

THE CROATIAN COPYRIGHT LEGISLATION AFTER THE AMENDMENTS AND REVISIONS TO THE COPYRIGHT AND RELATED RIGHTS ACT OF 2007

1. Introduction

In the Republic of Croatia the amendments to the Copyright and Related Rights Act were introduced in 2007 (Official Gazette 79/07, hereinafter: ZAPSP 2007) and entered into force on 7 August 2007.

The main purpose of the Amendments was to fully harmonise the Croatian copyright legal system with the *acquis communautaire* of the European Union. The 2003 Copyright and Related Rights Act (Official Gazette No 167/03) had already been to a great extent harmonised with the EU *acquis communautaire*, but the accession negotiations with the EU showed that some minor parts of the ZAPSP 2003 failed to completely harmonise with the *acquis communautaire*. Also, after the ZAPSP 2003 had been passed some changes related to copyright and related rights were introduced also in the *acquis communautaire*, especially by adopting the Directive 2004/48/EC on the Enforcement of the Intellectual Property Rights. Therefore, the revisions and amendments to the ZAPSP 2003 were proposed in accordance with the negotiating positions of the Republic of Croatia for Chapter 7 – Intellectual Property Rights of 18 October 2006 and with the EU Common Position reached at the Accession Conference held in Brussels on 14 February 2007. In addition, the Act on Revisions and Amendments to ZAPSP 2003 (Official Gazette No. 79/07; hereinafter: the Amendments) entails some improvements of the former legal terminology and also provisions on the cultural role of collective rights management associations in the light of the Convention on Cultural Diversity.

2. Basis of the Croatian copyright system

1. Copyright

The Croatian legislation regulates copyright as the highest private law authority of an author over its work. This is a unique right comprising of three components: one that protects author's personal and spiritual connections with his work (author's moral rights); one that protects author's property rights with regard to his copyright work (author's economic rights) as well as the one that protects other author's interests with regard to his work (author's other rights) (Article 13 ZAPSP 2007). Copyright, as a unique right, is inalienable and inseparable and cannot be subject to enforcement. It cannot be in its entirety transferred except in the case of inheritance. Legal disposition of copyright is therefore limited, but still the author has at his disposal numerous legal possibilities to freely dispose of his work. Namely, he can grant the right of exploitation, the same as in other countries of the central European family of continental European legal circle. Such regulation is due to the monistic principle which has been consistently applied in the entire ZAPSP.

1.1. Author's economic rights

The author has the exclusive right to do with his copyright work whatever he likes, and to exclude any other person from it (Article 18 ZAPSP). The author's economic rights are of unlimited content, but certain economic rights are specially defined in the provisions of Articles 19 to 31 ZAPSP. Article 18 of ZAPSP stipulates four basic forms of exploitation of copyright works: the right of reproduction (making of copies), the right of distribution (putting in the circulation), the right of communication to the public and the right of alternation.

The right of reproduction (copying the work) in Article 19 ZAPSP is regulated in a manner suitable both to analogue as well as to digital environment, all in accordance with the WIPO Internet Treaty and the Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter: Info. Soc. Dir.). This is an exclusive right of making (manufacturing) one or more copies of a copyright work, in whole or in part, directly or indirectly, temporarily or permanently, by any means and in any form. It also includes fixation which is the fixing of copyright works in the material or other corresponding medium.

The distribution right in Article 20 ZAPSP is regulated as is the exclusive right to put into circulation the original or copies of the work by sale or otherwise, and to offer them to the public for such purpose. It also includes rental, which is the making available for use of the original or copies of the work, for a limited period of time, and for direct or indirect economic or commercial benefit. Thus, the right of distribution includes every transfer of ownership on the material copy of copyright work, against compensation or without it, but also other forms of putting copyright works fixed in the material medium into circulation, which does not also include transfer of the ownership right on a respective copy. These provisions are stipulated in compliance with the provisions of Article 6 of the WIPO Copyright Treaty, Article 8 of the WIPO Performances and Phonograms Treaty and Article 4 of the Info. Soc. Directive as well as with the provisions of the Directive 92/100/EEC on Rental and Lending Right. It therefore follows that rental, which is included in the notion of distribution, is making available for use of the original or copies of the work, for a limited period of time, and for direct or indirect economic or commercial benefit (the rental right does not refer to architectural and applied arts works). The issue of exhaustion of the distribution right was in Article 20/2 ZAPSP regulated as national, which provision was changed in the Amendments.

