

Collective management of copyright and related rights - fiscal implications

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Abstract. Creative activities are a constant in all the periods and changes that humanity has gone through, they enriched life, improved living conditions and contributed to the progress made in different areas of activity. In today's highly digitized context, social networks, YouTube, Spotify and Netflix are representative means by which intellectual creations reach the public. In this equation, it is legally required to answer the question - how do creators, authors and holders of related rights receive appropriate compensation for the use and exploitation of their works? Collective management organizations provide an answer, they provide a way through which copyright and related rights may be exercised. As a consequence of their contribution to the exploitation of copyright and related rights, collective management organizations also play a fiscal role. Some aspects require clarifications, such as identification of taxable persons, direct and indirect tax applied to the achieved income, as well as non-patrimonial tax obligations.

1 Introduction

The concept of 'collective management of copyrights and related rights' is relatively recent in the millennial history, as for a long time the works of intellectual creation have not benefited from protection, especially from a patrimonial perspective. The notion of 'copyright' is in place nowadays to safeguard original works of authorship and ensure their protection under the law. This guarantees certain privileges for copyright-holders, which include both non-monetary and monetary aspects that can be exercised either individually or collectively. We aim to shape the general framework of collective management, when it appeared and how it has evolved, what role has the World Intellectual Property Organization (WIPO) played, which are the primary provisions at the European level, as well as the way in which collective management is regulated in Romanian legislation. In the second part of the paper, we will discuss the main fiscal implications of obtaining income through the collective management organization (CMO), aspects related to direct taxation, indirect taxation, taxable persons and non-pecuniary tax obligations.

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2 The collective management - classical input and Internet-mediated forms

The concept of copyright reunites all legal rules related to the creation and use of a literary, artistic, or scientific work [1], assuming both patrimonial and non-patrimonial aspects. From a legal perspective, the concept of 'related rights' is similar to copyright, with the distinction that these are assigned to performing artists, interpreters and show organizers [2]. Both copyright and related rights (CRR) involve a monetary extent that can be (and in some cases must be) individually or collectively exercised. The main patrimonial right implies using the work by authorizing the reproduction, distribution, hire, broadcasting, or public communication. Individual management represents the natural and common way for CRR administration and derives from the personal nature of the copyright [2]. The author or his successors authorize the ways in which the work will be used when the right is individually managed. Individual management is almost impossible and economically inefficient for certain categories of works of art and the corresponding rights, for example, in the case of a musical work, the author must grant licenses for each public communication or broadcasting of his work and his repertoire may contain dozens of songs. This conclusion led in time to the appearance of the collective management of CRR.

Collective management is carried out by the CMOs, which are CRR owners' associations and it can be optional or mandatory. The cases and conditions in which collective management is mandatory will be part of every national legislation. The concept of collective management of copyrights and related rights (CRR) appeared in France in the 18th century. Its starting point was marked by the authors' efforts to get their patrimonial and non-patrimonial rights respected. The first CMO appeared in France in 1777 and still carries out its activity today under the name of *The society of dramatic authors and composers* [3], (originally called - *The Office of Dramatic Legislation*). Another CMO was founded by Honoré de Balzac in 1837 (Victor Hugo, who had a significant role in drafting the Berne Convention for the Protection of Literary and Artistic Works in 1886, and Alexandre Dumas also contributed) and it was named *The society of men of letters*. *The civil society of multimedia authors* - SCAM [4] detached itself from *The society of men of letters*. A defining moment for the collective management system was the famous trial between the owner of the restaurant *Les Ambassadors* and 3 authors of intellectual works of creation. In 1847, considering it unfair that they must pay for food and drinks, while the owner had no obligation to pay them for their musical pieces performed by the local orchestra, two composers and one writer refused to pay for food and drinks if they were not being paid for their performances. With the support of their editor, they decided to sue the owner of the restaurant. Unexpected for those times, their action was admitted and the defendant was forced to pay a large sum of money as remuneration for using their songs in the restaurant [5]. For composers and lyricists, this decision opened a new path. They realized that the need to coordinate efforts is imperative and because individual management of copyright was almost impossible in some cases, they founded the *Society of Authors, Composers and Publishers of Music* - SACEM, the most advanced and efficient CMO today in France. In 2004 it collected 725 million Euros from users. In 2008, 128,000 authors were members of SACEM, including 15,500 foreign members and it collected 755.8 million Euros. The society has more than 37 million musical works in the repertoire and 1425 employees [6].

The collective management system has been used and improved over time as it is both necessary and useful to ensure complete and efficient protection of CRR. Due to their characteristics, intellectual property rights (IPR), despite all diligence, cannot be protected only through individual management. Authors organized themselves according to categories of works and many CMOs were founded. Subsequently, collective management was extended for related rights [2]. France always had one of the most performing, if not the most

performing CRR protection system. Even though the system of collective management was constantly developed, mixed and improved, this was detailed and precisely regulated in 1985 [2].

