Performers' Rights in European Legislation:

Situation and Elements for Improvement

A study prepared for AEPO-ARTIS
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Table:

Introduction

1. Executive Summary

About AEPO-ARTIS

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

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[1] – 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.

[1] 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

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 summs 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 ha 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.

2. Description of the study

The revision of the '*acquis communautaire*' - the comprehensive corpus of European legislation - relating to authors' and performers' rights is high on the agenda of the European Commission for the year 2007. This takes place as performers' rights were introduced in the European legislation some 15 years ago.

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 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 (…); whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the right-holders 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 right-holders 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, performers transfer all their exclusive rights at the time when the contract is signed in return for an overall lump sum 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 right-holders 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.

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.

Scope

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.
The aspects concerned are:
1. Right to an equitable remuneration for the broadcasting and the 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.

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 let 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 are the rules applicable to the exercise of performers' right for cable retransmission investigated in this study. The terms for exercising this right vary between the countries studied: most often, it is administered along with equitable remuneration for communication to the public. Moreover, cable retransmission practices vary considerably from one country to another in Europe and therefore the associated collective management for this right is quite varied: only in a limited number of countries does it represent a valuable income for performers.

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 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.

The study covers 10 European countries: Belgium, the Czech Republic, Croatia, France, Germany, Lithuania, the Netherlands, Spain, Sweden and the United Kingdom. For this last country however, unfortunately less information was available.

It covers countries where performers' rights existed before European legislation began to dealing 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, Sweden and United Kingdom), 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.

Methodology

This study is the first of its kind in the field of performers' rights: never before have legal provisions and actual practices been compared on the basis of figures and experience gathered directly from those bodies that manage these rights.

The study is based firstly on examining legislation, and secondly on analysing practice. Empirical data, both quantitative and qualitative, were collected through questionnaires addressed to European collecting societies for performers, as well as to trade unions for

performers, generally via their international federations. Answers were received from the following collecting societies: URADEX (Belgium), INTERGRAM (the Czech Republic), HUZIP (Croatia), ADAMI (France), SPEDIDAM (France), GVL (Germany), AGATA (Lithuania), NORMA (the Netherlands), AISGE (Spain) and SAMI (Sweden). The following trade unions responded: British Musicians Union, Syndicat français des artistes, Deutsche Orchestervereinigung e.V. and Federacion de Actores del Estado Español.

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

Part I of the study describes the applicable international and European provisions for each of the 6 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 analyzed and its impact on performers' rights is assessed.

Part II focuses on the economic weight of performers' revenues generated by the exercise of their intellectual property rights and extends this consideration to their effects on the general economic situation of performers, first of all, but also on the European cultural sector. Some comparative data provide information about the functioning of performers' rights collective management, highlight some areas where difficulties are met and examine their origins.

Part III 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.

PART I. International, European and national legislation and their impact on the situation in practice

I.1. General overview of the protection of performers' rights in international and European law

Rome Convention

The International Convention for the protection of performers, producers of phonograms and broadcasting organisations (hereinafter the Rome Convention) was adopted on 26 October 1961 following persistent efforts by BIRPI/WIPO, ILO and UNESCO. It entered into force on 18 May 1964. It is considered the founding text for the protection of performers' rights.

The Rome Convention established a minimum guaranteed protection for performers, producers of phonograms and broadcasting organisations. Each state willing to join the Rome Convention must, at the time of filing its instrument of ratification, have incorporated this minimum protection in its domestic law.[2]
Under its art. 7, this protection system takes the form of a "possibility of preventing": it gives the performer the possibility of preventing the carrying out of certain acts with his or her performance.[3] However, this limited protection is not applied in cases where the performance is used for the broadcasting or any communication to the public of broadcast or fixed performances. In addition, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, art. 7, which ensures minimum protection for the performer, ceases to apply.[4]

For the broadcasting or communication to the public of phonograms published for commercial purposes, an equitable remuneration is envisaged. This equitable remuneration shall be paid by the user to the right-holders. It is still payable when the phonogram has been incorporated in a visual or audiovisual fixation.[5] Yet art. 12 indicates that this remuneration shall be paid to the performers, or to the producers of the phonograms or to both. Therefore, performers are not guaranteed remuneration. Furthermore, this remuneration right is jeopardized by the possibility of the reservations envisaged in art. 16 of the Rome Convention.[6]
The duration granted to performers' rights under the Rome Convention is 20 years.

TRIPS Agreement

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[2] Art. 26 Rome Convention

[3] Art. 7 Rome Convention; the words "possibility of preventing" differ from those in the articles dealing with protection for producers and broadcasting organizations. Producers and broadcasting organizations have the right "to authorize or to prohibit". The wording allows countries like the U.K. to retain their method of protection, through criminal law.

[4] Art. 19 Rome Convention; this obsolete and surprising provision is still incorporated in some recommendation on national legislation by WIPO, although it is based on an old model law of 1971 which actually no longer exists.

[55] Art. 19 Rome Convention only excludes the applicability of art. 7 providing a minimum protection through the possibility of "preventing" certain acts. It does not exclude the applicability of art. 12 providing for equitable remuneration in the event of the broadcasting or any communication to the public of phonograms published for commercial purposes.

[6] Reservations about the provisions of Art. 12 of the aforementioned Rome Convention.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement) was concluded as an annex to the WTO Agreement on 15 April 1994. It entered into force on 1 January 1995.[78] Although it was drafted more than 30 years after the Rome Convention, the TRIPS Agreement does not provide performers with formal exclusive rights. It reproduces the wording of the Rome Convention by stating that performers' rights are limited to a mere possibility of preventing certain acts relating to the fixation of their performance on a phonogram.
Where the performance is itself already a broadcast performance or is made from a fixation, no protection is envisaged against the broadcasting and the communication to the public. Neither does it provide a system of equitable remuneration for those uses in the event of performances fixed in commercial phonograms.

Yet, on one topic the TRIPS Agreement goes beyond the Rome Convention: it extends the term of protection up to 50 years. It also obliges its members to implement enforcement procedures so as to permit effective action against any act of infringement of intellectual property rights covered by the Agreement.[9]

WPPT

The shortcomings of the Rome Convention led the WIPO to draw up a new international instrument ensuring the protection of the rights of performers and phonogram producers. On December 20, 1996, the WIPO Performances and Phonograms Treaty was adopted (hereinafter WPPT). It entered into force on 20 May 2002.

The minimum protection provided by the WPPT is developed further than in the preceding Conventions.[10] With the WPPT, performers are granted formal exclusive rights for the first time.[11]
Furthermore, the WPPT pays attention - to a certain extent - to the consequences of digital technology on the exploitation of the performances: it introduces an exclusive right for performers to authorize the making available to the public on demand of their performance fixed in phonograms and extends the right to equitable remuneration for broadcasting and communication to the public to phonograms made available to the public on demand.[12]

Regarding the term of protection, it stipulates a term of 50 years, as in the TRIPS Agreement.[13] Finally, it recognises the existence of moral rights of performers.[14]

However, the protection offered remains limited, with the most serious shortcoming being the exclusion of the audiovisual sector. Notwithstanding the resolution of the Diplomatic Conference in 1996 to adopt a protocol concerning audiovisual performances

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[7] The provisions of the TRIPS Agreement had to be applied within one year following the date of entry into force of the WTO Agreement. Longer terms are foreseen for developing countries or countries in transition from a centrally-planned into a market economy (arts. 65 and 66 TRIPS Agreement).
[8] The TRIPS Agreement is based on the principle of the most-favoured-nation and the principle of national treatment. The principle of national treatment is more limited than as stipulated in the Rome Convention, since this obligation as regards performers only applies in respect of the rights provided under the TRIPS Agreement.
[9] Art. 14.5 and art. 41 to 62 of the TRIPS Agreement
[10] The WPPT is also based on the principle of national treatment, but as in the TRIPS Agreement and the Rome Convention, this principle only applies in respect of the rights provided under the WPPT. Concerning the right of an equitable remuneration in case of radio-broadcasting and communication to the public of phonograms published for commercial purposes, the national treatment only applies if the other State did not issue any reservations (art.4.2).
[11] Arts. 6 to 10 WPPT
[12] Arts. 10 and 15.4 WPPT
[13] Art. 17 WPPT
[14] Art. 5 WPPT

by 1998, neither a protocol nor a treaty has yet been achieved.[15] In accordance with the resolution, work on this issue continued in the WIPO Standing Committee on Copyright and Related Rights. At the Diplomatic Conference on the protection of audiovisual performances, which was held in December 2000, no agreement was reached, the sticking-point being the different views on the relationship between performers and producers in the EU and the USA and in particular the question of the international recognition of statutory provisions on the transfer of rights from performers to producers.[16]

European Directives

The European policy aims to reconcile several objectives. One of the main objectives of the European Community is to establish an internal market and to guarantee that competition within the internal market is not distorted. Another objective is to help the cultures of the Member States to blossom. Art. 151 of the Treaty requires the Community to take cultural aspects into account in its action. Cooperation between Member States should be encouraged and if necessary supported and supplemented in the area of artistic and literary creation, including in the audiovisual sector.
The harmonization of certain aspects of Member States' national laws on copyright and neighbouring rights is intended to contribute to the achievement of these objectives: copyright protection serves not only economic interests, but also creativity, cultural diversity and cultural identity. By harmonizing national copyright laws in certain areas considered to be detrimental to the internal market, obstacles to the free movement of people, goods, capitals and services can be overcome.

Eight directives on substantive copyright law were adopted between 1991 and 2004.[17]

This study examines the following three directives that are of particular importance in the matter of performers' rights:
- 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;[18]
- Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and related rights;[19]
- Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

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[15] In a Resolution concerning audiovisual performances adopted during the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (Geneva, 2-20 December 1996), the Delegations called "for the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of the preparatory work on a protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances, with a view to the adoption of such a protocol not later than in 1998."

[16] For more information see www. wipo.int.; the basic proposal for the protocol can be found under document IAVP/DC/3.

[17] Council Directive 91/250 of 14 May 1991 on the legal protection of computer programs; Council Directive 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Council Directive 93/83 of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Council Directive 93/98 of 29 October 1993 harmonising the term of protection of copyright and certain related rights; Directive 96/9 of the European Parliament and the Council of 11 March 1996 on the legal protection of databases; Directive 2001/29 of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art; Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[18] This Directive was replaced by Directive 2006/115/EC of 12 December 2006 (codified version). In this study we will continue to refer to the former Directive, since the content of the provisions has not changed.

[19] This Directive was replaced by Directive 2006/116/EC of 12 December 2006 (codified version). In this study we will continue to refer to the former Directive, since the content of the provisions has not changed.

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 and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 regarding the enforcement of intellectual property rights remain outside the scope of this study.

The collective management of copyright and neighbouring rights has not yet been subject to any binding regulation at European level. Preliminary efforts in this respect started in 1995.[20] This resulted in the Resolution of 15 January 2004 of the European Parliament on a "Community Framework for collecting societies for authors' rights" and the communication of the Commission of 16 April 2004 on "The management of copyright and related right in the internal market". It is followed by the Recommendation of the Commission of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services. The effects of this Recommendation on the European market is currently being assessed by the European Commission.

The protection granted by the provisions of European legislation is not only offered to nationals of other Members States; it is also applicable internally, to each Member State's own nationals.

National legislations

Apart from Croatia, all the 10 countries studied are Member States of the European Union.
All of the 10 States have ratified the Rome Convention. All are members of the WTO Agreement.[21] As regards the WPPT, the 10 States have signed the treaty, but France, Germany, Spain, Sweden, the Netherlands and U.K. have not yet ratified the WPPT. The EC and the Members States have decided to ratify the WPPT jointly.[22] By adopting the Directive 2001/29/EC the European Community has mainly carried out the obligations imposed by the WPPT. However, ratification of the WPPT has had to be postponed until now, since the remaining two Member States France and Spain have implemented the Directive only recently.[23]

It should be noted that these three international conventions only regulate international situations. Subjects of a contracting State can not invoke the protection of these conventions for a performance, a phonogram or a broadcast, "indigenous" to the State where the protection is sought, unless the State stipulates this in its national legislation.

[20] Green Paper, Copyright and related rights in the information society, of 19 July 1995, COM (1995) 382.
[21] The European Union approved the TRIPS Agreement by decision of the Council of 22 December 1994, Publication L 336 of 23 December 1994.
[22] Decision nr. 2000/278 Council of Ministers of 16 March 2000, Publication EC 2001, L 89/6. New Member States such as the Czech Republic and Lithuania had already ratified the WPPT before they became members of the EC.
[23] In France: Law of 1 August 2006, JO 3 August 2006; in Spain Law 23/2006 of 7 July 2006, BOE 8 July 2006.

I.2. Analyses per topic

I.2.1. Right to an equitable remuneration for broadcasting and communication to the public of commercial phonograms

I.2.1. 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.[24] 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.[25]

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.[26]
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

[24] Art. 3 (d) Rome Convention
[25] Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981, pp. 47-49.
[26] 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.[27]

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)).[28] 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.[29]

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 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.

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[27] 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).

[28] 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).

[29] 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.

National legal framework

All of the 10 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.
Only in France is the remuneration no longer collected for broadcasting via television channels, further to a decision of the "Cour de Cassation" (Supreme Court). This might change again following the amendment to the national code for intellectual property (CPI) on 1 August 2006[30]
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.
In Belgium, as far as broadcasting is concerned, remuneration is currently only collected for a limited number of forms (only for the broadcasting of phonograms via radio), since the legal provision has not been put into practice to its full extent.[31]

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 Belgian and the French legislators have narrowed the terms "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. These legislations also exclude commercial phonograms used for a show.[32]

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[30] The collecting society SPEDIDAM has taken during the last 12 years the initiative of proceedings against television channels and producers for the application of the equitable remuneration principle in the field of television. The new wording of art. L214-1 of the law of 1 August 2006 seems to modify the situation. But the wording of the article is still subject to interpretation.

[31] Royal Decree of 9 March 2003, bringing into force the decision of the Commission determining the equitable remuneration due by radio-broadcasters. Broadcasting is defined as the broadcasting of sounds by any wireless system, of the unidirectional type and from one point to a multipoint, for the reception by the public on the Belgian territory. Radio programmes or part of radio programmes for which the broadcaster receives a remuneration paid by the listener, are excluded. Phonograms are defined as the purely audio fixation of sounds from a performance or from other sounds; see also Haoudig, H., "Diffusion en continu sur internet", *A.M.*, 2006, pp. 17.

[32] The Belgian legislator added as an extra condition that no entrance fee should be required from the public.

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 Belgium or France for this type of use.[33]

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

[33] 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). This definition excludes the transmission via the Internet in so far as it is carried out by means of wire.

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

Countries	Communication to the public/ in public places	Broadcasting through the radio	Broadcasting through TV channels	Webcasting	Simulcasting	Making available on demand	Other ways of communication to the public?
Belgium	Yes on the condition that the performance is not used for a show and that no entrance fee is asked to the public	Yes	Yes but not collected yet	No, but under discussion for non-interactive forms[34]	No, but under discussion	No[35]	No
Croatia[36]	Yes	Yes	Yes	Yes but not yet in practice	Yes but not yet in practice	Yes but not yet in practice	No
Czech Republic	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 II, paragraphs on exclusive making available right	No
France	Yes on the condition that	Yes	No Paralysed by a conflict	No	Yes but not yet	No	No

[34] For the Belgian discussion : see Michaux, B., "*Webcasting ou diffusion musicale sur Internet: licence obligatoire ou droit exclusive des titulaires de droits voisins?"*; *A.M.*, 2002, p.479 and following ; contra Haoudig, H.,"*Diffusion en continu sur Internet*", *A.M.*, 2006, pp. 10-20, arguing for the inclusion of non interactive forms of webcasting under the term "broadcasting".

[35] Brison, F., Het naburig recht van de uitvoerend kunstenaar, De Boeck & Larcier, 2001, nr. 924.

[36] 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).

	the performance is not used for a show		between performers' organisations, producers and audiovisual broadcasters. The new wording of art. 214-1 in the law of 1 August 2006 seems to modify the situation.		in practice		
Germany	Yes	Yes	Yes	Yes	Yes	No	No
Lithuania	Yes	Yes	Yes	Yes	Under debate	Yes but not yet in practice	No
Netherlands	Yes	Yes	Yes	Yes	Yes	No[37]	No[38]
Spain	Yes	Yes	Yes	Yes but not yet in practice	Yes but not yet in practice	No See chapter on exclusive making available right	Theatrical release of films
Sweden	Yes	Yes	Yes	Yes	Yes	No	No
United Kingdom	Yes	Yes	Yes	Only when Internet transmissions constitute broadcasts as defined in national law[39]	Yes when it constitutes a broadcast as defined in national law	No	No

[37] Spoor & Verkade, Auteursrecht, p. 665
[38] Spoor & Verkade, Auteursrecht, p. 665
[39] See art. 6 (1A) of the British IP Law: the definition of broadcast includes (a) a transmission taking place simultaneously on the Internet and by other means, (b) a concurrent transmission of a live event, (c) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

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 like Belgium or 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 reference to the revenues from the exploitation in order to determine the equitable remuneration.

