

## 8 NEW RULES ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN SERBIA: WORK IN PROGRESS

\*Dr Dusan Popovic

### ABSTRACT

Serbian IP law has undergone significant reforms over the last two years. Numerous Acts have been amended or replaced in order to further harmonize Serbian rules on the protection of intellectual property in line with those of the European Union, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). Among these recent reforms the new rules on collective management of copyright and related rights laid down by the Copyright Act 2009 are the most discussed by academics and the general public. The previous 2004 Act presented significant difficulties concerning the collective management of copyright and related rights resulting in some 5000 court proceedings relating to the tariff determined under the Copyright Act. One of the main objectives of the Copyright Act 2009 is to resolve these problems by laying down more detailed rules on the functioning of collective management organizations and the negotiations procedure, in line with the provisions already in force in most European countries. The negotiations between collective management organizations and representative associations of users have become obligatory and the Commission on Copyright and Related Rights is empowered to intervene in the event that an agreement between the negotiating parties is not reached. However, as will be demonstrated in this paper, owing to the ambiguous legal status of the Commission under the 2009 Act, the collective management of copyright and related rights in Serbia could easily result in an impasse again.

*Keywords:* copyright, related rights, collective management organizations, Serbia, tariff, negotiations

### I. INTRODUCTION

Serbian intellectual property law has undergone significant reform over the last two years. Numerous acts have been amended or replaced in order to further harmonize Serbian rules on the protection of intellectual property in line with those of the European Union, WIPO and the WTO. The new acts include the Copyright Act<sup>1</sup>, the Trademarks Act<sup>2</sup>, the Act on the Legal Protection of Registered Designs<sup>3</sup> and the Integrated Circuit Topography Act<sup>4</sup>, which

---

\* **Dr Dusan Popovic** (Serbia) was born in 1978 in Belgrade. He is Assistant Professor (*docent*) at the University of Belgrade School of Law, where he teaches Intellectual Property Law and Competition Law. He also teaches Intellectual Property Law at the University of Banjaluka School of Law (Bosnia-Herzegovina) and Copyright and Information Technology Law at the University of Skopje School of Law (Macedonia). He completed his undergraduate studies in 2001 at the University of Belgrade, his master studies (*diplôme d'études approfondies*) in 2003 at the University of Nancy (France) and his doctoral studies in 2007 at the University Paris Nanterre (France). He regularly publishes papers in Serbian, French and English. He has received grants from the French Government, the Serbian Government and the Max Planck Institute for Intellectual Property Law and Competition Law, enabling him to conduct research on different IP law-related issues. Dusan Popovic is the national coordinator of the Tempus project 'Joint Regional Master of Intellectual Property Law', funded by the European Commission and supported by the WIPO Academy. He drafted the amendments to the Serbian Copyright Act (2011), as well as the rules on resolution of .rs domain name disputes (2010). He was among EU law specialists who drafted the National Strategy for the Accession of Serbia to the European Union (2005). Dusan Popovic is the president of the Serbian Commission for the resolution of .rs domain name disputes, which acts within the auspices of the Serbian Chamber of Commerce. He is arbitrator at the Permanent Court of Arbitration of the Serbian Chamber of Commerce.

<sup>1</sup> *Official Journal of the Republic of Serbia* No. 104/2009.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

were adopted in 2009; the Act on Geographical Indications and Designations of Origin<sup>5</sup>, adopted in 2010; and the new Patents Act<sup>6</sup>, which entered into force on 4 January 2012. Furthermore, in October 2010 Serbia became party to the European Patent Convention and in November 2010 to the Singapore Treaty on the Law of Trademarks. The Government has set up specialized units, including a high-tech crime prosecutor, specialized customs, as well as tax, tax police, and police cyber units, aimed at enforcing the legislation in this area and the Intellectual Property Office (IPO) has set up an in-house Education and Information Centre. The newly adopted Strategy for Scientific and Technological Development provides an indirect stimulus to innovative activities, while the national Intellectual Property Strategy is currently under public debate. In its 2010 Progress Report the European Commission concluded that Serbia's preparations in the area of intellectual property remain moderately advanced; further efforts are needed in terms of alignment with the *acquis communautaire*. As regards the enforcement of intellectual property, the European Commission observed that, although progress had been made, better coordination among relevant agencies was required.<sup>7</sup>