Nowadays, an additional and important element is represented by the Internet, a system architecture used for communications and commerce ‘by allowing various computer networks around the world to interconnect’ [7]. By 2020, approximately 4.5 billion people, or more than half of the world’s population, were estimated to have access to the Internet [7]. The role played by the Internet is crucial, as it provides a means by which the authors’ work reaches the public. In this context, it is almost impossible to exclusively exercise copyright individually, because that would imply each author to track the number of public communications or broadcasting of his works and grant a license for each user. Websites and applications like Youtube, Spotify or Netflix are used as much as classical methods to bring the authors’ work to the audience, as ‘Publishing rights holders earned \$3.5 billion from streaming overall in 2020, a sum that is more than publishing revenue from CDs and downloads any year in the 21st century so far, even during the peak of the CD era’ [8]. Spotify paid more than 7 billion dollars in royalties in 2021, according to a transparency report [8], this being the highest amount paid by such a service in 2021 and a record for the highest amount paid annually by a single retailer in history, according to the same report. The conclusions of the report highlight the importance and necessity of the collective management of CRR. According to this, streaming revenue in 2021 alone exceeded total industry revenue from 2009 to 2016, with Spotify payments representing around a third of that streaming total. More than 1000 artists generated 1 million dollars on Spotify alone, 450 artists generated more than 2 million dollars on Spotify, an increase of 110% in five years and 130 artists generated over 5 million dollars, an increase of 160% in the same period. Moreover, Spotify’s royalty payments increased by \$2 billion in 2021, up from \$5 billion in 2020 [9].

The mechanism used by the Spotify platform involves payments to the right-holders, such as the record labels, distributors and CMOs, whom ‘artists allow putting their music on the platform and who in turn pay the artists revenue from the earnings on the streaming service’ [9]. Artists cannot upload their own music on Spotify, because there are 3 parties involved in this activity, the platform, the intermediary (CMOs, record labels, distributors) and the artist, which makes it important to our study. According to the transparency report published by Spotify, streaming has made it easier for artists to share their music and accelerated the path to finding a global fan base, meaning artists can go from their first single to their first significant paycheck fast. Over 10% of artists (5300) who generated more than 10,000 dollars on Spotify in 2021 released their first song ever in the last two years. In 2021, 350 of them generated 100,000 dollars from Spotify alone. Also, ‘streaming revenue is bringing real scale to the music industries of emerging markets, making it increasingly possible to pursue a professional career as an artist in countries around the world. In 2021, Spotify launched in 80+ markets, introducing these artists to new fans in places all over the world. Of the 52,600 artists who generated more than \$10,000 on Spotify in 2021, 34% live in countries outside the IFPI’s top ten music markets (Australia, Canada, China, Italy, France, Germany, Japan, South Korea, the U.K. and the U.S.)’ [8]. Likewise, the mechanism used by YouTube allows artists to get royalties through intermediaries (CMOs, record labels, etc.), but it imposes certain conditions to be able to monetize. Now, in order for a YouTube video to be eligible for monetization, it must have both of these: at least 1,000 subscribers and 4,000 hours of watch-time over the past 12 months [10]. A difference between Youtube and Spotify is given by the fact that ‘artists can upload their releases to YouTube as they would to a traditional streaming service, putting it on YouTube Music as well as the main site’ [11]. The mechanism is entirely different from the one used by Netflix, the most popular subscription streaming service in the world in 2022, with more than 225 million subscribers worldwide

[12]. Netflix does not accept any materials that they do not specifically request, so if the individuals have ‘an idea about a show, film, game, or other projects the only option is to work through a licensed agent (for example, WME - William Morris Endeavor, CAA - Creative Artists Agency, ICM - International Creative Management and UTA - United Talent Agency [13]), producer, attorney manager, or industry executive, as appropriate, who already has a relationship with Netflix, as the platform does not share any references for these resources’ [14]. So, if CRRs are collectively managed, this equation involves four parties, the author (or the related rights-holder), the CMO, the middleman and Netflix.

According to its politics, Netflix does not publicly disclose its deals. There are viewpoints that claim Netflix is currently paying between 100 and 250 million dollars for blockbuster movies, while popular TV shows with multiple seasons have budgets that range from 300 to 500 million dollars [15]. None of the agreements signed with filmmakers are made public. In accordance with some opinions and based on some usual ratios, ‘filmmakers themselves get around 10 to 20% of direct profit, without the additional fees, but this is really just a rough estimate, as the exact numbers are not subject to public disclosure’ [15].

Numbers speak for themselves. The Internet, through platforms such as Netflix, Spotify and YouTube, contributes nowadays decisively to the exploitation of IPR, generating significant incomes, a fact which requires paying particular attention to the fiscal aspects, as well the intellectual property ones.

2.1 The role of The World Intellectual Property Organization

Aspects related to the collective management of CRR were addressed at an international level for the first time in 1975, during a meeting that took place in Washington, on the development of techniques for reprographic reproduction of literary works, with the participation of some committees of the Berne Union. It was concluded that it is up to every state to decide how to approach these new challenges, especially the legal framework for non-voluntary licenses and the authors' royalties, suggesting that the foundation of some CMOs for the right of remuneration may be a solution [16]. Over time, the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) constantly recommended and suggested collective management for the works that are stored and reproduced with the help of computer systems and for private copying. Simultaneously, they drafted and passed two statute examples and starting in 1985 published studies about CRR collective management.

