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# Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis

Dr. Silke von Lewinski\*

## INTRODUCTION

The intellectual property systems of Central and Eastern Europe are changing rapidly as those nations join the ranks of capitalist countries. As the former Communist bloc countries continue their transition from Socialist to free market systems, they are feeling growing pressure to implement new standards of protection for intellectual property rights.

The former socialist countries have metamorphosed into one of the world's most dynamic regions. That transformation has prompted development of new economic structures, new market-oriented thinking, and modernization of goods and equipment. The metamorphosis also has created pressure to speed up the adoption of new intellectual property protections to keep pace with the rapid economic and technological modernization. Those protections—which atrophied for so long behind the Iron Curtain—are only now beginning to take hold.

The regions of Central and Eastern Europe cover more than twenty-five countries, including the countries of the former Soviet Union. Although they share a common socialist past, they do not form a unified bloc. They are kept apart by their widely varying economies, by their disparate geographical areas and populations, and, to some extent, by their unique pre-socialist histories. Politi-

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cally, however, the countries of Central and Eastern Europe appear to align themselves into two groups; on the one hand are the countries of the former Soviet Union with the exception of the Baltic countries; on the other hand are the Central European countries and the Baltic States.<sup>1</sup> The split can be seen in the groups' different relationships with the European Union. The split also was visible December 1996 in Geneva, at the World Intellectual Property Organization ("WIPO") Diplomatic Conference regarding copyright and neighboring rights questions. There, the Baltic countries associated themselves in an ad hoc coordinating group with the Central and Eastern European countries, while the other former Soviet Union countries acted separately.

This Essay takes those geographic, demographic, and political alignments and differences into account in evaluating the current status of copyright law in Central and Eastern Europe. Part I reviews the history of copyright protection in the region and briefly describes the legislative developments that followed the collapse of the socialist regimes. Part II explores the current standard of copyright protection in Central and Eastern Europe. Part III examines the practical problems burdening the application of the newly-created copyright laws in the region. This Essay concludes that Central and Eastern Europe have a further road to follow before they are able to reap full benefit from their new copyright laws.

## I. HISTORY OF COPYRIGHT IN CENTRAL & EASTERN EUROPE

Most Central and Eastern European countries have long-standing copyright traditions. Those copyright protections historically were based on the European continental system—a tradition that continues today.

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1. The Baltic countries receive funding from the European Union under the Poland and Hungary Aid to Reconstruct Economies Fund ("PHARE"). See Commission Regulation 3906/89, 1989 O.J. (375). PHARE was originally established to provide economic support to Poland and Hungary. PHARE later was extended to Czechoslovakia, thereafter the Czech and the Slovakian Republics; Bulgaria; Yugoslavia, thereafter Slovenia; the German Democratic Republic, which resigned from PHARE after German unification on July 1, 1990; Romania; Albania; and the three Baltic countries. The overall aim of the PHARE program is to provide economic support to non-member countries of the European Union.

### A. *The Pre-Socialist Period*

In the 1920s, most Central and European countries enacted copyright acts, which provided a relatively high standard of protection and enabled them to join, or comply with the provisions of, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").<sup>2</sup> That was particularly true for Bulgaria, Hungary, Poland, Romania, Czechoslovakia, and the former Yugoslavia.<sup>3</sup> Many of these countries further developed their copyright laws through legal doctrine and case law, which later had significant influence in the interpretation and formation of regulations under the socialist copyright systems.<sup>4</sup>

From the time the Central and Eastern European countries began to recognize copyright protection, they adopted the continental European approach of *droit d'auteur*, "author's right,"<sup>5</sup> rather than the Anglo-Saxon approach of copyright. The *droit d'auteur* approach now serves the basis of the current copyright acts in Central and Eastern Europe.

### B. *Socialist Copyright Systems: The Main Features*

New copyright legislation was enacted in Central and Eastern Europe in the 1950s during the Socialist period.<sup>6</sup> Although those laws and their respective amendments were based on the continental European system, they contained a number of distinguishing common features that set them apart from the continental European

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2. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3.

3. See 1992 COPYRIGHT (WIPO) 6-8 (listing Berne Convention signatories and dates of accession). Two notable exceptions were Albania and the former Soviet Union, which did not belong to the major international copyright treaties of the pre-Socialist era. In fact, the former Soviet Union did not join the Universal Copyright Convention until 1973, and Albania did not join the Berne Convention until 1994.

4. See Adolf Dietz, *Intellectual Property and Desocialization in Eastern Europe*, 26 INT'L REV. INDUS. PROP. & COPYRIGHT L. 851, 865 (1995) [hereinafter Dietz I].

5. See generally ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT—DIVERGENCES ET CONVERGENCES (1993) (describing the *droit d'auteur* approach to copyright).

6. See Mihály Ficsor, *The Past, Present and Future of Copyright in the European Socialist Countries*, 118 RIDA 33, 61 (1983).

regime on which they rest. The result was a unique socialist legal system.<sup>7</sup>

### 1. Low Standards of Protection

Under a socialist system, the standard of copyright protection was comparatively low.<sup>8</sup> In particular, the terms of protection were often significantly reduced. For example, Poland provided a term of protection of twenty years prior to 1975 and a term of twenty-five years after 1975.<sup>9</sup> The former Soviet Union provided a term of protection of twenty-five years *post mortem auctoris* (“p.m.a.”).<sup>10</sup> Many countries applied article 11<sup>bis</sup>(2) of the Berne Convention<sup>11</sup> which allowed countries to grant broadcasters a statutory license to use copyrighted material, rather than permitting the author to grant or deny the license.