Among these recent reforms, the new rules on collective management of copyright and related rights are the most discussed both by academics and the general public. Under the Serbian Copyright Act, owners of copyright or related rights may exercise their rights individually or collectively. In general, private rights are exercised individually and directly or, exceptionally, through a representative. There are, however, certain subjective rights that are more efficiently managed collectively rather than individually, by associating different right owners in order to collectively manage their rights. Such associations/organizations act in the interest and on behalf of the right holders, and represent an important link between the creators and users of copyrighted works (for instance television stations). Individual management of rights is virtually impossible with regard to certain types of use for practical reasons, for instance the authors are unable to monitor all uses of their works, and they cannot contact every single user of their works and negotiate licences and remuneration. In the same way, it would be highly impractical for users of the works to seek permission from every author for the use of every copyrighted work. Therefore the system of collective management of copyright and related rights appeared to be a necessity and has been widely accepted in national legal systems. This is true in Serbia also, although the functioning of the system has shown certain deficiencies in practice. The Copyright Act 2009 aims to eliminate these deficiencies, in particular by establishing a specialized independent body – the Commission on Copyright and Related Rights, within the IPO to act on behalf of the representatives of right holders and users of works, if they fail to reach an agreement on the tariff.

## II. COLLECTIVE MANAGEMENT ORGANIZATIONS

In Serbia, only one organization may be entrusted with the collective administration for the same category of right holders. The Collective Management Organization (CMO) selected will be the one whose founders represent the majority of right holders in respect of a certain

---

<sup>4</sup> *ibid.*

<sup>5</sup> *Official Journal of the Republic of Serbia* No. 18/2010.

<sup>6</sup> The draft text is available at the website of the Serbian Intellectual Property Office: <http://www.zis.gov.rs>

<sup>7</sup> See European Commission, 'Serbia 2010 Progress Report', *SEC, 1330*, 2010, pp. 35 to 36. Please note that in December 2009 Serbia officially applied for membership in the European Union. In April 2008, Serbia signed the Stabilization and Association Agreement and the Interim (Trade) Agreement with the European Union. The European Commission publishes its Progress Reports annually, thus evaluating the reforms undertaken by Serbia.

category of rights and that fulfils certain organizational, technical and financial conditions to efficiently administer the rights of national and foreign right holders in Serbia and national right holders abroad (e.g. the one with the most contracts on mutual representations with foreign collecting societies).<sup>8</sup> There are currently three<sup>9</sup> CMOs in Serbia: the music authors' organization (SOKOJ),<sup>10</sup> the phonograms producers' organization (OFPS),<sup>11</sup> and the organization for the collective management of performers' rights (PI).<sup>12</sup>

Any holder of copyright and/or related rights not having concluded a contract with the CMO may notify the organization in writing of his or her intention to exercise the rights individually, except in cases where the Copyright Act prescribes mandatory collective management of rights. With respect to the distribution of remuneration, the CMO shall treat equally the holders of copyright and/or related rights, who have not notified the organization of their intention to exercise their rights individually, and the holders of copyright and/or related rights, who have concluded the contract on representation. Under the Serbian Copyright Act, the collective management of copyright and related rights is mandatory in respect of the following rights:

- The author's right to remuneration for cable rebroadcasting of a copyright protected work (Article 29);<sup>13</sup>
- the author's right to levy (Article 39);<sup>14</sup>

---

<sup>8</sup> The organization which fulfils the criteria set by the Copyright Act shall obtain the operating licence. Through the operating licence, the organization shall acquire the right to engage in the collective management of copyright and/or related rights for the five-year period.

<sup>9</sup> In anticipation of the new Copyright Act, a fourth collective management organization was founded. It was Pragus – the organization founded for the collective management of actors' right to remuneration for cable rebroadcasting. Following the adoption of the 2009 Copyright Act, the operating licence delivered to Pragus was withdrawn, since neither the 2004 nor the 2009 Copyright Act prescribed any remuneration paid to performers for communication to the public or broadcasting of their performances fixed in a videogram.

<sup>10</sup> The operating licence had been issued to SOKOJ in 1998, although the organization is active in Serbia (and previously in ex-Yugoslavia) for more than 60 years. For more information on SOKOJ, visit: <http://www.sokoj.rs>

<sup>11</sup> OFPS received its operating licence in 2002. For more information on OFPS, visit: [www.ofps.org.rs](http://www.ofps.org.rs)

<sup>12</sup> The operating licence had been issued to PI in 2007. For more information on PI, visit: [www.pravainterpretatora.org](http://www.pravainterpretatora.org)

<sup>13</sup> Collective exercise was mandatory under the 2004 Copyright Act as well (see Article 28(6)). The 2009 Copyright Act introduced an exception to the mandatory collective exercise of this right in case of cable rebroadcasting of own broadcasts of broadcasting organizations (see Article 29(3)). The implementation of Article 29(2) of the 2009 Copyright Act prescribing an author's right to remuneration for cable rebroadcasting of a copyright-protected work is postponed until the corresponding collective management organization is founded, and at the latest until the date of the accession of Serbia to the European Union (see Article 220).

