The Rights to Remuneration in Switzerland
(Translation)

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Within the Swiss Confederation, the rights to remuneration are relatively recent: They were introduced by the new federal law on copyright and neighboring rights (hereinafter: LDA) in force since the first of June, 1993. In 10 years, there have been many opportunities in case law to precise or to finish the work of the legislator. Thus the rights to remuneration have been a part of day-to-day reality in Switzerland for the past few years; and they continue to be a part of it.

1. Covered uses and available means

If one consults the preparatory legislative work, one observes that the Swiss Federal Council often links the notion of "rights to remuneration" with that of "mass use of works."[98] This is revealing: Intellectual property can sometimes be "consumed" with such an intensity by the users that the use becomes uncontrollable by the copyright holders.[99] Justice desires that the creators participate financially in the use of their works, but there is a clash of diverse considerations as regards the recognition of an exclusive right: The author will not be in a position to exercise the right, and one would not want to restrict, by the right of prohibition, the aspiration of consumers to benefit from technological possibilities. This results in the laws on compensation. They are presented as palliative solutions to concrete situations which the legislature neither wants to nor can avoid.[100]

1.1. In general

Thus, the use of works for private purposes forms the object of a right to remuneration which departs from exclusive rights: would it be imaginable in practice to offer the author the ability to oppose the private use of his work? The response is negative, insofar as Switzerland applies remuneration on blank carriers, levied

[98] Article from CF; in FF 1989 III 473, 483, 489, etc. …

[99] Article from CF; in FF 1989 III 489.

[100] V. Salvade, The Laws on Compensation in Federal Law on Copyright and Neighboring Rights, in 5/1997, p. 489.

on analogue cassettes[101] since 1995. It also recognizes a right to remuneration for reprography.[102] It should be noted that the law, when it establishes the right to remuneration for private uses, does not only target personal use or use within a tightly linked group of people; it includes all uses of works by a teacher and his pupil for educational purposes[103], as well as the making of copies of works in the workplace for the purposes of internal information or documentation.[104] Reproduction for private use of a third party is also the object of the right to remuneration: If a person, acting out of personal interest, asks a centre of reprography to make a copy, the centre must pay a levy.[105]. The law continues that the same applies for libraries making copy machines available for the use of their readers.[106] However, use in the school or workplace for the purposes of documentation or information, as well as reproduction for the use of a third party, do not form the object of an unlimited right to remuneration: The reproduction of the entirety, or the essence of available works on the market is covered by an exclusive right, similar to the situation of reproduction of works from the fine arts, of musical scores or the recording or the performance of a work on phonograms or videograms.[107] Finally, the right to remuneration for private use of software is not applied: The exclusive right is reserved.[108]

In the area of neighboring rights, the Swiss law establishes another right to remuneration for the use of available supports in the market for the purposes of distribution, broadcasting, public consumption or performance.[109] This right corresponds to that of Article 12 of the Rome Convention, but it is not limited to the use of phonograms: It also deals with videograms. The Swiss Federal Tribunal has specified that the right to remuneration targets the distribution of supports and not their ephemeral reproduction for broadcasting: ephemeral reproductions are dealt with by an exclusive right.[110]

It is an interesting fact to note that the rental right[111] in Switzerland is a simple right to remuneration. However, the rental of copies of works is not frequent

[101] The common tariff 4a of the Swiss collective management organizations
[102] See the common tariff 8 of the Swiss collective management organizations .
[103] Article 19, Section 1, lit. B and Article 20 Section 2, LDA.
[104] Article 19, Section 1, lit. C and Article 20 Section 2, LDA.
[105] Article 19, Section 2, land Article 20, Section 2, LDA.
[106] Ibid.
[107] See Article 19, Section 3, LDA.
[108] Article 19, Section 4, LDA.
[109] Article 35, LDA.
[110] Meeting of the Federal Tribunal, 2 February, 1999, in sic 1999, p. 257.
[111] Article 13, LDA.

enough to necessitate the suppression of the exclusive right of the author.[112] This use is no more massive than broadcasting, for example. Even though the use of this sort is in decline, the legislation had perhaps underestimated the growing importance of video rental at the time when the law was in preparation.[113] It is also probable that the envisaged regulation of the lending right colored that of the rental rights.[114] Even if the lending right was not finally established by the law, it was one of the stumbling blocks encountered during its preparation, always treated in conjunction with the rental right; there would have been reason to make it into a simple right to remuneration: The lending of books by libraries is truly a massive use and the interest of the public demands that the author should not be allowed to object to this use.