The right to communicate copyright works to the public in Article 21 ZAPSP is defined as an exclusive right of unlimited content. Any form of the communication to public is the author's exclusive right. Article 21 ZAPSP therefore lists only *exempli gratia* rights which are included in the content of the exclusive right of communication of the work to the public: the right of public performance, the right of public stage presentation, the right of public transmission, the right of public communication of fixed works, the right of public presentation, the right of broadcasting and rebroadcasting, the right of public communication of broadcasting and the right of making available to the public. The right of making available to the public is the exclusive right to communicate a work to the public by wire or wireless means, in such a way that members of the public may access it

from a place and at a time individually chosen by them (Article 30 ZAPSP). The definition is adjusted to the exploitation of copyright works in the information environment, the same as envisaged in the WIPO Internet Treaties and the Info soc Dir.

The right of alternation is the exclusive right to translate, adapt, musically arrange or otherwise transform a work.

1.2. Author's Moral Rights

Unlike author's economic rights which are defined as the rights of unlimited content, except otherwise stipulated by law, the author's moral rights are specified in the ZAPSP. The author's moral rights are: the right of first disclosure, the right to be recognised as an author, the right of respect for the copyright work and honour or reputation of the author and right of revocation.

The right of first disclosure means that the author has the right to determine whether, when, where and under what circumstance his work will be disclosed to the public for the first time (Article 14 ZAPSP). The paternity right or the right to be recognised as an author in Article 15 ZAPSP implies that the author has the right to be recognised and indicated as the author of his work. It follows therefore that every person who publicly uses a copyright work is obliged to indicate the author of the work at each use, unless the author made a written statement that he does not want to be indicated. The right of respect for the copyright work and honour or reputation of the author means that the author has the right to oppose to distortion, mutilation and similar modification of his work and to destruction and any use of the work in a manner which is prejudicial to his honour and reputation.

The right of revocation in Article 17 ZAPSP reflects the fact that a copyright work is actually the reflection of the author's personality. Consequently, the author has been given a legal possibility to influence in a special manner the future use of his already published or disclosed work. The author has the right to revoke the right of exploitation of his copyright work and its further use if this use would be prejudicial to his honour or reputation. In doing so he is obliged to compensate the damage to the user of such right.

1.3. Other rights of the author

Other rights of the author can be placed, according to their nature, neither in the author's exclusive economic rights nor in the author's moral rights, since they have some patrimonial and/or some personal characteristics, but also some other features. For their dispersive nature they cannot be categorised in neither one of stated categories. These are the right to remuneration, the resale right and other rights.

When a copyright work can be reproduced for private or other personal use without the author's authorisation, in accordance with the limitation of the author's exclusive economic right, the author is entitled to a respective remuneration. This right may be exercised only collectively (Article 156/2 ZAPSP). The producers, i.e. importers of

blank sound and video mediums, as well as the producers, i.e. importers of appliances for visual and sound recording are obliged to pay remuneration. Furthermore, the authors are also entitled to a fair compensation from natural or legal persons who provide photocopying services against payment. The author is entitled also to remuneration the rental of his work, provided that its further distribution is allowed, through public libraries (Article 33 ZAPSP). In compliance with the Directive 2001/84/EC on the Resale Right, the author is entitled to the respective share in the sale price of his work of visual art for any resale of the original subsequent to its first alienation (*droit de suite* - Articles 34 – 38 ZAPSP). Additional author's other rights are also the right of access to the copyright work (Article 39 ZAPSP) and the right to prohibit public exhibition of the work (Article 40 ZAPSP).

2. Related rights

Related rights, pursuant to ZAPSP, are: the right of performers on their fixed and unfixed performances, the right of phonogram producers on their phonograms, the right of videogram producers on their videograms, the right of broadcasting organisations on their broadcasts, the right of publishers on their editions and the right of data-base producers on their data-bases. The provisions on definitions regulating copyright apply *mutatis mutandis* also to related rights. The provision of Article 4 ZAPSP regulating the relation between copyright and related rights was subject to the Amendments.

Among related rights only the right of performers has both economic and personal component, while all other rights have only economic component. The content of related rights is limited, and thus holders of related rights are not entitled to do whatever they want with the subject matter of these related rights. They are entitled only to the exclusive economic rights and remuneration rights exclusively provided for in the provisions of ZAPSP.

3. Legal disposition of copyright and related rights

As already mentioned, copyright cannot be transferred during the author's life. But this is not an obstacle to exploiting of copyright in the practice. The copyright can be burdened by granting the right of exploitation either as exclusive or non-exclusive right. If the exploitation right is exclusively established, the holder of such right may exclude every person from exploitation in accordance with a contract, including also the author. If, on the other hand, the exploitation right is a non-exclusive one, more than one person can simultaneously exploit the copyright work, without disturbing the other right holders in exercising their right of exploitation. The author grants the right of exploitation by a contract. The copyright is also disposed of by entrusting the administration of rights, which normally happens when a collective management society (CMS) is entrusted with administration of copyright in the collective system. Unlike the copyright, the related rights are freely disposed of by their holders, either by transfer or in any other way. The exception to the rule relates to performers who are entitled also to personal component of their right. Therefore, the issues concerning disposition of the performer's rights is regulated in the same manner and with the same limitations as the disposition of copyright.

