

**Performers' Rights in European Legislation:  
Situation and Elements for Improvement  
- Updated Version -**

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**The present update covering the period 2005-2007 has been carried out by AEPO-ARTIS.**

**The first edition of the study released in 2007 covering the year 2005 was prepared for AEPO-ARTIS by Els Vanheusden, Lawyer, Antwerp, Belgium.**

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## About AEPO-ARTIS

AEPO-ARTIS unites 29 collective management organisations for performers operating in 22 European countries, and represents them at European level. It is a non-profit making organisation.

AEPO-ARTIS main objectives consist of developing and securing a wider recognition of the collective administration of performers' rights, strengthening the collaboration at a European level between the organisations concerned and improving the protection of performers' rights, in particular through international and Community legal frameworks.

AEPO-ARTIS members are:

Austria: LSG  
Belgium: URADEX  
Croatia: HUZIP  
Czech Republic: INTERGRAM  
Denmark: GRAMEX and FILMEX  
Finland: GRAMEX  
France: ADAMI and SPEDIDAM  
Germany: GVL  
Greece: APOLLON, DIONYSOS and ERATO  
Hungary: EJI  
Lithuania: AGATA  
The Netherlands: NORMA and SENA  
Norway: GRAMO  
Poland: SAWP and STOART  
Romania: CREDIDAM  
Russia: ROUPI  
Slovakia: OZIS and SLOVGRAM  
Slovenia: ZAVOD IPF  
Spain: AISGE  
Sweden: SAMI  
Switzerland: SWISSPERFORM  
United Kingdom: BECS

## Executive Summary

### Scope of the study

Performers in all cultural fields – musicians, singers, actors, dancers... – enjoy certain intellectual property rights aimed at protecting their performances and the use made of their work. These rights were introduced at international level and subsequently at European level.

In 2007, 15 years after the first provisions granting rights to performers were introduced in European legislation, AEPO-ARTIS released a study that covered large parts of the so called '*acquis communautaire*' as regards performers' rights in a panel of 10 European countries: Belgium, Czech Republic, Croatia, France, Germany, Lithuania, the Netherlands, Spain, Sweden and the United Kingdom.

Thus it covered countries where performers' rights existed before European legislation started dealing with them – such as Germany or France – as well as countries where these rights are new and their implementation results mainly from the adoption of European legislation – like Spain, the Netherlands or Lithuania.

This panel included long standing Member States of the European Union, recent Member States and a candidate country.

It reflected a variety of national situations as regards the nature of the rights granted to performers and related management practices.

The 2007 study assessed the impact of some of the main aspects of the European legal framework on the actual protection of performers' rights in Europe.

It was deliberately focused on actual, concrete facts describing how and to what extent performers enjoyed their rights. Legal and empirical economic data were compared with each other and collated with descriptions of rights management practices.

The year of reference for all the data used at the time was 2005.

The present edition gives an updated picture of the situation. It tries to evaluate the evolution of the situation since 2005.

This edition covers the years of 2005, 2006 and 2007. This provides a dynamic analysis of the state of play over a three year period.

Following the same methodology as the previous edition, the present study is based on information that was collected directly from performer collective management societies in the countries covered, so as to properly evaluate the direct effects of European legislation observable on the situation of performers, identify any possible unsatisfactory measures or those lacking provisions and make proposals to improve performance protection.

International treaties, European legislation and national laws are also used so as to draw analyses from the legal framework in application in each country. In addition, wherever possible, economic data from external sources is used for reference to give indications on the market framework in which performers' activities and the management of their intellectual property rights take place.

For reasons of availability of data, the scope of this new edition was limited to 8 of the 10 countries examined in the previous study. The countries covered by this update are the Czech Republic, Croatia, France, Germany, Lithuania, the Netherlands, Spain and Sweden. We have not reported on developments within Belgium and the United Kingdom

in this update.<sup>1</sup>

In addition to the various types of use previously covered in the 2007 edition, the present edition also looks at the situation of performers' rights and their management in the field of satellite broadcasting and cable retransmission across borders.

As for broader issues addressed in the study's previous edition – concerning the cultural and social functions of collectively administered rights for performers, obstacles faced by collecting societies when exercising these rights, comparative data in terms of revenue for performers' and authors' societies, allocation of rights revenue subject to collective management amongst performers and the part of their IPR revenues derived from royalties or contractual agreements – they are not revisited in the present edition. One can reasonably assume however that in the main, the descriptions in the 2007 edition of the AEPO-ARTIS study remain valid.

The present study focuses more particularly on the following aspects of performers' rights:

1. Right to an equitable remuneration for the broadcasting and communication to the public of commercial phonograms;
2. Satellite Broadcasting and Cable Retransmission;
3. Right of making available to the public;
4. Remuneration for private copying as a counterpart for an exception to the exclusive reproduction right;
5. Rental right;
6. Treatment reserved for recordings in the audiovisual field;
7. Duration of the protection of performers' rights.

These items are covered by an international legal framework – the Rome convention of 1961, the TRIPS agreement of 1994, the WIPO Performances and Phonograms Treaty (WPPT) of 1996 – by European legislation – mainly Directive 92/100/EEC, Directive 93/98/EEC, Directive 2001/29/EC and Directive 93/83/EEC<sup>2</sup> – as well as by national legislations.

After describing the legal framework applying to each of them, the study describes their practical implementation and gives indications about the impact of the *acquis communautaire* in each field covered.

This enables one to draw conclusions and recommendations of a technical and legal nature to improve the situation of performers in Europe and offer a better environment for administering their intellectual property rights.

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<sup>1</sup> However, our member BECS reports that the collection of secondary revenues for audio-visual performers within the UK grew over the three years relevant to this study.

The total revenue distributed by BECS comprises a combination of monies derived from application of exclusive rights of performers recognised within the United Kingdom and the collection of statutory payments falling due to collection within other EU Member States from private copying, rental and cable retransmission.

BECS allocated the following sums to performers in the three years relevant to this update :

£2.81 million in 2005 , £2.6 million in 2006 , £3.03 million in 2007.

<sup>2</sup> Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (repealed and replaced by its codified version, the Directive 2006/115/EC), Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (repealed and replaced by its codified version, the Directive 2006/116/EC), the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

## Main findings and recommendations

The study shows that the European legal framework has had and still has a contrasted impact on the enjoyment and exercise by performers of their rights.

Performers exercise their rights both through collective management and individually, through contracts. Observations show, however, that despite the beneficial aspects that specific collective agreements introduced in some performers' contractual clauses, for most performers common use has remained unchanged since 2005 and consists of having no alternative but to waive all their exclusive rights at once, for a one-off fee which is often derisory, on signing their recording or employment contract.

- **For most performers, the "rights to remuneration" they can enjoy even after they have transferred their exclusive rights remain an important, if not essential, source of remuneration.**

According to European legislation, performers are granted a number of 'exclusive rights' that require their prior authorisation before use is made of the performance - a sound or audiovisual recording for instance. Nevertheless, in practice most performers have to renounce the exercising of these rights to the benefit of those who will record and make further use of their performances.

Having transferred their exclusive rights, performers retain some 'remuneration rights' that are generally considered as unwaivable and not assignable. These remaining rights do not give performers the possibility of authorizing or preventing the use made of their performances but make it possible for them to receive appropriate remuneration for this use.

Under European Directives 92/100/EEC further codified in Directive 2006/115/EC and under Directive 2001/29/EC, performers enjoy 3 main guaranties of remuneration for the use of their performances that are not the result of exercising their exclusive rights:

- equitable remuneration for the broadcasting or communication to the public of commercial phonograms;
- remuneration for the private copying, as a counterpart for an exception to the exclusive reproduction right;
- equitable remuneration for rental in cases where the performer's exclusive rental right was transferred by means of contractual clauses.

- **To date, the exercise of these 3 categories of rights to remuneration accounts for around 95 % of the collection by performers' collective management societies. This proportion has remained remarkably stable over the three year period covered.**

In terms of revenues collected, the majority generally comes from equitable remuneration for **broadcasting and communication to the public** of commercial phonograms, which is subject to collective management in all the countries of the study and represents approximately **58 %** (57% in 2005, 59% in 2006, and 57% in 2007) of the total amount collected.

Remuneration for **private copying** accounts for **around 35%** of the total collection (38% in 2005, 34% in 2006, and 33% in 2007). It represents an essential remuneration for performers whose recordings are subject to widespread copying practices – from varied sources onto a wide range of media and devices.

As for the **rental right**, the situation differs widely from one country to another, but is not satisfactory. Although the laws in 7 of the 8 countries studied, with the exception of France, stipulated that, if the performer has transferred his exclusive rental right to the

phonogram or film producer, he shall retain a right to an equitable remuneration, This remuneration represents **less than 1 %** of the total collected by collective management societies. Several countries set for this remuneration right a mandatory collective management by collecting societies. To date, only in Germany and Spain, and to a very limited extent in the Czech Republic, is some remuneration actually collected through collective management.

The reasons for this are either that this remuneration right has been newly implemented or that the body liable for payment is not determined by law, which constitutes a major obstacle preventing collective management societies from exercising this right. Another obstacle lies in the absence of provisions establishing recourse to collective management for exercising this remuneration right.

These obstacles may help to explain why no remuneration for rental has been collected so far in the growing sector of online rental.

⇒ In the light of these 3 types of use, it appears that some general rules should be laid down within the legal provisions to guarantee the efficiency of collective management:

- the collective administration of these types of remuneration should be encouraged and, where needed, made compulsory;
- the body liable for payment, in most cases the user, should be clearly determined;
- it should be stated that remuneration must be paid and equitably shared between the categories of rightholders concerned;
- where a remuneration right is granted to performers, it should not be transferable to any other body except for the specific purposes of collective management.

All these elements are already present in European legislation, but never appear all together in the provisions covering the corresponding rights.

**• In the field of the internet and new services, a solution for performers being able to enjoy their rights is urgently needed. The introduction at European level in 2001 of a new right for the making available to the public of services on demand has proved ineffective for performers. Some countries have started implementing a system of a remuneration right in case of transfer of the making available exclusive right and this development deserves attention.**

Out of all the countries surveyed, only 1 collective management society succeeded in collecting any amount at all, and in that country, the amount collected averaged less than €30 per year! At a time when more and more commercial services for downloading are up and running, this sum highlights the obvious gap between the protection that the *acquis* intended to give to performers and the impossibility of their actually enjoying it.

Most performers are required to transfer this exclusive making available right with all their exclusive rights when they sign their recording or employment contract. European legislation has failed to take into account this common practice: unlike the provisions adopted for the broadcasting and communication to the public of phonograms, for instance, those provisions of *acquis* for the online making available of recorded performances via on-demand services do not give performers any specific right to remuneration alongside the right to consent to use. As a result, in practice the entitlement to receive remuneration from this making available right is side stepped by the "transfer" of rights with the result that most performers are currently receiving no benefit from the increasing exercise of these rights in a fast expanding offer of new media services.



⇒ Online use, like any type of use subject to intellectual property rights, should be subject to the principle of fair remuneration of the rightholders. The system applied to the making available right should be revised in order to become effective for performers.

- **The manner of collection of revenue in respect of cable retransmission needs to be consolidated.**

European legislation has provided a definition of exactly what cable retransmission is and set out which laws shall be applicable in a given situation. It has also stipulated that rightholders' rights should be exercised only through a collecting society. Largely, this has worked well, however, it can be seen that where national law fails to implement the European legislation accurately, and fails to ensure that an established collecting society is tasked to collect the remuneration, the system does not work.

- **The treatment reserved for performances in the audiovisual field is a total anachronism and needs to be improved.**

Whilst new online services are already incorporated in the *acquis*, the European legislator has continued to exclude the broadcasting and communication to the public performers' rights from the audiovisual field. Indeed, it has even established a presumption of transfer of the performer's rental right to the film producer that can extend to all performers' exclusive rights.

The situation remains unharmonized and inefficient as regards the possibility of performers retaining and enjoying remuneration for the various types of use made of their recordings in the audiovisual field. As a result of the lack of harmonization and of clear provisions on collective management mechanisms in this field, in several countries performers cannot receive any remuneration at all for their audiovisual rights.

⇒ There is no acceptable justification for the general presumption of transfer of performers' rights to the producer in the audiovisual field. This presumption should under no circumstances be encouraged by European legal provisions.

- The European Parliament recently<sup>3</sup> voted in favour of **a proposal for extending the term of protection of copyright and related rights**. The Parliament's legislative resolution states that the term of protection for fixations of performances and for phonograms should be extended to 70 years, rather than 95 years as the Commission had proposed. Regrettably, it only covers the musical sector but asks for an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector.

Whether or not the resolution becomes law is now dependent on the view taken by the Council of Ministers which has started examining the proposal.

Unlike authors' rights, which last for until 70 years after the author's death, performers' rights are protected in the European Union for an overall period of 50 years from the date of the performance or the first lawful publication or communication to the public. As a result, some performers lose the rights over their own performances while they are still alive. By way of comparison, neighbouring rights in other parts of the world such as the United States of America can be protected for a period of 95 years.

⇒ At a time when a large number of European sound and audiovisual recordings of high, durable quality, which are still very popular and much exploited, are coming

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<sup>3</sup> On 23 April 2009

to the end of their protection period and their performers may still count on these to make a living and continue to perform, it seems justified to extend the term of protection for performers' rights.

The results of the study also indicate that the rights administered through collective management represent a significant part of the revenues received by performers for the exercise of their rights.

⇒ Laying down an obligation incumbent on commercial users and producers to display to collective management organisations, on a free access basis, such complete and accurate information as is necessary to enable them to identify rightholders would certainly help them to efficiently administer their rights.

Lastly, it should be borne in mind that so far, moral rights are not included in Community law and have not been harmonised within European Member States. Directive 2001/29/EC was intended to bring the European Community in line with the WPPT, but failed to grant performers those moral rights that they are granted under the international treaty.

⇒ Performers' moral rights deserve to be reinforced at European level.

The recognition of performers' rights is essential for the development of a strong and dynamic European cultural sector and would contribute to its enrichment. In particular, internet use and services are developing fast and a significant part of this economy is driven by cultural content and services. However, the valuable contribution made by performers to the development of the information society remains largely unrewarded. Improving the situation of performers' rights in all cultural sectors can only happen if performers are given the practical tools through which to exercise and efficiently manage their rights.

# Introduction to performers' rights in European Law

## Background

Under international, European and national legislations, performers are granted a protection for their performances in the field of music, audiovisual, dance or any other category of performing arts. Those rights are generally called performers' rights.

Like authors' rights, performers' rights can be divided in two categories: moral rights and economic rights.

Apart from the recognition of their creative contribution, the introduction of authors' rights and performers' rights has been mainly justified on economical and cultural grounds. Financial rewards give artists the necessary incentives to create new work and contribute to their income. Recouping the investment by artists supports cultural development. It also safeguards employment and encourages new job creation.

Abundant examples of this economical justification appear in the various European legislations in the field of authors' and performers' rights. To give some examples, recital 7 of Directive 92/100/EEC (recital 5 in 2006/115/EC codified version) reads as follows:

Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work (...). The possibility for securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

According to recital 4 of Directive 2001/29/EC:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation (...) and lead in turn to growth and increased competitiveness of European industry (...).

Recital 10 of the same directive furthermore underlines that:

If authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work (...). The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand services', is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

European legislation relating to authors' and performers' rights clearly aims to give authors and performers an instrument to allow them to make decisions about the use of their own creations and performances and to enable them to generate an adequate income for this exploitation.

This instrument can consist of the recognition of exclusive rights - attributing to rightholders the decision-making power to authorise or to prohibit the use of their work - which supposedly gives them a strong bargaining position.

Exclusive rights concern the fixation, reproduction, distribution, rental, broadcasting, communication to the public - to a limited extent - and the making available of performances.

What has characterized performers' rights in comparison with authors' rights to date is the weak exercising of their exclusive rights. Unlike authors, performers are usually obliged by most producers to sign standard "all rights" (buy-out) contracts: according to these employment or recording contracts, most performers transfer all their exclusive

rights at the time when the contract is signed in return for an overall lump sum which often happens to be derisory or even sometimes without remuneration.

In accordance with the *acquis*, in parallel to these exclusive rights performers enjoy three main sources of remuneration:

- Right to equitable remuneration for broadcasting and communication to the public of their performances,
- Right to equitable remuneration for rental,
- Remuneration for private copying as a counterpart for the use of the corresponding exception to the reproduction right.

Equitable remuneration rights and the remuneration granted under exceptions and limitations to certain exclusive rights do not give rightholders the possibility to authorise or to prohibit the exploitation of their work but do at least ensure them an income.

They are nonetheless generally considered by law as non-transferable, which means that they remain in the hands of the performers concerned whatever the provisions of the contracts signed.

Hence, most performers are depending much more on the remuneration rights and the remuneration from private copying than on the exclusive rights to receive an income from the exploitation of their rights.

## Scope

This study gives an update of a study carried out for AEPO-ARTIS and released in 2007 that analysed the situation in 2005. It tries to evaluate the evolution of the situation since 2005. This edition covers the years of 2005, 2006 and 2007. This provides a dynamic analysis of the state of play over a three year period.

Like its previous edition, this study assesses the impact of some of the main aspects of the *acquis communautaire* concerning performers' rights on the actual situation of performers and, more particularly, on the collective management of their rights. It aims to determine to what extent and in which ways the *acquis communautaire* has impacted on the current situation of performers, identifying any possible unsatisfactory measures, inadequate or incomplete provisions and making proposals for improving performance protection.

For this purpose, both the content and the actual exercise of the main categories of rights assigned to performers by the European Directives were scrutinized.

In addition to the various types of use previously covered in the 2007 edition, the present edition also looks at the situation of performers' rights and their management in the field of satellite broadcasting and cable retransmission across borders.

For reasons of availability of data, the scope of this new edition was limited to 8 of the 10 countries examined in the previous edition. The countries covered by this update are the Czech Republic, Croatia, France, Germany, Lithuania, the Netherlands, Spain and Sweden. We have not reported on developments within Belgium and the United Kingdom in this update.<sup>4</sup>

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<sup>4</sup> However, our member BECS reports that the collection of secondary revenues for audio-visual performers within the UK grew over the three years relevant to this study.

The total revenue distributed by BECS comprises a combination of monies derived from application of exclusive rights of performers recognised within the United Kingdom and the collection of statutory payments falling due to collection within other EU Member States from private copying, rental and cable retransmission.

BECS allocated the following sums to performers in the three years relevant to this update :

It covers countries where performers' rights existed before European legislation began to deal with them - such as Germany or France – as well as countries where these rights are new and their implementation is mainly the result of adopting European legislation – such as Spain, the Netherlands or Lithuania. This panel includes long standing Member States of the European Union (France, Germany, the Netherlands, Spain and Sweden, recent Member States (the Czech Republic, Lithuania) and an acceding country (Croatia). It reflects a variety of national situations as regards the nature of the rights granted to performers and relating management practices. Thus, the chosen panel of countries allows comparisons to be made in relation to whether and how the *acquis communautaire* has impacted and still impacts on the rights of performers.

The present study focuses more particularly on the following aspects of performers' rights:

1. Right to an equitable remuneration for the broadcasting and communication to the public of commercial phonograms;
2. Satellite Broadcasting and Cable Retransmission;
3. Right of making available to the public;
4. Remuneration for private copying as a counterpart for an exception to the exclusive reproduction right;
5. Rental right;
6. Treatment reserved for recordings in the audiovisual field;
7. Duration of the protection of performers' rights.

After describing the legal framework applying to each of them, the study describes their practical implementation and gives indications about the impact of the *acquis communautaire* in each field covered.

This enables one to draw conclusions and recommendations of a technical and legal nature to improve the situation of performers in Europe and offer a better environment for administering their intellectual property rights.

As for broader issues addressed in the study's previous edition - concerning the cultural and social functions of collectively administered rights for performers, obstacles faced by collecting societies when exercising these rights, comparative data in terms of revenue for performers' and authors' societies, allocation of rights revenue subject to collective management amongst performers and the part of their IPR revenues derived from royalties or contractual agreements – they are not revisited in the present edition. One can reasonably assume however that in the main, the descriptions in the 2007 edition of the AEPO-ARTIS study remain valid.

Although the question of the recognition and the definition of moral rights is of significant interest and worthy of special attention, it does not fall within the scope of this study which concentrates on economic rights. Moral rights have not been subject to harmonisation at Community level and are not part of the *acquis*. Moral rights were given to performers with regards to sound recordings at international level with the WPPT. The Directive 2001/29/EC did not fully integrate all provisions of the WPPT and deliberately left moral rights out of its scope. Nevertheless, several national laws of European countries have granted moral rights to performers. Given this situation, one might certainly advise for the question of moral rights for performers to be considered at Community level.

Nor does this study examine Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 regarding the enforcement of intellectual property rights: this Directive, currently under assessment by the European institutions, is intended to establish a number of general provisions to coordinate the measures taken on a national scale to ensure - without prejudice to the specific provisions on the enforcement of rights

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£2.81 million in 2005 , £2.6 million in 2006 , £3.03 million in 2007.

and on exceptions contained in Community legislation concerning copyright and related rights - that intellectual property rights, including the performers' rights subject of this study, are enforced.

## **Methodology**

This study updates our previous study published in 2007, which was the first of its kind in the field of performers' rights: never before had legal provisions and actual practices been compared on the basis of figures and experience gathered directly from those bodies that manage these rights.

Following the same methodology as the previous edition, the present study is based on information that was collected directly from performer collective management societies in the countries covered, so as to properly evaluate the direct effects of European legislation observable on the situation of performers.

The study is based firstly on examining legislation, and secondly on analysing practice. International treaties, European legislation and national laws are used so as to draw analyses from the legal framework in application in each country. In addition, wherever possible, economic data from external sources is used for reference to give indications on the market framework in which performers' activities and the management of their intellectual property rights take place.

Empirical data, both quantitative and qualitative, were collected through questionnaires addressed to European collecting societies for performers. Answers for the 2005 to 2007 period were received from the following collecting societies: INTERGRAM (the Czech Republic), HUZIP (Croatia), ADAMI, SPEDIDAM (France), GVL (Germany), AGATA (Lithuania), NORMA, SENA (the Netherlands), AISGE, AIE (Spain) and SAMI (Sweden).

As regards contractual practices and the way performers exercise their rights individually, data were less accessible; findings in this regards are necessarily limited but reflect the information that came out of the documentation available.

Legal provisions and practice regarding performers' rights are compared in order to produce a proper assessment of their current situation and identify where changes are needed.

On the basis of the main findings emerging from the data collected, some suggestions for improvements have been formulated.

## **Layout**

Following the Introduction and Executive Summary, Part I of the study describes the applicable international and European provisions for each of the 7 items studied. The national legislations and practices in the countries studied are compared. The ways and the extent to which European legislation has been implemented is analysed and its impact on performers' rights is assessed. Wherever possible, statistical data is presented on the economic development of performers' remuneration over the years 2005-2007.

Part II builds on the main findings of the analysis to conclude and make some recommendations for the appropriate protection of performers' rights, including suggestions for changes in European legislation and pointers for further reflection.

Tables and charts are incorporated in the corresponding chapters. A list of all of them can be found at the end of this document.



## **PART I. Analyses per topic**

### **1. Right to an equitable remuneration for broadcasting and communication to the public of commercial phonograms**

#### **1. a. Legal framework**

##### *International legal framework*

The Rome Convention of 1961 introduced in art. 12 the principle that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, then a single equitable remuneration must be paid by the user to the performer, or to the producer of the phonogram or to both.

In the Rome Convention, a “phonogram” is defined as “any exclusively aural fixation of sounds of a performance or of other sounds”.

In practice, a phonogram is any fixation of sounds, taking the form of a CD or a MP3 file for instance.

Under the provisions of the Rome Convention, there are 3 conditions for the equitable remuneration to be paid, which relate to the type of phonogram, the character of its use and its purpose.

Not all phonograms are covered by this remuneration clause: the article applies only to published phonograms and only if the publication was for commercial purposes. The Rome Convention only defines “publication” as the offering to the public (of a performance) in reasonable quantities.<sup>5</sup> It does not provide a definition of “commercial purposes”. In fact, almost all phonograms are published for a direct or indirect financial benefit.

Furthermore, the use must be direct. This means that the person who takes the decision to make use of the phonogram is the one called upon to pay. Use by way of re-broadcasting would not be considered to be a direct use.

Finally, the phonogram in question must be used for broadcasting or for “any communication to the public”. Other types of use are not covered.<sup>6</sup>

Performers are not guaranteed remuneration in any case, since the Convention foresees 3 possibilities: payment to the performers, payment to the phonogram producers or to both. Failing an agreement between the parties concerned, domestic law may lay down the conditions relating to sharing this remuneration.

In addition, art. 16 of the Rome Convention leaves room for numerous reservations. A contracting State may at any time declare that it will not apply art. 12 entirely - or partially - in respect of certain uses. A contracting State may also declare that it will not apply art. 12 as regards phonograms whose producer is not a national of another contracting State.<sup>7</sup>

Finally, a contracting State which grants payments for secondary uses of a phonogram whose producer is a national of another contracting State, may limit the protection to the extent to which and to the term for which the latter State grants protection to nationals

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<sup>5</sup> Art. 3 (d) Rome Convention

<sup>6</sup> Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981, pp. 47-49.