Whatever about the validity of the option chosen, one can note in conclusion, that the right to remuneration as conceived by the Swiss legislators is a compromise between the interests of the copyright holders and those of the users.

1.2. New technology

Since the beginning of 2003, the Swiss Confederation charges levies on digital blank carriers. In the case of CD-R Data[115], these levies are 6 Swiss centimes for 525 MOs, and for recordable DVDS with a capacity of 4.7 GOs[116], the levy is CHF 1.84. During the corresponding negotiation on tariffs, the users opposed these new levies, pointing out that the system of digital rights management (DRM) should, in the digital era, guarantee the compensation of copyright hold-

[112] The European Directive concerning the rental right and the lending right and on certain rights related to copyright in the field of intellectual property (Directive 92/100/CEE; JO No. L 346 of 27 November, 1992) otherwise considers it as an exclusive right and imposes on Member States an equivalent right: CF A. Lucas/H-J. Lucas, "Treaty on Literary and Artistic Property," Paris 1994, 245.

[113] Cf. The article from CF, in FF 1984, III 215; article from CF in FF 1989 III 517. See also Barrelet/Egloff, "The New Copyright," Commentary on the federal law on copyright and neighboring rights, 2nd edition, Berne 2000, No. 1, Article 13 LDA. Regarding the importance of rental, we can find in the Article of 1989 this contradiction which leaves us stunned: "Concerning phonograms, the rental of inalterable compact discs has become an alternative to purchase". (FF 1989 III 517)

[114] Cf. Article 16 of the project of 1984; Article 16 of the advance project of the Third Commission of Experts; Article from CF in FF 1989 II 516-517.

[115] Approximately four euro cents, see the common tariff 4B of the Swiss collective management organizations.

[116] Approximately 1.2 euros, see the common tariff 4C of the Swiss collective management organization.

ers and replace levies on blank supports.[117] This was ignoring the fact that the systems were not in place at the time. The collective management organizations had to see that the technical approach developed to safeguard the interests of authors were being evoked, in reality, to attack the rights of the authors, which is not a small paradox.

Still in the area of new means of communication, the next issue is to introduce a levy covering the private copying of works in the electronic networks of companies and schools.[118] These networks are frequently used to obtain information or documentation. This compensation would be owed, however, by the companies and schools themselves: Switzerland does not charge levies on copying equipment. According to some, this is a gap that should be filled, especially in the light of the advent of the digital era.

2. The obligation to pay remuneration and its collection

From a dogmatic point of view, two characteristics of the right to remuneration are demonstrated: they are always the counterpart of a legal license and they are exercised obligatorily by the collective management organization.

2.1. The legal license

When the right to remuneration exists, the law accepts the use of works: It suppresses the exclusive right but offers compensation to the artist. This law results in the authorization of use; copyright can only be violated by non-payment of the levy. The constitutional ban on certain criminal sanctions could not prevent the punishment of non-payment[119] since there are such sanctions in similar situations.[120] Nevertheless we are of the opinion that such sanctions should only be used in exceptional cases: Normally, the inability to pay one's debts is not punished by penal law. It is thus difficult to imagine a different state of affairs for the rights to remuneration: Failing this, their beneficiaries would be overly advantaged compared to other creditors, in particular compared to authors who have signed a licensing contract and have not received the royalties. In practice, the

[117] See especially the decision of the Federal Commission on Arbitration for the Management of Copyright and Neighboring Rights, 14 November 2002, concerning the common tariff 4C, p.5.

[118] See the Project on the Common Tariff No. 9 of the Swiss collective management organizations.

[119] Salvade, op.cit. p. 450.

[120] Cf. Article 217 CP.

work of collective management bodies will not be facilitated by this. Not only can they not prohibit the use of their repertoire; they have few means at their disposal when the debtor is insolvent.

2.2. Obligatory collective management

All of the legal provisions on the rights to remuneration foresee that these prerogatives can only be exercised by the agreed collective management organization.[121] The law distinguishes between the ownership of the rights, which belongs to the authors, the performers or the producers; and the exercise of the rights, which is the privilege of the collective management organization. This is different from the situation as regards exclusive rights, since here the owners of rights cannot exercise their rights to remuneration themselves.[122]

The aim of this obligatory recourse to collective management is as much to assure the compensation for the beneficiaries as to simplify the legal situation of the users.[123] The massive use of works brings a huge number of users and copyright holders in contact. It is difficult to imagine copyright holders being in a position to intervene in each transaction. Also, it is important that the user can turn to a single address and not be exposed to a multitude of individual demands.