<sup>14</sup> The authors of works, which in view of their nature, can be expected to be reproduced for personal non-commercial purposes on sound, picture and text carriers have the right to remuneration paid in case of import and/or sale of technical devices and sound, picture and text carriers, for which it can be assumed that they shall be used for such reproduction. In addition, in case copyright-protected works have been reproduced by means of photocopying or using a similar technique, the author has the right to remuneration from legal or natural persons that provide commercial services of photocopying. Collective

- the author's right to remuneration from the person who lends copies of his/her work, except computer programs, when such lending is a registered activity of that person (Article 40);<sup>15</sup>
- the performer's right to remuneration: (i) for broadcasting and rebroadcasting of his/her performance from a published phonogram; (ii) for communication to the public of his/her performance broadcasted from a published phonogram; and (iii) for communication to the public of his/her performance from a published phonogram (Article 117);<sup>16</sup>
- the right of the producer of a published phonogram to remuneration: (i) for broadcasting and rebroadcasting of the phonogram; (ii) for communication to the public of the phonogram; (iii) for communication to the public of the phonogram which is being broadcasted (Article 127);<sup>17</sup>
- the right of publishers of printed editions to levy (Article 142);<sup>18</sup>
- the right of phonogram producers, performers and videogram producers to levy (Article 146).<sup>19</sup>

While the Act was under public debate, the provision on 'exclusivity in respect of particular type of works and particular type of exploitation' was criticized by certain influential local competition law specialists, who argued against such legal monopoly. However, the introduction of competition among CMOs would jeopardize the entire system of collective management of copyright and related rights and annul all the advantages arising from the collective management of rights. In a country that is rapidly transforming from a socialist economic model into a liberal capitalistic economy, it is not surprising that there is a strong pro-competition tendency in all areas of economy. Luckily, the arguments in favour of a single CMO in respect of a particular category of works and specific type of exploitation furthered by IP specialists have been accepted by the Government. Such a system is rewarding the creators

---

exercise of the author's right to levy was mandatory under the 2004 Copyright Act as well (see Article 38). The right to levy has further been regulated by the 2009 Copyright Act, which precisely defined all persons entering the category of levy debtors. Furthermore, under the 2009 Act, levy debtors are under an obligation to respond to each request for information on the type and quantity of devices/carriers imported or sold, as well as to each request for information on the number of photocopies made, presented by the collective management organizations. The Copyright Act prescribes that a levy needs to be 'fair', since levy debtors are not users of copyright protected works and/or subject matter of related rights. The rules on the author's right to levy were modelled upon paragraph 35 of the preamble and Article 5.2(b) of the Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>15</sup> Collective exercise was mandatory under the 2004 Copyright Act as well (see Article 39).

<sup>16</sup> Collective exercise was not mandatory under the 2004 Copyright Act (see Articles 114, 115 and 141).

<sup>17</sup> Collective exercise was not mandatory under the 2004 Copyright Act (see Article 125).

<sup>18</sup> The right of publishers of printed editions to levy is introduced by the 2009 Copyright Act, which prescribes identical conditions for the authors' and the publishers' right to levy. The remuneration collected through collective management organization has to be distributed equally to authors and publishers (50 per cent : 50 per cent). The organization for collective management of reprographic rights has not yet been founded.

<sup>19</sup> Collective exercise was mandatory under the 2004 Copyright Act as well (see Articles 143 and 38).

that are more inclined to develop their talents in an environment that provides an efficient system for management of rights.

A CMO is a legal entity that has the status of an association, operating on the whole territory of the country.<sup>20</sup> As prescribed in Article 154 of the Copyright Act, a CMO may be founded by the authors and/or owners of copyright or related rights and/or their associations. A Memorandum of Association represents the founding document of the CMO. The organization can perform only the activities related to the collective management of copyright and related rights, enumerated in Article 153 of the Copyright Act:

- (a) [T]he holders of copyright and/or related rights shall license their rights exclusively to the organization, instructing it to conclude contracts on the non-exclusive licensing of such rights, in its own name and on their behalf, with the users of works;
- (b) the holders of copyright and/or related rights shall instruct the organization to collect the remuneration from the users, in its own name and on their behalf;
- (c) the organization will exercise control over the exploitation of the subject matters of protection on its repertoire;
- (d) the organization will protect the rights entrusted to it by the holders of copyright and/or related rights before courts and other authorities;
- (e) upon the request of the organization, any authority responsible for maintaining the record of data that are relevant for determining the amount of remuneration, shall make such data available to the organization.

