PERFORMERS' RIGHTS STUDY

UPDATE 2022

AEPO ARTIS

ASSOCIATION OF EUROPEAN PERFORMERS ORGANISATIONS

WE DEFEND PERFORMERS' RIGHTS

CONTENTS

FOREWORD BY TILO GERLACH, PRESIDENT OF AEPO-ARTIS

Dear Reader,

Even though it is hard to imagine a world without performers' rights, they are still a very recent phenomenon and, because of their youth, they are often misunderstood. This update, of our study which was first published in 2013, aims to provide you with a clear and understandable framework about which rights our performers obtain from international and European regulations. We pay a lot of attention to the true purpose of these rights, as well as the challenges faced in providing our performers with stable and future-proof protection.

This update also addresses the collective management of those rights in more detail. Even more than for other categories of rightholders, the collective management organisations set up by musicians and actors play a crucial role in creating value from these rights, on behalf of performers, for performers and by performers.

Collective management does not replace the contractual relationship between individual performers and the people that make use of their work. For performers, it is however an indispensable addition to these individual relations. Collective management is non-profit and inclusive, and always puts the interests of the performers first and protects them against the loss of their rights.

AEPO-ARTIS has managed to bring together 37 different European performers' organisations in a spirit of cooperation. Through the constant exchange of expertise and best practices, we grow closer to each other with a view to equal treatment and legal certainty for performers across borders. As this study will demonstrate several times, performers do not always need more rights. They need their rights to be recognised and used in their interest. And yes, sometimes a little help from the legislator is necessary to make that happen.

This third update of the AEPO-ARTIS Study on Performers' Rights is dedicated to all the performers whose music, acting or dancing you have ever enjoyed.

I hope you will find it both useful and informative.

Thank you.

Tilo Gerlach,
President of AEPO-ARTIS

EXECUTIVE SUMMARY

This is a study on performers' rights. Performers' rights – often called neighbouring rights or related rights – are a relatively young phenomenon and are therefore often misunderstood. This study aims to improve the understanding of performers' rights and thus contribute to a further development of their legal framework - and its application in practice – taking into account the specific situation performers are in.

With this objective in mind and with a focus on the EU, this study:

1. Explains the complex existing legislation and practice - whether international, European or national - that applies to performers today and the role that collective management plays in navigating these complexities.

2. Highlights where the legislation works to support performers who wish to pursue a career as actors or musicians... and where it does not.

3. Sets out five key recommendations designed to create an environment in which performers are fairly remunerated for their contribution to the music, films and other works that enrich the lives of so many.

The study starts off with a general chapter on performers' rights. It elaborates on the differences between an exclusive right and a remuneration right and addresses the practical implications that this has for performers and the collective management of their rights.

The following chapters will each address a specific type of performers' right, with most of the attention being given to the right of communication to the public, before touching upon private copying and rental.

Finally, a separate chapter is devoted to the term of protection that performers receive from their neighbouring rights.

CONCLUSIONS

As a common thread throughout our study, we have identified the following challenges:

The necessity of performers' rights.

Performers are the singers, musicians, actors, and other performing artists whose contribution is indispensable to the enjoyment of music, films and other works around the world.

Performers' rights were first granted in an international treaty in 1961. These were the building blocks which were designed to make a career as a performer financially viable. Since then, these rights have been supplemented by several international instruments and multiple EU directives. Most recently, the Copyright in the Digital Single Market Directive, adopted in 2019, provided performers with additional rights.

Historically, the rights granted to performers are very similar to those granted to authors. This may seem fair, but time has shown that a right that is beneficial to an author, may be of minimal benefit when granted to a performer. **Today, performers' rights are long past their sell-by date.**

Exclusive rights are not always better than remuneration rights

Exclusive rights give rightholders the power to authorise or prohibit a certain act. The purpose of granting performers exclusive rights was to give them control over how and when their performances would be used. This was a well-intended approach that has now been found to be **not fit for purpose**, particularly in the world of online exploitations. With streaming being the most popular way in which people access music and audiovisual content, this puts performers in a very precarious position.

Particularly in the context of streaming, it is no longer realistic to offer performers an exclusive right only. The power to authorise or prohibit is not the essential goal of protecting performers with neighbouring rights; the essential goal is fair remuneration. Providing performers with **unwaivable remuneration rights** will ensure that when they transfer (or "lose control of") their exclusive rights, such fair remuneration can still be guaranteed.

Today, the imbalanced commercial negotiating power between performers and producers has led to contractual practices that are one-sided, unfair and out-dated. **The exclusive making available right**, being the only tool provided to performers to assist them to obtain fair remuneration from new technological uses, **has clearly failed.**

A technology neutral application of existing rights is missing

Existing "traditional" performers' remuneration rights remain very relevant.

One example is the right to equitable remuneration for broadcasting and communication to the public of commercial phonograms set out in article 8(2) of Directive 2006/115/EC. While working well in many areas, this right can and should be applied in a technology neutral way.

As a large percentage of streams on platforms such as Spotify and Deezer are non-interactive or "passive" streams, these fall under the provisions of article 8(2), and accordingly remuneration ought to be paid to performers. Currently, this is not happening and performers are therefore being denied a remuneration which they are entitled to **under existing legislation**.

In the same Directive, performers are granted a right to remuneration (upon the transfer of the exclusive right) for rental. This provided a source of revenue when their films were rented from high street video-rental shops. Today, these shops have almost all disappeared. However, digital streaming platforms such as Amazon Prime and Apple TV, now offer subscribers the same opportunity to "rent this film", albeit online. Despite sharing all properties of a high street shop, these platforms pay no remuneration as a result of an antiquated legal anomaly.

If a change in these commercial practices cannot be achieved, governments should play an active role in assisting to reach a solution.

Another traditional source of remuneration for performers comes from the current **private copying remuneration** systems that exist in almost all EU Member States. It is an important source of remuneration for performers, but can at times fail to keep up with technology. It is essential that, as the Court of Justice of the European Union has confirmed, it is applied in a technology neutral way to cover new methods of making private copies, such as those made via cloud data storage providers.

Performers in the audiovisual sector are still discriminated against.

Performers in the audiovisual sector are still less well protected than their fellow performers in the music sector.

The term of protection of audiovisual performances is twenty years shorter than musical performances. Accordingly, this limits the period during which actors may benefit from remuneration mechanisms that currently exist under EU law.

It can be seen that, without any justification, EU law grants audiovisual performers fewer rights than their colleagues working in the music sector.

There is an urgent need for transparency

Across both the music and audiovisual sectors, **performers suffer from a lack of transparency**. This prevents them from ascertaining whether they are receiving the amounts to which they are entitled.

With effect from June 2022, performers in the EU were entitled to receive transparent information from producers regarding the exploitation of their performances.

This was a welcome move on the part of EU legislature, however **historically performers have been unwilling to confront producers for fear of being blacklisted**. For that reason, time will tell the extent to which performers will be able to benefit from this right in practice.

KEY RECOMMENDATIONS

To meet these challenges, we have developed the following key recommendations.

1. Introduce a right to equitable remuneration for on-demand streaming

Every EU Member State must comply with their obligation in article 18(1) of the CDSM Directive i.e. to "ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration". In particular, this must apply to all acts of **interactive streaming** including by User-Generated Content (UGC) platforms.

In order to reduce the imbalance in contracts between performers and producers, where a performer has transferred or assigned their exclusive right of **making available on demand, an unwaivable right to equitable remuneration** subject to compulsory collective management and payable by the user should be introduced.

The introduction of such a right will go some way to reducing the imbalance in contracts between performers and producers.

2. Ensure that performers are adequately remunerated for passive streaming and online rental

Commercial practices should be adapted to ensure that existing legislation is applied in a technology neutral way. If this cannot be achieved, governments should play an active role in assisting to reach a solution.

A very large percentage of streaming on digital platforms consists of passive streams. This is mainly in the case of music, where these "non-interactive acts of communication to the public" should be covered by article 8(2) of Directive 2006/115/EC and accordingly equitable remuneration must be paid to performers. As Member States have often provided legal frameworks for the negotiation and fixation of the tariffs for such equitable remuneration, **they should take an active role in accelerating this process.**

In the audiovisual sector, **large digital streaming platforms are offering users the chance to rent a film for a limited period of time.** If these platforms and their consumers are still applying essentially the same practices for which a legal framework has existed for thirty years, then it is incomprehensible that this framework is no longer applied.

3. End discrimination against performers in the audiovisual sector.

Directive 2011/77/EU on the **term of protection** of copyright and certain related rights must be amended to ensure that audiovisual performances are protected for a period of 70 years i.e. the same length of time as for musical performances.

The EU must ratify the **Beijing Treaty** in a manner that ensures that audiovisual performers will be adequately remunerated when fixations of their performances are communicated to the public in any way, including online.

4. Ensure that a modern future-proof system of private copying remuneration exists in all Member States

All Member States must ensure that performers are adequately remunerated when private copies of their recordings are made. Levies must be urgently and regularly reviewed to ensure that they cover all "modern devices", such as smartphones, as well as new technology, such as cloud data storage providers.

5. Monitor performers' right to transparent information about the exploitation of their recordings

It is essential that performers receive transparent information from producers, particularly with regard to modes of exploitation that they no longer fully control themselves and the details of which are frequently obscured. Without this, they cannot determine whether what they are receiving is what they are entitled to under their contracts.

The extent to which producers will provide sufficiently transparent information remains to be seen. This must be closely monitored. In the event that producers do not meet their obligations, they must be held to account.

THE WAY FORWARD

Today, we are at a crossroads in the history of performers' rights. Some countries have granted equitable remuneration rights for streaming, some are heading in that direction, and some seem to be making no attempt to introduce such rights at all. This unharmonised, patchwork approach is not enough.

There is only so much performers' and their CMOs can do.

EU Member States now have an opportunity to set an example for governments in the UK, US and the rest of the world in creating an enlightened progressive legal model that protects performers in the digital era. This opportunity should not be missed.

The stated aim of the Belgian government during its presidency of the European Union in 2023 is to introduce an EU-wide right to unwaivable equitable remuneration for music and audiovisual streaming.

If this can be achieved, it would be the biggest step forward in performers' rights in decades.

> "The addition of remuneration rights for online exploitations was made at the request of the artists. It empowers them to effectively receive a remuneration and during the upcoming Belgian EU presidency in 2024, we want to make an effort to generalise this system in the EU."
>
> **Pierre-Yves Dermagne,**
>
> Belgian Minister of Economic Affairs

CHAPTER 1

PERFORMERS' RIGHTS AND COLLECTIVE MANAGEMENT

1.1. PERFORMERS' RIGHTS

Performers are – and always have been - an integral part in the creation of any music or audiovisual work. Despite this, performers' rights are a relatively new phenomenon in the field of intellectual property.

When delivering their performance, performers are the first and most crucial factor that allows any work to be experienced by an audience. These actors, musicians, singers and dancers enjoyed considerable prestige in days gone by. Unlike today, experiencing a musical or theatrical work was not taken for granted.

The technological revolution in the late 19th/early 20th century that made it possible to record performances on phonogram and film changed this. Once the performance was recorded, one was no longer bound by the physical presence of the performer in order for an audience to enjoy a performance.

Against this background, it is understandable that in some countries the first so-called neighbouring rights already appeared in the 1920s. The rights are referred to as "neighbouring" because they are closely related to authors' rights in both form and subject. They were primarily designed as economic rights to ensure that the fixation of a performance is always subject to the consent of the performer and to guarantee that the performer was entitled to a share of the revenues from the commercial exploitation of that recording by reproduction or communication to the public. As such, they would ensure performers received an economic counterpart whenever their performance was used.

In addition to these economic rights, in most jurisdictions performers have also been granted moral rights. These are intended to ensure that performers are properly credited for their performances and that these performances are not used in a derogatory manner that would harm the reputation of the performer.

When looking at the different protection granted to authors and performers it has to be remembered that the substance of performers' rights is not completely the same as authors' rights. Performers' rights do not protect the work (i.e., the song, lyrics or film) as such; they protect the "interpretation" or "performance" of the work.

In contrast to authors' rights that were granted in the Berne Convention of 1886, it was not until 1961 with the adoption of the Rome Convention, that performers were first granted a basic international level of protection. Long overdue, it offered basic economic rights for performers regarding the fixation of their live performances, the broadcasting and communication to the public of these live performances, and a reproduction right. Its main success was, despite the possibility of making reservations, the introduction of a guaranteed right to equitable remuneration for broadcasting and communication to the public of commercial phonograms, a term corresponding to sound recordings that in 1961 applied to vinyl records (and former 78 rpm records), but a technology neutral notion that has throughout the years expanded to include other sound recordings such as CDs and digital files such as mp3s and even NFTs.

The Rome Convention also provided an international basis for the protection of phonogram producers and broadcasting organisations by means of neighbouring rights. These parties were considered to deserve their own neighbouring rights because of the financial effort they made to enable the fixation of a performance or to enable the bundling of recorded works and live performances in a communicable broadcasting signal.

In 1996, the WIPO Performances and Phonograms Treaty (WPPT) improved performers' rights by introducing a more far-reaching and significantly stronger range of rights. However, the WPPT applies only to phonograms.

In 2012, the WIPO Beijing Treaty on Audiovisual Performances was adopted, introducing long-awaited international basic protection to performers for audiovisual fixations. The protection granted is comparable to that granted by the WPPT. However, with regard to broadcasting and communication to the public, the Beijing treaty offers those countries that have ratified it various options that range from exclusive rights, guaranteed equitable remuneration or no protection at all. The EU, which is a Contracting Party to this treaty, has not yet ratified it thereby slowing down its full application in the Member States.

The inequality in the treatment of performers in the audio and audiovisual sectors is unfortunately something that continues to this day – also at European level - and will be referred to frequently throughout this study.

At EU level, a number of directives have been introduced since the beginning of the 1990's, granting performers a range of exclusive and remuneration rights. These directives mostly date from the last century and have been unable to keep up with technology in some crucial areas. As a result, the rights granted to performers are often not suitable for the realities of the 21st century.

In 2019, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (the "CDSM Directive") was adopted. Its aim was to address "rapid technological developments" and to "adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights"[1]. Contained within its provisions was the principle that performers and authors should be entitled to receive appropriate and proportionate remuneration whenever they transfer any of their exclusive rights[2].

However, the many freedoms given to EU Member States in implementing this Directive have limited its harmonising effect and, with that, its goal of protecting rightholders. The CDSM Directive has not resulted in an EU-wide high level of neighbouring rights that are effective in practice and fit for the 21st century. Currently there are, on one hand, Member States where performers enjoy comprehensive protection (e.g. Spain), but on the other hand there are still Member States where even the broadcasting of music is not accompanied by payment of equitable remuneration (e.g. Malta). Furthermore, the many EU directives have not been able to end the discriminatory treatment of actors. On the contrary, in several cases these directives have perpetuated it.

What can be seen from the above is that authors were granted rights long before performers. However, starting in 1961 with the Rome Convention, performers' rights have slowly increased to a level where they are now very similar "on paper" to those of authors.

The manner in which those rights are **exercised** is very different and this is why, in practice, performers benefit less than authors from the rights granted to them, despite those rights being similar.

For authors, the creation of a work (unlike the recording of a performance) is not systematically linked to a contract with a producer. Authors create the work and thereafter authorise a third party to exploit ("use") the work. They retain their exclusive rights and therefore retain control of how the work will be exploited in the future. For example, an author might **authorise** the synchronisation (reproduction) of their work in a film. The author will negotiate what they consider to be a fair payment for the use of the work. However, because the author retains control of their reproduction rights, this allows them to authorise the synchronisation of their work on many more occasions and in many more areas, e.g., films or TV commercials.

The exercise of these exclusive rights can also be transferred to the authors' collective management organisation ("CMO").

By contrast, a performer signs a contract with a "producer" (i.e., a record company or film/TV studio) which usually permanently transfers all of their exclusive rights to the producer. Once that contract is signed, the performer has no further control over how the recording will be used. Within the music industry there are some performers who have the capacity to negotiate a royalty payment in return for the transfer of their rights. In recent years, however, it has become increasingly clear that - despite the reality that it works for a small minority of musicians - contractual practice by design does not work to the benefit of performers as a whole. The fact that there are a huge group of musicians (non-featured artists or "session musicians") who do not receive any royalty payments at all, but one lump sum buy-out, is also too often overlooked.

Within the European audiovisual sector, such a buyout is even the norm. Actors who receive a royalty payment from an audiovisual producer are extremely rare. In addition to the lack of attributing a proper value to these exclusive rights, the practice of transfer means that performers have fewer opportunities to organise themselves through their collective management companies, as compared to authors (and even producers).

Another reason why performers benefit less from their rights than authors is because the term of protection of neighbouring rights is substantially shorter than that of authors' rights. In the case of performers, protection is connected to the date of publication of the recording. For audio recordings, protection granted by the EU "Term Directive" (see Chapter five) lasts for 70 years after publication. For audiovisual recordings, the period is 50 years. In comparison, authors' works are protected for the lifetime of the author and for 70 years thereafter.