Article 44/4 ZAPSP 2003 was amended by the provision on interpretation of contracts.

4. Limitations to copyright and related rights

Copyright and related rights are timely limited rights. Duration of these rights is, in compliance with ZAPSP, completely harmonised with the Directive 2996/116/EC on the term of protection of copyright and certain related rights (the copyright runs for the life of the author and 70 years after his death (Article 99 ZAPSP); the related right of the performers runs for 50 years as from the date of the performance, and if within this term, a fixation of the performance has been lawfully published or communicated to the public, it runs for 50 years as from the date of the first such publication (Article 131 ZAPSP); the related right of the phonogram producers runs for 50 years as from the date of the first fixation of a phonogram and if the phonogram is lawfully published during this period, the rights run for 50 years as from the date of the first such publication. If the phonogram is not published during this period but is lawfully communicated to the public, the rights run for 50 years as from the date of the first such communication to the public (Article 137 ZAPSP); the related right of videogram producers runs 50 years as from the date of the first fixation of a videogram, and if the videogram is lawfully published or lawfully communicated to the public during this period, the rights of the film producer run for 50 years as from the date of the first such publication or the first such communication (Article 142 ZAPSP); the related right of broadcasting organisations runs for 50 years counting from the date of the first broadcast irrespective of whether it is by wire or wireless means (Article 144 ZAPSP); the related right of database producers runs for 15 years as from the date of the completion of the making of the database and if the database is lawfully disclosed during this period, the rights shall run for 15 years as from the first such disclosure (Article 152 ZAPSP).

The exercise of copyright and related rights is limited. The list of limitations complies with the list of limitations in the Info. Soc. Directive. The provisions on private copying and the provisions on the application of technological protective measures in the context of content limitations were subject to the Amendments. The revisions were introduced to completely harmonise the legislation with the provisions of the Info. Soc. Directive.

as from the date of the first fixation of a phonogram. If the phonogram is lawfully published during

5. Administration (exercise) of copyright

Copyright and related rights can be administered individually and collectively. Individual administration relates to the individual use of copyright and subject matter of related rights and it is carried out through respective contracts. Individual exercise is carried out by the right holder or his representative. Article 156/1 ZAPSP entails rights that can be exercised in the collective system, through collective societies, which may administer these rights in their own name and for the account of the right holders. Some rights are exercised only collectively.

The right holder is always entitled to remuneration for the use of his copyright work, i.e. subject matter of related rights. In individual administration the remuneration is determined in a contract. Also in collective administration this remuneration is first of

all determined in a contract, but if the contract is missing the remuneration is paid in accordance with the tariffs adopted by a collecting association. The ZAPSP stipulates special procedure for adoption of tariffs in which both the representatives of the users and of the collecting associations take part. If they fail to reach an agreement, they have to request an opinion from the Council of Experts – a body appointed by the Government of the Republic of Croatia. It consists of a president and four members from among eminent experts in the field of copyright and related rights. However, as copyright and related rights are private rights, the Council of Experts' opinion has only advisory and not compulsory character.

The collective administration of copyright and related rights is in more detail regulated in the provisions of Chapter IV ZAPSP and in the Ordinance on expert standards and on the procedure of granting the authorisation for collective administration of rights and on remuneration to the members of the Council of Experts (Official Gazette No 72/04). The provisions on collective administration were included in the Amendments, thereby improving the rules on distribution of collected remunerations and the cultural role of collecting associations.

The collective administration of copyright and related rights can be exclusively exercised by a society of right holders which has been authorised by the State Intellectual Property Office and which perform these activities in a non-profit terms. The Act stipulates that only one collecting society may be entrusted the collective administration with respect to the same category of right holders – that being a society to which the most right holders have given their powers of attorney for administration of their rights, and which has the most contracts on mutual representations with foreign collective societies.

Such society administrates rights in its own name and for the account of the right holders, and it performs especially the following activities: granting authorisation for the use of copyright and related rights subject matters if such authorisation is requested in the Copyright and Related Rights Act, collecting and distributing royalties to the right holders, supervising the use of copyright works and related rights subject matter and instituting and carrying out procedures for the protection of rights if they have been infringed. The distribution of royalties is carried out pursuant to the information on the use of copyright works and related rights subject matter and in accordance with the rules on distribution of collected royalties delivered by the body established in the Statute of a society.