Aside from these activities, the CMO may perform activities realizing the artistic, professional or social interests of the right holders, and perform specific administrative and technical services in the name and for the account of another organization, on the basis of an agreement concluded in a written form.

The organization is bound to conclude a contract on non-exclusive licensing of the right to exploit the subject matter of protection from its repertoire with each interested user and/or association of users, under equal and appropriate terms. There were situations in the past where a CMO did not offer equal terms to different users of copyright protected works and/or subject matter of related rights; for instance, in 2009 the Serbian Competition Authority (*Komisija za zastitu konkurencije*) initiated ex officio proceedings against the organization of phonogram producers, OFPS, aimed at determining whether the tariff it had applied was an anti-competitive agreement. The tariff prescribed unequal conditions that OFPS would apply when concluding three-year contracts with different cable RTV operators. According to the tariff, more favourable conditions would be offered to operators covering more than 40 per cent of the market. Immediately following the initiation of proceedings before the Competition Authority, OFPS modified its tariff. The Competition Authority suspended the proceedings, provided that the CMO did not repeat the infringement of competition rules within six months following the adoption of the decision on suspension.<sup>21</sup>

---

<sup>20</sup> Under the 2004 Copyright Act, collective management organizations had to be founded in the form of a company and registered within the Serbian Business Registers Agency.

<sup>21</sup> See the 2009 Report of the Serbian Competition Authority, page 27, available at <http://www.kzk.gov.rs>. The Competition Authority is obliged to publish only the wording of its decisions in the Official Journal of the Republic of Serbia, which makes the website of the Authority the main source of information on competition enforcement. Unfortunately, only rare decisions of the Competition

Each CMO is required to adopt certain acts prescribed by the Copyright Act: the Statute, the Fee Schedule and the Distribution Plan. The Distribution Plan lays down criteria on the basis of which the organization distributes to the right holders the income collected from the users in the form of remuneration for the use of the subject matter of protection. The Copyright Act sets out the main principles of such distribution: proportionality, appropriateness and fairness. The distribution is based on accurate data concerning the use of the subject matter of protection. If accurate data is not available and/or if the collection of accurate data would represent an unacceptable organizational and financial burden for the organization, the distribution plan may be based on estimates stemming from relevant and verifiable facts.

### **III. THE TARIFF: GENERAL RULES AND NEGOTIATIONS PROCEDURE**

#### **A. GENERAL RULES**

Article 170 of the Copyright Act lays down certain rules regarding the determination of tariff. Tariff is an act of the CMO which determines the amount and criteria for establishing the remuneration paid by users of copyright-protected works and the subject matter of related rights, as well as the remuneration paid by the levy debtor. If the use of the subject matter of protection is indispensable for performing the user's activities (e.g. in case of broadcasting or concert use), the tariff is determined as a rule as a percentage of the income the user receives by performing the activity under which the subject matter of protection is being used. The amount has to be proportional to the importance that the use of the protected subject matter from the repertoire of the organization has for the income of the user. If, by using the subject matter of protection, the user did not receive any income, the tariff shall be determined by a percentage of the amount of the expenses necessary for performing the activity under which the subject matter of protection is being used, taking into account the importance of the use of the subject matter of protection for the activities of the user. The tariff also determines the lowest amount of remuneration for the use of the subject matter of protection from the repertoire of the organization. The Serbian Copyright Act further emphasizes the proportionality principle by stating that, when determining a tariff, the tariffs of the CMOs of the countries that have a similar GDP to that of the Republic of Serbia need to be taken into consideration.

The tariff can exceptionally be determined as a lump sum, if the use of the subject matter of protection is not necessary for the performance of the activities of the user, but is only useful or pleasant (e.g. in the transport, hotel and catering industry, merchant and manufacture shops, shopping malls, exhibition spaces). This is only possible if the determination of the tariff as a percentage would be impossible or unreasonably difficult. When determining the lump sum, the following criteria shall be taken into consideration: (a) the specific type of use of the subject matter of protection; (b) the geographical location of the seat of the user; (c) the type and size of the space where the subject matter of protection is being used; (d) the duration and scope of use and prices of services offered by the user. The Serbian copyright legislation was in force prior to the adoption of the 2009 Copyright Act, but did not lay down criteria that should be followed when setting the tariff in form of a lump sum.<sup>22</sup> The absence of such criteria

---

Authority are published online in integral version. In case a decision is not published at the website, the yearly report on the activities of the Competition Authority remains the only source of information on its activities.

