1) of Article 14*ter* of the Berne Convention, "[t]he author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."

91. Paragraphs (2) and (3) of the same Article, however, give much liberty to countries party to the Convention in respect of the recognition and regulation of such a right. They are free to decide whether or not to introduce it, and its enjoyment is subject to reciprocity. Furthermore, the procedure for collection and the amounts are matters for determination by national legislation.

92. In spite of the non-obligatory nature of Article 14*ter*(1) of the Berne Convention, a number of countries recognize the "*droit de suite*," such as Belgium, Brazil, Chile, Congo, Costa Rica, Côte d'Ivoire, the Czech Republic, Ecuador, France, Germany, Guinea, Hungary, Italy, Luxembourg, Mali, Morocco, Peru, Philippines, Portugal, Senegal, Spain, Tunisia, Turkey, and Uruguay.

93. The *droit de suite*, as a rule, covers original works of art; in some countries, however, it also covers original manuscripts. (Nevertheless, also in those countries, it is in the field of works of art that this right is really significant.) It is fairly rare that the *droit de suite* is extended to all sales (that is the case in Brazil, Portugal, Uruguay). The great majority of countries only applies this right to public auction sales and some of them also to sales through dealers. (The reason is to restrict the scope of the right to cases where it can be realistically exercised and enforced.)

94. The methods of calculation of *droit de suite* levies fall into one of two categories: those which calculate such levies on the basis of the increase in the price of the work at each resale and those which base their levies on the selling price of the work. Certain threshold prices, however, are determined below which the *droit de suite* is not applicable. In the first group of countries, the rate (because it only covers the "increased value" attributed) is, in general, higher than in the second category. In the great majority of countries the levy is chargeable to the seller; in Hungary, however, it is chargeable to the buyer.

95. The reason why the *droit de suite* is not even more widespread is that certain countries have some misgivings concerning possible practical problems that may emerge in the field of exercise and enforcement of this right. Those misgivings are not unfounded to the extent that there are countries where practical problems do exist. The example of other countries shows, however, that those practical problems can be avoided by means of an appropriate regulation of the exercise of this right and through the application of an appropriate collective management system.

96. The best example of a solution to practical problems through collective management is the case of Germany. In that country, the *droit de suite* was introduced by the Copyright Law of 1965 and it is applied not only in case of public auction sales but also in case of sales through art dealers. However, the law originally did not lay down any specific procedure for the application of this right. Auctioneers and dealers refused to pay the *droit de suite* levies on the ground that they were not the true vendors and, at the same time, used the requirement of professional secrecy as a pretext for not disclosing the name and address of the true vendors. Following a long legal battle, the Federal Supreme Court decided, in 1971, that auctioneers and dealers might decline to disclose the identity of the vendor, but only on condition that they themselves pay the *droit de suite* levies. There was, however, no general obligation to provide information. The Law of November 10, 1972 completed the regulation on the *droit de suite*. That Law introduced a general obligation of information, determined the rate of levies as 5% of the resale price with a 100 DM threshold price. In the new legislation, authors' societies have been given an important role. It is only an

authors' society that is empowered to request information, so as to save actioneers and dealers from being overwhelmed with individual requests.

97. In 1980, a further important step was made to make use of the possibilities of collective management. An agreement was signed between BILD-KUNST, the authors' society administering the rights of artists, on the one hand, and the organizations of art dealers, on the other. The agreement covered 20th-century works. The art dealers have undertaken to pay 1% of their full turnover in sales of all 20th-century works of art. This rate was based on an estimation according to which the art dealers' turnover was 100 million DM a year and the payments due in respect of the "*droit de suite*" and of social security payments to artists introduced in 1980 amounted to 1.5 million DM. It was agreed that, if the lump sum thus calculated fell below the level based on that situation, further negotiations would take place. BILD-KUNST deducts 20% for management costs. According to the distribution scheme of the society, 10% is deducted from the authors' heirs for a fund to support living artists, whereas living artists accept a deduction of 10% for social security payments and a further 10% for a fund to support creativity.

98. In France, prior to the 1957 Law, the arrangement was that, if the owner of the right met certain formalities (declaration), a public official deducted the "*droit de suite*" levy from the sum to be paid to the vendor. The amounts were then held at the disposal of the artist for three days after the sale and handed over to his agent or the artist himself. If the deducted levies were not claimed, the responsible public official was required to inform the beneficiary by registered letter, within one month. When three months had elapsed from the date of the sale, the official's responsibility was discharged by paying the sum deducted to the seller.

99. Since the 1957 Law came into force, the above-mentioned system has been set aside and arrangements for the supervision and collection of "*droit de suite*" levies have been laid down by agreements between the authors' societies and the National Chamber of Auctioneers, taking previous practice into account.

100. The membership of, and any new admission to, the authors' societies (SPADEM and ADAGP) is reported to the Secretariat of the National Chamber of Auctioneers, which informs its membership. The sales catalogs or lists of works presented for sale are also regularly sent to the authors' societies. Using these, as well as bulletins on auction sales, the authors' societies exercise close supervision over these events. Their agents attend certain sales, particularly those which take place without a catalog and without advertising. On the basis of this information, the authors' societies draw up a list of the works of their members which are up for sale and qualify for "*droit de suite*" levies; they send this list to the auctioneer concerned shortly before the sale. The auctioneer marks on it the selling price of each work and returns it, together with the "*droit de suite*" levy, to the appropriate authors' society. This simple procedure makes the collection of "*droit de suite*" levies easy and cost-effective.

101. In Hungary, there is also a very simple system in force, in which HUNGART, the collective *management* organization plays a decisive role. The *droit de suite* levies (5% of the resale price) have to be transferred to this organization which, after the deduction of administrative costs, pays them to the owners of rights.

102. The role of collective management organizations is getting more important in the field of works of art not only in respect of the *droit de suite* but also in respect of other rights of artists. E.g., reprography also concerns works of art and such works may also be concerned by cable transmissions (see in that respect the following subchapters).

103. In addition to BILD-KUNST, SPADEM, ADAGP and HUNGART, there are some other collective management organizations which deal with rights in works of art, such as VBK in Austria, VIS-ART in Canada, DDG BEELDRECHT in the Netherlands, BONUS in Sweden, DACS in the United Kingdom, VAGA in the United States of America. A number of organizations of more general repertoire administer

the rights in works of art along with the rights in various other categories of works. All those organizations co-operate closely under the aegis of CISAC.