In accordance with socialist thinking, copyright, as a private property right, was largely restricted for the benefit of the general public. Citizens were to participate in their nations’ cultural products without authorization and without making payment. Four main groups of so-called free uses existed under socialist copyright laws: (1) free personal and professional use; (2) use for the purpose of information, for example, news reports; (3) lending by public libraries or use of works in school books; and (4) free non-commercial uses, for example, the performance of a work of music at a non-commercial event where the performing artist is not remunerated for the performance.<sup>12</sup>

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7. See STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 1.17 (2d ed. 1989).

8. See M.H. Eminescu, *Aktuelle Probleme des Urheberrechts der europäischen sozialistischen Länder*, GRUR Int. 387 (1980) (providing an overview of socialist copyright legislation); see also Dietz I, *supra* note 4, at 865; Ficsor, *supra* note 6, at 63.

9. See Teresa Grzeszak, *Das neue polnische Gesetz über Urheberrecht und verwandte Schutzrechte vom 4. Februar 1994 [The New Polish Law On Copyright]*, 126 UFITA 5, 20 (1994).

10. See HEINZ PÖSCHEL, *INTERNATIONALES URHEBERRECHT [INTERNATIONAL COPYRIGHT]* 25 (1982). The designation “p.m.a.” indicates that the calculation of the term of protection begins only after the death of the author. See 1989 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. REP. 178.

11. Berne Convention, *supra* note 2.

12. See Artur Wandtke, *Entwicklungstendenzen des Urheberrechts in Osteuropa (unter besonderer Berücksichtigung der Gesetze in Polen, Russland, Ungarn sowie*

## 2. The Gap Between East and West

From the 1960s to the 1980s, the socialist Central and Eastern European countries fell farther behind Western Europe in the standard of protection offered for intellectual property, due primarily to the technology-driven modernization of most Western European laws. For example, statutory remuneration rights for private copying and reprography were introduced in many Western European countries after the equipment for private reproduction became accessible to the general public. Other legislative amendments concerned cable and satellite broadcasting and the protection of computer programs.

Central and Eastern Europe's failure to modernize its law in that manner may be explained by the lack of technological innovation and the unavailability of modern consumer goods, such as personal computers and copying machines.<sup>13</sup> Because of such technological deficiencies, along with the broad free-use provisions, few of the socialist Central and Eastern European countries provided statutory remuneration rights, especially for private copying and reprography.<sup>14</sup> Accordingly, collecting societies had a comparatively limited range of activities.

## 3. Collecting Societies, Contractual Relationships, and Neighboring Rights

Collecting societies enjoyed state-endorsed monopolies.<sup>15</sup> The close associations between collecting societies and the government sometimes led to censorship. For example, VAAP,<sup>16</sup> the collecting

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*Tschechien und der Slowakei [Trends in the Development of Copyright Law in Eastern Europe]*, GRUR INT. 564, 566 (1995).

13. See Dietz I, *supra* note 4, at 865.

14. Some notable exceptions were the introduction of the home taping levy in Hungary in 1969. See Peter Gyertyanfy, *Zur Angleichung des Urheberrechts der ehemaligen RGW-Staaten an das Urheberrecht der EG-Staaten*, GRUR INT., July 1992, at 176.

15. Collecting societies are organizations that represent groups of copyright holders, offer standard terms for copyright licensing, collect licensing fees, and distribute royalties. See John Kay, *The Economics of Intellectual Property Rights*, 13 INT'L REV. L. & ECON. 324, 337 (1992).

16. The VAAP, the "All-Union Agency for Copyright," was created in 1973 as the sole copyright agent in the Soviet Union for all Soviet authors and entities. See generally Elena Muravina, *Copyright Transactions with Soviet Authors: The Role of VAAP*, 11

society of the former Soviet Union, was the sole licensing authority for the use of domestic works in foreign countries. Without a license from VAAP, any private licensing contract was considered void and any licensing fee paid was susceptible to confiscation by the state.<sup>17</sup> This unfortunate aspect of the history of collecting societies may explain certain developments that occurred during the post-Socialist period.

During the Socialist era, the state controlled almost all entities in the cultural sectors, such as broadcasting organizations, publishing houses, record companies, and theaters. Socialist thinking included the goal of socialization of the “means of production.” The free market and competition barely existed. Neither did freedom of contract between authors and the socialist enterprises that exploited their works.

The socialist copyright system regulated intensely the relationships between authors and the state. In particular, the state established tariffs, which remunerated authors when state enterprises exploited their works. These tariffs varied according to the type of work and the nature of the use. Regulations also fixed minimum and maximum remuneration.<sup>18</sup> The main purpose of these tariffs was to guarantee authors a certain social standard, that freedom of contract might have failed to afford. Stringent contract laws also strengthened the position of authors within their contractual relationships with the exploiting enterprises.<sup>19</sup> Tariff regulations and the well-established copyright contract laws were among the most distinctive features of the socialist copyright system.

Although copyright protection was granted in all Central and Eastern European countries, the protection of neighboring rights—specifically, the rights of performing artists, phonogram producers, and broadcasting organizations—barely existed during the Socialist period. Only Czechoslovakia, and to a very limited extent, Hungary and Yugoslavia, provided for some neighboring rights

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LOY. L.A. ENT. L.J. 421 (1991).

17. See MARK M. BOGUSLAWSKI, URHEBERRECHT IN DEN INTERNATIONALEN BEZIEHUNGEN [COPYRIGHT LAW IN INTERNATIONAL RELATIONS] 235 (1977).