In all countries except for the UK the equitable remuneration is payable by the user as stated in European Directive 92/100/EEC. In the UK Directive 92/100 EEC has not been implemented accordingly and remuneration is payable by the owner of the copyright, meaning the producer.

In Belgium, France, Lithuania and the Netherlands, the law stipulates that both performers and producers are entitled to equal shares of the remuneration. However, most of the countries (6 out of 10) do not specify in their legislation the division of remuneration between performers and producers. The table shows that, in practice, this division is fairly balanced. Mostly remuneration is divided in equal shares between performers and producers.

In 7 of the 10 countries (Belgium, Croatia, Czech Republic, France, Lithuania, Netherlands and Spain), the responsibility of collecting societies for administering this remuneration has even been made compulsory by law.
In Germany and the United Kingdom, 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

Countries	Amount of the remuneration	Body liable for payment	Rules about sharing of the remuneration between performers and producers	Intervention of collecting societies
Belgium	Tariffs determined by agreements between collecting societies and users. If no agreement 6 months after the coming into force of the law, then tariffs determined by a commission made of 50 % representatives of collecting societies, 50 % representatives of users, beheaded by a representative of the Minister. The decisions of the commission are declared binding upon third parties through a royal decree.	the user	By law: 50/50 Without prejudice to international treaties.	Compulsory licence
Croatia	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	Law provides that performer is entitled to "a share". In practice: collecting society of producers and collecting society of performers collect separately; globally, the share of each party is 50/50	Compulsory licence
Czech Republic	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
France	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 right-holders and of the government	the user	By law: 50/50	Compulsory licence
Germany	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.	Can only be assigned to a collecting society, but not compulsory In practice: collecting

			In practice, as agreed between performers and producers and stipulated in an annual allocation plan: *Audio:* -public performance: performers 64 % / producers 36 %. - broadcasting 50/50 *Video:* -public performance and broadcasting: -performers 20 % / producers 80 %	society GVL
Lithuania	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
Netherlands	Equitable remuneration	Not determined by law In practice: the user	By law: 50/50	Compulsory licence
Spain	Each collecting society fixes its own tariffs and then negotiates their implementation with the users	the user	*Audio:* According to the law, by agreement and failing agreement 50/50 *Video:* Each collecting society fixes its own tariffs.	Compulsory licence
Sweden	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
United Kingdom	Tariffs determined by agreement by or on behalf of the persons by and to whom it is payable. In default of agreement or to vary any previous agreement, each may apply to the Copyright Tribunal.	By the owner of the copyright in the commercially published sound recording	Not specified by law	May not be assigned, except to a collecting society, but not compulsory

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

Type of fixation - Table 1.3 shows the types of fixed performances for which use remuneration is legally due and collected. Pursuant to international treaties and to art. 8.2 of Directive 92/100 EEC, remuneration is only due for phonograms published for commercial purposes. However, in certain countries (e.g. Belgium, Croatia, Sweden) remuneration is due for any phonogram, or is extended to any kind of published phonograms (as is the case in Germany).

Belgium, Croatia, Germany and Spain have extended the right to remuneration to the broadcasting and communication to the public of audiovisual fixations. In Belgium, however, the legal provision has been only partially implemented. Royal Decree of 9 March 2003 only envisages an equitable remuneration for the free-to-air broadcasting of sounds. 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' right by the producer[40].
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 certain countries the remuneration has been excluded for phonograms on other than on audio carriers, by legislation (e.g. the Czech Republic, Sweden) or by court decision (e.g. France). 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). 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, some remuneration is collected for music video for the exclusive right of communication to the public. In such case, 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 right-holder.

In Sweden, according to SAMI's mandate, the music performers commissions 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.
The recourse to collective management with regard to these secondary uses depends on how extensive the primary (first) transfer of performers' rights to a certain production is. 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

[40] 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.

performers through the union. The impact of this agreement is limited by the fact that it is, of course, 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**	
Belgium[41]	Any reproduced or broadcast phonogram In practice: only phonograms published for commercial purposes	Not specified by law	Included but not yet put in practice
Croatia	Any phonogram	Any carrier	Included but not yet put in practice
Czech Republic	Phonograms published for commercial purposes Yet remuneration is sometimes extended by contract with broadcaster and right-holders to any phonogram	Audio carrier only	Not included but exclusive right for broadcasting and communication to the public included under contracts with right-holders also for music videos
France	Phonograms published for commercial purposes	Not specified by 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
Germany	Published phonograms	Any carrier	Included In practice: only for music videos
Lithuania	Phonograms published for commercial purposes	Not specified by law In practice: remuneration only collected for	Not included

[41] Art. 41 of Belgian Authors' law extends the compulsory licence to all reproduced or broadcast authorized performances; therefore it also includes live performances that were broadcast.

		phonograms on audio carriers	
Netherlands	Phonograms published for commercial purposes	Not specified by law (a phonogram is defined as a fixation of *sounds* exclusively)	Not included
Spain	Phonograms published for commercial purposes	Not specified by law In practice: any carrier	Included
Sweden	Any phonogram In practice: mainly phonograms published for commercial purposes	Only for "sound recordings" "Sound films" are explicitly excluded in the law, therefore only audio carriers	Not included but exclusive right for broadcasting and communication to the public included under contract with right-holders also for music videos
United Kingdom	Commercially published sound recording	Not specified by law	Not included

I.2.1. b. Practice

The exercise of the right to remuneration

The table below and accompanying description do not comment on the situation in the UK due to a lack of information about this country.
The amount collected for broadcasting and communication to the public represents an essential part of the revenues received by performers from the collecting societies. Overall, this is actually the main source, representing on average 57% 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.

Table 1.4 below clearly shows 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 Belgium, Croatia, France and Spain. In the Czech Republic and Sweden the amounts collected are still very small. In Germany, Lithuania and the Netherlands the amounts collected cannot be precisely determined, since they are reported together with remuneration collected for "broadcasting". However, it seems that in these countries as well, amounts collected for webcasting and simulcasting are still limited. The low amounts of remunerations are most probably due to the fact that webcasting and simulcasting are new practices.

In most countries remuneration is only collected for the use of phonograms. However, in certain countries, such as Belgium, 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. This amounts for the collecting society AISGE to around € 19 million per year. The amount mentioned in table 1.4 for TV- broadcasting in 2005 is exceeds € 19 million 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 Belgium and Croatia no remuneration has been collected so far for audiovisual fixations.

Table 1.4 Equitable remuneration for broadcasting and communication to the public - Collection for performers in 2005

Gross amounts in euro (VAT not included)[42]
Remunerations for the use of the cable retransmission right are not included except where otherwise stated
For those collecting societies that collect jointly for performers and producers, namely AGATA, GVL, INTERGRAM and SENA, only the part of the performers is mentioned (as is the case for all following tables in this study).

NA= not applicable

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simul-casting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
Belgium URADEX	5.764.112	0	54.366*	0		NA	NA	NA	NA	**5.818.478**
Croatia HUZIP	488.218	0	1.167.044	0		0	0	0	NA	**1.655.262**
Czech Republic INTERGRAM	1.341.937	NA	778.921	782.167	Included in com. to the public	8.810	0	NA	NA	**2.911.835**
France ADAMI SPEDIDAM	12.088.240 5.980.240 ADAMI 6.108.000 SPEDIDAM	NA	12.666.958 6.345.958 ADAMI 6.321.000 SPEDIDAM	53.364 SPEDIDAM	NA	NA	0	NA	NA	**24.808.562**
Germany GVL	21.245.440	159.000	27.035.000	6.570.000	853.400	Included in broadcasting		NA	NA	**55.862.840**

[42] Applied exchange rate: average rate 2005:
HRK 1 = EUR 0,135
CZK 1 = EUR 0.034
LTL 1 = EUR 0,290
SEK 1 = EUR 0,108

Countries	Communication to the public		Broadcasting through the radio	Broadcasting through TV channels		Webcasting	Simul-casting	Making available on demand	Other ways of communication to the public	Total by country
	Audio	Video		Audio	Video					
Lithuania AGATA	149.039	NA	58.378	126.221	NA	2.468	Included in radio broadcasting	0	13.666 (rebroadcast-ting)	**349.772**
Netherlands NORMA SENA	Approx. 12.694.000	NA	Approx. 6.425.500 (including webcasting, simul-casting, cable retransmission)		NA	Included in broadcasting		NA	No data available	**19.119.500**
Spain AIGSGE AIE	7.858.990 AIE (includes radio-and TV broad-casting)	369.730 AISGE	AIE (included in com. to the public)		38.771.616** AISGE	0	0	NA	427.080 (cinema) AISGE	**47.427.416**
Sweden SAMI	4.313.736	384.264 (exclusive right only)	4.114.800		NA	13.500	21.222	NA	NA	**8.847.522**
Total by type of use	**65.943.712**	**912.994**	**97.457.735**			**24.778**	**21.222**	**0**	**440.746**	**166.801.187**

Source: data collected from the performer collecting societies.
As for SENA and AIE, data were found in Annual Reports and other available documents. Both organisations were invited to participate in this study, but declined.
Unfortunately no information was available for the UK either.

* Belgium-URADEX: in total € 1.092.280 was invoiced for broadcasting through the radio in 2005, but only a small amount of this sum was received in 2005. Most payments were received in 2006.
** Spain-AISGE : this amount includes payments for 2005 and late payments.

I.2.1. 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 (e.g. 1993 in the Netherlands, 1994 in Belgium and in Spain, 1999 in Lithuania). In other countries it already existed previously (e.g. 1953 in the Czech Republic - for soloists, 1960 in Sweden, 1965 in Germany, 1985 in France, 1988 in the UK - only for broadcasting).

As has been shown in tables 1.1 to 1.3 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 and Belgium, the broad terms "communication to the public" have been restricted in national laws to the terms "communication in public places". Consequently, in these countries new types of use such as webcasting have been excluded from the remuneration right to date. However, these uses fall under the broad terms "communication to the public".
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 92/100/EEC.[43]

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. These exclusions seem to contradict the general guarantee provided by art. 8.2. of the Directive. In France, the debate concerning audiovisual incorporation may be solved by the amendment to the Intellectual Property Code on 1 August 2006, which introduces new wording for art. 214-1 suggesting that television broadcasters would be liable for payment at least for the phonograms they have incorporated in their own works.

However, it is also 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 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.[44]

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.

[43] 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.
[44] 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.

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.[45]
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 co-contractors, it also seems useful to provide a reminder that the right to an equitable remuneration cannot be waived.

Lastly, 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 (financial) step forward for performers (and producers). The Spanish legislation could serve as a model for European legislation.

[45] 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.

I.2.2. Making available to the public of services on demand

I.2.2. 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 life performance without their consent (art. 14.1 of TRIPS).[46]

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.

National legal framework

The 10 countries have implemented Directive 2001/29/EC. Their national legislations provide the performer with an exclusive making available right. France and Spain were the last countries to implement the Directive[47]. The French legislator did not mention the making available right explicitly, since Art. 212-3 CPI was thought broad enough by the

[46] 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 via the Internet, since Internet access is based essentially on telecommunication networks (with wire). "Communication to the public" is not defined in the Rome Convention nor in the TRIPS Agreement. According to the Guide to the Rome Convention, published by WIPO, the term "performance" 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.

[47] 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.

French government and parliament to include this right as well.[48] Accordingly, before the law was amended, French jurisprudence already considered that "the making available to the public through a network", such as the Internet, is considered to be a communication to the public.[49]

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".[50] 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. [51] The law ensures that, where the performer has transferred his exclusive right, he retains an unwaivable right to an equitable remuneration as a counterpart to this transfer. The equitable remuneration is payable by the person who is making the fixation available.[52] The right must be exercised through collecting societies.

I.2.2. b. Practice

Exercise of the right

Very few studies have been conducted to date on the exercise of the making available right.[53] 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 has remained near to zero and concerns concerns only a couple of performers.

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

[48] 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.
[49] Tb. Com., Paris, 3 March, 1997, *La semaine juridique* (JCP), 1997, p. 22; Kerever, A., *'Chronique de jurisprudence', RIDA*, 1997/172, 215.
[50] Art. 20, 2, i of the Spanish IP Law
[51] Art. 108,2 of the Spanish IP Law
[52] Art. 108,3 of the Spanish IP Law
[53] 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.

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.

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.[54] 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.[55]

All countries, with the exception of Croatia and the UK, 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.[56] In Belgium, the making available right is generally considered not to be included in the rights subject to a presumption of transfer.[57]

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.

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, the performers' collecting societies in Spain have not yet collected any amounts. They are currently examining the new models for exploiting works, in order to be in a position to start negotiations with users and thereafter collect remuneration from them.

In the event of transfer, this making available right has so far resulted in little income for performers. In the audio sector, the study by ADAMI shows that for each song sold through an on-demand service (like online music stores) at the price of € 0.99,

[54] 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.
[55] Art. 108.2 Spanish IP Law
[56] Art. 108.2 Spanish IP Law
[57] Berenboom, A., *Le nouveau droit d'auteur*, Bruxelles, Larcier, 2005, n°. 164 and n° 256; Corbet, J., " *Cinq ans après ; Première évaluation de la nouvelle loi belge sur le droit d'auteur*, *RIDA*, p. 181.

contracted performers - the main performers - receive between € 0.03 and € 0.04.[58] 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 %[59] - 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.

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. Performers therefore have no idea about the way in which the right is exercised by producers and the revenues it generates.

I.2.2. c. Impact of European legislation

In most countries, 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. Most 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 most countries (e.g. Belgium, the Czech Republic, Lithuania, the Netherlands, the UK) 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 growing market, current legislation needs to be adapted. Failing this, the making available right will remain purely theoretical for most performers.

An appropriate solution to make this 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 may be the best solution to overcome the weak contractual position of the performer. The performer should be clearly entitled to remuneration for making available his performance. This option would give the remuneration right a good

[58] ADAMI study, "*Filière de la musique enregistrée: quels sont les véritables revenus des artistes interprètes* ?", 2006, pp. 26-27.
[59] On the wholesale price, excluding VAT, and after BIEM contribution

chance of being effective since it would be automatically administered by a collecting society. It follows the model that has been running in Spain for a few months.

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 this right to be exercised through a collecting society, thus following the example of the way in which the cable retransmission right has been exercised for a couple of years in several countries.[60]

[60] Art. 9 of the Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission provides that "Member States shall ensure that the right (…) to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.
Where a right-holder 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 (…)" and gives some guidelines for this compulsory collective management.

I.2.3. Limitation of the reproduction right for private use

I.2.3. 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.[61] However, any contracting State may provide for exceptions to the protection guaranteed by the Convention, including for private use.[62]

The TRIPS Agreement also envisages the possibility of a performer preventing reproductions of fixations on a phonogram if this is undertaken without their authorization.[63] However, it does not provide explicit exceptions to the rights of performers. It refers to those permitted by the Rome Convention.[64]

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[65].

The WPPT gives the performer an exclusive right of authorizing the reproduction of his performances fixed in phonograms.[66] 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.[67]

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 authorize or prohibit the reproduction of fixations of their performances, but they may also provide for limitations in respect of private use.[68] Art. 10.3 of the Directive stipulates that this exception is "*without prejudice to any existing or future legislation on remuneration for reproduction for private use*".

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[61] 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 subjects 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).

[62] Art. 15,1a of Rome Convention

[63] Art. 14 of TRIPS Agreement

[64] Art. 14,6 of TRIPS Agreement

[65] 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.

[66] Art. 7 of WPPT

[67] Art. 16,1 of WPPT

[68] Art. 7.1 and 10.1 a of Directive 92/100/EEC

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. According to this article, Member States may provide for 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 right-holders 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 right-holders 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.[69] 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.[70]

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 right-holders 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 right-holders. All of the 10 countries in this study, apart from the UK, have introduced in their national legislation the exception for private use, linked to fair remuneration for right-holders.[71]

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[69] Art. 5.5 of Directive 2001/29 EC, similar to provisions of art. 9.2 of the Berne Convention quoted above.

[70] However, it should be underlined that the three-steps-test is subject to different interpretations.

[71] 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 right-holders (which is not in line with the provisions of the Directive 2001/29/EC).
The Belgian legislator has implemented the exception for private use ("made by a natural person for private use and for ends that are neither directly nor indirectly commercial") as "made within the family circle and only

As will be shown in table 3.1 the terms of the remuneration systems differ from country to country.

Remuneration schemes:

Table 3.1 presents the different remuneration schemes. The UK has no remuneration scheme at all, since no exception to the reproduction right for private use is envisaged. However, right-holders in the UK can benefit from the situation in other countries where such remuneration exists. To date, the following countries operate a dual remuneration scheme with levies on equipment and blank carriers: Belgium, the Czech Republic, Croatia, Germany, Spain. In the other countries - France, the Netherlands and Sweden -, royalties are levied on blank video and audio carriers only.

Moreover, 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, memory-cards for cell phones with storage capacity). In Germany, a levy has been introduced on computer hard disks, but legal procedures concerning the levy are still pending. In Belgium the law that implemented Directive 2001/29EC indicates that computers or categories of computer can only be included in the remuneration system by royal decree, deliberated in the Council of Ministers.[72]
In other countries, to date computer hard disks are exempted. However, there are also debates concerning recording devices in several countries (e.g. CD burners, computers).