F. Collective management of reprographic reproduction rights

104. Reprography was the first major technological development after the 1971 Paris revision of the Berne Convention which raised serious copyright problems and in respect of which it was found that collective management of rights was the best possible solution.

105. While in the case of the rights whose collective management has been discussed so far ("performing rights" in musical works, mechanical rights, rights in dramatic works, the "*droit de suite*") it is fairly clear and practically undisputed to what extent and under what conditions they had to be recognized under the Berne Convention, in respect of reprography, there have been certain questions raised as to the actual rights to be recognized and to the very legal nature of such rights. It very much depends on the answers to those questions, in which cases and under what conditions collective management may prevail in this field.

106. Reprographic machines have become ever more sophisticated during the last decades in all important aspects: they are of smaller size and, at the same time, produce better quality, more quickly and more cheaply. The appearance of color copiers on the market has opened new avenues for the reprographic reproduction of protected works, not to mention the combination of reprography with the retrieval of works stored in computers (the so-called electrocopying).

107. The situation in the field of reprography is, in some respects, different from the one which prevails in the field of copying of audiovisual works and phonograms. This difference follows from the fact that while "home taping" (that is, the reproduction of audiovisual works and phonograms, at home, for private purposes) is a global phenomenon, the number of personal photocopying machines is still relatively small. Therefore, the control of the reproduction of works by means of reprography can be organized more easily and there are much better chances of avoiding the restrictions of the right of reproduction as an exclusive right of authors.

108. It should, however, also be taken into account that the functions of reprographic reproduction differ from those of "home taping." While "home taping" concerns mainly works of entertainment, reprography is, typically, used for copying of material necessary for education, research and library services in respect of which special public considerations prevail. Those considerations may be invoked as a basis for certain restrictions of authors' exclusive rights.

109. From the viewpoint of the legal situation in respect of reprography, the first and most important fact is that the right of reproduction is an exclusive right under the Berne Convention which cannot be restricted—either allowing free use or in the form of non-voluntary licenses—except in cases which are strictly defined by the Convention. It has never been questioned—and on the basis of the text of the relevant provisions of the Convention it could not be questioned seriously—that reprographic reproduction (photocopying, etc.) is a form of reproduction which is covered by the said exclusive right. Therefore, the question is not what rights authors should have at the international level in respect of reprographic reproduction of their works, as if there were no clear and fairly detailed provisions about this in the Convention; what should be discussed is only how these provisions can be applied.

110. The Berne Convention contains basic provisions on the right of reproduction in its Article 9(1), which reads as follows: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." The general rule of possible limitations of this exclusive right is contained in Article 9(2) which reads as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

111. The report of the 1967 Stockholm Diplomatic Conference which adopted Article 9 stresses that the two conditions indicated in Article 9(2) should be considered separately, step by step. If reproduction would conflict with a normal exploitation of the works concerned, reproduction is not permitted at all (that is the case, e.g., in respect of photocopying certain material, such as sheet music). Even if a relatively large number of photocopies are made—for internal purposes—in industrial undertakings, it may not conflict with the normal exploitation of the work but it may unreasonably prejudice the legitimate interests of authors. Such a prejudice, as the report makes clear, may be—and if it may be, it should be—eliminated or, at least, mitigated by means of an equitable remuneration.

112. After the above reference to the legal situation under the Berne Convention, in the following part, a description is given of how the copyright problems of reprography have been tackled at the national level and, particularly, what kind of role collective management plays in various national systems. Those countries have been chosen for this purpose where legal developments have produced certain typical solutions.

113. First, the example of Germany is mentioned because it was as early as in the 1965 Copyright Act that the legislation of this country contained fairly detailed provisions on the right of reproduction and on its limitations. Those provisions, although they did not refer directly to reprography, were also meant to be applied to such reproduction. The legislators had taken into account a decision of 1955 of the Federal Court of Justice on photocopying which concerned the reproduction of articles from scientific journals by an industrial firm for the use by its experts. The Federal Court of Justice found that this activity served the commercial objectives of the firm and, therefore, it was not a free use according to the notion of private use, but an infringement of copyright. This decision led to the conclusion of a contract between the Federation of German Industry (*Bundesverband der deutschen Industrie*) and the Association of the German Book Trade (*Börsenverein des deutschen Buchhandels*) on photocopying from periodicals for internal use by firms. The firms undertook to pay remuneration in the case of periodicals published not earlier than three years before being copied.

114. The 1965 Copyright Act permitted single copies of a work to be made for personal use, without the obligation to pay any remuneration. It was also permissible to make or cause to be made single copies of a work for one's own scientific use, for its inclusion in internal files and also for other internal uses with respect to small parts from published works or single articles published in newspapers or periodicals and to works which were out of print and where the copyright owner could not be traced (if the copyright owner could be traced and the work was out of print for more than three years, he was allowed to refuse his consent to such reproduction only for a valid reason). The Copyright Act also provided that if the reproduction was for commercial purposes, an equitable remuneration was due to the author.

115. On the basis of the above-quoted provisions, the copyright collecting societies of Germany (at that time the Federal Republic of Germany) concluded a series of licensing agreements. For example, in 1982, the general literary rights society WORT concluded an agreement with the ministers of culture of the provinces (*Länder*) concerning the reprographic reproduction of protected works in schools for an annual lump sum. In order to distribute those sums, surveys were made in selected schools. WORT has also collected substantial amounts under agreements concerning copying for commercial purposes. The remuneration so collected was divided equally between publishers and authors. The authors' portion was transferred to authors' associations and used for general welfare purposes.

116. The Copyright Amendment Act of June 24, 1985, has made several changes in this system. Under the new Act, it is permissible to make or to cause to be made copies of small parts of a printed work or of individual contributions published in newspapers for personal use, and for teaching in non-commercial institutions of education, in a quantity required for one school class or for State examinations in schools, universities and non-commercial institutions of education. In three cases, an absolute prohibition has been imposed on reprographic reproduction without the author's consent, namely in respect of whole books or whole periodicals, graphic recordings of musical works (sheet music) and computer programs.

117. The most significant change is, however, that a statutory license has been introduced for all cases where the authors' consent is not needed for reproduction. The legislators found that, since 1965, technological development had led to private copying on a scale that such copying unreasonably prejudiced the legitimate interests of authors and that this prejudice should be eliminated or, at least, mitigated by means of provisions on an equitable remuneration for such use. Therefore, the statutory license system also covers private copying.