<sup>7</sup> In a State that makes such a declaration, nothing would be payable either to the producer or to the performer if the producer is not a national of another contracting State.



of the former.<sup>8</sup>

The TRIPS Agreement of 1994 does not envisage any system of equitable remuneration for the broadcasting or communication to the public of performances. In addition, under this agreement there is no protection against unauthorized broadcasting or communication to the public when the performance is itself already a broadcast performance or is made from a fixation.

Art. 15.1 of the WPPT of 1996 provides performers and producers of phonograms with a 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.

The WPPT updates the definition of "phonogram" as worded in the Rome Convention, by also allowing "representation of sounds" and omitting the words "exclusively aural" (see art. 2 (b)).<sup>9</sup> In an agreed statement, it is specified that the definition of a phonogram does not suggest that rights to the phonogram are in any way affected by their incorporation into a cinematographic or other audiovisual work.

This treaty extends the right to a remuneration to direct and indirect use.

In the application of its art. 15, phonograms made available on demand would be considered to have been published for commercial purposes.<sup>10</sup>

The WPPT confirms that both performers and producers are entitled to remuneration. Nevertheless, the treaty still provides a possibility for contracting States to apply exemptions to this right to equitable remuneration: according to art. 15, §3 of this Treaty, any contracting party can declare that it will apply these provisions only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

### ***European legal framework***

According to art. 8.2 of the European Directive 2006/115/EC (formerly Directive 92/100/EEC), Member States have to provide a right ensuring 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. The Member States shall further ensure that this remuneration is shared between the relevant performers and producers. In the absence of an agreement, Members States may lay down the conditions for sharing this remuneration between the performers and the producers.

This provision of the Directive was inspired by art. 12 of the Rome Convention, but by omitting the limitation to "direct use", it extended the remuneration right to be additionally payable for the indirect use of phonograms published for commercial purposes. Moreover, it guarantees performers a real right to remuneration. In particular, it does not envisage any possibility of expressing reservations concerning the application of this right to remuneration.

### ***National legal framework***

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<sup>8</sup> However, the fact that the contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered to make a difference to the extent of the protection (art. 16, 1, a, iv, second sentence).

<sup>9</sup> According to art. 2 (b) of the WPPT a phonogram is the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work. In the Rome Convention a phonogram is defined as any exclusively aural fixation of sounds of a performance or of other sounds (art. 3b).

<sup>10</sup> According to art. 15, §4 of the WPPT, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as being published for commercial purposes.

All of the countries studied provide in their national legislation a right to remuneration for broadcasting and communication to the public of phonograms. However, the extent of the remuneration right differs amongst the countries depending on the uses for which the remuneration is legally due and collected (see table 1.1). The methods of the calculation, payment and sharing of the remuneration differ as well (see table 1.2) from one country to another.

Although this is not envisaged in the international treaties or European Directives, certain countries have extended the right to remuneration for broadcasting and communication to the public to audiovisual fixations (see table 1.3).

*Uses for which an equitable remuneration is legally due and collected*

As summarized in table 1.1, national legal situations vary as regards the uses that trigger a right to remuneration. In most countries remuneration is due for the “traditional uses”, namely communication to the public and broadcasting through the radio and television channels, over the air, via cable or satellite, of performances.

Until recently, due to a decision of the French “Cour de Cassation” (Supreme Court), France was the only one of the covered countries where no remuneration was collected for broadcasting of programmes incorporating audio phonograms via television channels<sup>11</sup>. In 2006 the national code for intellectual property (CPI) was revised to transpose the provisions of European Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. In this context, art. L214-1 of the CPI of 1 August 2006 relating to broadcasting and communication in public places was amended. The new wording of this article may open ways for a commercial phonogram included in an audiovisual programme to be subject to equitable remuneration upon broadcasting of the audiovisual programme.

However, the precise legal position remains uncertain.

Specifically, the new wording states that where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose its direct communication in a public place, or its broadcasting or simulcasting. Nor can either party oppose the reproduction by or on the account of a broadcasting organisation of a phonogram in order for this phonogram to be embodied in an audiovisual work for a broadcast on its own channel or for broadcasting by other organisations paying the equitable remuneration.

Such uses of phonograms published for commercial purposes shall entitle the performers and producers to an equitable remuneration.

This new wording adds the act of reproduction of a phonogram by or for the account of a broadcasting organisation for its own programme to the category of acts which performers and producers cannot oppose, but for which they are entitled to equitable remuneration.

In this respect, it should be noted that this article in the French law contradicts the existing *acquis communautaire* in that it creates an exception to the performer's and phonogram producer's exclusive right to authorise reproductions of a phonogram. Such an act of reproduction is not in the exhaustive list of authorised exceptions contained in the Directive 2001/29/EC.

In the Czech Republic no equitable remuneration is envisaged for communication to the public. In practice, however, the collecting society INTERGRAM administers an exclusive right of performers corresponding to acts of communication to the public and of broadcasting, and collects the relating remuneration.

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<sup>11</sup> For many years, the collecting society SPEDIDAM has raised proceedings against television channels and producers for the application of the equitable remuneration principle in the field of television.

Concerning the “new media”, most countries consider that an equitable remuneration is due for “webcasting” and “simulcasting”. In some countries (e.g. Croatia, the Czech Republic, the Netherlands), “webcasting” is considered to be a type of “broadcasting”. In others (e.g. Spain, Sweden), it falls under the broad term of “communication to the public”. Some countries (e.g. the Czech Republic, France, Lithuania) stipulate an equitable remuneration for “simultaneous retransmission by cable of the broadcast”, therefore including “simulcasting”. In other countries like Croatia, “simulcasting” is considered to fall under the term “broadcasting” as well.

Most performer organisations have not yet started to collect remuneration for “webcasting” or “simulcasting”, or have started only recently.

The French legislator<sup>12</sup> has narrowed the term “communication to the public” in their national legislation to “communication in public places”, thus imposing an additional condition for performers to be granted equitable remuneration: the place where the communication to the public takes place must be of a public nature. This legislation also excludes commercial phonograms used for a show.

Since according to current international definitions, “webcasting” is not considered to be “broadcasting” and does not fall under the narrow term of “communication in public places”, no equitable remuneration is currently collected in France for this type of use.<sup>13</sup>

In Spanish, Croatian and Lithuanian legislations the making available on demand of phonograms is considered to be an act of communication to the public for which an equitable remuneration is due. In practice, however, in 2007 the performers’ organisations had not yet started collecting equitable remuneration for this use.

In Croatia and Lithuania the lack of collection for this type of use can partly be explained by the limited development of commercial online on-demand services. Since this market is expected to develop quickly, changes are expected as well in terms of collection and distribution of remuneration for performers for these types of use.

The situation in Spain<sup>14</sup> has changed recently: in the context of reviewing the national law to implement the provisions of Directive 2001/29/EC, the Spanish law 23/2006, of 7 July 2006 amended IP Law of 1996. It considers the making available right as a specific act of communication to the public and introduces a right for performers having transferred their exclusive making available right to perceive equitable remuneration for their performance fixations made available to the public on demand<sup>15</sup>.

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<sup>12</sup> The same specificity is to be found also in the Belgian law.

<sup>13</sup> According to the international and European definition, broadcasting is *the transmission by wireless means* for public reception of sounds or of images and sound or of the representations thereof (Rome Convention, art. 3 f, WPPT art. 2 f, art. 8.2. Directive 92/100 EEC further codified as 2006/11/EC). This definition excludes the transmission via the internet if it is carried out by means of wire.

<sup>14</sup> The position in Portugal is similar. It is provided in Article 178º, Law 50/2004 that a performer who has transferred the making available to the public of his or her performances, by wire or wireless means, retains the right to receive a *one-off* unwaivable equitable remuneration. The management of this remuneration is subject to a collective agreement signed between the users and the collective management society which manages rights of the same category. It is also deemed to be mandated to manage the rights of non-members.

<sup>15</sup> For more detailed information see chapter on the making available to the public of services on demand.

**Table 1.1 Equitable remuneration for broadcasting and communication to the public of commercial phonograms - Uses for which an equitable remuneration is legally due and collected**

Countries	Communication to the public	Broadcasting through the radio	Broadcasting through TV channels	Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public?
<b>Croatia<sup>16</sup></b>	Yes	Yes	Yes	Yes but not yet in practice	Yes but not yet in practice	Yes but not yet in practice	No
<b>Czech Republic</b>	No equitable remuneration provided by law In practice INTERGRAM administers the exclusive right for performers for communication to the public.	Yes	Yes	Yes	Yes	No See chapter 2, paragraphs on exclusive making available right	No
<b>France</b>	Yes on the condition that the performance is not used for a show.	Yes	Paralysed by a conflict between performers' organisations, phonogram producers and audiovisual broadcasters. The new wording of art. 214-1 in the law of 1 August 2006 is unclear. It may suggest that remuneration is due for acts of broadcasting of audiovisual works incorporating audio performances. In practice, no remuneration collected from 2005 to 2007.	No	Yes but not yet in practice	No	No
<b>Germany</b>	Yes	Yes	Yes	Yes	Yes	No	No
<b>Lithuania</b>	Yes	Yes	Yes	Yes	Under debate	Yes but not yet in practice	No
<b>Netherlands</b>	Yes	Yes	Yes	Yes	Yes	No	No
<b>Spain</b>	Yes	Yes	Yes	Yes, but not yet in practice	Yes, but not yet in practice	Yes, but not yet collected	Theatrical release of films
<b>Sweden</b>	Yes	Yes	Yes	Yes	Yes	No	No

<sup>16</sup> In Croatia the right of broadcasting and re-broadcasting of fixed performances, as well as the right of public communication and the making available right of a fixed performance are also exclusive rights (art. 125 Copyright and related rights act).

*Terms of remuneration:*

All countries provide a right to remuneration for performers and producers.

In most countries the remuneration is determined by mutual agreement between collecting societies and users. Some countries such as France envisage an administrative organ if no agreement is reached. In certain other countries (e.g. Croatia, Germany), the collecting societies determine the tariffs and the users have a possibility to challenge these tariffs.

Only France has included in its legislation a direct reference to the revenues from the exploitation in order to determine the equitable remuneration.

In all covered countries the equitable remuneration is payable by the user as stated in European Directive 2006/115/EC.

In France, Lithuania and the Netherlands, the law stipulates that both performers and producers are entitled to equal shares of the remuneration. However, other countries do not specify in their legislation the division of remuneration between performers and producers. The table (1.2) shows that, in practice, this division is generally fairly balanced. Mostly remuneration is divided in equal shares between performers and producers.

In the majority of the countries covered – namely in Croatia, Czech Republic, France, Lithuania, Netherlands and Spain –, the responsibility of collecting societies for administering this remuneration has been made compulsory by law.

In Germany, there is no system of compulsory licence but this right can only be assigned to a collecting society for the purposes of it being efficiently exercised. Thus in practice, it is generally administered by a collecting society.

As for Sweden, the claims of the performers and those of the producer against the user of a recording are to be addressed at the same time. For this reason, in this country the exercise of this right is managed by means of cooperation between the collecting societies for performers and for producers.

**Table 1.2 Equitable remuneration for broadcasting and communication to the public - Terms of remuneration**

<b>Countries</b>	<b>Amount of the remuneration</b>	<b>Body liable for payment</b>	<b>Rules about sharing of the remuneration between performers and producers</b>	<b>Intervention of collecting societies</b>
<b>Croatia</b>	Tariffs determined by collecting societies. If the users do not agree, a Council of experts renders its opinion. The Council consists of experts on copyright and neighbouring rights, mainly from the academic and legal field.	Not determined in the law  In practice the user	The law provides that the performer is entitled to "a share".  In practice: the collecting society of producers and the collecting society of performers collect separately; globally, the share of each party is 50/50.	Compulsory licence
<b>Czech Republic</b>	Tariffs determined by agreements between collecting societies and users	The user	Not specified by law  In practice, agreement between producers and performers: 50/50	Compulsory licence
<b>France</b>	Remuneration based on the revenue of exploitation or failing that (in specific cases) a lump sum. Tariffs determined by agreements between collecting societies and users; failing an agreement, tariffs determined by an administrative commission comprised of representatives of users, of rightholders and of the government	The user	By law: 50/50	Compulsory licence
<b>Germany</b>	Tariffs are determined by collecting societies and open to arbitration between collecting societies and users and to further legal action.	The user	The law provides only that the producer of the phonogram is entitled to receive an equitable share of the remuneration of the performer.  In practice, as agreed between performers and producers and stipulated in an annual allocation plan: <i>Audio:</i> -public performance: performers 64 % / producers 36 %. - broadcasting 50/50 <i>Video:</i> -public performance and broadcasting: performers 20 % / producers 80 %	Can only be assigned to a collecting society, but not compulsory  In practice: collecting society GVL

<b>Lithuania</b>	Tariffs to be determined by agreements between collecting societies and users	The user	By law: 50/50 unless mutual agreement provides otherwise. In practice: no other agreement, hence 50/50	Compulsory licence
<b>Netherlands</b>	Equitable remuneration	Not determined by law In practice: the user	By law: 50/50	Compulsory licence
<b>Spain</b>	Each collecting society fixes its own tariffs and then negotiates their implementation with the users.	The user	<i>Audio:</i> By law: 50/50 <i>Video:</i> Each collecting society fixes its own tariffs.	Compulsory licence
<b>Sweden</b>	Tariffs determined by agreements between collecting societies and users.	The user	Not specified by law In practice: 50/50 by agreement between producers and performers	Not specified except for retransmission through cable, in which case there is a compulsory licence. Yet collective management is indirectly imposed by law.  In practice: collecting society

*Types of fixed performances for whose use remuneration is legally due and collected*

Table 1.3 shows the types of fixed performances for which use remuneration is legally due and collected.

Type of fixation - Pursuant to international treaties and to art. 8.2 of Directive 2006/115/EC, remuneration is only due for phonograms published for commercial purposes. However, in certain countries (e.g. Croatia and Sweden) remuneration is due for any phonogram, or is extended to any kind of published phonograms (as is the case in Germany).

Croatia, Germany and Spain have extended the right to remuneration to the broadcasting and communication to the public of audiovisual performance fixations.

In Croatia, audiovisual fixations are included in principle but collection for this type of fixations is not yet applied in practice.

In Germany, remuneration is collected for the broadcasting and communication to the public of music videos. Yet, according to the collecting society GVL, this collection is based on the transfer to the collecting society of the exclusive performers' broadcasting right by the producer. The German law is not altogether clear in this respect. On the one hand, published videos are mentioned in the provision relating to equitable remuneration (art. 78.2 of the Law of Authors' rights and neighbouring rights). On the other hand, there is a legal presumption of transfer of the broadcasting right of the performer to the producer with regard to cinematographic works (art. 92 (1)). Therefore, for the time being, the performer and producer collecting society GVL collects the equitable remuneration for the performers' broadcasting rights for audiovisual productions only when the film producer has transferred his exclusive broadcasting right to this collecting society. So far, this transfer to GVL by the producer has only occurred in cases of music videos.

Thus, so far this remuneration right is only fully put into practice in Spain.

Type of carrier - A phonogram can be fixed either on audio carriers, like CDs, or on audiovisual carriers, as is the case for musical video clips for instance.

Although art. 8.2 of the Directive does not limit the remuneration to phonograms on audio carriers, in France, as a result of the aforementioned "Cour de Cassation" (Supreme Court) decision, remuneration has been excluded for phonograms included in audiovisual works. In other countries, even if the carrier is not specified by law or by court decision, the remuneration is currently only collected for phonograms on audio carriers and not for phonograms incorporated in an audiovisual work (e.g. Lithuania and the Netherlands). Hence, in these countries, every time music is inserted in video clips or in films or in any other content that is not carried by an audio carrier, no remuneration is due so far to performers or producers.

In the Czech Republic (and Germany to a more limited extent as explained above), some remuneration is collected for music video for the exclusive right of communication to the public. There, the remuneration is paid by the broadcaster or the other user concerned to INTERGRAM in application of a licence entrusting the collecting society to collect for the rightholder.

In Sweden, according to SAMI's mandate, the music performers commission SAMI to handle their remuneration right for public performance and communication to the public (incl. broadcasting and retransmission) but also the so called "secondary uses" of recorded performances that relate to the exercise of exclusive rights, such as the inclusion of a sound fixation into a video subsequent to a first use. In practice SAMI collects remuneration for music videos when they are publicly performed in public places (stores, bars etc). The collected remuneration is categorised under public performance and shared 50/50 with the collecting society for music producers.



As to broadcasts of music videos, according to an agreement between the collecting society for producers in Sweden and the Swedish Musician Union a certain percentage of what the producer(s) has received for the broadcast of the video is to be paid to the performers through the union. The impact of this agreement is limited by the fact that it is on condition that the performers' rights are not already transferred to the producer in the agreement between the performer and the producer.

**Table 1.3 Equitable remuneration for broadcasting and communication to the public - Type of fixed performance for whose use remuneration is legally due and collected**

Countries	Phonograms (audio fixations)		Audiovisual fixations
	Type of phonogram subject to remuneration: published for commercial purposes or any phonogram	Type of carrier	
<b>Croatia</b>	Any phonogram	Any carrier	Included, but not yet put in practice
<b>Czech Republic</b>	Phonograms published for commercial purposes Yet remuneration is sometimes extended by contract with broadcasters and rightholders to any phonogram.	Any carrier	Not included but exclusive right for broadcasting and communication to the public included under contracts with rightholders also for music videos
<b>France</b>	Phonograms published for commercial purposes	Not specified by the law. According to the French Supreme Court, once a phonogram has been included in an audiovisual work no equitable remuneration is due. The new wording of art. 214-1 in the law of 1 August 2006 seems to modify the situation.	Not included
<b>Germany</b>	Published phonograms	Any carrier	Included In practice yet: only for music videos
<b>Lithuania</b>	Phonograms published for commercial purposes	Not specified by the law. In practice: collection only for phonograms on audio carriers	Not included
<b>Netherlands</b>	Phonograms published for commercial purposes	Not specified by the law. In practice: collection only for phonograms on audio carriers	Not included
<b>Spain</b>	Phonograms published for commercial purposes	Not specified by the law. In practice: any carrier	Included
<b>Sweden</b>	Any phonogram In practice: mainly phonograms published for commercial purposes	The remuneration right is restricted to "sound recordings", but applied if a film soundtrack is used separately. It also applies if a sound recording is broadcasted through TV. The type of carrier/device is not decisive.	Not included, but exclusive right for broadcasting and communication to the public included under contract with rightholders also for music videos

## **1. b. Practice**

### **The exercise of the right to remuneration**

The amount collected for broadcasting and communication to the public represents an essential part of the revenues received by performers from the collecting societies. There has been no change since 2005 with this remaining the main source of revenues, representing on average 58% of the total remuneration collected by the performers' collecting societies in the countries examined.

In all countries the right to remuneration is exercised through a collecting society.

Tables 1.4.1 to 1.4.4 below clearly show that in most countries remuneration is only collected for the use of phonograms. However, in certain countries, such as Croatia, Germany and Spain, where remuneration can also be collected for audiovisual fixations, collection for these audiovisual fixations has remained much lower than for audio fixations.

Only in Spain is a significant amount collected every year for audiovisual fixations. The collecting society AISGE collected on average € 19 million per year in 2006 and 2007. The amount mentioned in table 1.4.1 (and 1.4.4) for TV-broadcasting in 2005 is significantly higher since it includes remuneration collected for previous years that could not have been collected earlier. In Germany and the Czech Republic the amount collected is far lower than in Spain, since it only concerns music videos for whose exclusive rights have been transferred by the producers to the collecting society GVL. In Sweden a limited amount is collected as equitable remuneration for the use of music videos. In Croatia no remuneration has been collected so far for audiovisual fixations.

The tables also show that most of the remuneration is collected for communication to the public and broadcasting, and that webcasting, simulcasting and making available on demand generate far less, or even no remuneration for performers.

As regards webcasting and simulcasting, no amounts are currently collected in Croatia, France and Spain. In the Czech Republic and Sweden the amounts collected are still very small (although Sweden is seeing a promising upward trend). In Germany and the Netherlands the amounts collected cannot be precisely determined, since they are reported together with remuneration collected for "broadcasting". In Lithuania collection has started for webcasting, but not for simulcasting or making available. The revenue comes from radio stations that make their broadcasts solely available on the internet.

However, it seems that in the countries where revenue has started being collected for webcasting, there has been substantial growth since 2005. This said, it represents only an increase of approximately 185.000 euros over three years, between 2005 and 2007. The total amount collected for webcasting in 2007 (slightly under € 224.000) is very modest considering that on-demand music and film services have been established on parts of the European market for several years, with some of these services being very successful.

In Spain, the recent change in law is expected to enable collection and distribution to performers of equitable remuneration for the making available of performance fixations within the coming months.

**Table 1.4.1 Equitable remuneration for broadcasting and communication to the public - Collection for performers in 2005**

*Gross amounts in euro (VAT not included)*

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
<b>Croatia</b> <i>HUZIP</i>	488.218	0	1.167.044		0	0	0	NA	NA	<b>1.655.262</b>
<b>Czech Republic</b> <i>INTERGRAM</i>	1.341.937	0	778.921	782.167		8.810	0	32	NA	<b>2.911.867</b>
<b>France</b>	12.088.240	NA	12.666.958	53.364	NA	NA	0	NA	NA	<b>24.808.562</b>
<i>ADAMI</i>	<i>5.980.240</i>		<i>6.345.958</i>							
<i>SPEDIDAM</i>	<i>6.108.000</i>		<i>6.321.000</i>	<i>53.364</i>						
<b>Germany</b> <i>GVL</i>	21.245.440	159.000	27.035.000	6.570.000	853.400	Included in broadcasting		NA	NA	<b>55.862.840</b>
<b>Lithuania</b> <i>AGATA</i>	149.039	NA	58.378	126.221	NA	2.468	Included in radio broadcasting	NA	13.666 (rebroadcasting)	<b>349.772</b>
<b>Netherlands</b> <i>SENA</i>	Approx. 12.694.000	NA	Approx. 6.425.000 (including webcasting, simulcasting, cable retransmission)		NA	Included in broadcasting		NA	No data available	<b>19.119.000</b>
<b>Spain</b>	7.858.990	369.730	Included in communication to the public		38.771.616*	0	0	NA	427.080 (cinema)	<b>47.427.416</b>
<i>AISGE</i>	<i>0</i>	<i>369.730</i>	<i>0</i>		<i>38.771.616*</i>				<i>427.080</i>	
<i>AIE</i>	<i>7.858.990 (includes radio and TV broadcasting)</i>		<i>Included in communication to the public</i>		<i>0</i>					
<b>Sweden</b> <i>SAMI</i>	4.490.424	214.164	4.239.216		NA	27648	19224	NA	0	<b>8.990.676</b>
<b>Total by type of use</b>	<b>60.356.288</b>	<b>742.894</b>	<b>99.585.435**</b>					<b>32</b>	<b>440.746</b>	<b>161.125.395</b>

*Source: data collected from the performer collecting societies.*

\*Spain-AISGE: this amount includes payments for 2005 and late payments. \*\* But note above entry of AIE regarding communication to the public

**Table 1.4.2 Equitable remuneration for broadcasting and communication to the public - Collection for performers in 2006**

*Gross amounts in euro (VAT not included)*

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
<b>Croatia</b> <i>HUZIP</i>	633.510	0	1.133.404	0	0	0	NA	NA	<b>1.766.914</b>	
<b>Czech Republic</b> <i>INTERGRAM</i>	1.091.132	132.400	1.560.435	2.371.816		16.551	0	40	NA	<b>5.172.374</b>
<b>France</b> <i>ADAMI</i>	12.633.009	NA	12.493.441	0	NA	NA	0	NA	NA	<b>25.126.450</b>
<i>SPEDIDAM</i>	6.336.569		6.266.660							
<i>SPEDIDAM</i>	6.296.440		6.226.781							
<b>Germany</b> <i>GVL</i>	19.145.600	160.000	29.581.000	9.794.000	579.400	Included in broadcasting	NA	NA	<b>59.260.000</b>	
<b>Lithuania</b> <i>AGATA</i>	214.662	NA	66.623	151.327	NA	1.310	Included in radio broadcasting	NA	29.946	<b>463.868</b>
<b>Netherlands</b> <i>SENA</i>	14.500.000	NA	6.600.000	0	0	Included in broadcasting	NA	0	<b>21.100.000</b>	
<b>Spain</b> <i>AISGE</i>	10.897.690	1.284.300	0	0	23.738.521	0	0	0	476.759	<b>36.397.270</b>
<i>AIE</i>	0	0			23.738.521				476.759	
<i>AIE</i>	10.897.690	1.284.300			0				0	
<b>Sweden</b> <i>SAMI</i>	4.540.536	228.960	4.023.000	204.336	0	53.028	32.724	NA	0	<b>9.082.584</b>
<b>Total by type of use</b>	<b>63.656.139</b>	<b>1.805.660</b>	<b>92.400.916</b>					<b>40</b>	<b>506.705</b>	<b>158.369.460</b>

**Table 1.4.3 Equitable remuneration for broadcasting and communication to the public - Collection for performers in 2007**