18. See Adolf Dietz, *Trends in the Development of Copyright Law in the Countries of Central and Eastern Europe*, 162 RIDA 120, 208 n.22 (1994) [hereinafter Dietz II].

19. See Wandtke, *supra* note 12, at 566.

protection.<sup>20</sup>

### C. *Legislative Developments After the Collapse of Socialism*

The collapse of socialism was followed by a period of transformation from centrally-planned economies to free markets. That transformation was accompanied by the desocialization of means of production, privatization of state enterprises, the formation of new private enterprises and associations, and deregulation. Due to market changes, modern consumer goods, such as copying machines, recording equipment, and personal computers, have become readily available to businesses and consumers. Accordingly, the Central and Eastern European countries have created new legislation to replace socialist elements with typical elements of a market economy. In addition, with the introduction of technologies, including cable television and satellite broadcasts, there is increased potential for exploitation of protected works. That requires the modernization of copyright laws to accommodate the increase in exploitation of works through newly available modern technology and new avenues of exploitation.

Much of the change in Central European copyright law can be attributed to the multinational and bilateral agreements that these countries have joined. Unilateral pressure by foreign countries also has significant effect. The United States in particular has entered into bilateral trade agreements, including intellectual property provisions, with most Central and Eastern European countries<sup>21</sup> as part of its world-wide strategy based on the Trade Act of 1988.<sup>22</sup> These bilateral agreements incorporate the existing con-

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20. See Dietz II, *supra* note 18, at 178.

21. See Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J. COPYRIGHT SOC. 123, 125 (1991) (noting the significant number of bilateral copyright negotiations between the United States and many Central and Eastern European countries).

22. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 7, 15, 16, 19, 20, 21, 22, 29, 35, 41 U.S.C.); see also Silke von Lewinski, *Copyright in Modern International Trade Law*, 161 RIDA 5, 47-53 (1994) [hereinafter von Lewinski, *Copyright*] (providing a comprehensive discussion of United States trade strategy regarding intellectual property). The overall objectives of United States trade policy are set forth at 19 U.S.C. § 2901 (1994).



ventions to which the United States is a party. In some of those treaties, the parties confirm their obligations under pre-existing international agreements. In other bilateral treaties, the parties may be obliged to (1) adhere to those conventions, (2) undertake efforts to do so, or (3) merely comply with the provisions of those conventions.

The bilateral agreements with the United States share a number of common elements. Enforcement provisions represent an important part of these agreements. Provisions on dispute settlement also are usually included. These agreements provide for protection for computer programs as literary works and also for databases, including original compilations of data.

The rights to be provided by these agreements may include exclusive rights of importation and first distribution for all authors and producers of sound recordings. They also may include commercial rental rights for authors of computer programs and producers of sound recordings. In cases where the term of protection cannot be based on the life of the author, many agreements will specify the method of computing the term of protection. Also, provisions on the permitted limitation of rights, the prohibition of formalities with respect to sound recordings, and other items are usually part of these bilateral agreements.<sup>23</sup> In sum, the bilateral agreements with the United States oblige Central and Eastern European countries to provide adequate and efficient copyright protection, not only on the basis of the bilateral agreements themselves, but also on the basis of multilateral conventions to which the United States is a party.

Although the European Community has not pursued a systematic, trade-based, worldwide strategy regarding intellectual property, it has entered into bilateral agreements with the Central and Eastern European countries. The main objective of these agreements seems to differ from the United States approach. Instead of creating new export markets by ensuring adequate intellectual property protection, the prevailing goal of the European Community agreements is the progressive approximation of laws of the Eastern neighbors with a view to possible future accession of these

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23. See von Lewinski, *Copyright*, *supra* note 22, at 53-59.

nations to the European Union.

Because European Community agreements take into account the respective status of economic development in the countries concerned, the European Community has entered into agreements with the Central and Eastern European countries on different levels. In this way, the European Community has allowed the countries to pass from a first generation of bilateral agreement to a second or third generation of more comprehensive and demanding bilateral agreements.

The first generation of agreements on trade, commercial, and economic cooperation, established between 1988 and 1991, contained only limited provisions on intellectual property. For example, European Community firms in Poland were to benefit from favorable business relations, facilities, and practices, including measures ensuring compliance with international undertakings relating to intellectual property. Subsequent agreements were more explicit. Those agreements stated the obligations to ensure adequate protection and enforcement of intellectual property rights, and required compliance with international commitments. Nevertheless, those obligations remained relatively flexible.

A second generation of bilateral trade, commercial, and economic cooperation agreements, initiated in 1992, envisaged the long-term objective of association agreements, which were considered as a possible step toward membership in the European Union. Accordingly, the obligations concerning intellectual property were somewhat more precise than under the former agreements. The notion of "effective and adequate protection," for example, was specified by the words "at a level similar to that which exists in the [European] Community,"<sup>24</sup> reflecting the long-term goals of rapprochement of laws and of integration. While adherence to international conventions was also required, specific conventions were not indicated.

