Opinion on the status of performers' rights in the phonograms produced by Jugoton

I. Questions to be answered

1) The Croatian collective management organization HUZIP has turned to me with the request that I express my opinion on the following questions:

Previously, during 1990-ties, publicly owned companies in Croatia, had to pass the process of privatisation where the existing property was evaluated and afterwards sold to the private entities (privatisation process). The property which was not evaluated becomes the property of Republic of Croatia.

In a court decision, it was ruled that the phonoteque (sound library) of the former, publicly owned company, which was produced before privatisation, is the property of the Republic of Croatia.

Questions:

1. If the Republic of Croatia is owner of master recordings, does that mean that Republic of Croatia owns respective phonograms?

2. If the Republic of Croatia is owner of master recordings, does that mean that Republic of Croatia is the owner of the rights of phonogram producers in respective phonograms?

3. Is there any possibility that in described situation - Republic of Croatia owns phonograms (master tapes), but that new company (privatised company) is the right owner (of phonogram rights) in respective phonograms?

If yes, which are conditions for that, or precisely, on the basis of which legal fact or legal transaction the same is possible?

(The questions are connected with the relationship between copyright and property rights, given that copyright is independent of property rights)

4. Is there any influence by the fact that new company has digitized old master recordings (in relations to ownership of phonogram rights)?

5. Is there a possibility that new company (later) signs the agreements with performers on those old master tapes (under the concept of contract renewal / contract novation), which would result that new company owns phonogram rights based on such agreements?

II. Introduction to the questions and answers

The concepts of "phonogram", master recording → "master tape" and rights of producers of phonograms

2) The five questions relate to three issues. Questions 1 to 3 are about the status of the right of producers of phonograms in the phonograms produced by Jugoton the master tapes of which – on the basis of a final court decision – are the property of the Republic of Croatia; question 4 concerns the impact, if any, on the rights that Croatia Records have made digital copies of the phonograms produced by Jugoton, and question 5 is on the status of the rights of performers in their performances fixed in those phonograms and on the way, in the current situation, in view of the final court judgement, the pending questions might be settled either through legislation or otherwise.

3) I express my opinion in the order of these three issues on the basis of the documents made available to me by HUZIP and taking into account the relevant norms of the international treaties, the E.U. law and the 2021 Act on Copyright and Related Rights Act of Croatia[1] in force (hereinafter: the current Copyright Law).

III. The status of the rights of phonogram producers in the phonograms produced by JUGOTON

The first three questions

4) The first three questions is basically about the same issue asked from different viewpoints:

1. If the Republic of Croatia is owner of master recordings, does that mean that Republic of Croatia owns respective phonograms?

2. If the Republic of Croatia is owner of master recordings, does that mean that Republic of Croatia is the owner of the rights of phonogram producers in respective phonograms?

3. Is there any possibility that in described situation - Republic of Croatia owns phonograms (master tapes), but that new company (privatised company) is the right owner (of phonogram rights) in respective phonograms?

[1] Act of October 14, 2021 published in Narodne Novine, in NN 111/2021; in force since October, 22, 2021. With the exception of the 1978 Yugoslav Copyright Law just mentioned and the 1990 Amendment Act quoted below, the English versions of the subsequent copyright laws of Croatia to which I refer below have been examined in the form in which they are available at the services of WIPOLex at https://www.wipo.int/wipolex/en/members/profile/HR?collection=laws&subjectMatter=11 (last visited on January 15, 2023).

If yes, which are conditions for that, or precisely, on the basis of which legal fact or legal transaction the same is possible?

The concepts of "phonogram", "master recording/tape" and the rights of producers of phonograms

5) Before analyzing the issues raised in the three questions, it is necessary to clarify the concepts referred to: (i) phonogram; (ii) master recording (but I rather use the synonyms "master tape" or "mother tape" for the reasons mentioned below); (iii) rights of producers of phonograms. As it can be seen below, the three concepts differ but they closely overlap each other.

6) *Ad (i):* A "phonogram", according to Article 2(b) of the WIPO Performances and Phonograms Treaty (WPPT) "*means the fixation of the sounds of a performance* or other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work" [emphasis added], where (under Article 2(c) of the WPPT) "'fixation' is "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device." It is clear from this that "phonogram" as the subject matter of protection is not equal with the *first* fixation of the sounds. A "phonogram" exists in the form of the original fixation (the first fixation of the sounds: the "master – or mother – tape") and in copies; it may be reproduced, distributed, communicated to the public, etc. and it is always the same "phonogram" (unless it is modified, but it is another matter).

7) The concept of "phonogram" is similar to the concept of "work" – for example a "musical work" – in that, as a subject matter of protection, it is an abstract concept irrespective how it appears concretely in a given case (either as an original or as a copy). A musical work is the same musical work in the form of the composer's original notation, in the form of the copies of sheet music published by a music publisher, in a vinyl copy, in a CD-ROM, or in digital format stored in an electronic memory. A "phonogram" – the way the sounds are fixed in it – is also the same phonogram as originally fixed (in the "master – or mother – tape") and, as included in a vinyl copy, in a CD-ROM, or in digital format stored in an electronic memory.

8) *Ad (ii)*: It follows from what is discussed above that, although a master – or mother – tape, in the given tangible form as original fixation of a "phonogram" is not equal to the abstract concept of "phonogram" (which is the *subject matter of protection* of the rights of producers of phonograms). Nevertheless, since it is the original of the phonogram, all other copies are derived from it. The WPPT makes it clear in an agreed statement – concerning Article 3(2) – that "fixation" (in the context, obviously the *first* fixation) "means the finalization of the master tape ('*bande-mère*')." This "mother" function makes the master tape special, which influences also the relationship of the property right in the master tape as a physical object (the term "master – or mother – *tape*" expresses more clearly this nature than the term "master *recording*"), and the rights in the phonogram as the subject matter of protection.

9) *Ad(iii)*: It is confirmed by the definition of "producer of phonogram" in Article 2(d) of the WPPT that the term "fixation" means the *first* fixation of the sounds. Under the definition, a "'producer of phonogram' means the person, or the legal entity, who or which takes the initiative and has the responsibility for *the first fixation* of the sounds of a performance or other sounds, or the representations of sounds" [emphasis added]. The rights of producers of phonograms are the rights in the phonograms as subject matters of protection. It is usual that a producer of phonograms acquires the right in a performance the sounds of which are recorded and also the rights in the work performed, but those are not parts of the rights of producers of phonograms (but other rights of which the producer has become the licensees). It goes without saying that a producer of phonogram is the original owner of both the "traditional" property right in the master tape and the intellectual property rights of producers of phonograms in the given phonogram. The first three questions above are about the relationship of these two different kinds of rights; whether they are linked together or may be transferred separately.

Relationship of property rights in objects embodying works and copyright in the works

10) It is a basic principle of copyright all over the world what is also stated Articles 112 and 113 of the current Copyright Law:

> Article 112
>
> (1) Copyright is individual and independent from ownership and other proprietary rights in an object on which the copyright work is fixed.
>
> (2) Ownership and other proprietary rights in an object on which a copyright work is fixed shall not be, without the authorisation of the copyright holder, exercised contrary to copyright, unless otherwise provided by this Act.
>
> Article 113
>
> (1) Disposition of copyright shall not affect the ownership in an object on which the work is fixed, unless otherwise provided by this Act or a contract.
>
> (2) Disposition of ownership in an object on which the copyright work is fixed, shall not affect the copyright in such work, unless otherwise provided by this Act or a contract.

11) In the case of a literary work, such as a book, the work is first fixed in the manuscript; in the case of a musical work in notes as sheet music or directly on a sound recording; a work of art in the original painting or statue; and an audiovisual work in what is referred to as the final cut of the film. All these are tangible objects incorporating works; thus, in principle, the above-quoted provisions apply to them. There are, however, basic differences between the various categories of works; namely, between a manuscript, a sheet music, or original painting, on the one hand, and, on the other hand, a musical work created by directly recording it in a phonogram or a first fixation of an audiovisual work. There are basic differences from the viewpoint of whether or not the separation of rights in the subject matter of protection (a work) and the physical copy of embodying the original may be practical and meaningful at all.