Nowadays, according to WIPO, ‘managing CRR individually may not always be realistic’, thus the collective management of CRR is necessary. This is being done through CMOs, which are not-for-profit entities, either private or public [16]. Regarding the attributions, typically a CMO monitors when, where and how works are used; negotiates tariffs and other conditions with users; licenses the use of protected works on behalf of its members and of other rights-holders it represents; and collects the fees from users and distributes these to the rights-holders [16]. WIPO also developed the *WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit): A Bridge between right holders and Users*, which ‘brings together examples of legislation, regulation and codes of conduct in the area of collective management from around the world’ [17]. The document is available in 7 languages: English, French, Spanish, Portuguese, Russian, Chinese and Arabic, the last version is from September 2021.

2.2 Collective management of copyright and related rights in the European Union

European Union-wide efforts to create a framework of legal protection for holders of CRR materialized in the adoption of 11 directives and 2 regulations, ‘harmonizing the essential rights of authors, performers, producers and broadcasters’ [18]. Particularly relevant to the collective management of CRR is the adoption of Directive 2014/26/EU of the European Parliament and of the Council on 26 February 2014 on collective management of CRR and multi-territorial licensing of rights in musical works for online use in the internal market. Before the directive was drafted and adopted, a number of documents regarding to the patrimonial rights of the creators and the administration methods of that rights were adopted in European Union. Among these, Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of CRR in the information society. Among the targets set through the adoption of Directive 2014/26/EU was ‘to provide for coordination of national rules concerning access to the activity of managing CRR by CMOs, the modalities for their governance and their supervisory framework’ and also ‘to lay down requirements applicable to CMOs, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to CMOs established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law’ according to points 8 and 9 stated in the considerations.

In this regard, a series of rules and principles relating to financial management, transparency, reporting and transparent operation of CMOs are stated in the directive and must be transposed in member states’ legislations. According to the text of the directive, CRR can be individually or collectively managed, collective management being possible, optional, or mandatory. Also, the CMOs must collaborate with similar foreign organizations, grant licenses in a non-discriminatory manner and facilitate quick access to works of art. These provisions exist in the Romanian legislation as well.

2.3 Collective management of copyright and related rights in the Romanian legal system

Romanian legislation, in line with Directive 2014/26/EU, provides for both individual and collective management of CRR, in accordance with the guidelines drawn by international and European law. According to art. 144 para. (2) of the law on CRR (Law no. 8/1996), collective management can be optional or mandatory and it can only be done for works previously brought to the public's knowledge and the collective management of the related rights can only be done for interpretations or performances previously fixed or broadcast, as well as for phonograms or videograms previously brought to public knowledge.

The provisions of art. 144 para. (4) indicate some of the rights of authors and copyright holders, such as the right to choose for which categories of rights or types of works it authorizes, based on a written warrant, the CMO, the right to grant licenses for non-commercial uses of any types of works or categories of rights, the right to revoke the management warrant, with a reasonable notice that must not exceed 6 months, to collect the remuneration due to them for the acts of exploitation that occurred before the revocation or restriction of the management warrant came into force, the right to be informed annually

about how the remuneration collected from users is distributed to members. In the context of the collective management of CRR, the CMO cannot restrict the exercise holders' rights by imposing the condition that the management of the rights or categories of rights that are subject to revocation to be entrusted to another CMO, according to art. 144, para. (5).

Collective management of CRR is mandatory in certain cases: for the right to compensatory remuneration for the private copy, the right to fair remuneration for the public loan, the right to broadcast musical works, the right to unique fair remuneration recognized to performers and producers of phonograms for public communication and radio broadcasting of phonograms published for commercial purposes or their reproductions, cable retransmission right, retransmission right, the right to fair compensation for orphan works, according to art. 145 para. (1) of Law no. 8/1996. Article 145^{^1} provides the extended collective management for the right to public communication of a musical work; the right to public communication satellite; the right to reproduction, distribution, public communication, or putting on available to the public of protected works outside the commercial track; the right of reproduction and putting on available to the public of works belonging to the publishers of press publications. At the same time, Romanian legislation provides that in situations where collective management is mandatory, right-holders who have not granted a warrant to the CMO will also be represented, according to art. 145 para. (2) of Law no. 8/1996. Statutory provisions also indicate situations in which collective management is optional. These are listed in the contents of art. 146: the right to reproduce musical works on phonograms or videograms; the right to public communication of works, except for musical works (for the right to public communication of musical works an old version of the Law of CRR provided mandatory collective management; nowadays, according to art. 145^{^1}, the right to public communication is subject to extended collective management) and artistic performances in the audiovisual field; the right to borrow (with the exception of the public loan); the right to broadcast works and artistic performances in the audiovisual field; online rights to musical works; the right to fair remuneration resulting from the assignment of the rental right; the resale right.