The system is further reinforced by the fact that the collective management bodies are obliged to establish a common tariff for each right to remuneration and to designate a body as the common organization which collects the remuneration and transfers it to the other bodies.[124] The Federal Tribunal has clarified the legal provisions in the sense that the collective management body responsible for the collection of the remuneration does not need, in every case, to demonstrate the contractual acquisition of the rights. In other words, its ability to act stems from the law itself, it can demand levies at the tribunals.[125]

In the field of rights to remuneration, the activity of collective management organizations is supervised by the Swiss Confederation: The first thing is for these companies to be licensed to operate the Federal Intellectual Property Office.[126] The law provides for the licensing, as a rule, of one body per field[127] (one for music, one for literature, one for audiovisual works, etc.) Each body is

[121] Article 13, Section 3, 20, Section 4 and 35, Section 3, LDA.

[122] Salvade, op.cit. p. 451.

[123] Article from CF in FF 1984 III 236-237, 195; article from CF in FF 1989 III 538–539, Barrelet/Egloff, op.cit. No. 17 Article 40 LDA.

[124] Article 47, LDA.

[125] ATF 124 III 489.

[126] Article 41, LDA.

thus, in principle, in a monopoly position. We are dealing with *de facto* monopolies, which are always created by the law in the public interest owing to the significant simplification which thus ensues.

Another aspect of federal control: The Federal Intellectual Property Office supervises the management of these societies.[128] The LDA lays down certain rules which the collective management bodies must respect: For example, the fairness of treatment and the administration of their affairs according to the principles of healthy, economic management.[129] It is the task of the Office to ensure that the licensing bodies fulfill their obligations in this regard. It must also approve the distribution rules (that is to say, the assembly of rules determining how the levies will be divided among the right holders).[130] Finally, the last aspect of federal control, which will become the object of more important developments: the tariffs of the collective management bodies, for the levies are the object of a specific procedure of calculation and approval.

3. Determination of remuneration

Globally, the system is the following: The collective management organizations start by negotiating their tariffs with the associations representing the users.[131] Concretely, if they are establishing a scale of levies on blank supports, they will negotiate with the Federation of Manufacturers and Importers of Supports; if they are setting a tariff applicable to video or DVD rental, they will begin negotiation with the representatives of video clubs, etc. Whatever the result of the negotiations (agreement or dissent), the tariff plan will have to be submitted to the Federal Commission of Arbitration for the management of copyright and neighboring rights[132], which verifies its fairness.[133] Before taking a decision, the Commission informs the Office for Price Surveillance[134], which gives consultative advice.[135] The Commission of Arbitration can reject this advice, but if so, it must explain the reasons.[136] When the preliminary negotiations have resulted in agreement, the Commission, in principle, ratifies it. Case law constantly shows

[127] Article 42, Section 2, LDA.
[128] Article 52, LDA.
[129] Article 45, LDA.
[130] Article 48, Section 1, LDA.
[131] Article 46, Section 2, LDA.
[132] Article 46, Section 2; and article 55, LDA.
[133] Article 59, Section 1, LDA.
[134] The meeting of the Federal Tribunal, 24 March 1995 in RSPI, 1996, p. 440 ss.
[135] Article 15, Section 2 bis, LSpr.
[136] Article 15, Section 2 ter, LSpr.

that the agreement of the organizations of users is a significant indication of the fair character of tariffs.[137] All goes differently if the plan of the management organizations remains contentious, which is the case very often. The Commission must then decide, determining itself the fairness of the tariff, notably with regard to the criteria laid down by Article 60 of the LDA. These are listed below:

A. First of all, the payment must be calculated, which is a function of the income obtained from the use of the work or other product protected by neighboring rights. In the absence of income, the payment will be calculated on the basis of the expenses incurred by this use. Concretely, if one sets the payment for blank supports, one chooses as a basis the costs invested by the consumer for the private copy: That is to say, the costs of the purchase of the blank supports and the reproduction equipment.[138] In the calculation, the period of amortization of the recording equipment, taken into account by the Federal Commission of Arbitration, is five years.[139] The law specifies that the payment will amount to "as a general rule a maximum" to 10 percent of the income or the expenses, for copyright, and to a maximum of 3 percent for neighboring rights;[140] the law continues, however, stating that the remuneration should be fixed in a rational way so that the collective management body obtain an equitable remuneration for the right holders, which implies that the maxima of 10 and 3 percent can be exceeded in certain cases. In practice, it is extremely rare that the Commission goes beyond these percentages.