12) The ownership or possession of a manuscript, the notation of a musical work, or the original of a painting has special – sometimes potentially very high – value for collectors, museums,

archives, etc., independently of copyright in such works. This is recognized, *inter alia*, in the provisions on the resale right (*droit de suite*), which, by virtue of Article 14*ter* of the Berne Convention applies only to the originals of works of arts and original manuscripts, while under the E.U.' Resale Right Directive (Directive 2001/84/EC) only to the originals of works of art. It is not by chance that the resale right does not apply to musical works created by directly fixing it in phonograms (without any previous notations) and to first fixations of audiovisual works. It is not by chance because, while the objects of resale rights have the value as visible, tangible objects, in contrast, with a recording of musical work and a fixation of an audiovisual work, it is not the case; if one looks at the objects embodying such works, he or she cannot see the work; they are really valuable only along with the rights in them – and, in that respect, these objects embodying such works are of the same nature as a master tape.

Relationship of property rights in master (or mother) tapes and the rights of producers of phonograms

13) There is no resale right in master (or mother) tapes; and this is understandable for the reasons mentioned above. Nevertheless, *in principle*, the provisions on the separability of proprietary rights in the objects incorporating protected materials and the intellectual property rights in the materials may apply also to the relationship in the rights in master tapes and the rights of producers of phonograms in the phonograms incorporated therein.

14) Article 145 of the Croatian Copyright Law provides as follows:

> Article 145
>
> *The provisions referred to in* Articles 5, 17, 25, Article 26 paragraph (3), Articles 33 and 34, Articles from 36 to 53, Article 55, Articles from 58 to 63, Articles from 65 to 71, Articles from 84 to 86, *Articles from 96 to 114,* and Articles 126 and 127 of this Act *shall apply accordingly* and pursuant to the provisions under this Chapter *to the rights of a phonogram producer as well, unless* otherwise provided specifically for him or *deriving from the legal nature of the rights of phonogram producers*. (Emphasis added in italics.)

15) As it can be seen, the provisions of Articles 112 and 113 (within the range of Articles 96 to 114), *in principle*, also apply accordingly ("*mutatis mutandis*") to the rights of producers of phonograms. I stress, however, that it is only *in principle* that the same norms apply, because – again for the reasons mentioned above – such separation seems impractical and more or less meaningless.

16) The question of ownership of "masters rights" has become the focus of attention recently in connection with the attempts of Taylor Swift, one of the most popular singers nowadays, at trying to get back, from the producer of phonograms, these "masters rights" in the phonograms embodying her performances. The spectacular fight for the "masters" is taking place, *inter alia*, in view (or it may also be said: in spite) of the relevant provision in the U.S. Copyright Act – section 202 – on the separability of property rights and copyright, which applies also to "phonorecords". Irrespective of what is stated in that provision, it is a common understanding of the various stakeholders of the music industry that the property rights in the masters and the

related rights (in the U.S., copyright) of phonogram producers are inter-related.

17) Although, on the website of Wikipedia, the information is not on an academic level; nevertheless, the crowd-created publications quite adequately reflect the general understanding about certain issues in a given context; in this case, the music industry. In contrast with what is stated in the above-mentioned provision of section 202 of the U.S. Copyright Act, the following may be read on the website about "master rights":

> "According to the U.S. copyright law [...] the master is the first recording of the music, from which copies are made for sales and distribution. *The owner of the master,* therefore, *owns the copyright to all formats of the recording,* such as digital versions for download or streaming, or physical versions like CDs and vinyl LPs. A party who wishes to use or reproduce a recording must obtain a copyright license authorized by the master-owner." (Emphasis added in italics.)
> See at https://en.wikipedia.org/wiki/Taylor_Swift_masters_controversy.

18) If someone looks around on the Internet, he or she can see that the various sources do reflect the same understanding about the inseparable relationship between the property rights in the masters and the rights of phonogram producers in the recordings fixed in therein. Let us see some examples of the plethora of such sources (I add emphasis in italics to the relevant parts of the texts):

> "*A master license gives the license holder the right to use a recorded piece of music* in a media project such as film, TV show, commercial, or another visual creation or audio project. A master license is obtained from the person who owns the recording, which is the party that financed the recording. Usually, these rights reside with the record label if not the independent artist." See at https://www.liveabout.com/master-license-for-music-recordings-2460595.
>
> "*A master license* is an agreement between a music user and the owner of a copyrighted sound recording that *grants permission to use the sound recording*. This permission is also called a master lease or master rights." See at https://support.easysong.com/hc/en-us/articles/360047682133-What-is-a-Master-License.
>
> "*When you own your masters, you have total legal control over what is done with the recording - and any financial gains from it*, too. You can license your song for use in films, TV, advertising and for sampling by other artists, and collect the royalties afterwards."
> See at https://routenote.com/blog/how-to-get-your-music-discovered-by-a-major-record-label-in-2021/
>
> "The Sound Recording = Master Rights
> *Owning your masters means you own the copyright to* the original sound recordings of your music. The copyright of the Sound Recording is generally owned by the artist or record label that they are signed to. *Whoever owns the master recordings will earn royalties when the song is played or reproduced (including radio, streaming, downloads)*."
> See at https://www.amuse.io/en/content/owning-your-masters
>
> "The copyright owner of the master recording has the rights to exploit the work. For example, *the master rights holder has the power to grant third-party licenses for the master recording.* [...] The

owner of the master recording is also able *to gain profits from the publication or streaming* of such songs. Traditionally, under a contract between a record label and artist, the record label retains the rights in such master recordings. [...] On the other hand, an artist who owns the rights in her master recordings would be able to retain creative control of her work, and can release her music at her own bidding through whichever channel she feels appropriate. https://conventuslaw.com/report/ownership-of-master-recordings-in-the-music/.

19) It seems justified to take into account this general understanding among the stakeholders of the music industry also for the analysis of the status of the rights in the phonograms produced by Jugoton.

Administrative and judicial decisions on the ownership of "phonograms" from the viewpoint of the tangible object aspect of master tapes

20) HUZIP has made available to me the English translations of the following decisions adopted in the dispute on the status of ownership of rights concerning the phonograms produced by Jugoton:

- Decision of 21 October 2016 of CERP - Centre for Restructuring and Sale,
- Judgement No. Usl-3465/16-26 of 9 April 2019 of the Administrative Court of Zagreb,
- Judgement No. Usž-4551/19-4 of 21 April 2021 of the High Administrative Court of Zagreb, and
- Judgement No. U-III-4780/2021 of 15 December 2021 of the Croatian Constitutional Court.

21) The basic ruling of the CERP decision reads as follows: "It is hereby determined that phonograms were not included into the value of the social capital in the process of transformation and privatization of the socially owned enterprise HRVATSKA NAKLADA ZVUKA I SLIKE, Zagreb" (that is Croatia Records). This seems to have been followed from the rules of Croatian privatization by virtue of which Croatia Records has not become the successor of Jugoton in general; it has only acquired certain concretely identified assets.

22) The CERP found that "phonograms" had not been among the assets acquired by Croatia Records. The ruling related to the question of whether or not what were referred to as "phonograms" were to be regarded as tangible "movable" objects. Croatia Records claimed that "phonograms are not movables, but are instead, according to Article 132 paragraph 1 of the Copyright and Related Rights Act, a fixation of sounds embodied in a certain audio medium, and not an audio medium as such and neither an audio medium with a phonogram as a new product"; thus a phonogram "cannot be legally classified as a thing or as a movable". In contrast, the "requestee" Croatian Musicians Union expressed the view that a phonogram may be considered a movable thing. In this way, the two parties stressed two sides of the same: on the one hand, phonograms as the subject matter of related rights and the master tapes as tangible – movable

– objects embodying the first fixation of phonograms (thus, the originals thereof). *Exactly these are the two aspects that both are taken into account when the music industry refers to "masters", "master rights", "master tapes", "mother tapes", "mother recordings" or "master recordings".*

23) It seems that the Ministry of Culture also had in mind both these aspects when it intervened. The CERP decision reflects the Ministry's intervention in this way:

> The Ministry of Culture has joined the proceedings through a written submission of 30 August 2016, stating that the collection of phonograms (music library) of former Jugoton, and subsequently of Hrvatska naklada zvuka i slike, never underwent valuation, so it was never included in the privatization process, and that this Ministry is, on behalf of the Republic of Croatia, expressing its direct *interest to take over entirely the care and control of further dealings with the music library* upon the completion of these proceedings and in cooperation with experts and holders of copyright and related rights derived from the contents of the music library concerned, *including legislatively regulating the legal status and the conditions of the future use of this archive material of national interest.* [Emphasis added.]

24) On the basis of this description, it seems that the Ministry of Culture does not intend to handle the *collection of phonograms* just to put it into a passive archive, but to take over its „control of further dealings" by „legislatively regulating the legal status and the conditions of the future use".