118. The new legislation differentiates between domestic and non-domestic reproduction. It has been taken into account that, for the time being, only few copying machines are available in private households and are less frequently used for copying of protected works than the machines functioning in libraries, educational institutions and similar places where protected works to be copied are available to a qualitatively larger extent. Therefore, a hybrid levy system has been introduced. One of the elements of the system is an equipment levy to be paid by the manufacturer or importer, defined by the law and depending on the capacity of the machines. This levy has to be paid for every machine irrespective of whether it is used in domestic or non-domestic context as a lump-sum payment corresponding to the amount of copyright material normally copied by means of such machines. The fact that in non-domestic situations (in schools, universities, public libraries, copy-shops, etc.) protected works are reproduced to a greater extent is taken into account by an operator levy to be paid in addition to the equipment levy (different amounts are charged for each A4 page from a school book and for an A4 page from other works).

119. The amount of the operator levy is determined on the basis of a sampling method: it is established how large the percentage of the photocopies of protected works is in relation to all photocopies made in selected institutions that are representative of their area, and these data are used when charging remuneration for photocopying in a comparable institution. The law provides that the right to photocopying levy can only be exercised through a collecting society.

120. Although this system may seem to be simple, it has proved to be difficult to calculate the amount of copying for which fees have to be paid. Therefore, WORT has chosen to conclude various agreements with organizations of operators of copying machines in which lump-sum payments have been agreed upon. The lump-sum payments are based on statistical surveys reflecting the extent and structure of reprographic reproduction of protected works.

121. WORT, after the deduction of the management costs, distributes to the authors 70% of the fees in case of works of fiction, and 50% of the fees in case of scientific works; the rest is distributed to publishers. If, however, the contract between the author and the publisher provides for different distribution rate, they have to redistribute the payment between each other.

122. The example of the Netherlands, which was also among the first countries to legislate on reprography, underlines how important a well-functioning collective management system is for an appropriate solution in this field.

123. The first provisions on reprography were introduced in the years 1972-1974 but did not touch the limitation of the right of reproduction according to which, as a general rule, the reproduction of a few copies for private use was free. The Copyright Act is even more generous towards government offices, libraries, educational institutions and other institutions representing public interests. Those institutions are allowed to make more than a few copies for their own internal use. Finally, commercial organizations and institutions may also make more than a few copies, in other words "as many copies as are reasonably necessary." All these mass copiers, however, are obliged to pay an equitable remuneration. The remuneration to be paid by the government, libraries, educational institutions and other public interest institutions has been fixed per copy of a page from a scientific publication and per copy of a page from a non-scientific publication. Libraries, however, may make single copies of articles for users and for interlibrary loans with no liability to pay such a remuneration.

124. Foundation REPRORECHT, the Dutch collecting society representing authors and publishers—which had been set up to collect photocopying remuneration—had difficulties in fulfilling this task for a fairly long time because it did not have any special status under the law and its membership was not wide enough. Therefore, copiers refused to deal with REPRORECHT; only the government paid some nominal sums to the society to keep alive the system it had set up itself.

125. Finally, a new Royal Decree was needed to get out of this deadlock. Under the Decree of August 23, 1985, reprography remuneration has to be paid to the collecting society appointed by the Minister of Justice with the exclusion of any other society and even of the owners of rights themselves. On February 19, 1986, REPRORECHT was appointed as the exclusive collecting society.

126. In the copyright laws of the Nordic countries, it is just the strong, institutionalized legal position of collecting societies which is the most typical feature of the regulation dealing with reprographic reproduction.

127. The Nordic copyright laws all recognize the exclusive right of authors to control their works in respect of making copies thereof and making them available to the public. The limitation for "private use" can be found equally in all these laws. Works which have been disseminated to the public may be reproduced in "single copies" ("a few copies") for such use.

128. Special provisions exist in the Nordic countries in favor of libraries and archives to make copies for their own purposes (such as conservation of their collections, copying for loaning books or documents because of their fragility or rarity, etc.). It is also permitted for such institutions to make a single copy of an article appearing in a composite work or in a periodical or newspaper or of parts extracted from other published works for borrowers engaged in studies or scientific research (instead of lending the original volumes).

129. The most typical feature of the Nordic copyright laws concerning reprography is the so-called "extended collective license" system which applies to the agreements concluded between collecting societies and the competent state and municipal authorities governing photocopying in schools and at universities. Under that system, teachers and professors of schools and universities which have received authorization from an association representing a large number of national authors of a certain category of works also have the right to copy published works of the same category, the authors of which (including foreign authors) are not represented by the association. Non-member authors whose works are thus reproduced are, as regards, for example, remuneration, treated in the same way as the members of the contracting organization. Furthermore, they have generally—for instance, if the contracting organization decides to use the remuneration for collective purposes—a right to claim individual remuneration for the reproduction of their works. For non-members, there is a kind of compulsory licensing element in this system. This is, however, only a conditional element because there are also other guarantees to safeguard the rights of authors outside the organization. For example, in Sweden, no reproduction can be made under the agreement if the author has filed a prohibition against such reproduction with any of the contracting parties. There are also provisions in the laws for possible cases where users and the collecting organization are unable to reach agreement. In such cases an arbitration system-in Sweden, a special mediation system—is applied.

130. The agreements impose several limitations on photocopying which, in addition to the upper limits of the number of copies and of the extent of the portions to be copied from various types of works, etc., prohibit the reproduction of certain publications which are especially vulnerable from the point of view of photocopying (it being in conflict with the normal exploitation of such works), such as sheet music, exercise books, answer books and other one-time use publications.

131. In respect of the methods of determining the remuneration as well as of its collection and distribution, there are some differences between the various Nordic systems. In general, sampling methods are applied, but in Denmark a separate solution has been adopted: the users have to indicate, in their

reports, the title of the work, the names of the author and the publisher as well as the year of the publication; furthermore, they have to produce one surplus copy on which the number of copies made is to be marked on the first page.

132. The differences in distribution systems are particularly significant. Only COPYDAN, the Danish collecting organization, distributes the remuneration to individual authors and publishers on the basis of the above-mentioned detailed information. In the other countries, the remuneration is transferred to the associations representing authors and publishers more or less according to the proportion of the actual reproduction of the categories of works concerned and such moneys are used for certain collective purposes (grants, subsidies, etc.).