B. The tariff should, according to Article 60, Section 1, lit. B of the LDA, take into account the number and nature of the protected works or objects of neighboring rights.[141] This criterion means that, when a creation is constituted of a

[137] See for example the decision, 31 October 2000 concerning the common tariffs 7A and 7B, pg. 31. For exclusive rights, see also the decision of 1 November 2000, concerning the PI tariff or the meeting of the Federal Tribunal 7 March, 1986, regarding common tariff 1 in Dec. CAF III p. 190.

[138] See for example, a recent decision: Decision 14 November 2002 of the Federal Commission on Arbitration for the Management of Copyright and Neighboring Rights Concerning the Common Tariff 4c, pg. 25 ss. Decision of 21 December 1993 concerning CT 4, pp. 31-32 confirmed by ATF 2A 142/173/174/ 1994 (c.6) in JdT 1995 I 279. Decision of 12 November 2001 concerning the CT 4a p. 23 ss in sic! 7/8 2002, p. 516.

[139] Decision of 12 November, 2001, concerning the CT 4a, c. 7b in sic! 7/8 2002 p. 516.

[140] Article 60, Section 2, LDA

[141] Barrelet/Egloff, op. cit. No. 14 and No. to Article 60 LDA. ATF 2A 142/173/174/1994 concerning the CT4 (c. 9b) in JdT 1995 I 280; decisions of the commission of 21 December, 1993, concerning CT 4, p. 32, of 12 November 2001, concerning the CT4a, p. 27 ss in sic! 7/8 2002 p. 517.

large number of protected elements, produced by a great number of authors, it gives grounds for an increase in the amount of the remuneration.[142] This could be the case for audiovisual works, which contain a visual part, a musical part, and which are based on a script, perhaps originating from a work of literature, which thus assembles a large number of contributions and right holders, etc.

C. Finally, it is compulsory that the tariffs take into account the proportion of protected objects used, compared to the proportion which is not protected. This is the principle of *pro rata temporis*. Thus, for example, a tariff applicable to blank supports should take into account the proportion of non-protected works and objects of neighboring rights copied for private purposes.

But the rules laid down by Article 60 of the LDA are not the only ones that the Commission observes. In practice, the Commission supervises the general obligations of the collective management organizations. Thus, it cannot qualify a tariff as fair if it violates the principle of equal treatment,[143] or if it is so complicated that it would affect the economical character of the management,[144] that is to say that its application would be too difficult for the management organizations.

The state control of fairness will, nevertheless, be undertaken with due regard to the principle of autonomy of tariffs. The private nature of copyright desires that right holders set the conditions for the use of their works. If a tariff has satisfied legal requirements, it is not the state's role to substitute its own solution for that given by the collective management organization.[145]

An appeal will be possible to the Federal Swiss Tribunal[146] against the decision of the Federal Commission of Arbitration.

Once in force, the tariffs may be enforced by a civil court in a possible legal action for payment brought against uncooperative users.[147] The users will therefore have no further opportunity to contest the tariffs. According to the Federal Tribunal, it is exclusively the equitable character of the tariffs which the authorities cannot revise. On the other hand, they will always have the opportunity not to apply tariffs which contravene the law.[148] Besides, according to the Swiss

[142] Article 60, Section 1, lit. c LDA.

[143] Article 45, Section 2, LDA. ATF 2A 142/173/174/1994 concerning the CT4 (c. 13a).

[144] Article 45, Section 1, LDA. See Barrelet/Egloff, op.cit. No. 3 to Article 59 LDA.

[145] Barrelet/Egloff, op.cit. No. 2 to Article 59 LDA.

[146] Article 74, Section 2, LDA.

[147] Article 59, Section 3, LDA. ATF 125 III 141, published also in Medialex 2/99, p. 102.

[148] ATF 125 III 141, published also in Medialex 2/99, p. 102.