Currently, in Romania a number of 14 CMOs are registered at the Romanian Office for Copyright: ADPFR - The Association for Phonogram Producers' Rights in Romania; AOTO - The Association on Theological Orthodox Opera; ARAIEX - The Romanian Association for Interpreters or Performing Artists; COPYRO - CMO for Copyright; CREDIDAM - The Romanian Center for Performers' Rights Management Association; DACIN SARA - The Society for Copyright in Cinemas and Broadcasting; OSRO - CMO for Copyright; PERGAM - The Society of Romanian Authors and Editors of Scientific Works; SOPFIA - The Society of Producers of Film and Broadcasting; UCMR - ADA - Romanian Musical Performing and Mechanical Rights Society; UNART - National Union of Artist from Romania; UPFAR-ARGOA - Union of Romanian Producers of Film and Broadcasting; UPFR - Romanian Phonogram Producers Union; VISARTA - CMO for Copyright in the Field of Visual Arts [19]. Romanian CMOs handle copyrights and related rights for Romanian and foreign artists, based on their scope. For instance, UNART has 8458 member rights-holders [20] and 44 members who have acquired rights by inheritance [21].

3 Fiscal implications of collective management

Incomes from intellectual property have constantly diversified and experienced a significant increase [22]. For instance, Canadian rapper Drake (Aubrey Drake Graham) has gained 52,5 million dollars from Spotify, generated from 21,5 billion streams, thus being the artist with the higher gain from the platform [23]. As shown above, Spotify, YouTube and Netflix have been paid billions of dollars in royalties. These payments have fiscal relevancy; hence the need to carefully regulate the fiscal issues, methods of taxation, owners of tax obligations

(patrimonial and declarative) and methods for avoidance of double taxation, given the nature of the IPR that can effortlessly be exploited abroad. In line with the international and European efforts in this matter, the Romanian legislator has introduced on March 23, 2019 Chapter II¹ in Title IV of the Fiscal Code with regard to taxation on income gained from IPR.

3.1 Taxable persons

In this equation, both copyright or related rights holders and the CMOs have tax obligations. The copyright holder is the taxpayer, being the one who owes the tax [24]. According to art. 72 of the Romanian Fiscal Code, the CMO must calculate, withhold the tax and transfer it to the state budget, all the obligations to establish and identify fiscal claims returning to the CMO. Fiscal dispositions do not stipulate direct or indirect taxes applicable for the amounts collected by CMOs, whatever the commission that members pay based on the statute or the amount collected and distributed to the right-holders. This aspect has generated an uneven practice and extensive jurisprudence, as we will analyze further.

3.2 Direct Taxation

Incomes obtained by exploiting IPR by natural persons are subject to income tax according to the provisions of Chapter II¹ in Title IV of the Romanian Fiscal Code. According to the definition stipulated in art. 70 of the Fiscal Code, income from the exploitation of IPR in any form comes from copyright and copyright-related rights, including the creation of monumental works of art, patents, designs, trademarks, geographical indications, topographies for semiconductor products and others like it. In Romania, income is only considered as obtained if it is received from a payer within the country or a non-resident payer with a permanent establishment in Romania. The gross income is represented by the total amount collected during the year and the equivalent in RON (currency of Romania) of income in kind. Net income is calculated by deducting from gross income a flat rate of expenses of 40% [24]. The legislator foresaw in the methodological rules for the application of the Fiscal Code what is included in the flat rate, such as commissions and sums due to CMOs, social contributions owed and other income payers as payment for the services provided for the management of rights by the latter to the rights holders. The tax rate is 10% and is calculated after subtracting from the gross income the flat rate of expenses in the amount of 40%.

There are some situations when the net income is determined by subtracting from the gross income the commission owed to the CMO or other payers who have duties to collect and distribute revenues to copyright holders; these situations are represented by income from inherited IPR, income from artist's resale rights, income from private copying compensation (according to art. 72¹ para. (2) of Fiscal Code). The introduction of Chapter II¹ in Title IV of the Fiscal Code outlined plain provisions on direct taxation incomes obtained from valuing intellectual property by individuals.

Another key aspect related to direct taxation is clarifying the legal nature of the commission charged by the CMO, whether or not it is subject to the profit tax, in absence of clear legal provisions. There were several legal cases in Romania regarding the nature of the commission charged and if it represents a commission within the meaning of art. 7 point 9 of the Fiscal Code and also if the provisions of art. 15 para. (3) of the Fiscal Code should be applied or not. According to art. 7 point 9, any payment in money or in kind made to a broker, general commission agent, or to any person deemed a broker or a general commission agent for services mediated in connection with an economic operation is considered commission. Article 15 of the Fiscal Code stipulates that in the case of non-profit organizations, for the

calculation of the fiscal result, other earned income is also non-taxable, up to the level of the equivalent in RON of 15,000 Euros, in a fiscal year, but no more than 10% of the total non-taxable income provided for in paragraph 2.