*Gross amounts in euro (VAT not included)*

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
<b>Croatia</b> <i>HUZIP</i>	653.031	0		1.210.624	0	0	0	NA	0	<b>1.863.656</b>
<b>Czech Republic</b> <i>INTERGRAM</i>	1.050.997	157.370	1.573.870	2.337.390		58.223	0	0	0	<b>5.177.850</b>
<b>France</b>	12.821.305	NA	12.916.429	0	NA	0	0	NA	0	<b>25.737.734</b>
<i>ADAMI</i>	<i>6.380.048</i>		<i>6.579.712</i>							
<i>SPEDIDAM</i>	<i>6.441.257</i>		<i>6.336.717</i>							
<b>Germany</b> <i>GVL</i>	19.415.040	160.000	29.958.500	6.279.000	497.400	Included in broadcasting		NA	0	<b>56.309.940</b>
<b>Lithuania</b> <i>AGATA</i>	260.750	0	81.390	190.361	0	1.129	Included in radio broadcasting	NA	49.138	<b>582.768</b>
<b>Netherlands</b>	22.500.000	0	6.700.000			Included in broadcasting		NA	No data available	<b>29.200.000</b>
<i>NORMA</i>	<i>0</i>		<i>0</i>							
<i>SENA</i>	<i>22.500.000</i>		<i>6.700.000</i>							
<b>Spain</b>	9.405.220	6.205.170	0	0	14.200.530	0	0	0	3.859.800	<b>33.670.720</b>
<i>AISGE</i>	<i>0</i>	<i>0</i>			<i>14.200.530</i>				<i>3.859.800</i>	
<i>AIE</i>	<i>9.405.220</i>	<i>620.51.70</i>			<i>0</i>				<i>0</i>	
<b>Sweden</b> <i>SAMI</i>	4.849.416	236.088	4.291.812	380.916	0	164.376	14.472	NA	0	<b>9.937.080</b>
<b>Total by type of use</b>	<b>70.955.759</b>	<b>6.758.628</b>			<b>80.856.422</b>			<b>0</b>	<b>3.908.938</b>	<b>162.479.748</b>

**Table 1.4.4 Equitable remuneration for broadcasting and communication to the public - Collection for performers over the years**

*Gross amounts in euro (VAT not included)*

	2005
	2006
	2007

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
<b>Croatia</b> <i>HUZIP</i>	488.218	0		1.167.044	0	0	0	NA	NA	<b>1.655.262</b>
	633.510	0		1.133.404	0	0	0	NA	NA	<b>1.766.914</b>
	653.031	0		1.210.624	0	0	0	NA	0	<b>1.863.656</b>
<b>Czech Rep</b> <i>INTERGRAM</i>	1.341.937	0	778.921	782.167		8.810	0	NA	NA	<b>2.911.835</b>
	1.091.132	132.400	1.560.435	2.371.816		16.551	0	NA	NA	<b>5.172.334</b>
	1.050.997	157.370	1.573.870	2.337.390		58.223	0	NA	0	<b>5.177.850</b>
<b>France</b> <i>ADAMI and SPEDIDAM</i>	12.088.240	NA	12.666.958	53.364	NA	NA	0	NA	NA	<b>24.808.562</b>
	12.633.009	NA	12.493.441	0	NA	NA	0	NA	NA	<b>25.126.450</b>
	12.821.305	NA	12.916.429	0	NA	0	0	NA	0	<b>25.737.734</b>
<b>Germany</b> <i>GVL</i>	21.245.440	159.000	27.035.000	6.570.000	853.400	Incl. in broadcasting		NA	NA	<b>55.862.840</b>
	19.145.600	160.000	29.581.000	9.794.000	579.400	Incl. in broadcasting		NA	NA	<b>59.260.000</b>
	19.415.040	160.000	29.958.500	6.279.000	497.400	Incl. in broadcasting		NA	0	<b>56.309.940</b>
<b>Lithuania</b> <i>AGATA</i>	149.039	NA	58.378	126.221	NA	2.468	Incl. in radio broadcasting	NA	13.666 (rebrdcast)	<b>349.772</b>
	214.662	NA	66.623	151.327	NA	1.310		NA	29.946	<b>463.868</b>
	260.750	0	81.390	190.361	0	1.129		NA	49.138	<b>582.768</b>
<b>Netherlands</b> <i>NORMA and SENA</i>	Approx. 12.694.000	NA	Approx. 6.425.000 (including webcasting, simulcasting, cable retransmission)		NA	Incl. in broadcasting		NA	No data available	<b>19.119.000</b>

	14.500.000	NA	6.600.000	0	0	Incl. in broadcasting	NA	0	<b>21.100.000</b>	
	22.500.000	0	6.700.000		Included in broadcasting		NA	No data available	<b>29.200.000</b>	
<b>Spain</b> <i>AISGE and AIE</i>	7.858.990 (including radio & TV broadcasting)	369.730	(included in com. to the public)		38.771.616 *AISGE	0	0	NA	427.080 (cinema)	<b>47.427.416</b>
	10.897.690	1.284.300	0	0	23.738.521	0	0	0	476.759	<b>36.397.270</b>
	9.405.220	6.205.170	0	0	14.200.530	0	0	0	3.859.800	<b>33.670.720</b>
<b>Sweden</b> <i>SAMI</i>	4.490.424	214.164	4.239.216		NA	27.648	19.224	NA	0	<b>8.990.676</b>
	4.540.536	228.960	4.023.000	204.336	0	53.028	32.724	NA	0	<b>9.082.584</b>
	4.849.416	236.088	4.291.812	380.916	0	164.376	14.472	NA	0	<b>9.937.080</b>
<b>Total 2005</b>	60.356.288	742.894	99.527.285			38926	19224	0	440.746	161.125.363
<b>Total 2006</b>	63.656.139	1.805.660	55.457.903	12.521.479	24.317.921	70.889	32.724	0	506.705	158.369.420
<b>Total 2007</b>	70.955.759	6.758.628	56.732.625	9.187.667	14.697.930	223.728	14.472	0	3.908.938	162.479.748

Source: data collected from the performer collecting societies.

\* Spain-AISGE: this amount includes payments for 2005 and late payments.

### 1. c. Impact of European legislation

In a number of countries, the remuneration right for broadcasting and communication to the public of commercial phonograms was introduced following the implementation of art. 8.2 of Directive 92/100/EEC of 19 November 1992 renamed 2006/115/EC after codification. It was introduced in 1993 in the Netherlands, 1994 in Spain, 1999 in Lithuania.

In other countries it already existed previously: 1953 in the Czech Republic - for soloists, 1960 in Sweden, 1965 in Germany and 1985 in France.

As has been shown in tables above, there are numerous differences between the national legislations concerning the extension of this remuneration right.

This can partly be explained by the fact that certain countries have not implemented the Directive to its full extent: in France the broad terms "communication to the public" have been restricted in national laws to the terms "communication in public places". Consequently in France, despite the fact that they fall under the broad terms "communication to the public", new types of use such as webcasting have been excluded from the remuneration right to date.

To clarify all doubts, the Recommendation of the Commission of 18 October 2005 clearly cites webcasting, internet radio, simulcasting and near-on-demand services received either on a personal computer or on a mobile phone as belonging to the right of communication to the public, in the form of a right to remuneration in accordance with Directive 2006/115/EC.<sup>17</sup>

Moreover in France, the Supreme Court has excluded the broadcasting of commercial phonograms incorporated in audiovisual works from the categories covered by the remuneration right. This exclusion, which seems to contradict the general guarantee provided by art. 8.2. of the Directive, is still applied despite the introduction of an amendment to the concerned article (L214-1) of the Intellectual Property Code on 1 August 2006.<sup>18</sup> This amendment may open ways for equitable remuneration for the broadcasting of audiovisual programmes incorporating phonograms.

It is noteworthy that art. 8.2 of the Directive allows room for manoeuvre in terms of national interpretations. Rewording of the provision could considerably reduce the differences between national legislations. Since some countries exclude the remuneration

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<sup>17</sup> Recommendation of the Commission of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, art. 1, f, i and ii.

<sup>18</sup> The new wording for art. 214-1 reads as follows: Article L214-1

*Lorsqu'un phonogramme a été publié à des fins de commerce, l'artiste-interprète et le producteur ne peuvent s'opposer :*

*1° A sa communication directe dans un lieu public, dès lors qu'il n'est pas utilisé dans un spectacle ;*

*2° A sa radiodiffusion et à sa câblo-distribution simultanée et intégrale, ainsi qu'à sa reproduction strictement réservée à ces fins, effectuée par ou pour le compte d'entreprises de communication audiovisuelle en vue de sonoriser leurs programmes propres diffusés sur leur antenne ainsi que sur celles des entreprises de communication audiovisuelle qui acquittent la rémunération équitable.*

*Dans tous les autres cas, il incombe aux producteurs desdits programmes de se conformer au droit exclusif des titulaires de droits voisins prévu aux articles L. 212-3 et L. 213-1.*

*Ces utilisations des phonogrammes publiés à des fins de commerce, quel que soit le lieu de fixation de ces phonogrammes, ouvrent droit à rémunération au profit des artistes-interprètes et des producteurs.*

*Cette rémunération est versée par les personnes qui utilisent les phonogrammes publiés à des fins de commerce dans les conditions mentionnées aux 1° et 2° du présent article.*

*Elle est assise sur les recettes de l'exploitation ou, à défaut, évaluée forfaitairement dans les cas prévus à l'article L. 131-4.*

*Elle est répartie par moitié entre les artistes-interprètes et les producteurs de phonogrammes.*



right for phonograms on carriers other than audio carriers, although this does not seem to be implied by art. 8.2. of the Directive, it appears necessary to specify that the medium on which the phonogram is reproduced is not relevant for determining whether or not equitable remuneration is due.

In addition, given the fact that almost all phonograms are published for direct or indirect financial benefit, the reference in the Directive to “commercial purposes” that prompted the publication of phonograms could be omitted. The current wording does not add a new criterion and creates needless discussions with users.<sup>19</sup>

Furthermore, the Directive does not define what is meant by “equitable” remuneration. According to the European Court of Justice, while the concept of equitable remuneration in art. 8.2. of the Directive is a Community concept that must be interpreted uniformly by all Member States, it is for each Member State to determine, for its own territory, the most appropriate criteria for assuring adherence to this concept.

However, the European Court gives some directives to Member States. There has to be a proper balance between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. Whether the remuneration is equitable is to be assessed, in particular, in the light of the value of that use in trade.<sup>20</sup>

Linking the amount of the remuneration to the revenues from exploitation, as the French legislator has done, is an advisable option. It gives performers’ organisations a clear guideline in their discussions with users.

As far as the sharing of the remuneration between performers and producers is concerned, as is shown in table 1.2, in general, remuneration is divided in equal shares between performers and producers. As this is current practice in most of the countries, a principle of equal shares between performers and producers could be enshrined in the Directive.

Given the noticeable contractual pressure under which performers are regularly put by their contracting partners, it also seems useful to provide a reminder that the right to an equitable remuneration cannot be waived.

Lastly, it is worth reminding that in certain countries the remuneration right indicated in art. 8.2 of the Directive is not only applied to the broadcasting and communication to the public of phonograms, but also to that of audiovisual fixations. At a time when technologies are converging and when the same performance, subject to a single category of use such as its communication to the public, often includes both audio and audiovisual elements, there is little justification for excluding possibilities of remuneration in the whole audiovisual sector. As shown in other parts of this study this extension could be a considerable step forward for performers. In this respect the Spanish legislation could serve as a basis for European legislation.

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<sup>19</sup> E.g. the collecting society SAMI reports discussions on this basis with broadcast organisations concerning the remuneration right for demo broadcasts and illegal recordings of performances.

<sup>20</sup> E.C.J., February 6 2003, C-245/00 (SENA/NOS); for an analysis, see Seignette J., “Vergoedingen in de contractuele praktijk, wet en rechtspraak”, *AMI*, 2003, pp. 117 e.v.

## 2. Satellite broadcasting and cable retransmission

### 2. a. Legal framework

#### *European legal framework*

Council Directive 93/83/EEC on the co-ordination of certain rules concerning Copyright and rights related to Copyright applicable to satellite broadcasting and cable retransmissions was adopted on 27 September 1993, with a deadline of 1 January 1995 for implementation.

The directive addressed a number of problems which existed regarding potentially conflicting or overlapping rules in the different Member States of the European Union. The potential for conflict created legal uncertainty and impeded the free movement of goods and services. The directive does not introduce any new right or modify any existing right for performers or any other category of rightholder. It provides for a number of rules to resolve some shortcomings covering both satellite broadcasting and cable retransmission of a programme.

#### Communication to the public by satellite

While giving for the first time a single European definition of broadcasting and communication to the public *by satellite*, the directive relates directly to the pre-existing right of communication to the public and broadcasting as introduced in directive 92/100/EEC (now codified as 2006/115/EC).

For that reason, the figures for collection and distribution corresponding to broadcasting and communication to the public by satellite are included in the chapter dealing with communication to the public and broadcasting in general (chapter 1 above).

The directive provides (at Art.6) that each country must adhere to at least the level of protection for holders of rights related to copyright required by Article 8 of Directive 92/100/EEC about broadcasting and communication to the public<sup>21</sup>, but that they may provide for more far-reaching protection.

Importantly, the directive 93/83/EEC addressed the problem of determining the applicable law in any given set of circumstances.

The directive defines communication to the public by satellite as the "*act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth*"<sup>22</sup>.

With regard to communication to the public by satellite Member States have differing copyright legislations including in particular whether the applicable rules should pertain to the country of emission or the country of reception of the broadcast programme. When cross-border broadcasts (where the country of uplink to the satellite may be different to the country of downlink) were made, there would be an inevitable conflict regarding which law would apply. The directive resolved this problem by determining that broadcasting only takes place at the point of emission and applying the general country of origin principle. Member States are free to apply their own laws regarding broadcasts originating outside the European Community.

Authorisation to broadcast or communicate a programme to the public by satellite may be done by agreement between a collective rights management organisation and the

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<sup>21</sup> See chapter of the present document dedicated to broadcasting and communication to the public.

<sup>22</sup> Art. 1.2

user. Under certain conditions, Member States have the possibility to organise the licensing in a way that rightholders of the same category of works (cinematographic works excluded) may all be covered by the collective agreement, independently from their being members or not of the rights management organisation<sup>23</sup>.

### Cable retransmission

With regard to cable retransmission, the directive neither develops nor modifies the scope or nature of rights granted to performers or any other categories of rightholders. It merely provides a definition and harmonises the way in which the right shall be administered across borders throughout the European single market.

Cable retransmission is defined as *"the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, or television or radio programmes intended for reception by the public"*<sup>24</sup>.

It is restricted to retransmission from one member state to another. The fact that the initial transmission is made by wire or by other means is irrelevant.

Directive 93/83/EEC however clearly introduces a harmonized rule for the administration of cable retransmission across borders. Art.9.1 provides that:

Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

"Collecting society" is defined in Art 1.4 as:

Any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.

The importance of the role that collecting societies play in this area is reflected in the lack of ambiguity regarding their involvement.

The recourse to collective management pursues two objectives: limiting the number of interlocutors to ease the task of the users (cable operators) on the one side, ensuring a high level of protection of performers by putting this right management in the hands of collecting societies on the other side: collecting societies are in a better position to negotiate the tariffs, administer the collection and distribution of remuneration to the rightholders concerned as well as to guarantee the enforcement of applicable rules. The explicit requirement of the management of this right being exercised through collecting societies is therefore an important element.

Art.9.2 covers the situation where a rightholder has not transferred the management of his rights to a collecting society. Interestingly, it explicitly organises a system whereby collecting societies are deemed to be mandated to administer the cross-border cable retransmission right and remuneration on the account of the rightholder. The scheme is aimed at avoiding duplication of work and guaranteeing the free choice by the rightholder of the collecting society mandated to administer his rights. The provision is worded as follows:

Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights.

In addition, the directive cares for ensuring a level playing field for rightholders and collecting societies throughout the European Union, by stating:

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<sup>23</sup> Art. 3.2

<sup>24</sup> Art. 1.3

A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society.

Finally, the legislator has foreseen the possible cases where cable retransmission in another country than the place of residence of the rightholder may have the consequence that the rightholder or the organisation managing his rights may claim remuneration only after a little while. It let it to the Member States to decide on the time limit for claim they consider the most appropriate:

[The rightholder] shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

Helpfully, the directive also addresses the potential situation where an agreement cannot be reached on the authorisation of the cable retransmission of a broadcast and provides, at Art 11, for a system of dispute resolution by way of mediation. Art 12 is directed at preventing the abuse of negotiation provisions and directs Member States to ensure that the parties negotiate in good faith and do not prevent or hinder negotiation without valid justification.

### ***National legal framework***

In general terms, the European directive has been well implemented in national legislations. Each country guarantees a right to an equitable remuneration for re-broadcasting or cable retransmission. The compulsory management of this latter right by a collecting society has been recognised by each Member State; however the wording varies on a country by country basis.

For example, in the Czech Republic the wording says that the right shall be administered by a "relevant statutory collective administrator", while in the Netherlands the legislation is less clear and refers only to "a legal person". In Lithuania, the text refers to "the collective administration which administers the rights on the territory of the Republic of Lithuania" and in Spain, the right shall be exercised by "an entity for the administration of intellectual property rights."

Finally, in the candidate country Croatia the wording is specific and says that the right "shall be administrated only through a collecting society".

## **2. b Practice**

Tables 2.1 and 2.2 below show that all countries studied except France<sup>25</sup> reported collecting varying amounts.

The failure to collect a significant amount in the Netherlands may be attributed to the failure to make collective management compulsory. In France, the rights in the audiovisual sector are subject to a presumption of transfer to the benefit of the producer. This transfer has been specifically mentioned in the implementation legislation (article L 217-2 II of the Intellectual Property Code). With regard to commercial phonograms, their retransmission simultaneously to broadcasting is covered by the equitable remuneration in application of article L 214-1 of the Intellectual Property Code.

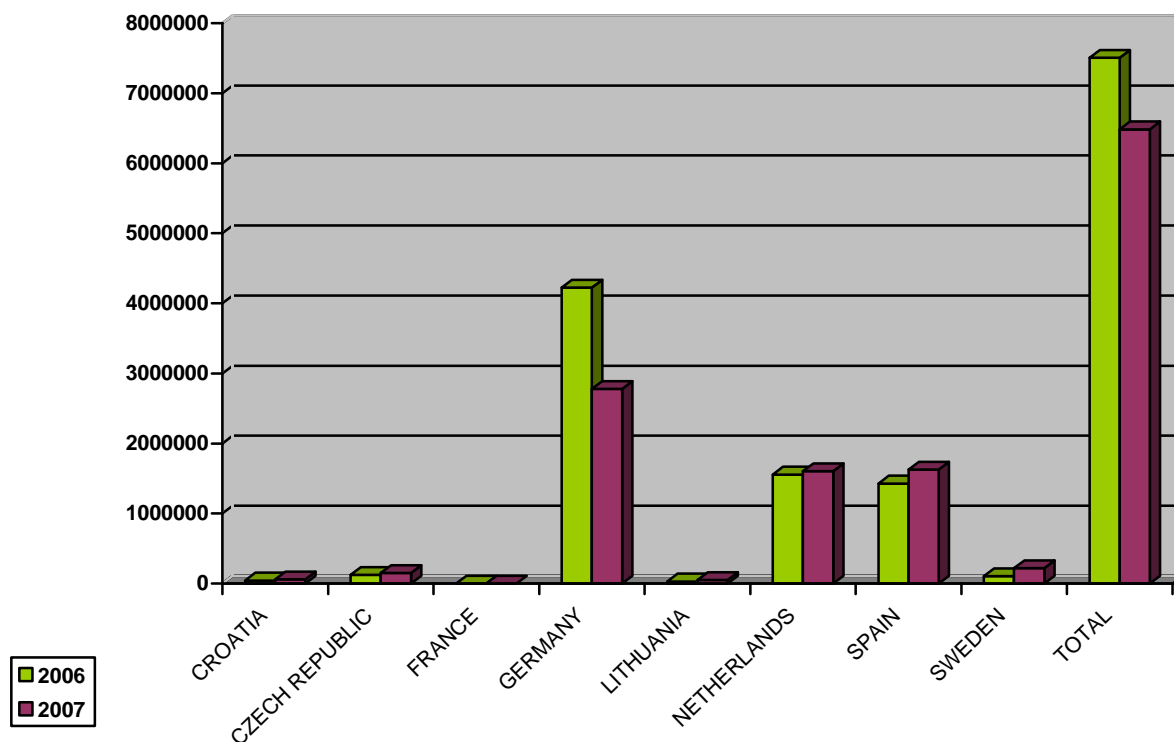
There was however a significant drop in collection in 2007 compared to 2006 and it remains to be seen whether this trend will continue.

**Table 2.1 Cable Retransmission –Collection for performers 2006-2007**



Country	Organisation	Audio	Audiovisual	Total
Croatia	HUZIP	0	42.114	42.114
		0	58.535	58.535
Czech Republic	INTERGRAM	60.644	60.634	121.278
		75.089	75.089	150.178
France	ADAMI, SPEDIDAM	0	0	0
		0	0	0
Germany	GLV	845.000	3.380.000	4.225.000
		444.800	2.335.200	2.780.000
Lithuania	AGATA	29.165	0	29.165
		48.153	0	48.153
Netherlands	SENA	1.556.000	0	1.556.000
		1.603.000	0	1.603.000
Spain	AISGE	0	1.428.148	1.428.148
		0	1.627.547	1.627.547
Sweden	SAMI	105.408	0	105.408
		218.052	0	218.052
All countries 2006		2.596.217	4.910.896	7.507.113
All countries 2007		2.814.269	4.096.371	6.485.465

**Table 2.2 Cable Retransmission –Collection for performers 2006-2007 (diagram)**



## 2. c Impact of European legislation

In most European countries, it seems that national law has transposed European law well. This, combined with recourse to collective management has resulted in efficient collection and distribution of remuneration. In those countries where there has been no collection, this is not as a result of a fault in the European legal framework; rather it is as a result of national peculiarities. In the Netherlands, the problem can be attributed to the national law's failure to provide that an actual collecting society (and not merely a 'legal person') should be responsible for collection.

The directive recently came under the spotlight as a result of the decision dated 16 July 2008 of the European Commission in the "CISAC" case.<sup>26</sup> The decision analysed, *inter alia*, whether certain aspects of bilateral representation agreements between authors' societies regarding internet, satellite and cable broadcasting were in breach of competition law. While the decision was focused largely on matters relating to competition law, it did address a number of specific points about the Directive.

It emphasised that the directive does not provide that the applicable law is the law of the Member State where the uplink takes place. It specifies that the act of communication to the public is the "*act of introducing the programme-carrying signal into an uninterrupted chain of communication leading to the satellite and down towards the earth*"<sup>27</sup>. Consequently, the applicable law will be the law of the Member State where this act of communication takes place<sup>28</sup>.

However, this act does not automatically start with the uplink. The decision gives an example: the act of communication can be the signal sent by the television studio to the uplink radio station. The television studio and the radio station may not be located in the same Member State. In that example, the applicable law will be the law of the Member State where the television studio is located.

Secondly, even in the situation where the uplink is the place where the first act of communication takes place, this still does not mean that the collecting society established in the country of the uplink should be the only one competent to grant the licence. Directive 93/83/EEC merely establishes the applicable law and this is irrelevant to making a determination on which collecting society can grant the licence.

The decision is currently under appeal.

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<sup>26</sup> Case COMP/C-2/38.698

<sup>27</sup> See Article 1(2)(a) of Directive 93/83/EEC.

<sup>28</sup> See Article 1(2)(b) of Directive 93/83/EEC.

### **3. Making available to the public of services on demand**

#### **3. a. Legal framework**

##### ***International legal framework***

At the time of the adoption of the Rome Convention in 1961, on-demand services were not yet an issue.

Although these services were involved in 1994 when the TRIPS Agreement was concluded, the protection offered to performers under this agreement remained limited to the possibility of preventing the broadcasting and the communication to the public of their live performance without their consent (art. 14.1 of TRIPS).<sup>29</sup>

Hence, one of the most important innovations of the WPPT was to pay attention to the impact of digital technology on the use of the performances of the performing artist. This led to the recognition of the making available right for services on demand (referred to hereinafter as “the making available right”) as a new exclusive right of the performer. Pursuant to art. 10 of the WPPT:

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

This right has only been attributed as regards performances fixed on phonograms. The Diplomatic Conference on the protection of audiovisual performances in 2000 did not succeed in offering protection for the audiovisual fixations.

##### ***European legal framework***

At European level, Directive 2001/29/EC introduced an exclusive making available right for performers.

Art. 3 of Directive 2001/29/EC states that:

Member States shall provide for the exclusive right [for performers] to authorize or prohibit the making available to the public, by wire or wireless means [of fixations of their performances], in such a way that members of the public may access them from a place and at a time individually chosen by them.

This right is granted for all types of fixations, including audiovisual fixations. It is not limited to phonograms, as is the case in the WPPT.

In a context of political will to accelerate the harmonisation of rights management in the digital environment, the European Commission most recently published a reflection document “Creative Content in a European Digital Single Market: Challenges for the Future”, on 22 October 2009, for comments and discussions<sup>30</sup>. In this document the European Commission addressed – among other things - the need of “creating a favourable environment in the digital world for creators and rightholders, by ensuring

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<sup>29</sup> The term “broadcasting” is meant to refer to the transmission by wireless means for public reception of sounds or of images and sounds (art. 3, (f) Rome Convention and art. 14,1 TRIPS Agreement). This type of transmission does not include the transmission by wire. “Communication to the public” is not defined in the Rome Convention or in the TRIPS Agreement. According to the Guide to the Rome Convention, published by WIPO, the term “communication to the public” refers to transmission to a different public, not present in the hall, by loudspeakers or by wire (p. 36). This may include transmission via the internet and related uses such as the making available of on-demand services.