Finally, performers' rights (which were granted to them much later than rights granted to authors), are sometimes considered as inferior to authors' rights, based on an artificial concept of the hierarchy of intellectual property rights, both in terms of respect and in monetary value. To take one example, when private copying remuneration is shared between authors, performers and producers, in some countries authors may be entitled to a 50% share whereas performers are entitled to only 25%. This disparity is exacerbated by the fact that there are usually far more performers contributing to a single recording than there are authors. This is examined further in Chapter three.

1.2. EXCLUSIVE RIGHTS VS REMUNERATION RIGHTS?

Exclusive rights

Apart from moral rights, neighbouring rights are economic rights that - in principle – are granted in the form of exclusive rights. The exclusive nature of an intellectual property right corresponds to the legislator's aim of providing the rightholder with the possibility of controlling the exploitation of their creation, performance, recording or signal.

Exclusive rights link a specific use to the requirement of "authorisation". For each exploitation that is covered by an exclusive right, permission from each individual rightholder, including performers, is needed.

However, the rights (or more precisely the "package" of all the performer's rights) to control the exploitation is very frequently **transferred** to a third party, allowing them to decide which acts are permitted and which are not. This is what musicians do when they sign a contract with a record label.

By signing contracts with all musicians involved, the record producer centralises all exclusive rights in a single point of contact for users. The purpose of this centralisation, i.e., to facilitate the exploitation of the recording, is understandable. However the transfer process should, in principle, be advantageous to **both** performers and producers. This is all the more important since, in practice, performers are obliged to systematically transfer full ownership of their exclusive rights to the producer.

In general, there are two types of contracts in the musical sector. On one hand, there are contracts that provide performers with recurring remuneration that is expressed as a percentage of the revenues made with certain exploitation of the record, the "royalties". On the other hand, there are contracts that provide non-featured artists with a one-off payment (i.e., a lump sum, or "buy-out"). The number of non-featured artists is vastly higher than the number of artists receiving royalties.

Over the past two decades, the recording process has become more affordable and musicians are investing more and more in their own recordings, with producers investing less and less in the actual first fixation of music recordings. When this occurs (and the practice remains relatively infrequent), musicians receive revenue not only from their neighbouring rights as performers, but also from their neighbouring rights as a producer.

Musicians who are well aware of their position as a producer will often choose to **licence** their rights to a producer and remain the actual rights owner, rather than selling them. The success or otherwise of such an action will depend on the contractual terms agreed. However, this could bring the practice regarding neighbouring rights closer to that of authors in the music industry. Composers have a culture of retaining ownership of their rights when signing contracts with publishers. This also provides them with a much stronger position to organise themselves via collective management.

Actors also assign their rights to the producer (i.e., the film studio or TV company) of the film or series they take part in. This takes place mostly by means of contracts and in Europe the general rule is a complete transfer of all transferrable exclusive rights in return for a lump sum buy-out. In some countries, the film producer is even protected against missing or incomplete contracts with a presumption of transfer. Where such presumption applies, which may be rebuttable, the performer's rights get transferred to the producer unless a contract stipulates otherwise.

Remuneration rights

While granting exclusive rights is still the most common protection, legislation may provide for **exceptions** to the exclusive right. Exceptions define specific situations that fall outside of the scope of the exclusive right and allow users to act without requiring permission from the rightholder. Common examples are parody, private use, teaching and facilitating the use of works and recordings by people with disabilities.

Sometimes such exceptions are **accompanied by a remuneration right**. The most common of these exceptions are private copying and public lending. When an exception exists, rightholders are not able to prevent such use. Requesting permission from the rightholder for the exclusive right of reproduction or distribution is not required, under the condition that the categories of rightholders affected receive specific remuneration. In these situations, CMOs are usually called upon to collect and distribute such remuneration.

Sometimes a remuneration right is **granted instead of an exclusive right**. This is the case, for instance, for equitable remuneration for the broadcasting and communication to the public of phonograms. The Rome Convention introduced the concept of a guarantee of such a remuneration right without granting performers and producers an exclusive right of communication to the public.

Sometimes a remuneration right can be **granted in addition to an exclusive right.** In these situations, the exclusive right remains intact (the user needs to obtain permission), but a performer or an author that transfers such exclusive right, retains the right to receive remuneration for the specific use covered by the exclusive right.

The most well-known example of this type of remuneration rights is the remuneration right introduced by the 1992 Rental and Lending Directive (92/100/EEC), which guarantees that performers who transfer the exclusive right to permit the rental of their recordings, retain the right to obtain a remuneration for that rental at all times.

1 See recital 3
2 See article 18

This model has been applied to different rights in several countries. Belgium applied it in 2014 to the exclusive right to allow cable-distribution. In 2006, Spain applied it to the general right of communication to the public.

In general, remuneration rights are neither transferrable nor waivable. This means that despite any contractual agreements, performers will always be entitled to receive the remuneration they are entitled to. In many cases this is accompanied by mandatory collective management.

Among copyright scholars, and based largely on the practice of the exercise of authors rights, the historically held view was that granting exclusive rights was the most far-reaching protection for any category of rightholders, including performers.

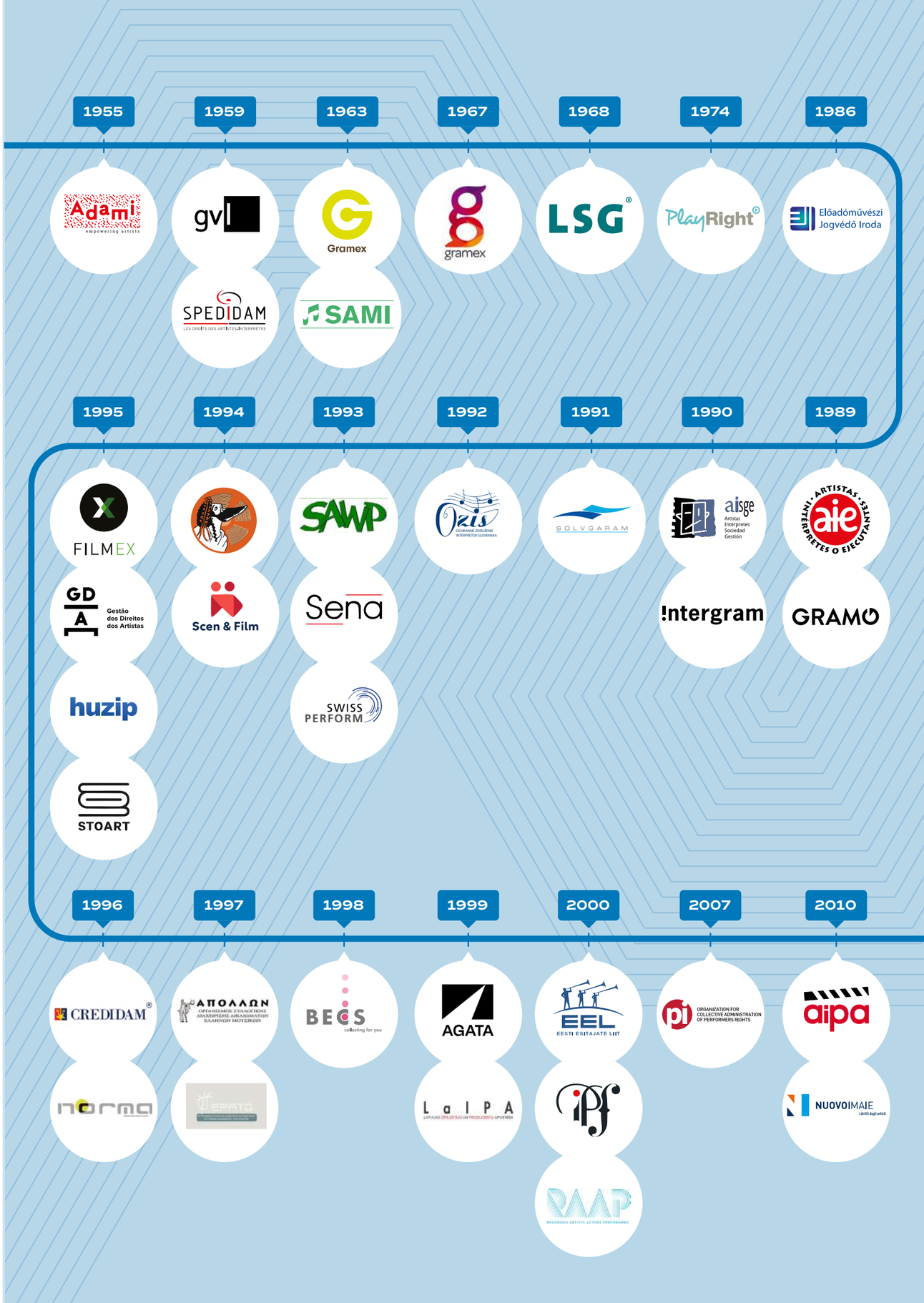
However, given the contractual reality, it can now be seen that these **exclusive rights do not guarantee** that the performer will be remunerated. On the other hand, **remuneration rights do provide such a guarantee.**

1.3. COLLECTIVE MANAGEMENT

As mentioned under 1.2., neighbouring rights are – in principle – granted in the form of transferable exclusive rights. As such, each performer is individually responsible for the management of their rights, for each contract signed and for all remuneration received for any form of exploitation. In the world of intellectual property rights, the starting point is individual management; but it does not always have to be that way.

Performers can also entrust the management of their rights to a CMO. The mechanism of collective management was first applied by authors in France where, already in 1777, theatre authors founded SACD and, in 1851, music authors established SACEM. By organising themselves in a collective, they strengthened their negotiating position with regard to theatres, cafes and other places where their works were communicated to a public. It also made it possible to effectively collect remuneration where they were previously unable to do so on an individual basis. Shortly afterwards, similar organisations were founded by authors in other countries. In time, other categories of legally protected rightholders, did likewise. Today, collective management organisations exist for authors, record producers, film producers, book publishers, news publishers, journalists and performers.

The first collective management organisation for performers - ADAMI - was only founded recently, in 1955, in France. The large time disparity with the first authors' CMOs is obviously due to the much more recent emergence of neighbouring rights – which could only exist after the advent of commercially available carriers (phonograms and film) - compared to copyright. However, it is also a consequence of the reality that the collective management of performers' rights was, and still is, more difficult to organise. For instance, in each recording there will only be one producer and one or two authors, whereas there may be dozens of performers, each of whom is a rightholder who will need to be identified accurately.



The fact that authors mostly receive copyright protection before they enter into any negotiations on the exploitation of their creation ensures that they can transfer their rights to a CMO prior to such negotiations[3]. However, because performers receive the protection of neighbouring rights only when the performance actually takes place - and the transfer of the exclusive rights is often a condition performers are contractually obliged to relinquish - they cannot transfer rights to a CMO in the same way as authors. This considerably weakens their negotiating position. Systems, such as the presumption of transfer, further reinforce this weak position. **Performers rights are not working conditions, but their transfer is often a condition for work.**

The impact on performers who utilise collective management is significant. Performers who agree to transfer all their rights to a producer prior to their performance have no rights left that they can entrust to a CMO to manage on their behalf.

When the first remuneration rights were granted in Europe in the early 1990s, the increasing emergence of several CMOs for performers could be seen. The non-transferable nature of these rights finally put performers in a position to build their own CMOs.

Currently, almost every European Member State[4] has at least one CMO representing performers, which take different forms. Some CMOs may represent performers only, some may represent performers together with producers, some represent authors too. Some may represent performers in audiovisual and music recordings, some may limit their mandates to a specific type of recording or a specific type of right. Some are the only organisation representing performers, others compete with or complement other organisations active in the same territory. Whatever their form, they operate on a non-profit basis and have an organisational structure that gives performers direct control over their collective management.

1.3.1. How does collective management work?

Collective management can be defined as "the management of copyright or neighbouring rights on behalf of more than one rightholder, for the collective benefit of those rightholders".

In practical terms, this will include setting/agreeing tariffs - whether by negotiation with users or with the intervention of governmental bodies such as a copyright tribunal or Intellectual Property Office (IPO) - and thereafter ensuring that the correct level of remuneration is collected from these users.

The CMO will then calculate how much of this remuneration should be paid to each individual performer and distribute it appropriately and within a strict timetable of no more than nine months, as specified in the "CRM Directive"[5].

Clearly, this creates an immense administrative burden, particularly since obtaining the necessary information from producers and users to allow accurate distribution is often difficult or impossible. Despite improvements in data management systems, producers and users continue to provide incomplete and inaccurate data. Particularly in the music sector, and streaming in particular, this has a disproportionately detrimental impact on less well-known artists who are often overlooked and lose out on remuneration that they ought to have received.

By obtaining mandates from individual rightholders, or by the existence of a system of compulsory collective management enshrined in national law, a CMO bundles individual rights in a large catalogue. On the one hand, this offers a solution to the practical limitations that individual management entails. It would, for instance, be impossible for musicians to enter into individual negotiations with each radio station separately. CMOs can manage rights on behalf of an enormous number of rightholders. On the other hand, collective management provides a solution for the limited value that an individual recording represents in negotiations with users who consume catalogues rather than individual works. It strengthens the general bargaining position of a specific category of rightholders as a whole and as such also each individual belonging to that category.

Collective management organisations provide simplicity and security for the user. They simplify and speed up the process of managing performers' rights for a certain use and, by working with non-discriminatory tariffs, they ensure a level-playing field between large and small users. The legislator has therefore often opted to make collective management mandatory in some situations that occur between certain categories of rightholders and specific users. A good example of this is the relationship between rightholders and cable distributors, for which the European legislator already required the intervention of collective management in 1993[6]. Most countries also provide for mandatory collective management for the collection of equitable remuneration for broadcasting and communication to the public[7].

Collective management is also usually made mandatory in those situations where the legislator has introduced an exception to an exclusive right. In situations where the legislator has removed the requirement to ask permission, but has granted a right to remuneration, the management of the collection of this remuneration is assigned to collective management. The best example of this is the private copying system which is explained in Chapter three.

It should be emphasised that CMOs offer their services to a category of rightholders and any individual belonging to the category for which the CMO acts is entitled to join the organisation. A CMO cannot exclude rightholders. A CMO representing the neighbouring rights of performers is obliged to allow each performer to join the organisation. This is certainly important for those situations where collective management has been made mandatory by law, but also for those situations where the legislator allows a CMO to collect remuneration on behalf of a category of users, without the affiliation to a CMO of each individual having to be demonstrated (referred to as "extended collective licensing").

Another main characteristic of the collective management of performers' rights is that CMOs do not own the rights they manage. The individual rightholders remain the owners of their rights; the CMO only receives a mandate to manage those rights as part of a larger collective.

CMOs have no financial interests of their own. They are non-profit organisations that not only serve a certain category of rightholders, but are also **controlled** by those same rightholders.

In that sense, collective management must be clearly distinguished from what can be described as catalogue management. Recently we have seen many new players appear in the rights management market.

- There are Independent Management Entities (IMEs), a type of rights administration organisation that will licence catalogues to users. It is characteristic of these players that they work on a commercial - for profit - basis. In addition, they are not obliged to represent the whole category of rightholders but can refuse individual performers as "clients". This enables them to cherry-pick who they wish to represent, which in most cases will be the most profitable artists active in the most profitable markets enabling them to earn very substantial revenues.

- There are agents who will manage the rights of performers and smaller labels. These are not only private companies that are not under direct control of the rightholders, but their operations are also limited to the administration of existing contracts. Agents assist performers in their relations with CMOs and labels, but they do not collect remuneration for performers themselves.

- Finally, the record labels and to a growing extent audiovisual producers must also be mentioned. While these companies have a history of commercialising individual recordings, during the last decade we have seen them make a major shift towards catalogue management. The additional difference with this is that these companies do not manage the rights on their catalogues based on mandates. Producers acquire rights and exploit their catalogues as owners.

1.3.2. Legal framework of collective rights management

Managing the rights of performers or other rightholders and ensuring that the remuneration due to them is efficiently collected and distributed comes with a high degree of responsibility. As a result, most countries have subjected the operation of these organisations to specific rules, the most important of which is obtaining a permit or licence to act on behalf of a certain category of rightholders. In particular, in their role as a collector of remuneration, CMOs must be able to demonstrate that they are able to represent an entire category of rightholders, rather than a composite group of rightholders. In addition, CMOs must be able to provide the necessary transparency and their structure must at all times guarantee direct control by the rightholders concerned.

These rules are even more important since collective management has been made mandatory in certain situations, including by the EU legislator. As a result, in 2014, the CRM Directive - which in the first place recognised the importance of collective management - harmonised a number of obligations and duties applicable to CMOs to guarantee a level playing field in the sector.

The harmonisation covered governance[8] (e.g., strict provisions concerning the requirements of an annual general assembly, the creation of a supervisory body in which rightholders are fairly represented, the extent to which deductions can be made), transparency (the establishment of an annual transparency report) as well as provisions on the efficient distribution of revenue to rightholders. It sets out the rights that rightholders have within that CMO and also who can become a member of a CMO[9].

The Directive provides a high level of harmonisation which ensures that all CMOs throughout Europe operate in a cohesive manner. For most performers' CMOs, rules that met the necessary requirements of the Directive were already in place. Consequently, in general only minimal changes needed to be made to the way in which they operate.

