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**ABOUT SOME
THEORETICAL AND
PRACTICAL ASPECTS OF
COLLECTIVE MANAGEMENT
OF PROPERTY RIGHTS**

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About some theoretical and practical aspects of collective management of property rights

1. The national copyright system created by our national leader Heydar Aliyev possesses already a decade of experience. The relevant legislation and normative legal base for the protection of intellectual property rights, state governance in this area, including the state support for the carrying out the rights by the owners and, finally, the enforcement of rights - mechanisms for judicial and law enforcement bodies for restoration of violated rights are taken into consideration in the three key areas of this system formed by our great leader, and it is carried out according to the international practice and relevant standards. According to the legislation, our state's copyright policy encompasses the following directions and is implemented by the Republican Copyright Agency under the authority of the President of the Republic of Azerbaijan: to implement state policy and management in the field of copyright and related rights; to prepare the proposals on improvement of legislation in the field of copyright and related rights; to control the compliance with the current legislation in the field of copyright and related rights; to represent the Republic of Azerbaijan at the international organizations on copyright and related rights, and to organize cooperation in this field; to implement the state registration of science, literature and art works; to register of state registered organizations for the collective management of property rights and to control over their activities; to fulfill other duties provided by the legislation.

With regard to the protection of rights, it should be noted that four laws in the field of intellectual property, excluding industrial property, as well as the laws "On

Copyright and Related Rights", "On Legal protection of integrated circuits topologies", "On Legal protection of Azerbaijani folklore" and "On legal protection of data collections" (the 3rd reading), tens of normative legal acts, official instructions were adopted. The Republic of Azerbaijan is involved in wide international cooperation in the field of copyright, actively participates in the work of international organizations and is a member of the main international agreements. Azerbaijan is included in the list of 42 country-coordinators within 180 countries of the WIPO, and the Agency's representative has been elected Vice Chairman of the Berne Convention for the Protection of Literary and Artistic Works, which unites 150 countries. The growth of the authority of the Republic of Azerbaijan and attention to it is a clear evidence of the support of the national and foreign policy course laid by our national leader, Heydar Aliyev, and successfully implemented by Mr. President Ilham Aliyev.

The database on right holders, the works, the objects of related rights and users connected with implementation of copyright and related rights has been established at the Agency. The works are registered by presenting the registration certificates at the Agency, coordination and control of the work of authors' societies are implemented, and they are supported for assistance in their activities.

2. The authority to carry out the rights is directly belonged to the authors and other legal owners in accordance with the law. The reason is that intellectual property rights, especially its most complex and important part - copyright have a personal character and are usually regulated under a special (individual) law. According to Article 27 of the Universal Declaration of Human Rights of 1948 and to the International Covenant

“On Political, Economic and Social Rights” the copyright is included in the human rights framework, these rights are called as exclusive rights under the Berne Convention for the “Protection of Literary and Artistic Works”. Thus, according to the accepted norms, the most effective way of implementing such exclusive rights is to implement them by the author himself. However, it is impossible in many cases (new methods of using technology, a large number of users, expanding the scope of the works, etc. because of technology development) and taking into consideration of the impossibility of individual enforcement of the rights, Articles 11bis (2) and 13 (1) of the Berne Convention for the “Protection of Literary and Artistic Works” permit the establishment of a legal base for the use of "compulsory licenses", i.e., the use of a work without the author's permission by paying fee. This compulsory step is taken by the state to ensure the interest of the society in acquiring cultural values.

It is obvious that any compulsory license is contrary to exclusivity of the author's and other right holder's use right of the work, and restricts them. Because the exclusivity is the personal authorization of the author to use the work and the compulsory license substitutes the exclusive right with the right to get the royalties without permission. There is a principle of collective management of property rights related to the use of works in world practice to mitigate the conflict. Thus, the collective management acts as an alternative to compulsory licensing, it restricts relatively little the carrying out the exclusive rights of the right holders to use their work, and is therefore used in world practice.