<sup>30</sup> [http://ec.europa.eu/internal\\_market/consultations/docs/2009/content\\_online/reflection\\_paper%20web\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf). The consultation is open until 5 January 2010.

appropriate remuneration for their creative works, as well as for culturally diverse European market". While this announcement may sound promising for rightholders, the ways the European Commission envisages to give it life remain largely unclear.

Echoing the demand of users to have a simplified, cheaper licensing system for the licensing of online rights in the musical field, the European Commission evokes the possibility of organising a unique licensing for both acts of digital reproduction and digital "performance" (communication to the public). It remains unclear however what acts would be covered exactly, how they would apply to each category of rightholders, how they would be licensed and what remuneration terms and conditions would be attached to it, should this idea be given any future.

Going a step further in its ideas for reform of the current system, the Commission evokes the possibility that "the rights of authors, composers, music publishers, the producers of sound recordings and the recording artist pertaining to online dissemination would all be licensed in a single transaction"<sup>31</sup>. But as commented by the Commission itself, this raises "rather complex issues of how the jointly collected revenue is distributed"<sup>32</sup>.

Finally, in a later paragraph of the same document, the Commission mentions "an altogether different approach", which would consist of introducing "alternative forms of remuneration" in the form of compensation for rightholders against "mass reproductions and dissemination of copyright protected works and sound recordings in the internet or on digital fixed or mobile services"<sup>33</sup>.

Beyond questions of feasibility and practical management of such options, it appears that none of the first two options address at anytime the need for performers to be decently remunerated for the use made of their performances online and the conditions for ensuring such remuneration. The last one envisages a system of "compensation" without giving precise indications as to the corresponding rights involved in the process. Neither does it define "mass reproductions", which may actually be difficult to do in a technological environment of ubiquitous and unlimited possibilities of use.

Meanwhile, some European countries have started addressing the question of the licensing of online and mobile on-demand use of music and audiovisual content, and the related management and remuneration conditions for this use. This is the case notably in Spain and in another country that is not covered in the present study, Portugal, where national laws were recently adapted to enable the efficient implementation of the making available right. These initiatives are explained in more details later in this chapter.

### ***National legal framework***

The countries covered in the present study have implemented Directive 2001/29/EC. Their national legislations provide the performer with an exclusive making available right. In the Netherlands (1993), Lithuania (1999) and the Czech Republic (2000) the introduction of this right predated the adoption of Directive 2001/29/EC, whereas it dates back from 2003 in Croatia and Germany, 2005 in Sweden and 2006 in Spain. France and Spain were the last countries to implement the Directive<sup>34</sup>. The French legislator did not mention the making available right explicitly, since Art. 212-3 CPI was thought broad enough by the French government and parliament to include this right as well.<sup>35</sup> Accordingly, before the law was amended, French jurisprudence already

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<sup>31</sup> Reflection paper, p16

<sup>32</sup> Ibid.

<sup>33</sup> Reflection paper, p19

<sup>34</sup> In France the amendment to the Law incorporating the Directive was promulgated on 1 August 2006 and published on 3 August 2006. In Spain the new law implementing the Directive was adopted on 7 July 2006 and published on 8 July 2006.

<sup>35</sup> Art. L 212-3 of the CPI gives performers an exclusive right for the fixation of their performances, the reproduction of this fixation and its communication to the public.



considered that “the making available to the public through a network”, such as the internet, is considered to be a communication to the public.<sup>36</sup>

Spain went further. As in France, the making available right for on-demand services was considered to exist prior to the implementation of Directive 2001/29/EC as a specific form of communication to the public. But since the law 23/2006 was adopted on 7 July 2006, this type of right is explicitly recognised as a new exclusive right, as a type of “communication to the public”.<sup>37</sup>

At the same time, Spain introduced a presumption of transfer of the performers’ making available right to the producer if a contract is concluded with a phonogram or film producer concerning the production of a phonogram or a film, unless the contract stipulates otherwise.<sup>38</sup> Article 108 concerning the broadcasting and communication to the public now stipulates that a performer who has transferred to a phonogram or film producer his exclusive making available right shall keep an unwaivable right to receive an equitable remuneration from the user who carries out the act of making available as a counterpart to this transfer. It is further specified that equitable remuneration for making available shall be paid by the user (the person who is making the fixation available) and shared between performers and producers. The management of this remuneration is entrusted to collecting societies by law.<sup>39</sup>

Due to the recent date of introduction of this provision in the law, at the end of 2007 no significant amount had yet been collected (hence also distributed) in Spain in application to the equitable remuneration for making available audio or audiovisual fixations to the public. However, the practical implementation of this system is underway (see below) and the situation is expected to continue to evolve.

### 3. b. Practice

In recent years, various commercial business models for music or audiovisual services based on internet or mobile phone technologies have been developing. The most common include pay-per-download, subscription systems giving access to a certain repertoire for a limited period of time and advertising supported websites. All these services are based on the making available of music or films to the public on demand.

While some of them may not yet be sustainable, in particular in the audiovisual sector, a number expect to become profitable soon. Some well-known services like Apple iTunes already enjoy great success. Its year-on-year growth rate of revenues for in the first quarter of 2009 was 8.7%, after an impressive 25% rate of growth recorded in the fourth quarter of 2008.

In this framework, it is striking that so far none of these services is reported to incorporate a remuneration scheme for performers whose music or other performances they make commercially available.

In parallel to the general development of the digital market, physical sales of CDs and DVDs have decreased.

There seems to be a change in the market investment strategies and in the consumer entertainment habits that will both contribute to further increasing the spread of services based on the making available right.

Competing online services and record companies are trying to reduce licensing costs and retail costs. The latter are also striking different kinds of agreements, insisting on equity

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<sup>36</sup> Tb. Com., Paris, 3 March, 1997, *La semaine juridique* (JCP), 1997, p. 22; Kerever, A., ‘*Chronique de jurisprudence*’, *RIDA*, 1997/172, 215.

<sup>37</sup> Art. 20, 2, i of the Spanish IP Law

<sup>38</sup> Art. 108,2 of the Spanish IP Law

<sup>39</sup> Art. 108,3-6 of the Spanish IP Law

stakes or a share of revenue from advertising or subscriptions, in an effort to ensure that they benefit from the growth of the new services.

A 2009 working document by the European Commission<sup>40</sup> indicates also that the development of creative content digital services has a positive spill-over effect on the digital ICT market: "It is interesting to note that the digital content (for instance videogames developed by third-parties) is being used as a tool to create value for the product. It is estimated that without the "App Store", Apple would have sold between 10% and 15% less iPhones."

Several indicators confirm the general raise in the European creative content online services market but show strong variations between Member States.

The European Commission staff working document of 2009 reports that "broadband internet is available to 93% of the EU 25 population [Bulgaria and Romania not included], up from 87% in 2005."

The European Union now counts 114 million subscribers of internet broadband, which makes it the largest world market.<sup>41</sup>

On average regular internet use, defined as at least once a week, has increased in the EU from 43% in 2005 to 56% in 2008. This use has also become more frequent, with 43% of the population (i.e. 77% of regular users) now using the internet almost every day, compared to 29% in 2005. Regular internet usage has risen in all EU 27 Member States. However, in August 2009 one third of European citizens had never used the internet. This number is likely to diminish greatly in the coming years.

The countries showing the biggest increases since 2005 are Ireland, the Czech Republic, France, Hungary, Latvia, and Lithuania.

The countries with the least improvement are Iceland, Denmark, Sweden, Romania, Estonia, the Netherlands, Italy, Cyprus and Portugal. While low growth in regular internet use in countries such as Iceland, Denmark, Sweden and the Netherlands can be attributed to their already very high rates of internet usage, in others, such as Italy, Cyprus, Romania and Portugal, which have some of the lowest rates of regular internet use, it is a source of concern<sup>42</sup>.

The most intensive users of the internet and of online or mobile music and video services are people between 16 and 34, whom the report calls the "digital natives". This is an additional indicator that the digital market is likely to keep on developing at exponential pace in the coming years.

In terms of use, downloading of music is the main activity performed online by Europeans in 2008, carried out by 24% of EU individuals and followed by listening to Web radios and/or watching Web television (20%). Movie downloading is also a very common activity<sup>43</sup>.

The digital music business in the world in 2008 experienced a sixth year of expansion, growing by an estimated 25% to US\$ 3.7 billion in trade value. However, figures show that it currently accounts for around 20 per cent of recorded music sales (up from 15 per cent in 2007)<sup>44</sup>; in other terms, despite a steady increase over the last years, the digital market has not eclipsed or even equaled the traditional market of physical sales.

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<sup>40</sup> 'European Commission staff working document (SEC(2009) 1103) accompanying document to the Communication on Europe's Digital Competitiveness Report; Volume 1: i2010 — Annual Information Society Report 2009; Benchmarking i2010: Trends and main achievements', pp93-94

<sup>41</sup> Ibidem, p16

<sup>42</sup> Ibidem, p22

<sup>43</sup> Eurostat Community Survey on ICT Usage by Households and by Individuals, 2008

<sup>44</sup> IFPI, Digital Music Report 2009

According to a Screen Digest database<sup>45</sup> in Western Europe (Austria, Belgium, Denmark, France, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the UK) music downloads have grown by 76% from 2007 to 2008.

About a quarter of European citizens have downloaded and/or listened to music online in 2008, with large disparities between Member States however. In the Netherlands or Norway, 40% of citizens have used the internet, in the last 3 months, for downloading and/or listening to music other than via web radio, and in 16 other countries over 20% do so. The difference with those that lag behind reaches up to 25 percentage points.

When it comes to audiovisual, there are again significant differences between Member States: in Latvia or the Netherlands almost 30% of citizens regularly download and watch movies, and this figure is higher than 20% in 10 other countries. Here, the difference with those lagging behind reaches up to 20 percentage points.

The development of the digital market is actively encouraged by the European Commission through financial incentives and regulatory activities, at well as at national level.

However, to date these incentives and this regulatory approach may be concentrating on infrastructures and technologies primarily, whilst a sustainable online market for culture and entertainment services needs also to remunerate appropriately its creative contributors.

### **Exercise of the right**

While market analyses over consumer habits and online music and video services revenues are abundant, very few studies have been conducted to date on the effects of said market trends on the situation of performing artists. In particular there is no European-wide information about the impact on the rightholders of the making available right introduced in European legislation in 2001 to meet the digital sector's specific needs.<sup>46</sup> Most of the information below is taken from reports by performers' organisations of their experience in daily practice.

### ***Exercise of the exclusive right***

In both audio and audiovisual sectors, the performer almost always transfers his making available right to the producer. No case is known where performers exercise this right individually.

In general, this right is not yet collectively administered. There are, however, a few exceptions where it is subject to collective management.

In the Czech Republic only, in the audio sector, a very small number of performers have retained their making available right and have transferred the administration of this right to the collecting society INTERGRAM with regard to the use of ringtones. However, the amount raised by this administration concerns only a couple of performers and is near to zero: the total collection by the Czech collective management society for the exercise of this right averaged less than €30 per annum for the years 2005-2007.

In France, the membership contract that performers sign with the collecting society SPEDIDAM indicates that the making available right will be transferred to the society. Therefore, any subsequent transfer of the making available right a performer agrees with

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<sup>45</sup> cited in European Commission Staff Working Document {COM(2009) 390, p.63, available at [http://ec.europa.eu/information\\_society/eeurope/i2010/docs/annual\\_report/2009/sec\\_2009\\_1060\\_vol\\_1.pdf](http://ec.europa.eu/information_society/eeurope/i2010/docs/annual_report/2009/sec_2009_1060_vol_1.pdf)

<sup>46</sup> The French collecting society ADAMI released a study in April 2006, "*Filière de la musique enregistrée: quels sont les véritables revenus des artistes interprètes*", that covers among other matters the exclusive right for making available on-demand services.

the producer as a contractual provision would be in contradiction with their previous contract with SPEDIDAM and would therefore be invalid.

Legal proceedings were instituted at the end of 2005 by SPEDIDAM against the 6 main downloading commercial platforms active in France that had not entered into agreements with the collecting society. So far, no case has yet reached a final judgement.

In Sweden, the collecting Society SAMI collects for online on-demand services offered by broadcasters for their webcasting activities. Since the amount is included in an annual lump sum for all types of internet use by broadcasters, the value of the collectively managed making available right is difficult to estimate.

In the countries surveyed in the present study, the transfer of the making available right to the producer is common practice in the audiovisual sector and encouraged by a possible presumption of transfer in the event of concluding a film contract.

In general the making available right is considered to be part of the package of rights transferred by the performer to the film producer.<sup>47</sup>

All countries, with the exception of Croatia, include in their legislation a presumption of transfer of audiovisual exploitation rights to the producer if a film contract is concluded.

In the Czech Republic, France, Germany, Lithuania, the Netherlands, Spain and Sweden the making available right is considered to be part of the package of rights transferred by the performer to the film producer. In Spain, the new law provides an explicit and broader presumption of transfer of the making available right: this right is considered to be transferred to the film or phonogram producer if a film or phonogram contract is concluded unless a provision in the contract stipulates differently.<sup>48</sup>

***Possibility for the performer of exercising a right to receive remuneration for the exploitation of his performance through on-demand services in the event of the transfer of his exclusive making available right***

In all the countries where the right is presumed to be transferred, with the exception of Sweden, this transfer is linked to a right to remuneration for this mode of exploitation for the performer. However, as long as this remuneration right remains individually exercised, it does not change current practices, since the contractual position of the performer vis-à-vis the producer remains too weak: generally the performer consents to sign off his making available right together with all other exclusive rights against a certain amount, most of the time taking the form of a single lump sum, that also covers any future making available on demand to the public of the performance during all the duration of protection of the performance.

To date, in all the countries covered by this study only Spain allows a right to equitable remuneration to be exercised through collecting societies - in the audio and audiovisual sector. Since it is a new remuneration right, introduced by the law of 7 July 2006, it is too early to assess the effectiveness of such a provision. There are currently transitional agreements in place regarding the precise terms of payment between collecting societies and users. It is expected that this will remain the case until such time as the market becomes mature and fully developed business models are established.

In the event of simple transfer (without a corresponding right for remuneration of the performer as introduced in Spain), this making available right has so far resulted in little income for performers. In the audio sector, a 2006 study by ADAMI shows that for each

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<sup>47</sup> In France the making available right is considered by the legislator as being part of the communication to the public (art. 212-3 IP-law). Therefore, the presumption envisaged in art. 212-4 IP-law that includes the right to the communication to the public in the audiovisual field may also extend to the making available right.

<sup>48</sup> Art. 108.2 Spanish IP Law

song sold through an on-demand service (like online music stores) at the price of € 0.99, contracted performers - the main performers - receive between € 0.03 and € 0.04.<sup>49</sup>

It is striking that the royalty rate for on-line use is lower than that applicable to the sales of CD's and DVD's - around 4 to 8 %<sup>50</sup> - despite the fact that there are no distribution or stocking costs for on demand services.

Moreover, non-featured artists receive no additional remuneration at all. They receive the same all-inclusive fee as a counterpart for the transfer of all their exclusive rights.

There is no sign that the situation has evolved since 2006.

The same observation has been made by some performers' unions. In the audiovisual sector, the introduction of the making available right has not led to any significant additional remuneration for performers. The performer generally receives the same one-off inclusive payment for the entire package of rights transferred to the producer. Furthermore, the royalties declaration documents handed over by producers to the main performers almost never include a line regarding "on demand" exploitation. As was the case in the early years of "on demand" exploitation, most performers still have no idea about the way in which the right is exercised by producers and the revenues it generates.

### 3. c. Impact of European legislation

In 4 out of the 8 countries studied, legislation changed with the implementation of art. 3 of Directive 2001/29/EC introducing at European level an exclusive right for the making available of on-demand services. In these countries national legislations did not previously provide an explicit making available right. As explained above, only in France did the legislator consider any explicit reference to the making available right unnecessary, since existing legislation was broad enough to include the rights provided for in art. 3 of the Directive. However, in the Czech Republic, Lithuania, the Netherlands, the making available right was already implicitly recognised as a form of communication to the public.

The economical situation of performers has not changed after the explicit introduction of this new making available right. The right is generally transferred to producers under contractual agreements. Only the main performers manage to negotiate the payment of royalties for the exploitation of their performances. There is very little data on royalty rates or on those performers who benefit from these payments taking the form of a percentage of the sales revenues. However, on the basis of the information in the hands of collecting societies and trade unions, it appears that even these "happy few" performers receive only small royalties for the exploitation of their making available right, as was already the case before they were granted this new right explicitly, according to the information provided by performers' organisations.

Other performers continue to receive the same all-inclusive payment for the entire package of rights transferred.

If performers are to actually receive remuneration for the making available of their performances via on-demand services, which is a rapidly growing and potentially huge market, current legislation needs to be adapted. Failing this, the making available right will remain purely theoretical for most performers.

A solution to make the making available right effective for performers would consist of providing for an unwaivable remuneration right that the performer would be guaranteed if he were to transfer his making available right, to be obligatorily exercised by a collecting society. This option would overcome the weak contractual position of the

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<sup>49</sup> ADAMI study, "*Filière de la musique enregistrée: quels sont les véritables revenus des artistes interprètes ?*", 2006, pp. 26-27.

<sup>50</sup> On the wholesale price, excluding VAT, and after BIEM contribution

performer and would give the remuneration right a good chance of being effective since it would be administered by collective management. It would ensure that performers are finally remunerated for the making available of their audio and audiovisual performances in music and film recordings that are made available to the public by online and mobile services for on-demand use<sup>51</sup>.

The similar mechanism that was recently introduced in Spain (and in Portugal) is at the early implementation stage and should become effective soon.

It has also been envisaged in the European Commission Impact Assessment of 23 April 2008 on the legal and economic situation of performers and record producers in the European Union, but has not been subject to in-depth scrutiny so far. The study reads:

In view of the fact that performers do not enjoy any share in the money collected by record producers for sales of music on the internet, one option to improve the social situation of performing artists would thus be an amendment to extend the scope of Article 5 (art. 4 before codification) of the Rental and Lending Directive to also cover the situation when the making available right is transferred. The remuneration right would have to be administered by a collecting society. [...]

The creation of a claim for equitable remuneration for online sales or other forms of making performances available online is an interesting option, however, whose time may yet come. [...]<sup>52</sup>

This is a positive development. However, in order for the provisions to have any positive effect on the actual situation of performers it would be essential to have users defined as being those parties liable for payments with the management of this remuneration right entrusted to collecting societies. Whichever legal method is used, a clear indisputable right should exist, whereby it is ensured that performers receive equitable remuneration for online use.

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<sup>51</sup> Collecting societies are in general in a better position than performers acting individually to negotiate and obtain global agreements providing for satisfactory remuneration for performers and to enforce them. Therefore, an alternative solution could also be to make it compulsory for the exclusive right of making available to be exercised through a collecting society, thus following the example of the way in which the cable retransmission right has been exercised.

See Art. 7.1 (c) of the Rome Convention. This possibility of prevention is limited to the cases where the original fixation itself was made without the performer's consent, or where the reproduction is made for no other purposes than those for which the performer gave his consent, including reproductions subject to exceptions or limitations of protection in accordance with art. 15 of the Convention. It should be noted that this possibility of the performer preventing the reproduction of his performance ceases to apply from the moment that the performer consented to the incorporation of his performance in an audiovisual fixation (see art. 19 of Rome Convention).

<sup>52</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf), pp 8, see also 29-30 for further details.

## 4. Limitation of the reproduction right for private use

### 4. a. Legal framework

#### *International legal framework*

The Rome Convention introduces the possibility of a performer preventing the reproduction of a fixation of his performance made without his consent.<sup>53</sup> However, any contracting State may provide for exceptions to the protection guaranteed by the Convention, including for private use.<sup>54</sup>

The TRIPS Agreement also envisages the possibility of a performer preventing reproductions of fixations on a phonogram if this is undertaken without their authorisation.<sup>55</sup> It does not provide explicit exceptions to the rights of performers, but it refers to those permitted by the Rome Convention.<sup>56</sup>

Neither the Rome Convention nor the TRIPS Agreement make any reference to the conditions set forth in the Berne Convention, generally known as the “three-step test”, under which exceptions to the reproduction right shall be permitted<sup>57</sup>.

The WPPT gives the performer an exclusive right of authorising the reproduction of his performances fixed in phonograms.<sup>58</sup> It does not provide an explicit exception for private use. It simply states that Member States may provide for the same kind of limitations or exceptions as they provide in their national legislation in connection with the protection of copyright in literary and artistic works.<sup>59</sup>

No international treaty provides for a right to remuneration in the event of reproduction for private use.

#### *European legal framework*

Some grounds for a right to remuneration in the event of reproduction for private use were provided at the European level by Directive 92/100/EEC. According to this Directive, Member States shall provide for all performers the exclusive right to authorise or prohibit the reproduction of fixations of their performances, but they may also provide for limitations in respect of private use.<sup>60</sup> Art. 10.3 of the Directive stipulates that this exception for private use is “*without prejudice to any existing or future legislation on remuneration for reproduction for private use*”.

The possibility of Member States providing for an exception to the reproduction right in the event of private copying and the conditions attached to an exception of this nature were finally specified in Directive 2001/29/EC art. 5, 2, b. Subsequently, the provisions about the reproduction right and private use were removed from the former directive when it was codified and renamed Directive 2001/115/EC.

According to article 5, 2, b of Directive 2001/29/EC, Member States may provide for

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<sup>54</sup> Art. 15,1a of Rome Convention

<sup>55</sup> Art. 14 of TRIPS Agreement

<sup>56</sup> Art. 14,6 of TRIPS Agreement

<sup>57</sup> According to art. 9,2 of the Berne Convention granting protection to authors, limitations or exceptions to their exclusive right of reproduction should be limited to certain special cases, should not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.

<sup>58</sup> Art. 7 of WPPT

<sup>59</sup> Art. 16,1 of WPPT

<sup>60</sup> Art. 7.1 and 10.1 a of Directive 2006/115/EC

exceptions or limitations to the reproduction right:

in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological protection measures [...] to the work or subject-matter concerned.

According to recital 35 of the same Directive, the notion of harm caused to the rightholders is mentioned as a valuable criterion for evaluating the "*particular circumstances of each case*" that should help to determine the form, detailed arrangements and possible level of compensation.

According to Directive 2001/29/EC the exception for private use, like all the other exceptions envisaged in this Directive, is submitted to the three-steps-test.<sup>61</sup> The concept of the three-steps-test was introduced in the field of the neighbouring rights by the WPPT, in similar terms to those used for authors in the Berne Convention: art. 16.2 of the WPPT stipulates that any limitation or exception should be confined to certain special cases which do not conflict with normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.<sup>62</sup>

With respect to any distinction between analogue and digital copying, the Directive contains no mandatory requirements. Yet in recital 38 to the Directive the Commission does point out that:

due account should be taken of the differences between digital and analogue private copying and that a distinction should be made in certain respects between them.

Recital 39 further states that:

when applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection means are available.

Hence the provisions of the Directive consist of recognising the right of Member States to provide for exceptions or limitations to the reproduction right for private copying and establishing as a necessary condition that in these cases, a mechanism of fair compensation for rightholders must be set forth. How a system of this type should be designed relies on national competence.

### ***National legal framework***

Most Member States of the EU realised quite early that in view of technical developments and the resulting massive use of reproductions made by individuals, a ban on private copying could not be enforced. Therefore most Member States introduced in their national legislation an exception for private use, linked to an entitlement to remuneration for the rightholders.

All the countries covered in the present study in this study have introduced in their national legislation the exception for private use, linked to fair remuneration for rightholders.

In the whole of the EU, 22 of the 27 Member States apply a remuneration system for private copying. In the UK, in Ireland and in Cyprus there is no exception for private copying, and no corresponding remuneration scheme. In Luxemburg and Malta an exception for private copying exists, but without relating remuneration schemes for the

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<sup>61</sup> Art. 5.5 of Directive 2001/29 EC, similar to provisions of art. 9.2 of the Berne Convention quoted above.

<sup>62</sup> However, it should be underlined that the three-steps-test is subject to different interpretations.



rightholders (which is not in line with the provisions of the Directive 2001/29/EC). In those countries where no exception for private use exists, remuneration for private copying is nevertheless collected from those countries which do provide for private copying remuneration. Taking the example of the UK, it is worth pointing out that, whilst this country has no remuneration scheme at all, rightholders in the UK can benefit from the situation in other countries where such remuneration exists.

As will be shown in table 4.1. the terms of the remuneration systems show a number of similarities but specific provisions differ from country to country.

*Remuneration schemes:*

Table 4.1. presents the different remuneration schemes. To date, the following countries operate a dual remuneration scheme with levies on equipment and blank carriers: Croatia, the Czech Republic, Germany and Spain. In other countries – Lithuania, France, the Netherlands and Sweden -, royalties are levied on blank video and audio carriers only.

Moreover, while technology is evolving quickly, in some countries remuneration is not applied on all carriers that are used to reproduce recordings (e.g. mp3-players, DVD-recorders, CD-burners, computer external hard-disks, memory-cards for cell phones with storage capacity).

In other countries, to date computer hard disks are exempted. However, there are also debates concerning recording devices in several countries.