Continued technological progress deter any regulation involving the definitive listing of specific types of carriers and equipment and favours general regulations. E.g. the Belgian (forthcoming[73]), the Spanish and the French legislators have provided a revisable system: on a regular basis, the public authorities revise the list of equipments and blank carriers, as well as the applied tariffs. A series of conditions established in the law need to be taken into account, amongst which the level of reproduction and further private use, the extent of the prejudice caused and the applicability and efficiency of anti-copying devices.

Remuneration schemes applied in 9 countries (all of the countries examined apart from the UK) 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 and at the moment in Belgium as well, regarding equipment[74]) are problematic since wholesale prices tend to be dropping increasingly, while the number of copies made for private use is continuously increasing. Some countries (e.g. Belgium, the Netherlands, Spain, Sweden) differentiate between the levies for digital and analogue media.

In general, digital copies are characterised by a higher quality and can be made in less time. This explains the higher remuneration rates most countries apply for digital media.
Other countries (the Czech Republic, France, Germany, the Netherlands) make/add a difference 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 and the forthcoming Belgian legal provisions[75]) have introduced in their law that the

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intended for the family circle", which is more extensive.

[72] New art. 56 of the Belgian Authors' Law; this article has not yet come into force. The date will be determined by the King.
The new article also indicates that equipment that incorporates a carrier on a permanent basis, is only subject to one remuneration (and not two because of the dual remuneration system).

[73] New art. 56 of the Belgian Authors' Law; this article has not yet come into force.

[74] Current art. 56 of the Belgian Authors' Law and Royal Decree of 28 March 1996 (to be replaced in the future).

[75] New art. 56 of the Belgian Authors' Law; this article has not yet come into force.

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 right-holders concerned: performers, authors and producers. The division between the various right-holders 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 is made unbalanced and does not involve equal shares for the various categories of right-holders - performers, authors and producers. The remuneration is generally considered to be non-transferable via individual contracts.

In some countries (France, Lithuania, the Netherlands, Spain) a considerable 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 the 9 countries where there are remuneration schemes, it has been made compulsory for the remuneration right to be administered by a collecting society.

Table 3.1 Private copying - Terms of remuneration

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 right-holders	Contribution to cultural activities	Intervention of collecting societies
Belgium	a- Tariffs set by royal decree, agreed upon by the Council of Ministers[76] b- On equipment and carriers (audio and video) c- % of the selling price of the equipment and fixed amount for the carriers (distinction analogue and digital)	Manufacturer, importer or person making an intra-Community acquisition for non-private use of equipment or carriers (art. 55)	By law (art. 58, §1) *Audio & Audiovisual*: 33 % to each of the 3 groups (authors, performers, producers)	The Federal State and the Communities can decide to use up to 30 % of revenues from private copying to encourage the creation of works (art. 58,§2)	Compulsory licence (art. 55)
Croatia	a-No rates nor mechanism to determine the rate is stipulated in the law, therefore rates determined by negotiation between interested parties b- On equipment and carriers (audio and video) (art. 32,1)	Manufacturer, jointly with importer of equipment or carriers (art. 32,4) 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	Not specified by law By agreement between parties involved: *Audio*: authors: 40% performers: 30% producers: 30%. *Audiovisual*: still in the process of negotiations	Not determined by law, but under the statutes of the collecting society 10 % of remuneration collected for private copying is allocated to cultural activities	Compulsory licence (156, (2))
Czech Republic	a- Stipulated in the law (rate schedule attached in the annex of the IP law). b- On equipment and carriers (audio and video) c- % of the selling price of the	Manufacturer or, importer of equipment and carriers, or the conveyor instead, unless that person allowed the identification of the	By law (art. 104) *Audio*: 25 % to performers 25 % to producers 50 % to authors *Audiovisual*: 15 % to performers and	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	Compulsory licence (art. 96, 1)

[76] Royal Decree of March 28 1996. Art. 56 provides subsidiary default tariffs applicable in case there would have been no Royal Decree.

	equipment and the carriers	manufacturer or the importer (art. 25)	authors of choreographic and pantomimic works 25 % to producers 60 % to authors	cultural activities.	
France	a- Types of carriers, rates of remuneration and conditions for payment determined by a Committee comprised of 50 % beneficiaries, 25 % manufacturers and importers, 25 % consumers (art. L.311-5). b- On carriers (audio and video) c- Fixed amounts (distinction audio-video) (art. L 311-3 and 4). New art. 311-4 states that the amount must take into account the degree of use of technical measures and their impact on uses relevant for the exception of private copy. No remuneration in case where financial compensation already paid for the same act of private copying	Manufacturer, importer of carriers or the person making an intra-Community acquisition for non-private use of recording mediums (art. L311-4)	By law (art. 311-7) *Audio:* 25 % performers, 25 % producers, 50 % authors *Audiovisual:* 33 % to each of the 3 groups (authors, performers, producers) Distribution to right-holders in proportion to the private reproductions made for each work or recording (art. 311-6)	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. 321-9).	Compulsory licence (art. 311-6) .
Germany	a- Rules applied are those stipulated in the law unless otherwise agreed (rate schedule attached in the annex of the IP law, see art. 54 d (1)) b- On equipment and carriers (audio and video) c- Fixed amounts (distinction audio-video)	Manufacturer, importer and retailer of equipment and carriers (art.54)	Shares not determined by law; the law only stipulates that each right-holder is entitled to receive an equitable share (art. 54h). According to the Federal Minister of Interior and Patents and Trademarks Office the management of this remuneration is primarily the task of collecting societies By agreement between parties involved:	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)

			Audio 42 % to be shared between performers (64 %) and phonogram producers (36 %) 58 % authors *Audiovisual*: 21 % to be shared between performers (64 %) and phonogram producers (36 %) 50 % to film producers and other right-holders 29 % authors		
Lithuania	a- The law stipulates that the rates are established by the Government after consultation of manufacturers and importers on the one hand and collecting societies on the other hand. b- On carriers (audio and video) c- % of the wholesale price of audio or audiovisual carriers with a max. of 6 % (arts. 58,2 & 20 IP-Law) *Application or non-application of technical measures is taken into consideration*	Manufacturer and, importer of carriers (art.20,4)	By the Government (Resolution 1106, art.21) *Audio & Audiovisual*: 30 % performers 30 % producers 40 % authors	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 According to art. 20 Resolution 1106, a 25 % amount shall be retained from the remuneration collected on imported and produced audiovisual media for the National Cinema Promotion Programme (after deduction of administrative expenses)	Compulsory licence (art.65,3 IP-Law)
Netherlands	a- After art. 16 of the Copyright law, tariffs are fixed by a body (Stichting de Thuiskopie) representing the interests of right-holders and users b- On carriers (audio and video) c- Fixed amounts (distinction audio-video and analogue and digital)	Manufacturer or, importer of carriers (art. 16c)	Not specified by law By agreement between parties involved: *Audio*: 30 % performers 30 % producers 40 % authors *Audiovisual*: 25,5 % performers, 40,75 % producers 33,75 % authors	No legal basis In practice, 15 % of the revenues from private copying collected by De Thuiskopie + 5 % of amounts administered by NORMA & SENA are allocated to actions supporting cultural activities	Compulsory licence (art. 16d Copyright Law)

Spain	a+b- The new law distinguishes between the analogue and digital equipment and carriers: - For analogue equipment and carriers the rates are fixed in the law (art. 25.5) for both audio and video - For digital equipment and carriers the list of equipment and carriers to be levied, and the tariffs are determined by negotiation between the collecting societies and the debtors. If no agreement is reached, then the Ministries of Culture and Industry would decide. c- Fixed amounts.	Manufacturer and importer of equipment or carrier 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)	Specified in Royal Decree 1434/1992 (art. 36) for analogue equipment and carriers: *Audio:* 25 % performers, 25 % producers 50 % authors *Audiovisual*: 33 % for each category of right-holders (authors, performers and producers) For digital equipment and carriers the negotiating parties are to fix the distribution between the categories of right holders.	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	Compulsory licence (art. 25)
Sweden	a- Rates are fixed in the law b- On carriers (audio and video) c- Fixed amounts (distinction analogue-digital) (art. 26 l).	Manufacturer or importer of carriers (art. 26k).	Not specified by law In accordance with copying actually made In practice: *Audio*: 33 % performers 33 % producers 33 % authors Audiovisual: Sharing based on the source of copying and the type of programme that the various right-holders fall within. In 2006, SAMI received a share of 3.62 % of total video levy and Swedish Union for theatre, artists and media received a share of 25.65 %.	No legal basis In practice?	Compulsory licence (art. 26m)
United Kingdom	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

I.2.3. b. Practice

Table 3.2 shows that in all countries, with the exception of the UK - where no exception for private use exists, but where remuneration for private copying is nevertheless collected for cross-border administration of performers' rights - and of Croatia - where the remuneration system was only introduced in 2003-, performers' organisations currently collect remuneration for private copying.

The amount collected represents an essential part of the revenues received by performers from collecting societies. It represents 38 % of the total remuneration collected by the performers' organisations of the countries under examination. However, the amounts collected in the new Member States, the Czech Republic and Lithuania, even taking into account the smaller size of their populations, are smaller than in the old Member States. In Lithuania, where the remuneration system for private copying was set up only recently, legal disputes are paralyzing collection. The amount collected was higher in 2004 (156,900 EUR). It decreased in 2005, since importers refused to pay the levy for recording media imported from the EU.

In most countries – such as Belgium, 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 centralized by one single (or two) organisations that usually collect private copying remuneration for all categories of right-holders. 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 3.2 Private copying – Collection for performers in 2005

Gross amounts in euro (VAT not included)

Countries	**Remuneration collected for performers for private copying by performers' organisations**
Belgium **URADEX**	4.942.776 (amount for 2004*)
Croatia **HUZIP**	0
Czech Republic **INTERGRAM**	392.423
France **ADAMI** **SPEDIDAM**	44.158.298
Germany **GVL**	24.279.680
Lithuania **AGATA**	57.567
Netherlands **NORMA** **SENA**	17.762.000
Spain **AISGE** **AIE**	19.859.149
Sweden **SAMI**	1.765.024

United Kingdom **BECS**	2.998.950 (from other EU Member States only)
Total	116.215.867

* The Belgian performers' organisation URADEX has not yet received the collected amount for 2004 from Auvibel, the society that collects the remuneration for private copying in Belgium. It is expected to be received in 2007. For 2005, € 6.125.378 are expected to be received from Auvibel.

I.2.3. c. Impact of European legislation

In most of the 10 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 1999 in Lithuania, in 1985 in France, in 1994 in Belgium, in 1987 in Spain, in 1990 in the Czech Republic, in 1993 in the Netherlands, 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 harmonization of this exception. For right-holders in the 9 countries with remuneration schemes for private copying, it is incomprehensible that they should return empty-handed from the UK, while UK right-holders receive remuneration collected abroad. In addition, 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.[77] Against this background of growing consumer demand and greater affordability and availability of technology able to produce high quality copying, performers' unions such as Equity in the UK are supporting the introduction of a levy on equipment and blank carriers.[78]

Furthermore, performers' organisations fear that the introduction by Directive 2001/29 EC of elements such as the application or non-application of technological protection measures (the so-called TPM or lockers that prevent consumers from making copies of audio or audiovisual content) and the three-steps-test to determine fair compensation and their subsequent incorporation in national legislation have considerably weakened the existing national remuneration system. Assessment of the application of technological measures will be very difficult and may give rise to legal disputes and legal uncertainty.

Their incorporation has also reopened the debate on the existence of a remuneration system. The reference to technical protection measures is a new argument used by the industry in the battle to abolish of the "levies systems", the private copying remuneration

[77] A recent 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 www.ncc.org.uk/intellectualproperty/index_htm or www.ippr.org.uk (press release 2404).

[78] Equity submission to the *Gowers Review of Intellectual Property*, www.equity.org.uk.

systems. The industry is complaining that levies hamper the development of their market - although they are living on the sales of recordable carriers and equipment enabling the reproduction of copyrighted content.

Market figures for equipment and carriers as well as related audiovisual and music markets are far from alarming: in 2006, the sale of personal digital audio players ('MP3 players') has grown quickly to reach 33,295m units in the 10 Western European countries (Austria, Belgium, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, the UK).
After a soaring rapidly, DVD video player/recorder penetration seem to have reached a plateau. At the end of 2004 it hit 50.5 % of TV households in Western Europe (61.3 % in the UK, 61 % in France, 58 % in Germany and 49.5 % in Spain), thus narrowing the stable 52.2 % penetration rate for VHS players/recorders in these countries.
Broadband penetration per capita in the EU 20 (Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden, the UK, the Czech Republic, Estonia, Hungary, Poland, Slovakia, Slovenia) reached 16.8 % in 2006 and is expected to increase to 21.8 % in 2008 (and 25.2 % in 2010, with a total number of broadband connections in Europe of 116m).
In addition, 3 G penetration in 6 Member States (Belgium, Denmark, France, Italy, Spain, the UK) accounted for 11.0 % of population at the end of 2005[79].

While MP3 players' sales and broadband penetration are increasing in Europe, recent studies have begun to assess the development of peer-to-peer practices. According to figures from EITO (the European Information Technology Observatory) obtained in 2006, the number of P2P users in the entire European Union, with the exception of Bulgaria and Romania, was in the region of 13.6m at the end of 2005 and was expected to grow to some 20.3m by the end of 2006, reaching 26.5m in 2007 and almost 39m in 2009. In the larger EU countries, 15 to 34 % of broadband Internet subscribers would use at least one P2P application; 90 % of them state that they also download and exchange files using other sources including websites, Instant Messaging (IM) and File Transfer Protocol (FTP) servers[80]. In decreasing order, music, audiovisual (mainly films), images and photos are the main types of downloaded content.

A major trend in technological changes characterizing the rapidly evolving market of equipment and carriers of content should also be taken into account: while sales of equipment devices such as CDs or DVDs seems to be stagnating, although still remaining quite lucrative, sales of creative content online and the use of digital formats are increasing at a rapid pace.

Total revenue from online content is estimated to reach € 8.3 billion by 2010 in Europe, a growth of over 400 % in five years, according to a study for the European Commission. For the most advanced sectors, online content will represent a significant share of total revenue: about 20 % for music and 33 % for video games[81].
Despite this fact, recent legal disputes or complaints show a strong reluctance on the part of retailers and importers of equipment or carriers, sometimes echoed by opinion makers, to accept that remuneration for private copying should not be limited to the offline, analogical environment.

[79] *'Interactive Content and Convergence: Implications for the information Society'* By Screen Digest Ltd, CMS Hasche Sigle,Goldmedia Gmbh, Rightscom Ltd, October 2006 and conference by The European Cable Communication Association ECCA in Amsterdam, 6 February 2007.
[80] EITO 2006 edition, *"P2P Networks and Markets"*, data gathered from information by IDC, IDATE and GfK.
[81] *'Interactive Content and Convergence: Implications for the information Society'* by Screen Digest Ltd, CMS Hasche Sigle,Goldmedia Gmbh, Rightscom Ltd, October 2006

The opinions of consumer organisations as regards private copying remuneration schemes and their link with the effective use of TPM are divided.[82] They would prefer not to have to pay for private copying, while they recognise the right for right-holders to be remunerated for the exploitation of their works/recordings. They believe that technical protection measures have a role to play in the digital market environment, but stress that the way they are being used at the moment is causing a number of serious problems. These include unreasonable constraints on the use of digital products, adverse impacts on the use and the security of their equipment and infringement of consumer rights under consumer protection and data protection law.

Interestingly, some consumer organisations stress that the use of technical protection measures itself should be regulated.[83] Until now, the regulation of technical protection measures technologies has merely been concerned with protecting against circumvention. Consumers expect clear statements about the way in which a product operates, and about its effects. Unfortunately, providing consumers with this information is not current practice within the industry: clear statements are seldom available on products employing technical protection measures.

Moreover, more and more voices are questioning the efficiency of technical protection measures.[84] Even if technical protection measures are protected by law, they can and will be bypassed by consumers with increasing technological skills, thus ensuring that the number of private copies will go on increasing but this time without any compensation for the right-holders.

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 3.2 show that collective management works. Digital rights management can help the management of remuneration systems to become more accurate and efficient, but it has no reason to replace collective management.

As indicated in table 3.1, the sharing system between the various right-holders is often unbalanced, to the detriment of performers. A specification that each category of right-holders is entitled to an equal share could help counterbalance the negative effects of unbalanced market bargaining powers.

[82] See BEUC position on digital rights management practices, content online (October 2006, ref. X/076/2006 pp.5-6; 9-12) and private copying (July 2006, ref. X/047/2006, pp. 4-6) on www.beuc.eu (under "position papers")

[83] National Consumer Council Britain, *Gowers Review of intellectual property*

[84] .Examples are multiplying of record companies that have decided, on a voluntary basis, to remove technical protection measures they had originally put on the CDs and online music tracks they are selling (e.g. *"Kopieerbeveiliging in vuilnisbak"*, De Tijd, 9 January 2007).