25) The Administrative Court confirmed that "the value of the phonograms was not included in the value of the social capital in the process of transformation and privatization." The Court concentrated on the masters and did not deal with the question of the rights in phonograms. The less so because as it correctly pointed out it had been impossible for Croatia Record to acquire related rights in the phonograms of the "music library" along with the other Jugoton's assets, simply because, before 1999, there were no such rights in Croatia (see below the references to the provisions of the 1999 Act). The Court also referred to the intention of the Ministry of Culture to take control of the use of the music library and legislatively regulate its legal status. The High Administrative Court rejected the appeal against the lower court's judgment citing the same reasons, and so did the Constitutional Court too. Since the final decision of the Constitutional Court was adopted only at the end of 2021, the legislative regulation of the rights and uses of the phonograms to be handled as state property probably will only take place in the forthcoming period.

26) For the reasons mentioned in the court judgments, it was not possible for Croatia Records to acquire any related rights of producers as the successor of Jugoton. Therefore, the „other rights" to which the courts referred could have only been some contractual rights – including those that Jugoton might have acquired from performers (and possibly from authors). The possibility of the existence of such rights does not mean, however, that Croatia Records have acquired them; at least in those privatization documents that I have been reviewed, there does not seem to be any reference to such rights. What is, however, more important, from the viewpoint of the rights managed by HUZIP is whether or not the contracts concluded by Jugoton

with the performers represented by HUZIP may be regarded valid, and if they may, what impact, if any, they have now. This is discussed, below.

Answers to the first three questions

27) On the basis of the analysis above, I give the following closely linked answers to the first three questions:

1. If the Republic of Croatia is owner of master recordings, does that mean that Republic of Croatia owns respective phonograms?

28) The question – correctly – differentiates between "master recordings" and "phonograms;" the first meaning the master tapes as tangible objects, while the second the phonograms as non-tangible subject matters of rights. It seems to me that the conditional mode of the question is not justified anymore as regards the ownership of the master tapes, because the Constitutional Court has confirmed in a final judgment that Croatia Records has not acquired the right in them; under the privatization legislation, they have remained State property. As mentioned, the court decisions reflect the intention of the Ministry of Culture to take care of the music library incorporated in the masters, legislatively regulate their status (but this legislative settlement has not taken place yet since the final judgment of the Constitution Court was adopted only at the end of 2021).

29) The question of whether, along with the master tapes, the Republic of Croatia also owns the respective phonograms, it may be understood in two meanings. First, phonograms exist in the original and in copies made on the basis of the original. It goes without saying that the ownership of the master tapes incorporating the first fixations of the phonograms means that the Republic of Croatia owns the originals of the phonograms. Second, "owning" the phonograms as subject matters of related rights means the real value thereof; namely, the rights of using the phonograms. Question 2 is specifically about this second meaning of "owning" the phonograms.

2. If the Republic of Croatia is owner of master recordings, does that mean that the Republic of Croatia is the owner of the rights of phonogram producers in respective phonograms?

30) I remark in connection with this question too that it has been settled definitively by the courts that the Republic of Croatia does own the master tapes of the phonograms produced by the State company Jugoton. The tapes – although this was clarified definitively only not much time than a year ago – have remained State property without any period when they would have become the property of others. They have never been the property of Croatia Records (even if Croatia Records might have kept them in its possession during the long judicial procedure).

31) As it is also clarified in the court decisions, the related rights of phonogram producers were recognized only in 1999. This means that Croatia Records did not acquire, since it could not have acquired, such – at that time non-existent – related rights when it acquired several assets of

Jugoton. At that time, without such related rights, only the ownership of the master recordings could have offered a legal basis for Croatia Records if it had obtained it – but, as noted above, it had not. By virtue of the final judgment on the question of ownership of the master recordings, they have always remained the property of the Republic of Croatia as a State successor of Yugoslavia. Therefore, in 1999 when the phonogram producers' related rights were recognized, they were recognized as the rights of the State – and certainly not as the property of Croatia Records (even if it still might have held the masters in its possession until the final court judgment clarified that it has not had any right to it). In fact, this seems to be the case legally even if the handing over of the tapes to the Ministry of Culture may not have been fully taken place and even if the legislative regulation of the exercise of the State-owned rights in the tapes and the phonograms embodied in them by the Ministry (or any other body to be appointed in the law) has not taken place yet.

3. Is there any possibility that in described situation - Republic of Croatia owns phonograms (master tapes), but that new company (privatised company) is the right owner (of phonogram rights) in respective phonograms?

If yes, which are conditions for that, or precisely, on the basis of which legal fact or legal transaction the same is possible?

32) From what is analyzed above, it follows that Croatia Records has not become the successor of Jugoton in general, but only has acquired the specifically identified assets at the time of privatization. I point out again that Croatia Records did not acquire, at that time any related rights of phonogram producers not only because such rights did not seem to be among the assets listed as acquired (at least not according to the privatization documents we have had to opportunity to review), but also – and this is decisive – because, at that time, simply there were no such rights. It was only in 1999 that the mere contract-based rights of the owners of master recordings were transformed into related rights in phonograms embodied therein – but at that time (as it is settled now judicially), the master recordings were (as they had always been since the very moment of the dissolution of Yugoslavia) owned by the Republic of Croatia.

33) Therefore, in my opinion, Croatia Records may have only become the owner of related rights in the phonograms embodied in the master recordings if it had acquired them from the Republic of Croatia. It is another matter that Croatia Records may have kept the masters in its possession may have used, and also digitized them (see below). Although the acts were performed without authorization, this might have taken place in more or less good faith in the (badly founded) belief that it was legally in order. The issue of the possible legal consequences of acts performed in such a way is beyond the questions I am to answer, the more so because it is a liability issue not regulated at the international level either; it is a matter for the statutory and case law of the various countries.

The fourth question and the answer to it

34) The fourth question raised by HUZIP is this:

4. Is there any influence by the fact that new company has digitized old master recordings (in relations to ownership of phonogram rights)?

35) The answer is simple: No, it has no influence. Digitization is an act of reproduction which may only be performed with the authorization by the owner of rights (meaning the owner of the related rights of producers, as well as the performers whose performances and authors whose works are recorded – depending on their possible agreement with the producers). Although digitizing is allowed to some public institutions without authorization under certain conditions, the relevant exceptions and limitations hardly apply to a private company, like Croatia Records.

36) Croatia Records has never been – but the Republic of Croatia has been – the owner of the master tapes and, for the reasons discussed above, also of the related rights recognized in 1999 for the owners of master recordings. Even if there were an unrealistic legal situation that the Republic of Croatia owned the masters of the phonograms (which now is an established legal fact) but Croatia Records as private company would have owned the "master rights" (the producers' rights; which for the reasons mentioned above does not seem to be the case), Croatia Records would have had to request the Republic of Croatia to allow digitization (but, in view of the dispute about the ownership issue, it obviously has not made such a request).

37) It makes the regulation of the property right/related rights dichotomy in the Croatian Copyright Law quite special that although, as noted above, in Article 145 the application of Articles 112 and 113 are extended also to related rights – which in principle raises the possibility of an unusual separation of property rights of masters and the so-called "master rights" (as the producers' rights are referred to in the jargon of the music industry), the same extension has not taken place for Article 116 on the "right to access", although such a right of access is a usual element of such dichotomy of rights. Thus, the possibility of an anachronistic separation of the property right in the masters and the said "master rights" could not have gone so far that the owner of the masters were constrained on the basis of this "right to access" to allow free reproduction of the masters.

IV. Status of the rights in performances fixed in Jugoton phonograms

Introductory remarks

38) As outlined above, in my opinion, Croatia Records is *not* the successor of rights in the master tapes of the phonograms produced by Jugoton (but the Republic of Croatia is); and is not the successor of the phonogram producers' rights either in those phonograms (but the Republic of Croatia is). It is therefore also more than doubtful that Croatia Records might be recognized as the licensee of rights to use the performances fixed in the Jugoton master tapes. This seems to be the case because it would be contradictory to consider that, although the Republic of Croatia is the owner of both the property rights of the master tapes and the phonogram producers' rights in the phonograms the first fixations of which are embodied therein, in contrast Croatia Records is the rightholder (either as successor of title or as a licensee) of the performers' rights in the

same phonograms. Croatia Records does not seem to be the successor of Jugoton in general; it has only acquired certain assets among which, according to the information made available to me – no intellectual property rights were included; it is not clear how performers' rights still could have been.