Continued technological progress deters any regulation involving the definitive listing of specific types of carriers and equipment and favours general regulations. E.g. the Spanish and the French legislators have provided a revisable system: on a regular basis, the public authorities revise the list of equipment and blank carriers, as well as the applied tariffs. A series of conditions established in the law need to be taken into account, including the level of reproduction and further private use, the extent of the prejudice caused and the applicability and efficiency of anti-copying devices.

In Germany, the amount of the levy will depend on the intensity of copying activities to be proven by empirical studies and has to be in proportion to the value of the carrier or device. Previously, there were fixed amounts for each category of product enabling reproduction but this is no longer the case as a result of a change in the national legislation. The major change in this system does not lie in the consideration taken for actual use of private copying, which was already the case with fixed amounts, but in the fact that evidence of private copying activities has to be given, failing which, no remuneration may be payable.

In France, a decision by the Conseil d'Etat has established that private copying remuneration must only take into account copies made from a non-infringing source.<sup>63</sup> In Germany and Spain, it is stated in the law that remuneration shall be payable only in respect of legal copies. In other countries such as the Czech Republic, Lithuania, the Netherlands and Croatia the legal character of the source is considered as irrelevant.

Remuneration schemes applied in the countries covered either consist of a percentage of the selling price or of fixed amounts. Remuneration schemes based on percentages (as is the case in the Czech Republic, in Lithuania) are problematic since wholesale prices tend to decrease, whereas the recording capacity of the subject equipments or carriers is continuously increasing and the number of copies made for private use seems to increase

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<sup>63</sup> On 11 July 2008, the French Conseil d'Etat (supreme administrative court) issued a decision cancelling the French Private Copying Commission's decision of 20 July 2006 according to the principle that "private copying remuneration must only take into account legal copies".

alike. In Croatia tariffs are no longer taking the form of percentages but are now fixed amounts.

Some countries (e.g. Croatia, the Netherlands and Spain) differentiate between the levies for digital and analogue media. In general, digital copies are characterised by a higher quality and higher recording capacity. This explains the higher remuneration rates most countries apply for digital media.

Other countries (the Czech Republic, France, Germany, the Netherlands) differentiate between audio and video equipment and carriers. In accordance with recital 39 of Directive 2001/29/EC, a limited number of countries (e.g. France, Lithuania, Spain) have introduced in their law the stipulation that the applicability and the efficiency of technical protection measures must be taken into account when determining the level of remuneration.

*Body liable for payment:*

Remuneration is mainly collected from the manufacturer or the importer of the carriers and - in those countries that operate a dual remuneration scheme - of the equipment.

*Rules about sharing remuneration:*

Remuneration for private copying is shared between all categories of rightholders concerned: performers, authors and producers. The division between the various rightholders is stated in national legislations or in general agreements. In some countries (e.g. in the Czech Republic, in Germany (in particular audio), in France (audio), in Spain (audio)) this division made is unbalanced and does not involve equal shares for the various categories of rightholders - performers, authors and producers.

The remuneration is generally considered to be non-transferable via individual contracts.

In some countries (France, Lithuania, the Netherlands, Spain), part of the private copying remuneration is dedicated to the financial support of creative activities and promotion of artists.

*Compulsory intervention of collecting societies:*

In all the countries in this study, where there are remuneration schemes for private copying, it has been made compulsory for the remuneration right to be administered by a collecting society.

In practice in most countries – such as France, Germany, Lithuania, the Netherlands or Sweden – collecting societies for performers do not collect remuneration for private copying directly from the bodies liable for payment: collection is centralised by one single (or two) organisations that usually collect private copying remuneration for all categories of rightholders. Then the collecting societies for performers distribute the remuneration to the performers concerned. These collecting societies nevertheless take an active part in the negotiations (where these are involved) and in decisions relating to management practices for this remuneration.

**Table 4.1 Private copying - Terms of remuneration**

<b>Countries</b>	<b>Remuneration schemes: a-mechanism for setting rules b-base for levies c-calculation of tariffs</b>	<b>Body liable for payment</b>	<b>Rules about sharing of the remuneration between rightholders</b>	<b>Contribution to cultural activities</b>	<b>Intervention of collecting societies</b>
<b>Croatia</b>	<p>a-No rates nor mechanism to determine the rate is stipulated in the law, therefore rates determined by negotiation between interested parties</p> <p>b- On equipment and carriers (audio and video) (art. 32,1)</p> <p>c- fixed amounts (distinction analogue - digital)</p>	<p>Manufacturer, jointly with importer of equipment or carriers (art. 32,4)</p> <p>Since there are no manufacturers of the equipment and the carriers in Croatia yet, the remuneration is to be paid in practice only by the importers.</p>	<p>Not specified by law</p> <p>By agreement between parties involved: <i>Audio:</i> 33% performers, authors and producers each <i>Audiovisual:</i> 30% performers 70% authors and producers</p>	<p>Not determined by law, but under the statutes of the collecting society 10 % of remuneration collected for private copying is allocated to cultural activities.</p>	<p>Compulsory licence (156, (2))</p>
<b>Czech Republic</b>	<p>a- Stipulated in the law (rate schedule attached in the annex of the IP law).</p> <p>b- On equipment and carriers (audio and video)</p> <p>c- % of the selling price of the equipment and the carriers</p>	<p>Manufacturer or importer, or the conveyor instead, unless that person allowed the identification of the manufacturer or the importer (art. 25)</p>	<p>By law (art. 104) <i>Audio:</i> 25 % performers 25 % producers 50 % authors <i>Audiovisual:</i> 15 % performers and authors of choreographic and pantomimic works 25 % producers 60 % other authors</p>	<p>Not determined by law, but under decision of the collecting society general assembly 15 % from the unidentifiable income collected by collecting society for performers is allocated to cultural activities.</p>	<p>Compulsory licence (art. 96, 1)</p>
<b>France</b>	<p>a- Types of carriers, remuneration rates and conditions for payment determined by a Committee comprised of 50 % beneficiaries, 25 % manufacturers and importers, 25 % consumers (art. L.311-5).</p> <p>b- On carriers (audio and video)</p> <p>c- Fixed amounts (distinction audio-video) (art. L 311-3 and 4). No remuneration in case of financial compensation already paid for the same act of private copying.</p>	<p>Manufacturer, importer or the person making an intra-Community acquisition for non-private use of recording mediums (art. L311-4)</p>	<p>By law (art. L311-7) <i>Audio:</i> 25 % performers 25 % producers 50 % authors <i>Audiovisual:</i> 33 % performers, authors and producers each</p> <p>Distribution to rightholders in proportion to the private reproductions made for each work or recording (art. L311-6)</p>	<p>Under the law, 25 % of collected amount for private copying shall be used for actions to assist creation and promote live entertainment and for training schemes for performers (art. L321-9).</p>	<p>Compulsory licence (art. L311-6)</p>

Countries	Remuneration schemes: a-mechanism for setting rules b-base for levies c-calculation of tariffs	Body liable for payment	Rules about sharing of the remuneration between rightholders	Contribution to cultural activities	Intervention of collecting societies
<b>Germany</b>	<p>a- Rates decided by agreement, failing which, by reference to the rate schedule contained in the annex of the IP Law, art 54d (1)</p> <p>b- On equipment and carriers (audio and video)</p> <p>c- Amounts calculated depending on the intensity of copying-activities to be proven by empirical studies and have to be in proportion to the value of the carrier or device.</p>	Manufacturer, importer and retailer (art.54)	<p>Shares not determined by law; the law only stipulates that each rightholder is entitled to receive an equitable share (art. 54h). According to the Federal Minister of the Interior and Patents and Trademarks Office the management of this remuneration is primarily the task of collecting societies.</p> <p>By agreement between parties involved:  <i>Audio</i>  42 % to be shared between performers (64 %) and phonogram producers (36 %)  58 % authors  <i>Audiovisual</i>:  21 % to be shared between performers (64 %) and phonogram producers (36 %)  50 % to film producers and other rightholders  29 % authors</p>	Under the statutes of collecting society and resulting from board decision, a certain amount of total remuneration collected is dedicated to cultural activities. For the year 2005, the part of the amount coming from collection for private copying and further dedicated to cultural activities was estimated around 2.5 %.	Compulsory licence (art. 54h)
<b>Lithuania</b>	<p>a- The law stipulates that the rates are established by the Government after consultation of manufacturers and importers and collecting societies.</p> <p>b- On carriers (audio and video)</p> <p>c- % of wholesale price of audio or audiovisual carriers with a max. of 6 % (arts. 58,2 &amp; 20 IP-Law)</p>	Manufacturer and importer (art.20,4)	By the Government Resolution (1106, art.21) <i>Audio &amp; Audiovisual</i> 30 % performers 30 % producers 40 % authors	<p>According to art. 20,5 IP-Law/ art. 23 Resolution 1106, up to 25 % of collected amount for private copying may be used for programmes of support of creative activities.</p> <p>According to art. 20 Resolution 1106, 25 % (after deduction of administrative expenses) remuneration collected for audiovisual media shall be retained for the National Cinema Promotion Programme.</p>	Compulsory licence (art.65,3 IP-Law)

Countries	Remuneration schemes:	Body liable for payment	Rules about sharing of the remuneration between rightholders	Contribution to cultural activities	Intervention of collecting societies
<b>Netherlands</b>	<p>a- After the law, tariffs are fixed by a body (Stichting de Thuiskopie) representing the interests of rightholders and users (art. 16 IP law)</p> <p>b- On carriers (audio and video)</p> <p>c- Fixed amounts (distinction audio-video and analogue-digital)</p>	Manufacturer or importer (art. 16c)	<p>Not specified by law By agreement between parties involved:</p> <p><i>Audio</i> 30 % performers 30 % producers 40 % authors</p> <p><i>Audiovisual</i> 25,5 % performers 40,75 % producers 33,75 % authors</p>	<p>No legal basis</p> <p>In practice, 15 % of the revenues from private copying collected by De Thuiskopie + 5 % of amounts administered by NORMA &amp; SENA are allocated to actions supporting cultural activities.</p>	Compulsory licence (art. 16d Copyright Law)
<b>Spain</b>	<p>a+b- The new law distinguishes between the analogue and digital equipment and carriers:</p> <ul style="list-style-type: none"> <li>- For analogue equipment and carriers the rates are fixed in the law (art. 25.5) for both audio and video;</li> <li>- For digital equipment and carriers list of equipment and carriers concerned and tariffs determined by negotiation between the collecting societies and the debtors. In case of no agreement, decision by the Ministries of Culture and Industry.</li> </ul> <p>c- Fixed amounts.</p>	<p>Manufacturer and importer In addition, the distributors are liable for the payment of the remuneration unless they prove to have paid the remuneration already to the manufacturer or importer. (art. 25)</p>	<p>Specified in Royal Decree 1434/1992 (art. 36) for analogue equipment and carriers:</p> <p><i>Audio</i> 25 % performers 25 % producers 50 % authors</p> <p><i>Audiovisual</i> 33 % performers, authors and producers each</p> <p>For digital equipment and carriers the negotiating parties are to fix the distribution between the categories of rightholders.</p>	<p>Under the law (art. 155.2/ % determined through regulation), 20 % of amount collected for private copying is dedicated by the collecting society to services of assistance of their members as well as training of authors and performers and promotional activities</p>	Compulsory licence (art. 25)
<b>Sweden</b>	<p>a- Rates are fixed in the law.</p> <p>b- On carriers (audio and video)</p> <p>c- Fixed amounts (distinction analogue-digital) (art. 26 l).</p>	Manufacturer or importer (art. 26k).	<p>Not specified by law. In accordance with actual copying. In practice:</p> <p><i>Audio</i> 33 % for performers, producers and authors each</p> <p><i>Audiovisual</i> Sharing based on source of copying and type of programme that the various rightholders fall within. In 2006 SAMI received a share of 3.62 % of total video private copying remuneration and Swedish Union for theatre, artists and media received a share of 25.65 %.</p>	No legal basis	Compulsory licence (art. 26m)

#### 4. b. Practice

Tables 4.2 to 4.3 show that in all the countries covered, performers' organisations currently collect remuneration for private copying. In Croatia, where the remuneration system was introduced in 2003, collection became effective in 2006.

The amount collected represents an essential part of the revenues received by performers from collecting societies.

In 2005 it accounted for 38% of the total remuneration collected by the performers' organisations of the countries under examination. However, in 2007 that percentage had dropped to 33%. Thus we see that the amount of private copying remuneration has decreased between 2005 and 2007 by 18.3%<sup>64</sup>

Despite this decrease, it still represents one third of the total collection for performers.

The evolution by country shows contrasted changes between the years 2005 and 2007. Collection continuously decreased in Lithuania, the Netherlands and Spain.

In the Netherlands there was a notable drop from € 17.762.000 collected in 2005 to € 5.550.000 the next year. This may be due to a confusing situation regarding national law: whilst the Dutch law foresees that private copying remuneration should be paid for import and sales of any carrier, thus including also MP3 players or DVD recorders, this is not applied in practice. In 2006 a decision by SONT (Stichting Onderhandeligen Thuiskopievergoedingen), the national body appointed by the Minister of Justice as the organisation in charge of the collection and distribution of private copying remuneration, implemented a new levy on MP3 players and HD DVD-recorders (later to be followed by flash-memory cards, mobile phones etc.).

As a transitory measure, a so-called 'zero tax' (the tariff was initially € 0) was introduced, which would later be adjusted according to private copying actual use of the concerned devices.

The Dutch Minister of Justice however further commented that a "zero tax" as such was not intended to result in expanding the basis of devices subject to payment. By consequence, manufacturers and importers were exempted from payment on MP3 players or DVD recorders until 1 July 2007.

In Lithuania the law is under review following a decision by the Supreme Court confirming that imports of relevant equipment and carriers from another Member State should entail the payment of private copying remuneration.

In Spain, an intensive campaign against the payment of private copying remuneration fuelled heated public debates, in a context of change of rules with the introduction of new tariffs for digital devices. In addition, it is now stated in the law that remuneration shall be payable only in respect of legal copies.

This is likely to have negatively impacted on the level of collection for private copying in this country as is the case also in Germany and to a certain extent in France, where a similar decision was given by the "Conseil d'Etat".

In Germany the collection decreased between 2005 and 2006 and the increase on the next year could not compensate this decrease. One reason behind this decrease is a change in the system for calculating the payable tariffs. It is now for the rightholders to bring the empirical proof that a given device is actually used for private copying. The degree of use for private copying is taken into account to establish the applicable tariffs. This resulted in lengthy disputes and delayed negotiation procedures. Moreover, tariffs must stay proportionate to the price value of the subject carrier or device (and not the

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<sup>64</sup> Calculation excludes the Belgian and Croatian data on account of data not being available for Belgium in years 2006 and 2007 and no remuneration being paid in Croatia until 2006.

value of the rights being used). This change of rule resulted in a significant decrease in collection.

In the Czech Republic difficulties in agreeing certain new tariffs and collecting remuneration for private copying on mobile phones are reported, but the overall collection nevertheless increased greatly over the last three years.

In Croatia collection by the collecting society HUZIP increased because of late payment for previous years further to a dispute settlement with users.

France, in common with many countries has seen significant developments in the market for physical and digital media carrying devices. The rise in sales of blank CDs reached a peak around 2003 and continuously declined in the following years. An increase in sales of blank DVDs at the beginning of the 21<sup>st</sup> century did not compensate for this decline in blank CDs sales. In addition, the increase in sales of blank DVDs has also slowed down in the recent years. During the same period, the sales of digital carriers such as memory cards, USB sticks, mp3 players and external hard drives developed quickly but never equalled the revenue from the sales of more traditional carriers.

In addition, these devices tend to have a much higher storage capacity and are sold at prices that become readily affordable for the consumer. Given the huge recording capacity offered by some of these devices offered for sale not only to professionals but to any consumer, the tariffs payable in respect of these products have not increased in proportion to the increase in storage capacity which they provide. This is another factor in explaining the decrease in private copying remuneration collected.

**Table 4.2.1 Private copying – Collection for performers in 2005**

*Gross amounts in euro (VAT not included)*

<b>Countries</b>	<b>Organisation</b>	<b>Total</b>
<b>Croatia</b>	<i>HUZIP</i>	0
<b>Czech Republic</b>	<i>INTERGRAM</i>	392.423
<b>France</b>	<i>ADAMI, SPEDIDAM</i>	44.158.298
<b>Germany</b>	<i>GVL</i>	24.279.680
<b>Lithuania</b>	<i>AGATA</i>	57.567
<b>Netherlands</b>	<i>NORMA, SENA</i>	17.762.000
<b>Spain</b>	<i>AISGE, AIE</i>	19.859.149
<b>Sweden</b>	<i>SAMI</i>	1.994.112
<b>All countries</b>		<b>108.503.229</b>

**Table 4.2.2 Private copying – Collection for performers in 2006***Gross amounts in euro (VAT not included)*

Country	Organisation	Audio	Audiovisual	Total
<b>Croatia</b>	HUZIP	26.334	12.661	<b>38.995<sup>65</sup></b>
<b>Czech Republic</b>	INTERGRAM	208.110	338.670	<b>546.780</b>
<b>France</b>		20.398.734	23.538.166	<b>43.936.900</b>
	<i>ADAMI</i>	<i>10.204.021</i>	<i>18.955.320</i>	<i>29.159.341</i>
	<i>SPEDIDAM</i>	<i>10.194.713</i>	<i>4.582.846</i>	<i>14.777.559</i>
<b>Germany</b>	GLV	8.575.360	14.310.000	<b>22.885.360</b>
<b>Lithuania</b>	AGATA	24.632	9.799	<b>34.431</b>
<b>Netherlands</b>		2.766.000	2.784.000	<b>5.550.000</b>
	<i>NORMA</i>	<i>95.000</i>	<i>2.784.000</i>	<i>2.879.000</i>
	<i>SENA</i>	<i>2.671.000</i>		<i>2.671.000</i>
<b>Spain</b>		4.773.150	11.066.517	<b>15.839.667</b>
	<i>AISGE</i>		<i>9.014.817</i>	<i>9.014.817</i>
	<i>AIE</i>	<i>4.773.150</i>	<i>2.051.700</i>	<i>6.824.850</i>
<b>Sweden*</b>	SAMI	2.019.956	78700	<b>2.098.656</b>
<b>All countries</b>		<b>38.792.276</b>	<b>52.138.513</b>	<b>90.930.789</b>

\*Although the total shown is accurate, the division of this amount between audio and audiovisual has been approximated in the same ratio as 2007.

**Table 4.2.3 Private copying – Collection for performers in 2007***Gross amounts in euro (VAT not included)*

Country	Organisation	Audio	Audiovisual	Total
Croatia	HUZIP	26.334	12.661	<b>38.995<sup>66</sup></b>
Czech Republic	INTERGRAM	494.597	529.581	<b>1.024.178</b>
France		20.004.680	27.156.715	<b>47.161.395</b>
	<i>ADAMI</i>	<i>9.920.229</i>	<i>21.650.792</i>	<i>31.571.021</i>
	<i>SPEDIDAM</i>	<i>10.084.451</i>	<i>5.505.923</i>	<i>15.590.374</i>
Germany	GLV	8.712.960	14.434.560	<b>23.147.520</b>
Lithuania	AGATA	11.075	5.898	<b>16.973</b>
Netherlands		2.259.000	2.103.000	<b>4.362.000</b>
	<i>NORMA</i>	<i>92.000</i>	<i>2.103.000</i>	<i>2.195.000</i>
	<i>SENA</i>	<i>2.167.000</i>		<i>2.167.000</i>
Spain		4.695.440	10.500.442	<b>15.195.882</b>
	<i>AISGE</i>		<i>8.359.152</i>	<i>8.359.152</i>
	<i>AIE</i>	<i>4.695.440</i>	<i>2.141.290</i>	<i>6.836.730</i>
Sweden	SAMI	1.750.788	68.256	<b>1.819.044</b>
<b>All countries</b>		<b>37.954.874</b>	<b>54.811.113</b>	<b>92.765.987</b>

<sup>65</sup> The revenue collected by Huzip was a combined amount of €52.668 covering both 2006 and 2007. It is accordingly recorded here on the basis of a 50:50 split.

<sup>66</sup> Idem.



**Table 4.3 Private copying – Collection Evolution by country 2005-2007**

*Gross amounts in euro (VAT not included)*

Country	Organisation	Audio	Audiovisual	Total	Year
Croatia	HUZIP	0	0	0	2005
		52.668	25.323	77.991	2006
					2007
Czech Rep.	INTERGRAM			392.423	2005
		208.110	338.670	546.780	2006
		494.597	529.581	1.024.179	2007
France	ADAMI and SPEDIDAM			44.158.298	2005
		20.398.734	23.538.166	43.936.900	2006
		20.004.680	27.156.715	47.161.395	2007
Germany	GVL			24.279.680	2005
		8.575.360	14.310.000	22.885.360	2006
		8.712.960	14.434.560	23.147.520	2007
Lithuania	AGATA			57.567	2005
		24.632	9.799	34.431	2006
		11.075	5.898	16.973	2007
Netherlands	NORM and SENA			17.762.000	2005
		2.766.000	2.784.000	5.550.000	2006
		2.259.000	2.103.000	4.362.000	2007
Spain	AIE and AISGE			19.859.149	2005
		4.773.150	11.066.517	15.839.667	2006
		4.695.440	10.500.442	15.195.882	2007
Sweden	SAMI			1.994.112	2005
		2.019.956	78.700	2.098.656	2006
		1.750.788	68.256	1.819.044	2007
All countries				108.503.229	2005
		38.792.276	52.138.513	90.930.789	2006
		37.954.766	54.811.113	92.765.879	2007

#### 4. c. Impact of European legislation

In most of the countries studied as part of this report, remuneration for private use had already been introduced and applied prior to the implementation of Directive 2001/29/EC: it was introduced in German law in 1965 on hardware and extended in 1985 to blank tapes, in 1985 in France, in 1987 in Spain, in 1990 in the Czech Republic, in 1993 in the Netherlands, in 1999 in Lithuania, in 1999 in Sweden.

Only in Croatia, which is not yet part of the European Union, was it introduced in 2003, after the adoption of the Directive. Provisions relating to the exception to the reproduction right for private use were partly redrafted in some national laws up until in 2006 (see Spanish or French laws) as part of the implementation process of Directive 2001/29/EC. In Lithuania, although this exception predated the adoption of Directive 2001/29/EC, its management (collection and distribution) was set up recently (2004).

While leaving the choice to the Member States as to whether to introduce the exception of private use on the condition of fair compensation, Directive 2001/29/EC has certainly not contributed to any harmonisation of this exception. For rightholders in those

countries with remuneration schemes for private copying, it is incomprehensible that they should return empty-handed from other Member States like the UK, while UK rightholders receive remuneration collected abroad<sup>67</sup>.

Performers established in the UK would be happy to benefit from such a system that recognizes the value of their work and takes into account the use made of it. This is an even bigger issue, since private copying also occurs in the UK and will continue to do so.<sup>68</sup> Against this background of growing consumer demand and greater affordability and availability of technology able to produce high quality copying, performers' unions in the UK are supporting the introduction of a levy on equipment and blank carriers. Unfortunately, no such legislative change has been introduced so far.

In November 2006 in the UK the Gowers Review of Intellectual Property<sup>69</sup> proposed the introduction of a "a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect. It was envisaged that there "should be no accompanying levies for consumers."

In Lord Triesman's (Parliamentary Under Secretary of State for Intellectual Property and Quality) 2008 consultation document "Taking Forward the Gowers Review of Intellectual Property"<sup>70</sup> with regard to the private copying exception it was stated that the proposal was very narrow in scope.

*"It would only permit format shifting, i.e. the copying of legitimately owned works to different formats for use on different devices. It would not include the broader range of private uses, such as multiple copying of all types of work or copying for friends and family. In particular, file sharing of music or film is not format shifting and would not fall within the scope of the exception."*

Thus despite the fact that the Gowers review found that format shifting was widespread (as are also other types of reproduction for private, non commercial use), it stopped short of recommending a private use exception which would have brought the UK into line with the common position in the vast majority of EU Member States. Despite the fact that consultation continues, it seems that there is no short-term prospect of a change of law in the UK, which will contribute any revenue to performers for the private copying of their work.

In 2005, the European Commission started addressing the question of private copying throughout the European Union. In particular, they wanted to assess the degree of use of DRMs (and in particular TPMs or "technical protection measures" limiting or preventing acts of reproduction) as well as the way Member States had applied the exception for private copying and related compensation schemes.

At that time it remained uncertain whether or not the use of TPM to prevent or limit the number of reproductions for private, non commercial purposes would become general practice and would have the effect of significantly reducing or even stopping acts of private copying. Since then, the use of TPM has proved to remain limited and sometimes easily circumvented. In addition, they may have adverse side-effects like a lack of interoperability, thus preventing also a number of authorised uses.

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<sup>67</sup> 5 out of 27 EU Member States have no remuneration scheme for private copying: UK, Ireland, Cyprus, Luxemburg, Malta.

<sup>68</sup> A poll on consumer CD copying habits commissioned to YouGov Plc, a member of the British Polling Council, by the UK National Consumer Council (NCC), as part of the UK government review of national intellectual property law, which interviewed in April 2006 a nationally representative sample of 2135 British aged 18 years and over, found out that over half of British consumers are infringing the law by copying their CDs onto other players, for private purposes. The study concludes that UK copyright law is out of step with actual practices. See <http://www.ippr.org.uk/pressreleases/?id=2404>.