The Romanian High Court of Cassation and Justice (RHCCJ), The Panel for preliminary Ruling on Questions of Law, ruled in Decision 1788 on April 27, 2020, stating that the commission fees outlined in Law no. 8/1996 are the responsibility of members of CMO, as specified by the rules of each individual organization. These fees are meant to cover the operational costs of the organization and are not directly related to CRR. As such, they cannot be considered part of the definition provided by art. 7 point 9 of the Fiscal Code. Also, according to the provisions of Law no. 8/1996, the remuneration collected by the CMO is not and cannot be assimilated into their income. The RHCCJ provided that these income categories are expressly exempted from the profit tax, regardless of whether the provisions of art. 15 of the Fiscal Code refer to the notion of tax, contribution, or financial contribution, while Law no. 8/1996 uses the notion of commission, as long as both apply to the same income categories, only the names used are different. It follows, therefore, 'that the plaintiff's exemption from paying additional profit tax is determined, on the one hand, by the nature of its activity, as a CMO; and, on the other hand, by the nature of the commission collected by the plaintiff in consideration of the operations of collecting the revenues of the holders of CRR'.

The same judgment in Decision 48 of June 19, 2017, related to pronouncing a preliminary ruling on questions of law [25] was used by The RHCCJ (The Panel for preliminary ruling on Questions of Law) to rule that the commission value is established by law without being related to the other party's services, in any way. According to art. 134 para. 1 (i) of Law no. 8/1996, the commission held by the CMO cannot be higher than 15% of the sums distributed to everyone.

3.3 Indirect Taxation

Incomes obtained from the CRR also require the clarification of aspects related to value-added tax, this being the only indirect tax related to which, at a practice and doctrine level, questions have been raised as to whether or not it is applied to the income collected by the CMOs [24]. The main clarification required, in absence of express legal provisions, is the determination of the legal nature of the operation by which CMOs gather sums of money that afterward distribute to CRR holders if that is framed as supplying of services, according to art. 271 para. 3 (c) of the Fiscal Code, having correspondent in art. 2 (c) of the VAT Directive. The practice has provided different answers, thus generating extensive jurisprudence.

The RHCCJ by Decision 1788 pronounced on April 27, 2020 ruled that amounts collected as commission cannot be subject to value-added tax, because in this way 'the value-added tax corresponding to the rendered service by a middleman would have to be applied to value distinct service which was attended and not at the value of own supplied service' [26]. There is a similar reasoning in Decision 48 of June 19, 2017, pronounced by the RHCCJ [25]. Through it, the RHCCJ has ruled that the 'collection of CMO remunerations due to performing artists for the broadcasting or public communication of records containing fixation artistic performances of them does not represent a taxable operation in terms of the value-added tax' (paragraph 124 of the decision). The main arguments the RHCCJ relied on refer to the fact that a direct rapport between the services performed by each party does not exist, CMOs collect amounts due by users under the law or based on an agreement with the owners and not as counter-service for their services.

Regarding this aspect, the decision of the Court of Justice of the European Union (CJEU); pronounced on January 18, 2017, in case C-37/16, following the request for a preliminary decision according to art. 267 of the Treaty on the Functioning of the European Union is

relevant. The request was made in a dispute between the Ministry Finansów (Ministry of Finance, Poland), on one hand and Stowarzyszenie Artystów Wykonawców Utworów Muzycznych I Słowno-Muzycznych SAWP (the Society of Performers of Musical Works with or without Words (SAWP), based in Warsaw, Poland), on the other hand, related to the application of value-added tax in the situation of compensatory remuneration for the sale of devices for recording and reproducing works protected by copyright or objects protected by related rights and for the sale of supports used to fix such works or such objects [27].

The relevant EU legal context was represented by art. 2 para. (1) letter (c) of the VAT Directive: 'The following operations are subject to VAT: [...] (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'; art. 24 para. 1 of the VAT Directive 'supply of services shall mean any transaction which does not constitute a supply of goods'; art. 25 letter (a) 'A supply of services may consist, inter alia, in one of the following transactions: (a) the assignment of intangible property, whether or not the subject of a document establishing title (...)'; art. 2 of the Directive 2001/29/CE on the harmonisation of certain aspects of CRR in the information society 'Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite'; and art. 5 para. (2) letter (b) of Directive 2001/29 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases (...) (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rights-holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned'.

The relevant Polish legal context was represented by the provisions relating to the VAT and the one relating to CRR. Regarding VAT provisions 'The following shall be subject to the tax on goods and services: (1) the supply of goods or services for consideration within national territory'. According to the same law (art. 8), 'The supply of services (...) shall mean any supply to a natural person, legal person or organizational unit without legal personality which does not constitute a supply of goods (...), including the assignment of intangible and legal assets, regardless of the form in which the legal transaction is effected' and 'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself'. Regarding CRR provisions, art. 20 of Law on CRR 'Producers and importers of: (1) audio recorders, video recorders and other similar devices, (2) photocopiers, scanners and other similar reprographic devices enabling a published work to be copied in full or in part, (3) blank media for recording or reproducing, for personal use, works or the subject matter of related rights, using devices referred to in subparagraphs 1 and 2, shall be required to pay to CMOs determined pursuant to paragraph 5 and acting on behalf of authors, performers, phonogram producers, videogram producers and publishers, fees in an amount not exceeding 3% of the amount due by virtue of the sale of those devices and media' and art. 20¹ para. (1) 'Possessors of reprographic devices who carry on an economic activity relating to the reproduction of works for the personal use of third parties shall be required to pay, through an organization collectively managing copyright or related rights, fees amounting to 3% of the revenue in that respect to authors and publishers, save where the reproduction is made pursuant to a contract with the right holders. Those fees shall accrue to the authors and publishers in equal parts'.