133. If the system of the Nordic countries offers good examples of how collective management organizations may work with legislative support and with some semi-compulsory elements insofar as owners of rights outside the collecting organizations are concerned, the example of the United States of America shows that entirely private schemes based on exclusive rights are also workable.

134. The l976 Copyright Act of the United States of America contains various provisions limiting the right of reproduction in respect of reprography (fair use for purposes such as teaching, scholarship or research, free photocopying by libraries and archives in certain cases which, however, must not amount to the related or concerted reproduction of multiple copies of the same material or to systematic reproduction or distribution).

135. Although the 1976 Copyright Act limits the right of reproduction under the provisions mentioned above, the exclusive right to authorize reproduction still prevails as a general rule. The individual exercise of the rights concerned is, however, generally impossible; only their collective management may be workable and efficient. In the United States of America, the Copyright Clearance Center (CCC) has been set up in order to take care of the management of such reprographic reproduction rights.

136. CCC was set up following a recommendation by the Congress that a practical clearance and licensing mechanism be developed, with the support of various bodies representing authors and other right holders. The goal of CCC was to ensure that the publishers of scientific, technical and medical journals receive compensation for each copy reproduced by colleges, universities, libraries, private corporations, etc. CCC represents, on a non-exclusive basis, in addition to the right holders of journals, also those of magazines, newsletters, books and newspapers. There are almost one million titles now registered with CCC.

137. The original system for collection and distribution was the following: publishers established photocopying fees which were printed in journals, and it was also stated that copies could be made—for personal or internal use—if the indicated fees were paid to CCC. Each user had to keep a record of photocopies or send in a copy of the first page of each article indicating the number of copies made. CCC billed users on the basis of those records and copies which were sent in. After the deduction of handling charges, the fees were forwarded to the individual publishers, who then distributed a certain part of the fees to their authors in accordance with their contractual agreements.

138. This system (the so-called Transactional Reporting Service) was found to be too burdensome for certain users. Therefore, CCC has introduced an additional plan, the Annual Authorization Service. The licenses granted in the framework of that service are based upon industry-wide statistical coefficients that estimate copying levels of various classes of employees. The copying coefficients are derived from 60-day surveys of photocopying conducted at sample locations for each licensee. The copying coefficients are used to estimate total annual copying for each licensee taking into account their “employee population.” Distribution to right holders is based upon the survey information.

139. A specific feature of the collective management of rights by CCC is that each publisher establishes his own fees for the licensing of the photocopying of his works. Therefore, the licenses offered by CCC are

not real blanket licenses with unified license fees, but actually a collectively administered system of individualized licenses. CCC only deducts administrative expenses and distributes fees to the publishers who then distribute them to their authors in accordance with their contractual arrangements.

140. The Copyright, Designs and Patents Act 1988 of the United Kingdom has introduced some new legal solutions having also taken into account the satisfactory contractual arrangements of the Copyright Licensing Agency (CLA) representing authors and publishers.

141. The new Act provides for certain precisely determined free uses for libraries and archives and in respect of photocopying by educational establishments of passages from published works. Reprographic copies of passages from published literary, dramatic or musical works, to the extent determined in the Act, can be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement. Not more than one per cent of any work may be copied by, or on behalf of, any establishment in any quarter of a year. What is important, however, is that such copying is not authorized if licenses (practically, a collective management scheme) are available authorizing the copying in question and the person making the copies knew, or ought to have been aware of, that fact. The Secretary of State is empowered to take further measures to guarantee educational needs. If, after considering any representations, he is satisfied that the refusal by an individual copyright owner to join an existing scheme is unreasonable, he may issue an order that the owner should be treated as if he were a member of that scheme; such orders would be subject to appeal. Following a recommendation to that effect by an inquiry ordered by him, the Secretary of State may issue an order providing for non-voluntary licensing in respect of a particular class of works.

142. The fairly detailed presentation, above, of various national laws and collective management systems shows that appropriate and practical ways and means can be applied to meet obligations under the international copyright conventions without creating unreasonable obstacles to photocopying by various users, and particularly that collective management of rights is a workable and efficient solution in this field.

143. There is one point, however, where further steps are needed. It is essential that national treatment should be fully applied in this field, and foreign copyright owners should enjoy the same rights as national ones. From this viewpoint, it is extremely important that the collective management organizations dealing with such rights—the so-called reproduction rights organizations (RROs)—conclude reciprocal representation agreements and that they grant equal treatment to the owners of rights represented by foreign societies. So far, such agreements have been established only in a relatively narrow circle. In this field, however, there is a hope for positive developments because the International Federation of Reproduction Rights Organizations (IFRRO)—which until 1988 was known as the International Forum of such organizations—has become much more active recently in promoting bilateral agreements among such organizations.

144. The reproduction rights organizations administer the rights of both authors and publishers. Various solutions can be found in national laws, in collective management agreements, and in individual contracts concerning the participation of publishers in the remuneration received for photocopying. However, the end result is practically the same: authors and publishers share the photocopying remuneration between themselves.

145. In general, it is the author who is indicated as the owner of the right, which is normal because photocopying is covered by the right of reproduction. Authors then can—and fairly frequently do—transfer their reprographic reproduction rights, with the stipulation that they receive a certain percentage from such payments collected by the publishers. Some contracts, however, are silent about the entitlement to such remuneration. In such cases, it is useful if national legislation contains some guidance about the distribution of the amounts between authors and publishers. (In countries where under the law the employers are the original owners of rights in works created by their employee authors, the legal status of such works is, of course, “simpler.”)

146. Furthermore, what is copied is not the work in general, but a specific published edition of the work. If users do not use published editions but replace them by photocopies, this conflicts not only with the authors' rights and interests, but also with the acquired rights and the interests of the publishers. The interests of the authors and publishers are, however, not always the same. For example, the authors of scientific works may be interested in as wide and as free a use as possible of their works, an attitude which, from the viewpoint of publishers, may be disastrous and may lead—and, according to the information received from interested international non-governmental organizations, frequently does lead—to the bankruptcy and disappearance of certain scientific journals. (This latter outcome then is detrimental also to the scholars because they lose a forum for publication of their works.) Those considerations—and, particularly, the aim of better protection of publishers against piracy—have led certain legislators to recognize a separate related right of publishers (in the so-called typographical arrangements). All that makes it even more desirable that reprographic rights organizations administer the rights of both authors and publishers.