Supreme Court, the obligation of users towards the collective management organization lapses after 5 years.[149]

What evaluation can we give for the system of prior tariff control, as applied in Switzerland? Incontestably, and this is an advantage, it guarantees judicial security. Once approved, the tariffs will be supported by the law and can only be contested very rarely. The procedure of adoption of tariffs will safeguard the right to be heard of the users, to as great an extent as possible, in view of their large numbers. But the system, in practice, arouses certain criticism. The most important is certainly the criticism linked to the criteria defined by Article 60 of the LDA. This article codifies the principles of jurisprudence followed by the Commission under the former law, before 1 July 1993, for the tariffs concerning exclusive rights. The criteria were more or less transposed as they were, and applied to simple rights to remuneration. But for these rights, it is not sure whether they are adequate. Basically, Article 60 of the LDA rests on the idea that authors should receive a remuneration which is in proportion to the economic significance of the use of their works. If there have been receipts, they form the yardstick for the amount of the payment: In the absence of that, the costs are considered. The importance given to costs does not always have much sense, for example, when we are concerned with adopting a tariff applicable to non-commercial uses, such as private copies on blank supports. For the authors, the compensation should be determined as a function of their loss in earnings (owing to the fact that they have sold fewer discs) than as a function of the costs of the private copies for individuals. Why should the remuneration for creation, considered sufficient some years before, not be adequate any more, owing to the lowering in prices of the technology?[150] It seems to us that Article 60 of the LDA restricts, inadvisably, the concept of fairness, which should remain an element of natural law. It should be noted that *de lega lata* the Commission could already take into account the loss in earnings if it regarded the saving made by the consumer, who does not buy the disc, as a receipt in the sense of Article 60 of LDA.[151] This is perhaps an avenue which the management organizations could explore.

4. Distribution

A few words on the distribution of the remuneration collected. This area focuses the critics against the management organizations. They are often asked how they ensure the right holders receive the remuneration due to them. And as the ques-

[149] ATF 124 III 370.

[150] Finally, the costs of technical devices and materials for individuals has nothing to do with the authors' rights .

[151] Cf. Meeting of the3 Federal Tribunal 2A 142/173/174/1994 concerning common tariff 4 (c.5c).

tion is complex, occasionally, the suspicion of a lack of transparency may emerge.

However, the system is perfectly justifiable. First of all, the organization having accomplished its collection of the remuneration, distributes, after covering its expenses, the money to other Swiss management organizations, owing to the use of their repertoire.[152] For example, SUISA, an organization managing rights in the musical domain, is the central organ of collection, and pays a part of its collected revenue to *Suissimage*, which is the society operating in the audiovisual field; a part to Prolitteris, managing rights in respect of literary works, ae part in Swissperform, administering neighboring rights; and a part to the Swiss Society for Authors, for use of its repertoire consisting in particular of dramatic works. According to this system, the proportions owed to each category of rights holders for private copying on blank analogue supports, for example, are the following:

Audio supports:	
Composers and editors of music:	63.75 percent
Musical performers:	11.25 percent
Producers of phonograms:	11.25 percent
Radio and tv organizations:	2.5 percent
Other right holders:	11.25 percent
Audio-visual supports:	
Composers and music publishers:	9.48 percent
Musical performers:	7.5 percent
Producers of phonograms:	7.5 percent
Radio and TV organizations:	10 percent
Film authors:	28.77 percent
Producers of films:	28.77 percent
Other right holders:	7.98 percent

Each society then distributes the income for the works found in its repertoire, according to its own regulations. It starts by deducting the cost of its expenses. Afterwards, according to the law, it has the possibility to offer a part of the results of its management for social purposes and for the encouragement of cultural activities, the amount of which to be authorized by the highest body of the soci-

[152] The proportion of use of each repertoire is established on the basis of statistical enquiries, which will identify, for example, the average part of music, literature and films, etc. reproduced by consumers for private means.

ety (the General Assembly).[153] As to the division of the payments proper, Article 49 of the LDA authorizes the societies to evaluate the payment resulting from the use of works if an exactly proportional division were to entail an excessive expense. Since one is normally concerned with the mass use of works, it is regularly this method of distribution by evaluation which is practiced,[154] a fact we see demonstrated in the example of SUISA's payments on blank supports. It being given that the organizations do not possess extensive lists of the works reproduced for private purposes, they make the distribution according to the sources of the recording.[155] For example, this is based on the proportion of copies made on blank supports taken from radio or television. Then, the organizations separate a sum corresponding to the "blank support" payment, which they divide according to the programs provided by radio and tv organizations; thus, the same principles of distribution are used as for the remuneration received from broadcasting organizations.[156] In the same way, they identify the proportion of recordings made on blank supports from phonograms. Then, on the basis of these figures, they distribute a part of the "blank support" payment according to the principles applicable to the distribution of remuneration paid by the producers of phonograms. Finally, the last part is treated similarly to the distribution of the remuneration for retransmissions.[157] Thanks to this system, the general fairness of the distribution among right holders is guaranteed.