The most advanced and far-reaching agreements are the third

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24. See, e.g., Agreement Between the European Economic Community and the Republic of Estonia on Trade and Commercial and Economic Cooperation, Dec. 12, 1992, E.E.C.-Est., art. 13(3), O.J. (L 403) 2.

generation, or "Europe Agreements."<sup>25</sup> They are association agreements, within the meaning of article 238 of the Treaty Establishing the European Community.<sup>26</sup> The Europe Agreements envisage the preparation of the agreement's parties to become members of the European Union. Thus, their coverage is much broader than that of the preceding generations of agreements, and the requirements regarding intellectual property are more stringent. Countries entering into these agreements must increase protection to the European Community level and accede to specified international conventions within five years. In addition, the Central and Eastern European countries "shall act to ensure that future legislation is compatible with European Community legislation as far as possible."<sup>27</sup> Thus, these agreements oblige the Central and Eastern European countries to adapt their copyright laws to the European Community copyright legislation, namely the harmonization directives. Future directives and other European Community legal measures also face integration into the laws of Central and Eastern Europe.

In 1989, the European Commission created the Poland and Hungary Aid to Reconstruct Economies Fund ("PHARE"),<sup>28</sup> followed by a successor program ("PHARE II"),<sup>29</sup> and supplemented by the Technical Assistance for the Community of Independent States program ("TACIS").<sup>30</sup> Through these programs, many

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25. See Lynn E. Ramsey, *The Implications of the Europe Agreements for an Expanded European Union*, 44 INT'L. & COMP. L.Q. 161 (providing a general analysis of Europe Agreements); see also Michiel Elst, *The Interaction of European Community and Russian Copyright Law: A Matter of Partnership and Cooperation*, 22 REV. OF CENT. & E. EUR. L. 267 (1996) (containing a detailed analysis of European Community-Russian relations in copyright law).

26. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. Article 238 of the EC Treaty states that "[t]he Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures." *Id.*

27. See von Lewinski, *Copyright*, *supra* note 22, at 65.

28. Commission Regulation 3906/89, *supra* note 1.

29. The PHARE II program is directed at neighboring rights and the fight against piracy; in addition to the original eleven countries, Bosnia-Herzegovina and Macedonia will be included. See *Commission to Fund "PHARE II"*, 68 COPYRIGHT WORLD 6 (1997).

30. Commission Regulation 2053/93, 1993 O.J. (L 187) 1. TACIS was designed to

countries of Central and Eastern Europe received technical aid, including the presentation of seminars, the establishment or improvement of appropriate infrastructures, and expert consultation regarding legislative amendments.

As with the European Community, the European Free Trade Association (“EFTA”),<sup>31</sup> which includes Norway, Iceland, Switzerland, and Liechtenstein, also entered into bilateral free trade agreements with Central and Eastern European countries.<sup>32</sup> Those agreements envisage the creation of an extended free trade area in Europe that, together with the Europe Agreements between the European Union and the Central and Eastern European countries, will promote European integration.

The obligations under these agreements with respect to intellectual property are very similar to those under the Europe Agreements of the European Union. The parties must provide the same non-discriminatory protection, including enforcement measures, at a level that is similar to that prevailing in the area of the contracting parties. The subject countries also must comply with, and must exercise their best efforts to join, specified conventions, usually the Berne Convention<sup>33</sup> and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (“Rome Convention”).<sup>34</sup> Those obligations

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assist economic reform and recovery in Mongolia and the independent states of the former Soviet Union (“Community of Independent States”), namely, Armenia, Azerbaijan, Belarus, Georgia, Kazakstan, Kyrgyztan, Moldavia, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. TACIS did not apply to the Baltic countries. It was followed by Commission Regulation 1279/96, 1996 O.J. (L 165) 1, concerning the provision of assistance to economic reform and recovery in the new independent states and Mongolia. This new TACIS-program applied as of January 1, 1996 and runs through December 31, 1999. See Andreas Strub, *Überlegungen anlässlich der neuen TACIS-Verordnung [Considerations Triggered by the New TACIS Regulation]*, EuZW 105 (1997), for a discussion of both the old and new TACIS programs.

31. Convention Establishing European Free Trade Association (“EFTA”), Jan. 4, 1960, 370 U.N.T.S. 3.

32. See Kimmo Mettala & Kaarina Stahlberg, *Free Trade Agreements Between Finland and Central and Eastern European Countries*, 28 INT’L LAW. 773, 781-82 (1994) (providing examples of agreements between EFTA and certain Central and Eastern European countries). Finland has since joined the European Community and is no longer a member of EFTA.

33. Berne Convention, *supra* note 2.

34. International Convention for the Protection of Performers, Producers of Phono-

must be fulfilled within specified deadlines.<sup>35</sup> In addition, these trade agreements set forth more specific obligations that are not contained in the Europe Agreements, including protection of computer programs and databases through copyright, specified enforcement duties, and most-favored-nation clauses.

Member countries of the Central European Free Trade Agreement (“CEFTA”)<sup>36</sup> also have agreed to grant intellectual property protection to each other. The obligations include non-discriminatory enforcement measures. The level of protection must correspond to that of specified conventions, in particular, the Berne and Rome Conventions.<sup>37</sup>

Moreover, the recent membership of certain Central and Eastern European countries to the World Trade Organization (“WTO”)<sup>38</sup> and, consequently, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”),<sup>39</sup> has effectively raised the standards of protection to the prevailing international level. This trend will continue with the upcoming ratification of the WIPO Copyright Treaty<sup>40</sup> and the WIPO Performances and Phonograms Treaty of 1996.<sup>41</sup> After the envisaged

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grams and Broadcasting Organisations, done at Rome, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

35. See Grzeszak, *supra* note 9, at 6.

36. Central European Free Trade Agreement (“CEFTA”), 34 I.L.M. 3 (1995). The current members include Poland, Hungary, the Czech and Slovakian Republics, Slovenia, and Romania. See *Warsaw Hosts CEFTA Anniversary Session*, MTI ECONews, Dec. 18, 1997, available in LEXIS, World, Allwld Database.