<sup>22</sup> Under the Copyright Act 2004, when setting a tariff as a lump sum, the collective management organizations had to take into account the remuneration payable by another user of a comparable economic power, as well as other relevant criteria (see Article 163.4). However, the Copyright Act did not enumerate any such criteria.

resulted in the same tariff class being applied, for instance, to exclusive restaurants in the capital city and those in the countryside, regardless of their geographic location, frequency of usage of the subject matter of protection etc.

The Copyright Act introduces an obligation for the users of copyrighted works and subject matter of related rights to inform the CMO of all circumstances relevant for the calculation of the remuneration payable in accordance with the tariff. The breach of this rule is sanctioned by a pecuniary fine, payable by both the moral person (association of users) and the responsible person of a moral person.<sup>23</sup>

The tariff shall be determined proportionally if the use of copyright-protected works is performed together with the use of the subject matter of related rights – that is if there are multiple right owners involved in a single use of work. When determining the proportionality between the remuneration payable for the use of copyright protected work and the use of subject matter of related rights, the usual international practice is to be pursued.

By laying down new rules for tariffs in terms of the remuneration to be paid to right holders, the Copyright Act 2009 introduces a balance between public and private interest in situations in which copyright and related rights are being exercised collectively. Under the previous Copyright Act, CMOs were allowed to set the tariff independently, without having to consult the organizations of users of copyright protected work and subject matter of related rights. Pursuant to Article 163 of the Copyright Act 2004, the Management Board of the CMO could set the tariff unilaterally and the tariff would become obligatory following its publication in the Official Journal. This led to constant tension between right owners and users, and there were cases of organized boycott.<sup>24</sup> Such unilateral determination of the tariff is no longer possible; under the Copyright Act 2009, CMOs must engage in negotiations on the tariff with the representative organizations of users of copyright protected works and subject matter of related rights. The introduction of mandatory negotiations is a fair solution since it allows for the economic strength of the users to be taken into account. By introducing mandatory negotiations, the legislator wished to achieve a more efficient exercise of copyright and related rights, since the users would *a priori* pay the remuneration without opposition in case they participated in the process of its determination. The new rules are expected to lead to a decrease in the number of court proceedings related to the application of the tariff as well.

The collection of remuneration for the use of copyright-protected works and subject matter of related rights is an issue in Serbia. According to the data referring to the period when the Copyright Act 2004 was in force, an extremely large number of court proceedings are initiated by the CMOs against natural and legal persons that have failed to pay the remuneration for the use of copyright-protected works and subject matter of related rights. Currently pending before the courts are some 2000 proceedings to which SOKOJ is a party, and some 3000 to which OFPS is a party.<sup>25</sup> Under the 2009 Copyright Act, in case of a dispute between the CMO

---

<sup>23</sup> Articles 215 and 216 of the Copyright Act 2009.

<sup>24</sup> The organized protests of associations of users of copyright protected works and subject matter of related rights continued even following the entry into force of the Copyright Act 2009. The latest actions were performed on 22 December 2010, 22 January 2011 and 22 February 2011 throughout Serbia, when bars and restaurants stopped playing music for one hour.

<sup>25</sup> Information taken from the document explaining the reasons for passing the new Copyright Act (*Obrazloženje Predloga zakona* in Serbian), published by the Government/Serbian Intellectual Property Office in 2009.

and the user of a copyright-protected work or a subject matter of related rights regarding the amount of remuneration, the user has to pay the amount determined under the previously valid tariff, until the dispute is resolved.<sup>26</sup> Therefore, the tariff determined under the 2004 Act is to be applied while the dispute is pending. However, owing to the significant number of court proceedings initiated precisely because of the amount of remuneration payable under the tariff determined in accordance with the Copyright Act 2004, it is evident that the collection of remuneration will remain an issue until the new tariffs are set in accordance with the 2009 Copyright Act.

#### B. NEGOTIATIONS PROCEDURE

Under the Copyright Act 2009, the negotiations on the tariff are to be initiated by the CMO by way of public invitation to associations of users and individual users, published cumulatively in the Official Journal of the Republic of Serbia, the website of the CMO and one of the daily newspapers with high circulation. In addition, the CMO will negotiate the tariff with the representative association of users. According to the Act, in order to be considered representative, the association of users shall represent the majority of users on the territory of the Republic of Serbia within a certain profession. Exceptionally, the association of users shall be considered as representative, if such status is recognized by another national legislation. If a representative association of users cannot be identified by reference to any of the two criteria indicated above, the representation authority shall be determined following the assessment of the number of users represented by the association, the activity of the association, the way in which the association is being organized and other criteria.