Thus, both compulsory licenses and collective management impose restrictions on property rights,

exclusivity to the use of works, and extent conflict with them in some sense. According to the leading experts on intellectual property, the joint implementation of these two autonomous legal institutions (exclusive rights and collective management) in one legal system creates complexity and therefore the establishment of a collective management institution requires great attention. The principles of collective management should be established to create the conditions for the maximum unobstructed implementation of the exclusivity of rights. These views are directly reflected in paragraph 227 of "Research and Recommendations on Establishment and Activities of Collective Rights Management Organizations" (Geneva, 1990) of the World Intellectual Property Organization (WIPO) which is the specialized organization of the United Nations, and it is noted here that "Exclusive rights reaches its highest value when they are implemented by their right holders and it is advisable to keep this as far as possible."

Above mentioned, especially free choice of any right holder during implementation of his or her rights individually or through collective management, restrictions on the capacity of managed copyrights in the use of collective management are widely reflected in the copyright law of Azerbaijan. Even when collective management organizations were not created by authors and right holders, our state delegated these functions to the Republican Copyright Agency by order of the Cabinet of Ministers dated to May 2, 1997, No. 38, in order to support the rights of authors. All this is compatible with the world experience. Because, according to this practice, collective management can be implemented by both government and non-governmental organizations.

It is considered possible to implement the collective management at the community level in the Law “On Copyright and Related Rights” (Article 41). In this regard, the Republican Copyright Agency supports the establishment of such organizations and provides any methodological support to them (for example, the Guild of Filmmakers which is engaged to collectively managing the property rights of authors of audiovisual works).

Because according to the legislation, these organizations should be registered as new subjects of the field at the Copyright Agency after their creation and should be controlled.

This practice is available in all developed countries. Proper registration of such organizations is licensed or accredited, and its activities are controlled by the state body. The purpose of state control is to prevent various cases that are not in the authors' favor.

3. The analysis of the provisions of the Law “On Copyright and Related Rights” allows to note the following features of the Institute for Collective Management of Property Rights:

- collective management is not compulsory and applies only when the author is not in a position to manage his rights individually, and this management relates only to the author's property rights;

- the collective management organizations should be established in accordance with the Law “On Copyright and Related Rights” and the Law “On Non-Governmental Organizations” (public associations and foundations);

- the collective management organizations operate on the basis of being the membership of the authors (right owners) to the same organizations or the authority of obtained from representation of their rights by the contract;

- the collective management organizations represent the interests of the authors (right holders) who give them this authority and act on their behalf;

- the collective management organizations generally collect and distribute royalties, and perform other actions provided by the law for the benefit of authors;

The collective management organizations work in such a way that the authors (right holders) get as close to the amount they can receive when they use their work individually, rather than a portion of the profits as in commercial organizations.

The collective management organizations' activity principles determined by the legislation allow to confirm that the legislation of the Republic of Azerbaijan adopts the concept of "limited expanded collective management". An alternative to such collective management societies are the "agent type" collective management organizations. If "enhanced collective management" refers to the monopoly nature of activities in a particular area of use of the works and a limited number of societies, the "type of agent" is based on a large number of copyright societies in the same area, each of them can represent the interests of the right holders in a limited circle.

The limitations set by Azerbaijani legislation on "enhanced collective management" are that such a public association can only represent the interests of the rights holders by whom it is authorized. At the same time, in accordance with the existing law (Article 43), the right holder who does not transfer his or her right to the collective management organization may require a royalty (the royalty calculated for a co-production or for the full program) and removing his or her works from the repertoire of the organization.

In accordance with this norm provided by the legislation of the Republic of Azerbaijan and the classification adopted by international organizations, "limited expanded collective management" is itself a limitation of the number of persons in whom collective management is implemented.

In the WIPO's "Researches and Recommendations on the Establishment and Activities of Collective Rights Management Organizations" (Geneva, 1990) such a provision for acting the collective management organization on behalf of the right holders who have not transferred their rights to this organization must be required by law. This is also confirmed in the document "The European Union: The Legislation experience in the field of Intellectual Property" prepared through the Intellectual Property program TACIS of the European union. There is no such norm in Azerbaijani legislation. Such norm is considered in Russia. It is stated in the same "Recommendations" that when the functions of collective management are implemented by public authorities, only those bodies may act on behalf of the right holders and represent them without requiring the membership in the organization, and this is appreciated as the state's attention and care to this field.