While harmonisation should always be welcomed and it is something that should be achieved in all areas of performers' rights throughout the EU, it can also create challenges. CMOs in smaller Member States may have far fewer resources, both in terms of finance and personnel. For example, the French CMO ADAMI is able to employ 90 people, whereas a CMO in a far smaller Member State may only have resources to employ 4 or 5 people. This can make it more challenging for the latter to comply with certain elements in the Directive, particularly those requiring a significant amount of administrative input. An example of this concerns the numerous important steps required to be taken to make information available regarding recordings where a performer has not been identified[10].

3 In the audiovisual sector, where work for hire is becoming more and more the norm, authors increasingly find themselves in the same position as performers. In the music sector as well, there is an increasing rise in the practice of buy-out contracts, which is strongly opposed by many songwriters.
4 Luxembourg and Malta are the only two EU Member States that do not have a performers' CMO.
5Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
6 See Article 9 Council Directive 93/83/EEC.
7 Even though Article 8(2) of Directive 2006/115/EC does not explicitly require it.
8 See for example Articles 8 to 10.
9 Articles 5 and 6.
10 See CRM Directive Article 13(3).

This burden could of course be avoided if producers, who generally have significant personnel and financial resources, provided accurate and complete information in the first place.

It should also be recognised that, as a consequence of the far lower amount of remuneration that performers' CMOs collect, they have far more limited financial resources than authors' CMOs. To illustrate this, the French authors collecting society SACEM collects more money annually than all European performers' CMOs put together. In 2020, it collected €988 million, rising to €1,056 million in 2021 . By comparison, in 2020 the 37 performers' CMOs represented by AEPO-ARTIS collected €642 million and €668 million in 2021[11]. This is a direct result of performers' rights generating less income than authors' rights, due to the fact that a part of these rights cannot be collectively exercised.

In contrast to the long set of obligations, the Directive offers few rights to CMOs whose social importance it explicitly recognises. In this regard it is highly regrettable that the Directive failed to include a proper right to information for CMOs and transparency obligations for specific entities who make extensive use of musical and audiovisual content. This would significantly alleviate the complex and costly task of many CMOs and facilitate the collection for and distribution of revenues to performers.

Despite the lack of a true level-playing field, performers' CMOs have demonstrated significant growth over the past decade. The total revenue of the AEPO-ARTIS network has increased by 25,7% in the period 2013 to 2021[12]. The confidence of performers in their organisations has also increased. For example, we see that the actual combined membership of the AEPO-ARTIS members has increased from 500.000 to 662.000 over the same period, an increase of 32%[13].

A report on the application of the Directive was published by the European Commission in November 2021[14] which found that:

"Some five years after the transposition deadline, the CRM Directive has proven to have had a positive effect on the market, providing a benchmark for CMOs operating across the EU and beyond. Based on available evidence from the studies and the stakeholder consultations, at this stage there is no need for a review of the Directive."

Nevertheless, there is still room for improvement; not every experience has been a positive one. As in all other walks of life, there have been instances of mismanagement and impropriety within some areas of collective management. That is just one reason why performers' CMOs welcomed the CRM Directive and its measures which oblige all CMOs to recognise the importance of transparency and good governance.

1.3.3. International collaboration among CMOs

While the licence that a CMO receives from its government often only entails the authorisation to licence rights and collect remuneration within its own territory, CMOs often receive the mandate from performers to also manage their rights outside the national borders of the CMO. After all, performances created in one country are enjoyed in many other countries throughout the world. One individual recording may contain contributions from performers who have several different nationalities and it may be used all over the world.

As a result, it is a necessity for CMOs to work closely with other CMOs to ensure that the relevant performers are properly paid. And practice shows that this happens. No CMO is an island. They all work in close cooperation with sister CMOs around the world to ensure that their respective performers are represented on each other's territory and to share data on repertoire and use.

This practice is facilitated by a web of bilateral agreements between performers' CMOs, not only throughout Europe but also worldwide. With the vast amount of data involved in managing performers' rights in an international context, there is a requirement for a high degree of technical co-operation. SCAPR, an international organisation representing 56 performers' CMOs from 41 countries, acts as an international platform for the development of practical cooperation between performers' CMOs to improve the exchange of data and performers' remuneration across borders. It has done this by creating the International Performers' Database (IPD), used to assist in identifying individual performers in audio recordings and audiovisual works and the Virtual Recording Database (VRDB), which compiles centralised global repertoire data which facilitates the flow of remuneration between the member societies of SCAPR.

It should be noted here that the high degree of collaboration and interdependence between CMOs worldwide is also accompanied by a high degree of self-governance. While in Europe the CRM directive provided the necessary level-playing field, international cooperation also (if not more so) ensures mutual control over each other's operations and allows CMOs to not only impose healthy high expectations on each other, but also to help each other achieve them.

1.3.4. CMOs and their role in society

In addition to their strict activities regarding collecting and distributing rights for the benefit of performers, all performers' CMOs developed parallel activities actively promoting and protecting performers' rights and providing opportunities for performers where needed. Based on national legislation, European provisions, internal rules and regulations, they often allocate a part of the payments they collect to cultural, social and educational activities.

Performers' CMOs play a major role in commanding respect and recognition for the performing arts as a profession to be proud of. They take and support initiatives that aim to achieve stability of income and in some cases provide support in order to contribute to health insurance and pensions systems.

During the Covid-19 pandemic, performers' CMOs played a crucial role in supporting performers at a time when their livelihoods were threatened more than ever because of the ban on live performances and studio work. Despite an average decrease of 9% in terms of collection, payments to performers increased significantly. 70% of CMOs adapted their operations to better help their members in times of crisis. 61% brought forward distributions, 36% made additional efforts to lower their administrative costs. As a result, the effective payments to performers increased from €585 million in 2019 to €664 million in 2020[15]. In addition, 55% of all CMOs started an emergency fund or played an active role in the proper functioning of a fund to help performers during the pandemic.

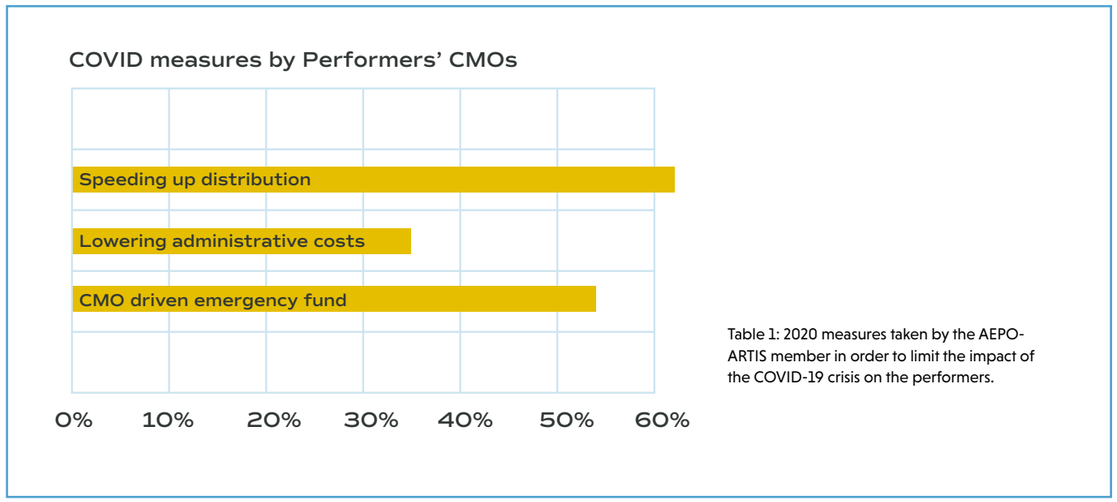


Table 1: 2020 measures taken by the AEPO-ARTIS member in order to limit the impact of the COVID-19 crisis on the performers.

1.4. CONCLUSIONS

While copyright has a long history, performers' neighbouring rights are still a recent phenomenon. With the introduction of the Rome Convention in 1961 and the WPPT in 1996, the legal landscape began to develop. Performers' CMOs emerged, making it possible in practice for performers' rights to be of economic benefit. EU directives built upon these international instruments to create an acquis communautaire (a framework of EU laws) designed to grant performers a fair level of protection.

The decision to base this acquis communautaire largely around a system of exclusive rights has failed to achieve this fair level of protection. In many cases, it can be seen that remuneration rights, managed by CMOs, are the only way in which performers will be protected.

The lack of possibility in practice for CMOs to manage the exclusive rights that performers are originally granted, and the gap in existing guarantees of remuneration systems, limits their scope of activities and therefore their possibilities to collect on behalf of their members. The amount collected for performers is still vastly lower than the amount collected for authors. As a consequence, performers' CMOs have lower financial resources with which to carry out their tasks.

Nevertheless, performers' CMOs have been able to successfully fulfil these tasks and have worked with each other all over the world to collaborate in the interests of their members. A worldwide web of bilateral agreements ensures that all performers can effectively assert the rights they have, anywhere in the world, and certainly within the European Single Market.

At the same time, performers' organisations do not limit themselves to the mere management of neighbouring rights, but they contribute by all possible means to the active promotion of the performing arts as a valued profession. They actively lobby for improvements in performers' rights and promote their local cultural and social activities. In doing so, they contribute to maintaining cultural diversity throughout the EU.

11 SACEM Annual report http://flyer.sacemenligne.fr/RA/2021_UK/SACEM_RA_2021_210x297_UK.html#p=14.
12 Calculation based on the combined overall turnover (national and international) of 34 of AEPO-ARTIS' members, which increased from 520.257.498€ in 2013 to 653.739.256€ in 2021.
13 Calculation based on the affiliated members of 34 of AEPO-ARTIS' members for the period 2014 to 2021. For this calculation only the worldwide mandates have been taken into account and have been completed with the highest number of regional mandates given to one AEPO-ARTIS member.
14 COMMISSION STAFF WORKING DOCUMENT Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market at https://ec.europa.eu/newsroom/dae/redirection/document/81237
15 See results of a 2021 survey by AEPO-ARTIS and SCAPR among their members: https://www.aepo-artis.org/wp-content/uploads/2022/07/website-AEPO_SCAPR_pressreleaseCOVIDsurvey_final_20211213858.pdf.

CHAPTER 2

COMMUNICATION TO THE PUBLIC

2.1. INTRODUCTION

The neighbouring rights of performers with regard to "communication to the public" (CTTP) naturally concern rights granted to performers in order to control or remunerate this form of exploitation of their performances. However, CTTP is a term that covers the use of music and audiovisual content in many different ways.

Traditionally, CTTP covered use of this content by TV and radio broadcasters, for example, as well as in public places like bars and shops (known as "public performance"). As technology has evolved, so has the scope of what is legally classified as "communication to the public". It now covers an ever-increasing number of methods by which the user, as an individual member of the public as a whole, can hear and watch audio and audiovisual content such as streaming, podcasts and user-generated content ("UGC") via platforms such as YouTube, TikTok and Twitch. Most of today's consumption of music and audiovisual content is a form of CTTP, which is why this right, and its proper legal protection, is increasingly important for performers.

A single definition of communication to the public applicable to both music and audiovisual performances does not exist, but a joint reading of Articles 2(g) of the WIPO Performances and Phonograms Treaty (WPPT) and Article 2(d) of the Beijing Treaty on Audiovisual Performances (Beijing Treaty) allows the following definition to be developed:

> Communication to the public of a performance means the transmission to the public by any medium, other than by broadcasting, of an unfixed performance, or of a performance fixed in a phonogram or an audiovisual fixation.

Apart from demonstrating the fact that the act of broadcasting falls outside the scope of the definition, this definition is of little practical value to the performer.

What can be learned from this definition is that CTTP has the specific characteristic that the use is intended for a public audience, rather than an individual person. Whether at a live concert, a bar that plays music or the cinema, that individual person is part of a public. In order to be part of a public, the user does not need to be **physically** in the presence of other users. An individual sitting on their own scrolling through videos on TikTok is part of a public audience. They are one of millions of people around the world doing the same thing at that moment. A person listening to the radio in the car or watching television at home is still part of a public audience, that public audience being all the people tuned into that radio or TV station at that time.

Different rules apply to different forms of CTTP. Sometimes a specific form of CTTP is referred to separately within European or international law, such as with cable retransmission and "making available on demand" (a legal term that applies to some of the most common types of streaming). However, a general exclusive right that makes all forms of "communication to the public" subject to the approval of the performer does not exist, at least not at the international or European level.

There is indeed no supralocal norm that guarantees performers an exclusive right to all forms of CTTP. The Rome Convention (Article 7), the WPPT (Article 6) and the Beijing Treaty (Article 6) grant an exclusive right, but limit its scope to live (unfixed) performances. This right does not apply to performances once they have been recorded. Although Article 11(1) of the Beijing Treaty introduces an exclusive right for the broadcasting and communication to the public of performances in audiovisual recordings, Article 11(3) of said Treaty offers countries the option to deviate from this principle. As a result, this Treaty likewise only offers a **guarantee** for the exclusive right to live (unfixed) performances.

With Article 8(1) of Directive 2006/115/EC, EU legislation follows this line. It only offers an exclusive right to CTTP for said unfixed performances. It does not provide a legal basis for an exclusive right to CTTP relating to recorded performances for either music recordings or for audiovisual recordings.

This is in stark contrast to the protection granted to authors. While Article 3(1) of Directive 2001/29/EC grants authors an exclusive right for "any communication to the public", **including** making available, under Article 3(2) of that Directive, performers are only granted an exclusive right with respect to the type of CTTP that constitutes **making available** on demand of fixations of their performances.

Despite the lack of any international or European obligation to do so, several Member States do grant performers a general exclusive right regarding communication to the public. As a result, different rules apply to performers in different EU Member States. These differences also occur in areas that have been harmonised at the EU level. In the EU, the laws covering performers' rights have been introduced by way of directives[16]. As a result of the discretion given to Member States to implement directives and their lack of full coverage of performers' rights, performers receive different protection in different Member States.

This comprehensive chapter contains an analysis of performers' right to CTTP in more detail, making a distinction between the rules relating to non-interactive (also referred to as "traditional", "passive" or "lean back") CTTP on the one hand (see section 2.2) and the rules relating to more modern forms of CTTP (also referred to as "active" or – in some circumstances – "making available on demand"), where a variable degree of interactivity exists – on the other hand (see section 2.3).

The goal is to bring structure to the fragmented patchwork of legislation provided by international treaties and the acquis communautaire and to highlight where and how performers' collective management organisations have been able to turn these diverse rights into an effective source of income for performers [...] and where it has proven impossible to do so (with some notable national exceptions). The focus is on the use of recorded performances, while making a distinction between sound recordings (phonograms) and audiovisual recordings. Also addressed is the specific situation of live (unfixed) performances.

2.2. BROADCASTING AND ANY COMMUNICATION TO THE PUBLIC

2.2.1. Phonograms (sound recordings)

2.2.1.1. The concept of a phonogram

The **"phonogram"** was introduced as an international concept by the 1961 Rome Convention to cover a broad scope of sound recordings. A phonogram is defined in the Rome Convention, Article 3(b), as "any exclusively aural fixation of sounds of a performance or of other sounds".

While the definition applied mainly to vinyl records in 1961, it was drafted in a technology neutral way. Accordingly, over the years it has come to cover other formats such as CDs and digital files like mp3s and even NFTs.

The 1996 WIPO Performances and Phonograms Treaty (WPPT) updates this definition of "phonogram" by also allowing "representation of sounds" and omitting the words "exclusively aural" (see Article 2(b)).

"Article 2(b) WPPT: "phonogram" means 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 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.

2.2.1.2. Broadcasting and communication to the public of phonograms

Regarding performances fixed in a phonogram, the **Rome Convention** introduced the principle that if such phonogram (published for commercial purposes) is used directly for broadcasting or any communication to the public, then a **single equitable remuneration** must be paid by the user. The Rome Convention foresaw three possibilities: (1) payment to the performers, (2) payment to the phonogram producers (i.e. "record labels" broadly speaking) or (3) payment to both. In any case it was clear from the wording that this single remuneration was to be shared between both. Indeed, it was explicitly stated that, failing an agreement between the parties concerned, domestic law may lay down the conditions relating to the sharing of this remuneration.

In 1996, this principle was upheld with approval of the **WIPO Performances and Phonograms Treaty** (WPPT), which states in Article 15(1) that performers and producers of phonograms are entitled to a single equitable remuneration for the direct or indirect use of phonograms for broadcasting or for any CTTP.

Neither of these international treaties provide rules or principles on **how to organise the collection and sharing of the equitable remuneration** between performers and phonogram producers.

Both the Rome Convention and the WPPT allow for Contracting Parties to limit the application of this right to equitable remuneration. According to Article 16 of the Rome Convention, and Article 15(3) of the WPPT, 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[17].

While certain large music markets like the United States or Australia have indeed limited application of this right to equitable remuneration, the EU has obliged Member States to implement it without restrictions.

According to Article 8(2) of the **Rental and Lending Directive**[18], Member States must provide a right ensuring that a single equitable remuneration is paid by the user if a phonogram is used for broadcasting by wireless means or for any CTTP. The article also includes the obligation for Member States to 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 performers and producers[19].