147. The importance of reproduction rights organizations is further increased by the ever more widespread storage in, and retrieval from, computer systems of works including electrocopying (copying of a work published in a machine- readable medium, optical recording, "downloading" from data bases, etc.). This new form of using protected works—where machine-readable material is disseminated through information and telecommunication systems and where hard copy reproductions can be made by adequate terminals—is very complex and is still in the formative stages of development. It seems, however, fairly certain that the existence of appropriate collective management systems is even more indispensable than in the case of photocopying.

148. The collective management organizations dealing with the rights concerned by photocopying and electrocopying, in many cases, also administer certain other rights in writings. One such right is the public lending right, that is, the right to receive remuneration for the public lending of books, etc. The legal nature of such a right is, however, fairly controversial; it has been questioned whether this right belongs to the field of copyright and related rights or if it is rather a general, cultural or social right. For this reason, this report, which concentrates on the typical cases of collective management of copyright and related rights, does not cover the management of the public lending right.

G. Collective management of the rights of performers and phonogram producers

149. The further two fields (namely, the fields of cable retransmission of broadcast programs and "home taping"), where new typical forms of collective management have been developed concern not only copyright but also the so-called related rights. Therefore, first, the special problems concerning collective management of those rights are discussed.

150. Some basic rights that are recognized by the Rome Convention and by national laws for the owners of the so-called related rights (the rights of performers, producers of phonograms and broadcasting organizations) can be, and actually are, exercised on an individual basis without the need for specific collective management schemes (although, e.g. the conditions of employment contracts of performers are very frequently the subject of collective negotiations between unions representing them and the representatives of their employers). There is, however, one area of related rights where collective management is indispensable, namely, the rights of performers and phonogram producers with regard to the broadcasting and communication to the public of phonograms.

151. Article 12 of the Rome Convention provides as follows: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." (The rights provided for in Article 12 of the Rome Convention are sometimes referred to as "Article 12 rights.") Under Article 16 of the Convention,

however, Contracting States may make various reservations; *inter alia*, they may declare that they do not apply Article 12 or may make its application depending on reciprocity.

152. As to the question of whether this provision also covers cable transmission—and in respect of the legal consequences—, see the following subchapter on collective management of copyright and related rights concerned by cable retransmission of broadcast programs.

153. Article 12 of the Rome Convention does not provide for an exclusive right in respect of broadcasting and communication to the public but only a right to equitable remuneration (that is, what is involved is a kind of non-voluntary license). Countries party to the Convention are, however, free to grant exclusive rights in this field. Certain countries (e.g., Brazil, Costa Rica, Guatemala and the United Kingdom) have granted phonogram producers the right to authorize or prohibit the broadcasting and/or public performance of their phonograms (in that respect, it also should be noted that in some countries, e.g., in the United Kingdom, the rights of producers of phonograms are considered to belong to copyright in a wider meaning of that word). In the majority of countries, however, only a right to equitable remuneration is granted to performers and/or phonogram producers for such uses.

154. Under Article 12 of the Rome Convention, Contracting States are free to grant such rights to performers alone, to producers of phonograms alone or to both, or to grant such rights to one of the two categories only, with the obligation to share with the other. Both categories are entitled to such a right to equitable remuneration, e.g., in Barbados, Brazil, Costa Rica, the Czech Republic, Denmark, Finland, Italy, Norway, Paraguay, Sweden and Uruguay. Furthermore, in Austria, Colombia and Germany, the right is granted to one of the beneficiaries with the obligation to give a share to the other beneficiary. Performers alone are entitled to such a right in, e.g., Chile, Ecuador, El Salvador and Peru and producers of phonograms alone are entitled to it, e.g., in Fiji, Guatemala, Ireland, Philippines and the United Kingdom. In certain countries, such as Ireland and the United Kingdom, the beneficiaries enjoying the right have agreed voluntarily to share the remuneration with the other category of beneficiaries. In Spain, phonogram producers enjoy an exclusive right to authorize any kind of communication to the public of their phonograms, and performers have the right to receive an amount equal to 50% of the fees collected by the phonogram producers for such a use.

155. As far as the shares of the two categories of beneficiaries are concerned, the WIPO/ILO/UNESCO Model Law concerning Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in 1974 suggests that, unless otherwise agreed between performers and producers, half of the amount received by producers should be paid to performers. In general, the shares of the two categories are equal, but there are some exceptions. In those European countries that grant a right only to one category of beneficiaries, an agreement between FIM, FIA and IFPI applies according to which the entitled category gives the other a share of one-third of the revenue received for the broadcasting of phonograms. In some countries, such a voluntary sharing is based on a national agreement between the organizations of performers and those of phonogram producers.

156. The right to remuneration or the exclusive right of performers and producers of phonograms in respect of broadcasting and communication to the public of their performances recorded on phonograms or their phonograms, respectively, is, from a practical point of view, of a nature that is similar to the one of the so-called "performing rights" of composers and text-writers discussed in subchapter B, above. It follows from this fact that this right of performers and producers also can only be exercised through an appropriate collective management scheme.

157. In the majority of countries where such a right is recognized, performers and producers of phonograms have established joint collective management organizations (e.g., LSG in Austria, SOCINPRO in Brazil, GRAMEX in Denmark, Finnish GRAMEX in Finland and GVL in Germany). In certain other countries, the two categories of beneficiaries have separate organizations (e.g., SAMI in Sweden for performers, PPL in the United Kingdom and IFPI national groups in other countries).

158. Collective management organizations dealing with related rights are, frequently, under the same State control as the musical performing rights organizations. They negotiate contracts with users, and their tariffs, in certain countries, have to be approved by the competent authorities. In other countries, the competent authorities and special tribunals only interfere in case of dispute, particularly if what is involved is the possible abuse of the *de facto* monopoly position of such organizations.

159. As far as the collection of the remuneration for the communication to the public of phonograms is concerned, the organizations of performers and producers of phonograms, in certain countries, have not established their own monitoring and collecting services, but entrust the performing rights organizations of authors with doing this job. An appropriate commission fee has to be paid for those services but that fee is still considered to be generally lower than the costs would be in case of establishing a new monitoring and collection system. Such a solution is applied, to more or less extent, e.g., in Austria, Colombia, Denmark, Germany, Hungary, Italy and Spain. On the other hand, as far as the collection of the remuneration for broadcasting of phonograms is concerned, this task is carried out by the performers' and producers' organizations themselves. The administrative costs of organizations representing performers' and phonogram producers' rights do not usually exceed 10-15%.