However, one can imagine other methods just as fair: thus, Swissperform divides the payment from blank supports among the neighboring rights holders

[153] Article 48, Section 2, LDA. Cf. Ch. 7.1 lit. C. of the distribution regulation of Suissimage; ch. 5.2 of the distribution regulation of SUISA; ch. 6 of the distribution regulation of the SSA concerning private copy remuneration, rental rights, rights of educational use of dramatic, dramatico-musicals and choreographic works etc.

[154] Cf. Ch. 15.10.1 of the regulation of division of Prolitteris for reprography: "From the time when it is not possible to find out directly from the users the works of members of Prolitteris that have been copied, and as a result of the excessive costs which would result from this, the division of payments available in the category 'books' and 'press' is defined by the group of works created by the rights holders of Prolitteris and available for copying".

[155] See ch. 5.5.4 of the distribution regulation of SUISA.

[156] Fundamentally, the SSA links the distribution of payments on blank supports to those payments resulting from broadcasting rights (ch. II of its regulations).

[157] Suissimage links the distribution of payments on blank supports to that of payments originating from retransmission (ch. 14.2. of the regulations of division of Suissimage).

basing the proportions, at least in part, on the charts for phonograms[158], videograms or tv[159] programs, and on the trade figures from the producers of phonograms.[160]

5. The principle of national treatment

Independently of the obligations stemming from international conventions, the principle of national treatment is guaranteed by Swiss Law, in so far as the protection which it affords is applicable to all right holders, whatever their nationality or place of residence is.[161] This general principle is the same for remuneration rights. However, there is also a law of reciprocity regarding rights: Article 35, section 4 of the LDA states that foreign performers who don't have their permanent residence in Switzerland only have the right to remuneration for the use of their phonograms or videograms in broadcasting, retransmission, and public communication if the state of which the performer is a national affords a similar right to Swiss nationals. Even if the performer has a temporary residence in Switzerland and only lives there for a limited period,[162] he still has rights. According to the proverb, "who can do a lot can also do a little; residence (that is to say residence with the intention to settle)[163] is regarded as permanent residence.[164]

6. Conclusion

The legal system applied to the rights to remuneration is interesting because it stems from the uncontrollable character of mass uses of works. Such uses characterize our information society. One can, therefore, legitimately pose the question if the legal system for the rights to remuneration is appropriate for dealing with present problems. In our opinion, the answer is positive and negative at the same time.

Positive, because of the important role given to the collective management organizations. History shows us: when we can no longer master our problems,

[158] CF. Ch. 2.1.1.2.1 and ch. 2.1.1.2.2. of the distribution regulation of Swissperform.

[159] Cf. Ch. 2.1.1.2.3 and ch. 2.1.2.2. of the distribution regulation of Swissperform.

[160] Cf. Ch. 2.2.8. of the distribution regulation of Swissperform.

[161] Barrelet/Egloff, op.cit., No. 2 to Article 1 LDA.

[162] Article 20, Section 1 lit. b of the Federal Law on the International Private Law of 18 December, 1987 (LDIP).

[163] Article 20, Section 1 lit. a LDIP.

[164] Barrelet/Egloff, op.cit. No. 15 to Article 35 LDA.

we ask them for help; the organizations must simplify the tasks of the users to a maximum in order to guarantee a fair level of remuneration. This consideration maintains all its value in the digital universe.

We must take into account the exclusive nature of copyright and its discretionary character. If authors and other right owners no longer have the right of prohibition concerning the use of their works, they lose a large part of their right to intervene. The mission to protect creative works then becomes extremely difficult, or impossible. To retract the power of exclusivity from authors should only be an *ultima ratio.* Creators need all possible means to fight against the unlawful use of their works. As regards present problems, an interesting fact about the legal system concerning the rights to remuneration is that it gives collective management a heightened role. Obligatory collective management is a model worthy of interest, but one must remember that it has an effect on exclusive rights. It is not necessarily the corollary of a legal license. All the more so as the mechanisms for the setting of tariffs is leading to a large state role in copyright.

As the Swiss statute on rental rights shows, we have, sometimes, expropriated creators a little too fast.