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THE CURRENT SITUATION OF THE COLLECTIVE MANAGEMENT OF RESALE ROYALTY RIGHT

I. Introduction

Collective management aims to guarantee the technical background of the enforcement of the resale right, as well as of the other financial rights of authors. In the present paper, we examine whether the collective management is able to fulfill its role in the enforcement of resale right in the current legal environment and, what other solutions can be applied in the interest of improvement of the collective management.

The resale right is a royalty to be paid after each successive sale (following the first sale, thus, the secondary art market) of a work of art. Its scope is not covering all of the works of art; namely, it requires a certain threshold of selling price and it is only paid when an intermediary is taking part in the transaction.

First, we give a draft of the general problem area occurring in the field of collective management, then, we examine the alternatives coming from the European Union law and from some significant national models.

II. The Collective Management and its current problems

The collective management is a special way to enforce financial rights in copyright. The collective management organisations exert the similar rights of more than one authors, in cases when the authors could not do that on their own, because of the nature of a certain use; for example the licensing and the determination of its circumstances, the fixing and collecting of the copyright royalties, the monitoring of the uses. In case of a copyright infringement, it is the collective management organisation who represents the authors, as well.

The collective management societies operate in a non-profit form. Their register of artists/authors is not automatically kept, the authors have to apply for registering themselves.

The collective management not only exists in the interest of the authors, but also in the interest of the users/consumers with the communication and a complex database between the collective management societies, contributing to an easier and more effective administration (at least theoretically).

As for the European Union, the role of the collective management is significant in the development of the internal market and in the legal harmonisation in the field of copyright. The legal environment of the collective management and its existence in the conscience of the entitled authors and their legal successors is not satisfying in its current situation. The entitled get in lot of cases not adequate or deficient information about collective management, and they cannot control the activity of the collective management societies, especially the financial aspects of it. For today, it became obvious that the self-regulation of these societies is not satisfying, it is necessary to create a central direction to control them. Like this, the not satisfying operation of these societies results in more costs and more administration, instead of fulfilling its original purpose to reduce the costs and the administrative burden¹.

III. Collective Management in the European Union

Currently, there is a relatively new, 2014/26/EU Directive (in the followings: Music CM Directive) concerning the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market², which makes collective management compulsory in this field.

The 2001/84/EC Directive about the resale right does not prescribe a compulsory collective management for the Member States, it only lays down the followings: “*The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. Member States should ensure that collecting societies operate in a transparent and efficient manner. Member States must also ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution*”³.

As the Directive does not contain a compulsory collective management, the Member States have a broad consideration about it. Some of the Member States established a compulsory collective management, like .

The collective management organisations have an important role in spreading of the resale right. The countries, where there already were collective management societies earlier, could accept the necessity of the resale right easier

than other countries, because of the lobbying of those organisations. The collective management organisations have a significant role not only in collecting and distributing royalties, but in giving information and in enforcing authors' rights, as well.

There is a working document of impact assessment made in 2012 to the Proposal of the Music CM Directive, which contains facts not exclusively about the music area, but also general information about collective management's problems, and it offers some alternative solutions as for the legal regulation of this topic⁴. As these offers are general, in our opinion, they can be applied in the field of visual arts, taking into consideration the special character of this field.

The alternative ways offered by this document are followings⁵:

1. Status quo option / better enforcement

There is no need to further legislation; this option would rely on the existent EU and national rules, which should be enforced more effectively.

The impact of such a way could improve the central oversight and the control of collecting societies, but it could not stop governance inefficiencies, and the rightholders' control would not be significantly improved. As for the costs, this option would not require any compliance costs as it would not entail any legislative intervention.

2. Codification of existing principles

This option would involve the codification of EU rules and non-binding recommendations.

Regarding to the impact of this version, on the one hand, it would be more effective as it would introduce a minimum governance and transparency framework, but on the other hand, it would not improve the quality of key issues such as financial management.

As for the costs, this way would require the establishment of dispute resolution mechanisms for rightholders and users that involves costs.

3. Governance & transparency framework

It would complement the previous, principles-based option with "fill in the gaps", and specifically adapted to the nature of collective management, especially in transparency of financial operations and the participation of rightholders in the decision-making process.

The impact: the rightholders could access to relevant, detailed and accurate information on the operation of collecting societies, including financial information, and the participation of rightholders would be improved effectively.

3a. It would combine the regulatory intervention with industry self-regulation.

3b. This sub-option would involve a more extensive legislation, which would contribute to the establishing of an exhaustive legal framework applicable for all collecting societies in .

This last sub-option is not flexible enough as for the regulation opportunities of the Member States.

Although option 3 is the preferred one, the cost of this option would be relatively high, as it is a complex version of option 2 and additional elements. Most of the additional costs would be related to the application of new rules for the handling of funds and financial reporting and audit of collecting societies. But these costs lead to efficiency gains.

The current situation of the collective management in the field of visual arts is not satisfactory. There is a need for a compulsory register of the artists, and for all of the visual artists, as a first step. Then, it would be necessary to provide rightholders adequate information about resale royalties and collective management. Nowadays, there are many artists without any information about resale right or the collective management register.