If the parties to negotiations reach an agreement on the tariff, it must be in written form and must specify: (a) the amount of remuneration paid for the use of copyright protected works or subject matter of related rights from the repertoire of the organization; (b) the conditions for the use of copyright protected works or subject matter of related rights from the repertoire of the organization; (c) the deadline and form of payment of the remuneration; (d) the specific circumstances of use, based on which the amount of a given remuneration determined by the tariff shall be increased or decreased. Exceptionally, the tariff can be determined as a result of negotiations between the CMO and the individual user, if the individual user is the only one performing a specific activity in the Republic of Serbia, due to specific characteristics of the activity. Public broadcasting organizations are considered individual users *ex lege*. The tariff set through negotiations between the CMO and the representative association of users/the individual user enters into force on the eighth day following its publication in the Official Journal. However, if agreement is not reached within 60 days following the initiation of negotiations, the Administrative Board of the CMO shall adopt a proposal of the tariff and communicate it to the Commission on Copyright and Related Rights established within the IPO. The procedure shall continue before the Commission.

The Copyright Act 2009 provides for certain specific rules relating to situations in which a single tariff applies; firstly, it prescribes a single tariff for the exercise of the performer's right to remuneration pursuant to Article 117 and the right of the producer of a published phonogram to remuneration pursuant to Article 127.<sup>27</sup> The collection of remuneration

---

<sup>26</sup> If the amount refers to the tariff number which did not exist in the previously valid tariff, the user has to pay the amount envisaged in the new tariff into the special fund which is not distributed to the holders of rights until the dispute is resolved.

<sup>27</sup> See the list of provisions of the Copyright Act prescribing mandatory collective management of copyright and related rights in the section 'Collective Management Organizations' of this paper.



shall be administered by one collective organization, following a written agreement between the collective organization of performers and the collective organization of phonogram producers. The two organizations agreed that the single tariff shall be collected by the organization of phonogram producers.<sup>28</sup> The negotiations on the single tariff are initiated and pursued jointly by the two CMOs. If the agreement is not reached through negotiations within 60 days following their initiation, the Administrative Board will follow the procedure outlined above. If neither CMO communicates the proposal of the tariff to the Commission on Copyright and Related Rights within 90 days following the initiation of negotiations (i.e. publication of the invitation in the Official Journal), the tariff shall be determined by the Commission.

Secondly, the Copyright Act prescribes a single tariff for the exercise of the author's right to levy pursuant to Article 39; and the right of phonogram producers, performers and videogram producers to levy pursuant to Article 146.<sup>29</sup> The negotiations on the single tariff are initiated and pursued jointly by the organizations empowered to collectively administer these rights. If agreement with the representative association of producers or importers of technical devices for sound and visual recording, and producers or importers of blank sound, video or text fixation media is not reached through negotiations within 60 days following their initiation, the Administrative Board of the CMOs shall adopt a proposal of the tariff and communicate it to the Commission. The procedure shall continue before the Commission.

If the CMOs do not communicate the proposal of the tariff to the Commission within 90 days following the initiation of negotiations, the tariff shall be determined by the Commission. The collection of the single tariff for the exercise of the author's right to levy pursuant to Article 39 and the right of phonogram producers, performers and videogram producers to levy pursuant to Article 146 is performed by the CMO. The remuneration collected through a levy system shall be distributed in the following way: 40 per cent to authors, 30 per cent to performers, 30 per cent to producers of phonograms and producers of videograms.

#### **IV. COMMISSION ON COPYRIGHT AND RELATED RIGHTS**

Under the Copyright Act 2009, the Commission on Copyright and Related Rights, a new and independent expert body, was established. The Commission is formed of five experts on copyright and related rights, appointed by the Government.<sup>30</sup> The Commission acts in the event that representatives of right holders and users fail to reach an agreement on the tariff. In such a situation, the Commission will issue a motivated opinion on the proposal of tariffs. The Commission was constituted in December 2010, six months after the expiry of the deadline

---

<sup>28</sup> The 2004 Copyright Act empowered phonogram producers to collect the remuneration for communication to the public and broadcasting of phonograms and performances fixed therein. Pursuant to Article 125(2) of the 2004 Copyright Act, a phonogram producer had to transfer one half of the amount collected to a performer, unless otherwise agreed. The Act attributed the collection of a single tariff to the organization of phonogram producers, since the performers' collective management organization had not yet been founded in 2004 (this happened only in 2007).

<sup>29</sup> See the list of provisions of the Copyright Act prescribing mandatory collective management of copyright and related rights in the section 'Collective Management Organizations' of this paper.