I.2.4. Rental right

I.2.4. 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 right-holders in phonograms as determined in a member' law*".[85] 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 right-holders on a phonogram a rental right should be given.[86]

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.[87]

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".

European legal framework

At Community level, Directive 92/100/EEC grants a rental right to all performers: pursuant to its art. 2.1, performers have the exclusive right to authorize or prohibit the rental and lending of fixations of their performances.
According to 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.[88] 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.[89]

However, these provisions are considerably weakened in terms of the audiovisual field given the fact that Directive 92/100/EEC introduces a presumption of transfer of rental right in the event of a film production: pursuant to art. 2.5, Member States are obliged to implement in their national legislation a rebuttable presumption 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

[85] Art. 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.
[86] 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.
[87] Art. 9 (2) WPPT
[88] Art.4.1 to 4.3 Directive 92/100/EEC
[89] Art. 4.4 Directive 92/100/EEC

Exclusive rental right

In 9 of the 10 countries studied, the national law expressly grants an exclusive rental right to performers. France is the exception. French legislation does not explicitly envisage any rental right for performers.[90] However, it explicitly grants a rental right to producers, notably to phonographic producers.[91]

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 phonogram of a film producer.[92] The terms for determining the remuneration and the body liable for payment differ amongst the countries, as shown in the table 4.1.

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, Sweden, the UK). In Belgium the legislator has not issued any regulation regarding the party from whom this remuneration may be claimed.

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 and the UK 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 Germany. 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.[93]

In countries where remuneration is collected by collecting societies, this remuneration is determined by mutual agreement between the collecting societies and the users.

[90] Art. L 212-3 of the CPI only mentions an exclusive right for fixation, reproduction and communication to the public of this fixation. All the attempts to have the right of rental listed in this article have failed to date.
[91] Art. L213-1 of the CPI
[92] In the law in the Czech Republic the term "reasonable remuneration" is used (art. 49,3 and art. 74).
[93] However, the collecting society SAMI recently joined an agreement concerning the video-distribution by the Swedish Television and Swedish Education Radio.

Table 4.1 Rental right - 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
Belgium	Yes	Not determined.	Not regulated	No
Croatia	Yes	Not determined	Video-shop	Yes, compulsory licence; But not applied in practice
Czech Republic	Yes	Tariffs determined by agreements between collecting societies and video-shops (currently 3 % from rental fee or lump sum in function of number of titles)	Consumer	Yes, compulsory licence
France	Not regulated	NA	Not regulated	Not regulated
Germany	Yes	Tariffs fixed by collecting societies and open to arbitration between collecting societies and users and, if necessary, to further legal action	Video-shop	No, but remuneration right can only be administered by a collecting society in case a performer has transferred this right in advance to the collecting society In practice collecting society GVL administers this remuneration right
Lithuania	Yes	Not determined	Consumer and video-shop	Originally compulsory licence. After the amendment of the Law in October 2006, it became not “compulsory” but “usually” enforceable through the collecting society for related rights But not applied in practice
Netherlands	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 the actual rental use of the work is not compulsory: a single remuneration is possible. The equitability of the amount paid can be controlled by the Court, but until now, this has not been done.	Producer	No
Spain	Yes	Tariffs fixed by collecting societies and then implementation negotiated with the users;	Video-shop	Yes, compulsory licence

		communicated to the Ministry of Culture (tariffs depending on the surface of the shop)		
Sweden	Yes	Not determined As regards Swedish TV (public service) tariffs fixed by agreements between collecting societies and the Swedish TV	Producer[94]	No But in practice Copyswede and the Swedish Television/Swedish Education Radio concluded a video-agreement concerning their own video distribution. However, the collecting society for performers only joined this agreement recently.
United Kingdom	Yes	Tariffs fixed by agreements between persons or on behalf of the persons by and to whom it is payable. In default of agreement or to vary any previous agreement, each may apply to the Copyright Tribunal	To be paid by the person to whom the right was transferred (the producer) or any successor	No, but remuneration right may not be assigned, except to a collecting society

[94] 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 right holder and the producer.

I.2.4. 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 Belgium, in the Czech Republic, Germany, Lithuania, the Netherlands, Spain, Sweden and the UK if a contract concerning the production of a film is concluded.
For the UK, no figures nor detailed information about current practices were available.

It should be noted that most producers of phonograms prohibit the use of the rental right. Since the right is not exercised in the audio sector, no remuneration is collected.

The exercise of the remuneration right

A comparison between tables 4.1 and 4.2 shows that it is only in countries where the remuneration is payable by the user 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 no administration of the remuneration right by collecting societies.
No figure was available as regards the collection in the UK.

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 and Spain, and to a very limited extent in 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 right-holders.
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. SAMI joined the agreement quite recently and its administration of this right is still at an early stage.

Collecting societies in Germany and Spain are not expecting to collect more remuneration for rental in the future than they have over the last years: according to them, on-demand services are progressively substituting rental. The remuneration they have been collecting over the past 5 years is actually decreasing. Table 4.3 shows this overall trend.

This observation corresponds with the developments on the rental market, which has seen little or no growth in recent years. In 2004 almost € 2.7bn was spent in Europe on renting DVD discs and VHS cassettes (of which € 400m on offline VHS, € 2.1bn on offline DVD and € 200m on online DVD). It is expected to decline to € 2.3bn by 2009.
Meanwhile, the online DVD rental market is developing rapidly: in 2005, digital on-demand movie distribution (retail or rental), which emerged later than on-demand market for music, generated € 30m in revenue in Europe, but digital revenue is expected to reach € 1.2bn by the end of 2010, € 1bn of which would come from online VOD[95].

[95] *'Interactive Content and Convergence: Implications for the information Society'* By Screen Digest Ltd, CMS Hasche Sigle,Goldmedia Gmbh, Rightscom Ltd, October 2006

As regards audiovisual rental alone, in 22 European countries, almost 350,000 Europeans subscribed to an online rental service by the end of 2004, generating expenditure of over € 53m. This customer base was expected to more than double, to over 850,000 subscribers, by the end of 2005. The online DVD rental sector continued to grow in 2005, accounting for 5 % of the total video rental market. This was expected to rise to around 27 % by the end of 2010 as the traditional market continues in a downward spiral[96].

The online services proposed are of various types, from traditional VOD with payment for the rental of a film or a package of films chosen from a catalogue, for a limited period of time and a limited number of viewings - to SVOD – flat fee subscription allowing access to an unlimited number of films from a given catalogue for a limited period of time. After the time limit, the downloaded content is no longer available for viewing. Downloadable audiovisual content – especially short clips or summaries of episodes of popular series – from the Internet onto mobile phones is also developing, as a result of technological convergence. DVD online rental will broaden access to film titles and give a wider choice to consumers than DVD and cassette stores have been able to offer.

However, the growth of the online market is expected to fail to compensate for the decline in the traditional offline market.[97] In addition, the rental market has also been affected by downloading practices from the Internet generally considered to be illegal.[98] Central and Eastern Europe also account for a very small proportion of total spending on the global video market (just 2 % of total European spending in 2005) which explains the lower importance of the remuneration right in this region.[99]

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. situation in the Netherlands). In practice this often means no remuneration for the transfer of this right.

[96] Studies by Screendigest, *"European Video: market assessment and forecast to 2010"* and to 2009, published in November and January 2006, on the video market in 22 European countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK, Croatia, the Czech Republic, Hungary, Poland and Russia)

[97] See study by Screendigest of January 2006, *"European video: market assessments and forecasts to 2009"* (in particular table on p. 4, European consumer spending on video rental 2002-2009).

[98] *"European Video Market: the industry overview"*, European Video Yearbook 2004, International Video Federation 2004, p. 10.

[99] Study by Screendigest of January 2006, *"European video: market assessments and forecasts to 2009*"; by way of comparison: the five largest European video markets (the UK, France, Germany, Italy and Spain) will account for more than three quarters of consumer spending in 2005; see also *"European Video Market: the industry overview"*, In European Video Yearbook 2004, International Video Federation 2004: prices for legitimate rental of DVD are still beyond the price affordable for many consumers in Central and Eastern Europe and the increased availability of pirated DVD and VCD is another explanation that DVD market growth has not been as robust there as in some other regions.

Table 4.2 Rental right –Collection for performers through collective management in 2005

Gross amounts in euro (VAT not included)

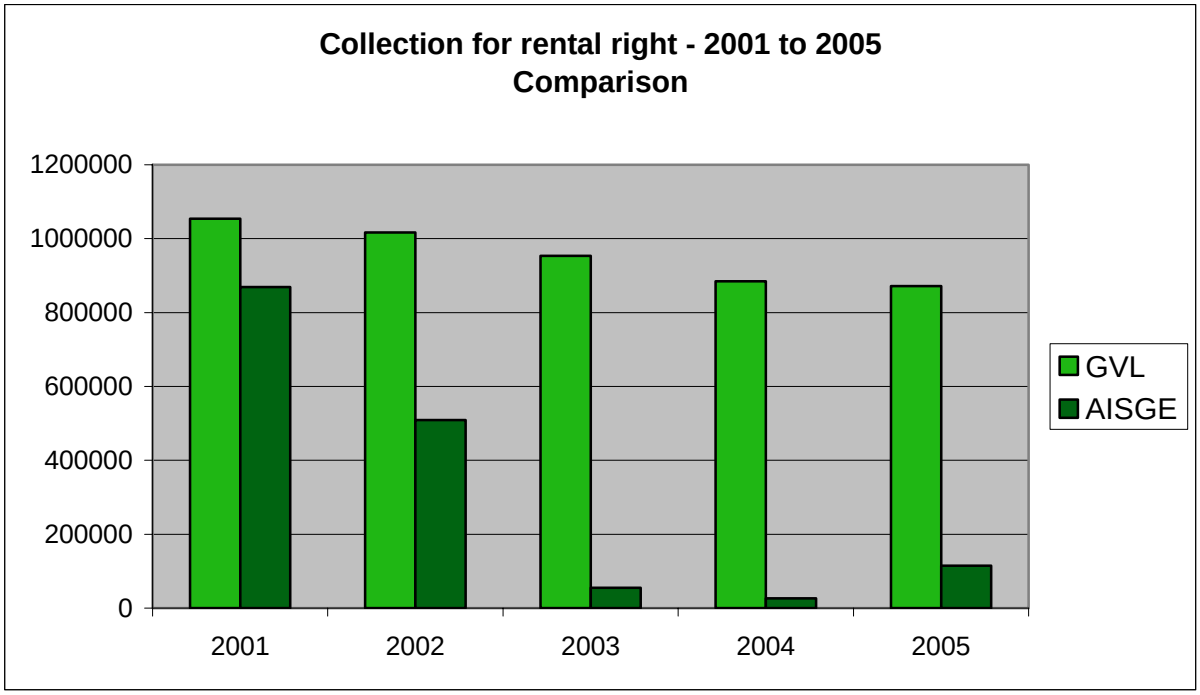
Countries	Amount collected in 2005		Body liable for payment
	Audio	Audiovisual	
Belgium URADEX	NA	NA	NA
Croatia HUZIP	0	0	Video-shop
Czech Republic INTERGRAM	0	353	Video-shops
France ADAMI SPEDIDAM	NA	NA	NA
Germany GVL	0	871.500	Video-shops
Lithuania AGATA	0	0	Consumer / Video-shop
Netherlands NORMA SENA	NA	NA	Producer
Spain AISGE AIE	0	114.871	Video-shops
Sweden SAMI	0	0	Producer

Table 4.3 Rental right – Collection by collecting societies for performers in Germany and Spain for 2001-2005

Gross amounts in euro (VAT not included)

Year	Remuneration collected for rental by GVL (Germany) in €	Remuneration collected for rental by AISGE (Spain) in €
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*

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



I.2.4. 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. 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 Belgium or the Netherlands, no remuneration is collected by collecting societies (no figures were available for the UK).. Since performers are not really in a position to be able to manage 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” seems to imply the making available for use of carrier devices. However, new uses such as video on demand allow users to select and watch video content over a network. 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 remain effective in the future, the definition of "rental" should clearly include the making available of digital fixations. [100]

Integration of this unwaivable remuneration right could also be contemplated in the event of the transfer of the exclusive making available right for on-demand services, under similar terms as those applied to the rental right in Directive 92/100/EEC. However, under those circumstances, as described above, in order for the provisions to have any positive effect on the actual situation of performers it would be crucial and necessary to have users defined as being those parties liable for payments with the management of this remuneration right entrusted to collecting societies.

[100] 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 (1) and 2 (1) in the Directive 92/100/EEC 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'.

I.2.5. Treatment reserved for recordings in the audiovisual field

I.2.5. 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 art. 19 of the Rome Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, art. 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.[101] 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.[102]

European legal framework

At European level, Directive 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 life performance, be it audio or audiovisual.[103] However, since according to art. 8.1 of this Directive, Member States do not have to provide performers with an exclusive right to authorize 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 for 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.[104]

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

Directive 92/100/EEC introduces the possibility of a general presumption of transfer of all the above-mentioned exclusive rights to the film producer: pursuant to art. 2, 7, 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 authorizing rental, provided that the contract provides for an unwaivable equitable remuneration. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights of fixation, reproduction, distribution, broadcasting and communication to the public.[105] 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

[101] Art. 14.1 TRIPS Agreement, arts. 2b, 5-10 WPPT
[102] Art. 7, 1 (b) Rome Convention.
[103] Arts. 6 to 9 Directive 92/100 EEC
[104] Art. 8.2 Directive 92/100 EEC
[105] Art. 2. 7 (last phrase) and recital 19 of Directive 92/100/EEC

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 Lithuania and the UK there are no exclusive rights over broadcasting and communication to the public rights.
In Germany only the exclusive right to communicate in public places 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 the exclusive right to communicate in public and broadcast their performances. However, most responses relating to the situation in these countries specified that despite these exclusive rights being granted by law, all these rights 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 co-contractor, the remuneration concerned may take the form of one lump sum: a single one-off fee. In practice, the situation is even worse: co-contractors often argue that the remuneration corresponding to these exploitation rights are 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 5.1 Audiovisual recordings – Applicable exclusive rights

Countries	Reproduction	Distribution	Lending/ rental	Communication in public places	Broadcasting and communication to the public through the television channels	Webcas-ting	Making available
Belgium	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Croatia	Yes	Yes	Yes	Yes To be administered only through a collecting society In practice not yet	Yes To be administered only through a collecting society In practice not yet	Yes To be administered only through a collecting society In practice not administered yet	Yes Can be administered through a collecting society In practice not administered yet
Czech Republic	Yes	Yes	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes*	Yes*	Yes	Yes	Yes*	Yes*
Germany	Yes	Yes	Yes	No (remuneration right)	Yes	Yes	Yes
Lithuania	Yes	Yes	Yes	No	No	No	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes	Yes	Yes

United Kingdom	Yes	Yes	Yes	No	No	Not when it constitutes a broadcast as defined in national law	Yes

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

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. The UK indicates a presumption of transfer for the rental right alone. Only Croatia has not introduced any presumption of transfer, including for the rental right, although this is prescribed by 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 Spain, apart from the general presumption of transfer of all audiovisual exploitation rights, the law provides for a specific presumption of transfer of the making available right.

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.[106] In Spain the new law provides an explicit and broad presumption of transfer of the making available right, concerning audio and audiovisual performances; the right is considered to be transferred to the film or phonogram producer when a film or phonogram contract is concluded.[107] In Belgium, is most of the time, the making available right considered not to be included in the rights subject to a presumption of transfer.[108]

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. 2.7 and art. 4 of Directive 92/100/EEC.[109]

The remuneration is in general unwaivable.[110]

[106] In France the making available right is considered by the legislator to be part of the communication to the public (art. 212-3 IP-law). Therefore, the presumption envisaged in art. 212-4 IP-law including the right to the communication to the public also extends to the making available right.
In the Czech Republic this was recently included following an amendment of the law in 2006; yet it should be noted that the making available right is only assigned (and not transferred).
[107] Art. 108.2 Spanish IP Law
[108] Berenboom, A., *Le nouveau droit d'auteur*, Bruxelles, Larcier, 2005, n°. 164 and n° 256; Corbet, J., *"Cinq ans après ; Première évaluation de la nouvelle loi belge sur le droit d'auteur, RIDA*, p. 181.
[109] This is subject to criticism in the German doctrine, see Von Lewinski, S., *"Die Umsetzung der Richtlinie zum Vermiet-und Verleihrecht"*, p. 449.
[110] 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.

The table 5.2 summarizes the situation in the various countries as regards the presumption of transfer of performers' exclusive rights as broken down in the table 5.1. 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 – described in more details in the second part of this study – it clearly appears that performers' rights in the audiovisual field are not given appropriate protection.