The main dispute is based on a request made by SWAP to Poland's Ministry of Finance about stating its position on whether or not to apply the value-added tax for the amounts representing compensatory remuneration for unregistered media and recording and reproduction devices, paid by the producers and importers of such devices and supports pursuant to art. 20 of the Law on CRR. In response, on August 20, 2012, the Ministry of Finance issued an individual opinion in which he indicated that the sums paid to the SWAP company by the producers and importers of supports constitute a payment for the use of CRR related to the sale of equipment that serve to copy and fix the works and that, therefore, VAT must be applied.

SWAP requested the cancellation of the opinion in court (Administrative Court of Warsaw Voivodeship) and the request was accepted. The Ministry of Finance filed an appeal and the court of appeal noted that in Poland there is a contradictory jurisprudence on this matter and decided to address the CJEU using the preliminary procedures provided for by art. 267 of the TFEU.

The questions addressed to the CJEU concerned the nature of the provision of the authors to the manufacturers and importers of media, respectively whether this is a supply of services in the sense provided by the VAT Directive and, if the answer is affirmative, must the CMOs issue invoices to the producers, respectively the importers of supports, in which they include the value added tax when they charge compensatory remunerations? According to the VAT Directive, a series of 3 transactions can be classified as supplies of services, including the assignment of intangible property, the referring court requesting to clarify whether the operation in question in the main litigation represents the transfer of an intangible asset within the meaning of the VAT Directive. However, before answering this question 'it should be determined whether such a transaction is carried out for consideration. Under Article 2(1)(c) of the VAT Directive, in order for such a supply of services to be covered by the directive it must, in any event, be made for consideration' (paragraph 24). The Court ruled that it is not a matter of a service provided for consideration in the case. Based on consistent jurisprudence, the court ruled that in the sense of the VAT Directive, a provision of services is performed for consideration only when a relationship between the provider and the beneficiary exists and between them, there are mutual services. However, fair compensation does not constitute the direct consideration for any supply of services, because it is linked to the harm resulting for those rights-holders from the reproduction of their protected works without their authorization (see, to that effect, the judgment of 21 October 2010, *Padawan*, C-467/08, EU: C:2010:620, paragraph 40). 'In the present instance, first, it does not appear that there is a legal relationship pursuant to which there is a reciprocal performance by, on the one hand, holders of reproduction rights or the organization collectively managing such rights and, on the other, producers and importers of blank media and of recording and reproduction devices. Indeed, the obligation to pay fees, such as those at issue in the main proceedings, is owed by those producers and importers by virtue of the national legislation which also determines their amount' (paragraphs 27 and 28). Thereby the CJEU (Eighth Chamber) ruled that the VAT Directive 'must be interpreted in the sense that holders of reproduction rights do not make a supply of services, within the meaning of that directive, to producers and importers of blank media and of recording and reproduction devices on whom organizations collectively managing CRR levy on behalf of those rights holders, but in their own name, fees in respect of the sale of those devices and media'.

A different reasoning has been applied by the Court in case C-501/19, a request for a preliminary ruling under art. 267 TFEU [28] in the proceeding between UCMR – ADA Association for the copyright of composers (UCMR-ADA) and Cultural Association 'Romanian Soul' (the Association). The request concerns the interpretation of art. 24 para. (1), art. 25 (a) and art. 28 of the VAT Directive, regarding the taxation for value-added tax. The EU legal context was represented by the VAT Directive: art. 2 para (1) - 'The following

transactions shall be subject to VAT: (...) (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;’, art. 24 para (1) - ‘Supply of services shall mean any transaction which does not constitute a supply of goods’, art. 25 - ‘A supply of services may consist, inter alia, in one of the following transactions: (a) the assignment of intangible property, whether or not the subject of a document establishing title;’ and art. 28 - ‘Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself’.

The Romanian legal context was represented by the provisions of the then Fiscal Code (in the main proceedings, the applicable law was represented by Law no. 571/2003; in 2015, the Romanian legislator has adopted Law no. 227/2015 which replaced Law no. 571/2003): art. 126 - Taxable transactions - ‘Transactions that fulfil the following cumulative conditions shall be taxable in Romania for VAT purposes: (a) transactions which, within the meaning of Articles 128 to 130, constitute or are treated as a supply of goods or services, which is subject to VAT, for consideration’, art. 129 - ‘(1) A supply of services shall mean any transaction which does not constitute a supply of goods as defined in Article 128. (2) Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself. (3) Supplies of services include transactions such as: (...) (b) the assignment of intangible property, whether or not the subject of a document establishing a title, inter alia: the transfer and/or assignment of copyright, patents, licenses, trademarks and other similar rights; (...) (e) services performed by intermediaries acting in the name and on behalf of other persons, where they take part in a supply of goods or services (...)’ and the Copyright Law: art. 134 para (3) - ‘Royalties paid to CMOs is not revenue of those organizations, nor can it be treated as such’.