<sup>30</sup> On a proposal from the Intellectual Property Office, the Government appoints a president of the Commission and four 'ordinary' members. The Government appoints one of the members as a vice-president. Two deputy members are also appointed. The appointments are made following a public invitation to collective management organizations and associations of users of copyright protected works and subject matter of related rights to propose the candidates who meet the criteria set by the Copyright Act.

prescribed by the Act. Although it acts independently, the Commission operates within the auspices of the IPO, which provides administrative assistance to it. The Act explicitly prescribes that the Commission is not a permanent body<sup>31</sup>, which further complicates the determination of its legal nature and its positioning within the Serbian administrative law system. Under Serbian administrative law, special administrative organizations are enumerated in the Act on the Ministries.<sup>32</sup> Only the IPO is mentioned as such an organization, leaving the issue of the Commission's legal nature unclear.

The procedure before the Commission is initiated by a written request submitted by the collective organization within three months following the publication by the CMO of an invitation for negotiations on the tariff. If a proposal of a single tariff has been agreed upon by two or more CMOs, these organizations jointly initiate the procedure before the Commission. A copy of the request for opinion on the tariff, submitted by the CMO(s) is forwarded by the Commission to the association of users or an individual user. The latter has the right to respond within 30 days following receipt of the copy of request.

In the absence of a response by the association of users or an individual user, the Commission shall assess the request submitted by the CMO(s) only. If it considers it necessary, it may organize consultations with the representatives of CMO(s) and representative association of users. By majority vote, the Commission adopts an opinion on the tariff, thus evaluating whether the proposal refers to the rights, whose collective management has been lawfully attributed to the CMO, and whether the remuneration has been set in accordance with the criteria prescribed by the Copyright Act. It must publish its opinion within 60 days following receipt of the request. Copies of the opinion are sent to the CMO(s) and the association of users/individual user.

If the Commission considers that the proposal of tariff refers to the rights whose collective management has been lawfully attributed to the CMO and that the remuneration has been set in accordance with the criteria prescribed by the Copyright Act, the CMO(s) shall publish the opinion in the Official Journal within 15 days following its receipt. If the Commission considers that the proposal does not refer to the rights whose collective management has been lawfully attributed, the CMO(s) must within 30 days, following the receipt of the opinion, repeat the negotiations with the association of users or forward a new proposal on tariff to the Commission. If, following the assessment of the second proposal of tariff, the Commission still considers that the tariff has not been set in accordance with the criteria prescribed by the Copyright Act, it shall set the tariff itself. The Commission's decision on tariff is binding on both parties.

The rules regulating the work of the Commission appear to be clear and logical at first. However, following its late establishment, the Commission has encountered problems relating to the significant deficiencies arising from the Copyright Act. For instance, the Commission has not been defined as an administrative body by the legislator. Being defined as an independent body of experts, the Commission is neither an organ of the Government nor of the IPO. The ambiguous legal nature of the Commission further raises the question of whether there is a right to appeal its decisions. Under Serbian administrative law, an appeal is considered an ordinary administrative remedy that can only be denied in exceptional circumstances, and has to be explicitly prescribed by the law. The Copyright Act does not contain any provision explicitly denying the right to appeal the decisions adopted by the

---

<sup>31</sup> Article 192.2 of the Copyright Act 2009.

<sup>32</sup> *Official Journal of the Republic of Serbia* No. 16/2011.

Commission. Therefore, it would appear that the decisions can be appealed, provided that the Commission is considered an administrative body within the meaning of the Act on General Administrative Procedure.<sup>33</sup> Furthermore, it is unclear which court or administrative body would be competent to hear an appeal. In general, decisions adopted by the IPO may be appealed before the Administrative Commission of the Government. However, the competence of the Administrative Commission is explicitly provided for only in case of appellate proceedings conducted against the decisions of the IPO, and the Commission on copyright and related rights is not formally a part of this Office. Consequently, the Commission would not be able to determine with certainty whether its decisions can be appealed or not. For this reason it did not instruct the parties as to the available legal remedy at all. If the right to appeal the decision itself is denied, it would mean that an administrative dispute proceeding could still be brought against any decision of the Commission – even procedural ones adopted in the form of a resolution.<sup>34</sup>

More importantly, if the Commission is to be considered an administrative organ, it would be possible to initiate an administrative dispute before the Administrative Court against the opinion on the tariff issued by the Commission. Although qualified as an opinion, the act adopted by the Commission could substantially be seen as a decision of an administrative organ<sup>35</sup>, where the latter, directly applying the legal provisions, decides on the rights, obligations or legal interests of natural persons, moral persons or other parties to proceedings.<sup>36</sup> Allowing the somewhat excessive access to the Administrative Court could be most burdensome for the Commission. Furthermore, owing to the significant number of administrative disputes pending before it, the Administrative Court would find it extremely difficult to respect the time limits for the adoption of its decisions under the Act regarding administrative disputes.<sup>37</sup>