The collective administration in Croatia has 60 year long tradition. At the moment there are five societies for collective administration of copyright and related rights who carry out these activities (Croatian Composers Society – protection of the authors' musical rights, HDS-ZAMP – administrates public performance right, the so-called mechanical reproductions and the right to fair compensation for private reproduction for the authors of musical works; Croatian Societies for Protection of Performance Rights (HUZIP) – administrates public performance right and the right to fair compensation for private reproduction for the performers; Society for the Protection, Collection and Distribution of Phonogram Rights (ZAPRAF) –

administrates for the phonogram producers the right to remunerations for the public performance and private reproduction; The Croatian Film Directors Society (DFHR) – administrates for the right holders of audiovisual rights the cable transmission rights and the right to fair compensation for private reproduction; Society ZANA which administrates the right to fair compensation for private reproduction to publishers.

3. Content of the Amendments

In accordance with the negotiating position of the Republic of Croatia for Chapter 7 – Intellectual Property Rights of 18 October 2006 and with the EU Common Position reached at the Accession Conference held in Brussels on 14 February 2007, the Amendments include provisions which completely harmonise the Croatian copyright legislature with the *acquis communautaire* in force at the time when the Amendments were passed. In addition, the content of the Amendments also include revisions aimed at enhancing the former legal terminology and which, to the minor extent, regulate the procedures of collective management associations.

1. Relationship between copyright and related rights

Pursuant to the amended Article 4/2 ZAPSP the provisions of ZAPSP regulating economic rights of authors, the right to remuneration for the reproduction of a copyright work for private or other personal use, the right to remuneration for public lending, the exhaustion of the right of distribution, exceptions and limitations of copyright, effects of time limits of copyright, copyright in legal transactions and the relations between copyright and property rights correspondingly apply also to the related rights, if not otherwise stipulated or if their legal nature requires different treatment.

In comparison to the former regulation no essential changes were introduced concerning the relation between copyright and related rights. The provisions on copyright still apply *mutatis mutandis* to certain issues concerning related rights. It is specially emphasised now that the issue of exhaustion of distribution right as regulated with regard to copyright also applies to related rights. In the remaining part of the provision at hand the amendments refer to correction of grammatical/semantical errors in ZAPSP 2003.

2. Copyright protection of standards

Regarding the copyright protection of standards some changes were introduced. The *acquis communautaire* regulating copyright and related rights does not regulate the protection of standards as copyright works. Consequently, the EU members are free to regulate the protection of standards as they find appropriate. For example, the German legislator provided for the copyright protection of private standards which are considered copyright works, i.e. which meet the requirements set for the copyright protection since they are individual intellectual creations. Other standards which are not private are free for use. Furthermore, technological standards which are not individual intellectual creations enjoy no copyright protection. This provision aims at providing copyright protection for the German Standardisation Institute standards

since their exploitation brings the necessary funding to this Institute as well as to other similar institutions. At the same time, however, these norms are under compulsory licensing regime.

The provision of Article 8/2 of ZAPSP which specified that standards are not subject to copyright brought substantial dilemma in the Croatian legislation. Therefore the notion of "standards" has been deleted in the Amendments. This revision was introduced only to avoid misinterpretation and not to let us conclude now that every standard is actually a copyright work. The standards need not be, but can be copyright works provided that they meet general requirements for the copyright protection stipulated in ZAPSP.

Croatian standards are, in compliance with the Standardisation Act (Official Gazette No 163/03) published as separate publications, and protected in accordance with the law, national and international copyright legislation. Pursuant to these provisions, the copyright and all exploitation rights relating to standards belong to the Croatian Standards Body and any reproduction or distribution of a part or of a whole Croatian standard without the consent of the Croatian Standards Body is prohibited.

At this point, however, it must be pointed out to some incorrectness in the regulation of standards in the Standardisation Act (Official Gazette No 163/03). Article 2 defines a standard as a document adopted by consensus and approved by a competent body, providing, for common and repeated use, rules, guidelines or characteristics of activities and their results, aimed at the achievement of the optimum degree of order in a given context. The Croatian standard is a standard available to the public, accepted by the Croatian Standards Body. Such standard can be subject to copyright protection only if it meets general requirements set in Article 5 ZAPSP, i.e. only if it is an original intellectual creation in the field of literature, science or arts. In this case science would be the appropriate field. Therefore the provision of Article 10 of the Standardisation Act, stipulating that the copyright and all exploitation rights relating to standards belong to the Croatian Standards Body should be taken tentatively. The separate law regulating some other field cannot specify for some creation to be considered copyright work if this creation fails to meet general requirements for the copyright protection, i.e., if it is not the original intellectual creation in the field of literature, science and arts. In addition, only natural person who created a work can be considered an author. The author may grant the exploitation of his copyright work to another person, although he cannot transfer the copyright as a whole. It could be defined in the law that the copyright belongs to some other person, but only under conditions under which the private rights are limited. Nevertheless, to stipulate that the author is some other person who actually is not the author would be contrary to the nature of the copyright law. It is also contrary to its nature to stipulate that the state, some state body or standardisation body be author of some copyright work. Therefore, in the conflict of the confronted provisions of the Standardisation Act and ZAPSP, the precedence should be given to ZAPSP, because this Act is *sedes materiae* of the legal regulation of the protection of copyright works and related rights subject matters by the copyright and related rights. The provisions in Article 2 and 10 of the Standardisation Act disturb the fundamental copyright law principles concerning the requirements for some creation to be considered a copyright work and requirements for acquiring the copyright and the status of an author by expressly stipulating something that is to be yet determined in the specific case. For all the