39) I note that the legal status of the rights in the Jugoton phonograms the master recordings of which (in my view, along with the corresponding phonogram producers' rights) are the property of the Republic of Croatia – due to the relatively recent final court decision – has not been settled yet by legislation. It seems to me that, in this still not settled situation the parties (including HUZIP) have accepted – or at least do not oppose – so far as a *modus vivendi* and *de facto* practice that Croatia Records have acted as the rightholder of these related rights (although by the final court decision it has turned out that without good reasons).

40) In view of this, first, I analyze a sample of contracts concluded by Jugoton with performers. Second, I review the legislative regulation of the rights of performers and producers of phonograms (in the 1990 Act recognizing performers' rights, the 1999 Act to recognize rights of producers of phonograms, the 2003 Copyright Law and current Copyright Law; see all below). Third, I express my opinion on the present status of the ownership and exercise of performers' rights in the Jugoton phonograms in four steps: (i) general comments, (ii) status of the rights corresponding to the contractual rights acquired by Jugoton; (iii) status of the rights not acquired by Jugoton; and (iv) a summary of all this. Fourth and last, I answer to Question 5 concerning possible options to settle the pending issues after that now more than a year ago – but from the viewpoint of legislative procedures still relative recently – the Republic of Croatia's ownership of rights in Jugoton master recordings was confirmed by a final court judgment.

Civil law contracts concluded by Jugoton with performers

41) According to the publicly available information, Jugoton was established in 1947 (and existed until the dissolution of Yugoslavia and the obtaining of independence by Croatia in 1991). Even the 70-year term of protection provided in accordance with the E.U. Terms Extension Directive (Directive 2006/116/EC as amended by Directive 2011/77/EU) has expired by now for the Jugoton phonograms published between 1947 and 1962) (not mentioning the previous 50-year term which also would have expired for those published between 1962 and 1972). Nevertheless, the questions still concern a big number of phonograms published during the three decades between 1962 and 1991 (or even between the two decades between 1972 and 1991).

42) I have asked HUZIP to make available to me some contracts concluded in the period between 1972 and 1991. I have received one concluded in 1977, and two concluded in 1984.

43) These contracts were not about acquiring performer's rights (as related rights). They were just civil law contracts. It seems that, between 1977 and 1984 (I refer to this period due to the dates of the contracts I have received as samples), the basic nature of the contractual terms and the key provisions of the contracts did not change.

44) Under both the 1977 and 1984 contracts, the performer (or if it was a group, the performers) authorized Jugoton in this way:

> Article 2. In relation to all of the recorded performances referred to in this contract, the Performer hereby authorizes Jugoton:
>
> (a) (1977:) "to use them for the purpose of *producing gramophone records in unlimited quantities*, print runs and types of records, as well as music cassettes, and to market commercial quantities of produced records and cassettes in the country and abroad", (1984:) "to use them for the purpose of *producing gramophone records* and other sound carriers;"
>
> (b) *to license* them *for the purpose of producing gramophone records* and music cassettes [...] in the country and abroad;"
>
> (c) *to use them for public broadcasting* whether from magnetophone tapes or gramophone records *without extra charge for the purpose of promoting* the performer and the work in the country and abroad, in particular:
>
> 1) *in domestic and foreign radio and TV programs* pursuant to a written arrangement between Jugoton and radio and television stations;
>
> 2) *in public events*;
>
> 3*) in advertising, propaganda, cultural and live-action films*. The term propaganda broadcasting shall be interpreted to mean any broadcasting from which Jugoton does not obtain any particular income from performers' rights. (Emphasis added.)

45) It may be deduced that Jugoton under points (a) and (c) obtained contractual rights *to use* the performances fixed in their phonograms. The uses, under the current law, would be covered by the rights of reproduction and by implication, the right of distribution of the tangible copies made (point (a)) and the rights of broadcasting along with right of using the broadcast phonograms in public events (point (c)).

46) Under subparagraph (c), Jugoton acquired the contractual right to use the performances "for public broadcasting." The rest of the subparagraph is about certain details of using the broadcast performances which is made clear by the words "in particular" referring back to use for broadcasting. This is also true concerning point 2, which – in the context of the subparagraph – means using the performances in broadcast phonograms, but only in that way, "in public events." That is, Jugoton – if the translation of the text of the contracts is correct – did not acquire the contractual right of communication to the public in such a general way as it is defined in Article 2(g) of the WPPT (using – playing – phonograms directly, and not just using them as broadcast phonograms, "in public events" as provided in the contracts).

47) Furthermore, it seems that, on the basis of subparagraph 2(b), Jugoton acquired the contractual right of granting sub-licenses to reproduce and distribute the performances fixed in its phonograms.

48) Under Article 3 of both contracts, Jugoton assumed the obligation

a) as a fee for recording, as well as remuneration for all other rights acquired by this contract [...] to pay to the performer a total of (1977:) 10% (1984:) 9% of the ex-works price of records sold,
b) calculate the percentage fees quarterly for the duration of **5** years, counting from the day this contract is signed, *after which period the right of the performer to receive the percentage from records or music cassettes sold will cease*.

49) In both the 1977 and the 1984 contracts, Article 4 provided for a payment to the performers "2% of the retail price of the record or cassette, on the basis of 90% of the retail price of the record" where the phonograms had been licensed to be used abroad.

Recognition of performers' rights in 1990 – still in Yugoslavia

50) In contrast with the rights of producers of phonograms, the rights of performers did exist already at the time of the privatization, but only from 1990 when it was recognized by Act of April 11, 1990, of Yugoslavia[2] amending the Yugoslav Copyright Law of 1978.[3] The 1990 Act was published on April 20, 1990, in the Yugoslav Official Gazette, and entered into force on April 28, 1990.[4]

51) Thus, there was a very short period, between 1990 and the end of existence of Jugoton in 1993 when it was possible for Jugoton to conclude contracts to acquire the performers' related rights (and not only contractual rights what it had originally obtained) according to the terms of the 1990 amendments.

52) Article 99e inserted by the 1990 Law read as follows:

99e. Unless otherwise provided by this Law, the performance of the performer may not be subjected to the following without his consent:
1.radio or television broadcasting;
2.sound or visual or audiovisual recording;
3.—in the form of such recordings—reproduction;
4.distribution in the form of copies of such recordings;
5.direct communication to the public by loudspeaker or other technical systems outside of the room or place in which the performance is given.
In the cases referred to in the first paragraph of this Article, the performer shall be entitled to remuneration, except where otherwise provided by this Law or agreed.
Except where otherwise agreed, all performers shall be entitled to remuneration.

These basically corresponded to the minimum rights of performers provided in the Rome Convention, although not as "rights to prevent" but as exclusive rights of authorization (subject to the "consent" of performers).

[2] Its English translation published in the February 1991 issue of *Copyright* (the then monthly review of the World Intellectual Property Organization (WIPO)
[3] Its English translation published in the April 1980 issue of *Copyright*.
[4] See the footnote on these data on page 1 of the English translation published in *Copyright*.

53) Article 99h inserted by the 1990 Act contained a special provision for the acts that corresponded to Article 12 of the Rome Convention (and what is provided in Article 15 of the WPPT). Those provisions are on a *single* equitable remuneration *of performers and producers of phonograms for broadcasting and communication to the public* of phonograms published for commercial purposes (with various possibilities of reservations). The Act, however, apparently did not provide for a right to remuneration to be shared with producers of phonograms but *only for performers* and *not for broadcasting* but only for communication to the public; furthermore, it left the regulation of this right to the member republics and autonomous provinces of the then Yugoslavia:

> *Article 99h.* When a recorded performance that had been placed on sale is used for *communication to the public other than by radio or television broadcasting* (secondary use), a contribution shall be payable to the organizations of performers if that is specified in the provisions adopted by the Republics or Autonomous Provinces. [Emphasis added.]

54) Under Article 99n, the performers' rights were to be protected, for their recorded performances, for 20 years counted from the end of the year in the year of recording.

55) Article 99k inserted by the 1990 Law provided as follows:

> *Article 99k.* The performer may, during the term of the right of exploitation that is granted him in relation to his performance, transfer that right by contract to another person (performer's contract), either wholly or in part, for a consideration or free of charge.
>
> The person to whom the right to exploit a performance has been transferred may not, without the consent of the performer, transfer that right to a third party unless otherwise provided by the performer's contract.

56) These provisions seemed to allow also the assignment of the rights themselves (transferring the rights of exploitation – and not only granting licenses to use – wholly). This is in contrast with Articles 56 (and 139) of the current Copyright Law under which the performers' rights of exploitation themselves are not transferable.