Table 5.2 Audiovisual recordings - Presumption of transfer of audiovisual exploitation in contracts with film producers

Countries	Presumption	Rights for which transfer is presumed	Rebuttable?	Right to a remuneration in case of transfer?	Unwaivable?
Belgium	Yes	All audiovisual exploitation rights (including the rights linked to dubbing or to subtitling of audiovisual content)	Yes	Yes Separate remuneration for each mode of exploitation, except for performances in audiovisual works that belong to the non-cultural sector or the sector of advertising	Yes (but not explicitly mentioned in the law)
Croatia	No	NA	NA	NA	NA
Czech Republic	Yes	No transfer, only assignment of the following rights: - to include the performance into an audiovisual work; - to fix the first fixation, to dub it and to provide it with subtitles; - to use the performance during the utilisation of the audiovisual work (with the exception of reproduction for distribution, distribution); - to make it available to the public (art. 64 /74, as amended in 2006)	Yes	Yes Remuneration subject to contractual negotiation, generally one amount for all modes of exploitation	Yes (but not explicitly mentioned in the law)
France	Yes[111]	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)

[111] 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

Germany	Yes	All audiovisual exploitation rights	Yes	No remuneration except for rental	NA (except for rental)
Lithuania	Yes	All audiovisual exploitation rights	Yes	Yes Remuneration for each individual economic right in the performance transferred	Not specified in the law
Netherlands	Yes	All audiovisual exploitation rights	Yes	Yes For all forms of exploitation	Yes, but only for rental
Spain	Yes	All audiovisual exploitation rights	Yes	Yes	Yes
Sweden	Yes	A transfer of the right to record a performance on a film includes - the right to make work available to the public, through the film; - to make spoken parts of the film available in textual form; - to translate them into another language (dubbing and subtitling)	Yes	No remuneration, except for rental	NA (except for rental)
United Kingdom	Yes, but only for rental right	Rental right	Yes concerning rental	Only for rental	NA (except for rental)

I.2.5. 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 in public places of audiovisual fixations (the Czech Republic, Germany and Sweden) and the right to broadcast audiovisual fixations (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, 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[112]. Performers are given a global amount, which then is divided between the various types of exploitation. 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-

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).

[112] See also Brison, F., *o.c.*, nr. 1047; Henneman, V., "Wat verdient een acteur", *AMI*, 2003, pp. 130-132.

series where the 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 does not mean any actual additional revenue for performers in general.

In France, the most important collective agreements are the collective agreement for the TV-sector of 30 December 1992 and the 1990collective 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 only for around 100 film productions, that 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 (excluding Bulgaria and Romania), according to a study by S. Newman-Baudais.[113] 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.[114]

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, it 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.[115] 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

[113] 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
[114] A. Lange, *Heurs et malheurs du cinéma européen*, European Audiovisual Observatory, Council of Europe, November 2001.
[115] Heevel, G. "*Beoogd en daadwerkelijk verkregen profijt van tien jaar WNR*, AMI 2003, p. 196-197.

administering this exclusive right, an economic benefit for the performers can be noted (e.g. the Czech Republic, Germany, Sweden as shown in table 5.2).

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 table 1.4). 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 (see table 1.4). The mandatory collective management of a remuneration right implemented in the Spanish model 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 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. In the other countries no remuneration was collected via collective management and presumably most performers did not exercise the rights concerned individually.

I.2.5. c. Impact of European legislation

In some Member States (the Czech Republic, France, Germany, the UK), audiovisual exploitation rights for performers had already been introduced before the implementation of European Directive 92/100/EEC.
Contrary to art. 8, 1 of Directive 92/100/EEC, most countries provide performers with an exclusive right to authorize or prohibit the broadcasting and communication to the public of audiovisual fixations. Only Lithuania and the UK do not provide for such rights. Germany does not provide an exclusive right to authorize or prohibit the communication of audiovisual fixations in public places, 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 art. 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.
In Belgium the right to remuneration for each type of exploitation of performances in audiovisual works is not valid in the non-cultural sector or the sector of advertising, although this exclusion is not envisaged in the Directive.
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. 2.7 of Directive 92/100/EEC. However, prior to the adoption of Directive 92/100/EEC, 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. 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.[116] 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.

[116] P.B. Hugenholtz and Guibault L., *o.c.*, p. 82.

I.2.6. Duration of the protection of performers' rights

I.2.6. 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.[117] 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.[118] The WPPT indicates the same duration (at least 50 years).[119]

European legal framework

Pursuant to art. 3 of 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.[120]

National legal framework

The 10 countries examined in this 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 Belgium, Croatia, Germany, Lithuania, the Netherlands, Sweden and the UK have implemented the Directive completely.[121]
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).

[117] Art. 14 Rome Convention
[118] Art. 14.5 TRIPS Agreement
[119] 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).
[120] Art. 8 Directive 93/98/EEC
[121] In the Netherlands, according to art. 12 of the Neighbouring rights act the reference 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 6 Duration – Implementation in national legislations

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

I.2.6. b. Effects of the limited duration of the protection of performers' rights on their actual remuneration

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. They would concentrate on the part of their back catalogue that is still under copyright protection.

I.2.6. 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.

All those who answered the questionnaire considered that the current term of protection was too short. Some evoked the fact that the length of protection in the US or other countries outside the EU can extend to 95 years. The shorter term in the EU puts performers at a disadvantage.

Others suggested extending the duration to a period equal to the term granted to authors: 70 years after their death. The distinction between authors and performers cannot be justified, as the creative input is the same. Contrary to authors, performers see some of their performances fall within the public domain during their lifetime.

Others agree with an equal term for the rights of performers and authors, but point out that linking the term to the "death" of the performer would be very difficult to manage. Indeed, performances are often given by groups of performers, which involves different protection terms for each of the participants. In the case of orchestras, over a hundred of performers may be involved in the same performance. Extending the term to 95 years after the date of the performance has therefore been suggested, which would then in most cases give performers a protection period no longer than that enjoyed by authors. This would at least protect them during their lifetime.

The 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 according to 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. It is therefore recommended that the starting point for performers should be identical to that of producers of phonograms.

PART II. Economic weight of revenue actually generated by performers' rights: comparative data and elements of analysis

II.1. Rights exercised by collecting societies

II.1.1. Overview of the remunerations collected and distributed by performers' collecting societies

Part I demonstrated that performers' collecting societies mainly manage remuneration rights - the equitable remuneration for broadcasting and communication to the public of commercial phonograms, the equitable remuneration for rental and the remuneration for private copying. Rarely do they administer exclusive rights.

The only exceptions in the 10 countries studied are the right of communication to the public of phonograms in the Czech Republic - since it is an exclusive right according to the Czech law -, the exclusive right of communication to the public of audiovisual fixations - music videos - (the Czech Republic, Germany and Sweden) and the exclusive right to broadcast audiovisual fixations - music videos - (the Czech Republic). Furthermore, in the Czech Republic the making available right for ringtones is exercised through the collecting society INTERGRAM, but only for a very limited amount of performers to date. In Sweden the collecting Society SAMI exercises the making available right for on-demand services by broadcasters.[122]

Those collecting societies exercising exclusive rights for performers generally happen to be joint performers' and producers' collecting societies, where the producers to whom the performers have transferred their rights give the collecting society a mandate to administer these rights (e.g. the Czech Republic, Germany).

The economical preponderance of remuneration rights will be reflected in the overview of the amounts collected by performers' collecting societies per country. Amounts collected for broadcasting and communication to the public of commercial phonograms and for private copying are the principal amounts collected. The remuneration collected for the use of the rental right is limited.

II.1.1. a. Overview of remuneration collected in 2005 for performers

Remuneration collected for broadcasting and communication to the public in the 10 countries studied represents on average 57 % of the total remuneration collected for performers, followed by remuneration for private copying at 38 %. These are almost always (except for communication in public places in the Czech Republic) remuneration rights.[123] This means that 95 % of the revenue administered by collecting societies comes from these non-exclusive remuneration rights.
In all countries, except for France and the UK, the remuneration for broadcasting and communication to the public represents the largest amount collected.
Since no complete information on the breakdown by category of rights was available for UK, the figures for this country could not be integrated in the table below.

[122] Since the amount is included in an annual lump sum for all Internet uses by broadcasters, the value of the remuneration collected by this organisation in application of the making available right is difficult to estimate.
[123] In Croatia the law provides for exclusive rights, linked to a remuneration right in the event of exploitation.

Currently, in none of these countries is remuneration for the making available right collected, apart from the very small amount collected in the Czech Republic and an undetermined but very limited amount collected in Sweden. Remuneration collected for rental, represents only a very small fraction of the amounts collected, less than 1 % on average. Remuneration collected for the use of audiovisual fixations represents on average 1.4 % of the total amount collected.

Overview Table 1 Overview of remuneration collected in 2005 for performers

Gross amounts in euro (VAT not included)

Country	Broadcasting Communication to the public	Making available on demand	Private copying	Rental	Others	Global amount collected in 2005	Sector
Belgium URADEX	5.818.478	0	4.942.776 (in 2004)	0	0	**10.761.254**	Music Audiovisual
Croatia HUZIP	1.655.262	0	0	0	0	**1.655.262**	Music
Czech Republic INTERGRAM	2.911.835	32	392.423	352	1.846.746 (incl. cable retransmission)	**5.151.388**	Music Audiovisual
France ADAMI SPEDIDAM	24.808.562 12.326.198 ADAMI 12.482.364 SPEDIDAM	0	44.158.298 28.850.703 ADAMI 15.307.595 SPEDIDAM	0	5.937.906 4.730.417 ADAMI 1.207.489 SPEDIDAM (secondary use of exclusive rights)	**74.904.766** 45.907.318 ADAMI 28.997.448 SPEDIDAM	Music Audiovisual
Germany GVL	55.862.840	0	24.279.680	871.500	2.800.000 (cable retransmission + lending)	**83.814.020**	Music Audiovisual
Lithuania AGATA	349.772	0	57.567	0	0	**407.339**	Music Audiovisual
Netherlands NORMA SENA	20.273.500 Of which 750.000 collected retroactively	0	17.762.000 7.662.000 NORMA (of which 1.742.000 retroactive rights and 3.041.000 one time retroactive payments) 10.100.000	0	1.200.000 (lending)	**39.235.500** (without retroactive payments: 27.002.500)	Music Audiovisual

			SENA (of which approx. 6.700.000 retroactive rights)				
Spain AISGE AIE	47.427.416 39.568.426 (20.000.000 of which as retroactive payments) AISGE 7.858.990 AIE	0	19.859.149 10.195.669 AISGE 9.663.480 AIE	114.871 AISGE	1.435.748 AISGE (cable retransmission)	**68.837.184** 51.314.714 (without retroactive payments:31.314.714) AISGE 17.522.470 AIE	AISGE: Audiovisual AIE: Music
Sweden SAMI	9.992.754	0	1.765.024	0	135.000 (cable retransmission)	**14.311.005***	Music Audiovisual
Total	**169.100.419**	**32**	**113.216.917**	**986.723**	**13.355.400**	**299.077.718***	

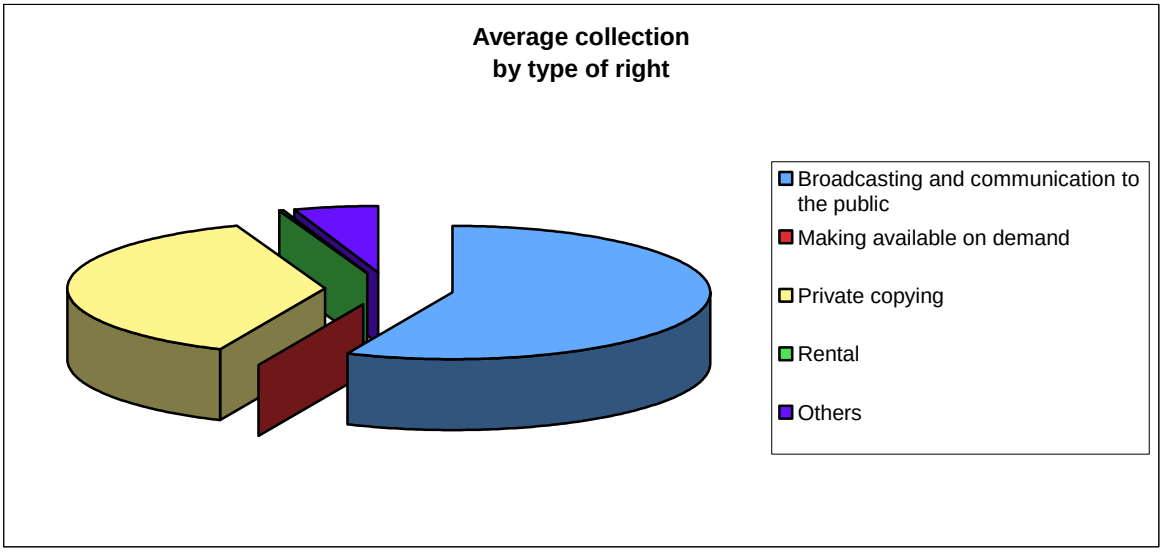
Source: Data from the collecting societies, except for SENA and AIE
For SENA: annual report 2005
For AIE: Letter of the President of AIE to the members concerning the year 2005

* Sweden-SAMI: The global amount stated is the estimated amount to be collected in 2005. Some of the remunerations for 2005 were received in 2006 only, which explains the discrepancy between the different remunerations and the total.

Overview Table 2 Overview of collection in 2005 for performers as a %

Country	Broadcasting / Communication to the public	Making available on demand	Private copying	Rental	Others
Belgium URADEX	54,07	0	45,93	0	0
Croatia HUZIP	100	0	0	0	0
Czech Republic INTERGRAM	56,53	0	7,62	0	35,85
France ADAMI SPEDIDAM	33,12	0	58,95	0	7,93
Germany GVL	66,65	0	28,97	1,04	3,34
Lithuania AGATA	85,87	0	14,13	0	0
Netherlands NORMA SENA	51,67	0	45,27	0	3,06
Spain AISGE AIE	68,90	0	28,84	0,17	2,09
Sweden* SAMI	69,83	0	12,33	0	0,94
Weighted average (SAMI not incl.)	**55,87**	**0**	**39,14**	**0,35**	**4,64**
Global weighted average	**56.54**	**0**	**37.86**	**0.33**	**5.28**

*Sweden-SAMI: The global amount indicated is the estimated collection for 2005. Some of the remunerations for 2005 were received in 2006 only, which explains the discrepancy between the various remunerations and the total. For the calculation of the balanced average, the amount corresponding to that discrepancy was transferred into 'others' category.



II.1.1. b. Overview of remuneration distributed to performers in 2005

The relative weight of the different categories of remuneration distributed differs from that collected to a limited extent only. Remuneration distributed for broadcasting and communication to the public represents on average 69 % of total remuneration distributed to performers, followed by remuneration for private copying at 25 %. In all the countries, with the exception of France, the remuneration for broadcasting and communication to the public represents the largest amount distributed. Regrettably, no figure was available for the UK.

Since no remuneration for the making available right has been collected so far - apart from very small amounts in the Czech Republic -, no remuneration is distributed for this use. Distributed remuneration for rental is less than 1 %.

Overall, 95 % of the revenue distributed by collecting societies comes from non-exclusive remuneration rights.