above the provision of Article 10 of the Standardisation Act should be appropriately revised and harmonised with the general regulation as provided for in ZAPSP.

3. Exhaustion of rights

Since the EU applies the principle of the exhaustion of distribution right within the Union, the present application of the national exhaustion of distribution right pursuant to Article 20 ZAPSP will be replaced by the Union-wide exhaustion at the moment when the Republic of Croatia becomes a fully fledged member of the EU. The part of the provision pursuant to which rental and lending are excluded from exhaustion has not been revised in compliance with the provisions of the Directive on Rental and Lending Right.

Article 109/3 of the amended ZAPSP lays down that the exhaustion of distribution right appropriately applies also to computer programs. Furthermore, there is no doubt that, pursuant to Article 4/2 ZAPSP, the provisions on the exhaustion of distribution rights, as stipulated with regard to copyright, apply also to all related rights, including also the related right of producers of databases.

Thus, Article 20 ZAPSP after the amendment has been completely harmonised with the *acquis communautaire* of the EU with regard to the exhaustion of the distribution right.

4. Definition of the notion of “appropriate remuneration” for private copying

Article 32/8 ZAPSP after the amendment especially lays down, in compliance with the Info Soc Directive, the content of “appropriate remuneration” which has to be paid for private copying of copyright works as provided in the Act. Although practical interpretation of the content of “fair compensation” in Article 32 ZAPSP that was in force prior to the Amendments corresponded to the content prescribed in the Info Soc Directive, to avoid any doubts the definition of “fair compensation” has now been expressly stipulated.

Following these changes, there should be no doubt that the “appropriate remuneration” provided for private copying of copyright works and subject matters of related rights stipulated also in Article 32/8 ZAPSP has been completely harmonised with the notion of *fair compensation* in the Info Soc Directive. The right holders determine the amount of remuneration for private copying which producers or importers have to pay for every manufactured or imported medium or appliance for reproduction. The amount must be appropriate, and in its determination all circumstances that could affect the just assessment regarding the form and amount of equitable remuneration such as: the application of technological protection measures, probable damage suffered by the right holders due to the reproduction of their copyright works for private or other personal use and other circumstances that may affect a proper decision on the form and amount of the appropriate remuneration should be taken into account.

5. Technological protection measures

ZAPSP 2003 failed to appropriately regulate the relationship between the application of technological measures on one hand and the limitations of copyright and related rights in terms of content on the other. The provision of Article 98/2 ZAPSP 2003 laid down the obligation of the Minister of Science to deliver an ordinance stipulating separate measures concerning the relation between the users and the right holders in cases when there is a statutory limitation of copyright in terms of content, and at the same time a technological measure prevented the use of a copyright work. As the Ordinance had not been passed on time, this issue remained unsettled until the Amendment entered into force. The reason for not passing the Ordinance was, among other things, also the view that the Ordinance was not an appropriate legal instrument for regulating this issue. Consequently, the Amendment settled this issue in a different manner.

In cases when the provisions of ZAPSP lay down some content limitation of copyright, and the right holder applied some technological measure in accordance with the stipulated content limitation and enabled the use of his work, the user of the limitation has at his disposal three different legal instruments for realising the use of the copyright work in compliance with the content limitation. Namely he can now: institute a legal action, request the mediation of the Council of Experts and initiate misdemeanour proceedings. The user may use these legal expedients only if, in accordance with Article 98/1 ZAPSP, the right holder has refused to remove the applied measure on his request.

The action is brought in accordance with the provision of Article 98/2 ZAPSP. It is on the user to prove in the legal action that the specific content limitation is stipulated in the Act, and that defendant has applied technological protection measure to prevent access to a copyright work or its use. He is also obliged to prove that also all other requirements in Article 80 ZPSP are met, i.e. that the use does not contravene the regular use of a copyright work and that it does not unduly harm author's legal interests.

Notwithstanding the legal action, the user may simultaneously request the Council of Experts to mediate with regard to access to and the use of a copyright work in compliance with the limitation. Article 98/3 ZAPSP regulates this issue. The Council of Experts will carry out the mediation by appropriate application of the rules on mediation regarding the contracts on cable retransmission, as regulated in the revised Article 163 ZAPSP.