<sup>69</sup> Available at (full report available at [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)).

<sup>70</sup> Available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>

After extensive consultations and analysis, the European Commission decided in May 2008 to set up a platform on the basis that existing national remuneration systems differ in some aspects from each other and may be improved by decisions of a technical nature as concerns cross-border trade.

The Commissioner for internal market and services, Mr McCreevy, took the opportunity to re-state the importance of private copying remuneration and its contribution to the cultural sector. In particular, he explained that "levies are a valuable component in how we presently ensure the livelihood of the creative community". He added that the entitlement of rightholders to receive "fair compensation for the use of their work cannot be contested".

On this basis, a platform gathering representatives of rightholders, of the ICT industry and of consumer organisations was set up. It has been working on certain technical aspects to improve where needed some practical modalities linked to the remuneration schemes, their management and their enforcement.

It is hoped that after the recent years of turmoil, this platform may establish common principles and provide an environment advantageous to all interested parties.

Although the Directive does not prescribe compulsory collecting management of this remuneration right -if the exception for private use is introduced-, all countries that made use of the exception linked the remuneration right to compulsory collective management. Results indicated in table 4.3 show that collective management works.

As indicated in table 4.1, the sharing system between the various rightholders is often unbalanced, to the detriment of performers. A specification that each category of rightholders is entitled to an equal share could help counterbalance the negative effects of unbalanced market bargaining powers.

## 5. Rental right

### 5. a. Legal framework

#### *International legal framework*

The Rome Convention does not grant the performer a rental right.

In the TRIPS Agreement an exclusive rental right “to authorize or to prohibit the commercial rental to the public of originals or copies of [their] copyright works” is attributed to the producers of phonograms and “any other rightholders in phonograms as determined in a Member’s law”.<sup>71</sup> This provision gives rise to differing interpretations: some argue that the TRIPS Agreement itself provides a rental right, others that it refers the decision to the national legislator as to whether and to which rightholders on a phonogram a rental right should be given.<sup>72</sup>

An unequivocal exclusive right of authorizing commercial rental to the public is finally given to the performer by the WPPT. This only concerns the rental of performances fixed in phonograms.<sup>73</sup>

Neither the TRIPS Agreement nor the WPPT provide for a definition of “rental”. The first definition of the term under international legislation is in fact to be found in the European Directive 92/100/EEC. This specifies that “rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage”<sup>74</sup>.

#### *European legal framework*

At Community level, Directive 2006/115/EC (originally Directive 92/100/EEC, slightly amended when subject to codification in 2006) grants a rental right to all performers: pursuant to its art. 3.1 (formerly art. 2.1 of Directive 92/100/EEC), performers have the exclusive right to authorise or prohibit the rental and lending of fixations of their performances.

According to art. 5 (formerly art. 4) of the Directive, if a performer has transferred or assigned his rental right concerning a phonogram or a film to a producer, he retains an unwaivable right to obtain an equitable remuneration for the rental.

The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies.<sup>75</sup> Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed as well as the matter relating to the party from whom this remuneration may be claimed or collected.<sup>76</sup>

However, these provisions are considerably weakened in terms of the audiovisual field given the fact that Directive 2006/115/EC introduces a presumption of transfer of rental right in the event of a film production: pursuant to art. 3.4 (formerly art. 2.5), Member States are obliged to implement in their national legislation a rebuttable presumption

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<sup>71</sup> Art. 11 and 14.4 TRIPS Agreement; the provision also stipulates that if on 15 April 1994 a system of equitable remuneration is in force, such a system may be maintained provided that the commercial rental is not resulting in the material impairment of the exclusive reproduction rights.

<sup>72</sup> E.g. Brison, F., *Het naburig recht van de uitvoerende kunstenaar*, nr. 351 (arguing that otherwise the rental right could have been simply mentioned in art. 14.1, enumerating the different acts a performer can prevent); contra: e.g. Kerever, A., “*Droit d’auteur et mondialisation*,” *Les Cahiers de Propriété Intellectuelle*, 1997, 35.

<sup>73</sup> Art. 9 (2) WPPT

<sup>74</sup> Art. 1.2 Directive 92/100/EEC; art. 2.1 (a) in Directive 2006/115/EC (codified version).

<sup>75</sup> Art. 5.1 to 5.3 Directive 2006/115/EC (formerly art. 4.1 to 4.3 of Directive 92/100/EEC)

<sup>76</sup> Art. 5.4 Directive 2006/115/EC (formerly art. 4.4 of Directive 92/100/EEC)

that performers have transferred their rental right to the film producer, when a contract concerning the production of a film is concluded.

### ***National legal framework***

#### *Exclusive rental right*

In all countries covered in the present study, with the exception of France, the national law expressly grants an exclusive rental right to performers. French legislation does not explicitly envisage any rental right for performers.<sup>77</sup> However, it explicitly grants a rental right to producers, notably to phonographic producers.<sup>78</sup>

#### *Remuneration right in the event of transfer of the rental right*

All countries, with the exception of France, grant the performer a right to an equitable remuneration if this performer transfers his rental right to the producer of a phonogram<sup>79</sup>. The terms for determining the remuneration and the body liable for payment differ amongst the countries, as shown in table 5.1.

Remuneration is due either by the user (e.g. the Czech Republic, Lithuania) or by those who operate the rental (e.g. Croatia, Germany, Lithuania again, Spain), or by the producer (e.g. the Netherlands and Sweden).

Some countries have made it compulsory for this remuneration right to be administered by collecting societies. This is the case in the Czech Republic, Croatia and Spain. In Germany there is no compulsory intervention of collecting societies, but a performer can only assign his remuneration right to a collecting society (and not to the producer). In practice, the collecting society GVL is administering this remuneration right. In the Netherlands and Sweden, where remuneration is payable by the producer, administration of the remuneration right has not been entrusted by law to a collecting society.<sup>80</sup>

In countries where remuneration is collected by collecting societies, this remuneration is determined by mutual agreement between the collecting societies and the users. It should also be noted that, in practice, the market for rental of physical copies of phonograms (sound fixations) is almost nonexistent.

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<sup>77</sup> Art. L 212-3 of the CPI only mentions an exclusive right for fixation, reproduction and communication to the public of this fixation.

<sup>78</sup> Art. L213-1 of the CPI.

<sup>79</sup> In the law in the Czech Republic the term “reasonable remuneration” is used (art. 49.3 and art. 74).

<sup>80</sup> However, the collecting society SAMI recently joined an agreement negotiated by Copyswede concerning the video-distribution by the Swedish Television and Swedish Education Radio.

**Table 5.1 Rental right of audiovisual fixations (physical sector only) - Terms of remuneration**

Countries	Equitable remuneration in case of a transfer of exclusive right	Determination of the remuneration	Body liable for payment	Intervention of collecting societies
<b>Croatia</b>	Yes	Not determined.	Video-shop	Yes, compulsory licence; but not applied in practice
<b>Czech Republic</b>	Yes	Tariffs determined by agreements between collecting societies and video-shops (currently 3 % from rental fee or lump sum depending on number of titles). Rental right is restricted to material copies, online use falls under the category of "making available".	Video-shop	Yes, compulsory licence
<b>France</b>	Not regulated	NA	Not regulated	Not regulated
<b>Germany</b>	Yes	Tariffs fixed by collecting societies and open to arbitration between collecting societies and users and, if necessary, to further legal action.	Video-shop	Not by law, but remuneration right can only be administered by a coll. society in the event of prior transfer of this right to the collecting society. In practice GVL administers this remuneration right.
<b>Lithuania</b>	Yes	Not determined.	Video-shop and consumer	Originally compulsory licence. After amendment of the Law in October 2006, it became not "compulsory" but "usually" enforceable through the collecting society. However, in practice remuneration is not paid and the right is not enforced.
<b>Netherlands</b>	Yes	Not determined. The law only stipulates that the producer owes the performer equitable remuneration for the rental in case of transfer of the right. Hence, remuneration related to actual rental use is not compulsory: it can be a single fee. The equitability of the amount paid can be ruled upon by the Court, but until now, this has not been done.	Producer	No
<b>Spain</b>	Yes	Tariffs fixed by collecting societies (based on the surface area of the shop). Implementation negotiated with the users and communicated to the Ministry of Culture.	Video-shop	Yes, compulsory licence
<b>Sweden</b>	Yes	Not determined. In practice, agreements unions - producers. As regards public service Swedish TV, tariffs fixed by agreement with Copyswede (representing collecting societies).	Producer <sup>81</sup>	No. In practice Copyswede and the Swedish TV/Swedish Education Radio concluded a video-agreement concerning their own video distribution. The collecting society for performers only joined this agreement recently.

<sup>81</sup> This is not very clearly stated in article 29 of Swedish IP Law but follows from the assumption that the rental right itself is primarily transferred to the recording producer. The producer becomes accordingly the body from whom the unwaivable remuneration right is to be claimed. Art. 29 is a rule "of contract", which means that the right of remuneration is only applicable in the relationship between the rightholder and the producer.

## **5. b. Practice**

### **The exercise of the exclusive rental right**

The exclusive rental right is in general transferred by the performer to the producer, in the audio sector as well as in the audiovisual sector. This practice is extended in the audiovisual sector by the presumption of transfer incorporated in the law in the Czech Republic, Germany, Lithuania, the Netherlands, Spain and Sweden if a contract concerning the production of a film is concluded.

It should be noted that most producers of phonograms prohibit the use of the rental right.

Since generally the right is not exercised in the audio sector in respect of physical copies, almost no remuneration is collected in this regard.

### **The exercise of the remuneration right**

A comparison between tables 5.1 and 5.2 shows that it is only in countries where the remuneration is payable by the user (generally the video-shop) that the remuneration right is administered by collecting societies.

In countries where the body liable for payment has not been indicated or where the producer has been designated as being liable for payment, there is usually no administration of the remuneration right by collecting societies.

Where the remuneration right is not administered by a collecting society, the performer generally receives a single, "overall" remuneration from the producer, which is supposed to include the equitable remuneration for the transfer of the rental right (e.g. the situation in the Netherlands). In practice this often means no remuneration for the transfer of this right.

To date, remuneration for rental that does not come from exercising the exclusive right is collected by collecting societies in the audiovisual sector only.

Furthermore, it appears that only in Germany, Spain, and the Czech Republic, is remuneration currently collected by the collecting societies. In the other countries where there is compulsory intervention of a collecting society - Croatia and until recently Lithuania -, collection of remuneration has not yet begun: the rental right and related remuneration right were introduced only recently in the legislation of these candidate and new Member States (1999 in Lithuania, 2003 in Croatia).

In Sweden, in accordance with a collective agreement signed between producers and the actors' union with regard to the rental right of performers, the producer shall pay an amount to the union for further distribution to the rightholders.

With regard to Swedish public service TV, the rental right for video is subject to an umbrella agreement between the various collecting societies that is administered through Copyswede. Nevertheless, no revenues were collected for the years 2005, 2006 and 2007.

In 2007, the collecting societies in Germany and Spain predicted that they would not collect more remuneration for rental in the future than they had done over recent years since in their view, on-demand services are progressively replacing rental. This forecast has proved correct with the remuneration they have been collecting since 2005 actually decreasing. Table 5.3. shows this overall trend. Possible explanations for this include the increasing market of new platforms offering on-demand content for usage during a limited period of time and sometimes also a limited number of viewings as well as losses incurred as a result of counterfeiting and the public's usage of filesharing technologies.

European consumer spending on DVD rental fell for the second year in a row in 2007, down 13% year-on-year from €2.1bn in 2006 to €1.9bn. This is slightly more pronounced than the nine per cent decline registered in 2006 and is due to the downturn in traditional store-based rental. While the online DVD rental business continued to grow in 2007 – consumer spending in Europe rose 31% from €158.2m in 2006 to €206.9m – rental spending through high street shops and automated vending machines fell by 16%, from €2.0bn in 2006 to €1.6bn.

The steady erosion of average retail prices and the availability of cheap product via newspaper kiosks and magazine/newspaper cover-mounts have made traditional DVD rental a less compelling value proposition for European consumers. In addition, DVD rental competes directly with copyright infringing products. The latter has been blamed for conditions in Spain where DVD rental spending plummeted by 25% in 2007, following a 13% decline in 2006. The climate in the Spanish rental market led to the withdrawal of rental giant Blockbuster in March 2006, followed by a spate of further closures in 2007, affecting both the family-owned rental stores that still dominate the sector, and the country's extensive network of DVD vending machines.

Spain was not the only major market to experience a steep decline in rental spending. In fact, of the big five European markets (France, Germany, Italy, Spain and the UK), Germany was the only country not to record a double-digit decline in 2007. This contributed to a 12% decrease in total DVD rental spending in Western Europe from €2.1bn in 2006 to €1.8bn. Consumers in the region rented half as many discs as they did five years ago, with the DVD rental tie ratio (the average annual number of DVD rental transactions per equipped household) dropping from 8.5 units in 2003 to 4.4 in 2007<sup>82</sup>.

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<sup>82</sup> International Video Federation - European Video Yearbook 2008



**Table 5.2 Rental right –Collection for performers through collective management over the years**

*Gross amounts in euro (VAT not included)*

Country	Organisation	Audio	Audiovisual	Total	Year	Body liable for payment
Croatia	Huzip	0	0	0	2005	Video shops
		0	0	0	2006	
		0	0	0	2007	
Czech Republic	INTERGRAM	58.060	0	58.060	2005	Audiovisual: Video shops Audio: Libraries <sup>83</sup>
		53.300	0	53.300	2006	
		50.255	0	50.255	2007	
France	ADAMI and SPEDIDAM	NA	NA	NA	2005	NA
		NA	NA	NA	2006	
		NA	NA	NA	2007	
Germany	GLV	0	871.500	871.500	2005	Video shops
		0	856.800	856.800	2006	
		0	849.800	849.800	2007	
Lithuania	AGATA	0	0	0	2005	Video shop
		0	0	0	2006	
		0	0	0	2007	
Netherlands	NORMA and SENA	0	0	0	2005	Producer
		0	0	0	2006	
		0	0	0	2007	
Spain	AIE and AISGE	0	114.871	114.871	2005	Video shops
		0	51.549	51.549 (42.809 AISGE, 8.740 AIE)	2006	
		0	56.619	56.619	2007	
Sweden	SAMI	0	0	0	2005	Producer
		0	0	0	2006	
		0	0	0	2007	
Total collection for all countries				1.044.431	2005	
				961.649	2006	
				956.674	2007	

<sup>83</sup> In accordance with national practices in the Czech Republic, libraries are entitled to collect remuneration for rental as well as for lending in the audio sector. The figures in the table fall under the category of rental.

**Table 5.3 Rental right – Collection by collecting societies for performers in Germany and Spain and the Czech Republic for 2001-2007**

*Gross amounts in euro (VAT not included)*

	Remuneration collected for rental by GVL Germany	Remuneration collected for rental by AISGE Spain	Remuneration collected for rental by Intergram Czech Republic
2001	1.053.500	868.856	*
2002	1.017.100	509.426	*
2003	953.400	55.015**	*
2004	884.800	26.730	*
2005	871.500	114.871***	58.060
2006	856.800	42.809	53.300
2007	849.800	56.619	50.255

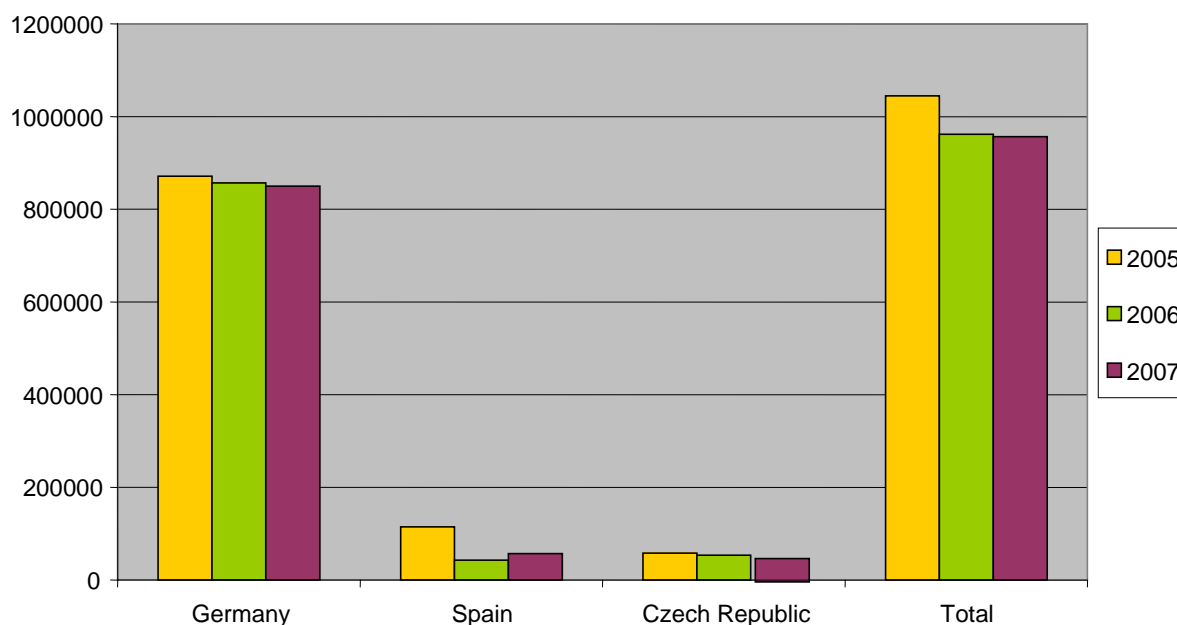
\* Data unavailable

\*\* Prior to 2003, AISGE had an agreement with the distribution companies who provided information on the number of works sold to video shops. That agreement was broken by the distribution companies and the new tariff agreed was significantly lower.

\*\*\* The significant increase of amounts between 2004 and 2005 is partly due to the fact that AISGE signed an agreement with ACVE (video shops association) following which it received amounts corresponding to previous years.

**Table 5.4 Rental right – Collection by collecting societies for performers in Germany and Spain and the Czech Republic for 2001-2007 (diagram)**

**Rental Right Collection 2005-2007**



## 5. c. Impact of European legislation

The rental right and related remuneration right were introduced in the national legislations following the implementation of Directive 92/100/EEC (currently referred to as Directive 2006/115/EC). Today, all countries except France grant their performers an explicit rental right and a remuneration right in the event of transfer.

The Directive does not determine by whom this remuneration should be paid. In those countries where national legislation does not determine who should pay the remuneration, as well as in those countries where it designated the producer as the party liable for payment, there is currently no collective management of the remuneration right. In countries where the user is designated as the party liable for payment, the remuneration right is generally collectively managed.

As can be seen from the tables, the remuneration right is of economical importance to performers in those countries where the right has been entrusted to collecting societies. In countries where there is no intervention of collecting societies, such as the Netherlands, no remuneration is collected by collecting societies. Since performers are not really in a position to be able to manage by themselves and enforce the payment of their remuneration right, retained even when they have transferred their exclusive rental right to their producers, performers in these countries most likely fail to exercise their remuneration right.

Making the administration of the remuneration right by collecting societies compulsory is therefore clearly beneficial to performers.

Furthermore, the current definition of "rental" may traditionally have been viewed as implying the making available for use of only physical carriers or devices.

However, new uses such as video on-demand allow users to select and watch video content over a network including via services where content may be accessed only for a limited amount of time. In these cases, carrier devices are no longer needed. Nor is there any return of the copy used. In order for the remuneration right in the event of rental to have any chance of becoming effective in the future, the definition of "rental" should clearly include making available via digital services.<sup>84</sup>

This view is supported by the fact that the directive states that "*copyright and related rights protection must adapt to new economic developments such as new forms of exploitation*"<sup>85</sup>.

Integration of an unwaivable remuneration right could also be contemplated in the event of the transfer of the exclusive making available right for on-demand services, as discussed in chapter 3 above.

Whichever legal method is used, a clear indisputable right should exist, whereby performers receive equitable remuneration for online use.

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<sup>84</sup> In the view of Reinbothe, J. and von Lewinski S., *The E.C. Directive on Rental and Lending Rights and on Piracy*, London, Sweet & Maxwell, 1993, pp. 41-42, the wording of articles 1 and 3 in the Directive 2006/115/EC would make it possible to understand that electronic "rental" and "lending" were not covered under this directive. However, as underlined by the same authors, the purpose of this directive – which writing predated the development of electronic commerce – suggests that those exploitations should be covered as well because they will have in practice the same effects as the traditional rental and lending of material objects. They conclude by considering that 'the Directive should be interpreted as covering the electronic "rental" and "lending", but leaving to the Member States the concrete means of incorporation into the national law'.

<sup>85</sup> Recital 4 of the directive

## 6. Treatment reserved for recordings in the audiovisual field

### 6. a. Legal framework

#### *International legal framework*

Article 7 of the Rome Convention gives the performer minimum protection by granting him the possibility of preventing a number of uses of his performance without his consent. However, pursuant to article 19 of the Rome Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, article 7 simply ceases to apply.

Neither the TRIPS Agreement nor the WPPT rectified this weakness in terms of protection for (audio-)visual fixations. The protection offered by the latter treaties concerns only the fixation of a performance on a phonogram, not a fixation incorporated in an audiovisual work.<sup>86</sup> The provisions of these treaties may even be considered to constitute a set-back, since in the Rome Convention the performer at least enjoys the possibility of preventing the audiovisual fixation of his performance.<sup>87</sup>

At international level, discussions have started again over the protection of audiovisual performances.

Notwithstanding the WIPO resolution of the Diplomatic Conference in 1996 to adopt a protocol concerning audiovisual performances by 1998, neither a protocol nor a treaty has yet been achieved.

In 2000, a WIPO diplomatic conference had failed to reach agreement on a new treaty about the protection of audiovisual performances. One element of major disagreement between WIPO Member States was the question of a possible presumption of transfer of the performer's rights to the producer of an audiovisual fixation. Such a systematic transfer of the performer's rights would have seriously limited the possibilities of this performer actually enjoying his rights over his audiovisual performance and negotiating balanced contractual conditions with the producer.

Since 2000 the issue has remained on the agenda of the General Assemblies but the reconvening of the Diplomatic Conference has not taken place.

In addition to organising regional and national meetings and seminars, the WIPO has notably carried out a worldwide survey in 2003 on national legislation protecting fixed audiovisual performances, which was prepared in cooperation with Member States.

In 2003 it published a study on the treatment accorded to performers in audiovisual production contracts and collective bargaining agreements in several countries<sup>88</sup> as well as a "Study on Transfer of the Rights of Performers to Producers of Audiovisual Fixations" and examined private international law rules on transfer under the legislation of eight countries (France, USA, Egypt, Germany, India, Japan, Mexico and the United Kingdom). The findings of the authors of the study lead to a degree of scepticism regarding the effectiveness of any choice of law rule, even if one could be agreed upon.

In 2005 it delivered a survey on national protection of audiovisual performances<sup>89</sup>.

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<sup>86</sup> Art. 14.1 TRIPS Agreement, arts. 2b, 5-10 WPPT

<sup>87</sup> Art. 7, 1 (b) Rome Convention.

<sup>88</sup> [http://www.wipo.int/copyright/en/activities/audio\\_visual\\_studies.html](http://www.wipo.int/copyright/en/activities/audio_visual_studies.html)

<sup>89</sup> [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=49249](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=49249)

In 2008, the Secretariat presented a Summary of the Outcome of the National and Regional Seminars on the Protection of Audiovisual Performances and Stocktaking of Positions<sup>90</sup>.

After a period of relative stagnation, since 2007 the topic is back on the agenda of WIPO Standing Committees on Copyright and Related Rights.

Discussions on the opportunity and conditions to re-launch the negotiations with a view to achieving an international treaty on audiovisual performances have started again. Informal consultations among Member States are ongoing in order to have an update on their respective positions and find ways for making progress on outstanding issues. In this context, the WIPO Secretariat published a background document dated 17 August 2009 on the main questions and position to feed the debate<sup>91</sup>.

However, it is too early to predict what the result of these discussions will be in terms of agreeing on a new international instrument first, but also on the way and the extent to which this would upscale the rights of performers in the audiovisual field.

In any case, an international legal instrument that would finally give adequate protection to performers with regard to audiovisual fixations is highly needed. The situation is currently uneven and detrimental to the audiovisual sector as compared to the musical one (see figures below).

### ***European legal framework***

At European level, Directive 2006/115/EC (92/100/EEC) does not make any distinction between phonograms and audiovisual fixations. The performer is granted exclusive rights over the fixation, reproduction and distribution of his performance as well as over the broadcasting and communication to the public of his live performance, be it audio or audiovisual.<sup>92</sup> However, since according to art. 8.1 of this Directive Member States do not have to provide performers with an exclusive right to authorise or prohibit broadcasting and communication to the public whenever the performance is itself already a broadcast performance or is made from a fixation, this protection remains limited.

While a right to equitable remuneration is provided if a phonogram published for commercial purposes is used for broadcasting or for any communication to the public, no such right is provided for the broadcasting or communication to the public of audiovisual fixations.<sup>93</sup>

However, according to recital 16 of the Directive 2006/115/EC (formerly recital 20 of Directive 92/100/EEC), Member States may provide for more far-reaching protection than that required by art. 8.