Overview Table 3 Overview of remuneration distributed to performers in 2005

Gross amounts in euro (VAT not included)

Country	Broadcasting / Communication to the public	Making available on demand	Private copying	Rental	Others	Global amount distributed in 2005	Sector
Belgium URADEX	1.740.239	0	847.538	0	0	2.587.777*	Music Audiovisual
Croatia HUZIP	1.103.400	0	0	0	0	1.103.400	Music
Czech Republic INTERGRAM	2.631.735	0	260.957	0	1.456.983	4.349.675	Music Audiovisual
France ADAMI** SPEDIDAM	19.059.910 13.881.116 *(net: 7.605.091)* ADAMI 5.178.794 SPEDIDAM	0	30.645.114 16.858.632 (audio) 6.838.008 (video) *(net: 12.520.974 audio/ 5.642.624 video)* ADAMI 6.948.474 SPEDIDAM	0	7.227.815 6.939.272 *(net:5.798.424)* ADAMI 288.543 SPEDIDAM:	56.932.839 44.517.028 *(net:31.567.113)* ADAMI 12.415.811 SPEDIDAM	Music Audiovisual
Germany GVL	52.789.152	0	22.895.738	1.481.000	0	77.165.890	Music Audiovisual
Lithuania AGATA	154.281	0	0	0	0***	154.281	Music Audiovisual
Netherlands NORMA SENA	13.700.000 (including private-copying SENA)	0	3.693.000 NORMA	0	507.000 NORMA	17.900.000 4.200.000 NORMA 13.700.000 SENA	Music Audiovisual
Spain AISGE	20.264.611 (6.909.275	0	5.685.185		450.975	26.400.771 (13.045.435	Audiovisual

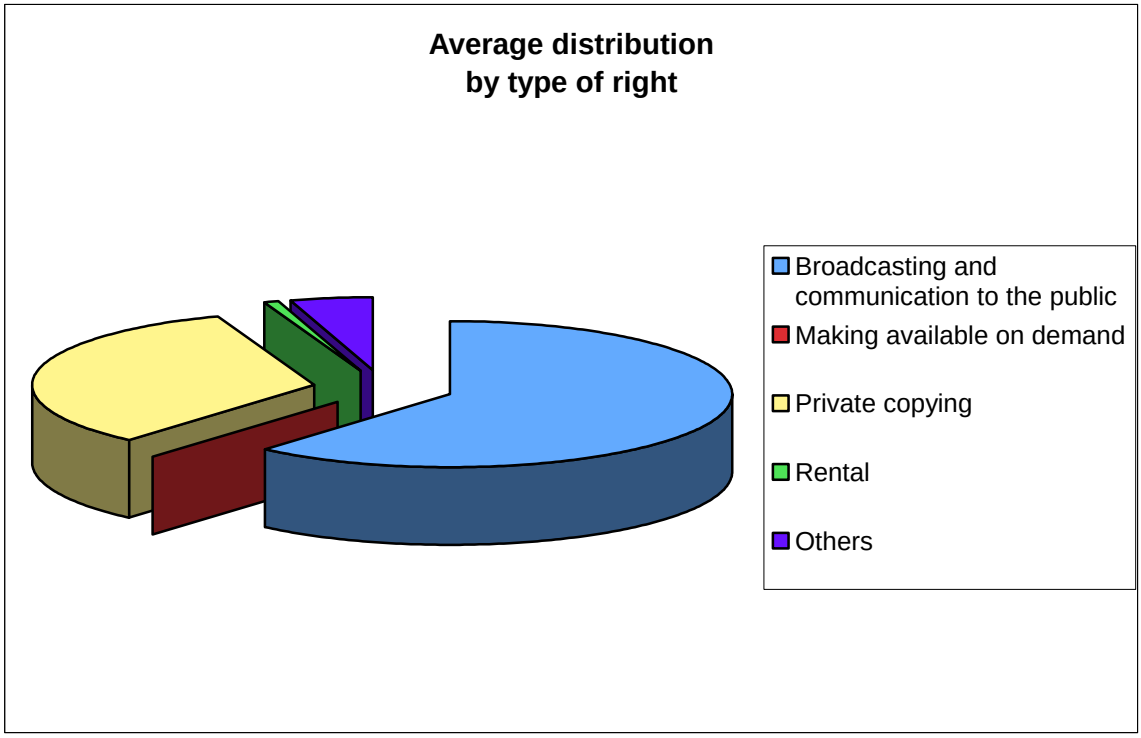
	without retroactive payments)****					without retroactive payments)	
Spain AIE	No breakdown available					14.000.000	Music
Sweden SAMI	10.458.936	0	1.799.064	0	0	12.258.000	Music Audiovisual
Total	**121.902.264**	**0**	**65.826.596**	**1.931.975**	**9.191.798**	**212.852.633**	

Source: Data from the collecting societies, except for SENA and AIE (annual report and public information for the latter)

* Belgium-URADEX: The amount has been attributed to the performers, but not yet entirely distributed.
**France-ADAMI would rather distinguish between 'amount' and 'net amount'.
***Lithuania-AGATA: collection for cable retransmission started in 2005, hence no distribution for this right in 2005
****Spain-AISGE: In 2005 AISGE managed to agree with certain users, mainly TV-operators, the payment of the remuneration owed by them since 1995 up to 2004. Therefore, in 2005 AISGE made two different distributions: the "ordinary" distribution of the rights collected in 2004 (€ 12.594.460), and an "extraordinary" retroactive distribution of the rights collected in 2005, but due to previous years (€ 13.355.336).

Overview Table 4 Overview of remuneration distributed in 2005 to performers as a %

Country	Broadcasting / Communication to the public	Making available on demand	Private copying	Rental	Others
Belgium URADEX	67,25	0	32,75	0	0
Croatia HUZIP	100	0	0	0	0
Czech Republic INTERGRAM	60,50	0	6,00	0	33,50
France ADAMI SPEDIDAM	33,48	0	53,83	0	12,69
Germany GVL	68,41	0	29,67	1,92	0
Lithuania AGATA	100	0	0	0	0
Netherlands NORMA SENA	76,54	0	20,63	0	2,83
Spain AISGE (AIE not included)	76,76	0	21,53		1,71
Sweden SAMI	85,32	0	14,68	0	0
Weighted average (AIE not included)	**61,30**	**0**	**33,10**	**0,97**	**4,62**



II.1.2. Cultural and social functions of collectively administered rights for performers

II.1.2. a Value of performers' rights for the public at large

The table below gives a general idea of the costs that performers' rights subject to collective management represent on average for the population in the countries studied. It uses data from several sources and is therefore far from perfect. With all these reservations, it is still valuable in so far as the very tiny fraction these performers' rights represent for the population can be seen at a glance.

Average expenditure per household on culture and recreation is compared with the average expenditures per household for performers' rights that are collectively managed. The amounts collected for performers' rights are very small in comparison with the consumer expenditure per household: according to this table, the average amount a household contributes to performers' rights in this respect could be estimated between € 0.17 and € 5.69 per year. When compared with the average amount a household spends on culture and recreation per year, these amounts vary between 0.1 and 0.2 % of expenditure on culture and recreation per household.

Cultural sector Table 1 Expenditure on culture and recreation compared with the contribution to performers' rights subject to collective management per household

Gross amounts in euro (VAT not included)

Countries	Average expenditure per household for culture and recreation in 2004	% of expenditure on culture and recreation on total expenses 2004	Number of households in 2001*	Average expenditure per household for performers' rights	% of performers' rights revenues per household compared to expenses for culture and recreation in 2004
Belgium	2.700	9,2	4.400.000	3,0	0,1
Croatia	No data available	No data available	No data available		
Czech Republic	867	11,5	3.777.778**	1,3	0,1
France	2.843	9,3	24.523.000	3,2	0,1
Germany	2.604	9,4	37.711.000	3,9	0,2
Lithuania	392	6,0	1.307.692***	0,4	0,1
Netherlands	3.177	11,3	6.889.000	5,7	0,2
Spain	1.975	8,5	13.281.000	5,1	0,3
Sweden	4.008	11,6	4.576.000	3,1	0,1
UK	4.671	12,7	25.564.000	0,2	0
Global average	**2.582**	**9,9**	**13.558.830**	**2,9**	**0,1**

Source: Eurostat

* Number of households: data from 2001; we assume that this number has not much varied since then.

** Czech Republic: average household size data from 1998, *Statistical Yearbook of the Economic Commission for Europe 2005*

*** Lithuania: average household size data from 2001, *Statistical Yearbook of the Economic Commission for Europe 2005*

II.1.2. b Cultural and social functions of collecting societies administering performers' rights

Performers' collecting societies play a cultural and social role within the cultural sector. Part of the remuneration collected is used to support cultural and social programmes. Furthermore, the performers' societies offer their services to all performers, both popular and less popular, cost-effective and non-cost-effective, without distinction.

In its resolution of 15 January 2004 the European Parliament recognized the social and cultural roles played by collecting societies. It also recognized that collecting societies carry out tasks in the public interest.

In the recent Opinion and Report on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, adopted on 20 July 2006 and 13 March 2007 respectively, the European Parliament confirms this analysis. In particular, it states that it "is convinced that the existing system of collective rights management societies (CRMs) will continue to play an important role in providing social support to minority

authors and in promoting cultural diversity (...)" and "points out that the existing network of national CRMs plays an important role in providing support for the promotion of new and minority European repertoire and that this should not be lost"[124].

Already back in 1999, the European Parliament said in its resolution *on the situation and role of artists in the European Union* that "despite the increased production and dissemination of works of art and literature and the emergence of cultural industries, the vast majority of artists still find themselves, as the twentieth century comes to an end, living from hand to mouth, a situation unworthy of their social role".[125] It stressed that the vigour and vitality of artistic creativity depends above all upon the material and intellectual well-being of artists both as individuals and as a social group.

In points 2 and 4 of this resolution, the European Parliament "urges the local, regional, national and European authorities to recognize the social, political and economic role played by culture in the development of European society and to act accordingly" and calls on the Commission to find "possible ways of approximating the laws on the social protection of artists to be examined, taking account of the most effective existing Member State legislation, given the specific requirements of the artistic profession".

Under point 10 of its Resolution of 23 July 2001 on the exchange of information and experience relating to conditions for professional artists in the context of EU expansion[126], the Council of the European Union invites the Commission to encourage the exchange of information and experience regarding conditions for professional artists and to foster the communication with European organizations representing artists.

The table below summarizes the cultural policies applied by collective rights management organisations in the countries studied. The amount dedicated to cultural and social activities varies significantly from one country to another. In some countries such as France or Spain, collecting societies are obliged by law to dedicate part of the amount collected to cultural activities. In others such as Croatia, Germany, the Netherlands or Sweden, similar decisions are made by the boards of directors or administrators of the societies, where performers are represented. This is also sometimes written down in the statues of the societies.

This amount represented nearly € 23.5m in the year 2005 for the 10 countries studied. It contributes to the financing of cultural events and training, taking the form of funding for music schools and scholarships. It provides significant support for the European cultural sector. It enables many cultural events and activities to take place. Hence it also generates new employment possibilities and represents a source of income for performers.

[124] Points 12 and 13 of Opinion of 20 July 2006 of the Committee on Culture and Education for the Committee on Legal Affairs on the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2006/2008(INI), draftsman M. Mavrommatis). See also Report of 5 March 2007 of the Committee on Legal affairs on the same Recommendation (A6-0053/2007, draftswoman K. Levai), notably point 6, indents 7 and 10.

[125] Official Journal C 175, 21/6/99, whereas H (

126 Official Journal C 213 , 31/07/2001 P. 0009 - 0010

Cultural sector Table 2 Percentage of total amount distributed in 2005 dedicated to cultural or social programmes

Gross amounts in euro (VAT not included)

Country	Amount dedicated to cultural/social activities	Basis for support of cultural/social activities
Belgium URADEX	0	Legal provision: The Federal State and the Communities can decide to use up to 30 % of revenues from private copying to encourage the creation of works
Croatia HUZIP	140.203	No legal provision Based on the statutes of HUZIP
Czech Republic INTERGRAM	169.655	No legal provision. INTERGRAM contributes to activities of Foundation a Life Performer and Association of Performing Artists under its statutes and Clearance Regulations
France ADAMI SPEDIDAM	13.622.229 7.212.666 ADAMI 3.826.899 (private copying) 2.582.664 (non-distributable sums) SPEDIDAM	Legal provision: - 25 % of revenues from private copying - non-distributable sums used for action to assist creation and promote live entertainment and for training schemes for performers
Germany GVL	3.300.000	No legal provision. Under the statutes of collecting society and resulting from decision of its board, 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 %.
Lithuania AGATA	Not yet, notably since remuneration system for private copying is new	Legal provision: -"not more than 25 % of the revenues from private copying may be used for programmes for the support of creative activities" -25 % shall be withheld from the remuneration collected on imported and produced audiovisual media for the National Cinema Promotion Programme
Netherlands NORMA SENA	349.000 149.000 NORMA 200.000 SENA*	No legal provision. 15 % of the revenues from private copying by De Thuiskopie + 5 % NORMA – SENA (but differently calculated; for NORMA: 5 % of the gross amount received from De Thuiskopie)
Spain AISGE AIE	4.352.665 2.952.665 AISGE	Legal provision: Collecting societies must provide their members with welfare activities or services as well as arrange activities for the training and promotion of authors and

	1.400.000 AIE*	performers. 20 % of the remuneration for private copying has to be dedicated to these purposes in equal shares.
Sweden SAMI	Approx. 1.566.000	No legal provision. - approx. 10 % from the remuneration for broadcasting and communication to the public
UK	No data available	No legal provision. Non-distributable funds can be used after 6 years for cultural and other purposes as long as appropriate reserve is kept Up to 1 % of the Total of amounts allocated to Members and affiliated societies can be donated to a number of different purposes including nurturing grass roots music creation*
Total	23.499.752	

*Source: The collective management of rights in Europe, the quest for efficiency, July 2006, KEA, p.43

II.1.3. Obstacles faced by collecting societies when exercising rights

II.1.3. a. In relation to the collection of rights

Users are sometimes reluctant to collaborate with performers' societies, since this would entail additional costs and time spent with no direct benefit for their activity. Some of them fail to properly declare or identify the works used. For instance, radio or TV stations do not always submit their play lists in time, send incomplete data or do not send in the lists at all. Sometimes the format of the play list supplied is not appropriate. These play lists should give the names of the tracks played by the radio or TV broadcasters and of the right-holders concerned. This information is needed to allow the collecting societies to identify the right-holders entitled to remuneration and for them to collect and distribute this remuneration adequately.

Users may also refuse to pay the remuneration owed. Users may claim to use a repertoire that is not administered by the collecting society. Disputes about the applicable tariffs are frequent as well, hence payments are sometimes delayed. This is even more of a problem when the legal enforcement system is slow and time-consuming.

In most countries the mechanisms for settling disputes have led to situations where users such as night clubs, restaurants or bars play whatever music they want, free of charge, during all the time when the tariffs applicable are disputed. The sums owed to performers are generally not retained in escrow, which is ultimately detrimental to performers, even after disputes have been settled by arbitration or by the court.

To sort out situations of this type, discussions are being held on the possibility and accuracy of establishing a legal right to provisional payment and for a double-tariff system to be set up to cover cases of failure to pay (i.e. tariff claimed by collecting societies and tariff set by final arbitration). This type of system is already in existence for authors' societies in certain countries such as Germany.

Failure to comply with legislation and to work towards achieving fair remuneration for performers is sometimes simply due to a lack of user awareness of performers' rights and the administration of these rights.
In the specific field of the Internet a common idea there is a growing common feeling that creative content should be totally free of charge. Raising the interest and awareness of citizens and explaining the need for performers to be remunerated for the use made of their performances may help to resolve some of these difficulties.

In addition to the problems listed above, collecting societies are also confronted with parallel imports or "grey" imports whereby importers avoid declaring the goods imported and paying any remuneration. This problem is particularly acute in the collection of remuneration for private copying.

Bypassing the law is particularly difficult to prevent in the field of online services and cross-border Internet trade. As regards the remuneration for private copying, for instance, some companies try to avoid paying collecting societies by failing to declare their activities and entrusting the distribution of recordable equipment or devices to intermediary societies.
As an effect of differences between countries as regards the basis for determining equipment and/or carrier devices subject to payment and the tariffs applied, the distribution of mainly CD-R/RWs and DVD-R/RWs over the Internet has become established in countries where there is little or even zero remuneration for private copying. In addition, a private person buying devices via the Internet to copy music or films from a retailer based in another country would be identified as the importer of these products. Although the body responsible for paying private copying remuneration is in theory the importer, in such cases in practice no remuneration is paid at all to collecting societies.

A system establishing subsidiary responsibility for resellers may help to reduce grey imports and facilitate the work of collecting societies. A system of this kind already exists in some European countries where it seems to have proved effective.

In order to resolve the problem of bypassing national laws on cross-border Internet trade at a community level, a system could be envisaged for all countries whereby only those items that are imported by businesses and not the ones imported by private individuals would be excluded from the obligation to pay, as is already in existence in certain countries, such as France.

II.1.3. b. In relation to the distribution of rights

Some collecting societies experience difficulties in identifying all the participants in recordings. On sound recordings in particular, information about the main participants alone is provided. Once identified, their contact details should be available, so that the remuneration can be passed on to them, since remuneration is not distributed to members of a collecting society alone but to all the performers concerned. To date, some collecting societies even have to pay producers to obtain this information which was simply registered after performers signed production contracts. This problematic situation is even more acute when distribution across national borders is involved.

The bodies having this essential data in their possession should be obliged to display it to performers' collecting societies on a free access basis, in a complete and accurate form, in compliance with rules on privacy, so that the collecting societies can identify the right-holders entitled to payment. This would significantly ease their task.
The European Parliament made some remarks along these lines in recommending a report that "for the purposes of efficiency, the European legal framework should promote exchanges of information and lay down an obligation for commercial users and producers

to display to CRMs (collective rights management organisations), on a free access basis, such complete and accurate information as is necessary to enable them to identify right-holders and properly administer their rights"[127].

II.1.4. Comparative revenue for performers' and authors' societies

Authors' societies are collecting far higher amounts than performers' collecting societies. The table below establishes a rough comparison between the main collecting societies for authors' rights operating in the music and audiovisual fields and the collecting societies for performers' rights in the same countries. It does not aim to provide comprehensive data and figures but rather gives a general idea on the amounts administered for each category of right-holders.

