

## Performers' Rights in European Legislation: Situation and Elements for Improvement

### About AEPO-ARTIS

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AEPO-ARTIS unites 27 collective management organisations for performers operating in 21 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  
Czech Republic: INTERGRAM  
Croatia: HUZIP  
Denmark: GRAMEX and FILMEX  
Finland: GRAMEX  
France: ADAMI and SPEDIDAM  
Germany: GVL  
Greece: APOLLON, DIONYSOS and ERATO  
Hungary: EJI  
Lithuania: AGATA  
The Netherlands: NORMA  
Norway: GRAMO  
Poland: SAWP and STOART  
Romania: CREDIDAM  
Russia: ROUPI  
Slovakia: OZIS and SLOVGRAM  
Spain: AISGE  
Sweden: SAMI  
Switzerland: SWISSPERFORM  
United Kingdom: BECS

### Scope

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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.

15 years after the first provisions granting rights to performers were introduced in European legislation, the revision of this part of the so called '*acquis communautaire*' is high on the agenda of the European Commission for 2007.

As compared to authors' rights, performers' rights are far more recent and some specific aspects are associated with their implementation. One of them is the importance of the remuneration rights that are subject to collective management.

This study intends to assess the impact of the *acquis communautaire* on the actual protection of performers' rights in 10 European countries: Belgium, Czech Republic, Croatia, France, Germany, Lithuania, the Netherlands, Spain, Sweden and the United Kingdom.

It covers 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 includes long standing Member States of the European Union, recent Member States and a candidate country.

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

The 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. Right of making available to the public;
3. Remuneration for private copying as a counterpart for an exception to the exclusive reproduction right;
4. Rental right;
5. Treatment reserved for recordings in the audiovisual field;
6. 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 and Directive 2001/29/EC<sup>1</sup> – as well as by national legislations.

This study deliberately focuses on actual, concrete facts describing how and to what extent performers enjoy their rights. Legal and empirical economic data are compared with each other and collated with descriptions of rights management practices.

The information was collected directly from performer collective management societies and trade unions 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.

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<sup>1</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) and the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

## **Main findings and recommendations**

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While the implementation of certain types of rights is still recent under development in some countries, it has been tried and tested in others. 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 consists of having no alternative but to waive all their exclusive rights at once, for a one-off fee, on signing their recording or employment contract.

**• A general preliminary finding concerns the importance for most performers of the "rights to remuneration" they can enjoy even after they have transferred their exclusive rights.**

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 and 2001/29, 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 95 % of the collection by performers' collective management societies.**

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 10 countries and represents on average **57 %** of the total amount collected.

Remuneration for **private copying** accounts for **38 %** of the total collection. It represents an important, wholly justified, remuneration for performers whose recordings are subject to widespread copying practices –from varied sources onto a wide range of media and devices. Among the 10 countries studied, only UK law does not provide for any remuneration to right-holders in the event of reproduction for private, non commercial purposes, since such acts of private copying are not authorized. Studies have shown however that private copying is common practice in the UK just as in other

countries and the national law currently under review may introduce changes in this regard.

As for the **rental right**, the situation differs widely from one country to another, but is not satisfactory. Although the laws in 9 of the 10 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, more commonly, that the body liable for payment is not determined by law, which constitutes a major obstacle preventing for 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 right-holders 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, the introduction at European level in 2001 of a new right for the making available to the public of services on demand has so far proved ineffective for performers.** One figure sums it up: out of the 10 countries surveyed, only 1 collective management society succeeded in collecting an overall amount of € 32 for all performers in 2005! At a time when more and more commercial services for downloading are being developed, 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 right-holders. The system applied to the making available right should be revised in order to become effective for performers.

- **The treatment reserved for performances in the audiovisual field is a total anachronism:** 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 Commission is in the process of assessing **the duration of protection** granted to neighbouring rights, including performers’ rights. Unlike authors’ rights, which last for until 70 years after the author’s death, performers’ rights are protected in the European Union for a 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 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 to the end of their protection period, it seems justified to extend the term of protection for performers’ rights to 95 years.

The results of the study also indicate that the rights administered through collective management represent a significant part, if not the main source 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 right-holders would certainly help them to efficiently administer their rights.

Lastly, these findings highlight the impact of the exercise of performers’ rights on the creation and promotion of cultural activities and the contribution of performers’ rights collective management systems to the dynamism and creativity of culture in Europe.

The recognition of performers’ rights should go with the development of a strong and dynamic European cultural sector and contribute to its enrichment. This can only happen if performers are given the practical tools through which to exercise and enforce their rights.