160. The methods of distribution of the remuneration among performers and among producers differ from country to country. In respect of broadcasting of phonograms, the remuneration is usually distributed to individual right owners (performers and producers of phonograms); while in respect of communication to the public, individual distribution to performers is less frequent, and a smaller or bigger part of the remuneration, or its entirety, is used for cultural and social purposes (as far as phonogram producers are concerned, individual distribution also prevails in this field). When the revenue from the public performance of phonograms is distributed to individual right owners, the distribution is usually based on the same scheme as the one applied for the distribution of the revenue arising from the broadcasting of phonograms.

161. The fact that it is difficult to obtain satisfactory data on the repertoire used is not the only reason for not distributing the remuneration to individual performers. The other reason which is stressed by the representatives of performers' organizations fairly frequently is that the repeated and uncontrolled uses of recorded performances have detrimental effects on the employment opportunities for performers and the remuneration is considered to be a compensation for this.

162. There exists an international cooperation between collective management organizations based on the joint activities of three international non-governmental organizations, the International Federation of Musicians (FIM), the International Federation of Actors (FIA) and the International Federation of the Phonographic Industry (IFPI).

163. Foreign performers and producers of phonograms are entitled to receive their share from the distribution of the remuneration under Article 12 of the Rome Convention in keeping with the principle of national treatment or, where applicable, to the extent of material reciprocity. However, in respect of performers, this entitlement of foreign right owners only prevails to a limited extent, for two main reasons.

164. The first reason is that the network of appropriate collective management organizations and bilateral agreements between such organizations has not been fully established yet, although FIM, FIA and IFPI and the collective management organizations work actively to promote wider and closer cooperation between national organizations.

165. The second reason why, in many cases, foreign performers do not receive the share to which they are entitled is that certain jointly adopted principles of FIM and FIA accept—and in a way promote—the conclusion of bilateral agreements under which no payments are transferred between the contracting organizations; all the income remains in the country where it is collected and is used in accordance with the rules of the organization of that country (it is either used for social or cultural purposes or is distributed to the performers of the country in order to compensate them for the remuneration they are entitled to in other countries but do not receive). This is the so-called category B agreement which is more frequently

used than the so-called category A agreement under which the shares due to performers of the other country are transferred in one sum and the distribution is completed by the organization of that country according to its own distribution schemes. However, even in the case of category A agreements, the non-identifiable shares (and their percentage is fairly high) remain in the country where they are collected and are used for social or cultural purposes for the benefit of performers.

166. As far as the arguments in favor of this system are concerned, mainly the problems of identification and the related high costs, on the one hand, and the need for mutual solidarity among performers, on the other, are cited.

167. It is also mentioned sometimes that category B agreements, in relation with developing countries—whose balance of payments is fairly negative in this field—may facilitate the adherence of those countries to the Rome Convention and may contribute to the improvement of the legal and economic position of their performers.

H. Collective management of rights concerned by cable transmission of broadcast programs

168. There are two basic types of cable programs. The first type of programs are the cable-originated programs; that is, programs initiated by the cable operators themselves. The second type of cable programs are the simultaneous and unchanged transmissions of broadcast programs. It is in the field of the second type of cable programs that certain legal and practical problems emerge which, in principle, can only be solved either by means of non-voluntary licenses or by means of a specific collective management scheme.

169. In respect of authors' rights, simultaneous and unchanged transmission of` broadcast works is covered by Article 11*bis*(1)(ii) of the Berne Convention, under which "[a]uthors ... enjoy the exclusive right of authorizing ... any communication to the public by wire ... of the broadcast of the work when this communication is made by an organization other than the original one." It is clear under this provision that such a right exists in all cases where an organization other than the original broadcaster transmits the broadcast program simultaneously and without change. In such cases, however, under Article 11*bis*(2), non-voluntary licenses may replace the exclusive right of authorization. (In respect of cable-originated programs, the general provisions on communication to the public prevail, where non-voluntary licenses are not allowed.)

170. The Rome Convention provides for rights of the beneficiaries of the so-called related rights only in respect of cable-originated programs which are covered by the general concept of direct communication to the public, but not in respect of cable retransmissions of broadcast programs. However, national laws may, and in certain countries do, grant some rights (at least a right to remuneration) to the beneficiaries of related rights also for such retransmissions.

171. The original broadcasters of programs are generally in the position to obtain authorization for their programs from the owners of copyright and the so-called related rights in due time. The cable operators who transmit broadcast programs simultaneously—and frequently, not only one program—cannot obtain authorizations in the same way. Although, in respect of certain categories of works, authors' organizations were ready to offer appropriate blanket licenses, other categories of works, particularly audiovisual works, were not covered by such licensing schemes. In addition, the rights of original broadcasters and other related rights also had to be taken into account.

172. In that situation, various governments and legislators came to the conclusion that the operation of cable systems can only be guaranteed by means of non-voluntary licenses. Such licenses have been introduced, e.g., in Austria, Denmark and—in respect of certain programs—in the United States of America.

173. However, the owners of copyright and related rights—through their national organizations and through the international non-governmental organizations grouping such national organizations—have

proved that non-voluntary licenses do not represent the only solution; they do not represent the optimum solution either; there is another workable option which better corresponds to the basic principles of the protection of copyright and related rights; and that option is the collective management of such rights.

174. At the end of the 1970's, CISAC initiated joint actions of the interested international non-governmental organizations. After a number of negotiations, CISAC, the International Federation of Film Producers Associations (FIAPF) and the European Broadcasting Union (EBU) adopted a joint declaration in October 1979 on the basic principles of a future collective management system. Then, those organizations, on the one hand, and the International Alliance for Distribution by Cable (AID), on the other, worked out a model contract for the same purpose in December 1981.

175. It was recognized that such a scheme could only be implemented in practice if an important link in the chain of collective management systems which was still missing was established. The link which was missing was an appropriate collective management network for the rights in audiovisual works. The right holders in such works—although on the basis of differing legal solutions—are generally the producers. Producers, however, did not have collective management organizations.