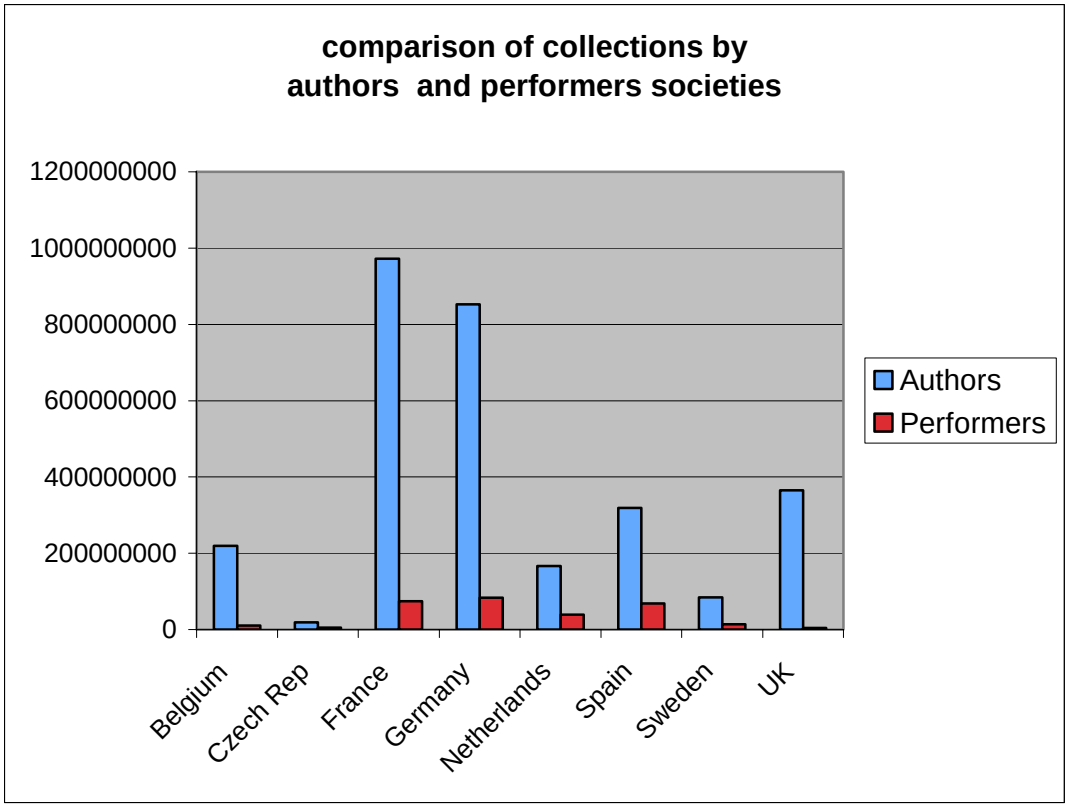
Comparative Table Comparative data on revenue for author and performer societies in 2005

Gross amounts in euro (VAT not included)

Countries	Authors' societies revenue	Performers' societies revenue
Belgium	219.706.598 SABAM	10.761.254 URADEX
Czech Republic	19.351.845 OSA	5.151.388 INTERGRAM
France	972.440.540 SACEM SACD SCAM	74.904.766 ADAMI SPEDIDAM
Germany	852.223.733 GEMA	83.814.020 GVL
Netherlands	167.030.000 BUMA STEMRA	39.235.500 (without retroactive payments: 27.002.500) NORMA SENA
Spain	318.772.000 SGAE	68.837.184 AISGE AIE
Sweden	84.900.000 STIM	14.311.005 SAMI
UK	365.500.000 MCPS-PRS (figures 2004)	4.498.426 (no data for PPL)
Total	2.999.924.716	301.513.543

Sources: annual reports of authors' and performers' societies and data from GESAC
Applied exchange rates for 2005: CZK 1 = EUR 0,034; SEK 1 = EUR 0,108; GBP 1 = EUR 1,499

[127] Report of 5 March 2007 of the Committee on Legal affairs on the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (A6-0053/2007, draftswoman K. Levai), point 6.



Author societies are collecting on average over 10 times the amount collected by performer societies, although the estimated numbers of right-holders for which author and performer societies collect respectively do not differ to this extent[128].

There are many explanations for this difference.
Author societies administer a larger package of rights than performer societies. Author societies generally administer exclusive rights as well, including distribution rights, which performers in general simply transfer to producers, thus renouncing the relating remuneration. As mentioned earlier, most collection by performer societies originates in the administration of remuneration rights and not exclusive rights.

Another explanation for these different situations lies in the fact that performers' rights are far more recent than authors' rights: they began to be introduced in international legislation by the Rome convention as recently as 45 years ago, in 1961. At European level, they started being introduced in European legislations following the adoption of Directive 1992/100/EEC in November 1992.

It is interesting that the legal framework for performers' rights was established entirely on the basis of an initial legal instrument, the Rome convention, which is far from complete: the Rome convention gave performers very weak exclusive rights which they could not fully enjoy. It leaves out the whole audiovisual sector.
As a result, the only basis established by this convention for performers to exercise their rights consisted of the equitable remuneration for the broadcasting or communication to the public of commercial phonograms. Nor did this convention introduce any remuneration system for private copying, which first appeared in national legislations and

[128]See Study *Collective Management of Rights in Europa,Tthe Quest for Efficiency"*, July 2006, by KEA European Affairs; in this study it is estimated that authors' societies in the European Union have approx. 500.000 members, while performers' societies in the European Union have approx. 380.000 members, p. 40. One has to bear in mind however that the remuneration rights the remunerations are collected for right-holders in general (and not only for members).

in European Directive 2001/29/EC of 22 May 2001. Thus the whole legal framework for performers' rights has suffered from this unsatisfactory and incomplete initial set of rights introduced by the Rome convention.

In addition to the question of the rights administered, most author societies have already been in existence for decades, with the oldest one, SACD, having been established as long ago as 1829, when the firsts two "offices" for artists that were already set up back in 1791 and 1798 merged.[129] Performer societies are far more recent. Their creation generally dates back to the adoption of the Rome Convention in the 1960s. In several countries, such as Belgium, the Netherlands or the UK, performer collecting societies were only created after Directive 92/100/EEC was issued.

Because of this longer tradition, author societies have a comparative advantage: they have been accepted by users and well-established systems and practices for the collection of remuneration. Unlike the situation with authors, certain users are unwilling to accept more recent legislation and rules that make them have to pay for performers as well; in particular, the difference between authors and performers is sometimes not clearly understood, with some users considering that they only have to pay remuneration once for all types of "artists".

The exercising by authors of their economic rights is based on their creative work, which may not be linked with any recording of this work by producers. On the other hand, the recording of their performances is essential for performers to be able to exercise their rights. This generally leaves performers in a situation of dependency vis-à-vis producers that is more binding than the relationship between authors and producers.
Moreover, it seems that systems establishing a proportional relationship between remuneration and the actual exploitation of the work or performance, as exists in some European countries, have helped to ensure that right-holders receive appropriate remuneration.

It should be noted that, in addition to all the above-mentioned differences, the tariffs applied for performers' rights are in general lower than those for authors' rights. For instance, performer societies apply generally lower tariffs than author societies in the field of communication to the public.

Performers are also entitled to a smaller share of the remuneration collected for certain types of remuneration, as has been shown for instance for private copying in the Czech Republic, France, Germany, Lithuania and Spain. Authors often receive if not the largest share, at least a share larger than that received by performers.

II.1.5 Allocation of rights revenue subject to collective management amongst performers

II.1.5.a Sharing

Income is not equally distributed amongst the various performers. The best remunerated artists represent a larger share in relation to total revenues than in relation to the total number of performers. In most countries (e.g. the Czech Republic, Croatia, France, Germany and the Netherlands), as shown in the table below, between 77 and 89.5 % of the total amount is distributed to 20 % of the top earning performers.

[129] Kretschmer M., *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments, E.I.P.R.*, 2002, p. 127.

Only in Sweden and Spain is the remuneration more equally distributed. In these countries, the largest portion - 64 to 72 % - of the remuneration is distributed to the middle 60 % of performers.
In the other countries 80 % of performers receive no more than 10 to 23 % of the total remuneration. At least 20 % of performers do not receive any noteworthy remuneration.

Revenue Table 1 Distribution of revenue subject to collective management amongst performers in 2005

Gross amounts in euro (VAT not included).
Distribution in 2005 is based on collection in 2004.

Countries	**Total amount distributed (amount dedicated to cultural activities not included)**	**Total number of performers who received remuneration**	**Amount distributed to the 20 % top earning performers**	**Amount distributed to the 60 % middle group**	**Amount distributed to the 20 % least earning performers**
Belgium URADEX	2.587.777	Approx. 1.500	No data available	No data available	No data available
Croatia HUZIP	1.103.400	3.202	879.509	222.908	983
Czech Republic INTERGRAM	4.349.675	11.439 individual members + 267 groups	3.896.574	452.792	309
France ADAMI	*44.517.028 (net amount 31.567.113)*	39.811	Approx. 27.300.000	Approx. 4.200.000	Approx. 50.000
France SPEDIDAM	12.415.811	46.279	9.612.771	2.430.126	372.914
Germany GVL	77.165.890	37.305	59.633.000	16.740.890	792.000
Lithuania AGATA	154.281	792	111.082	39.465	3.734
Netherlands NORMA (SENA not included)	4.200.000	41.000	3.582.000	616.000	2.000
Spain AISGE (AIE not included) *figures for 2004*	12.594.460	8.663	4.537.004	8.049.054	8.402
Sweden SAMI	12.258.000	23.536	3.996.000	8.258.166	3.834
Subtotal (ADAMI and URADEX not incl.)	**124.241.517**	**172.216**	**86.247.940**	**36.809.401**	**1.184.176**

Total	**171.346.322**	**213.527+267 groups**	**Approx. 113.547.940**	**Approx. 41.009.401**	**Approx. 1.234.176**

Revenue Table 2 Distribution of revenue subject to collective management amongst performers in 2005 as a %

Countries	**Total amount distributed (amount dedicated to cultural activities not included)**	**Total number of performers who received remuneration**	**Share of revenue distributed to the 20 % top earning performers**	**Share of revenue distributed to the 60 % middle group of performers**	**Share of revenue distributed to the 20 % least earning performers**
Belgium URADEX	2.587.777	+- 1.500	No data available	No data available	No data available
Croatia HUZIP	1.103.400	3.202 national members	79,7 %	20,2 %	0,1 %
Czech Republic INTERGRAM	4.349.675	11.439 individual members + 267 groups	89,6 %	10,4 %	0 %
France ADAMI	*44.517.028 (net amount 31.567.113)*	39.811	No data available	No data available	No data available
France SPEDIDAM	12.415.811	46.279	77,4 %	19,6 %	3 %
Germany GVL	77.165.890	37.305	77,3 %	21,7 %	1 %
Lithuania AGATA	154.281	792	72 %	25,6 %	2,4 %
Netherlands NORMA (SENA not included	4.200.000	41.000	85,3 %	14,7 %	0 %
Spain AISGE (AIE not included) *figures for 2004*	12.594.460	8.663	36 %	63,9 %	0,1 %
Sweden SAMI	12.258.000	23.536	32,6 %	67,4 %	0 %
Global average (all coll. societies but ADAMI and URADEX**)**	**15.530.190**	**21.527**	**69,4**	**29,6**	**1,0**

II.1.5.b. Distribution policy for rights subject to collective management

In table below the percentage of members of a collecting society who received remuneration in 2005 is indicated. The number of performers who received remuneration via collective management organisations does not tally with the number of performers who are members of these organisations: membership is not in fact a prerequisite for performers to receive remuneration. When distributing the remuneration collected, the collective management organisations do not differentiate between members and non-members; they distribute it to all performers concerned.

Administering the rights of these performers simply constitutes a cost for collecting societies. Although the exploitation of the rights of these performers is clearly not profitable, collecting societies continue to administer them. They are able to do so because of the members who are 'profitable'. Less popular performers benefit in this way from the success of popular performers.
With a view to achieving efficiency, in certain organisations there is a threshold below which no remuneration is distributed because the administrative work for distributing these amounts would basically cost as much as the amount to be paid. These amounts are not lost to performers, though: they are set aside until new collections accumulate in an amount that is high enough to be distributed to the performers concerned.

Revenue Table 3 Representation of performers to whom remuneration was distributed in 2005

Country	Total number of performers as members	Threshold below which no remuneration is distributed	Number of performers who received remuneration
Belgium URADEX	5.337	€ 10	+- 1.500
Croatia HUZIP	4.820	€ 6	3.202
Czech Republic INTERGRAM	10.156	€10	11.439 individual members +267 groups
France ADAMI	21.936	€ 15	39.811
France SPEDIDAM	27.216	€ 15	46.279
Germany GVL	111.229	€ 25	37.305
Lithuania AGATA	975	€ 15	792
Netherlands NORMA (SENA not included)	7.000	No threshold	41.000
Spain AISGE (AIE not included)	6.309	€ 6	8.663
Sweden SAMI	18.101	€ 27	23.536
UK BECS (PPL not included)	18.861	No data available	15.000

Total	**231.940**		**228.527+267 groups**

Remark: the exact number of performers as members is subject to constant variations. As for the final number of performers remunerated in 2005, it is known only after the distribution is completed, including the distribution of 'retroactive', late payments for previous years received by some collecting societies.

Forced competition between collecting societies, with no appropriate safeguards, runs the risk of disturbing the equilibrium of the system: a small number of collecting societies would manage the rights of the most famous performers whose names are well known and for whom all necessary information is generally easily available. At the other end of the scale, other collecting societies with fewer resources would have to administer the rights of less famous but more numerous performers (e.g. session musicians, members of bands and orchestras), since the collection and distribution of these rights is more complicated and costly due to lack of relevant information. As a result the most famous performers would attract all the attention whereas the main body of less famous performers would be neglected. This would have negative effects both on the quality of services provided by collecting societies and on the effective protection of performers.

The European Parliament recently acknowledged this risk on several occasions. A recent report clearly addresses the issue and declares that:

> (...) there is concern about the potentially negative effects of some provisions of the Recommendation (of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services) on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, and (whereas) the impact of any initiative for the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversity.

Considering the effects of rights management systems on the protection of right-holders, it further indicates that the ability of right-holders and users to choose a collective rights management organisation must not allow the most profitable right-holders to strengthen their dominance to the detriment of lower-earning right-holders, nor undermine the equitable treatment of all right-holders. [130].

II.1.5.c. Comparative importance of revenue from performers' rights on the performers' financial position

The revenue that performers can receive by exercising their rights - including other sources of revenue than those subject to collective management - consists basically of the following:

- performers generally receive a fee for their live performance, which can take the form of a wage in the event of an employment contract or of a one-off fee. This fee can be paid not only for the performance, but also for the related preparatory work (rehearsals, meetings, etc.);
- some performers may receive an income for the use of their exclusive neighbouring rights, e.g. royalties on the sale of CDs or DVDs and for the secondary uses of their performance (merchandising, the use of his name, picture, etc.). Payment of royalties

[130] See Report of the European Committee on Legal Affairs of 5 March 2007 on the Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (notably point 2 and point 6, indents 19 and 21) and the Opinion of 20 July 2006 of the Committee on Culture and Education (notably points 6, 7, 8 and subsequent).

basically concerns main performers alone and represents small amounts, as described above.
- finally, performers receive revenue for the use of their non-exclusive rights (remuneration rights), e.g. equitable remuneration in the event of broadcasting and communication to the public or exception to exclusive rights e.g. private copying.

Performers incur expenses when carrying out their work, which they may occasionally be able to recover: sometimes these expenses are paid directly to the third parties concerned. E.g. the organiser of a performance agrees to pay the performer' agent or manager separately and signs a separate invoice to hire the production staff and equipment. These expenses may also be paid in kind, e.g. in the form of tour equipment support provided by a record company.

Performances may also benefit from financial support, but mostly indirectly and to a limited extent, e.g. in the form of subsidies by a government agency or sponsorship provided by a private company, and some of these funds may be invested in the budget covering the cost of hiring performers.

Many performers do not live exclusively on the income of their artistic activities but have to find an additional occupation. A significant proportion seems to fall within categories entitled to receive unemployment and welfare benefits or similar aid from social funds.

Authors' and performers' rights aim to give authors and performers an adequate income. However, in practice, for most performers the remuneration received from the exploitation of their rights remains very small. Most performers as well as a number of authors have to rely on other sources of income and their financial situation remains precarious.

II.2. Performers' rights revenues as a whole: a few facts

II.2.1. The limited importance of royalties in revenue from performers' rights

The exercise of those performers' rights that are not subject to collective management remains outside of the scope of this study.
However, it seems interesting to introduce some facts to help and shape an overall picture of the various sources of remuneration performers rely on and the way in which it is allocated. These facts provide some indication of the effects of contractual practices on revenue from performers' rights, offering a few suggestions about the way these practices could be improved.

Although there is currently very little quantitative data available about the way performers' rights are exercised when not collectively managed, or on the average remuneration performers receive from producers in exchange of the transfer of their rights, the employment and recording contracts provided by performers tend to show that most producers impose standard-form "all rights" (buy-out) contracts.

Due to the considerable contractual pressure under which performers are placed by their co-contractors, this practice of performers having to transfer or assign – most of the time with only one single remuneration in exchange – all the exclusive rights that they enjoy in theory under European legislation has become routine. Only the most successful performers are able to negotiate royalties, which means payments proportionate to the exploitation of the creative content.