37. See Silke von Lewinski, *Europäische Integration jenseits der Union—Geistiges Eigentum im Netzwerk intereuropäischer Beziehungen [European Integration On the Other Side of the Union]*, AKTUELLE HERAUSFORDERUNGEN DES GEISTIGEN EIGENTUMS 607, 714 (1995).

38. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (“Uruguay Round”), Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

39. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement]. See Internet Website of the World Trade Organization (“WTO”) (visited April 1, 1998) <<http://www.wto.org>>, for the most recent list of WTO members.

40. World Intellectual Property Organization Copyright Treaty, *adopted by* Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty].

41. World Intellectual Property Organization Performances and Phonograms

ratification by the European Community and its member states, the Central and Eastern European countries are expected to ratify these treaties as well. Thus, in the not-too-distant future, Central and Eastern European nations will be part of a leading group of countries that provide modern, technology-adapted, and advanced copyright and neighboring rights protection.

## II. THE STANDARD OF PROTECTION UNDER CURRENT LEGISLATION

Since 1990, a series of new copyright acts and amendments to earlier copyright acts have changed copyright law in Central and Eastern European countries. Entirely new copyright acts have been adopted by Albania, Bulgaria, Estonia, Latvia, Poland, Romania, Russia, Slovenia, and the Ukraine.<sup>42</sup> Other countries, in particular Hungary and Czechoslovakia,<sup>43</sup> as well as Croatia, only amended their existing laws. Both groups of countries are expected to enact additional legislation either to replace their Socialist era laws or to update or correct their laws to fully account for their new obligations arising under multilateral or bilateral agreements.

The structure of these new laws reflects the influence of modern Western European copyright law. In addition to provisions on substantive copyright law itself, the new Central and Eastern European laws contain provisions on copyright contract law, neighboring rights protection, and provisions regarding collecting societies and enforcement.<sup>44</sup> These laws not only are concerned about copyright as a property right, but also aim to comprehensively cover all related aspects. In particular, the laws seek to achieve a balance between authors and those who exploit their works.<sup>45</sup> It is evident, not only from the structure of these laws, but also from their content that they principally follow the continental European

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Treaty, *adopted by* Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WIPO Phonogram Treaty].

42. See Dietz II, *supra* note 18, at 122-23, nn.3-4.

43. See *id.*

44. See *id.* at 138 (citing the Russian Federation Law as an example).

45. The most convincing example of the adoption of this structure may be seen in the Slovenian Copyright Act. *Zakon o avtorski in sorodnih pravicah* [Copyright and Related Rights Act], Official Gazette of Slovenia, No. 21/1995, *entered into force on* Apr. 29, 1995.

mental European system, in line with the legal traditions of the Central and Eastern European countries. This part highlights some common aspects of the new laws.<sup>46</sup>

#### A. *Subject Matter of Copyright Protection*

With respect to the subject matter of copyright protection, it is not surprising, given the contents of United States bilateral agreements,<sup>47</sup> the TRIPs Agreement,<sup>48</sup> and the European Community Software Directive (“EC Software Directive”)<sup>49</sup> and Database Directive (“EC Database Directive”),<sup>50</sup> that computer programs and databases are specifically included on the list of protected works under most laws. The more recent laws follow the EC Software Directive by further providing detailed provisions for the protection of computer programs. In accordance with the continental European system, sound recordings and broadcasts are the subject matter of neighboring rights, rather than of copyright.

#### B. *Initial Owner of Copyright*

An author, being a natural person, is considered the first owner of a copyright. In contrast, an author’s employer is not deemed to be the owner, although its interests may be taken into account, as may occur, for example, in countries where transfers of certain rights are legally presumed. With respect to audio-visual works, most, but not all, laws provide for the authorship of natural persons contributing to a film, regularly combined with presumptions of transfer in favor of the producer.<sup>51</sup> One exception to this principle has been widely adopted; there is no requirement that only natural persons can be owners and first authors of collective works. Accordingly, the natural or legal person on whose initiative and under

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46. Specific discussion of the copyright law of each of the Central and Eastern European countries is beyond the scope of this Essay, hence this Essay examines the common features of the laws.

47. See *supra* notes 21-23 and accompanying text (discussing bilateral agreements between the United States and Central and Eastern European countries).

48. TRIPs Agreement, *supra* note 39.

49. Council Directive on the Legal Protection of Computer Programs 91/250, 1991 O.J. (L 122) 42.

50. Council Directive 96/9, 1996 O.J. (L 77) 20.

51. See Dietz II, *supra* note 18, at 148-50.

whose direction a collective work has been created is considered to be the first owner of the copyright.

### C. *Rights and Limitations*

A clear indication of the adherence of Central and Eastern European countries to the continental European system is their recognition of far-reaching moral rights, which extend beyond the minimum rights contained in article 6<sup>bis</sup> of the Berne Convention.<sup>52</sup> Article 6<sup>bis</sup> provides the right of authorship and the right of integrity of the work.<sup>53</sup> Most of the laws also provide for a right of accession to the work where the author no longer exercises control over the original, a right of first disclosure, and a right of withdrawal at the author's behest if the author no longer agrees with his own work. Furthermore, moral rights are perpetual under most of these laws.<sup>54</sup>

The copyright laws of the Central and Eastern European countries usually provide for a rather comprehensive range of exclusive economic rights, including the rights of reproduction, distribution, rental, importation, public performance, and both satellite and cable broadcasting. The broadcasting right, however, may be limited by provisions in the laws for statutory licenses, rather than licenses granted by authors.<sup>55</sup> The influence of international and bilateral agreements is evident mainly from their grant of the rights of rental, distribution, and importation.