The Association had obtained a non-exclusive license from UCMR-ADA to perform some musical works for a public audience during a show it organized and had to pay remuneration for the public performance of those works. For the right of public communication, the national legislation established mandatory collective management. At the point where the facts happened, the Law on CRR provided that the right of public communication is subject to mandatory collective management. In 2019, Law no. 15/2019 modified the Law on CRR and now the right of public communication is no longer subject to mandatory collective management, being subjected to extended collective management, according to art. 145¹. The Association paid only a part of the remuneration claimed and UCMR-ADA brought the matter to court. The court of appeal considered that the transaction involving the collection of remuneration by UCMR-ADA was not subject to VAT and reduced the sum charged to the association by the amount of that tax (according to points 20, 21 and 22 of the Decision). UCMR-ADA claimed that the decision has the effect of making it bear the VAT burden, even though UCMR-ADA is not the end user of the works at issue. The RHCCJ asked, in the first place, whether a transaction by which holders of copyright in musical works authorize performance organizers to use such works could be classified as a supply of services for consideration within the meaning of the VAT Directive. In case of an affirmative answer, the CMO acts like a taxable person within the meaning of art. 28 from the VAT Directive when they receive remuneration from performance organizers for the right to perform musical works for a public audience? With regard to a supply of services made for consideration, in accordance with consistent jurisprudence, including the Decision pronounced in case C-37/16 [27], it is mandatory that a legal contract exists between ‘the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient’ (paragraph 31).

The CJEU ruled that the express request of the user, who, in turn, pays the fee due, indicates not only that there is a legal contract pursuant to which there is a reciprocal performance between the service provider and the user, but at the same time it allows a direct link to be established between the service supplied and the actual consideration received (paragraph 35). Thereby, in this situation, the remuneration paid by the user constitutes the actual consideration for the service supplied in the context of that relationship contract. Regarding the first question, due to the fact that the CJEU established that it is indeed a matter about supply of services made for consideration, it must also answer the second question as well: does the CMO act as a taxable person within the meaning of art. 28 of the VAT Directive?

Relating to the second question, the CJEU ruled that when a taxable person acting in their own name but on behalf of another person takes part in a supply of services, that person shall be deemed, under Article 28 of the VAT Directive, to have received and supplied those services itself. Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively.

The Court ruled that the CMO must be considered to have acted as a commission agent within the meaning of art. 28 of the VAT Directive, it must be regarded to have, firstly, received the services in question from the holder before providing, secondly, those services to the end users itself. The Court relied on the following arguments: collective management is mandatory for the right to perform musical works for a public audience; an appointed CMO also represents right holders who have not granted it a warrant and who are therefore not members of that organization; it is obliged to grant non-exclusive licenses to users who apply for such licenses; and the remuneration is collected in the name of CMO but on behalf of the copyright holders.

Thereby, the Court decided ‘that Article 28 from the VAT Directive must be interpreted in the sense that a CMO which collects, in its own name but on behalf of holders of copyright in musical works, royalties due to them in consideration for the authorization for the public performance of their protected works, acts as a ‘taxable person’ within the meaning of that provision and is therefore deemed to have received the services in question from those rights holders before providing them to the end user itself. In such a case, that organization is required to issue invoices in its own name to the end user containing the royalties collected from the latter, including VAT. The copyright holders are, in turn, required to issue to the CMO invoices including VAT for the services supplied in respect of the royalties received’ (paragraph 52).

We can notice that in interpreting the VAT Directive by relating to the modalities for the exercise of copyrights, the Court established that there is no supply of services in the case of compensatory remuneration for the sale of devices for recording and reproducing works, leading to the conclusion that the sums representing compensatory remuneration are not subject to the value-added tax. On the other hand, there is a supply of services made for consideration in the case of collecting the remuneration for public performance by the CMOs, after they have given in advance a non-exclusive license.

The different treatments of the two rights, both objects of mandatory collective management according to Romanian legislation at that moment, can be explained by the fact that it is easier to track the number of public communications of a work, the user needs a license beforehand, but it is impossible to track the number of private copies that can be made after a written work. For each public communication, we can identify the performance and the payment that has been made, therefore the CJEU considered it a supply of services made for consideration. The number of copies made of a written work cannot be counted; the remuneration for private copies has the function of compensating the author (or the copyright holder) and it does not represent a payment for each copy.

With reference to the application of the value-added tax for other rights, which according to the Law of CRR are subject to mandatory collective management, we consider that the solution pronounced by the Court in case C-37/16 [27] may also be applicable to the right to remuneration for the public loan, being almost impossible to track each loan and working as a remedy and the fair compensation for orphan works. In this situation, we consider that it is not a supply service made for consideration and on those sums of money the value-added tax should not be applied.