We can consider as an important step forward that in 2014, the main European collecting societies and the representatives of artists [Artists' Collecting Society (ACS), VG Bild-Kunst, European Visual Artists (EVA), Design and Artists Copyright Society (DACs), the French Société des Auteurs dans les Arts Graphiques et Plastiques (ADAGP) etc.] and the representatives of art dealers and auction houses, like the Christie's, the Sotheby's, the European Federation of Auctioneers (EFA), the Federation of European Art Galleries Association (FEAGA) signed a document with the title Key Principles and Recommendations on the Management of the Author Resale Right⁶, which encourages a cooperation on three emphasized fields:

- transparency and more effective administration
- increasing knowledge of the resale right
- cascade effect and problems concerning resale right payment.

A. Transparency and Administration

The collecting societies undertake to keep a comprehensive register of artists, and make it accessible in print and online. They take into consideration the compulsory collective management during their operation, and they develop a high level of transparency and accountability with the aim to encourage all involved people to adapt themselves to the rights and obligations originating from the 2001/84/EC Directive.

The collecting societies and the art market players undertake to develop streamlined reporting systems about their workflow, they agree in the time achievements as for the collecting system, they establish a mechanism for dispute resolution of frequently occurring issues, and they set up a database and they evaluate the data. The art dealers undertake to hand over the relevant informations concerning the sales to the collecting societies.

B. Increasing Knowledge of the Resale Right

The collecting societies publish clear guides and FAQs for artists and art collectors (buyers), especially explaining the functioning of the resale right and the registering process at the collecting society. The collecting

societies and the organisations of the artists are in a partnership in this field, preparing case studies and artist-led formats. Collecting societies should communicate more effectively with artists, and encourage participation and interaction with their activity. The parties would organize seminars, workshops, trainings and other events, and distribute written materials. At least one person per collecting society is in a regular contact with the legislators and is able to provide them with advice and professional information. The collecting societies try to resolve compliance issues through dialogue and agreement, as much as reasonably possible.

C. Cascade Effect and Problems Concerning Resale Right Payment

Cascade effect means that in some cases, it can occur that somebody will be obligated to pay the royalty two times, at the buying and at the selling, too. This can happen because of the different legal rules in the Member States: some of them charge the payment of the resale royalty to the buyer, others charge it to the seller, and again others share it between the buyer and the seller. This problem occurs the most often during cross-border transactions⁷.

The European Commission studies – among other issues – in its next report on the implementation and the effects of the 2001/84/EC Directive, this year (2015), how high is the occurrence and the extent of the cascade effect, distinguished between transaction where the parties are from the same Member State and at cross-border transactions.

However, this document is not a compulsory legal rule, it can be considered as a significant development in the field of collective rights management. It is a really positive result that the art market actors recognized the necessity of a higher-level transparency and communication.

IV. Comparison of Some European Collective Management Models in Relation with Resale Right

In copyright, at the European level, the French and the German models are considered as influential for the other states. In followings, we take an overview of these models, and after that, we examine the Hungarian model, as well.

The German collective management developed in a special way. Earlier, there was a frame-agreement between the associations of the art dealers and the collecting society (VG Bild-Kunst), which contained that the dealers would pay about 1 % of the selling price to a fund, in case of works of art originated after 1st January 1990. The VG Bild-Kunst would determine the concrete amount of the royalty paid to the artists, and represents the interests of the artists this way. In this system, the art dealers have to let register themselves, but their join is voluntary. If they do not want to join, they can pay the royalty even individually⁸. Today, the artists can get information about the sales and enforce the royalty only via the collecting society. The German law, the Urheberrechtsgesetz (UrhG) gives the opportunity to the artist to ask for information about the works of art sold in the last 3 years, and be informed about the details of the sale. The art dealer can refuse the information if he had paid the royalty. [UrhG §26 (4)-(6)].

In the French law [Code de la Propriété Intellectuelle (CPI)], there are strict requirements towards the collecting societies: they have to justify the dates kept in the register, like the number of the registered entitled artists, the qualifications of their employees and their experience gained in the art sector, their activity, their infrastructural conditions etc. If they can justify all of this, they can get onto a list kept by the minister.

Based on the CPI, the collecting society's obligation is to give information to the entitled artist, in case of a sale charged with resale royalty. In this purpose, the collecting society has to do all its best to find the entitled, if he is not known, the society has even to cooperate with other collecting societies or start a public research. [CPI R122-10].

In the Hungarian law – similarly to the German law, the artists can get the necessary information only via the collecting societies. The Hungarian act [Szerzői jogról szóló törvény (Szjt.)⁹] made the collecting management compulsory - it is another question whether it realized or not. The HUNGART is the collecting society responsible for resale royalty in visual arts. The Szjt. prescribes that the art dealers have to pay the resale royalty every three months to the collecting society which will distribute it to the artists. When paying the royalty, the art dealer has to give all of the information about the sale. [Szjt. 70. § (10)] For the artist, there is a 3-year period (similarly to the German law) when he can ask for dates about the sales. [Szjt. 70. § (11)].