As a third possibility the user has also at his disposal a misdemeanour proceeding. Article 189a ZAPSP provides for a special misdemeanour proceeding against a person who fails to remove technological measure which enabled the use of a copyright work in compliance with content limitations of exclusive rights.

In addition to the right holders, also other persons can apply technological protection measure, provided that they are authorised to do so by the right holder. In the above cases also these persons are obliged to remove technological measure, and all that has been stated above applies *mutatis mutandis* to these persons as well.

As the user cannot always know who applied the technological measure, and therefore has the possibility to remove it, Article 98/6 ZAPSP lays down this person's obligation to indicate his identity including the information of the technological measure and its effects.

6. In dubio pro auctore

Article 44/5 ZAPSP provides for the provisions on the interpretation of contracts concerning disposal of copyright by granting the right of exploitation. The author may grant to another person a right on the basis of which he can use a copyright work in a certain manner defined in the contract. The right of exploitation may be granted as an exclusive or a non-exclusive right, limited in terms of content, time or space (Article 44/2 ZPSP). As copyright contracts tend very often to be improperly formulated or they include deficient provisions, Article 44/5 ZAPSP provides for their interpretation. Thus if the contract establishing the right of exploitation fails to expressly indicate the manner of the use of a copyright work, it is deemed that the person acquiring the right has acquired a right to use the copyright work in a manner necessary to satisfy the purpose of a legal transaction pursuant to which the right has been acquired. Also if from the purpose of the legal transaction cannot be established if the right was granted as an exclusive or a non-exclusive right, or territorially limited, it is deemed that it was granted as a non-exclusive right for the territory of the Republic of Croatia. These two interpretation rules were stipulated in Article 44/4 ZAPSP 2003 and they comply with customary rules on the interpretation of the content of copyright contracts in accordance with the purpose the respective contract strives to achieve. The German legal literature refers to this rule as a rule on the purpose of the transfer of copyright (Ger. *Zweckübertragungsregel*). It relates to the traditional concept according to which the copyright should, to the fullest extent, stay with its original holder. In accordance with this concept is also the third rule on the interpretation of a contract establishing the right of exploitation stipulated in the Amendments. Pursuant to a third sentence of the amended Article 44/4 ZAPSP in case of doubt the copyright contract should be interpreted in *dubio pro auctore*. Thereby the author, as a weaker contractual part, is placed in a better position.

7. Cultural role of the collective rights management societies (CMS)

Although the collective management of rights is at the moment in the centre of the EU attention when dealing with copyright and related rights, in this field at present there is no binding document for the countries to harmonise their legal systems with. Still, all the member states share the same principles regulating the system of collective management of copyright and related rights.

The CMS in all EU member states, as well as in other countries in the world, have a manifold role from the moment they were established. They represent the right holders and their different interests not only of economic, but also of social and cultural nature. This is the case also in the Republic of Croatia and the Amendments include provisions aimed at strengthening this role of the collective rights management associations. This new regulation contributes to the goals of the Convention on Cultural Diversity which recently entered into force in the Republic of Croatia.

The amended Article 167a ZAPSP imposes on the collective management societies the obligation to establish a special fund for enhancing artistic and cultural creativity of predominantly non-commercial nature and for encouraging cultural diversity. It also regulates the principles of allocation to the fund and of the distribution of collected assets. The collected funds are to be used only for designated purposes, for enhancing artistic and cultural creativity and cultural diversity. The State Intellectual Property Office and the Ministry of Culture control the distribution of financial means in the fund. Furthermore, the amended Article 8/3 ZAPSP stipulates that the remuneration collected by the collective management societies as *domaine public payant* is also revenue of this fund. In this way the CMS cultural role has been strengthened, although they already in essence carried that role even before the Amendment entered into force.

In addition, Article 167/3 ZAPSP introduced the possibility for the collective management societies to participate more actively in the fight against piracy and counterfeiting by enabling the bodies of the association to spend maximum 3% of the total amount of the collected remunerations on measures against a misuse of copyright works and related rights subject matters.

8. Civil law protection

Certain provisions on the civil law protection were changed in ZAPSP for its harmonisation with the provisions of the Directive 2004/48/EC on the Enforcement of the Intellectual Property Rights. Given that the provisions on the civil law protection of copyright and related rights were even before the Amendments harmonised with the provisions of the Directive at hand, the Amendments introduced only changes in the field of provisional measures, taking of evidence and collecting information on the infringements of rights. The regulation of provisional measures in the amended ZAPSP does not essentially depart from the regulation in ZAPSP 2003, under which provisions developed noticeable case-law. Accordingly, the established case-law is still alive.