176. The way towards a workable collective management of rights concerned by cable retransmissions of broadcast programs was opened by the establishment, in December 1981, of the Association for the International Collective Management of Audiovisual Works (AGICOA). The members of the Association are national associations and societies of producers of audiovisual works for management and/or collection of fees in respect of such works and the Association has essentially two main tasks: negotiations (in cooperation with its national member organizations) in respect of cable retransmission of audiovisual works in its repertoire, and the distribution to right holders of the sums obtained on their behalf by the competent national collecting societies.

177. The first contract concerning the authorization of cable retransmission of programs on the basis of a global collective management system covering all rights involved was concluded in Belgium between SABAM (the authors' organization which already had a restricted collective management agreement with cable operators in respect of its own repertoire), AGICOA with its Belgian member organization (BELFITEL) and the broadcasting organizations concerned (individually represented), on the one hand, and the Professional Union of Radio and Teledistribution, on the other.

178. Under the contract, cable operators pay a lump sum for the use of the repertoire represented by the right owners' organizations, and the latter undertake guarantees against possible third party claims. After various rounds of negotiations, an agreement was reached in 1985 on the distribution rates between the broadcasting organizations concerned, AGICOA and SABAM.

179. After the success in Belgium, there was a breakthrough also in the Netherlands where a national model contract was concluded—and later applied—between BUMA (an authors' organization), AGICOA with its Dutch member organization (SEKAM) and the broadcasting organizations concerned, on the one hand, and VECAI, the organization of private cable distributors, and VNG, the organization of public cable distributors, on the other. In Germany also, contracts have been concluded recently between the interested right owners and the Deutsche Bundespost for the cable retransmission of broadcast programs, where right owners have been represented by GEMA.

180. As far as the distribution of fees within the three categories is concerned, in the case of broadcasting organizations, it did not raise any practical problems because of their limited number. The authors' organizations had already their established distribution system which they could also use for this purpose, although there is a need to extend and adapt that system to certain categories of authors (scriptwriters, film directors, etc.). AGICOA, however, had to establish its own system. Such a system—with a computer network and an international register of titles—started functioning as early as in 1984.

I. Collective management of rights concerned by "home taping"

181. In respect of reprographic reproduction, it has been already discussed (see paragraphs 110 and 111, above) that reproduction of works for private purposes is not recognized by Article 9(2) of the Berne Convention as a case where exceptions to the right of reproduction would be allowed without any further conditions. Any exception can only be allowed if the conditions set out in that provision of the Convention are met; namely if the exception only concerns a specific case, does not conflict with a normal exploitation of the works concerned and does not unreasonably prejudice the legitimate interests of authors.

182. Studies have proved, beyond any reasonable doubts, that widespread domestic reproduction of sound recordings for private purposes ("home taping") does seriously prejudice the legitimate interests of authors. In respect of the widespread domestic reproduction of audiovisual works for private purposes, similar, although less evident and, therefore, more disputed, prejudices have been identified.

183. As discussed above, in respect of reprographic reproduction, any reproduction which causes such a prejudice cannot be allowed under the national laws of countries party to the Berne Convention unless the prejudice is eliminated, or at least mitigated so as to render it reasonable, by an appropriate compensation.

184. It was Germany which, for the first time introduced such a compensation in 1965. The second country, Austria, followed suit in 1980, the third, Hungary, in 1982, and since then several other countries have taken more or less similar steps (Congo, France, Iceland, Norway, Portugal, Spain, Sweden) or have prepared draft laws to that effect.

185. The Rome Convention does not contain such obligations concerning "home taping" in respect of related rights as the Berne Convention does in respect of copyright. It is, however, generally considered to be justified to extend this right to remuneration also to performers and phonogram producers who suffer similar prejudices.

186. The countries which have introduced or are about to introduce a "home taping" royalty, have, in general, recognized that such a royalty is justified in respect of both audio and video recordings. As far as the medium on which the royalty is payable is concerned, the Copyright Law of Germany introduced royalties on hardware, that is, on recording equipment in 1965; in 1985, however, the royalty was extended to recording media (blank tapes). Iceland, Portugal and Spain have introduced a royalty on both hardware and recording media, while other countries (Congo, Finland, France and Hungary) restricted its application to recording media.

187. The obligation to pay the royalty is imposed on the manufacturers and importers of recording equipment and/or recording media. Certain equipment and media are, however, exempt from the obligation (exported items, equipment and tapes intended for use for professional purposes or which (such as dictaphones) are unlikely to be used for recording protected material). The amount of the royalty is determined by the law itself or is left, under certain conditions, to an arbitration type forum; it is either a flat fee or a percentage of the price.

188. The collection is made either by a special collecting organization established for that purpose or by an existing performing rights organization which then transfers the shares to the organizations representing the various other categories of owners of rights. It is fairly frequent, however, that the law itself provides that a certain percentage of the royalties must be used for cultural and social funds.

189. The national laws that have introduced a royalty for "home taping" provide that claims to such a royalty may only be made through collective management organizations. It follows from the very nature of this right to remuneration that it cannot be administered individually.

190. The distribution of home taping royalties by the competent collective management organizations is made by means of one of the most widespread techniques used also by the musical performing rights

organizations, namely by means of sampling. This technique contains an element of "rough justice" but it still guarantees a fairly correct distribution to individual owners of rights reflecting essentially the actual use of the works protected.

191. Various studies have proved that, in the case of audio home taping, the two main—almost exclusive—sources of recordings are records and radio broadcasts. On the basis of broadcasting logs, record sales figures and other available data, the actual structure of home taping can be identified and the royalties can be distributed to individual owners of rights with practically the same precision as in the case of certain categories of traditional performing rights royalties and with fairly low expenses. In the case of video recordings where copying is mainly made from television programs but where also tape-to-tape copying exists, the identification of the works most frequently used is somewhat more difficult but, with an adequate sampling technique, still a fairly correct "rough justice" can be obtained.

192. The distribution of "home taping" royalties, in general, is fairly cost-effective because the organizations dealing with it also administer certain other rights and the sampling methods, and, thus, also the actual distribution, can be easily connected to existing distribution schemes.

193. Although certain attempts have been made recently to try to offer some kind of legal theories for avoiding the application of national treatment in respect of "home taping" royalties (which may undoubtedly involve, for the time being, some unilateral burdens in international relations), it can hardly be denied that the right to remuneration for "home taping" is a right which belongs to the rights of authors in their literary and artistic works and the rights of the beneficiaries of related rights in their protected productions. Therefore, it can hardly be denied either that the granting of national treatment to foreigners is an obligation of countries party to the Berne Convention and the Rome Convention.