57) Article 99m on performers' contracts, provided, *inter alia*, as follows:

> In addition to the particulars mentioned in the first paragraph of this Article, the performer's contract relating to the recording of the performance and to the broadcasting of the said recording by radio or television shall also state the number of broadcasts and the period during which broadcasting may take place, while the performer's contract relating to the reproduction of the recording shall state the number of copies that may be made.

58) As quoted above, the contracts used as examples from 1977 and 1984 by which Jugoton acquired certain contractual rights to use the performances fixed in its phonograms did not correspond to the requirements concerning the use of performances introduced by the 1990 Act. The contracts did not state the number of acts of broadcasting (neither the period during which broadcasting was to take place) and did not state the number of copies that was allowed to be

made. I have not received information of whether or not, in the short period between 1990 and the privatization of Jugoton in 1993 (or by Croatia Records, pretending to be the successor of title of related rights in the Jugoton phonograms) any adaptation of the pre-1990 contract took place to these new requirements of validity of the contracts.

59) Finally, Articles 99p to 99s, also contained provisions on the exercise of rights, including collective management and on the obligation of users:

> *Article 99p.* The performer may administer his rights direct or through a representative or agent.
>
> *Article 99r.* Performers may also mandate to represent them organizations of performers and associated work organizations that are registered for the exercise of such an activity.
>
> *Article 99s.* Associated work organizations for broadcasting and other users shall be obliged to provide the organization representing the performer with full particulars on the use of his performance.
> The users referred to in the first paragraph of this Article are also obliged to submit to the organization representing the performer a copy of the performer's contract.

These provisions basically foresee collective management in respect of the right of broadcasting (although it was not provided yet as single equitable remuneration to be shared with phonogram producers).

Recognition of rights of producers of phonograms – and the amendment of the provisions on performers' rights – in 1999

60) The Copyright Amendment Act No. 1361 of June 30, 1999[5] provided in a new Article 120a for rights of producers of phonograms, *inter alia*, as follows:

> If not otherwise provided by this Law, producers of phonograms shall have the exclusive right of giving authorisations for:
>
> 1) the direct or indirect reproduction, in whole or in part, of their phonograms;
> 2) putting into circulation of the original or copies of their phonograms, including the importation and rental thereof [...]
>
> Producers of phonograms shall also have the right to remuneration in the case where the phonogram which is put into circulation is used for the radio or television broadcast or for other communication to the public (secondary use).
>
> The rights of the producers of phonograms shall last for fifty years, counting from the end of the year in which the phonogram was published, and if it has not been published, from the end of the year in which the fixation took place.

61) As it can be seen, the right to remuneration was provided not only for broadcasting (as for performers before) but also for communication to the public, and the rights were granted not

[5] Act of June 30, 1999, published in Narodne Novine, in NN No. 76/99.

only for 20 but for 50 years. However, the 1999 Amendment Act, by modifying Article 107 of the Copyright Law also extended the performers' right to remuneration beyond broadcasting also to communication to the public, and by Article 16, it increased the term of protection from 20 to 50 years for performers' rights too. It is to be noted, however, that the right to remuneration has not been provided as a single equitable remuneration of performers and producers but apparently as two *parallel* rights.

The Copyright and Related Rights Law of 2003

62) The 2003 Croatian Law on Copyright and Related Right[6] contained already many elements of the current – 2021 – Copyright Law; it provided the majority of performers' rights in a similar way. I do not analyze its provisions separately due to the similar elements of the two Laws. I only mention the new provisions of pro-creator (author and performer) approach that appeared already in that Law which characterizes the current Copyright Law duly following civil law ("Continental") European tradition. It was clarified in the 2003 Law already that the exclusive rights of authors and performers were not assignable, only licenses were to be granted (Article 44(2)). And the Law contained already provisions like these (on authors' rights but also applicable, mutatis mutandis, to performers' rights).

> Article 44(5) If the manner of use of a copyright work hasn't been expressly indicated when the right was granted, it shall be considered that the person acquiring the right has *acquired a right to use a copyright work in a manner necessary to satisfy the purpose* of a legal transaction on the basis of which the right has been acquired. If from the purpose of the legal transaction it cannot be established whether the right was granted as an exclusive respectfully a non-exclusive right, limited as to territory, *it shall be considered that it was granted as a non-exclusive right* for the territory of the Republic of Croatia.
>
> Article 53. If the amount of remuneration has not been fixed by a legal transaction, or *if the fixed amount of remuneration is not equitable, [...] the author shall be entitled to equitable remuneration*. An equitable remuneration shall be the one that has to be given fairly at the time of concluding a legal transaction, taking account of the type and scope of the use of a copyright work, its financial success in it, the kind and size of the work, the duration of use, the existence of agreement between the relevant associations of authors and the relevant association of users fixing the amount of equitable remuneration, as well as other elements on the basis of which a decision on the amount of equitable remuneration can be made.
>
> Article 54(1) *If the profit* derived from use of the work *is obviously disproportional* to the agreed or fixed remuneration, *the author shall be entitled to demand the modification of the agreement* for the purpose of fixing more equitable share in the profit deriving from the use of his work. [Emphasis added.]

Current status of the rights in performances fixed in phonograms: general provisions and comments

[6] Act of October 1, 2003, published in Narodne Novine, in NN 167/2003; entered into force on October 30, 2003.

63) The Croatian Copyright Law currently in force is a solid piece of legislation which is, in general, in harmony with the international treaties and the E.U. norms – with the exceptions outlined below, in particular as regards the regulation of the right of (interactive) making available to the public. As mentioned above, it also reflects a clear choice of following the civil law (or "continental") legal tradition and the recognition that the provisions on copyright and related rights should function "as advertised"; that is, as a legal mechanism to serve, first of all, for promotion of creativity and to duly recognize the creative efforts and achievements of human creators: authors and performers (not neglecting, at the same time, the protection of the rights of producers, publishers and broadcasters whose contributions and investments are necessary for the dissemination of the works and other protected subject matters – neither certain public and legitimate private interests that dictate certain exceptions to or limitations of the rights granted).

64) Since the provisions of the current Copyright Law are well-known to everybody, in contrast with the previous Yugoslav and Croatian laws the review of which has been necessary to follow the evolvement of the status of performers' rights, I, in general, only quote those provisions verbatim that seem necessary to analyze the current status of related rights.

65) The general provisions of the current Copyright Law relevant for analyzing the status of performers' rights are, in particular, these:

> *Article 4(2). Performer's rights shall belong*, by its nature, *to a natural person who has performed* a work from the literary or artistic domain, or the expressions of folklore.
>
> *Article 6(3)*. The *exercise of the rights of* phonogram *producers must not prejudice the exercise of* copyright or the *performers' rights*.
>
> *Article 26* (by virtue of Article 139, also applicable to performers). (3) The author is *entitled to remuneration for each use* of his work, unless otherwise provided for by this Act or by a contract.
>
> *Article 56* (by virtue of Article 139, also applicable to performers' rights). (1) Copyright *shall not be transferable*, except by inheritance and transfer for the benefit of coheirs in the case of dissolution of community of heirs.
>
> (2) Other dispositions of copyright shall be allowed, unless otherwise provided for by this Act.
>
> *Article 58* (by virtue of Article 139, also applicable to performers' rights). (5) [verbatim the same as Article 44(5) of the 2003 Law quoted above]
>
> (5) In the case of doubt, a legal transaction comprising a disposition of copyright *shall be interpreted for the benefit of the author [and performer].*
>
> *Article 66* (by virtue of Article 139, also applicable to performers' rights). (1) A copyright contract shall *specify* at least the work it concerns, *the manner of use, the remuneration for the use* of the work or an explicit provision that the right of use shall be exercised without remuneration and the person authorised to use the copyright work.

Article 67 (by virtue of Article 139, also applicable to performers' rights). The author shall be *entitled to appropriate and equitable remuneration for each use* of his copyright work.

Article 68 (by virtue of Article 139, also applicable to performers' rights). (1) The author has the *right to adjust the originally agreed remuneration* in copyright contracts in changed circumstances. The manner of adjusting the originally agreed remuneration in copyright contracts, in changed circumstances, *may be regulated in collective agreements* between representative associations of authors and representative associations of users.

(2) If the collective agreements referred to in paragraph (1) of this Article have not been concluded the author *has the right to demand additional appropriate and fair remuneration* from the holder of the right of exploitation with whom he concluded the copyright contract or his legal successor, *if the originally agreed remuneration proves disproportionately low* in comparison with the entire subsequent relevant income generated by the exploitation of the work, taking into account the circumstances of each case, the contribution of the author and the specifics of different areas of creativity and market practice that are applied in different areas of creativity.