Unlike the Rome Convention and WPPT, Article 8(2) in its present form does not allow Member States to introduce reservations concerning the application of this right to remuneration. However, like the international treaties, the Directive provides neither rules nor principles on how to organise the collection and sharing of the equitable remuneration between performers and phonographic producers.

As a result, the methods of sharing the remuneration are not harmonised at the EU level, leading to slight differences from one country to another. The amount of remuneration payable in some Member States is determined by agreement between the producer and users; if agreement is not reached, the matter is referred to a copyright tribunal or arbitration body. However, in other Member States it is determined by national legislation or by royal decrees or ad hoc committees.

With regard to sharing of the remuneration, in the vast majority of Member States the amount of equitable remuneration is shared on a 50:50 basis between performers and producers. This method has been established in national legislation in some cases, but in others it is merely a matter of established practice. Similarly, some national legislation specifies that it is compulsory for collection of the equitable remuneration to be administered by a single CMO, whereas in some countries collective management is applied as a matter of practice rather than law.

Nevertheless, there is a general trend in Europe for this income to be split 50:50 **at source** between the two categories of rightholders, resulting in a disproportionately lower share going to performers.

It is also becomingly increasingly important to note that the right to remuneration **does not apply to live performances.** These are addressed in Article 8(1) of Directive 2006/115, which provides:

"Article 8(1) Rental Directive. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation."

A number of digital/gaming platforms are partnering with producers and publishers to host live music performances in the "metaverse", creating a vast new revenue stream[20]. The exclusive right in Article 8(1) is therefore becoming increasingly valuable, at least in theory.

Since Article 8(2) constitutes an obligation for all Member States, but leaves a great deal of freedom to the Member States with regard to its exact practical implementation, this provision has led to a large body of case law of the Court of Justice of the European Union ("CJEU") over the years.

In 2012, in the **"SCF"** (or Del Corso) case[21], the CJEU ruled on the scope of the equitable remuneration by stipulating that playing music in a dentist's practice does not constitute CTTP. In the same year, in the **PPL case**[22] the same Court also ruled that the Directive did not allow Member States to introduce an exception providing for hotel operators to be exempt from the obligation to pay equitable remuneration when offering guests devices to listen to music in their rooms.

Although the two rulings seem contradictory at first sight, both made it clear that in each individual case there needs to be an individual assessment of the facts. Moreover, they set out the same criteria[23] which should be used when carrying out the individual assessment of each case, namely (i) the indispensable role of the user, (ii) the meaning of "public" and (iii) whether the communication is for profit.

16 The most important of these are Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0115; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029 and Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN.
17 The use of such reservations was a highly significant issue in Case C-265/19 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd.
18 Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (formerly Directive 92/100/EEC).
19 Note that the right to remuneration does not apply to live performances. These are addressed in Article 8(1) of Directive 2006/115 referred to below.
20 https://www.wmg.com/news/sandbox-partners-warner-music-group-create-music-themed-world-metaverse-36116
21 Società Consortile Fonografici (SCF) v Marco Del Corso, (C-135/10).
22 Phonographic Performance (Ireland) Limited v Ireland (C-162/10).
23 These have largely been based on previous decisions of the CJEU, which however relate to exclusive rights and "communication to the public" under Directive 2001/29/EC/EC.

The concept of CTTP was further developed by the **OSA** case[24] and the REHA case[25]. The OSA case involved a spa which had installed radio and TV sets in the bedrooms of its establishments. The spa refused to pay a licence to the Czech authors' society OSA, arguing that the SCF reasoning applied. However, the CJEU stated that:

"[...] the principles developed in SCF are not relevant in the present case, since SCF does not concern the copyright referred to in Article 3(1) of Directive 2001/29, but rather the right to remuneration of performers and producers of phonograms provided for in Article 8(2) of Council Directive 92/100/EEC."

The ruling led to the complex situation that CTTP of a copyrighted work would not necessarily constitute CTTP of the performance of the performers of that work.

In 2016, this was rectified by the ruling in the **REHA** case[26]. The CJEU (in para 33) found that:

"[...] in a case such as that in the main proceedings, concerning the broadcast of television programmes which allegedly affects not only copyright but also, inter alia, the rights of performers or phonogram producers, both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be applied, **giving the concept of 'communication to the public' in both those provisions the same meaning***" (emphasis added).*

Numerous subsequent rulings have been handed down by the CJEU, causing the legal interpretation of communication to the public, both online and offline, to develop continually, with added complexity. Of particular note is the **GS Media** case[27], which introduced a further element to the analysis of whether there is an act of communication to the public, namely the subjective role of the person instigating the communication.

Although a detailed analysis of the large body of case law on communication to the public is outside the scope of this study, what can be seen from the above is that this important subject continues to evolve and further references to the CJEU are inevitable[28].

More recently, and as examined below, controversial rulings in the **Atresmedia**[29] and **RAAP**[30] cases may have an impact on the of Article 8(2) in practice.

2.2.1.3. Article 8(2) in practice

Although not an obligation under Article 8(2) of the Rental Directive, all EU Member States (except for Malta and Luxembourg) have made the intervention of collective management organisations mandatory for the collection and distribution of equitable remuneration for broadcasting and any communication to the public of phonograms.

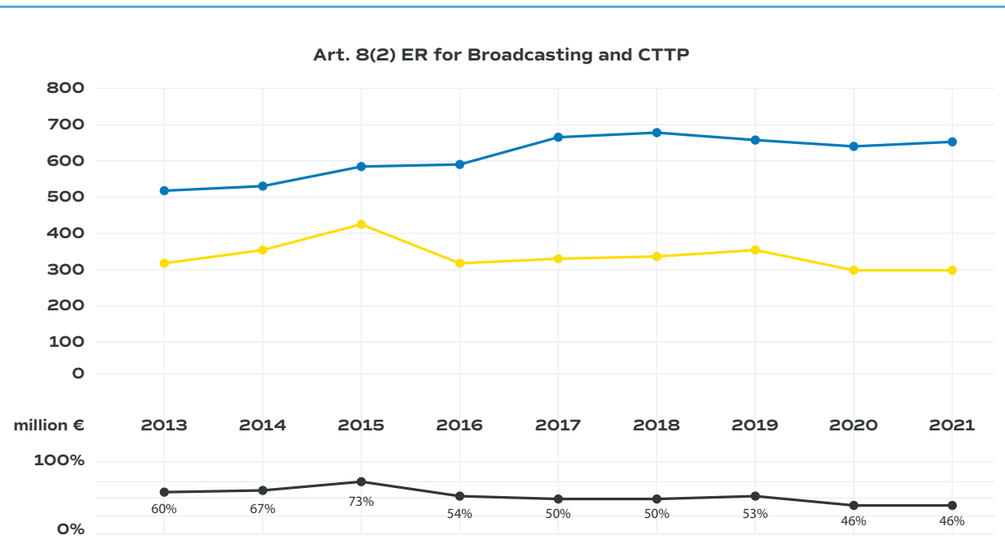


Table 2: The evolution of Article 8(2) equitable remuneration, based on the data of 34 of the 37 AEPO-ARTIS members for the period 2013 to 2021.

For all performers' CMOs, the equitable remuneration based on Article 8(2) represents an essential part of the total collections. In 2013 the equitable remuneration accounted for approximately 60% of the average total collection of performers' CMOs, in 2015 this reached a peak of 73%.

The collection of the equitable remuneration provided performers' CMOs with the necessary means to further develop their activities and explore other types of revenues. In absolute terms, the equitable remuneration has remained stable throughout the years, but its share relative to overall collections is gradually decreasing.

Despite this invariably large share in the general collections of performers' CMOs, we note that – due to the limited harmonising nature of Article 8(2) – there are still major differences in the forms of CTTP for which they can (or cannot) be collected. The concept of **any** communication to the public is not interpreted in the same way everywhere.

The French legislator, for instance, has narrowed application of the equitable remuneration to broadcasting and "communication in public places[31]". Accordingly, equitable remuneration is granted not for any communication to the public, but only when the place where the communication to the public takes place is of a public nature. Other forms of CTTP are subject to the exclusive right.

Most countries consider that equitable remuneration is also due for "webcasting" and "simulcasting".

In countries such as the Czech Republic and Lithuania, the legislation provides for equitable remuneration for the "simultaneous retransmission by cable of the broadcast", therefore including "simulcasting". In countries such as Croatia, "simulcasting" is considered to fall under the term "broadcasting" as well.

In some countries (such as Croatia, the Czech Republic and the Netherlands) "webcasting" is considered to be a type of "broadcasting". In others (such as Spain and Sweden) it falls under the broad term of "communication to the public".

In France the legal framework concerning webcasting has been amended[32], extending the scope of equitable remuneration to web radios under certain conditions. In Belgium web radios fall outside the scope of the equitable remuneration, allowing producers' CMOs to collect remuneration that does not have to be shared with all performers.

This legal framework narrowly defines the services included in the legal regime. Any services of online CTTP not included in this definition remain subject to the exclusive rights of neighbouring rightholders, with the law explicitly excluding online services that have implemented functionalities allowing the user to influence the content of the programme or the sequence of its communication from the scope of equitable remuneration. Thus, this exclusion does not correspond to strict on-demand services and French law relating to equitable remuneration still does not comply with Directive 2006/115/EC and international treaties.

In some countries (such as Croatia and Lithuania) the making available on demand of phonograms is considered to be an act of communication to the public for which equitable remuneration is due. In practice, however, Croatia has not collected any sums for this use and collection in Lithuania has been minimal.

The RAAP judgement

The way in which Article 8(2) will impact performers (and producers) may in practice be profoundly affected by the CJEU's judgment in the RAAP case, which was published on 8 September 2020. The CJEU was very clear in its ruling that it was not permissible to exclude performers from their share of remuneration.

While this case mainly provides food for thought about the international functioning of equitable remuneration, the fact is frequently overlooked that this was a case which RAAP was forced to instigate and which began with a far more limited scope, addressing a considerably more specific and straightforward subject, namely the unfair sharing of remuneration for broadcasting and CTTP between producers and performers in Ireland.

Irish legislation provides that the user shall pay a single licence fee to PPI, a licensing body representing the producer of the sound recording. The sum collected is then shared between the producers and the performers. Unlike in other EU countries, this is not done on the basis of a 50:50 split at source. PPI unilaterally calculates the share to which performers are entitled and obliges RAAP to request the payment for each performer separately.

PPI argued that Irish law has different qualifying criteria for producers and performers; these have the effect of excluding certain performers from certain countries from the right to equitable remuneration. In the case of a sound recording

24 OSA v Léčebné lázně Mariánské Lázně (C-351/12).
25 Reha Training v GEMA (Case C 117/15).
26 Reha Training Gesellschaft für Sport und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs und mechanische Vervielfältigungsrechte eV (GEMA), Case C 117/15.
27 GS Media BV v Sanoma Media Netherlands BV and Others, C-160/15.
28 For a thorough analysis of the relevant case law, see GS Media and its implications for the construction of the right of communication to the public within EU copyright architecture, Eleonora Rosati available here.
29 Atresmedia Corporación de Medios de Comunicación SA v AGEDI, AIE Case C 147/19.
30 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others C-265/19.
31 A similar provision existed under Belgian law, whereby equitable remuneration was not payable in some "non-public places" (such as workspaces). However, in 2014 the law was changed, removing this restriction. Further, the Belgian
32 By law n° 2016-925 "Creation, architecture and heritage" of 7 July 2016.

involving US producers and US performers, for instance, the producer would receive the totality of licence fees payable by users in Ireland. The reason for that was the fact that the payment eligibility criteria contained in the Irish legislation are more flexible for producers than they are for performers.

The CJEU found that the Irish legislation did not comply with Article 8(2) and that in cases where producers are entitled to equitable remuneration, performers are always entitled to a share of it. It stated: "As that remuneration has the fundamental characteristic of being 'shared' between the phonogram producer and the performer, it must give rise to an apportionment between them [...]".

PPI's argument that performers who are neither EEA nationals nor residents and whose performances do not originate in a sound recording carried out in the EEA are not eligible to receive a share of remuneration when those performances are played in Ireland led the court to analyse the subject of material reciprocity and national treatment.

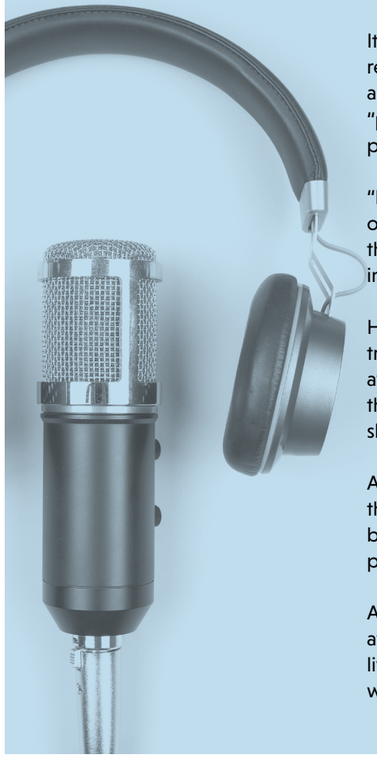
In essence, it reached the conclusion that all performers, regardless – notably – of nationality or residence, are entitled to benefit from the equitable remuneration payable under Article 8(2) of Directive 2006/115, provided that the use of the relevant commercial phonogram occurs within the EEA[33].

It is too early to determine the extent to which this judgment will affect EU CMOs. Different approaches taken by CMOs in different Member States (and non-EU countries) with regard to the principle of material reciprocity will inevitably affect the impact that the ruling will have.

Importantly, the judgment also made express reference to the possibility of the EU legislation being amended to address any issues arising from this case. This did not escape the attention of the European Commission, which, having conducted research in early 2022, launched a "Call For Evidence For An Initiative (Without An Impact Assessment)" in late summer 2022. It states that: "The Commission is considering an initiative that would introduce rules for third country nationals, whether natural or legal persons by amending the Article 8(2) [...]."

The outcome of this Call for Evidence will not be known until the end of 2022. Similarly, the effect in practice of this ruling on the application of Article 8(2) also remains to be seen.

Not all phonograms are protected by Article 8(2)



It should be noted that Article 8(2) does not grant the right to equitable remuneration to all phonograms. The Rome Convention, the WPPT and the acquis communautaire do not protect sound recordings that do not qualify as "phonograms published for commercial purposes", creating a gap in performers' protection.

"Publication" is defined in a similar way as in the Rome Convention, as "the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity".

However, a substantial addition has been made in Article 15 to cover not only such traditionally and physically published phonograms, insofar as "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 if they had been published for commercial purposes".

As a result, phonograms that are not traditionally published, but can be found through on-demand services, will be considered published when they are broadcast and communicated to the public and will therefore be subject to the payment of equitable remuneration.

A number of sound recordings (phonograms) are neither published nor made available on demand. This is notably the case for archive recordings made during live performances; these can nevertheless be exploited through broadcasting without an obligation to pay the performers equitable remuneration.

The Atresmedia judgment

In this case, the TV broadcaster Atresmedia refused to pay equitable remuneration to the Spanish CMOs for performers (AIE) and phonogram producers (AGEDI) for the pre-existing phonograms that were incorporated into its broadcasts.

Until the case of Atresmedia[34], it was never seriously disputed at the EU level that remuneration is payable when a phonogram incorporated into an audiovisual work is communicated to the public. After all (see under 2.2.1.1.), the agreed statement on Article 2(b) of the WPPT (of which Article 8(2) is an application) explicitly states that: "It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work."

Nevertheless, in this case, the CJEU came to the opposite conclusion. Its reasoning can – and has been – highly criticised.

Noting that Directive 2006/115 (and other EU directives) does not define the concept of "phonogram", the court went on to analyse the relevant provisions of the Rome Convention and the WPPT.

The outcome of this analysis, based on a weak a contrario reading of the non-binding "Guide to the Copyright and Related Rights Treaties Administered by WIPO[35]" (which is essentially nothing more than an unofficial commentary, not written by WIPO) was the statement that: "[...] it must be held that an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a 'phonogram' or 'reproduction of that phonogram' within the meaning of Article 8(2) [...]" and that "It follows that the communication to the public of such a recording does not give rise to the right to remuneration provided for in those provisions."

Analysing the possible effect of this judgment, it is important to note the provisions of Recital 16 of Directive 2006/115, which states: "Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public."

It follows that it is possible for national legislation to go further than the provisions of Article 8(2) and grant increased protection to rightholders. The negative effects of the judgment could be avoided by way of a simple amendment to Article 8(2), i.e. adding the wording highlighted in bold: "Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, **including when such a phonogram has been incorporated into an audiovisual fixation**, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them."

Some Member States have been looking at amending their own legislation to restore the "pre-Atresmedia" legal position. This has in fact already been carried out in Croatia and Lithuania, which have used wording very similar to that proposed above.

2.2.2. Audiovisual fixations

As already mentioned, the international treaties and European directives that concern performers' neighbouring rights do not provide the same protection to performances recorded in an audiovisual fixation as performances recorded in a phonogram. Although they are both "performers", actors and musicians do not have the same rights.