8.1. Provisional measures due to the infringements of copyright and related rights

Pursuant to the amended Article 185/1 ZAPSP the right holder, who makes it likely that his right has been infringed or threatened to be infringed, may propose that a court order any provisional measure intended to prevent or discontinue the infringement. In particular the court can order the opposing party to cease or desist from the acts infringing the right and can also order the seizure or removal from the market of the goods illegally infringing the right. Such regulation of provisional measures for the infringement of copyright and related rights does not essentially differ from the former regulation. Only the provision of Article 185 ZAPSP has been harmonised in terms of wording with the provisions on provisional measures for the infringement of rights stipulated in the Amendments also concerning other intellectual property rights.

The claimant of the provisional measure has to justify the proposal. Therefore the provision of Article 185/5 ZAPSP provides that the court shall, in a decision ordering

a provisional measure, specify the duration of such measure, and if the measure has been ordered before the institution of a legal action, the period, within which the claimant shall institute a legal action to justify the measure. This term cannot exceed 20 working days or 31 calendar days, counting from the day when the decision was served on the claimant, whichever expires later.

The novelty in reference to the former regulation is that a provisional measure intended to prevent or discontinue the acts infringing or threatening to infringe the right may also be issued against an intermediary whose services are being used by a third party to infringe copyright or related right. These intermediaries actually do not infringe intellectual property rights in the narrowest sense of the term, they rather sometimes enable the infringement within their businesses. Therefore they are considered infringers of the rights in the broadest sense (these are for example Internet Service Providers, or providers of transport or the like).

Article 185/2 ZAPSP specifically regulates temporary measures due to the infringements committed on a commercial scale. Upon a request of a right holder who makes it likely that his right has been infringed on a commercial scale for the purpose of acquiring commercial or economic benefit, and that such infringement has threatened to cause him irreparable damages, the court may order the precautionary seizure of the movable and immovable property of the opposing party not directly related to the infringement, including the blocking of the bank accounts and other assets. These measures may be ordered in addition to the provisional measures in Article 185/1 ZAPSP. The court may, for the purpose of ordering and carrying out this provisional measure, require the communication of bank, financial or commercial documents, or appropriate access to other relevant documents and information. The court is obliged to ensure the protection of confidentiality of such information and prohibit any misuse thereof (Article 185/3 ZAPSP).

The aim of the provisional measure in Article 185/2 ZAPSP is not acquisition of real property rights on the object that is being protected, but rather a temporary seizure or freezing of assets of the opposing party. For ordering and conducting such provisional measures the provisions of the Enforcement Act (Official Gazette Nos. 57/96, 29/99, 42/00, 173/03, 194/03, 151/04 and 88/05; hereinafter OZ) are applied in compliance with the provision of Article 185/6 ZAPSP. Since these cases require serious provisional measures, they would probably be determined only in exceptional situations. It is for the court to assess the nature of the infringement in each particular case and to determine appropriate provisional measure.

The provisional measures in Article 185/1 and Article 185/2 ZAPSP may be taken even without the opposing party having being heard. Concerning the provisional measure in Article 185/2 the applicant should make it likely that there is a risk of evidence being destroyed or irreparable damage incurred. With regard to this measure the existing case-law can also be invoked given that the previous legal regulation also envisaged this measure. Article 185a/3 ZAPSP provides for the court to communicate a decision on the provisional measure to the opposing party promptly upon its enforcement. The opposing party may appeal in accordance with the provisions of the OZ.

8.2. Measures for preserving evidence in civil proceedings

In addition to provisional measures for preserving evidence in Article 185a ZAPSP, the preservation of evidence may be required also under the provisions of the Civil Procedure Act (NN 53/91, 91/92, 58/93, 112/99, 88/01 and 117/03, hereinafter: ZPP) and also under the provisions of Article 185b ZAPSP.

ZPP includes provisions for preserving evidence in a civil proceeding that a court may order and carry out in any civil proceeding, and consequently also with regard to the proceedings in response to an appeal for the infringement of copyright and related rights. If there is a reasonable doubt that some evidence could not be carried out, or its carrying out at the later stage would be difficult, it may be ordered for this evidence to be presented in the course of the proceedings or even before the proceedings are instituted. In the motion for preserving evidence a claimant has to state rights whose protection depends on the facts to be established by the evidence proposed, the reasons why he deems it necessary to present this evidence to establish these facts and why it would not be possible to present this evidence at a later stage or that its presentation would be more difficult then. The motion has to include the name and surname of the opponent party, unless the circumstances show that he is unknown (Article 272 and 273 ZPP). If there is any danger of postponement the court will decide on the motion even without any previous statement of the opposing party. It can also in urgent cases order the presentation of evidence to begin before the ruling granting the motion to preserve evidence is served on the opposing party (Article 275 ZPP).