4. Collective management organizations require that the general rules on public associations should be adopted to the copyright legislation by their specific characteristics.

The first. The collective management organizations are created by right holders, because they implement property rights as defined in copyright law by joining under one society on the base of their genuine interests.

The second: If the collective management organizations, management of rights from this category

are considered in this Charter, it should be open to all rights holders.

The third: The subject of activities of these public associations should be defined in such way that it does not conflict with the interests of its members, at the same time the admission of both users and owners of the rights to this organization should be avoided.

The fourth: The management of property rights on the collective bases cannot be affected by personal (non-property) rights, according to the law these rights are inalienable and non-discriminatory, and cannot be conferred on any grounds, and therefore this can only be about collective management of property rights in relation to the disclosed works.

The fifth: The collective management refers to general (collective) management, in other words, according to the international norms such public associations are based on the membership of authors (right holders) because otherwise it voids the right holders who are from the same category of the society to express their opinions and to represent their own interests.

The sixth: While creation of the collective management organization their activity circle should be defined precisely and according to the international practice, otherwise there may be conflicts of interest and circle of work with other similar organizations. Thus, the management of the same works or objects of related rights of the same rights holders is not permitted for two or more organizations by using the same method, and these are regulated by a special norm in the legislation of major states.

The seventh: According to the copyright law of the Republic of Azerbaijan, the establishment of a collective

management organization is based on the free choice of the author, i.e. he or she has the right to implement his/her own property rights individually, except the use of work for personal purposes as specified in Article 17 of the Law and a phonogram for compulsory collective management under Article 37.

The eighth: The legislation's requirement on non-commercial character of the collective management organization of property rights automatically excludes statutes "profits" or "income" from the Charter and also eliminates the use opportunities of the works of the authors whose rights are authorized. (Article 41).

The ninth: While applying the norm on acquisition of property and non-property rights provided by the Law of the Republic of Azerbaijan "On Non-Governmental Organizations (Public Associations and Funds)" to the activities of a collective management organization it must be adopted to the requirements of copyright legislation.

The above mentioned principles and results derived from the law and international practice for establishing and functioning of organizations that manage property rights on a collective basis maximum keep the exclusivity of the rights in collective management condition which is the restriction of property rights. The most important system of purposes of copyright is directed to the providing the balance of interests of right holders and the society.

At the same time, we would like to draw attention to two main aspects of the activities of these organizations in terms of state control and elimination of piracy.

A major lack of possible monopoly of collective management organizations in certain areas may be due to:

- refuse to present the licenses to users without any grounds;
- unjustified discrimination against users of the same category;
- defining the terms of discrimination in the user license agreements;
- inadequate implementation and distribution of author's royalties.

If the first three cases of abuse lead to an indirect infringement of the rights of the rights holders, the latter may directly infringe their rights.

In this regard, it is clear from the legal documents and international practice that state control is important in establishing of collective management organizations and in implementing its activity.

According to experts and the recommendations of international organizations, the state monopoly on collective management and control over the activities of these organizations is based on the compliance of those activities with the legislation, with the interests of rights holders, users and the public.

In many countries, licensing of their activities as a form of control over collective management or accreditation in the form of registration in a specially authorized body, of course, is possible only after the proper registration of these organizations. The State Agency for Intellectual Property, in its absence, the Ministry of Culture or the Ministry of Justice act as a state control organization. For example, the system of licensing and state control being harder than accreditation (German Law "On Copyright and Related Rights Management", France's "Intellectual Property Code", Switzerland's Copyright Law) is applied in EU countries (Germany, France, Switzerland, etc.).

Azerbaijani legislation (Article 41) provides for a “soft” registration system, that is, the registration of such organizations by the Copyright Agency and subsequently control their activities (Article 43).

It should be noted that such registration is carried out after their registration at the Ministry of Justice, and of course, by indicating a specific area of rights management (rights transferring by right holders, use methods of rights, potential users, etc.).