With regard to the right of communication to the public assigned to fixations of performances, the Rome Convention and the WPPT are limited to equitable remuneration for the use of **phonograms**. As mentioned earlier, the European legal framework does not grant performers a "general right" of CTTP for all types of recordings of performances. Both audiovisual and audio fixations are protected by the exclusive right of making available. However, in terms of broadcasting and communication to the public of fixations, the **audiovisual sector** does not benefit from the remuneration guaranteed to the **music sector**. A right to equitable remuneration for any broadcasting and communication to the public – as Article 8(2) grants to phonograms – does not exist for audiovisual recordings.

At the international level, after more than 15 years of negotiation and the failure of the diplomatic conference of 2000, the **Beijing Treaty on the Protection of Audiovisual Performances** (Beijing Treaty) was adopted in 2012 and entered into force on 28 April 2020. It is the first international treaty aimed at protecting audiovisual performances.

Despite having been signed by the EU in **2013**, the EU has still not ratified the Treaty. That means its provisions are not yet applicable in the EU Member States, perpetuating further discrimination against performers in the audiovisual sector.

It is set out in Article 11 that performers in the audiovisual sector shall enjoy the exclusive right of authorising the broadcasting and CTTP of their performances fixed in audiovisual fixations. As a result, the Treaty – in theory[36]– goes further than the WPPT with regard to phonograms. However, in the same article, it allows Contracting Parties to choose to provide a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for CTTP, instead of establishing an exclusive right.

33 See paragraphs 61.62,75,88 and 91.
34 Atresmedia Corporación de Medios de Comunicación SA v AGEDI, AIE Case C-147/19.
35 https://www.wipo.int/publications/en/details.jsp?id=361.
36 That is not to say that in practice an exclusive right is more beneficial for performers. The opposite is true.

This stipulation that Contracting Parties may establish a right to equitable remuneration instead of an exclusive right is however hollowed out by the final provision in Article 11 that Contracting Parties may choose to establish a right to equitable remuneration "only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions [...] at all".

As of October 2022, forty-eight Contracting Parties have ratified or acceded to the Treaty. The vast majority have done so without making any notification that they wish to opt for the remuneration right possibility (in Article 11(2)) or the option of providing neither an exclusive nor a remuneration right as set out in Article 11(3). The only country which has opted for the "Article 11(3)" option of granting neither an exclusive nor a remuneration right for any forms of use is China[37].

Very few European countries have ratified the Treaty. This is to be expected since it is inappropriate for the EU Member States to do so prior to the Treaty being ratified by the European Union. Nevertheless, one Member State has not waited. In its accession to the Treaty, the Slovak Republic stated, "In accordance with Article 11, paragraph 2 of the Treaty the Slovak Republic declares that it has set conditions in its legislation for the exercise of the right to equitable remuneration."

In addition, Switzerland (which is not a Member State of the EU but generally adopts EU law in the field of copyright) made the following notification: "Instead of the exclusive right of authorization referred to in Article 11(1), and pursuant to Article 35 of the Swiss Copyright Act of October 9, 1992, Switzerland shall grant a right to remuneration subject to collective management and to the principle of reciprocity for the broadcasting, retransmission or public reception of an audiovisual fixation where it is made from a commercially available audiovisual fixation."

Although it is too early to draw firm conclusions, it is interesting that the two countries that follow the acquis communautaire both opted to introduce a remuneration right rather than an exclusive right. This may reflect the fact that exclusive rights have proven not to reward performers satisfactorily in the EU.

Article 11 keeps all options open and as such does not provide audiovisual performers any **guarantee**. Despite introducing the possibility of a presumption of transfer of performers' rights, Article 12 provides an important potential benefit to such transfer. It offers Contracting Parties the possibility to introduce the provision: **"Independent of the transfer of exclusive rights described** above, national laws or individual, collective or other agreements **may provide the performer with the right to receive royalties or equitable remuneration** for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.[38]"

This can be seen as explicit recognition that exclusive rights are insufficient and can be accompanied by a remuneration right, in the event that they are transferred.

The question remains, however, whether the EU's ratification of this Treaty will effectively improve the situation of actors "in Europe".

To date, the acquis communautaire has never protected audiovisual fixations with respect to the acts of broadcasting and CTTP. Article 8 of Directive 2006/115/EC only grants an exclusive right for live performances and an equitable remuneration right for performances fixed in phonograms published for commercial purposes.

The lack of protection of performers in the audiovisual sector is wholly illogical, a point made recently by Richard Arnold, a leading authority on performers' rights[39], who wrote: "At the very least, performers should be entitled to equitable remuneration for the public performance and communication to the public of films of their performances as well as sound recordings. It must be conceded, however, that **the advantage to performers of conferring on them an unwaivable right to equitable remuneration rather than a full proprietary exclusive right is that they cannot be pressurised by producers into assigning the right away. In the present state of the film and music industries, this is an important factor.**"

Some Member States have rightly rectified this in their national law, but there remains a lack of harmonisation.

Although there is currently no provision in EU or international law for the right to remuneration for broadcasting and communication to the public to apply to **audiovisual** fixations, a number of countries have taken the position that there should be no discrimination against performers in the audiovisual sector and have also granted them a right to remuneration.

This far-sighted approach shows the need for a right to remuneration to be available to audiovisual performers and to be harmonised throughout the EU.

2.2.3. The specific communication to the public of satellite broadcasting, cable retransmission and online transmissions

2.2.3.1. Introduction

As mentioned above (see 2.1.), the concept of "communication to the public" covers the use of music and audiovisual content in many different ways.

While the right to CTTP for performers in Europe is not yet fully provided for in a manner enabling them to make full use of it, individually or through their CMOs, specific regulation has been introduced for certain forms of CTTP. This has been seen very recently with the specific type of CTTP carried out by Online Content Sharing Service Providers[40]. It was also witnessed in the early 1990s when cable distributors started to deploy commercial activities with a cross-border impact.

The European regulations on satellite broadcasting, cable retransmission and online transmissions do not in themselves grant new rights to performers, but they have given collective management the task of "simplifying" the process of obtaining the necessary authorisations and paying the remuneration to the different types of rightholders. As such, they have ensured that these forms of CTTP – in certain EU Member States – have directly led to additional income for performers, via their CMOs, with or without the assistance of additional national rules.

2.2.3.2. Legal framework

2.2.3.2.1. The 1993 "SatCab" Directive

There are no international treaties providing **specific** rules with respect to performers' rights. At the EU level however, the market of these forms of CTTP has been highly regulated since the nineties by adoption of the 1993 "SatCab Directive[41]".

This Directive addressed a number of existing problems regarding potentially conflicting or overlapping rules in the different Member States of the EU that had created legal uncertainty and impeded the free movement of goods and services. To address this, the Directive provided for several rules to resolve shortcomings, covering both the satellite broadcasting and the cable retransmission of a programme.

Communication to the public by satellite

The Directive defines communication to the public by satellite as the "act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth[42]".

While providing a single European definition of communication to the public by satellite for the first time, the SatCab Directive offers authors an exclusive right to authorise this kind of CTTP[43]. As far as performers are concerned (as well as producers and broadcasting organisations), the SatCab Directive relates directly to the pre-existing right of CTTP as introduced in Article 8 of the Rental and Lending Directive[44], which was adopted a year earlier.

The Directive provides[45] that – with respect to the specific act of communication to the public by satellite – each Member State must adhere to at least the level of protection this Article 8 provides performers and other holders of rights related to copyright, as far as the broadcasting and CTTP of their performances is concerned. As such, it only provides performers with an exclusive right for communication to the public by satellite for unfixed performances. Performances fixed in a phonogram are guaranteed at minimum a right to equitable remuneration and performances fixed in an audiovisual fixation have no guaranteed rights with regard to acts of communication to the public by satellite.

However, in Article 6, the SatCab Directive refers to this existing protection as minimum protection, giving Member States the explicit possibility to provide for more far-reaching protection.

In addition, the SatCab Directive addressed the important problem of determining the applicable law in any given set of circumstances. With regard to communication to the public by satellite, Member States had differing copyright legislation, including – in particular – on whether the applicable rules should pertain to the country of emission (or "country of origin") or the country of reception of the broadcast programme.

The Directive resolved this problem by determining that broadcasting only takes place at the point of emission and that the general country of origin principle applies. This only applies to broadcasts originating from within the EU. With respect to broadcasts originating outside the European Union, Member States are free to apply their own laws regarding this matter.

Authorisation to broadcast or communicate a programme to the public by satellite may be by agreement between a CMO and the user. Under certain conditions, Member States have the possibility to organise the licensing in such a way that rightholders of the same category of works (cinematographic works excluded) may all be covered by a collective agreement, irrespectively of whether or not they are members of the relevant rights management organisation[46].

Cable retransmission

With regard to cable retransmission, the Directive neither developed nor modified the scope or nature of rights granted to performers or any other categories of rightholders. It merely provided a definition and harmonises the manner in which the right shall be administered across borders throughout the EU.

Cable retransmission is defined as: "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, or television or radio programmes intended for reception by the public[47]".

37 The Independent State of Samoa has also opted for the Article 11(3) option but only until such time as its national laws have been reformed.
38 Article 12(3) of the Beijing Treaty.
39 Arnold, Performers' Rights, sixth edition, p 52.
40 See Article 17 of Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
41 Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions.
42 Article 1(2).
43 Article 2.
44 Directive 92/100/EEC (now codified as Directive 2006/115/EC).
45 Article 6.
46 Article 3(2).
47 Article 1(3).

It is restricted to retransmission from one Member State to another. The fact that the initial transmission is made by wire or by other means is irrelevant. The SatCab Directive, however, clearly introduced a harmonised rule for the administration of cable retransmission across borders. Article 9(1) provides that: "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society."

A "collecting society" is hereby defined as: "Any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes[48]."

The recourse to **mandatory collective management** pursues two objectives: first, limiting the number of interlocutors to ease the task of the users (cable operators)[49] and, second, ensuring a high-level of protection of performers and other rightholders[50].

CMOs were seen to be in the best position to negotiate the tariffs, administer the collection and distribution of remuneration to the rightholders concerned and to enforce their rights. The explicit requirement for the management of this right to be exercised through CMOs is therefore a crucial element, both in law and – more importantly – in practice.

Article 9(2) covers the situation where a rightholder has **not** transferred the management of their rights to a CMO. Interestingly, it explicitly organises a system whereby CMOs are deemed to be mandated to administer the cross-border cable retransmission right and (related) remuneration on behalf of the rightholder. The scheme is aimed at avoiding duplication of work and guaranteeing the free choice by the rightholder of the CMO mandated to administer their rights.

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

In addition, the Directive ensured a level playing field for rightholders and CMOs throughout the European Union, by stating: "A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society[51]."

2.2.3.2.2. The 2019 "SatCab2" Directive

The original SatCab Directive (due to being drafted in the very early 1990s) does not apply to online transmissions and did not take technological developments such as direct injection and the possibility for broadcasters to provide additional services via their websites or specific apps into account.

In 2016, as part of the EU's general strategy of further developing the Digital Single Market, the Commission proposed a regulation, the key aim of which was to take these technological developments into account and expand the scope of the country of origin principle accordingly.

After much negotiation, agreement was reached to introduce a directive (instead of a regulation) to address these developments, namely Directive (EU) 2019/789 of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of TV and radio programmes and amending Council Directive 93/83/EEC, the "SatCab2 Directive".

Ancillary services

The Directive offers broadcasters more liberty to transmit their programmes via the internet and to offer their viewers the option of catch-up and other forms of postponed viewing. It defines these types of **"ancillary online services"** as: "an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of television or radio programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as of any material which is ancillary to such broadcast".

The SatCab2 Directive extends the scope of the country of origin principle to include these broadcasters' ancillary services[52].

The choice to apply the **country of origin principle**, which was so fundamental to the original SatCab Directive, proved controversial in the negotiations leading up to what became the SatCab2 Directive. Many stakeholders argued that it would prevent them from fully exploiting a programme in a way that would allow them to be fairly remunerated.

It its final form, it was determined that the country of origin principle would only apply to news and current affairs programmes and fully financed own productions of broadcasting organisations. In addition to these limitations, the Directive states that, when setting the amount of the payment to be made for the rights to which the country of origin principle applies, the parties shall take into account all aspects of the ancillary online service, such as features of the service, including the duration of online availability of the programmes provided in that service, the audience and the language versions provided.

It is clarified (in Recital 8) that it will **not** apply to services such as Netflix. In addition, the application of the country of origin principle itself has not been made obligatory. As seen in Article 3(3), the principle "shall be without prejudice to the contractual freedom of the rightholders and broadcasting organisations to agree, in compliance with Union law, to limit the exploitation of such rights, including those under Directive 2001/29/EC."

Retransmission other than by cable retransmission

Besides a European framework for ancillary services, the SatCab2 Directive introduced new rules for the distributors' market. The Directive states that "The development of digital technologies and the internet has transformed the distribution of, and access to, television and radio programmes" and that "Users increasingly expect to have access to television and radio programmes [...] through online services[53]." To meet these challenges, the Directive introduces new rules on means of retransmission of television and radio programmes, other than cable retransmission, by introducing the new concept of "retransmission", which is defined as: "any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC, intended for reception by the public, of an initial transmission from another Member State of television or radio programmes intended for reception by the public, where such initial transmission is by wire or over the air including that by satellite, but is not by online transmission[54]."

Like for cable retransmission, the SatCab2 Directive does not develop or modify the scope or nature of rights granted to performers or any other categories of rightholders. It merely provides a definition and harmonises the way in which the right shall be administered across borders throughout the EU by imposing mandatory collective management.

Direct injection

Finally, the Directive itself offers a solution for the notorious issue of direct injection.

Direct injection is the process whereby broadcasting organisations transmit their programme-carrying signals directly to signal distributors without transmitting their programmes to the public, and the signal distributors send those programme-carrying signals to their users to allow them to watch or listen to the programmes.

There was legal uncertainty as to whether this process constituted two acts of communication to the public (a communication to the public from the broadcasting organisation to the signal distributor and subsequent communication to the public from the signal distributor to the public) or just one, leading to lengthy litigation between distributors and CMOs in countries such as Norway and Belgium.

The SatCab2 Directive, however, confirms that in legal terms both the broadcasting organisation and the signal distributor shall be deemed to be participating in a single act of communication to the public in respect of which they shall both need to obtain authorisation from rightholders.

EU law now obliges all Member States to provide a solution based on the assumption that both broadcasters and distributors have a responsibility and that both are therefore obliged to remunerate the relevant rightholders.

Member States may provide that collective management for obtaining authorisation from rightholders, as made mandatory for retransmission, applies to acts of direct injection too.

48 See Article 1(4) of Directive 93/83/EEC.
49 See Recital 28 of Directive 93/83/EEC.
50 See Recital 24 of Directive 93/83/EEC.
51 See Article 9(2) of Directive 93/83/EEC.
52 See Article 3 of Directive 2019/789.
53 See Recital 2 of Directive 2019/789.
54 For the complete definition, see Article 2(2) of Directive 2019/789.

As such, neither the 1993 SatCab Directive nor the SatCab2 Directive provide performers with additional rights, but the choice to make collective management mandatory for cable retransmission and other forms of retransmission (optionally including direct injection) has offered performers in several Member States the opportunity to effectively receive direct remuneration from the exploitation of their performances by the radio and TV distribution industry.

2.2.3.3. National practice

In general terms, the original SatCab Directive has worked well. Each Member State has provided for compulsory collective management, although the wording used in implementing this Directive varies to some extent on a country-by-country basis.

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

As a result of the mandatory collective management, performers' CMOs have been able to turn this form of communication to the public into a revenue stream for performers. The collection has been stable during the period 2013-2021 representing an average 7% of performers' CMOs total collection (see table 3).

Nevertheless, there is room for improvement. The failure to grant a separate right with regard to cable retransmission, and recently also other forms of retransmission, has led to performers' CMOs being unable to act in a harmonised way throughout Europe. In some countries, the collection of retransmission remuneration for performers is based on the equitable remuneration (of commercial phonograms) set out in Article 8(2) of the Rental and Lending Directive. In other countries, the legislator has gone further and provided performers with an exclusive right with respect to (cable) retransmission. However – as is often the case with exclusive rights – the transfer of that right means that performers' CMOs lose the mandate to collect remuneration directly from the distributors, causing performers to lose their guarantee of a share of this remuneration. Belgium is a country that has faced this situation. In 2014, it therefore introduced a separate remuneration right with regard to cable retransmission, emphasising that this right can only be managed by the performers' own CMOs. This remuneration right has since been extended to other forms of retransmission and to direct injection.

The full impact of the SatCab2 Directive is yet to be seen. Although the deadline for implementation was back in June 2021, at the time of finalising this study not all Member States have completed the transposition. It is crucial for it to lead to more and not less protection for performers. The TV industry is shifting from broadcasting to air and retransmission by means of cable towards online broadcasting and retransmission by other means. It is essential that the remuneration received by performers be unaffected by this change in technical means.