Directive 2006/115/EC introduces the possibility of a general presumption of transfer of all the above-mentioned exclusive rights to the film producer: pursuant to art 3.6, Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that the contract provides for an unwaivable equitable remuneration. Member States may also decide that this paragraph shall apply *mutatis mutandis* to the rights of fixation, reproduction, distribution, broadcasting and

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<sup>90</sup> [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_3.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_3.doc)

<sup>91</sup> [http://www.wipo.int/edocs/mdocs/mdocs/en/ap\\_im\\_09/ap\\_im\\_09\\_inf\\_3.doc](http://www.wipo.int/edocs/mdocs/mdocs/en/ap_im_09/ap_im_09_inf_3.doc)

<sup>92</sup> Art. 6 to 9 Directive 92/100/EEC dealing with performer's rights are now covered in Art. 7 to 9 of Directive 2006/115/EC (codified version of this directive) and Directive 2001/29/EC at Article 2(b) dealing with the reproduction right (originally covered in art. 7 of Directive 92/100/EEC).

<sup>93</sup> Art. 8.2 Directive 2006/115/EC

communication to the public.<sup>94</sup>

Thus, if a Member State decides to expand the presumption of transfer to include these exclusive rights, performers should be entitled to an unwaivable equitable remuneration for each of these rights.

### **National legal framework**

#### *Exclusive rights for audiovisual fixations*

Most countries provide for legal protection in the form of exclusive rights over all types of exploitation of audiovisual fixations.

In Germany only the exclusive right to communicate to the public is excluded for broadcast or fixed performances, with a remuneration right being provided for instead.

In France, the situation as regards rental and lending rights for (commercial phonograms and) audiovisual fixations is disputed.

In the other countries performers enjoy by law the exclusive right to communicate in public and broadcast their performances.

However, most responses relating to the situation in these countries specified that despite all these exclusive rights being granted by law, they are almost always transferred to users in return for an equitable remuneration. In the Netherlands, for instance, the law even provides that in case of a transfer of this nature against remuneration by the other contracting party, the remuneration concerned may take the form of one lump sum: a single one-off fee.

In practice, the situation is even worse: parties contracting with performers often argue that the remuneration corresponding to these exploitation rights is included in the fee the artist receives upon signature of his employment or recording contract, which means that in reality the remuneration corresponding to exercising these rights is seldom paid.

**Table 6.1 Audiovisual recordings – Applicable exclusive rights**

Countries	Reproduction	Distribution	Lending/rental	Broadcasting through TV channels and com. to the public	Webcasting	Making available
<b>Croatia</b>	Yes	Yes	Yes	Yes To be administered only through a collecting society  In practice not administered yet		
<b>Czech Republic</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>France</b>	Yes	Yes*	Yes*	Yes	Yes*	Yes*
<b>Germany</b>	Yes	Yes	Yes	Broadcasting: No Com to the public: Yes**	Yes	Yes
<b>Lithuania</b>	Yes	Yes	Yes	No	No	Yes
<b>Netherlands</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Spain</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Sweden</b>	Yes	Yes	Yes	Yes	Yes	Yes

\* These rights could be considered to be included implicitly under art. 212-3 of the CPI as communication to the public.

\*\* eg broadcasting on TV sets situated in hotel lobbies, but note that communication in cinemas is excluded.

<sup>94</sup> Art. 3.6 and recital of Directive 2006/115/EC (formerly art 2.7 and recital 19 of Directive 92/100/EEC)

*Presumption of transfer of audiovisual exploitations rights in the event of signing a film production contract*

Most countries have introduced in their legislation the presumption of transfer to the producer of all audiovisual exploitation rights. Only Croatia has not introduced any presumption of transfer, including for the rental right, although this is prescribed by article 3.4 of Directive 2006/115/EC (formerly art. 2.5 of Directive 92/100/EEC). In the Czech Republic performers' rights are not transferable. Yet, in the event of a written contract, these rights are presumed to be assigned to the producer, which means that the producer is not the owner of the rights but is authorized to exploit them.

In all countries that introduced the general transfer of audiovisual exploitation rights, the bundle of the rights transferred is alike. In the Czech Republic, France, Germany, Lithuania, the Netherlands, Spain and Sweden the making available right is part of this package of rights transferred by the performer to the film producer.

In Spain, the new law provides a presumption of transfer of the making available right, concerning both audio and audiovisual performances, to the film or phonogram producer upon signature of the film or phonogram contract.<sup>95</sup> This said, apart from the general presumption of transfer of all audiovisual exploitation rights, the new Spanish law provides for a specific presumption of transfer of the making available right.<sup>96</sup>

The presumption is in general rebuttable, which means that it is applied unless it has been agreed otherwise.

All the countries that incorporated a presumption of "general" transfer in the event of signing a film contract, with the exception of Germany and Sweden, provide as a counterpart of this transfer a right to equitable remuneration for each type of exploitation, as is prescribed by art. 3.6 and art. 5 of Directive 2006/115/EC (formerly art. 2.7 and 4 of Directive 92/100/EEC)<sup>97</sup>

The remuneration is in general unwaivable.<sup>98</sup>

Table 6.2. summarizes the situation in the various countries regarding the presumption of transfer of performers' exclusive rights as broken down in table 6.1. When compared with the situation of collective management of performers' rights in the audiovisual field and the remuneration actually collected for performers in this field it clearly appears that performers' rights in the audiovisual field are not given appropriate protection.

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<sup>95</sup> Art. 108.2 Spanish IP Law

<sup>96</sup> For more information see chapter of this study dealing with the making available right.

In France, the presumption of transfer of a performer's rights in an audiovisual fixation to a producer envisaged in art. 212-4 IP-law (including the rights to fix, reproduce and communicate to the public the performance) is considered to also extend to the making available right.

In the Czech Republic the making available right is only assigned (and not transferred).

<sup>97</sup> This is subject to criticism in the German doctrine, see Von Lewinski, S., "*Die Umsetzung der Richtlinie zum Vermiet- und Verleihrecht*", p. 449.

<sup>98</sup> With the exception of Lithuania, where it is not stipulated in the law, and of the Netherlands, where it is limited to the rental right.

**Table 6.2 Audiovisual recordings - Presumption of transfer of audiovisual exploitation in contracts with film producers**

<b>Countries</b>	<b>Presumption of transfer</b>	<b>Exclusive rights for which transfer is presumed</b>	<b>Is this presumption of transfer rebuttable?</b>	<b>Right to a remuneration in case of transfer?</b>	<b>Is this remuneration right unwaivable?</b>
<b>Croatia</b>	No	NA	NA	NA	NA
<b>Czech Republic</b>	No transfer, but assignment	No transfer, but assignment of all audiovisual exploitation rights	Yes	Remuneration subject to contractual negotiation, generally one single amount for all modes of exploitation	Yes (but not explicitly mentioned in the law)
<b>France</b>	Yes <sup>99</sup>	All audiovisual exploitation rights	Not specified in the law	Yes. Separate remuneration for each mode of exploitation	Yes (but not explicitly mentioned in the law)
<b>Germany</b>	Yes	All audiovisual exploitation rights	Yes	No remuneration except for rental	NA (except unwaivable for rental)
<b>Lithuania</b>	Yes	All audiovisual exploitation rights	Yes	Yes For all forms of exploitation	Not specified in the law
<b>Netherlands</b>	Yes	All audiovisual exploitation rights	Yes	Yes For all forms of exploitation	Only for rental
<b>Spain</b>	Yes	All audiovisual exploitation rights	Yes	Yes	Yes
<b>Sweden</b>	Yes	All audiovisual exploitation rights	Yes	No remuneration except for rental	NA (except unwaivable for rental)

<sup>99</sup> In France, the presumption of transfer applies when a performer signs a contract in order to achieve an audiovisual work. Consequently, it has been judged that the presumption does not apply to the contracts concluded in order to participate in a soundtrack, even if this audio work has been specifically recorded to be incorporated in an audiovisual programme.

Indeed, the Court of Appeal of Paris decided that a contract concluded in order to participate in a soundtrack of a film cannot be considered as a contract signed to achieve an audiovisual work because the soundtrack can be dissociated from the images which are the proper elements characterizing an audiovisual work (Cour d'Appel de Paris, 4ème chambre – Section A, 8 June 2005).



## 6. b. Practice

### The exercise of exclusive rights

In general all the audiovisual exploitation rights are transferred to the producer, and this is also the case in countries where there is no presumption of transfer. The only exclusive rights that are exercised by collecting societies are the right of communication to the public of audiovisual fixations (in the Czech Republic, Germany, Spain and Sweden) and the right to broadcast audiovisual fixations (in the Czech Republic).

There is very little information available on the average remuneration the performer receives from the producer in exchange for the transfer of audiovisual exploitation rights. However, collecting societies observed, mainly from contracts given to them by their members (performers), that most performers in the audiovisual sector sign agreements with producers (or broadcasters) which stipulate that the fee to be paid for any and all forms of exploitation of their performances takes the form of a one-off lump sum<sup>100</sup>. Performers are given a global amount, which then is divided between the various types of exploitation. In this case the stipulated "right to an equitable remuneration" does not prevent this practice of buying all the rights at once.

The fact that no extra remuneration needs to be paid in the event of re-broadcasting may also generate situations in which performances are repeated endlessly, particularly in TV-series where the public ultimately identifies actors with the characters they play. Not only do performers not receive any extra income, but their repetition may also limit their market value thereafter.

Collective agreements sometimes indicate that a share of the audiovisual work revenues should be paid to performers, but this may not mean any actual additional revenue for performers in practice.

In France, the most important collective agreements are the collective agreement for the TV-sector of 30 December 1992 and the 1990 collective agreement for the cinema sector. In general, they concern the following types of exploitations: communication to the public, TV-broadcasting and exploitation of audiovisual or film productions for private use. No specific remuneration is foreseen for rental and webcasting.

In the cinema sector, a share is only due once the producer has recouped his investment, which happens with only a small percentage of film productions: over the last 15 years in this country the investment has been recouped for only around 100 film productions, which means an average of fewer than 7 film productions per year on average, while over 150 films are produced each year.

Figures actually reveal the discrepancy between the high number of productions and the lack of profitability of such productions. In 2004, 764 feature films were produced in the 25 EU Member States (not including Bulgaria and Romania at that time), according to a study by S. Newman-Baudais.<sup>101</sup> However, net profit and return on investment rates were less than 1 % for a panel of 1.000 European film production companies during the period 1997-1999.<sup>102</sup>

Actually, the market feasibility of a film project is not primarily based on its expected profitability but on the capacity to secure in advance all needed investments. When

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<sup>100</sup> See also Brison, F., *o.c.*, nr. 1047; Henneman, V., "Wat verdient een acteur", *AMI*, 2003, pp. 130-132.

<sup>101</sup> S. Newman-Baudais, *Partnering Europe – Access to the European Market for non-European Films: a Statistical Analysis*, European Audiovisual Observatory, Council of Europe, May 2005

<sup>102</sup> A. Lange, *Heurs et malheurs du cinéma européen*, European Audiovisual Observatory, Council of Europe, November 2001.

elaborating the financing plan of a film, the producer tries to minimise the risks and ideally secures the business plan to prevent any loss of money. Film financing occurs before pre-production and shooting. It is based on the assessed potential commercial value of the film. But whatever budget is envisaged, the producer tries to secure in advance all the financing to cover the production costs through public and private subsidies, pre-sales (selling the right to distribute a film in different territories before the film is produced) or investments from co-producers. The film project's generated cash flows are used in the first place to repay investors where repayment is due.

Only in case of extreme profits after net recoupement can performers envisage to receive any remuneration linked to the exploitation of the film.

As for the TV sector, in France the collective agreement currently applied does not impose any condition relating to recouping the investment, but links remuneration for exploitation of an audiovisual fixation to the producer's revenues (with the exception of re-broadcasting on television, which gives rise to remuneration based on a percentage of the performer's initial remuneration). Given the current major changes in audiovisual markets in Europe, with the entry of new actors as technologies and services evolve, while investments requirements remain high and advertising revenue is a determining factor, producers' revenues remain quite unstable. In addition, the collective agreement gives performers a right to remuneration of only 2 % of all the exploitation revenues.

Similar collective agreements exist in several European countries, such as Germany and Sweden.

Collecting societies also observe that the fees or salaries of performers do not seem to be increased in the event of profitable or widespread exploitation of audiovisual or film productions, notwithstanding the fact that remuneration for the use of the performance is often presumed to be part of the salary or fee for the performance.

The introduction of the presumption of transfer in general has had a negative effect on the bargaining position of the performer.<sup>103</sup> A performer needs very good credentials to be able to expect better conditions. Only performers considered as 'main performers' succeed in obtaining certain exploitation rights or procuring royalties for each mode of exploitation.

In those countries where a broadcasting and communication to the public right has been recognised for audiovisual fixations and where the collecting society has succeeded in administering this exclusive right, an economic benefit for the performers can be noted (e.g. the Czech Republic, Germany, Sweden as shown also in table 1.4.4).

However, the amounts collected are relatively small, especially when compared with those collected in the audio sector (music videos included) for communication to the public and broadcasting (see again table 1.4.4).

Interestingly, in Spain, where a remuneration right is established for the broadcasting and communication to the public of *audiovisual* fixations, once the performer's exclusive right has been transferred to the producer, this right is administered on a compulsory basis by a collecting society. In this country, the amounts collected are far higher than elsewhere. The mandatory collective management of a remuneration right implemented in the Spanish model therefore proves to be clearly beneficial for performers.

Finally, over recent years most collecting societies have observed that the exercise of exclusive rights has generally triggered little or zero remuneration for performers. Only in Spain, Germany, and, to a lesser extent, Sweden and the Czech Republic, do collecting societies collect some complementary remuneration for the use of performances in the

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<sup>103</sup> Heevel, G. "Beoogd en daadwerkelijk verkregen profijt van tien jaar WNR, AMI 2003, p. 196-197.

audiovisual field. In 2005, € 39.5m were collected in Spain, although this amount includes some retroactive payments corresponding to remuneration owed for previous years. € 1m was collected in Germany. In Sweden, € 0.32m went to actors' unions and some € 60.000 were collected for music videos; and in the Czech Republic an amount in the region of € 0.4m was collected. Since then, although there has been a marked decline in the amounts collected in respect of broadcasting through TV channels (with revenues dropping by 62%) this can to some extent be accounted for by the fact that Spain's very substantial revenue collected in 2005 included approximately € 20m of retroactive payments.

With regard to other forms of audiovisual communication to the public, the position in Germany and Sweden has remained relatively constant, while Spain has enjoyed very large growth with revenue increasing from € 0.37m in 2005 to € 6.20m in 2007.

In the other countries no remuneration was collected via collective management and presumably most performers did not exercise the rights concerned individually.

### **6. c. Impact of European legislation**

In some Member States (the Czech Republic, France, Germany), audiovisual exploitation rights for performers had already been introduced before the implementation of European Directive 2006/115/EC. Going beyond the minimum protection granted by article 8.1 of Directive 2006/115/EC only for unfixed performances, most countries provide performers with an exclusive right to authorize or prohibit the broadcasting and communication to the public of audiovisual fixations. Germany does not provide an exclusive right to authorise or prohibit the communication of audiovisual fixations to the public, but instead provides a remuneration right.

Thus, the majority of Member States legislations have considered that excluding audiovisual fixations from any protection in the event of broadcasting or communication to the public – as is made possible by the *acquis* – is not justified.

Not all Member States seem to have envisaged any right to an equitable remuneration in the event of the transfer of performer's rights other than the rental right (e.g. Germany and Sweden). In such cases, national legislations failed to fully implement article 3.6 of Directive 2006/115/EC (formerly article 2.7 of Directive 92/100/EEC), which links the contractual transfer of the rental right with an equitable remuneration for the contracting performer if any audiovisual exploitation rights have been transferred.

Most Member States provide a presumption of transfer of audiovisual exploitation rights in the event of a written contract pursuant to the possibility indicated in art. 3.6 of Directive 2006/115/EC (formerly art 2.7). However, prior to the adoption of Directive 92/100/EEC of 19 November 1992 (now codified as Directive 2006/115/EC), this presumption of transfer existed in a limited number of countries only (France, Germany and Spain).

If the aim of introducing audiovisual exploitation rights was to create an appropriate reward for performers for the use of performances in the audiovisual sector, it has failed to achieve this goal. Practices such as global all-inclusive one-off payments for the transfer of all audiovisual exploitation rights are common. To date, providing a "right to an equitable remuneration" in the event of a transfer does not prevent or change these practices.

The presumption of transfer of audiovisual exploitation rights in the event of signing a film contract has actually weakened the bargaining position of the performing artist.

Any fears on the part of producers that without such a presumption of transfer, exploitation of the works produced would become difficult, have appeared to be unfounded: written contracts in which the transfer of rights is regulated in detail are standard practice.<sup>104</sup> Moreover, in other sectors such as the music sector, where there is no presumption of transfer for the commercial phonogram, or even in other countries where no presumption of the transfer of rights in the audiovisual field exists, there is no sign that producers may have encountered comparatively greater difficulty in exploiting their productions.

Recourse to collective management of rights appears to be one solution for overcoming the weak bargaining position of performers: collecting societies are in general in a better position to negotiate and obtain global agreements providing satisfactory remuneration for performers and to control revenue.

Collective administration could be foreseen in particular with regard to collecting remuneration for the rights which the producer generally assigns to a third party, as is the case for broadcasting, communication to the public, webcasting and making available to the public. The Spanish model proves particularly beneficial: Spanish legislation provides performers with a remuneration right for the broadcasting and communication to the public of audiovisual fixations, administered compulsorily by a collecting society, as is the case for the remuneration right for phonograms.

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<sup>104</sup> P.B. Hugenholtz and Guibault L., *o.c.*, p. 82.

## 7. Duration of the protection of performers' rights

### 7. a. Legal framework and its implementation

#### *International legal framework*

The Rome Convention provides a minimum duration of protection of 20 years calculated from the end of the year in which the performance took place, or when it is incorporated (for the first time) in a phonogram, in which the fixation was made.<sup>105</sup> In the TRIPS Agreement protection is extended to a minimum period of 50 years calculated from the end of the calendar year in which the fixation (on a phonogram) was made or the performance took place.<sup>106</sup> The WPPT indicates the same duration (at least 50 years).<sup>107</sup>

#### *European legal framework*

Pursuant to art. 3 of Directive 2006/116/EC (formerly Directive 93/98/EEC) the performers' rights expire 50 years after the date of the performance. However, if a fixation of the performance has been lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

This introduces a potential extension vis-à-vis the duration of the protection envisaged in the TRIPS Agreement and the WPPT, since publication or communication to the public of a fixation of a performance can take place years after the performance (only in so far as this event takes place within 50 years of the date of the performance). The term is calculated from the first day of January of the year following the generating event.<sup>108</sup>

During 2006 and 2007, the European Commission carried out consultations and analysis on the effects of the term directive and the possible need to amend it. It delivered an impact assessment (available at: [http://ec.europa.eu/internal\\_market/copyright/termprotection/term-protection\\_en.htm](http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm)) on the basis of which in July 2008, it tabled a proposal for a directive amending the existing term directive and extending performers' rights term of protection.

The proposal tabled by the European Commission consisted mainly of extending the duration of protection of performers' rights from 50 to 95 years.

In the same proposal for a draft directive, phonogram producers' term of protection was proposed to be extended by the same number of years as for performers (from 50 to 95 years). Taking into account the fact that a term extension would mainly benefit producers because of the upfront transfer of rights from the performer to the producer that has been abundantly described in the present study, the Commission's proposal included also some complementary measures aimed at rebalancing the situation and ensuring that performers would benefit from a term extension of their rights in practice.

Despite some major elements likely to improve the situation of performers, the scope of this proposal was regrettably limited to the musical field only.

This proposal has been scrutinised by the European Parliament and the Council.

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<sup>105</sup> Art. 14 Rome Convention

<sup>106</sup> Art. 14.5 TRIPS Agreement

<sup>107</sup> Art. 17.1 WPPT; if no fixation of the performance has been made, no protection term has been envisaged (since it was not considered necessary).

<sup>108</sup> Art. 8 Directive 2006/116/EEC

A compromise version of the text emerged from these exchanges of views. The compromise version reduces the desired term extension from 95 to 70 years. Moreover, it continues to restrict the scope of this amending directive to the musical sector. It foresees however that the Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector and it shall report on the outcome of such assessment not later than 1 January 2010. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC (article 3). The tight schedule set forth risks making this assessment difficult.

A positive aspect for performers in the version as adopted in the European Parliament however is that it strengthens the complementary measures in their favour and makes them permanent instead of transitional.

In April 2008, the European Parliament voted by a large majority to adopt this compromise version.

However, approval by the Council is still pending, notably for reasons of some instability in the Czech government during the Czech European Community presidency (from January to June 2009).

The current difference in the definition of the duration of rights for performers compared with the definition of the duration of rights for producers of phonograms should also be mentioned. This is the result of replacing article 3 (2) of Directive 93/98/EEC by article 11 of the Directive 2001/29/EC. According to art. 11 of Directive 2001/29/EC, the starting point of the term for the rights of phonograms producers in the case of a lawful publication of the phonogram is the date of first publication. If no lawful publication has taken place within 50 years after the fixation is made, then the duration shall be 50 years from the date of the first lawful communication to the public.

As a consequence, in certain cases phonogram producers still enjoy exploitation rights over performances for which performers' rights have expired, which appears rather unfair, if not illogical. The proposal for a term extension and other related aspects would remedy this situation by making the starting point for performers identical to that of producers of phonograms.

### ***National legal framework***

The countries examined in the present study provide a 50-year term of protection. However, there are small differences in the various national legislations as regards the choice of the act considered as starting date from which the term should be calculated in the event of a lawful publication or communication to the public.

Only Croatia, Germany, Lithuania, the Netherlands and Sweden have implemented the Directive completely.<sup>109</sup>

In the other countries the law has established that in the event of a (lawful) publication, the rights shall expire 50 years from the date of that publication (therefore not taking into account any other communication to the public) or in the event of a (lawful) communication to the public, from that date onwards (not taking into account any publication).

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<sup>109</sup> In the Netherlands, according to art. 12 of the Neighbouring rights act the reference starting date is not the date when the recording was published, but the date when it was brought into circulation. The term lasts 50 years after the performance or after the moment when the recording was first lawfully brought into circulation or, if earlier, communicated to the public.

**Table 7 Duration – Implementation in national legislations**

<b>Duration of 50 years from...</b>			
	First publication	First communication to the public	First time the recording was brought into circulation
<b>Croatia</b>	Earlier of the two events		
<b>Czech Republic</b>	50 years from the date of the performance or from the date when its fixation is made public		
<b>France</b>		Communication to the public or making available to the public, provided that this making available is made via 'material devices'	
<b>Germany</b>	Earlier of the two events		
<b>Lithuania</b>	Earlier of the two events		
<b>Netherlands</b>		Earlier of the two events	
<b>Spain</b>			50 years from the first day of year following the first lawful disclosure of fixation
<b>Sweden</b>	Earlier of the two events		

**7. b. Effects of the limited duration of the protection of performers' rights on their actual remuneration**

In the current situation, the duration of protection for performers is limited compared with that afforded to authors. As a result of this limited term, performers can be denied income from the use of their recordings during their lifetime.

For performers the expiry of protection over their repertoire is likely to have a growing impact as their repertoire is developing along: since stereophonic recordings appeared in the 1950's, some high quality musical recordings have already entered the public domain.

Over coming years, this will involve a growing number of recordings, notably the first stereophonic recordings of jazz, blues and country music, but also pop and rock music. For instance, the first recordings of the Beatles' songs were made in the early 1960's and will consequently enter the public domain in the 2010's. As regards the audiovisual sector, technical innovations of major importance were also introduced some 50 years ago (colour films, cinemascope formats, etc.). Thus a significant number of films of good technical quality, which are part of the European cultural heritage and which are still regularly broadcast, have entered, or are about to enter, the public domain.

As far as performers' rights are concerned, performance lifetime does not simply depend on their type of repertoire or on the type of audiovisual work where they are performing. This lifetime depends on a number of factors – the impact of promotional action, consumer demand, the financial situation of producers – and as a result is often less than predictable.

One foreseeable impact of the expiry of the term of performers' protection might be that a very low cost editing market will develop for content which is no longer protected. In the music industry, it will directly compete with more recent recordings. For instance, prices for an 'old' and a recent recording of a same opera by Mozart could be significantly different. Assuming that a consumer does not usually buy two different versions of the same work, this consumer might be tempted to systematically favour the cheapest recording, which will in this case be the oldest one. This would undoubtedly raise problems of unfair competition.

In addition, this dual system will not encourage employment; it will not help new generations of performers to enter the market, nor foster their creativity.

In addition, music and audiovisual producers invest part of the earnings from their back catalogues on financing new films and music albums, especially for new talent. If this revenue is cut down as a consequence to a short term of performance protection, some of these producers might no longer have the financial means to make risky choices. It may be the case that they would concentrate on the part of their back catalogue that is still under copyright protection.

### **7. c. Impact of European legislation**

In all countries performers have been granted a performance protection term of 50 years since the implementation of Directive 93/98/EEC of 29 October 1993 (later renamed 2006/116/EC in its codified version)<sup>110</sup>.

An extension of performers' rights protection would reduce the gap between the protection granted to authors' rights in Europe as well as to performers in other parts of the world.

By way of comparison, neighbouring rights in the United States of America can be protected for a period of 95 years.