194. From the point of view of national treatment, also the legal obligation, or the actual practice, in some countries, to use an extensive part of the revenues collected on the basis of such a right for social and cultural purposes—and, thus, only in favor of national owners of rights—raises some questions. A specific legal situation exists, in this field, e.g., in France, where the Law of July 3, 1985 provides in its Article 28, that "the right to remuneration ... shall be shared amongst the authors, performers, producers of phonograms and videograms *in respect of phonograms and videograms fixed for the first time in France*" (emphasis added). It is, however, added to this provision that it is "subject to the international conventions," that is, if the international conventions (particularly the Berne Convention and the Rome Convention) provide otherwise the provisions of those conventions must be applied.

IV. CONCLUSIONS

195. As a result of the analysis of the main fields of collective administration of copyright and related rights and of certain basic questions in relation to such administration, several general principles can be outlined and, at the same time, some problems can be identified in respect of which further studies seem to be necessary.

196. The principles which seem to be generally applicable in respect of collective administration of copyright and related rights are the following:

(a) Collective administration of copyright and related rights is justified where such rights—because of the number and other circumstances relating to the uses—cannot be exercised, in practice, on an individual basis. Collective administration should be applied, whenever possible, as an alternative to non-voluntary licenses. It is not advisable, however, to extend collective administration to rights that can be administered individually without any serious practical problem.

(b) Full collective administration includes authorization for uses, monitoring of uses, collection of remuneration and their distribution to right owners, when exclusive rights are involved. However, even if certain rights are restricted to a right to remuneration, collective administration is preferable as far as negotiation, collection and distribution are concerned.

(c) It depends on the political, economic and legal conditions and traditions of the countries concerned whether one single, general collective administration organization or separate organizations for various rights and various categories of right owners are more appropriate. The advantage of separate organizations is that, by means of them, the particular interests of certain right owners can more fully and directly prevail. The advantage of a general organization is that it can more easily settle the problems of emerging new uses and may more efficiently enforce the general interests of right owners. If there are parallel organizations, there is a need for close cooperation between them, and, sometimes, for joint actions by them in the form of specific "coalitions," while, in the case of a general organization, guarantees are needed to avoid neglecting the interests of certain categories of right owners.

(d) As a rule, there should be only one organization for the same category of rights in each country. The existence of two or more organizations in the same field may decrease or even eliminate the advantages of collective administration of rights.

(e) It also depends on the political, economic and legal conditions and traditions of the countries concerned whether public or private organizations are more appropriate for the collective administration of copyright and related rights. In general, private organizations should be preferred. The conditions of certain countries (e.g. of those developing countries which are in the stage of establishment of their copyright infrastructure) may, however, make the setting up of public organizations desirable in order to safeguard right holders' interests.

(f) The prescription of obligatory collective administration of rights should be restricted to cases where such a measure is indispensable. Collective administration should not be made obligatory in respect of exclusive rights which, under the Berne Convention and the Rome Convention, may not be restricted to a mere right to remuneration.

(g) No extended collective administration clause (that is a statutory permission to use, without authorization, but against payment of remuneration, works belonging to the same category of works in respect of which a collective administration organization authorized the use of its own repertoire) should be applied in the case of exclusive rights if, under the Berne Convention or the Rome Convention, those rights may not be restricted to a mere right to remuneration.

(h) The operation of blanket licenses granted by collective administration organizations should be facilitated by a legal presumption that such organizations have the power to authorize the use of all works covered by such licenses and to represent all the right owners concerned. At the same time, the collective administration organizations should give appropriate guarantees to the users to which such licenses are granted against individual claims of right owners and should indemnify them in case of any such claims.

(i) Adequate government supervision is necessary concerning the establishment and operation of collective administration organizations. Such a supervision should guarantee, *inter alia*, that only those organizations may be allowed to operate which can guarantee to provide all the legal, professional and material conditions that are necessary for an appropriate and efficient administration of rights; that the collective administration system should be available to all right owners who need it; that the terms of membership of the organizations should be reasonable and, in general, that the principles outlined in the present summary of guidelines (e.g. concerning the equal treatment of various categories of right owners, the deduction of costs and other possible sums and the distribution of remuneration) should be duly respected.

(j) The decisions concerning the methods and rules of collection and distribution of remuneration, and about other important general aspects of collective administration, should be taken by the right owners concerned or by the bodies representing them.

(k) For the right owners and for the other organizations (particularly for foreign ones) the rights or repertoires of which, respectively, are administered by a collective administration organization, regular and sufficiently detailed information should be available about the activities of the organization that may concern the exercise of those rights.

(l) Government supervision of, and interference in, the establishment and operation of tariffs and other licensing conditions applied by collective administration organizations which are in a *de facto* monopoly position vis-à-vis users, is only justified, if, and to the extent that, such supervision and/or interference is indispensable for preventing abuses of such a monopoly position.

(m) Appropriate legislative and administrative measures should facilitate the monitoring and collecting activities of collective administration organizations. The fullest possible cooperation by users in those fields should be prescribed as an obligation, and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of collective administration organizations.

(n) No remuneration collected by a collective administration organization should be used for purposes (e.g. for cultural or social purposes) other than covering the actual costs of administration and the distribution of the remuneration to the right owners, except where the right owners concerned, including foreign right owners, authorize such a use of the remuneration in a procedure where they or their duly authorized representatives have a real opportunity to effectively participate.

(o) The remuneration collected by a collective administration organization—after the deduction of the actual costs of administration and of other possible deductions that the right owners might authorize according to the preceding point above—should be distributed among the individual right owners as much in proportion to the actual use of their works as possible. Individual distribution may only be disregarded where the amount of remuneration is so small that distribution could not be carried out at a reasonable cost.

(p) Right owners who are not members of a collective administration organization, and particularly foreign right owners, should enjoy, in all respects (such as the monitoring of uses, the collection of remuneration, the deduction of costs and, especially, the distribution of remuneration), exactly the same treatment as those right owners who are members of the organization and nationals of the country.

(q) Collective administration organizations may fulfill tasks other than collective administration proper (such as agency activities), but the costs of such activities should not burden the fees collected in the framework of collective administration proper.