(3) The author may not waive the right referred to in paragraph (1) and (2) of this Article. [Emphasis added.]

66) Since the time of the conclusion of Jugoton contracts in the 1970s and 1980s until the current Copyright Law, the statutory regulation of performers' rights have gone through a number of changes. Therefore, it is also an important question of how the new provisions were supposed to apply, if at all, to the performances fixed in phonograms under a previous regulation. The answer to the question is given by Article 22(1) the WPPT on the "application of time", according to which "Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty." Article 18 of the Berne Convention provides as follows:

(1) This Convention *shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain* in the country of origin through the expiry of the term of protection. [Emphasis added.]
(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.
(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.
(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

67) Although these provisions, as the provisions of the Convention in general, only apply to the rights of the nationals of other Contracting Parties, this is also due guidance how to address the questions of application in time of new provisions in domestic environment (the more so because

it may hardly be justified that the legislation of a country provides rights to foreigners that are more extensive than the rights of its own nationals). The comments in the 2003 WIPO Guide to the Berne Convention to Article 18[7] clarify (i) that this does not mean "retroactive" protection because the new provisions do not apply to acts performed before their entry into force; but (ii) that they do apply for all works and subject matters of related rights that exist at the moment of the entry into force of the new norms for which the term of protection under the new norms has not expired yet", and (iii) that "it only allows certain temporary provisions, transitional measures which should be limited for the purpose of the protection of [...] the acquired rights related to copies of works that were completed or were in the process of being completed, on the entry into force of the Convention."[8] It goes without saying that, in the case of "acquired rights" obtained in the 1970s and 1980s, one might hardly speak seriously about some justified "*transitional*" measures in the context of the current legislation.

68) The analysis below has been made on the understanding (as outlined above) that actually the Republic of Croatia is not only the proprietor of the master recordings of the Jugoton phonograms, but also the successor of the relevant related rights, including those licenses that might derive from the contracts concluded by Jugoton. I note, however, that the same would apply concerning the current status of the performers' rights also if Croatia Records had been recognized as the owners of those related rights (which, however, does not seem to be the case).

69) In view of the above-quoted provisions on "application in time," the rights that the current Copyright Law grants to performers are applicable for all performances for which the term of protection has not expired yet. But, from the viewpoint of Question 5 – about the way of their practical application – there is a difference between those rights that did exist in the Yugoslav times and were licensed to Jugoton, on the one hand, and on the other hand those rights that, at the time of the conclusion of the Jugoton contracts, did not exist yet or, if they did, they were not covered by the contracts.

Summary of the current status of performers' rights in the their performances fixed in Jugoton phonograms

70) On the basis of the contracts concluded in 1977 and 1984 analyzed above, it seems that Jugoton usually acquired contractual rights to use performances fixed in their phonograms for

[7] "*Guide to the Copyright and Related Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*," WIPO publication No. 891(E), 2003 (herein after: WIPO Guides), see pp. 97 to 99 (now the book is available on WIPO website at https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf free on the basis of a Creative Commons).

[8] (Original footnote in the Guide) No specific deadline is determined by the Convention for such temporary provisions and transitional measures; it seems, however, that such provisions and measures should not be applied, in any case, for a period longer than two years from the entry into force of the Convention. In a way, this two-year period, as the extreme maximum, for the "temporary measures" and "transitional measures", is confirmed implicitly by Article 13(2) of the 1971 Paris Act of the Convention which reads as follows: "Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date *two years after that country becomes bound by this Act*. [Emphasis added.]

reproduction, distribution of copies, broadcasting and the use of broadcast phonograms "in public events." Furthermore, it had been also authorized to allow sublicenses for reproduction and distribution of the performances covered by the contracts.

71) The text of the contracts – if the English translation is correct – does not allow an interpretation according to which the acquired rights to use the performances also extended to communication to the public as defined in Article 2(g) of the WPPT. The absence of coverage of the acts of communication to the public, however, is not truly relevant because both broadcasting and communication to the public are now covered by a right to a single equitable remuneration, which as a new right in contrast with the legal situation at the time of the conclusion of the Jugoton legacy contracts, as discussed below, is not covered by the licenses granted in the 1970s and 1980s.

72) In connection with the acts covered by the legacy civil law contracts, new contractual arrangements became necessary when, in 1990, the related rights in performances were recognized as statutory rights. The new provisions included a list of acts covered by the newly recognized statutory rights and with a term of protection (which at the time of the conclusion of the legacy contracts with Jugoton did not exist yet). I do not have information on what happened in the short period between the entry into force of the 1990 Law and the privatization of the Jugoton's assets. If the adaptation of the contractual relations to the newly recognized related rights did not take place at that time, the validity of the legacy contracts might have been interrupted; in that case, the contractual rights to use the performances by Jugoton would not have been transformed into licenses to use the phonograms in the way covered by the statutory rights for the newly provided term of protection. Nevertheless, I presume that the transformation of the contractual rights has taken place somehow and, thus, the Jugoton legacy contracts, in principle, may have still uninterrupted legal validity. Certainly, in the various subsequent copyright laws, I have not found any explicit provision to declare them explicitly void or expired otherwise[9].

73) It is another question, however, to what extent the contracts may be applied with their presumed continued validity; that is, in what respects the licenses granted by the performers may have remained applicable in spite of the legislative changes having taken place in the meantime. From this viewpoint it should be considered that

a) any acts of exploitation using these legacy agreements as a legal ground but going beyond the contractual limits of the original licences would constitute infringements of the rights of performers;

b) the pro-creator provisions of the current Copyright Law counterbalancing the weaker bargaining position of performers which – in accordance with Article 22 of the WPPT (and Article 18 of the Berne Convention) on "application of time" – are applicable to all

[9] Articles 3a and 5 of the contract dated 8th May 1984 allow the parties to unilaterally terminate the agreement or extend its duration to another year at a time by remaining idle. My understanding is that neither party has terminated the contract.

performances the term of protection had not expired yet at the moment of the entry into force of those provisions; consequently, they are also applicable to any possible licenses that may be considered still valid.

74) I submit that, of the licenses acquired by Jugoton from the performers by civil law contracts before the recognition of related rights in Croatia may be regarded valid as related rights licenses only for the rights of reproduction and distribution of tangible copies (including the possibility of granting sublicenses for such acts). No other acts covered by exclusive rights provided to performers in the current Copyright Law may be lawfully performed without the performers' or their representatives' authorization, and the legacy contracts do not have any application either concerning the mere rights to remuneration granted to the performers. The rights not covered by the legacy contracts are reviewed later below.

75) As mentioned above, the civil law licenses granted in the legacy contracts delivered to me by HUZIP limit the scope of uses to the fixation, reproduction and distribution of sound recordings *in the form of physical, tangible copies* ("gramophone records and cassettes"). This is also true of Jugoton sublicensing of the same acts[10]. Even when, in addition to gramophone records and cassettes, "other sound carriers" are also mentioned[11], the terms and definitions ("sale", "ex-work price") used in the contracts make it clear that the original purpose of the contracts did not go beyond producing and offering for sale physical, tangible copies of sound recordings. I stress this because it means that the licenses do not cover online transmissions of intangible digital copies irrespective whether in the form of streaming or for downloading (both such acts being covered by the new right of interactive making available to the public of phonograms provided in Article 10 of the WPPT, Article 3(2)(a) of the Information Society Directive and Article 136.1(8) of the Current Law).

76) Under the legacy contracts, Jugoton acquired the contractual rights of reproduction and distribution of tangible copies. It assumed the obligation to pay remuneration for this, but only for five years, and after that period the right of the performers to receive remuneration ceased. Where the sales have continued until today (and in certain cases, they have), it means that, for a period of 45 years, sales revenues have been accumulated without sharing them with the artists performing on the recordings sold. Such a long revenue-generating period without payment to the performers renders the original remuneration disproportionately and anachronistically small. This is not in harmony with Article 67 of the current Copyright Law which provides that "[t]he author [and the performer] shall be entitled to appropriate and equitable remuneration for each use of his copyright work."