As for authors (including composers and screenwriters) in Europe they enjoy a period of protection that covers their lifetime plus 70 years. In addition, copyright in films expires 70 years from the end of the year in which the last of a number of key contributors to the film dies. Performers are only given an overall 50 year term of protection.

Such term extension is expected to help in performers' rights recognition in so far as it will ensure that the performers concerned have their rights over their own performances protected throughout their entire lifetime.

It would avoid situations where performers see some of their own performances fall into the public domain while they are still alive, when they still count on intellectual property rights revenues for a living and to continue to perform.

The term extension that is presently under discussions concerns the audio sector only. The duration of protection of performers' rights in application of current European law (as defined in Directive 93/98/EEC further codified as Directive 2006/116/EC) does not differentiate between the musical and other sectors and the reasons for introducing such a sectoral distinction of treatment at a time of technological convergence is questionable.

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<sup>110</sup> In Greece, the duration of protection lasts 50 years from the performance / first communication to the public/ first publication or until the death of the performer, whichever is the longer.



As shown in other parts of this study, the situation of performers in the audiovisual field is not better than in the musical field. In many respects, their condition is even weaker. Performers in the audiovisual sector deserve an extension of the duration of protection of their rights just as much as performers in the musical field and any reason for introducing a distinction between the two sectors can be questioned.

One important aspect of the proposal for a term extension of performers' rights deserves specific attention: the main reason invoked by the Commission for tabling its proposal for a new term is to improve the situation of performers:

The proposal aims to improve the social situation of performers, and in particular session musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances.<sup>111</sup>

The text goes on to say:

This proposal is in line with the objectives of the EU to promote social welfare and inclusion. Performers, and especially session musicians, are among the poorest earners in Europe, despite their considerable contribution to Europe's vibrant cultural diversity.<sup>112</sup>

According to these explanations, this proposal is clearly aimed at better protecting performers in the first place (over other categories of rightholders like authors or producers which are currently far better protected).

To address this need, the proposed action mainly consists of accompanying the term extension of performers and producers' rights by a series of measures aimed at strengthening the position of performers and ensuring that they will not be deprived of the expected benefits of their rights:

The proposal is to extend the term of protection for performers and phonogram producers from 50 years to 95 years. In order to achieve the right balance between the benefits to record companies and featured artists and the genuine social needs of session musicians, the proposal contains certain accompanying measures such as establishing a fund for session musicians, introducing 'use it or lose it' clauses in contracts between performers and phonogram producers and a 'clean slate' for contracts in the extended period beyond the initial 50 years.<sup>113</sup>

This analysis echoes the Commission's Impact assessment's findings and follows most of the options put forward in this impact assessment. Nevertheless, it is regrettable that it has not retained a possible option to ensure that performers are remunerated for their music or films made available to the public via on-demand services in the ever growing digital market.

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<sup>111</sup> p2

<sup>112</sup> p7

<sup>113</sup> p9

## **PART II. Conclusions and recommendations**

### **1. Conclusions**

This updated version of the study published in 2007 reveals no major change in either the legal or financial standing of performers. It rather tends to confirm the main findings of the 2007 edition.

As stated in the 2007 study, the various directives adopted between 1992 and 2001 (and their subsequent codifications) have established, within European Union Member States, a globally harmonised level of protection for performers' intellectual property rights. Before then, these rights had been granted to performers for several years in some Member States, but in other countries performers were not protected, or only to a very limited extent.

The survey on the impact of these directives on the performer's situation brings out their positive impact but also their limits.

#### **The weakness of the exclusive right**

The exclusive right, considered theoretically as the inherent property of the protection of intellectual property rights, clearly emerges as an inefficient tool for performers in so far as it remains subject to contract law.

Information available on the content of performers' individual contracts beyond the scope of this study indicates that only a limited number of performers enjoy a real ability to negotiate on the grounds of their exclusive rights and benefit from their prerogatives. For most performers contracting with audiovisual or sound recording producers, the contractual link results in a global transfer of all their exclusive rights, for the whole protection period, and, moreover, for a fixed and final fee. It is the widely held view among performers (and the collecting societies that act on their behalf) that the typical fixed and final fee is in general insufficient and that it does not represent equitable remuneration for the transfer of the exclusive rights.

Sometimes, notably in the audiovisual sector, some unions have succeeded, on the basis of collective bargaining, not in limiting this transfer, but in obtaining additional payments as a counterpart to this transfer. However, the extent of these agreements is very limited, applying only to recordings from some countries without any positive effect on the use of foreign repertoires.

It is only when exclusive rights are subject to some guarantees that they become useful to most performers.

In this regard, the rental right in the *acquis communautaire* grants performers the unwaivable right, even after the transfer of the exclusive right, to receive an equitable remuneration within a framework that can potentially bring performers additional income. But, as shown in the study, it is necessary that this remuneration be subject to collective management and that the party liable for payment be clearly identified as the user of the recording. Rental rights for the year 2005 represented less than 1% of the remuneration managed by performers' collecting societies in the countries examined in this study. The rental market for material copies is in decline and is likely to disappear unless new or increased revenue streams start to bear fruit.

The possible application of the rental right to new cases where digital content is temporarily made available online also requires consideration.

Similarly, the compulsory collective management of rights applied to cable retransmission ought to guarantee remuneration to performers; however, not all countries have succeeded in collecting any amounts.

In general, guarantees granted for the exclusive rights of performers are very limited.

This is why the exclusive right of making available on demand, coming from the WIPO treaty of 1996, adopted in the directive of 2001, has so far failed to be beneficial to performers in all the countries included in this study.

While it is at the same time presented as a solution to the problems of new means of communication on the internet, this right of making available on demand follows the fate of all the exclusive rights: an immediate transfer in the initial recording contract to the benefit of the audiovisual or sound recording producers, with, in most cases, compensation limited to a usually inadequate fixed fee.

One of the only possible prospects within legislation currently in force is a mechanism for the collective management of a remuneration right in case of the transfer of an exclusive right as exists in Spanish legislation, derived from the model of the rental right in European legislation.

This precarious situation of the exclusive right is increased in the audiovisual sector by a provision in the *acquis* that allows presumptions of transfer to be implemented, which are largely used by national legislators, to the further detriment of the contractual situation of performers, who already are the weaker party in imbalanced contractual relationships.

The study clearly shows the consequence of this situation: in the countries studied, the share of exclusive rights managed by collecting societies represents approximately 5% of their overall collection.

It is thus essential to put an end to the fiction according to which the exclusive right, as such, is a guarantee for the protection of performers.

If the situation regarding these exclusive rights is different for authors, it is due to an historical, legal and contractual context that is very different: authors' rights were introduced much earlier than performers' rights and the historical and market conditions for implementing the "new" performers' rights at a later stage were in general less favourable. Also, most performers are in a more vulnerable contractual situation than authors and the general transfer of exclusive rights that is observable for performers is not to be found when it comes to authors' rights.

It is necessary to urgently consider remedying this situation that makes performers a category of rightholders for whom, in this regard, intellectual property rights do not have the supportive and economic effect that they should.

In this regard, this study formulates proposals regarding already existing provisions in the *acquis* that may modify this situation.

### **The guarantee of remuneration rights**

Performers' rights were born, on an international level, under the auspices of the remuneration right.

The Rome Convention, adopted in 1961, which only gave exclusive rights their first form, did, although in an imperfect manner, conceive the first right to remuneration; the right to equitable remuneration for the broadcasting and communication to the public of commercial phonograms.

This right was then adopted in a number of national laws, and was confirmed within the *acquis communautaire* by effective legal provisions insofar as they guarantee the collection of such remuneration from the users to the benefit of performers (and also to the benefit of producers of phonograms).

The implementation of this collection for mass uses takes place through collective management, and, in the countries studied, represents more than half of the rights managed collectively (between 57% and 59% during the period 2005-2007).

This does not mean that the existing provisions cannot be improved, but this guarantee of remuneration clearly shows the fundamental elements that ensure performers' protection: a mechanism for collective management of a type of remuneration collected from the users to the benefit of the performers.

These elements could be transposable to the new types of uses of music and audiovisual fixations on the internet.

The study proposes some clarifications that would avoid some difficulties with which performers are confronted in the exercise of this right.

More recently, the exception to the reproduction right for private uses has generated in most national legislations the implementation of a mechanism of remuneration for private copying.

The *acquis communautaire* has taken these realities into account and has prescribed the existence of such remuneration when national legislation allows such reproduction for private use. This remuneration is not only to the benefit of performers, but also of authors and producers.

This mechanism has been largely successful, although there has been a noticeable decline in revenues collected. In 2005, it represented in the countries included in this study 38% of the remuneration collected for performers by their collecting societies. By 2007 that figure had dropped to 33% with actual revenue collection decreasing by 18%.

This decline in collection (and therefore distribution) does not suggest any failing in the mechanism itself. Rather, it is as a result of changes in market conditions.

These remuneration rights only constitute a genuine guarantee for performers if, by law, they may not be waived or transferred under contractual provisions. At present the *acquis* does not take account of the commercial reality that in contract negotiations most performers have little or no bargaining power. As a result of the weak position in which most performers find themselves, they are forced to transfer their rights for little or no remuneration.

### **Insufficient period of protection**

The question of the duration of performers' rights has recently received much attention. Despite attempts to amend the *acquis*, the position remains the same. A growing number of audiovisual and sound recordings are no longer protected by reason of their communication to the public or publication more than 50 years ago. Consequently, performers are denied remuneration at a time in their lives when they may be most reliant upon it.

This is particularly a matter of concern while audio and audiovisual recordings of excellent technical (and artistic) quality are no longer protected.

The adoption of a protection period extended to at least 70 years from the first communication to the public or first publication would finally give performers protection during their entire lifetime.

### **Insufficient protection in the audiovisual sector**

There is no logical explanation for why audiovisual performers do not receive the same protection as other performers. Nevertheless, EU legislation provides far fewer rights for audiovisual performers. This failing in EU law filters down to national legislations with the result that the illogical and unfair treatment of audiovisual performers is almost always

perpetuated at a national level. The weak state of protection under the law is not the only difficulty audiovisual performers face. It is common practice in their field for their rights to be transferred to a producer in an unsatisfactory manner. The contractual terms upon which this is carried out are unbalanced and the amounts paid to performers are generally very low. Effectively, most performers are deprived of their rights from day one.

The proposal amending Directive 2006/116/EC as approved by the European Parliament on the term of protection regrettably and anomalously covers only audio works, not audiovisual. The only commitment regarding the audiovisual sector is that the position will be studied with a view to determining whether the law should be reformed.

An improvement of performers' rights in the audiovisual sector is urgently needed. It is to be welcomed that other international institutions have started tackling the issue but these efforts must be supported by the EU institutions to ensure that audiovisual performers receive the protection they deserve.

### **Moral rights**

Although this study did not address the subject of moral rights, it should be noted that these have not been harmonised within the Member States and are not subject to collective management. The lack of inclusion in the *acquis* of such provisions, already included in international treaties albeit to a limited extent, is a paradox.

### **Satellite broadcasting and cable retransmission**

The directive provided clarity regarding where the act of broadcasting or cable retransmission was deemed to have taken place and thus allowed interested parties to proceed on a sure-footed legal basis. Compulsory collective management in respect of cable retransmission is to be welcomed.

### **Access to information and subsequent management of rights**

Finally, collective management experience continues to show the specific difficulties with which performers' collecting societies are confronted in the identification of their rightholders and the management of their rights. No organisation managing authors' rights or neighbouring rights faces as many rightholders as performers' organisations. While Directive 2001/29/EC deals with technical protection measures, it does not guarantee intellectual property rights managers free access to information concerning exploited recordings and the identity of the rightholders having participated in such recordings. The *acquis* could be clarified in this regard.

Almost two decades after the first directive dealing with performers' neighbouring rights, such rights have not yet achieved their final goal.

Neighbours of better-protected and respected authors, performers are implemented in a constrained economic environment, and are confronted by the strategies of large industrial groups, which they are barely able to resist.

Although remuneration rights constitute essential elements of protection and have proved their efficiency, a number of exploitations, of substantial economic value, are based on the grounds of exclusive rights that remain out of the control of performers and are systematically subject to full transfer.

Remunerations collected for performers by their collecting societies are substantially lower than those collected to the benefit of authors, and are, most of the time, only a source of additional revenue for performer.

This situation can be improved.

It will involve the awareness of national legislators and European institutions, as the current situation of existing legal provisions must be re-evaluated in order to establish a balance that is still lacking today.

In this view, this study has examined European provisions and has made plans for modifications that would bring performers that which is the very reason for the adoption of the *acquis communautaire*: an economic counterpart to their personal and artistic investment through the exercise of their profession that is indispensable to culture in Europe.

## 2. Recommendations

### 2. a – For a better environment for administering performers' rights

- **Exchange of rights -management information:**

The findings of the study show that, whatever the type of right to be exercised via collective management, performers' collective rights management societies encounter difficulties in simply accessing the information needed to identify performances and those performers to whom remuneration is due. This problem is particularly acute for those performers who are not main performers or stars and whose name does not always appear in association with the use of their recordings. Introducing an obligation for an improved exchange of this essential information between the stakeholders concerned would be of great assistance to the efficient administration of performers' rights.

Article 7 of Directive 2001/29/EC on "Obligations concerning rights-management information" could integrate such provision under a new paragraph.

Art. 7. 3 (New):

***Member States shall provide for free access, to the benefit of collecting societies, to the existing information needed in order to identify the use of the work or other subject matter and the corresponding rightholders.***

### 2. b – Regarding a legislative review of performers' rights under the "acquis"

- **Moral rights**

The importance of moral rights cannot be ignored, particularly in a fast-changing environment which allows – notably through digital networks – very large, fast and easy use of copyright protected works and performances.

Although moral rights were not examined in the framework of this study, a number of those organisations scrutinized expressed some regrets that moral rights are not included in Community law and have not been harmonised within European Member States.

Directive 2001/29/EC was intended to bring the European Community in line with the WIPO WPPT, but failed to grant performers those moral rights that they are granted under the WPPT. We therefore recommend the adoption of the wording used in the WPPT (but not limited to commercial phonograms) in a new paragraph that could be inserted

under “Chapter II – Rights and Exceptions” of Directive 2001/29/EC. Accordingly, the last sentence of the Whereas 19 of the same Directive should be removed.

This proposal is written below:

Whereas 19

The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. [Such moral rights remain outside the scope of the Directive: **deleted**].

New paragraph under Chapter II “Rights and exceptions”

***Independently of a performer’s economic rights, and even after the transfer of these rights, the performer shall, as regards his live performance or fixation of his performances, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of use of the performance, and to object to any distortion, mutilation, or modification of his performance that would be prejudicial to his reputation.***

- **Equitable remuneration for broadcasting and communication to the public**

To date, the definition of the exclusive right for the broadcasting and communication to the public of commercial phonograms is very restrictive: according to Art. 8.1 of Directive 2006/115/EC this exclusive right does not apply to any performance that “is itself already a broadcast performance or is made from a fixation”. This means for instance that no recorded performance is protected by this right. In order to make up for this weakness, the article should be redrafted as follows:

Art. 8.1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except ***where the performance is a reproduction fixed on a phonogram published for commercial purposes.***

Since Art. 8.2 of this same directive envisages equitable remuneration for commercial phonograms only, it seems necessary to complete the picture by covering other types of performances such as audiovisual fixations or phonograms other than commercial ones. The type of media or carrier should not make any difference to whether or not a single equitable remuneration is due. This could easily be done by adding a new paragraph before par. 2 of Art. 8 as follows:

Art. 8.2 New.

***Where a performer has transferred or assigned the exclusive right provided for in par. 1, the performer shall retain the right to obtain an equitable remuneration for the broadcasting by wireless means and the communication to the public. This equitable remuneration shall be paid by the user.***

***The right of the performer to obtain an equitable remuneration for the broadcasting by wireless means and the communication to the public of his performance cannot be waived.***

Art. 8.3 (formerly 8.2 in Directive 92/100/EEC).

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

***them. Member States shall further ensure that this remuneration is collected and administered by the performer and phonogram collecting societies respectively.***

Former par. 3 becomes par. 4 and remains unchanged:

Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the re-broadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The introduction of a principle of equal sharing of remuneration between producers and performers gives an additional guarantee to performers for balanced relationship.

In addition, given the immense contractual pressure under which performers are placed by producers or other contracting parties (as a result of which they are forced to transfer, waive or assign their exclusive rights without receiving satisfactory remuneration) it is important to specify clearly that the right of the performer to obtain an equitable remuneration for the broadcasting by wireless means and the communication to the public of his performance cannot be waived, assigned or transferred. Such a system is set out clearly and explicitly with regard to the rental right, under Art. 5 of the same directive (Art. 4 in former Directive 92/100/EEC). Art. 8 should be similarly clear and explicit.

The above proposal includes the collective management of the right, which is optional in the directive relating to rental, as well as the clear identification of users as the parties obliged to pay the remuneration, in a similar way to what is already established under the existing Art. 8.2 for broadcasting and communication to the public.

- **Making available to the public on-demand**

As explained above, for any right which performers are granted to be effectual, the performers' poor contractual bargaining position means that it is necessary for such a right to either be unwaivable, or in the event that it may be waived, assigned or transferred, that the performer retains a right to an unwaivable equitable remuneration. Failing such a measure, the making available right for on-demand services will remain purely theoretical for most performers who will derive no benefit therefrom, as has proven to be the case so far.

Art. 3 of Directive 2001/29/EC on the "Right of communication to the public of works and right of making available to the public other subject-matter" could open the way for this guarantee for appropriate remuneration for performers for the use made of their performance, following a model based on what exists already under European legal provisions for the rental right. The new wording would read as follows:

Art. 3.1 remains unchanged.

Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Art. 3.2 is completed as follows.

Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;



- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

***Where a performer has transferred or assigned the exclusive right provided for in par. 1, the performer shall retain the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance.***

***The right of the performer to obtain an equitable remuneration for the making available to the public of his performance cannot be waived.***

***This remuneration shall be collected and administered by a performer collecting society.***

Art. 3.3 remains unchanged.

The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

- **Rental right – Right to equitable remuneration**

A necessary condition for the right to remuneration for rental to be effective is the fact that performers retain it, regardless of any contractual clauses to the contrary. Art. 5 of Directive 2006/115/EC should ensure that the right is unwaivable

Up until now, the exercising of the rental right granted to performers under Art. 5 of this directive has generally been ineffective for two reasons.

First of all, it omits any definition of the body that must pay remuneration in the event of rental. By way of comparison, provisions under Art. 8.2 of this same Directive (applying to the broadcasting and communication to the public of commercial phonograms) stipulate clearly that remuneration "is paid by the user".

A reference to the user would bring the wording in line with similar existing provisions under the same directive.

Secondly, the results of this study have clearly shown that in all the countries studied, the exercise of the rental remuneration right has proved unfeasible unless it is collectively managed. Appropriate provisions would amend paragraph 3 and remove paragraph 4 of Art. 5.

Art. 5.1 is completed as follows.

Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain ***from the user*** an equitable remuneration for the rental.

Art. 5.2 remains unchanged.

The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

Art. 5.3 is revised as follows.

[The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers] Removed and replaced by:

***Member States shall ensure that this equitable remuneration is collected and administered by author and performer collecting societies respectively.***

Art. 5.4 is inconsistent with the previous paragraph and is therefore deleted.

[Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected] **Deleted**

- **Audiovisual – transfer of rights**

The presumption of transfer of performers' rights in the audiovisual sector represents an additional, unjustifiable obstacle to performers exercising their rights. As information in this study has demonstrated, this presumption of transfer of performers' rights effectively set up a system in which all rights granted to performers by the European legal framework on the one hand are, on the other hand, simply denied in the audiovisual field by the same legal framework.

Such presumption of transfer does not exist in the other sector of commercial phonograms. Noticeably, as regards the commercial phonograms sector, the absence of such transfer did not prevent those involved in the phonogram industry from exploiting recorded performances.

This is an important element that should also be borne in mind in any discussions addressing this question on the international scene in the framework of negotiations towards a possible WIPO treaty for audiovisual performances.

Paragraphs 4, 5 and 6 of Art. 3 of Directive 2006/115/EC providing for an anachronistic presumption of this type should therefore be deleted in order to eliminate any reference to any presumption of transfer of rights.

Art. 3.1 to 3.3 remain unchanged.

3.1 The exclusive right to authorise or prohibit rental and lending shall belong:

- to the author in respect of the original and copies of his work,
- to the performer in respect of fixations of his performance,
- to the phonogram producer in respect of his phonograms, and
- to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this Directive, the term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

3.2 This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art.

3.3 The rights referred to in paragraph 1 may be transferred assigned or subject to the granting of contractual licences.

Art. 3.4 to 3.6 are deleted.

3.4 [Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.] **Deleted**

3.5 [Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.] **Deleted.**

3.6 [Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights included in Chapter II.] **Deleted**

- **Exception to the exclusive reproduction right in case of private copying**

As can be seen from the data and information provided in this study, equitable remuneration for private copying is hugely significant to performers. It amounts to more than one third of all revenues collected on their behalf by collecting societies. As technology evolves, the manner and extent in which private copying occurs also evolves. Carriers such as hard drives and memory sticks are becoming cheaper and have far more storage capacity than was the case a few years ago. Media such as music and films are becoming easier to “share” or indeed copy. For this reason, it is important that the private copying remuneration paid reflects the degree of actual usage of a performer’s work for private, non commercial activities.

Talks on harmonising the manner in which private copying remuneration is calculated are ongoing and it is crucial that any conclusion which may be reached does not result in a decrease in revenue paid to performers. Private copying remuneration has declined by over 18 per cent since 2005. Rather than decreasing, the revenue paid to performers ought to reflect the widespread increased non-remunerated usage of their performances.

In the countries where remuneration systems for private copying are in place, they have brought significant revenues to performers at a time when acts of reproduction of recorded performances for private, non commercial purposes are in widespread use. In addition, in most countries this remuneration also contributes to supporting cultural activities that benefit all European citizens.

For these reasons, it is desirable for private copying remuneration schemes to benefit all performers in Europe. This is all the more applicable since a growing number of acts of private copying are being carried out via the internet, a network that extends beyond national borders.

In order to avoid situations where performers cannot in practice enjoy an entitlement to remuneration granted by law, the law and/ or regulatory rules need to clearly establish that this right cannot be waived and that it is to be administered by collective rights management societies (as is already the case in practice).

Lastly, such remuneration should be “equitable” as is already stated in European law for other types of types of performance use.

The following rewording of Art. 5.2 of Directive 2001/29/EC on “Exceptions and limitations” would therefore be advisable:

Art. 5.2 (a) remains unchanged:

Member States may provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation.

Art. 5.2 (b) is removed and replaced by a new paragraph after paragraph 2 of Article 5:

*(b) [ in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned; ] **Paragraph removed and replaced by a new one in a new subsection specifically dedicated to private copying:***

New art. 5.2 bis. Member States **shall** provide for exceptions and limitations to the reproduction right provided for in Article 2 in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive **unwaivable equitable remuneration** which takes account of the application or non-application of technological

measures referred to in Article 6 to the work or subject-matter concerned. ***This equitable remuneration cannot be waived, and shall be collected and administered by rightholders' collecting societies.***

- **Duration of performers' rights**

It is very difficult to accept that some performers are deprived of their rights on the potential use of their performances while they are still alive. We are now seeing the situation where the lack of protection has begun to affect a significant number of performers, sometimes with lucrative performances. The performances concerned reflect very creative periods in all cultural fields and many parts of Europe and will remain fully exploitable for over 50 years since they have been recorded on high-quality devices.

The term of protection should therefore be extended in order to bring it in line with the term of protection applied in other parts of the world. In the US, for instance, the duration of performance protection can extend to 95 years. Such an extension would not in general make the duration of performance protection any longer than the term of protection granted to authors' works (70 years after author's death), performers and authors being the only two categories of rightholders that qualify as "creators".

As a minimum, the 70 year period as envisaged in the European proposal to the Term directive as amended and voted by the European Parliament in April 2008 ought to be implemented without delay.

In addition, a technical anomaly relating to the date from which the term of protection is calculated should be corrected: the "technical adaptation" in Art. 11.2 of Directive 2001/29/EC to the Art. 3.2 of Directive 93/98/EEC on the "Duration of related rights" has led to situations where performers can be deprived of protection over their performance whereas phonogram and audiovisual producers still enjoy protection for the very same performance and can exploit it.

In order to resolve this type of inconsistency and adopt an appropriate duration of protection over performances, the provisions of Art. 3.1 should be redefined as follows:

Art. 3.1.

The rights of performers shall expire **95** years after the date of the performance. However, if a fixation of the performance is lawfully published [or lawfully communicated to the public: **deleted**] within this period, the **said** rights shall expire **95 years** from the date of the first such publication [or the first such communication to the public, whichever is the earlier: **deleted**].

***If no lawful publication has taken place within the period mentioned in the first sentence, and if a fixation of the performance has been lawfully communicated to the public within this period, the said rights shall expire 95 years from the date of the first lawful communication to the public of the performance.***

Lastly, some interesting elements to ensure a better protection of performers' rights taking into account their generally derisory bargaining power when it comes to keeping their rights and obtaining decent contractual payment conditions, deserve attention. These elements were proposed in the European Parliament Resolution adopted in April 2008 in the context of the European proposal for a term extension of performers and phonogram producers' rights (see chapter on term extension).

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