The experience of the CIS countries and the post-Soviet space is also remarkable. Lithuania has more stringent state control over the creation and operation of public-sector organizations managing property rights, such conditions are also reflected in the Ukrainian copyright law, and it is directly regulated by the copyright laws of Kazakhstan and Kyrgyzstan that in case the requirements defined by the state copyright legislation are violated while creation the management organizations of property rights on collective base the registration of these organizations is officially denied. The application of licensing system for the activity of such public organizations after their establishment is considered by Uzbekistan's copyright legislation.

Being free of the creation and operation of organizations that manage property rights on a collective basis in Russia, to some extent, has been concern for well-known professionals and law enforcement agencies. Russia's miserable experience in this area is widely discussed in international circles and experts. “expanded collective management” system is applied here without any limitations, that is, the rights of unauthorized authors to these organizations are included in the licenses granted to users, and there is no registration system at the authorized body. In Moscow, there are more than 25

organizations that act on behalf of all authors and related owners, and many of them have operated and closed during a few months. According to Russian experts, these circumstances give opportunity for infringement of the rights of authors, audio and video piracy and other violations of the law, and of course, the probability of collapse of the institution of collective management increases.

Also, it should be noted that the collective management through public associations is intended for societies with a high legal culture, as its liberalism allows any person (s) to create an organization and act on behalf of the right holders. Establishment of such organizations in Azerbaijan also demonstrates the steps taken towards the formation of civil society.

It should be specifically noted that in all the aforementioned countries (near and far abroad) public organizations that collectively manage property rights are created by the right holders.

The experience of CIS countries which are in the transition period shows that when collective management of property rights by authors in these countries is carried out by public associations, the same subjects often form public societies, then (or before) register several commercial organizations, and for example, obtains a license for the production and distribution of audio and video products by getting permission "from itself". According to the experts' opinion, this is especially true for Russia. As it is seen, collective management of property rights in certain circumstances can lead to the legalization of piracy, which is direct conflict with the original goals of collective management. Most CIS countries (Ukraine, Moldova, Belarus, Uzbekistan, Kyrgyzstan, etc.) use the collective management system

only through government agencies because of above mentioned. Such circumstance exists in most developing countries (China, Algeria, Morocco, Latin America and Africa).

From the above, it can be concluded that the establishment and activities of public organizations in developed countries are subject to strict state control in the form of licensing and constantly monitored by the public authorities, or collective management is carried out by state (CIS and developing countries). The activities of public organizations in this area are not denied.

5. The collective management of property rights of authors and related right holders is currently being discussed in our country and certain steps are being taken to establish collective management organizations. The filmmakers' guild created by the directors has already gained some experience in this area. Public Association "Management of Property Rights of the Authors of Musical Works" which aims to manage the property rights of authors of musical works, has also been launched. In line with world practice, work is underway to establish new public organizations for the management of property rights of other categories of owners, and the Republican Copyright Agency will provide all kinds of support to public associations seeking to operate in this area. At the same time, when creating such organizations they face a number of problems, both in the process of creation and in the subsequent organization of their activities. Some of them are, first of all, the preparation of charters of public associations, taking into account the requirements of copyright legislation. We consider it advisable to give you some suggestions and recommendations in order to help solve these problems:

1) The main purpose of the collective management societies of the property rights on collective base is to manage the property rights of the authors and right holders on collective base. According to existing secular practice, the Certificate of State Registration of such organizations also provides for the collective management of property rights of authors and related rights holders, as a rule. Of course, because of belonging to the authors and related right holders of the rights which are considered to manage it is important to refer to the law "On Copyright and Related Rights". According to Article 1 of this Law, the problems arising in the territory of the Republic of Azerbaijan in connection with the creation and use of scientific, literary and artistic works (copyright), as well as performances, phonograms, broadcasting or cable broadcasting organizations (related rights) are regulated by this Law.

2) In some cases, the Charter of an organization established in the area of collective management of property rights includes a provision on their "access to property and personal non-property rights".

