

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

December 2009

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.

AEPO-ARTIS
Association of European Performers' Organisations
Bd du Régent 58 - B 1000 Brussels
tél.: +32 2 280 19 34 - fax: +32 2 230 35 07
aepo-artis@aepo-artis.org / www.aepo-artis.org

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.¹

¹ 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.

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/EEC² – 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.

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.

² 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 recently³ 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.

³ On 23 April 2009

⇒ 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 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.

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