Another feature of continental European copyright law that is well represented in Central and Eastern European countries is the provision of a number of statutory rights of remuneration. For example, most countries provide the *droit de suite*, "resale right," stated in article 14<sup>ter</sup> of the Berne Convention,<sup>56</sup> and rights of remuneration for private reproduction of audio and audiovisual works, and to a lesser extent, for reprography.

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52. Berne Convention, *supra* note 2.

53. *Id.*

54. See Dietz I, *supra* note 4, at 868 (noting the influence of European copyright tradition, particularly French copyright law, on the treatment of moral rights).

55. See Dietz II, *supra* note 18, at 154, 166-168.

56. Berne Convention, *supra* note 2, art. 14<sup>ter</sup>.



There remain in most of Central and Eastern Europe important areas of free use that do not even require remuneration.<sup>57</sup> Furthermore, these new laws vary in their provisions for statutory licenses for broadcast and cable retransmissions. Poland, for example, has introduced licenses in certain cases, while Hungary and Czechoslovakia have abolished them.

#### D. *Term of Protection*

During the pre-Socialist period, most countries provided for significant terms of protection. Those terms were reduced during the Socialist period, but have been reinstated under recent laws. To comply with the Berne Convention<sup>58</sup> and the European Community Copyright Duration Directive (“Copyright Duration Directive”),<sup>59</sup> the laws of Central and Eastern Europe now provide general terms of protection of fifty years and seventy years p.m.a.

#### E. *Neighboring Rights*

In socialist copyright law, regulation of neighboring rights was rudimentary or non-existent. The recent copyright laws, however, have incorporated provisions in particular from the European Community Rental Directive (“EC Rental Directive”),<sup>60</sup> the TRIPs Agreement,<sup>61</sup> and the Rome Convention.<sup>62</sup> For example, chapter two of the EC Rental Directive provides a fairly high standard of protection for performers, producers of phonograms, broadcasting organizations, and film producers. This standard has been, or must be, implemented into the laws of Central and Eastern Europe.

Beyond the requirements of the European Community law, most of the countries even grant remuneration rights for private

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57. See Dietz II, *supra* note 18, at 166-68 (discussing the limitations of rights in Central and Eastern Europe).

58. Berne Convention, *supra* note 2.

59. Council Directive 93/98, 1993 O.J. (L 290) 9 [hereinafter Copyright Duration Directive] (harmonizing the term of protection for copyright and certain related rights).

60. Council Directive 92/100, 1992 O.J. (L 346) 61; see JÖRG REINBOE & SILKE VON LEWINSKI, THE E.C. DIRECTIVE ON RENTAL AND LENDING RIGHTS AND ON PIRACY 84 (1993).

61. TRIPs Agreement, *supra* note 39.

62. Rome Convention, *supra* note 34.

copying to performers and phonogram producers. Amendments to neighboring rights constitute one of the major developments in the new copyright laws in Central and Eastern Europe.

In the Central and Eastern European countries, the terms of protection either have been adapted to the TRIPs Agreement and the Copyright Duration Directive, hence are fixed at fifty years, or they will be so adapted in the near future. In addition to these classical neighboring rights, some countries provide neighboring rights for other subject matters, such as certain photographs, scientific editions of public domain works, and first publications of public domain works, thereby following models of some Western European copyright laws and, partly, article 4 of the Copyright Duration Directive.<sup>63</sup>

#### F. *Contract Law with Respect to Copyright Law*

One of the main features of continental European copyright systems is the inclusion of specific provisions concerning contracts in the field of copyright law. Most of these provisions are intended to equalize the typical imbalance between an author and the exploiting industry. This feature was particularly important during the Socialist period, when tariffs, as well as minimum and maximum amounts of remuneration, were fixed by state regulation.

Although the transformation into market economies has brought about the freedom of contract, a number of Central and Eastern European countries have retained or modernized those provisions which intend to equalize the typical imbalance between an author and the exploiting industry. Examples of the new provisions include the principle of mutual independence of the different exploitation rights in the event of transfer, the specification requirement for the various methods and kinds of exploitation covered by the contract, and the duration and other terms of the contract. A number of countries have enacted only general contract rules to cover all copyright contracts, whereas other countries have added specific contract rules to cover specific types of copyright exploitation.<sup>64</sup>

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63. See Copyright Duration Directive, *supra* note 59, art. 4.

64. See Dietz II, *supra* note 18, at 168.

In contrast, the tariff systems of the Socialist period have been abolished in most countries, with the exception of certain laws that still empower the governments to fix minimum, but not maximum, tariffs for certain kinds of exploitation.<sup>65</sup>

### G. *Collecting Societies*

Collecting societies play an important role in the exercise of copyright, particularly with respect to remuneration rights newly established under most Central and Eastern European laws. Because Socialist era collecting societies often had some implicit censorship functions,<sup>66</sup> legislators in the post-Socialist period have been reluctant to allow any form of intervention by the state. Consequently, most of the Central and Eastern European laws, although providing for regulation of the rights and obligations of such organizations, did not introduce a system for state authorization or continuous supervision of collecting societies. Collecting societies usually are monopolies, hence supervision is essential in order to prevent abuse of their positions and to promote confidence in their activities. This concern is even greater if collecting societies are exempt from the application of general antitrust laws, as they are, for example, under article 45(1) of the Russian Copyright Act.<sup>67</sup>

### H. *Enforcement Provisions*

The high rate of piracy in the Central and Eastern European countries makes copyright enforcement provisions particularly important. Legislators have demonstrated their awareness of the problem by including enforcement provisions in the new laws, some of which are very detailed.<sup>68</sup> Slovenia, for example, has a provision that is new to systems of continental law: the right of an author to seek punitive damages.<sup>69</sup> Accordingly, an author may

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65. See, e.g., Russian Copyright and Neighboring Rights Act, No. 5351-I, July 9, 1993, art. 31(3), reprinted in *INDUS. PROP.*, Jan. 1994, at 10 (minimum tariff).