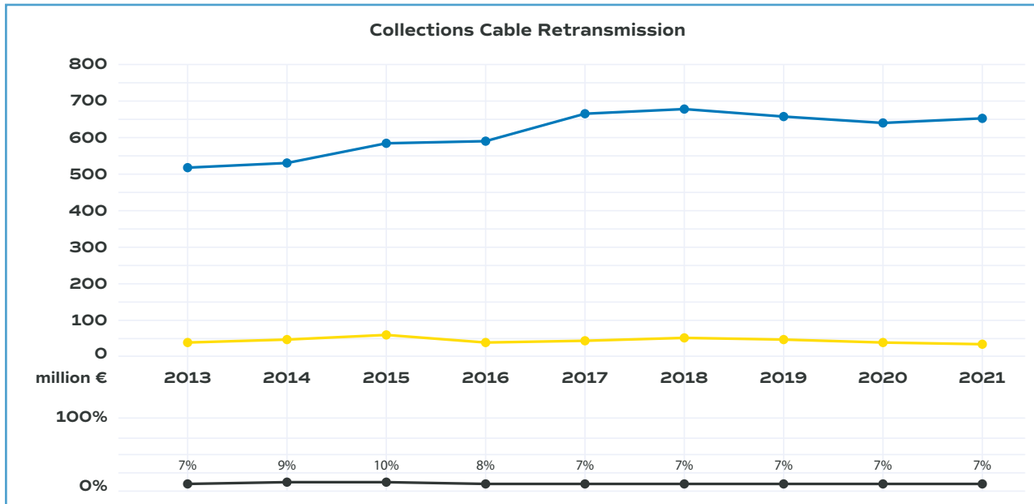


Table 3: The evolution of the collection of cable retransmission fees by 34 of the 37 AEPO-ARTIS members for the period 2013 to 2021.

2.3. MAKING AVAILABLE ON DEMAND

2.3.1. Introduction

The term **making available on demand** is most commonly used in the context of streaming. Streaming is the predominant way in which consumers enjoy music, films and TV today. In the audiovisual sector an ever-increasing number of services (such as Amazon Prime and Apple TV+ etc.) are competing with the once-dominant Netflix platform. In addition, countless national broadcasters provide streaming services in the context of catch-up services and other content. In the music sector, the ubiquitous Spotify, together with Apple, Amazon, Deezer, Tidal and many others, provide access to all the music in the world for less than €10 a month. This offering is made all the more attractive since it appears to be immune to inflation – with the price of a subscription not going up for more than a decade[55].

It should be noted that the decision of Apple in October 2022 to increase its monthly subscription fee to $10.99 was a welcome step in the right direction. Nevertheless, **it is unrealistic to think that the additional revenue generated by this increase in price will be seen by performers.**

In legal terms, making available on demand is considered a **sub-category of CTTP**. As set out in Article 10 of the WPPT, it describes the situation where a specific performance (incorporated into an audio and/or audiovisual recording) is "made available" to the public **so that they can access it at a time and place of their choosing**. Most commonly, this covers the situation where individual songs, TV programmes or films are available on streaming or UGC platforms. It also covers downloading services.

Making available on demand can be distinguished from other forms of CTTP by its degree of interactivity. Streaming may occur in a passive manner when the recording is "fed to you" or it may occur "on demand" i.e. when the consumer actively chooses a specific song/movie and the time and place at which he/she will watch it[56]. In a traditional radio or TV broadcast the user cannot choose (or "demand") an individual song or programme. This can be described as "passive" listening/viewing. With an on-demand streaming or UGC platform, the user can make such a choice (which would be described as "active" listening/viewing)[57].

The level of **interactivity** has very important legal consequences, as there is an important legal distinction between making available and other forms of CTTP. As we have explained, international and European legislation does not grant performers an exclusive right of "communication to the public" covering all forms of CTTP of fixed performances. For phonograms, there is a general right to equitable remuneration. For audiovisual performances there is neither an exclusive right nor a remuneration right.

The situation is different with making available. Here, the international and European legal framework offer performers an exclusive right in the case of both sound and audiovisual recordings.

In theory, this exclusive right should enable performers to control how their performance is used and give them the power to negotiate a fair contract with the producer. **In practice**, it merely leads to the transfer of this exclusive right without any corresponding remuneration. Thus, the choice of an exclusive right and not a remuneration right drastically limits the ability for performers to be paid when their performances are used online.

2.3.2. Legal framework

For phonograms, the making available on demand right was introduced to international legislation by the 1996 **WPPT.** Article 10 thereof provides that:

"Performers shall enjoy the exclusive right of authorising 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."

For audiovisual works, the making available on demand right was introduced to international legislation by the 2012 **Beijing Treaty**.

Article 10 of the Treaty stipulates that: *"Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in audiovisual fixations, 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."*

Making available on demand was not considered to be a new type of right. It has been designed as **a form of CTTP**. This is best demonstrated by the way in which authors' internet rights were designed in the WIPO Copyright Treaty (WCT).

Like the 1961 Rome Convention for performers, the 1886 Berne Convention did not grant authors a general right to CTTP. However, it did provide authors with exclusive rights to specific forms of CTTP (such as the exclusive right of communication to the public by way of public performance, the exclusive right of communication to the public by way of broadcasting[58] etc.). With the signing of the WCT in 1996, WIPO chose to rationalise these existing provisions and specified explicitly that making available fell within a new, broad general category of **any** communication to the public introduced by it.

55 When platforms in Norway increased the price of a subscription there were no serious complaints from consumers.
56 The term "streaming" also includes live streaming of concerts, for example. These have no or minimal levels of interactivity and would not be classified as active or "on-demand" streaming.
57 In many cases, these platforms provide a range of different functions, some of which would rightly be classified as making available on demand and some of which would not – see chapter 2.4.
58 See Berne Convention Article 11, Article 11bis.

Article 8 of the **WCT** provides:

"Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing ***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 these works from a place and at a time individually chosen by them."*

This illustrates a highly significant difference (with great practical importance) between performers' rights in the **WPPT** and authors' rights in the WCT. Authors have an exclusive right covering any communication to the public, **including** making available. Performers on the other hand receive a remuneration right for any communication of commercial phonograms, **excluding** making available. For making available on demand they were given an exclusive right, like authors.

The granting to performers of an exclusive right of making available on demand rather than a remuneration right under WIPO was well-intended and theoretically exclusive rights are supposed to give greater protection than remuneration rights. This was seen to be the case particularly in a context of growing illegal uses on the internet ("piracy").

Laws introduced a quarter of a century ago cannot be expected to have predicted the technological applications we use today to reach an audience. In 2001, the EU legislature followed the approach taken by WIPO in 1996 and chose to introduce an exclusive right for making available.

The technology which allowed the internet to function as a marketplace for legal use of content had not yet been created. In 2001, the only known on-demand library style streaming service was "Rhapsody". Apple only began offering the possibility to download individual tracks from its iTunes Store in 2003. It was not until 2006 that Spotify was launched.

With the creation of a legal marketplace still in the pipeline, the exclusive right was initially used to **prohibit** the use of protected content online, rather than authorise it. It was used to prevent "pirated" copies from being "made available" online. Sites like PirateBay were prosecuted for infringing this right. The exclusive right did not create any added value. Its only function was to protect existing, legal exploitation of protected content

However, when the legal streaming and download sites came along, the exclusive right began to have added financial value. Companies such as Apple and Spotify paid record labels large sums of money to "buy the right" to make protected content available online. The exclusive right was now being used to "authorise" use, rather than to prohibit it.

Performers were left somewhat in the lurch Prior to the advent of commercial streaming/downloads, when performers transferred the exclusive making available on demand right to the producer, it was done on the understanding that this would allow the producer to hold all necessary rights to prevent piracy of the performers' recording. They could not have known that when Spotify et al. began business, the exclusive right could be monetised and used to **authorise** use, not prohibit it.

But by that point it was too late. Performers had already transferred their making available right to the producer. Accordingly, they were unable to mandate their CMOs to manage that right. Consequently, the performer had no control over how it could be exploited and there was no possibility for a CMO to monetise the right on behalf of a performer.

This practice persists today. In almost all cases a performer will have to transfer the exclusive making available right to the producer.

Although well intended, time has shown that the choice of an exclusive right was the wrong one. Indeed, more and more research into the streaming market (music and audiovisual) shows that performers with an exclusive right alone are not guaranteed fair remuneration. A small number of Member States have taken the matter into their own hands and introduced their own legislation in this area, with varying degrees of success.

In 2012 the internet had already proven that it could accommodate legal business models. Nevertheless, when the **Beijing Treaty** was signed the decision was made to follow the WPPT approach and introduce the right to making available for audiovisual performances as a separate exclusive right. It is remarkable that with respect to CTTP as a general right, Contracting Parties have the option to introduce it as an exclusive right (Article 11(1)), a remuneration right (Article 11(2)) or even no right at all (Article 11(3)). However, with regard to acts of CTTP that qualify as making available on demand, the introduction of an exclusive right becomes an obligation.

Article 10 of the Treaty stipulates that:

"Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in audiovisual fixations, 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."

At the European level, the making available right for performers was introduced by the Information Society Directive (Directive 2001/29/EC). In line with the WCT, this Directive introduced a general right to communication to the public for authors, which includes making available in Article 3(1).

Performers, having already received in 1992 a **remuneration** right for "broadcasting by wireless means or for **any communication to the public**" of commercial phonograms[59] received only an **exclusive** right for making available on demand. Article 3(2)(a) of the Information Society Directive states:

"Member States shall provide for the exclusive right [for performers] to authorise 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 was granted for all types of fixations, including audiovisual fixations.

Only Spain implemented the Information Society Directive in a way that links the transfer of the exclusive right of making available to a right to remuneration for all categories of fixed performances and for all forms of making available on demand, while introducing a general presumption of transfer of this right to producers.

As already mentioned under 2.2.2., this approach is also reflected in the Beijing Treaty. In Article 12, the Beijing Treaty links the practice of a presumption of transfer to the possibility for Contracting Parties to couple it with a right to equitable remuneration for making available.

2.3.3. The Copyright in the Digital Single Market Directive (the "CDSM Directive")

In 2014, the European Commission launched an extensive consultation process on the EU copyright acquis, including on the rights that apply to online exploitations. After intense negotiations involving a wide range of stakeholders, this ultimately led to the **introduction of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC**, the "CDSM Directive".

The CDSM Directive covers a wide range of intellectual property rights, as well as provisions aimed at ensuring consumers have access to cultural content. Although it does not address making available on demand specifically, it is undeniably a reaction to an online environment where "new business models and new actors continue to emerge[60]". These include actors such as Netflix, Spotify, Disney+ and other online streaming platforms, whose business methods greatly depend on the right of making available. It refers to "rapid technological developments that continue to transform the way works and other subject matter are created, produced, distributed and exploited[61]" and aims to make legislation "future-proof", meaning that "in some areas it is necessary to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights[62]".

Apart from these general principles that apply to all chapters of the Directive, it also introduces specific rules for the use of content by online content-sharing service providers ("OCSSPs") such as YouTube, TikTok, Roblox, Facebook, Twitch etc., which is covered in Article 17.

Acts of making available on demand carried out by platforms such as Spotify and Netflix etc. (i.e. those platforms that are not OCSSPs) are not directly targeted by any specific article in the CDSM Directive. Nevertheless, along with all other elements of performers' economic rights, these fall within the wide-ranging scope of Article 18. As will be shown below, there is an obligation incumbent upon Member States to put in place mechanisms that ensure that performers (and authors) receive "appropriate and proportionate remuneration" for all exploitations, including the making available on demand of their performances and works.

59 See Council 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 Article 8(2). This Directive was codified by Directive 2006/115/EC, which reiterates the remuneration right for "broadcasting by wireless means or for any communication to the public", likewise in Article 8(2) thereof.
60 Recital 3 of Directive 2019/790.
61 Recital 3 of Directive 2019/790.
62 Recital 3 of Directive 2019/790.

2.3.3.1. Article 18

Article 18 is contained within Chapter 3 of the CDSM Directive entitled "Fair remuneration in exploitation contracts of authors and performers". It provides that:

"1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests."

This Article creates a broad obligation for Member States to **ensure** that performers receive "appropriate and proportionate remuneration" **for all forms of exploitation** of their performances. It therefore **includes, amongst other things, exploitations that fall within the scope of making available on demand.**

The Directive obliges Member States that do not already have provisions in place e**nsuring that performers receive appropriate and proportionate remuneration in the context of making available on demand** to introduce **"mechanisms"** that will achieve the **goal** of Article 18 i.e. to ensure performers and authors receive appropriate and proportionate remuneration.

In terms of the impact of Article 18 on making available on demand, the CDSM Directive stops short of explicitly introducing an unwaivable right to remuneration for making available on demand subject to compulsory collective management.

It has long been demonstrated by the performers' community that the most developed mechanism to **ensure** performers receive "appropriate and proportionate remuneration" for all exploitations within the EU single market is an unwaivable right to remuneration, collected from users and subject to collective management.

In June 2022, the European Commission confirmed that this mechanism – i.e. the introduction of an unwaivable right to equitable remuneration collected from users and subject to collective management – would be a valid way of transposing the Directive and would therefore achieve the goal of ensuring performers receive appropriate and proportionate remuneration.

In response to a formal written parliamentary question, Commissioner Breton responded that: "The Commission considers that, in principle, Member States could transpose article 18 through an unwaivable remuneration right provided that this complies with relevant EU law, including the principle of contractual freedom, fair balance of rights and interests, and the exclusive rights in the copyright acquis. Any provision implementing article 18 should secure appropriate and proportionate remuneration to authors and performers and should not deprive them of their freedom to decide in the first place whether or not to license or transfer their rights.[63]"

Another important element that Breton's answer confirms is that a mere **copy/paste literal transposition of Article 18 is not in compliance with the CDSM Directive**, except in the small number of Member States which can already claim that performers receive appropriate and proportionate remuneration for making available. He states that: "Article 18 [...] aims at ensuring appropriate and proportionate remuneration for authors and performers when they license or transfer their exclusive rights for the exploitation of their works or other subject matter. **Member States can implement this provision through different mechanisms** [...] provided they are in conformity with EU law."

Accordingly, for implementation to comply with the CDSM Directive, Member States can decide **which mechanism** they wish to introduce to ensure appropriate and proportionate remuneration, but they must introduce **a mechanism** if such a remuneration is not already part of their legal system.

When implementing the CDSM Directive, one of the very few Member States that could claim that it already had a mechanism in place to ensure that performers receive appropriate and proportionate remuneration is Spain. Prior to the introduction of the CDSM Directive, Spanish legislation already granted performers a right to remuneration upon the transfer of their making available right. For that reason, in Spain's case (but not in the case of the vast majority of other Member States), a copy/paste literal implementation of the Directive is sufficient.

Having established that the vast majority of Member States must introduce a mechanism to ensure performers and authors receive appropriate and proportionate remuneration, the question arises as to what that mechanism should be.

It is a fundamental principle of EU law that the implementation of Directives must be **effective in practice**.

In Belgium, recognising that performers (and authors) were not receiving "appropriate and proportionate remuneration" for the exploitation of their performances and works from commercial streaming platforms, the law implementing the CDSM Directive introduced an unwaivable remuneration right that applies when a performer has transferred their exclusive making available right to a producer and their performances or works are made available on a commercial streaming platform. Public service streaming platforms and platforms enabling permanent downloads[64] are excluded from the obligation to pay equitable remuneration.

Member States are free to opt for alternative mechanisms, **provided that they ensure performers receive appropriate and proportionate remuneration**. However, experience has shown that in the vast majority of cases the **most effective** mechanism to achieve this goal is a right to equitable remuneration, collected from users and subject to compulsory collective management

It is the responsibility of the European Commission to monitor how Member States have implemented the CDSM Directive. It shall carry out a final legal assessment of the implementing measures chosen by Member States.

In light of the above, it appears clear that **a literal copy/paste implementation with no accompanying mechanism will not be in compliance with the CDSM Directive** (unless a Member State can show that mechanisms already exist that guarantee appropriate and proportionate remuneration). A large number of Member States have opted for such a literal, copy/paste approach and it is hoped – and to be expected – that this will be picked up on by the Commission and that those Member States will be obliged to introduce the necessary mechanism.

2.3.3.2. Article 17

Article 17 of the CDSM Directive addresses what has been referred to as the "value gap". The "gap" referred to existed because in application of the **e-Commerce Directive** (2000/31/EC), internet service providers were not considered liable for the content they were making available online. They benefitted financially from making this content available, but none of this financial benefit was received or shared with rightholders (producers, performers and authors).

The content of this highly complex article was the result of intense lobbying representing conflicting interests by stakeholders such as rightholders, tech giants (YouTube, Google etc.) and consumer organisations which were concerned that any regulation could result in a decrease of civil liberties and prevent non-infringing content being made available on platforms. The outcome is a compromise between these interests; it lacks clarity and has already been subject to legal challenge[65].

For performers, the most important element of Article 17 of the CDSM Directive is the provision contained in 17(1), which states that:

"Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter."

This provision confirms that an online content-sharing service provider (OCSSP) performs an act of communication to the public or making available on demand to the public when it gives access to protected subject matter. Further, it introduces an obligation to obtain authorisation for this act.