In this regard, it should be noted that according to the request of Article 14 § 2 of the Law "On Copyright and Related Rights", personal (non-property) rights are indivisible and indivisible, regardless of property rights it belongs to the author and remains in author in case of transfer of property rights. On the other hand, the acquisition of copyrights by collective management organizations makes these organizations virtually the owner or user, which is in conflict with the requirements of the Law "On Copyright and Related Rights" and international practice. According to the second paragraph of paragraph 2 of Article 41 of the Law, organizations that administer property rights on a collective basis do not

have the right to use works and the objects of related rights for commercial purposes. This view once again proves that the requirements of copyright legislation should be taken into account when applying the principle “can acquire property and non-property rights” envisaged by the Law “On Non-Governmental Organizations (Public Associations and Funds)” and should be adapted to it.

3) As mentioned above, the main purpose of such associations is the collective management of the property rights of the authors and related owners. It should be noted that the Law "On Copyright and Related Rights" provides the legal basis for the establishment of a collective management institution. Collective management organizations are also created in accordance with the requirements of Article 41 of this Law. The article is just called "Establishment of Collective Property Management Organizations". The following requirements, as set out in paragraph 2 and paragraph 5 of this article, should be taken into account when establishing such organizations: a) establishment of collective management organization according to the Law “On Non-Governmental Organizations (Public Associations and Funds)” when it is practically impossible to implement management of authors’ and right holders’ rights individually; b) the principles for establishing collective management organizations by the different categories of rights and rights holders; c) the prohibition of the commercial activity of these organizations and denying the right to use the works obtained for the purpose of such management; (d) the compromise on non-application of the limitations defined by anti-monopoly legislation on the activities of such organizations; (e) providing such organizations the power to collectively manage property rights on a voluntary

basis by the owners of copyright and related rights, either on written agreements or by joining these organizations.

It is especially noted in the World Intellectual Property Organization's recommendations that this authority is voluntarily transferred to the organizations that administer property rights on a collective basis by owners of copyright and related rights. The recommendations of the International Confederation of Authors and Composers' Unions also states that "the authors' unions are created by the authors for themselves and operate under the supervision of the authors who trust their societies and who enter the Board of Directors." Thus, unlike other public associations, the right holders should participate directly in the creation of such organizations and in their control.

In addition, Article 2 of the Law "On Non-Governmental Organizations (Public Associations and Foundations)" states that "Public association is a number of individuals and / or legal entities that are united for the purposes specified in the constituent documents. It is a voluntary, self-governing, non-governmental organization established on its own initiative, which does not aim to generate income as the main purpose of its activities and does not distribute its income among its members.

The commonality of interests stems from the overlap of the needs of authors (right holders). One of the important bases of the claims of the copyright owner is the implementation of their own property rights as defined by copyright law. These interests are real and, of course, those belonging to this social category. For this reason, the creation of such organizations, in accordance with world practice, is carried out by the authors (right owners) themselves. In our opinion, ignoring this norm, which is based on world experience and reflected in the legislation

of many countries, can give rise to many negative tendencies, which is undesirable. The only purpose of this practice is to prevent the creation of collective management organizations by persons who do not have any copyright or property rights.

4) It is also important to consider the requirement of Article 41 of the Law "On Copyright and Related Rights" that "Collective management organizations do not have the right to engage in commercial activities and collectively manage works and related rights". In some cases, however, the inclusion of "revenues from exhibitions, concerts and other events" into the list of sources that make up the property of the Union is contrary to that requirement of copyright law. As already noted, organizations that manage property rights on a collective basis may only deal with property rights on a collective basis. Such organizations act as users when using objects of copyright and related rights, especially those used by the authors (right holders), which means a violation of the law.

5) While preparing of the Charter of such associations, the requirements of the Law "On Copyright and Related Rights" must also be taken into account in the regulation of relations between its founders and members. The last paragraph of paragraph 2 of Article 41 of the Law states that "Such organizations shall be empowered to manage property rights on a collective basis, either directly by the owners of copyright or related rights on the basis of written agreements or membership of these organizations."

The aforementioned theoretical and practical considerations and notes reflect the issues of membership in new collective management organizations in the field of property rights management, representation

of property rights, royalties and their distribution, as well as the requirements of copyright legislation in their activities and it is important to consider them by who wish to operate in the field of collective management.