As for the amendment of 2011 of the collective management in Hungary¹⁰, the law contains really modern rules – even preceding the EU legislation¹¹ – in the aspects of transparency, the increasing of efficiency in royalty enforcement, the register and supervising of the collecting management and the schedule of fees. Concretely, the amendment introduced well elaborated dispositions as the guarantee of publicity in a circle as broad as possible, the extending of the registered dates, an obligation to the collecting societies to make accessible the reports about their activity and financial management; the restriction of the use of the royalties, the use of the support given to the collecting society; introducing the exclusivity of the electronic procedures, the involving of experts, the applicability of a fine in the field of supervising the activity of the collecting society; the more satisfying information of the entitled artists etc.

Earlier, only one collecting society was permitted to exist in one certain genre, but with the amendment, there is a possibility to establish more collecting societies. This represents a competitive approach of the Hungarian legislator which is a positive development. The collecting societies should guarantee the efficiency of the royalty enforcement, this is the condition of co-existing. For justifying the appropriate co-existing, the collecting societies should agree in the question of extended force (in case of artists who are represented of none of these societies, which collecting society will be entitled to give a permission of use and will enforce the royalty).

V. Summary

As for the Hungarian situation, we can conclude that it transformed significantly, it became more balanced, a competitive collective management can be applied in our country.

The European tendencies project that a complex, consistent legal regulation will be established, for all of the genres, so for the resale right, as well. It is necessary to recognize that the interest of all art market players (the artists, the art dealers, the collecting societies) is same: a compulsory, efficient collective management, with complex and homogenous databases, an extended communication process (like the existing reciprocal agreements between collecting societies), and a possibility for the artists to enforce royalties via whichever collecting society. Because of the cross-border sales, there is an urgent need to a coherent system of enforcement.

It is a positive tendency that the represents of the art dealers, the collecting societies and the artists started a negotiation, a dialogue. It is necessary to make the collective management more transparent and efficient, but it cannot be reached via soft law regulations and non-compulsory documents like the Key Principles And Recommendations from 2014. It is a good starting point, but we need a directive or more directives valid for all of the art genres.

In the case of the resale right, it is often that the art dealers and the buyers realize the sale besides Europe where no resale right should be paid, or in an European country where the conditions (the amount etc.) of the royalty are more advantageous. So that they try to get round the law, and until the law is not better harmonized, the result will be the same. Of course, a total harmonization could not carried out, because of the characteristics of the art markets in the Member States, but the agreement in the principle tendencies, and a common basic regulation can be appropriate to establish a more efficient collective management. The debates will continue probably about the liberalization or the harmonization of the collective management, but the practice shows that in all aspects (transparency, costs, efficiency) the way to follow is the harmonization.

We should see that a more efficient collective management is not only good for the artists, but for the whole society, a country. The more efficient enforcement of rights is in connection in one hand with the rule of law, but more concretely, it gives an incentive to the artists to create new intellectual products, and it can enliven the cultural sector of a country and via the culture, the prestige of a country can also rise. The economical analysis of the resale right justify how incentive the efficient enforcement can be.

¹ Proposal for the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. COM(2012) 372 final, 2012/0180 (COD) Available at: http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf

² Directive 2014/26/EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>

³ Directive 2001/84/EC, Preamble (28). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0084:EN:HTML>

⁴ Commission Staff Working Document. Executive Summary of the Impact Assessment Accompanying the Document Proposal for the Directive on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. SWD(2012) 205 final. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0205&from=EN>

⁵ Commission Staff Working Document, p. 4–5.

⁶ Available at: http://ec.europa.eu/internal_market/copyright/docs/resale/140214-resale-right-key-principles-and-recommendations_en.pdf

⁷ See for example the Judgment SNA vs Christies France of 12.12.2012, and CPGA vs Christies France of 03.07.2013.

⁸ *Supper, Martina*: An Analysis of Droit de Suite from a Law & Economics Perspective. Master Thesis, Vienna, 2000.

⁹ 1999. éviLXXVI. törvény a szerzői jogról (Copyright Act of 1999)

¹⁰ 2011. évi CLXXIII. törvény

¹¹ A szerzői jogi ágazatok gazdasági súlya Magyarországon 3, SZTNH, 2012. P. 63–70.

Summary

Tomasovszky E. The current situation of the collective management of resale royalty right.

The study focuses on the technical background of the resale royalty right (droit de suite) enforcement, the collective management. We analyze the role of the collective management, at first in general, and after that, we research for the answer, how it can fulfill its role in the real legal environment, in Hungary and in the European Union. We examine some relevant European models, concretely the French and the German collective management rules concerning the resale right.

The development of the collective management in this field is continuous, the EU and the Member States are on the way to create a competitive collective management system, however, the debate about liberalization or harmonization is current nowadays, too. But the role of an efficient collective management system is recognized also in the aspect of the cultural sector.

Key words: Collective rights management, resale royalty right, copyright, collective management societies, 2001/84/EC Directive.