77) As quoted above, already the 2003 Law provided that, in the case of such disproportionality, the author (and the performer) was "entitled to demand the modification of the agreement for the purpose of fixing more equitable share in the profit deriving from the use of his work." (Article 54(1)). The current Law has made the application of this right to correction (known in copyright

[10] Article 2 b) of the contracts dated 23rd November 1977 and 9th May 1984.
[11] Article 1 of the contract dated 8th May 1984

jargon as "bestseller clause", although its scope of application is much broader than to what the expression refers) more practical and effective by providing that "[t]he manner of adjusting the originally agreed remuneration in copyright contracts, in changed circumstances, may be regulated in collective agreements between representative associations of authors and representative associations of users." In my opinion, in this case – in view of the huge historical anomaly in practically all Jugoton contracts only a collective settlement arrangement may be a realistic option. I am also of the view that, for this, legislative provisions would be needed.

78) It follows from the analysis above that none of the rights provided by the current Copyright Act for performers other than the rights of reproduction covered by the legacy contracts is valid anymore. The acts covered by those other exclusive rights may only be carried out with the consent by the performers (or their representative or their exclusive licensees whom they have also authorized to grant sublicenses) and the rights to remuneration apply exclusively in favor of the performers. I make specific comments only on one right below; namely, the exclusive right of authorization of (online, interactive) making available to the public in respect which I have to point out that, there seem to be certain self-contradictions and conflicts with the international norms and the E.U. directives.

79) For the right to a single equitable remuneration, is provided in this way in Article 15(1) and (2) of the WPPT:

> (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.
> (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

In the WPPT, the right of (online, interactive) making available to the public is not covered by the concept of communication to the public, but a parallel right which is not a mere right to remuneration; it is an exclusive right.

80) The status of performers' right of (online, interactive) making available to the public is the same under Article 3(2)(a) of the Information Society, but Article 8(2) of the Rental, Lending and Related Rights Directive – with which the Croatian law must be in compliance – provides for the right to a single equitable remuneration in a way that is more favorable for performers who are usually in a weaker position in their relations with producers of phonograms. It provides as follows:

> Member States shall provide a right in order to ensure that *a single equitable remuneration* is *paid by the user*, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that *this remuneration is shared between the relevant performers and*

phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them. [Emphasis added.]

81) This provision of the Directive differs from Article 15(1) and (2) of the WPPT (but thanks to the flexibility of the latter, it is in no conflict with it) in that it does not allow the same choice to the Member States regarding the question of who may claim the remuneration from the users. Under the WPPT, a Contracting Party may provide either that the producers may claim the remuneration and share it with the performers, or that the performers may claim it and share it with the producers, or that, since the performers and producers are joint owners of the single right, it is left to them how they manage it. In the Directive, the third option is applied. It follows from this option that the two categories of beneficiaries may agree either that they form a collective management organization (CMO) together to manage the right or that one category of the joint rightholders may trust the CMO of the other category to collect the remuneration and share it with the CMO of the other category. In the latter case, however, this is supposed to take place on the basis of an agreement between the CMOs of the two categories of joint rightholders as equal partners. Thus, it would not be in accordance with the Directive, if for example, the CMO of the producers – or the producers themselves – collected the remuneration, if the right were managed without having been agreed with the performers' CMO about the key aspects of management, and if the producers CMO did not even transfer the entire share of the equitable remuneration to the performers' CMO to be ditsributed, but it rather distributed it also to the identifiable and locatable performers (thus keeping for the producers the non-distributable amounts due to the unidentifiable and/or unlocatable performers).

82) The Directive does not determine the shares between the producers and performers. However, irrespective of how it is established, it follows from the context of the Directive that the share due to performers must not be lower than 50%. This is supposed to be such a share not only due to the joint ownership of their single equitable remuneration but it is also required by the welcome pro-creator – pro-author and pro-performer – orientation of the Directive and the E.U. legislation in general.[12]

83) Let us turn now to the way in which this right has been introduced in Croatia, how it is provided in the current Copyright Law, and how all this may be relevant from the viewpoint of the validity of certain licenses granted to the producers in the Jugoton legacy contracts.

84) First of all, as I have pointed out above, the legacy contracts only covered acts of broadcasting and certain uses of broadcast phonograms, but not the acts of communication to the public as defined in Article 2(g) of the WPPT. Therefore, for this reason alone, no right could be derived in favor of the owner of rights in the Jugoton music library from the legacy contracts.

[12] This approach of the Directive is clearly manifested in the provisions on the unwaivable rights to remuneration guaranteed to authors and performers in Article 5 of the Directive and also in Recital (12) which states that "[i]t is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them."

The 1990 Act provided already a right to remuneration for communication to the public, but not for broadcasting and not as a single right but only as a right of performers (see Article 99h quoted above). The 1999 Act granted both performers and producers of phonograms a right to remuneration for broadcasting – still not as a single right to remuneration but two parallel rights. It was then the 2003 Law that provided for a right of performers and producers of phonograms to a single equitable remuneration:

> Article 126(1) A performer shall be entitled to a share in a single equitable remuneration for broadcasting and any other communication to the public of his fixed performance.
>
> (2) The single equitable remuneration referred to in paragraph (1) of this Article consists of individual remunerations which belong to the performers and the producers of phonograms.

85) It is submitted that, through the subsequent provisions, a new right was provided that did not correspond to the licenses granted in the Jugoton contracts to use the fixations of performances for broadcasting and for communication to the public of broadcast phonograms (for which Jugoton was to pay remuneration usually only for five years). As a new right, Article 22 of the WPPT (and by reference, *mutatis mutandis*, Article 18 of the Berne Convention) applied to it already at that time. It goes without saying that the same applies to the right to a single equitable remuneration as provided in the current Copyright Law.

86) However, as mentioned above, there is at least one aspect of the provisions in the current Copyright Law that does not seem to be in accordance with the WPPT and with the E.U. Directives. Article 136(1) and (2) provide as follows:

> (1) A performer shall have the exclusive right to communicate to the public his unfixed and fixed performances including in particular:
>
> [1] the right of public performance;
> [2] the right of public transmission;
> [3] the right of public communication of a fixed performance;
> [4] the right of public presentation of an audiovisual performance;
> [5] the right of broadcasting;
> [6] the right of retransmission;
> [7] the right of direct injection;
> [8] the right of making available to the public;
> [9] the right of public communication of broadcasting, retransmission, direct injection and making available to the public;
> [10] the right of communication to the public, including an act of making available to the public within an ancillary online service;
> [11] the right of communication to the public, including an act of making available to the public with providing the public with access to performances uploaded by users on platforms for online content-sharing; and
> [12] other manners of communication to the public.
>
> (2) A performer shall be entitled to a share in a single equitable remuneration for broadcasting and any other communication to the public of his fixed performance. The single equitable

remuneration consists of individual remunerations which belong to the performers and the producers of phonograms.

87) There is one aspect where these provisions seem to be in quite clear conflict with the international treaties and the E.U. Directives binding Croatia. Namely, by providing about the right of (online interactive) making available to the public as a form of communication to the public, with the consequence that the same limitations apply to it as for the right of (non-interactive) communication to the public, which is not in accordance with the WCT and the WPPT. Although, in Article 8 of the WPPT and in Article 3(1) of the Information Society Directive (Directive 2001/29/EC), these two different rights are provided together for *copyright*, in the case of the *rights of performers and producers of phonograms*, they are included in separate provisions, and in the E.U. even in two different directives. Articles 10 and 14 of the WPPT and Article 3(2)(a) and (b) of the Information Society Directive provide for *an exclusive right* to performers and producers of phonograms to authorize (or prohibit) any acts of (online interactive) making available to the public, while under Article 15 of the WPPT and Article 8(2) of the Rental, Lending and Related Rights Directive, performers and producers of phonograms only enjoy *a right to a single equitable remuneration* for broadcasting and communication to the public of phonograms.[13]

88) As mentioned above, the two rights do differ from each other. Online interactive making available to the public is not a secondary use of phonograms, but – with the migration of their use from tangible copies to online making available either by streaming or for downloading – it has become the most important way of exploitation. It is allowed to apply exceptions to or limitations of the exclusive right of making available to the public but only in accordance with Article 16 of the WPPT and Article 5 – in particular paragraph (5) – of the Information Society Directive, if the cumulative conditions of the three-step test prescribed in those provisions are fulfilled. That is, only in special cases, provided there is no conflict with the normal exploitation of the right and further provided that there is no unreasonable conflict with the legitimate interest of performers and producers of phonograms. Mandatory collective management is a limitation of an exclusive right, because the rightholders lose the exclusivity nature of the right; they cannot determine when the acts are authorized and under what conditions.[14] This is a general limitation; it does not correspond to the concept of "special case" and – since the rightholders lose the right to decide when and under what conditions the acts online interactive making available to the public take place, this obviously gets into conflict with a normal exploitation of the phonograms along with the performances fixed in them.