These provisions are relevant to performers since OCSSPs are required to obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, and Article 3(2)(a) grants performers the exclusive right of **making available.**

It could be argued that an authorisation would not need to be obtained from performers, since although they are clearly rightholders under Article 3(2)(a) of Directive 2001/29/EC, they are almost always forced to transfer their right to the producer as a result of standard one-sided contractual practices and their weak negotiating position[66].

If that argument were accepted, then a literal implementation of Article 17 would not achieve its intended aim or would at the very least cause confusion. For that reason, the manner in which Article 17 is transposed is critical for performers.

To ensure effective implementation of the Directive and ensure that performers benefit in practice from the full protection that this Article is designed to provide, **this Article must be viewed in the context of the Directive as a whole and Article 18 must be applied when implementing Article 17.**

The starting point is the principle contained in Article 18 that Member States must ensure that performers receive appropriate and proportionate remuneration for the exploitation of their performances. Such exploitation of their performances undoubtedly includes use made by OCSSPs.

This could be achieved in two ways. One option would be to explicitly state that the "authorisation" referred to in Article 17 would be subject to compulsory collective management. In other words, if an OCSSP wished to use a work containing a performance, it would first need to obtain authorisation from the relevant performers' CMO. This option is explicitly made possible by Article 17(1), which presents a licence agreement as an example, rather than the only option.

Alternatively, legislation could grant performers an unwaivable right to remuneration for the making available on demand

63 https://www.europarl.europa.eu/doceo/document/E-9-2022-001255-ASW_EN.pdf.
64 In the case of a hybrid commercial streaming platform that enables both permanent downloads and non-permanent streaming, equitable remuneration is payable on the streaming part of that service only.
65 Republic of Poland v European Parliament and Council of the European Union (Case C-401/19) in which the Republic of Poland sought the annulment of Article 17(4)(b) and Article 17(4)(c).
66 This weak negotiating position was acknowledged in Recital 72 of the Directive, which states that:
"Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law."

of their performances subject to compulsory collective management and payable by the OCSSPs[67].

The need for these measures is illustrated by the current practices of phonogram producers in their dealings with OCSSPs. It is reported that they authorise OCSSPs to use their catalogue for a specific period of time in exchange for a one-off lump sum. To take just one example, one study[68] estimated that in 2021 TikTok paid phonogram producers a lump sum of €178 million. There is no guarantee whatsoever that this income will be shared with the performers in an appropriate and proportionate manner. After all, individual producers are not bound by the transparency obligations of the 2014 Collective Rights Management Directive, which all EU CMOs are subject to.

Furthermore, it is understood that no accurate reporting of the use of the recordings is provided by TikTok to the producers. Accordingly, even if producers **were** to share this revenue with performers it would be impossible for this to be done in a "proportionate" manner as required under Article 18.

Under these circumstances, performers receive no benefit from Article 17. Those Member States that opt for a literal implementation of Article 17 may therefore fail to ensure that performers receive "appropriate and proportionate remuneration". To achieve the aim of Article 18, it is essential that Member States follow the approach of Belgium and Germany and introduce legislation that ensures performers are remunerated for the use of their performances by OCSSPs too.

The Belgian approach

Belgium introduced a new right to remuneration specifically for online content sharing. This right to remuneration arises where a performer has transferred his or her exclusive right to authorise or prohibit the CTTP of their performances by an OCSSP. It is non-transferable, cannot be waived and can only be managed by a performers' CMO.

The manner in which this was achieved is important and enables a fuller understanding of how Articles 17 and 18 work in combination. Article 17 states that when OCSSPs provide public access to artists' performances uploaded by their users, they are performing an act of CTTP to the public which is subject to authorisation of the rightholders.

Belgium acknowledged the fact that under Article 18 it is obliged "to ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration." It noted also that they "shall be free to use different mechanisms [...]".

Accordingly, to ensure that performers receive appropriate and proportionate remuneration when OCSSPs communicate their recordings to a public (including via making available), Belgium introduced an unwaivable right to equitable remuneration, subject to compulsory collective management to be paid by OCSSPs. Without such a measure, Belgium would have failed in its obligation to introduce a mechanism ensuring that performers receive appropriate and proportionate remuneration for this type of use.

The legislative manner in which this was achieved is not complex. Belgium opted for a very simple, literal (copy-paste) implementation of Article 17, but at the same time introduced a supplementary provision containing the right to equitable remuneration payable by OCSSPs.

Following political pressure, very shortly thereafter it was decided that commercial streaming platforms should also pay equitable remuneration and a further provision was introduced to ensure that when a performer transfers their exclusive making available right, he/she is entitled to receive an unwaivable payment of equitable remuneration from the user.

This Belgian model is a simple and effective way for all Member States to comply with their obligation to ensure that performers receive "appropriate and proportionate remuneration".

It can – and should – be followed by all Member States, regardless of whether or not they have already implemented the CDSM Directive.

The German Approach

In implementing Article 17, German legislators also took note of their obligation under Article 18 to ensure performers receive appropriate and proportionate remuneration when they transfer their exclusive rights.

They sought a solution that guarantees that performers receive remuneration to be paid by OCSSPs via collective management. Their approach was to introduce a system of equitable remuneration based on the model found in Article 5 of Directive 2006/115/EC.

This right to equitable remuneration for the acts of CTTP (including making available) carried out by the OCSSPs was supplemented by two other separate remuneration rights applicable to the exception of parody and for the unauthorised use of "small extracts" of copyright protected recordings.

The Spanish Approach

Unlike almost all other EU Member States, Spain did not need to introduce a "mechanism" to ensure that performers receive appropriate and proportionate remuneration. The reason was that they **already had a guaranteed system that is achieving this goal.**

In Spain, the Spanish law 23/2006 of 7 July 2006[69] amended the IP Law of 1996, rendering the act of making available on demand a specific act of CTTP. The amendment to the law also introduced a right for performers (who are by law presumed to have transferred their exclusive making available right to the producer) to receive equitable remuneration for the making available on demand of their performances. This law already applied to traditional streaming platforms such as Spotify and Netflix and is now deemed to apply to OCSSPs as well.

Several other Member States have implemented the Directive and granted a right to equitable remuneration to performers. In Slovenia, for example, performers in the audiovisual sector have received such a right, together with other measures remedying the previous discrimination against actors, compared to performers in the music sector. Discussions are ongoing with a view to extending this right so that it covers the music sector too.

It can be seen that different Member States take different approaches. Nevertheless, there is a slow but noticeable trend of progressive legislation being introduced that grants performers rights to equitable remuneration.

This however is something that must be achieved in every Member State. For those Member States that have not already done so, AEPO-ARTIS advocates introduction of the following wording into their national legislation:

"Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have 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 should be unwaivable and collected and administered by a performers' collective management organisation."

Furthermore, in any forthcoming review of the EU or WIPO copyright legislation the same wording should be included.

67 This is the approach taken by Germany and Belgium.
68 https://www.musicbusinessworldwide.com/podcast/tiktok-start-paying-the-music-industry-properly/.
69 In the context of reviewing the national law to implement the provisions of Directive 2001/29/EC/EC.

2.3.4. Making available on demand in practice – the specific case of the music sector

As previously indicated, in most cases, due to the imbalanced contractual relationship between performers and producers, this exclusive right of making available is part of the package of rights that is transferred to the producer and in respect of which there is no possibility of collective management for performers. In practice, performers receive very little financial benefit from this transfer of rights as a result of the extremely one-sided contracts they are confronted with.

The following section focuses on the consequences of the legal classification of the different types of music streaming functionalities provided by platforms such as Apple, Spotify and Deezer (to name just a few). Their use of music is of massive significance to the music industry. Streaming is reported to have accounted for 65% of global revenues in the music sector in 2021[70] and growth continues to be seen every year.

> "This is an exhilarating time for artists and for fans and the music they love. The entire music ecosystem is growing – by genre, by geography, by platform, by consumer demand [...] **And the very definition of music consumption has evolved and deepened."**
>
> **Lucien Grainge**
> CEO of Universal Music Group [71]

Standard streaming services contain a number of different functionalities. Whether these are classified as making available on demand (and therefore fall under Article 3(2) of Directive 2001/29/EC) or are classified as broadcasting and any CTTP (and therefore fall under Article 8(2) of Directive 2006/115/EC) is of great importance in the music sector.

If they are classified as making available on demand, they are subject to the exclusive making available right[72]. As previously mentioned, in almost all cases performers transfer this exclusive right to producers.

If they are classified as broadcasting and any CTTP, they are subject to the remuneration right for the use of commercial phonograms and as such remuneration ought to be paid by the streaming platforms to performers' CMOs.

Based on the existing international and European legal framework, we can see that the determining factor is **whether or not a member of the public can access a performance from a place and at a time individually chosen.** In some cases this is clear. For example, when listening to traditional radio broadcasting, the user has no control over each song listened to. On the other hand, the user can open a streaming app and control which song they wish to listen to from amongst a selection of millions of other songs. These services therefore make it possible for users to have **complete control over the time (and place) at which they listen to a specific song.** If each of those criteria are met, an act of making available occurs. If any of them are not met, the act falls outside the category of making available.

Looking at some of the more popular streaming services, it is evident that **they provide functions which themselves** indicate that they would fall under the category of broadcasting and any CTTP.

Spotify offers the "Spotify Radio" function. The user chooses a specific song and thereafter an algorithm determines a list of similar songs that may appeal to the listener. The user has no control over which songs will be included in that list. They are contained in that list purely by virtue of the algorithm, meaning that the consumer does not choose these specific songs.

Apple Music provides a similar function called "Create Station". However, unlike Spotify Radio, users cannot see in advance all the songs that the algorithm has chosen for them, limiting the degree of control even further. Apple Music also includes "Apple Radio", which enables the user to listen to one of several live broadcasts provided by Apple and available in a number of different genres. The live nature of these broadcasts clearly shows they lack the needed interactivity to be categorised as making available.

With some freemium services, in addition to being unable to choose a specific song, the user cannot control the **time** it is played. In most cases, after a specific number of songs have been played, an advert is then played. There will also be less interactivity/ability to control which specific song is listened to. For example, listeners may be able to skip five or six songs, but then have to listen to a song in its entirety without any control over which song follows.

While the **name** of the functionality is not decisive in classifying whether that functionality falls under the category of broadcasting and any CTTP or making available, it is apparent that platforms are promoting these functionalities as something akin to traditional "radio".

While the legal distinction between Article 8(2) and making available is very clear, practical implementation is held back by a far too broad interpretation of the scope of making available. As a result, the share performers are entitled to is disproportionately low and is massively lower than the value created by the industry as a whole.

The way in which streaming services work and the way in which rightholders receive money from these services is largely misunderstood. The common belief is that all musicians receive the amount of €0.003, for example, per stream. In fact, the system works very differently from that.

The money that a subscriber pays (or revenue generated from advertising on freemium services) is paid into a "pot". From that pot (approximately) 30% is retained by the platform, 15% is paid to the songwriters and the remaining 55% is paid to the record label. No money is paid directly to the performers. The record label may – or may not – pass on a share of its revenue to performers, but this will depend on the contract the performers have been able to negotiate with the record label. Non-featured artists will always receive zero.

There have been many studies addressing how streaming revenue is split, but few have focused in detail on how the 55% share received by the labels is actually divided. The 2021 CMU Study titled "Performer Payments from Streaming[73]", shows how the share performers **actually** receive is massively affected by contractual practices.

This is most obvious in the case of non-featured artists. Their contracts grant them no royalties whatsoever. As a result, regardless of their contribution to the recording, they do not share in its success[74].

At first sight, for featured performers, some modern contracts (i.e. made during the past five years) do not seem unreasonable. They may include a royalty rate in the region of 15-25%. If performers **actually received** this amount of the producer's gross revenue, then it might be argued that the existing streaming business model works adequately for performers. However, the CMU study states that "an artist is likely to receive a 15-25% share of any monies the label receives, albeit subject to deductions, including payments to any record producers and guest artists, and some other complexities. Which means on average a **featured artist on a new deal might receive approximately 8.4%** of any monies allocated to a track on which they appear."

It is also obvious in the case of "legacy" artists[75]". Here, the CMU study states: "Royalty rates on legacy deals vary hugely depending on country and era, but based on an approximate average artist royalty of 12.5%, once common legacy deal deductions are taken into account the **featured artist is likely receiving less than 5%** of any monies allocated to a track on which they appear."

The most fundamental point to note is that **having a contract with a royalty rate (of 22%, for example) does not mean that the artist receives 22%**. Indeed, because of the way record contracts are structured, the artist is more **likely to receive nothing,** despite the fact that the record company has recouped all its expenses and is making considerable profits[76].

The lack of transparency and the degree of confidentiality insisted upon by producers means that there is limited evidence of these practices. However, Sony has provided an example (below) of what it claims is a typical record contract with a major label[77].

70 IFPI Global Music Report 2022.
71 https://variety.com/2022/music/news/universal-music-lucian-grainges-new-years-memo-to-staff-1235152364/.
72 Whether they are also subject to the remuneration right in Article 8(2) is an important question and one which has not yet been addressed at the EU level. Article 8(2) states: "Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user [...] for any communication to the public". Making available is a form of communication to the public. It can therefore be argued that equitable remuneration is payable under Article 8(2) for making available.
73 See p. 3: https://cmuinsights.com/performerpaymentsfromstreaming/.
74 It remains to be seen whether the legislative intervention of the contract adjustment provisions contained in Article 20 of Directive 2019/790 will enable performers to override these contractual provisions, but for practical reasons this is unlikely. Making a claim against a producer will inevitably negatively affect the prospect of obtaining further work.
75 Broadly speaking, these would include artists recording in the 60s and 70s.
76 For a detailed explanation of the recoupment process, see the DCMS report, paragraph 45.
77 See the UK IPO study: "Music Creators' Earnings in the Digital Era, p. 220: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020133/music-creators-earnings-report.pdf.

Sony Featured Artist Royalty Deal: Profit and Loss (2020)

			Label break-even point	Label 10% margine	Label £300k profit	Arlist recoups		% of Revenue: calculated in relation to 'Label 10% Margin'
Streams (Millions)	10	100	244	314	378	458	1,000	
Gross Revenue (£000s)	£50	£500	£1,222	£1,571	£1,889	£2,292	£5,000	
Artist Advance (£000s)	£300	£300	£300	£300	£300	£300	£300	19,1%
Recording Costs (£000s)	£250	£250	£250	£250	£250	£250	£250	15,9%
Artist Royalty (£000s)	£0	£0	£0	£0	£0	£0	£650	0%
Marketing (30%/£300k minimum) (£000s)	£300	£300	£367	£471	£567	£688	£150	30%
Overhead (25%) (£000s)	£13	£125	£306	£398	£472	£673	£125	25%
Label profit/loss (£000s)	(£813)	(£475)	(£1)	£157	£300	£481	£1,050	10%
Artist Total	**£300**	**£300**	**£300**	**£300**	**£300**	**£300**	**£300**	

This example (featuring an advance which is vastly higher than most bands would receive) is based on a performer receiving a 19.1% royalty. It can be seen that the producer immediately starts to receive revenue from the exploitation of the recording, but the performer receives nothing. This is because the 19.1% royalty is used to pay back the advance and recording costs. However, **none** of the revenue received by the producer is set against these costs.

The consequence is that in this example – which is based on an **extremely successful** song, with multi-million streams – the producer starts to receive payments from the streaming platform after the first stream. After 244 million streams, the producer has recouped all its costs and will start to make a profit. The performer will not yet receive any payments at this point. It is only after approximately double this number of streams that the performer will receive their first actual payment. By that time (after 458 million plus one streams) the producer will have received approximately £2.5 million gross revenue.

The 19.1% royalty, which may seem attractive, is in fact payable not on the gross revenues of the producer, but on that sum **after various** amounts have been deducted. For example, in this case we can see[78] that the performer's royalty is calculated after unspecified "overheads" amounting to **25% of gross revenue** have been deducted, as well as marketing costs of **30%** of gross revenue[79].

It follows that whatever percentage a featured performer is contractually entitled to is of a far smaller "pie" than might be imagined at first sight.

In addition, it must be emphasised that when a performer starts to receive royalties from their label, these payments cannot directly be regarded as clear profits derived from their artistic efforts. Just like a record label, a performer also has to recoup the (ever-growing) financial investment they make in creating a recording.

Record labels will refer to the risk they take in investing in an artist and giving them an advance. What is less frequently talked about is the investment that the artist makes in terms of unpaid time spent rehearsing and self-promotion, let alone the costs of equipment and recording and rehearsal facilities.

In an attempt to address such issues, in France, after six years of negotiations, **an agreement was signed between producers and performers' organisations**, aimed at achieving a fairer streaming market in the music sector. Various provisions were contained in this agreement, including a minimum royalty rate, a minimum advance payment and a slight increase in payments to non-featured artists, proportionate to the success of the recording to which they contributed.

In practice, this agreement will be of limited benefit to performers. The agreed royalty rate and advance payments are very low. Furthermore, a highly significant point is that it will only apply to **future** French recordings. As such it does nothing to improve the situation of performers whose **existing** contracts contain no or extremely low royalty provisions.