Regarding the other rights for which the Law of CRR provides collective management (the right of broadcasting, the right to public communication and broadcasting of phonograms for commercial purposes, the right of cable retransmission), we believe that the same judgment can be applied as in the case C-501/19 [28]. Considering that each use of a work can be identified, payments made can be attributed to performance, like a supply of services made for consideration, so they can be subject to value-added tax.

3.4 Double Taxation of Copyright and Related Rights

Nowadays, the Internet creates a facile communication of works of intellectual creation over a country's borders and this leads to the possibility of obtaining a foreign income. One of the most important points discussed regarding the foreign income is the avoidance of double taxation, both in the state where the income was achieved and in the state where the author (or the right-holder) has the domicile. States have taken action to prevent cases of double taxation and the efforts have taken the form of double taxation agreements, which are treaties between two (or more) countries to avoid this on CRR income [29].

Romania has signed many double tax treaties with other countries 'with the main purpose of avoiding double taxation on income both in Romania and in each country that has signed a bilateral agreement with Romania' [30]. A list of all double taxation agreements signed by Romania is published on the tax authority website [31].

International organizations have also created legal instruments to avoid double taxation of income obtained from the CRR [32]. To this effect, the convention signed within the UNESCO, in Madrid, Spain, on 13 December 1979 - the *Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, with model bilateral agreement and additional Protocol* [33].

Another international legal instrument was adopted within The Organization for Economic Co-operation and Development (OECD) - *Recommendations of the Council OECD Legal Instruments concerning the Avoidance of Double Taxation with respect to Taxes on Income and on Capital* [34]. This recommends the governments of member states 'to pursue efforts in concluding bilateral conventions for the avoidance of double taxation with respect to taxes on income and on capital with those Member countries with which they have not yet entered such conventions and to revise those of the existing conventions between them which may no longer be keeping up with present-day needs'. The annex to this document included the *Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital*.

At the European Union level, Member States have concluded double tax agreements that aim to shape a legal framework to avoid double taxation [35]. Under many bilateral tax agreements, the amount paid in the country where the person works will be offset against the tax owed in the country of residence [36]. In other cases, the income earned in the country where the person works might be taxable only in that country and exempt from tax in the country of residence [36]. These rules also applied to the income obtained through the CMOs, CRR royalties. There are two methods that can be applied: the exemption method and the credit method. If the exemption method is used, the state of residence of the recipient of income does not tax the income derived by and taxed in the other State [29]. On the other

hand, the credit method implies that the state of residence calculates the tax on the basis of all taxable income earned, internal and foreign income, deducting afterwards the tax paid abroad [29].

In the circumstance of collective management of CRR, the income is achieved through the CMO, so according to the features of the convention signed between the two countries, one of these two methods will be applied, the credit method or the exemption method. If the exemption method will be applied, the income obtained through the CMO would not be taxed in the state of residence, but it will be taxed according to the tax law of the state where the income was obtained. If the credit method will be used, the income obtained through the CMO will be taxed in the state where the income was obtained, that amount being later decreased from the tax due in the other state [32]. For example, according to Article 12 (paragraph 1) of the *Convention between Canada and Romania - For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* [37], 'royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State', thereby the exemption method is applied. The second paragraph provides the situation of taxing the royalties in the state in which they arise and according to the law of that state, but without exceeding '5 percent of the gross amount of the royalties if they are: (i) copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical, or other artistic work (but not including royalties in respect of motion picture films nor royalties in respect of works on film or videotape or other means of reproduction for use in connection with television broadcasting); or (ii) royalties for the use of, or the right to use, computer software or any patent or for information concerning industrial, commercial, or scientific experience (but not including any such royalty provided in connection with a rental or franchise agreement); 10 percent of the gross amount of the royalties in all other cases'; in this scenario the credit method is applied for 5 or 10 percent of royalties and the exemption method for the remaining.

4 Conclusions

The development of the Internet enables submitting works of intellectual creation to the public, requesting an efficient method through which the right-holders to be remunerated and collective management appears to be the answer. Being a means by which income can be obtained, it is of great importance to clarify the financial aspects related to that. We consider the current legal framework to be favorable, on both the national and the European levels. The distinct regulation in the Fiscal code of incomes obtained from intellectual property was welcomed and we believe that the Romanian legislator must clarify the situation of indirect taxation, especially the value-added tax, given the uneven practice of the courts.

Considering the statements found in the jurisprudence of The CJEU, the Romanian legislator needs to specifically regulate the situation of value-added tax for incomes obtained by and through CMOs, for each type of right that can be collectively managed, whether it is about mandatory or optional collective management.

The role of CMOs will reveal more prominent with the development of the Internet, this leading to the possibility of becoming the principal means for works of intellectual creation to get to the public. This being the case, clarifying and regulating the aspects related to the Internet and the ways in which the authors can use it for bringing the works to the public is crucial. This is also equally for ensuring the right remuneration for the right-holders. Thereby, CMOs ensure the link between authors (or the right-holders) and platforms on the Internet, which in many situations is the only space where they promote and exploit their works.

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