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[13] For the right of (online, interactive) making available to the public and the differences in the way it is provided in the WPPT (and, in accordance with it, in the Information Society Directive), see the *WIPO Guide*, pp. 207 – 211 and 247 – 248, as well as *"Collective Management of Copyright and Related Rights. Third Edition"*, WIPO publication, 2022, (hereinafter: WIPO book on collective management), pp. 188-199; the book published last month is freely available at https://www.wipo.int/edocs/pubdocs/en/wipo-pub-855-22-en-collective-management-of-copyright-and-related-rights.pdf on the basis of a Creative Commons.

[14] For the reasons for which mandatory collective management of exclusive rights is a limitation of such rights, see *WIPO book on collective management*, pp. 82 – 100.

89) It turns out from Article 142(1) of the current Copyright Law that the assimilation of the right of (online, interactive) making available to the public to (non-online and non-interactive) communication to the public goes so far as subjecting it to mandatory collective management by limiting it to a single equitable remuneration as for non-online and non-interactive communication to the public:

> the right, in accordance with Article 136 paragraph (2) of this Act, to a share in a single equitable remuneration for: public communication, public presentation, broadcasting, retransmission, direct injection, public communication of broadcasting, retransmission, direct injection and *making available to the public* and any other communication to the public of his phonograms issued for commercial purposes; *this right shall be exercised collectively only* [emphasis added].

That is, in fact, not only mandatory collective management applies but – if the translation is correct – the right of exclusive right to authorize online interactive uses is transformed into a mere right to a single equitable remuneration.

90) Article 306(5) of the current Copyright Law provides as follows:

> Contracts on exploitation of musical performances concluded between performers and phonogram producers before this Act entering into force shall be harmonised with the provisions of this Act within three years from the date of this Act entering into force. Otherwise it shall be considered that a phonogram producer has not acquired the rights to exploit musical performances online and that the rights of a performer in relation to exploiting musical performances online shall be managed collectively.

It is suggested that this forthcoming revision of the Law be used for bringing the provisions on the right of (online interactive) making available to the public into accordance with the WPPT and the Information Society Directive.

91) In the revision of the relevant provisions, it would be justified to take into account the differences in the roles of the rights of performers and producers of phonograms. Phonogram producers do need maintaining the exclusive right in the same way as in other cases of primary rights. The position of performers is different; in their case – if it is appropriately provided and applied – it is a satisfactory solution to transfer certain exclusive rights to the producers who need it, but to maintain an unwaivable right to remuneration (see such provisions in Article 7 of the Rental, Lending and Related Rights Directive or Article 13(3) of the Beijing Audiovisual Performances Treaty (BTAP) exercised through mandatory collective management). This may be done also in the case of performers' exclusive right of (online, interactive) making available to the public. See, for example, Article 108(3) of the Consolidated Text of the Law on Intellectual Property of Spain where exactly this is provided concerning the performers' exclusive right of (online, interactive) making available to the public.

Answer to Question 5

92) As quoted above, HUZIP's fifth question has been this:

> **5. Is there a possibility that new company (later) signs the agreements with performers on those old master tapes (under the concept of contract renewal / contract novation), which would result that new company owns phonogram rights based on such agreements?"**

93) The answer should be affirmative if this is asked as a possibility in the sense that the performers who own exclusive rights not covered by the Jugoton legacy contracts may license Croatia Records (in general, this is the case, only the rights of reproduction and distribution seem to be the exceptions in respect of which, however, as a minimum the above-mentioned corrective measures are needed). This would be in order if it were done in a duly regulated context. Such regulation seems to be necessary and it, along with the protection of performers' and other rightholders' rights, certainly should also guarantee that the phonograms published by Jugoton may be as obstacle-freely used also now that it has become clear that the Republic of Croatia has remained the owners of the master recordings along with the related rights (the so-called "master rights") to authorize their uses.

94) As it has been argued earlier, in my view, the Republic of Croatia in addition of owning both the master tapes and the master rights of the Jugoton music library (as the owner of phonogram producers' rights), has also remained the licensee of the uses authorized by the performers in the legacy contracts that may be considered still valid; which as analysed above may be the case concerning the acts covered by the rights of reproduction and distribution, with the need, however, to repair the huge disproportionality following from the contracts. Pursuant to the provisions of the 2013 Act on Management and Disposal of Assets Owned by the Republic of Croatia[15], and in view of the pertaining regulations qualifying these master recordings as parts of Croatia's national cultural treasure, this ownership is exclusive and absolute. Neither the original performers, nor the original phonogram producers of these master tapes/rights have legal standing to make any agreement as a result of which Croatia Records would be the new owner of the rights subsisting in the master tapes. This is confirmed by Article 16(4) of the 2018 Croatian law "on archival materials and archives"[16] that makes it the right and obligation of the Ministry responsible for cultural affairs to "hand over" this material for commercial use and conclude the agreements authorising any such exploitation.

95) It would be necessary to regulate by legislation the way in which the Republic of Croatia – by the Ministry of Culture or by another designated entity – would exercise its rights in the master recordings and the related rights linked to it. In fact, as quoted in paragraph 23 above, already

[15] Act of July 22, 2013, published in Narodne Novine in NN 94/2013.
[16] Act of June 29, 2018, published in Narodne Novine in NN 61/2018.

the 2016 CERP decision referred to the Ministry of Culture's plan "to take over entirely the care and control of further dealings with the music library [...] including legislatively regulating the legal status and the conditions of the future use of this archive material," and the Ministry maintained its intention throughout the administrative and judicial procedures

96) The Hungarian Law on the exercise of rights in original copies of films and the related rights in them by the National Film Archive may be an example. It is to be noted that the privatization of Hungaroton, the Hungarian State-owned phonogram producer company took place in a way that the new private company became full successor acquiring not only certain assets but also all the property rights, including intellectual property rights. In contrast, the original copies of the films produced by the State-owned studio has remained State property along with the related intellectual property rights as it has happened in Croatia – as it has confirmed by the final ruling of the Constitutional Court – in respect of the master tapes and related right of the Jugoton music library.

97) The property rights and the intellectual property rights in the State-owned films is exercised by the National Film Institute (NFI) as regulated in Act II of 2004 on Films (the Film Law). Article 5/C prescribes this task to the NFI. It is provided in Article 5/D(1) that the revenue derived from the exercise of the rights in the films in the collection of the film archive is to be used for the support of national film production and film culture.

98) Article 5/D(2) of the Film Law – and this may be relevant for the regulation of the use of the master tapes and rights in the Jugoton music library owned by the Republic of Croatia – provides that, if the State-property in the films in the archive does not extend to certain rights, the NFI is to obtain authorization from the rightholders of those rights in accordance with the relevant provisions of the Copyright Law. It is analysed above in detail which rights may be covered, in principle, by the licenses granted by the performers in the legacy contracts and it is also pointed out that major corrections are needed to eliminate the enormous disproportionality having occurred to the detriment of performers. In my view, it is necessary that the correction be made through a collective agreement between the Ministry or the institute appointed to exercise the rights in the Jugoton music library and HUZIP as the CMO managing performers' rights rather than leaving the solution to impractical contract-by-contract settlement. It seems also necessary that the legislative settlement foreseen by the Ministry also offer an appropriate framework for such a collective agreement.

99) As regards the other rights of performers – the huge majority – not covered by the legacy contracts, they are supposed to be applied as provided in the Law; that is, the acts covered by exclusive rights may only be performed with their consent, and their rights to remuneration must be applied as prescribed in the current Copyright Law.

100) As stressed above, when the current Copyright Law is updated – as it is foreseen in 306(3) of the Law – it should be brought into accordance with the WPPT, the E.U. Directives and the best European practices at least in two aspects.

101) First, it should be ensured that the CMOs of the performers and producers of phonograms have an equal say in the management of their joint single right to remuneration for broadcasting and communication to the public and also equal share of the remuneration between them, as pointed out in paragraphs 81 to 85 above.

102) Second, the exclusive right of performers and producers of phonograms to authorize (online, interactive) making available to the public must not be covered by a right to a single equitable remuneration. As discussed in paragraphs 87 to 91 above, the exclusive right of (online interactive) making available right (not covered by the rights of broadcasting and communication to the public in the WPPT and in the E.U. Directives) should be kept intact for the producers of phonograms; it should be left to them how they exercise that right. In contrast, for the same right of performers, it would seem appropriate to provide that, where they transfer their exclusive right to the producers, they maintain an unwaivable right to remuneration to be paid by the users and exercised by the performers' CMO through mandatory collective management.

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