In addition, certain accessory issues could jeopardize the efficiency of the proceedings before the Commission, for instance, the Copyright Act prescribes that the compensation for the work of the president and the members of the Commission shall be paid by the parties to the proceedings (CMOs and associations of users). It further advocates that the compensation for work shall be covered equally by the parties. However, the legislator ignored the fact that the parties to the proceedings before the Commission did not have the same interests; the associations of users generally tend to prolong the proceedings, thus postponing the adoption of the opinion on the tariff. In practice, the associations of users could be abusive of this provision by simply not paying their half of the amount, thus leaving the president and the members of the Commission without full compensation for their work. Under the Copyright Act, there are no procedural rules allowing the Commission to order any of the parties to pay compensation. In

---

<sup>33</sup> *Official Journal of the Federal Republic of Yugoslavia* No. 33/97 and 31/2001; *Official Journal of the Republic of Serbia* No. 30/2010.

<sup>34</sup> *Zaključak* in Serbian.

<sup>35</sup> *Resenje* in Serbian. Pursuant to Article 196.1 of the Act on General Administrative Procedure, any decision (*resenje*) has to be designated as such. However, specific regulations may stipulate a different designation.

<sup>36</sup> Article 1 of the Act on general administrative procedure.

<sup>37</sup> *Official Journal of the Republic of Serbia* No. 111/2009. The Administrative Court of the Republic of Serbia was established following the reform of the judiciary, undertaken in 2009. It became operational on 1 January 2010. All cases pending before the former Administrative Chamber of the Supreme Court of Serbia have been transferred to the Administrative Court.

such a situation it could eventually decide to dismiss the administrative proceedings.<sup>38</sup> However, in such a scenario the Commission would be unable to fulfil its mission.

## V. CONCLUSION

As demonstrated in this paper, the collection of remuneration that should be paid for the use of copyrighted works and subject matter of related rights is indeed a problem in Serbia. While the Copyright Act 2004 was in force, the collective management of copyright and related rights showed significant deficiencies, leading to some 5000 court proceedings relating to the tariff. One of the main objectives of the Copyright Act 2009 was to resolve the problems encountered with the collection of remuneration payable under the tariff. The 2009 Act laid down more detailed rules on the functioning of CMOs and the negotiations procedure, in line with the provisions already in force in most European countries. The negotiations between CMOs and representative associations of users became obligatory, and the Commission on Copyright and Related rights became empowered to intervene in case agreement between the negotiating parties was not reached. However, due to the ambiguous legal status of the Commission on Copyright and Related Rights under the 2009 Copyright Act, the collective management of copyright and related rights in Serbia could easily result in an impasse again.

It remains unclear whether the decisions adopted by the Commission could be appealed before the Administrative Commission of the Government or the parties could directly initiate an administrative dispute before the Administrative Court. Moreover, the 2009 Copyright Act provides that, in case of a dispute between the collective organization and the user of a copyright-protected work or a subject matter of related rights regarding the amount of remuneration, the user is required to pay the amount determined under the previously valid tariff, until the dispute is resolved. However, since there are already some 5000 court proceedings related to the tariff determined under the 2004 Copyright Act, it is evident that this provision cannot be effectively applied. It seems that the problem can only be resolved by amending the Copyright Act 2009, thus clarifying the legal status of the Commission, and allowing it to act efficiently in the best interest of the holders of copyright and related rights.

---

<sup>38</sup> Article 20.3 of the rules of procedure of the Commission on copyright and related rights.

## BIBLIOGRAPHY

### Official documents

Copyright Act, *Official Journal of the Republic of Serbia* No. 104/2009

Act on the Ministries, *Official Journal of the Republic of Serbia* No. 16/2011

Act on Administrative Disputes, *Official Journal of the Republic of Serbia* No. 111/2009

Act on General Administrative Procedure, *Official Journal of the Federal Republic of Yugoslavia* No. 33/97 and 31/2001; *Official Journal of the Republic of Serbia* No. 30/2010

European Commission, Serbia 2010 Progress Report, SEC (2010) 1330

Serbian Competition Authority, The 2009 Yearly Report

### Websites

Serbian Intellectual Property Office: <http://www.zis.gov.rs>

Serbian Competition Authority: <http://www.kzk.gov.rs>

SOKOJ – Serbian Music Authors’ Organization: <http://www.sokoj.rs>

OFPS – Serbian Phonograms Producers’ Organization: <http://www.ofps.ors.rs>

PI - Organization for Collective Management of Performers’ Rights in Serbia: <http://www.pravainterpretatora.org>