66. See *supra* Part I.B.

67. See Dietz II, *supra* note 18, at 184-88, for a detailed discussion of collecting societies in socialist Central and Eastern Europe.

68. See *id.* at 198.

69. See *Zakon o avtorski in sorodnih pravicah* [Copyright and Related Rights Act],

claim up to two hundred percent of either the agreed-upon remuneration or the customary royalty or remuneration for such use, regardless of whether the right holder suffered actual pecuniary damage from the infringement of his right.

### III. PRACTICAL PROBLEMS: APPLYING COPYRIGHT LAW IN CENTRAL & EASTERN EUROPE

Although copyright legislation in the Central and Eastern European countries has improved considerably during the past several years, its implementation remains inadequate. Practical problems remain, the most significant of which are the generally high level of piracy, lack of enforcement, lack of awareness on all sides, lack of education and expertise, inadequate infrastructure in some cases, and particular concerns regarding collecting societies.

Part of the piracy problem lies in the incomplete membership of Central and Eastern European countries in the relevant international agreements, particularly in the area of neighboring rights.

Although the percentage of pirate sales among the Central and Eastern European nations is very high,<sup>70</sup> the situation has improved remarkably in some countries. In Poland, for example, sound recording piracy dropped from ninety-five percent in 1992 to twelve percent in 1996.<sup>71</sup>

In the sound recording sector, particular problems arise from a number of compact disk ("CD") plants in Bulgaria. They have produced large quantities of pirated CDs for export into Russia, other Central and Eastern European countries, and worldwide.<sup>72</sup> New titles are put on the market in Bulgaria and its export coun-

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Official Gazette of Slovenia, No. 21/1995, art. 168.

70. See INTERNATIONAL FEDERATION OF THE PHONOGRAM INDUSTRY, PIRATE SALES '95 at 1 (1996) [hereinafter PIRATE SALES] (including charts comparing piracy sales in a number of Central and Eastern European countries).

71. Telephone interview with B. Kortlan, Director of Regional Office for Central and Eastern Europe of the International Federation of the Phonogram Industry, in Warsaw, Pol. (Mar. 11, 1997) [hereinafter Kortlan interview]. The percentages of sound recording pirate sales are estimated at 45% in Bulgaria, 45% in Latvia, and 80% in Lithuania. *Id.* In absolute figures, Russia is the largest pirate market in the world, with pirate sales of 222.3 million units worth \$363.1 million. See PIRATE SALES, *supra* note 70, at 2.

72. See *Bulgarian CD Pirates Cost Euro Record Industry \$100m Says IFPI*, MUSIC & COPYRIGHT, Mar. 12, 1997, at 1 [hereinafter *Bulgarian CD Pirates*].

tries at the same time that they appear on the European Union and other markets.<sup>73</sup> These CDs have the same quality as the originals, but they are sold for four to five dollars each, which is much less than the average price of a new CD in Europe. Piracy in Bulgaria has been more competitive than other piracy businesses in neighboring countries, because Bulgarian pirate operations produce high-quality CDs more quickly and less expensively than their competitors. Competition reduces the level of local piracy in other countries, where local pirates have disappeared or continued legally or concentrated on the recording of the local repertoire.<sup>74</sup>

The fight against piracy is severely hampered by the fact that some of the pirate plants are state-controlled, while in other cases their operations seem to be tied to the "Russian Mafia."<sup>75</sup> It has been suggested that high-ranking officials in Bulgaria, many of whom are former Communist Party officials, have financial interests in the pirate CD plants.<sup>76</sup>

Apart from the reluctance and inactivity of government officials,<sup>77</sup> a number of practical copyright enforcement problems continue even where sufficient enforcement laws are in place. In some cases, the time and effort spent enforcing copyrights may seem inappropriately high.<sup>78</sup>

One of the main reasons for the low level of enforcement is the lack of copyright awareness and education. Copyright holders themselves often seem little concerned about enforcing their rights, which may be due to a general lack of litigation in the former socialist countries.<sup>79</sup> The lack of right-holder initiative is further reflected in the lack of associations of right holders in some of the Central and Eastern European countries. For example, the Esto-

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73. Telephone interview with M. Rochiccioli, Responsable-Général, Intellectual Property, PHARE program (Mar. 11, 1997).

74. See *Bulgarian CD Pirates*, *supra* note 72.

75. See *Piracy still an issue in Bulgaria*, MUSIC & COPYRIGHT, Apr. 10, 1996, at 4 [hereinafter *Bulgarian Piracy Issue*]; Igor Pozhitkov, *Review of the Author's Rights Protection Regime in the Russian Federation*, 60 COPYRIGHT WORLD 22, 26 (May 1996) (stressing the strong role of organized crime in Russia).