The new provisions in Article 185b ZAPSP are introduced as a superstructure to the provisions of ZPP. In accordance with the provision of Article 185b/1 ZAPSP when a party to the civil proceedings invokes evidence claiming that it lies with the opposing party or under its control, the court may invite the opposing party to present such evidence within a specified time limit. Superstructure to the provisions of ZPP is in particular the provision of Article 185b/2 ZAPSP envisaged for the infringements committed on a commercial scale for acquiring commercial or economic benefit. Indeed, the matter is about serious infringements of copyright and related rights, and in such cases the right holder who makes the stated infringement likely during the proceedings, and where he invokes banking, financial or similar economic documents, paper or the like evidence, claiming that they lie with the opposing party or under its control, the court may invite the opposing party to present such evidence.

Where the party who has been invited to present evidence denies that the evidence lies with it or under its control, the court may take evidence to establish such a fact (Article 185b/3 ZAPSP). The party may however refuse to present evidence in accordance with the provisions of ZPP (Article 185b/4 ZAPSP). The court will, taking into consideration all the circumstances of the case, decide at its own discretion, on the importance of the fact that the party having the evidence refused to comply with the court's decision ordering it to present evidence, or denies, contrary to the court's holding, that the evidence lies with it (Article 185b/5 ZAPSP).

8.3. Claim for the provision of information

The Amendment revised Article 187 ZAPSP, and it now provides for a special claim concerning the provision of information pursuant to which the holder of copyright or a

related right who has instituted civil proceedings for the protection of the infringed rights may claim the provision of information on the origin and distribution channels of the goods or services which infringe his rights. This claim can be filed in the form of a legal action or a provisional measure. If a person acting as a counter party to the defendant is also included in the main claim, the claim can be included in a gradual legal action as the first claim.

The claim for the provision of information is a measure used in the practice for securing a high level of protection of copyright and related rights and all EU member states had had it included in their legal systems even before their harmonisation with the Directive 2004/48/EC on the Enforcement of the Intellectual Property Rights. Since these claims achieved a noticeable success, especially when applied in the form of provisional measures, they were also included in the Directive 2004/48/EC.

The claim for the provision of information can be filed against: a person sued in the civil proceedings; a person who is, within his economic activities, in possession of goods suspected of infringing a right; a person who provides, within his economic activities, services suspected of infringing a right; persons who, within their economic activities, provide services used in activities suspected of infringing a right and against a person who is indicated by any of the above persons as being involved in the manufacture or distribution of the goods or the provision of services suspected of infringing a right.

Article 187/4 ZAPSP defines the minimum information on the origin of the goods and distribution channels of the goods and services infringing the intellectual property right, in particular: names and addresses of manufacturers, distributors, suppliers and other former holders of the goods and providers of services as well as the intended wholesalers and retailers. Furthermore the minimum information also include the information on the quantities produced, delivered, received or ordered as well as the price obtained for the goods or services concerned. But, as this is an open-ended list, the competent persons may request also additional information to be provided.

Article 187 ZAPSP does not affect rules on how this information is used in civil and criminal proceedings or the rules that govern responsibility for misuse of the right of information. The stated provisions also do not affect regulations that govern the processing and the protection of personal data.

9. Misdemeanours

In addition to the new misdemeanour stipulated in Article 189a ZAPSP 2007 related to the removal of technological protection measures, the Amendment also introduced certain minor changes to the misdemeanours of the copyright and related rights.

The provisions of Articles 189, 190 and 192 of the ZAPSP have been harmonised with the provisions of Articles 11/2, 33/2,5, 50/4 and 114P/1/2 of the Misdemeanour Act (Official Gazette No 107/07), which was, at the moment of the passage of the Amendments, in the Parliamentary procedure. Now the misdemeanour committed by a natural person differs from the misdemeanour committed by a natural person- a

craftsman, or other self-employed person in performing their activities as a craftsman or other self-employed person.

Article 192a ZAPSP governs the position of an injured party in the criminal procedure where the rights collectively managed have been infringed. The new regulation should remove the doubts arisen in the practice related to the injured party in the misdemeanour proceedings conducted for the infringement of copyright and related rights that are collectively managed. As the collective management society administers rights on its own behalf and for the account of right holders, it consequently conducts proceedings for the protection of respective rights in its own name. In the civil proceedings it can file all civil law claims on its own behalf, including the claim for payment of remuneration, for compensation of damage and for termination of the infringement. Subsequently, it has a litigation capacity also in the enforcement proceedings. The position of the CMS must be observed in the same manner with regard to misdemeanour proceedings as well. It initiates misdemeanour proceedings on its own behalf. Furthermore, it is entitled to be an injured party in all misdemeanour proceedings conducted for the violation of rights that are collectively managed or for the violation of rights that it administers on the grounds of the powers of attorney. Unlike this, if the right that is administered individually has been infringed, its holder is considered injured party.