

## ***THE DEVELOPMENT OF STREAMING AND BROADCAST-LIKE SERVICES: ANY NEEDS FOR A CHANGE IN LEGISLATION***

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Technological innovation regarding the digitalization and compression of contents, the continuous increase in the processing and storage capacity of electronic devices, as well as in the Internet connection bandwidth, have yielded the development of new business models for the exploitation of cultural contents.

Audiovisual works and sound recordings are a clear example of contents widely exploited in the digital environment. We all know «*itunes*» and its system of pay-per-download; or «*Spotify*», through which the record producers license their repertoire to the service provider – but just in some cases this license also covers the performers' rights or royalties, as eventually agreed between the artist and the producer.

TV operators are also starting to base their business models in a more personalized service, clearly moving to the on demand services – «*what I want, when I want*» and replacing the traditional broadcasts. These new services are offered under the concept of «*TV a la carte*», or video on demand, and not just by the traditional TV operators, but also by those ones basing their services in an ADSL connection to the TV (IPTV), or even by Internet services providers offering the downloading of contents and/or streaming services.

Thus, the traditional release windows are getting simplified. In this sense, the online distribution of audiovisual recordings is replacing the traditional windows of rental and selling of DVDs.

One of the main factors in the development of these new models or services is the possibility for the user to access the contents from a number of devices, both fixed (TV, desktop computer) and mobile (mobile phones, laptops, mp3 players).

In sum, over the last decade the online exploitation of digital contents has been in continuous change, and new agents have entered the scene, boosting the need for legal certainty.

As many different right holders converge in any given digital content (be it a movie, a phonogram or a book), such as the authors, the performers, the producers, and the publishers, we must find a mechanism for granting them an adequate level of protection, enabling their legitimate participation in the exploitation of their contents.

The participation of the performer in the exploitation of his performances will first depend on the business model – whether such model allows or not the allocation and payment of royalties to the performer for each access and/or download. And secondly, but mainly, it depends on the negotiation power of the performers vis-à-vis the producer.

In fact, is the nature of these works which determines the transfer of every exclusive right from the performer to the producer, but it is the bargaining power which determines how the performer benefits from such transfer.

So, the question is how to ensure that performers will benefit from the online exploitation of their performances.

WPPT of 1996 provides the performers' exclusive right to authorize the making available of their performances fixed in a phonogram «*in such a way that members of the public may access them from a place and at a time individually chosen by them*». Article 3.2 of the Directive 29 of 2001 also provides such right, but not just for performers, also for authors and producers.

Therefore, this right should cover all the interactive or online exploitation models, for both audiovisual works and sound recordings, regarding streaming services as well as those others offering the download of the content. It is the essential right in the linear consumption, and should be the one in which the agents must focus when trying to find a proper balance between the performer, the producer and the user. In sum, the making available right is the «*tool*» which may enable the participation of the performer in the online exploitation of his performances.

But, what is the use of this right if the performer cannot negotiate an adequate remuneration for each access or download?

The protection of the performers' rights aims to incentivize their activity, enriching our cultural heritage – as well as an economic sector, the culture, representing an average 6% of the GDP. This protection must be effective, meaning that we must ensure the participation of the performer in the exploitation of his performances, in both the traditional market as in the online environment.

In this context, and given the negotiation power of the performer vis-à-vis the producer, I believe that such aim may only be achieved through a mechanism providing a remuneration right to the performer when he has transferred his exclusive right to the producer. And, in order to ensure the effectiveness of this right, it must furthermore be collectively managed by a collecting society. With this solution the performer not just secures its participation in the exploitation, but also won't depend on his negotiation power with the producer.

This was the solution adopted by the Spanish legislator when incorporating the 2001 Directive. In this sense, article 108 of the Spanish Intellectual Property Law provides that, otherwise agreed, the performers' exclusive right to authorize the making available is presumed to be transferred to the producer, keeping the performer the unwaivable right to an equitable remuneration, which shall be paid by the user making available their fixed performances (both in audiovisual and sound recordings), and shall be collectively managed by a collecting society.

This solution, which is not against the current EU legislation (the Directives set a minimum standard, which may be improved by the Member States in their respective legislations) , enables the pacific exploitation of those contents by the user with the mere license from the producer – who holds the exclusive rights from all the performers in the work, unless one of them has been «*strong*» enough to reserve his exclusive right, in which case he will have to exercise it, either directly by authorizing the use in the terms agreed with the user, or by mandating any organization for the collective management of such right.

In exchange of such legal certainty for both the producer and the user, and aiming to ensure the protection of the performers' rights, the performer keeps

an unwaivable right to an equitable remuneration, which shall be collected and distributed through the corresponding collective management organization. So, it is the task of these organizations to negotiate the tariffs with the users, claim the payment of the remuneration, and then proceed to its distribution among the performers whose performances have been made available. Such users can be an Internet service provider, a TV over IP operator, a mobile phone operator, etc.

To conclude this presentation, I would like to briefly mention the problem of the file-exchange, or peer-to-peer, networks, in which this solution does not work – neither for the producer, nor for the performer. The reason for such failure is that it is absolutely impossible for the producer to control the actual use of its repertoire. The only possibility for identifying the users is by asking the service provider for identification, but as long as these infringements are not considered criminal offences, the right to intimacy of the user prevails over the «*economic*» right of the producer.

So, regarding this kind of networks, we are in the same situation as we were some decades ago with the private copying. The solution then was to limit the exclusive right to authorize the reproduction, when carried out by individuals for their private use (impossible to control), but in exchange a fair compensation was provided for the right holders.

The problem is basically the same: the exchange of files through one of these networks is uncontrollable. Therefore, the same solution may be applicable by limiting the exclusive right to authorize such acts of making available, when carried out by individuals with no commercial purpose (for instance), and in exchange providing a fair compensation for the right holders. The amount of such compensation could depend, for instance, on the connection bandwidth.

This solution would not just ensure a fair compensation to all the right holders, but would also provide more legal certainty regarding both the uploading of contents in this kind of networks as well as in the downloading (the reproduction). Indeed, the downloading of these contents would be covered by the private copying exception, since the contents would be downloaded from a legal source.

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