76. See *Bulgarian Piracy Issue*, *supra* note 75.

77. See Pozhitkov, *supra* note 75.

78. See *id.*

79. See Dietz II, *supra* note 18, at 198.

nian Ministry of Culture has encouraged right holders to establish associations to represent their members' common interests. Such associations, in theory, would contribute to the establishment of a sound copyright infrastructure. To date, however, there has been virtually no success.<sup>80</sup> That might be a residual effect of the Socialist period, when the state largely took care of all the needs of the citizens and frowned upon too much individual initiative.

Central and Eastern Europe are experiencing the same consumer awareness problems that exist in many Western countries; consumers have little awareness of piracy, and there is no stigma attached to the purchase of pirate recordings, illegal software, and other illegally made products. Consumers are swayed by the enormous price differential between legal and pirated goods, and the general public is not yet sufficiently aware of the negative connection between piracy and the long-term health of the copyright industry.<sup>81</sup> In addition, even professional users, such as broadcasting organizations and cable distributors, often are unaware of copyright or neighboring rights protection, or are simply unwilling to pay remuneration or to acquire licenses.<sup>82</sup>

Another stumbling block for efficient application of copyright law is the lack or low degree of awareness and expertise by the police, border control authorities, and courts regarding copyright and neighboring rights. The police in many countries are concerned primarily with criminal acts involving drugs or weapons and usually show little appreciation for the importance of intangible property protections, such as copyright. Although police occasionally crack down on copyright pirates,<sup>83</sup> more time and effort should be spent on the education of police officers. Border control officers need the same training. This is particularly necessary in those Central and Eastern European Countries that have comparatively low rates of domestic piracy but suffer from the influx of pirate

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80. Interview with Kersti Paveer, chief copyright official, Estonian Ministry of Culture, in Tallinn, Est. (Nov. 4, 1996).

81. See Kortlan interview, *supra* note 71.

82. See *id.*

83. See Miha Trampuz, *Police Conduct Raids Against Software Pirates in Slovenia*, 10 WORLD INTELL. PROP. REP. 136, 136-37 (1996).

goods from neighboring countries.<sup>84</sup>

Another problem with implementing copyright laws is the failure of most Central and Eastern European countries to specifically educate judges and to establish special courts or divisions of courts to handle intellectual property cases. That problem, while not unknown in Western countries, is particularly prevalent in Central and Eastern Europe. Nevertheless, a positive example has been set by Slovenia, which has designated the District Court of Ljubljana the exclusive court of original jurisdiction for intellectual property cases.<sup>85</sup> The judges of that court receive specific training in copyright law.

Certain problems also may exist regarding collecting societies. In most countries, neighboring rights protection was introduced only after the end of the Socialist period. Consequently, collecting societies of neighboring rights owners, in particular those of performers and phonogram producers, have not existed in those countries.

To date, collecting societies have not been established for the owners of neighboring rights in most of the Central and Eastern European Countries. Although most retained their collecting societies for *authors* throughout the Socialist period, Slovenia, which gained independence in 1991, is the exception. Despite repeated encouragement by the Copyright Agency of Slovenia, authors have not taken the initiative to establish collecting societies.<sup>86</sup> That is particularly hard to understand, given the fact that Slovenia provides mandatory collective administration for a number of exploitation rights<sup>87</sup> Indeed, the authors' lack of initiative has produced a situation in which even users who would be willing to acquire

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84. See *supra* notes 72-74 and accompanying text (discussing the exports of pirated CDs from Bulgaria).

85. See Zakon o sodnih [Law on Courts], Official Gazette of Slovenia, Nos. 19/1994, 45/1995, art. 103.

86. Telephone interview with Dr. Miha Trampuz, legal counsel, Copyright Agency of Slovenia (Mar. 11, 1997).

87. See Zakon o avtorski in sorodnih pravicah [Copyright and Related Rights Act], Official Gazette of Slovenia, No. 21/1995, art. 147 (providing for mandatory collective administration of copyright). See *id.* art. 148 for a general report on the organization and activities of Slovenian collecting societies.

and pay for those rights continue to infringe upon copyrights.<sup>88</sup>

Poland faces a different problem regarding collecting societies. After the Socialist period's state monopolies, liberalism and free competition seemed to be the prevailing goals in the context of establishing democracy and a market economy. Although such a strong reaction to socialism is understandable, Poland could have avoided later problems by following the experiences of Western European countries. Those experiences showed that collecting societies work in the most efficient way and to the best benefit of right owners when they enjoy a monopoly.<sup>89</sup> Of course, certain state controls regarding abuses of such a position would be necessary. For example, in Poland, several collecting societies were admitted for the same rights. Practice shows that the administration of such rights has become extremely complicated and cumbersome, especially for those who want to acquire licenses or pay the statutory remuneration due for a certain right.

#### CONCLUSION

The Central and Eastern European countries have made incredible progress over the last eight years. In that short time, the former socialist nations have adopted many of the standards prevailing in Western Europe and other industrialized countries. Due to new international obligations, further amendments may be expected in the near future. Nonetheless, the enforcement of copyright remains inadequate in most Central and Eastern European countries, and remedial action is required. Right owners, users, police, customs authorities, and courts must become more knowledgeable about copyright and more aware of it. Media campaigns should be used to promote general copyright awareness, while special seminars and training programs are necessary to educate police, customs officers, and judges to provide them with the necessary tools to properly enforce copyright laws. In sum, the countries of Central and Eastern Europe are highly evolved legally in their intellectual property metamorphosis, but in practice are not fully emerged from their socialist cocoons.

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88. A prime example of such a user is the cable redistribution industry.

89. See Dietz II, *supra* note 18, at 184.