In the music field, a French study[131] recently identified that on average, for the music of a song, the main performer receives royalties amounting to 4 % of the album retail price – inclusive of all tax. The average retail price of a music CD is estimated to be € 14.55 on the French market in 2005. On this basis, the main performer receives on average less than € 0.6 per CD.
As regards jazz and classical music, a soloist receives in average only 2 % of the CD retail price.
As regards videos of live concerts, the main performer also receives an average royalty amount of 2 % of the video retail price.
On the music online market, revenues from royalties on a track sold at € 0.99 cents do not exceed, on average € 0.03 to € 0.04. Finally, on the retail price of a mobile phone ringtone estimated at € 3, the main performer receives on average 4 % of this, i.e. in an amount the region of € 0.12.

These figures concern only main performers such as soloists or main singers.
If a music band receives royalties, the amount of the royalties would have to be shared – not necessarily equally - between all members of the band.
As the majority of performers are not main performers, they usually do not receive any royalties at all but a single lump sum.
Thus, to date, the relative importance of remuneration received from collectively administered rights is absolutely determining in comparison with royalties.

II.2.2 Contractual clauses and practices

Performers suffer from weak bargaining power. Both the music and audiovisual industry markets are very concentrated. The number of (independent) producers has actually

[131] ADAMI – *Filière de la musique enregistrée: quels sont les véritables revenus des artistes interprètes ?*, April 2006

shrunk even further because of the vertical integration of the entertainment industry. On the other hand performers are numerous and isolated. In the face of insecure employment, many have to agree to work below the market price, if necessary transferring all their rights. Only performers with certain fame are able to negotiate the contractual conditions. In some countries there is no efficient collective organisation for performers either, which limits the possibility of a fairer balance between parties via collective agreements.[132]

Due to their weak bargaining power, most performers have their exclusive rights transferred to the producer from the outset. This general transfer is strengthened in the audiovisual sector by the presumption of transfer being acknowledged and written down in European legislation. Hence performers lack control over the exercise of their exclusive rights and the remuneration arising from the exploitation of these rights. Often the producer may not even be obliged to exercise the rights that were transferred to him.

As far as contractual terms are concerned, the costs to be charged to the performer and to the producer under the individual contract are often not broken down. As a result, it seems that performers focus on the amount of the lump sum or on the percentage of royalties granted, if any, not taking into account on what premises those royalties are calculated. There is often no obligation incumbent on producers to give performers information about the actual exploitation of their rights (e.g. turnover, cost deductions, modes of exploitation). In practice, performers seem to experience difficulties in obtaining this information and in staying informed in the long run about a production in which they have participated.

Current directives have failed to protect performers against those buy-out contracts. The European legal framework shows contrasted attitudes with regard to these contractual realities.

On the one hand, Recital 30 of Directive 2001/29/EC underlines the fact that the rights referred to in this Directive 'may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights'. Contractual and civil matters would thus fall under the exclusive competence of the Member States, which have adopted their own protective measures to the benefit of performers and authors regarding the scope of transfer of these rights, or the formation, execution and interpretation of contracts concluded with producers, broadcasters or publishers.[133]

On the other hand, the European legislator does not totally ignore the effects of contractual arrangements on the actual protection of right-holders. In certain cases, it even gives clear rules for better regulation in this field: in the case of rental of phonograms, for instance, not only does it envisage that if the performer has to transfer or assign his exclusive rental right, this performer shall retain the right to obtain an equitable remuneration. Importantly, it further specifies that this right to obtain equitable remuneration
-firstly cannot be waived by authors or performers, and
-secondly may be entrusted to collecting societies, with the possibility of Member States making the collective management of this unwaivable right to equitable remuneration by relevant collecting society(ies) compulsory.

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[132] No precise data could be found on the membership ratio of performers in trade unions. One can expect that a currently conducted study by the European Parliament Draft Report on the social status of artists in Europe (draftswoman C. Gibault, ref. 2006/2249 (INI)) will give interesting information in the near future.

[133] Hugenholtz B and Guibault L., *Study on Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, May 2002, p. 8.

These provisions under article 4 of Directive 92/100/EEC are explained under Recital 15 of this directive stating that "it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them".
The European legislator goes into greater detail as regards contractual practices in the subsequent Recital, stating that "the equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract".

As regards the right over the communication to the public and broadcasting of phonograms, another article (art. 8.2) of the same directive specifies that Member States shall provide a right in order to ensure that a single equitable remuneration that the performer shall retain in the event of the transfer of his exclusive right is "paid by the user" and is "shared between the performers and phonogram producers."

By laying down an obligation for the performer's right over cable retransmission to be exercised "only through a collecting society" (art. 9 of Directive 93/83/EEC), the legislator clearly intervenes in contractual practices.

Thus, the European legislator appears to have some room for taking into consideration contractual practices, and it has already applied this by establishing rules about either the results to be achieved or the ways to reach these results and adequatly protect performers' rights.

II.2.3 Considerations relating to contract law as applicable to performers' exclusive rights

This part of the study is not intended to provide a detailed analysis of contract law relating to performers or its implementation. It only highlights some stipulations in contractual provisions under national contract law that may invite further reflection on the way in which contract law could have a positive impact on the protection of performers' rights and related remuneration.

In the legislation of some of the countries studied interesting protective provisions are laid down in the contractual relationship between performers and producers to avoid an unfair advantage being taken of the standard weaker bargaining position of performers. However, in practice, those protective provisions have not proved to be very effective.

II.2.3. a The 'best-seller' clause

The German law provides a 'best-seller'-clause. Performers can be given the legal possibility of revisiting the remuneration clauses in their contract if circumstances have changed after the conclusion of the contract. The German legislator stipulates, for example, that if the performer (and the author) has granted an exploitation right on grounds that are conspicuously disproportionate to the returns and the advantages from the use of the performance (or the work), the other party shall be required, on request of the performer, to accept a change in the agreement that will secure an additional equitable share for the performer in view of these circumstances.[134]

Interestingly, if the contracting party has assigned the exploitation right to a third party and the significantly disproportionate outcome is the result of returns and advantages

[134] Art. 32 (a), 1 and art. 79 of the German IP Law of 9 September 1965 as last amended by law of 10 November 2006. Pursuant to art. 32 (a), 4 however, any claims under section 32 (a), 1 are precluded if collective labour agreements or common remuneration standards exist and further equitable participation is expressly provided therein.

gained by this third party, the latter is directly liable to the performer and the liability of the other contracting party ceases. The claims of additional remuneration from this type of exploitation may not be waived beforehand.[135] However, this 'best-seller'- clause has so far meant very little in practice in Germany. It involves legal action in court and before judges. Judges are generally reluctant to revise contracts because of the principles of contractual autonomy and legal certainty. Performers and authors are reluctant to start a long, costly procedure felt to involve situations of conflict in order to revise their contract that may endanger their relations with their co-contractor.[136]

II.2.3. b Remuneration proportionate to exploitation

In order to counterbalance the limiting effects of payments in the form of a lump sum on performers' rights revenue, in certain countries there is an obligation for remuneration to be proportionate to the actual exploitation of the rights. In France, for instance, proportional remuneration is the general rule for authors: remuneration must be proportionate to the gross revenue from exploitation. Remuneration in the form of a lump-sum is only possible in specific cases. [137] As regards performers however, there is no such clause in French legislation and, as explained above, this has resulted in most performers receiving very small or zero royalties but a lump sum in application of their employmet or recording contracts.

In the case of an audiovisual production, a specific right to remuneration for *each* mode of exploitation has been introduced in several legislations. However, such provision does not determine the calculation or the level of the remuneration. It does not exclude systems in which a single amount granted to performers is then divided between the various modes of exploitation, without being linked to the gross revenue for exploitation.[138].

However useful these measures are, practice shows that they do are not sufficiant to overcome the weak bargaining position of performers. If the starting-point is that performers are entitled to a larger share in the benefits from their products, structural measures are needed.

[135] Art. 32(a),3 of the German IP Law

[136] P.B. Hugenholtz and Guibault L., *Auteurscontractenrecht: naar een wettelijke regeling?* Onderzoek in opdracht van het WODC (Ministerie van Justitie), Instituut voor Informatierecht, Amsterdam, August 2004, p. 55.

[137] Art. 131-4 CPI. Non-proportionate remuneration would be possible e.g. if the basis for calculating the proportional remuneration is practically impossible or if the costs of calculation and control are not justified in view of the expected revenue.

[138] E.g. in the Belgian legislation art. 36 AW does not provide a minimum remuneration for the performer whose performance is used in an audiovisual work, while art. 19 AW grants authors whose work is used in an audiovisual work the right to a proportional remuneration, unless otherwise has been stipulated.

Part III. Conclusions and recommendations

III.1. Conclusions

The various directives adopted between 1992 and 2001 have established, within European Union Member States, a 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 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 as far as it is left to the sole contract law.

Even if this goes beyond the scope of this study, information communicated by AEPO-ARTIS members on the content of performers' individual contracts, as well as existing studies, shows 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 means a global transfer of all their exclusive rights, for the whole protection period, and, moreover, for a fixed and final fee.

Sometimes, notably in the audiovisual sector, some unions have succeeded, not in limiting this transfer, but in obtaining additional payments as a counterpart to this transfer. However, the extent of this agreement 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.

This is the case, in the *acquis communautaire*, of the rental right that 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. The possible application of this right to new cases where digital content is temporarily made available online also requires consideration. This explains why 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.

Other mechanisms are, in the *acquis*, a source of guarantees, like the compulsory collective management of rights applied to cable retransmission. This type of exploitation, which is not widely spread in Member States, has not been included in the present study.

Nevertheless, in general, guarantees granted for the exclusive rights of performers are 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 most of 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 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 10 countries studied, the share of exclusive rights managed by collecting societies represents 5% of their overall collection.
The catalogue of exclusive rights offered by the different directives is as explicit as it is inefficient.
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.

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 10 countries studied, represents more than half of the rights managed collectively (57%).
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.

These elements could be transposable to the new types of uses of music 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 successful; it represents, in the 10 countries included in this study, 38% of the remuneration collected for performers by their collecting societies.
In a number of these countries, provisions were implemented that prescribe the allocation of part of what is collected as financial support to the cultural sector.

These remuneration rights constitute a guarantee for performers in as far as they are protected from transfer under contractual provisions by the confirmation of the impossibility of the said transfer. Such a reminder would bring a consistent addition to the *acquis*.

Insufficient period of protection

On the other hand, the question of the duration of performers' rights seems to be increasingly crucial for a harmonised level of protection.

A great 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. It is not exceptional to meet performers who are the victims of piracy on the basis of old recordings initially broadcast and then published once the protection period has expired, or of illegal reproductions of recordings published more than 50 years ago.
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 95 years from the first communication to the public or first publication would at least give performers protection during their entire lifetime.

Moral rights

Even if the study did not deal with the question of moral rights, which 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.

Access to information and subsequent management of rights

Finally, collective management experience shows the specific difficulties with which performers' collecting societies are confronted for 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.

15 years 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, they 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 performers.

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.

III.2. Recommendations

III.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 right-holders.

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

- **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 92/100/EEC 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 authorize 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, this 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 is 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).
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 organizations the exclusive right to authorize 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 noticeable contractual pressure under which performers are placed by their co-contractors and the resulting situation of performers having transferred or assigned – most of the time with no adequate counterpart - the exclusive right granted to them by virtue of Art. 8.1, it seems necessary to provide a reminder indicating that

their right to an equitable remuneration can in no way be waived or transferred. Such a system is already applied to the rental right, under Art. 4 of the same directive.

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.

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

Given the noticeable contractual pressure under which performers are placed by their co-contractors, it seems necessary for them to retain a right to an unwaivable equitable remuneration if they have to transfer or assign their exclusive right.
Failing any such measure, this new making available right for on-demand services would remain purely theoretical for most performers who would not be able to enjoy it, as has proven to be the case until now.

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 the same model as 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, that 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 is collected and administered by a performers' 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. This is why it is crucial that this right be unwaivable, as stated under paragraph 2 of Art. 4 of Directive 92/100/EC.

Up until now, the exercising of the rental right granted to performers under Art. 4 of this directive has generally been ineffective for a couple of reasons.
First of all, it omits any definition of the body that owes remuneration in the event of rental with this party actually being the user. 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) do stipulate 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. Art. 4.1.
Secondly, the results of this study have clearly shown that in all the countries studied, the exercise of the rental remuneration right has brought has proved pointless and unfeasible unless it is collectively managed. Appropriate provisions would amend paragraph 3 and replace the paragraph 4 of Art. 4.

Art. 4.1 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. 4.2 remains unchanged.
The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

Art. 4.3 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. 4.4 is inconsistent with the previous paragraph and 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 consisted of setting 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 this commercial phonograms sector, the absence of such transfer did not prevent those involved in the phonogram industry from exploiting recorded performances.

Paragraphs 5, 6 and 7 of Art. 2 of Directive 92/100/EEC 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. 2.1 to 2.4 remain unchanged.

2.1 The exclusive right to authorize 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.

2.2 For the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

2.3 This Directive does not cover rental and lending rights in relation to buildings and to works of applied art.

2.4 The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

Art. 2.5 to 2.7 are deleted.

2.5 [Without prejudice to paragraph 7, 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 4.] ***Deleted***

2.6 [Member States may provide for a similar presumption as set out in paragraph 5 with respect to authors.] ***Deleted***.

2.7 [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 authorizing rental, provided that such contract provides for an equitable remuneration within the meaning of Article 4. 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, 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 these systems 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 needs 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 right-holders 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 right-holders 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 sub-section 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 right-holders 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; it is collected and administered by right-holders' 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. Times have changed since earlier decades and a situation of this nature has begun to arise in relation to a significant number of 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 right-holders that qualify as "creators".

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.

- **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 right-holders 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.

Annex I: Comprehensive historical overview of types of rights administered by collecting societies

	1 When was the organisation set up?	2A Introduction of right to equitable remuneration for broadcasting and communication to the public	2B Starting date of collective management by the organisation	3A Introduction of rental right	3B Starting date of collective management by the organisation	4A Introduction of making available right for on-demand services	4B Starting date of collective management by the organisation	5A Introduction of remuneration for private copying and exception to reproduction right	5B Starting date of collective management by the organisation	6A Introduction of performers' rights in audiovisual field	6B Starting date of collective management by the organisation
BELGIUM (URADEX)	1994 (1)		1994		2005		Not administered yet				Not administered
CROATIA (HUZIP)	1995	1991	1995	2003	Not administered yet	2003	Not administered yet	2003	2007	1991	Not administered
CZECH REPUBLIC (INTERGRAM)	1990 (2)	1953 - soloists only	1991	1996	1996	2000	2000	1990	1991	No distinction between audio and audiovisual field	Differs according to the rights concerned – limited management in practice
FRANCE (ADAMI)	1955	1985 (3)	1987	Not clearly granted in the legislation yet	Not administered yet	Not granted directly in the legislation; considered to be included in the initial wording of the law of 1985 under the term of "communication to the public"	Not administered yet	1985	1986	1985 (6)	Not administered
France (SPEDIDAM)	1959		1987		Not administered yet		Not administered yet		1986		Not administered

GERMANY (GVL)	1959	1965 (4)	1959	1995	1995	2003	Not administered yet	1965 for hardware only; since 1985 also for blank tapes	1995/1985	1965 (6)	Not administered
LITHUANIA (AGATA)	1999	1999	1999	1999	Not administered yet	1999	Only for webcasting In practice, not administered yet	1999	2004	1999 (6)	Not administered
NETHERLANDS (NORMA)	1997	1993	Right administered by other society SENA	1993	Not administered so far for lack of cooperation by other stakeholders	1993	Not administered yet	1993	1997	1993 (6)	Not administered
SPAIN (AISGE)	1990	1994	1997	1994	1999	2006 (presumption of transfer of such right to the producer, the performer keeping unwaivable right to equitable remuneration)	Not administered yet	1987	1992	1987 (6)	Not administered
SWEDEN (SAMI)	1963	1960 for broadcasting of sound recordings; 1986 for all other public uses of sound recordings as well as a right to equitable remuneration	1963 / 1986	1995	Not administered yet	2005	2006, but difficulties in implementation due to lack of coordination from other stakeholders	1999	1999	1995 (6)	Not administered

		for retransmission									
UNITED KINGDOM (BECS)	1998	1988 for broadcasting. 1996 for com to the public as well (5)	1998 (but not administered by BECS)	1996	1998	1988	Not administered, but BECS may act as agent for distribution of contractually agreed sums resulting from performers' consents having been granted.	No express provisions apply for private use. Copyright exceptions and limitations are under review in the context of the Gowers Review of Intellectual Property.	BECS represents members for the collection of private copying remuneration where applicable	1988 (but presumption of transfer of rights to the producer).	Not administered

(1) Became sole collective rights management organisation after final merge in 2004
(2) Former organisation OSWU that was set up in 1955
(3) Before then: collective management by the same organisations based on contractual agreements.
(4) Before then : ex gratia payment
(5) The statutory rights for performers to receive equitable remuneration was introduced into English law by the Copyright and Related Rights Regulations 1996
(6) But presumption of transfer of rights to the producer in all countries in the audiovisual field, which explains that the rights cannot be administered in practice

Annex 2: List of Tables

PART I. International, European and national legislation and their impact on the situation in practice

PART II. Economic weight of revenue actually generated by performers' rights: comparative data and elements of analysis

Annex 3: Main references

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