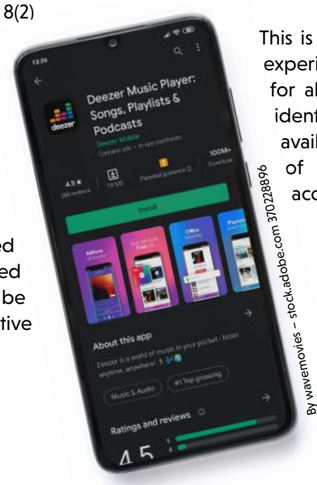
While this agreement may seem to be a step forward in symbolic terms, in reality it is another example of producers being able to impose poor contractual terms on performers due to their strong bargaining power. In addition, the length of time taken to achieve this agreement (over six years) indicates that this is not a viable approach that should be pursued by other Member States.

However, it is not only record labels that are benefitting massively from the contribution of performers. Streaming platforms are continuing to grow and (in a large majority of EU countries) they still do not pay performers any remuneration.

Spotify Radio, Apple Create Station, Deezer Flow etc.

Currently streaming platforms are, on a daily basis, carrying out millions of acts of communication to the public of music to which the remuneration right in Article 8(2) of Directive 2006/115/EC should apply, but only in a very few circumstances is remuneration actually being collected. These acts generate vast revenue for the platforms, but at present performers are not able to use the proper rights they have to collect a share of that revenue.

Commercial practices need to be adapted to ensure that existing legislation is applied in a technology neutral way. If this cannot be achieved, governments should play an active role in facilitating a solution.



By wavemaven – stock.adobe.com 370128896

Once this can be achieved, it will be necessary to implement and apply different tariffs for these services. Tariffs will need to be agreed (or established in accordance with national legislation/practices). A protocol for determining which specific use should be subject to the right of remuneration and which should be categorised as making available needs to be determined.

This is an area in which CMOs have the necessary experience to establish a practice that will work for all parties concerned. CMOs are capable of identifying and distinguishing between making available and broadcasting and any CTTP and of collecting and distributing remuneration accordingly.

78 There are two typos in this chart produced by Sony. In the second column from the right the figure of £150 should read £1500 and the figure of £125 should read £1250.
79 Numerous claims are made concerning the unreasonable and allegedly improper accounting practices of major record labels. It is frequently argued that some deductions made are entirely inappropriate.

2.4. CONCLUSIONS

The term "communication to the public" (undefined in legislation) covers a wide and increasing range of technological methods by which recordings made by performers can be viewed and listened to around the world. As technology has evolved, it has proven hard for the relevant legal framework to catch up.

With regard to phonograms, the 1961 Rome Convention introduced a right to equitable remuneration for broadcasting and CTTP, subject to possible limitations. In the EU this was followed by the 1992 Rental and Lending Directive, which provided a right ensuring that a **single equitable remuneration** is paid by the user if a phonogram is used for broadcasting by wireless means or for any CTTP. It also included the obligation that the remuneration be shared between performers and producers. Regrettably, it did not specify that this should be shared equally, but in the vast majority of countries that is the case.

In 1961, the Rome Convention was the first legal instrument to address broadcasting and CTTP for performers. The WPPT, introduced in 1996, increased the protection granted and its provisions concerning broadcasting and CTTP largely mirrored those of the Rental and Lending Directive and marked no significant change regarding the payment of equitable remuneration.

As required, EU Member States have a system of equitable remuneration in respect of CTTP. Variations exist among Member States as to precisely which forms of communication are covered by the right to equitable remuneration. Nevertheless, equitable remuneration for broadcasting and CTTP remains the highest source of collection for performers' CMOs, representing still 46% of their overall collection.

The unjustified distinction between rights applicable to performers in the music sector and those in the audiovisual sector has been – and remains – very striking. With regard to the right to CTTP assigned to fixations of performances, the Rome Convention and the WPPT are limited to phonograms. Further, the right to equitable remuneration for broadcasting and any CTTP as introduced in the 1992 Rental and Lending Directive does not apply to audiovisual recordings.

At the international level, after more than 15 years of negotiation and the failure of the diplomatic conference of 2000, the Beijing Treaty on the Protection of Audiovisual Performances was adopted in 2012 and entered into force on 28 April 2020. It is the first international treaty aimed at protecting audiovisual performances.

It grants audiovisual performers the exclusive right to authorise the broadcasting and CTTP of their performances fixed in audiovisual fixations. It allows Contracting Parties to instead introduce a right to equitable remuneration, but also permits Contracting Parties to grant neither an exclusive nor a remuneration right.

The Treaty is yet to be ratified by the EU and the question remains as to whether the EU's ratification of this Treaty will effectively improve the situation of the actors.

The legal framework is still deficient with respect to online exploitation.

> "For the Internet to thrive, content providers must be paid for their work. The long-term prospects are good, but I expect a lot of disappointment in the short-term as content companies struggle to make money through advertising or subscriptions. It isn't working yet, and it may not for some time."
>
> **Bill Gates**
>
> 1996[80]

Bill Gates spoke those words in 1996, the same year as performers were granted an exclusive making available right for the first time. His prediction has partially come true. The internet continues to thrive and, having weathered the storm of illegal filesharing, "content companies" such as record labels, film producers and platforms are undoubtedly now making money.

However, when he states that "For the Internet to thrive, content providers must be paid for their work. The long-term prospects are good [...]" performers may question how good their prospects are and how long they will have to wait.

The real "content" providers (i.e. performers and songwriters) are not being paid for their work and certainly not in a manner that is "appropriate and proportionate" to their contribution to culture.

The choice to introduce the **making available on demand right** only as an exclusive right has proven to be the wrong choice. Ever since it was introduced to international law in 1996 and to EU law in 2001, the contractual relationships between performers and producers have resulted in the transfer of the making available on demand right to producers.

In the context of streaming, the s**pecific case of the music sector** deserves special attention, as revenue rightly due to performers under existing legislation for passive streaming is not being paid. As indicated in the UK Parliament's Digital, Culture, Media and Sport (DCMS) Select Committee report titled "Economics of music streaming", a **"complete reset"** of the streaming industry is required. As a result of record industry practices, it is all but impossible for professional musicians to derive any meaningful income from streaming.

In the **audiovisual sector**, the prevailing buy-out practices have the same result: performers receive no meaningful revenue for streaming.

With the introduction of the Beijing Treaty, and in particular Article 12(3) thereof recognising that a right to remuneration may be introduced upon the transfer of an exclusive right to grant performers much-needed protection, there has been a step in the right direction for performers, albeit a very small one.

It can, however, be viewed as highly significant. It is both symbolic and legal recognition of the fact that where the exclusive right alone does not offer performers guaranteed fair remuneration, an unwaivable equitable remuneration right is justified.

It also serves as confirmation of the validity of co-existence of a right to unwaivable equitable remuneration with the exclusive making available right, a point which was already recognised by academics[81] and rightholder organisations[82], and, even more importantly, was already implemented in the acquis communautaire regarding the rental right[83].

The **2019 CDSM Directive** had the opportunity to remedy this, but stopped short of granting a right to equitable remuneration for making available on demand as advocated by performers, academics, grassroots campaigns and CMOs. Instead, it obliges Member States to ensure that mechanisms are in place to ensure appropriate and proportionate remuneration is received by performers. This obligation applies to all acts of making available on demand, including those carried out by OCSSPs. Some Member States, such as Spain, already had suitable mechanisms in place. A number of Member States, such as Belgium, Germany and Slovenia, have taken steps to introduce the necessary "mechanisms". The vast majority still need to provide effective mechanisms.

Much now depends on the approach taken by Member States and the European Commission. It is hoped that **all Member States will comply with their obligation to have in place a mechanism ensuring performers receive appropriate and proportionate remuneration.** This approach has long been advocated by AEPO-ARTIS and has received academic and political support.

It is hoped that they will choose to do so by the only proven method, i.e. an **unwaivable right to equitable remuneration** collected from users and subject to compulsory collective management.

And, finally, it is hoped that if Member States fail to implement an effective mechanism, the **Commission will hold Member States to account** for failing to implement the Directive in a compliant manner.

If performers are let down by their national governments and are then faced with a Commission which fails to monitor and enforce implementation of the Directive, their future is bleak and their options are severely limited.

Twenty-six years on from signing of the WPPT, WIPO is aware that there are concerns as to the suitability of the exclusive right in the modern era. The issue has been the subject of discussions in the WIPO SCCRs since 2015, when a formal "Proposal For Analysis Of Copyright Related To The Digital Environment" was put to WIPO by GRULAC (Group of Latin American and Caribbean Countries[84]). The proposal contends that the WPPT is no longer "sufficient" for the needs of the digital environment.

Among its comments it stated:

"Even more relevant, at least in the case of performers, the prospect of equitable remuneration could guarantee better remuneration for the communication to the public and the broadcasting of their interpretations and executions fixed in phonograms, since it is considered in many national laws an inalienable right that cannot be negotiated in record contracts. **As it happens with the exclusive rights, equitable remuneration could ensure greater balance in the relationship between these artists and record companies."**

The discussions in the WIPO SCCRs led to the publication of several studies, including the 2021 "Study on the Artists In The Digital Music Marketplace: Economic And Legal Considerations[85]", which stated that: "What remains is that performers transfer value to streaming services beyond that which is compensated by market centric royalty payments. **It seems that the policy goals and principles of equitable remuneration are best fulfilled by a streaming remuneration in the nature of a communication to the public royalty that is outside of any recording agreement, is not waivable by the performer and it is collected and distributed by performers' CMOs."**

Subsequently, with specific regard to the music industry, the UK Parliament's DCMS Select Committee recently came to a similar conclusion (in its report titled "Economics of music streaming") following an extensive enquiry into the current state of the music industry. It concluded that:

"The right to equitable remuneration is a simple yet effective solution to the problems caused by poor remuneration from music streaming. It is a right that is already established within UK law and has been applied to streaming elsewhere in the

80 https://medium.com/@HeathEvans/content-is-king-essay-by-bill-gates-1996-df74552f80d9.
81 Raquel Xalabarder, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Article 18 Copyright in the Digital Single Market Directive": https://ssrn.com/abstract=3684375.
82 https://fair-internet.eu/description/.
83 Directive 2011/77/EU on the term of protection of copyright and certain related rights, Article 1(2).
84 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_4.pdf.
85 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_3.pdf.

world. **A clear solution would therefore be to apply the right to equitable remuneration to the making available right in a similar way to the rental right.** *As such, an additive 'digital music remuneration' payment would be made to performers through their collecting societies when their music is streamed or downloaded.* **This digital music remuneration would address the issues of long-term sustainability for professional performers and the cannibalisation of other forms of music consumption where equitable remuneration applies, whilst also retaining the benefits of direct licensing**[86]*."*

There is also growing consensus among academics that the exclusive right is insufficient to provide the monetary protection that performers need. Leading academic Raquel Xalabarder wrote:

"Statutory remuneration rights have proven to be the most efficient mechanism to secure "secondary" revenues for Authors and Performers, especially when they are set as unwaivable (and inalienable) and subject to mandatory collective management."

86 UK Parliament DCMS Select Committee Report "Economics of music streaming", 2021, p. 103; https://committees.parliament.uk/publications/6739/documents/72525/default/.

CHAPTER 3

PRIVATE COPYING

3.1. INTRODUCTION

Everyone has made a private copy of a work at some point in their life: a film, a photo, a piece of music. Authors' rights and related rights are not designed to punish this very "human" act or make it impossible. However, when such behaviour is facilitated and even encouraged by commercial organisations that try to turn this private behaviour into a means of making money for themselves at the expense of the creators, legislation serves to correct that unjustified side effect. That is what private copying is all about.

Under EU law, rightholders (e.g., performers, authors and phonogram producers) have an exclusive right (the right of reproduction) which allows them to prohibit anyone from making a copy of their performance, work or recording, unless they obtain prior permission. However, consumers can make copies very easily.

It is unrealistic to expect or request members of the public to get permission to do this and, for that reason, EU law gives countries the option of introducing a law that provides an exception to the right of reproduction. When Member States make such a choice, private individuals may make copies for their own use and for non-commercial purposes without seeking prior permission. Given the reality that permission was never sought, introducing an exception for private copying actually amounts to a regularisation of common practice.

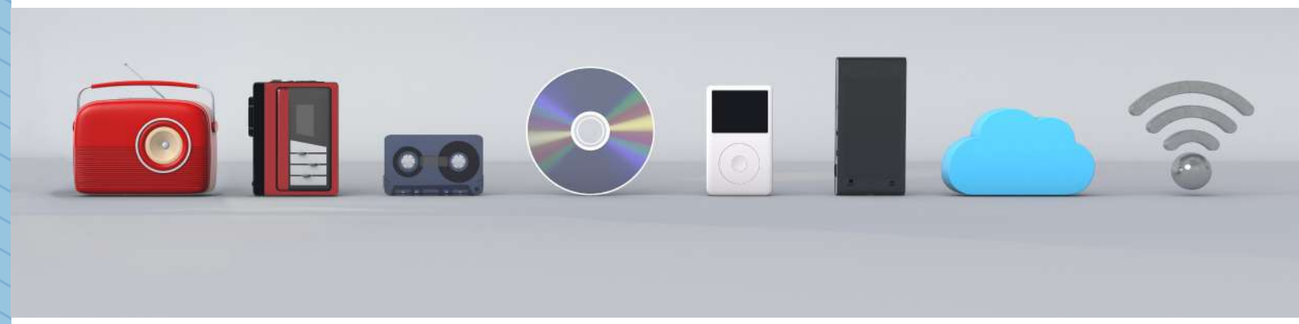
However, as technological advances have ensured that these small private copying acts are no longer the exception, many legislators have opted to allow the normalisation of these acts to work in both directions by introducing a remuneration scheme. In exchange for losing the opportunity to oppose these acts of private copying, rightholders will, mostly via a CMO, receive a payment or remuneration, referred to in EU legislation as "compensation".

When referring to rightholders that are affected by this, performers are of course included. In all countries that have introduced an exception for private copying, performers have been recognised as a category of rightholders that are affected and that are entitled to their own guaranteed individual share of the remuneration collected. For many performers' CMOs, and indeed authors' and producers' CMOs, the remuneration collected from private copying represents a significant proportion of their total revenue.

This remuneration is usually paid by the companies that benefit from enabling the private copying activity via the sale, manufacture or importing of media that are capable of storing these copies ("carriers") or of equipment/facilities ("devices") used to make the copies. This payment is made by way of a levy on these carriers and devices, hence the term "private copying levy" being frequently used in this area.

The way in which copies can be made has evolved with technology, using various different methods and various different carriers. Over the years, this has included using, e.g., tape-to-tape cassette recording machines to record onto a blank tape (hence private copying remuneration sometimes being referred to as the "blank tape levy"), burning a CD or DVD onto your PC, or from your PC onto a blank CD-R or DVD-R.

Of more relevance nowadays is the making and storing of copies on smartphones, portable drives or even "in the cloud", i.e., on remote cloud storage servers. More and more, cloud storage providers are being used to store copies of music/films. It was recently confirmed by the CJEU that these companies are also liable to pay private copying remuneration[87].



87 Austro Mechana v Strato AG C-433/20.

3.2. LEGAL FRAMEWORK

3.2.1. International legal framework

The **Rome Convention** of 1961[88] introduces the possibility for performers to "prevent the reproduction without their consent, of a fixation of their performance". However, any Contracting State may provide for exceptions to the protection guaranteed by many provisions in the Convention, including for private use[89]. However, no provision deals specifically with private copying and a corresponding remuneration, such possibilities being not readily technically available at the time the Convention was adopted.

The "possibility of preventing[90]" referred to in the Rome Convention is the essence of an exclusive right, and this is something that was explicitly introduced in the WPPT. The **WPPT of 1996** gives a performer[91] the exclusive right to authorise "the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form". It does not provide an explicit exception for private use. It simply states that Contracting Parties 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[92]. The content of such limitations or exceptions is subject to the provisions contained in Article 16(2), commonly referred to as the "three-step test". This is referred to below in the context of Directive 2001/29/EC.

The **Beijing Treaty on the Protection of Audiovisual Performances of 2012**, duplicating the corresponding provision of the WPPT applicable to phonograms, provides performers[93] with the **exclusive right** to authorise the direct or indirect reproduction of their performance in audiovisual fixations, in any manner or form.

In line with the WPPT, the Beijing Treaty further permits Contracting Parties to provide for exceptions and limitations to this right in their national legislation, which are of the same kind as those for the protection of copyright in literary and artistic works[94], i.e., that the exceptions and limitations must be confined to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer[95]. This mirrors the three-step test.

Consequently, while they allow the introduction of an exception to the reproduction right, no international treaty provides for a right to remuneration in the event of reproduction for private use.

3.2.2. European legal framework

3.2.2.1. Directives

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

Article 2 of the Directive provides performers with "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part".

The option for Member States to provide for an **exception to the reproduction right** in the event of private copying and the conditions attached to an exception of this nature were specified in Directive 2001/29/EC.

Some grounds for a right to remuneration in the event of reproduction for private use were already provided at the European level by Directive 92/100/EEC (subsequently codified as Directive 2006/115/EC). According to this Directive, Member States shall provide all performers with an exclusive right to authorise or prohibit the reproduction of fixations of their performances, but they may also provide for limitations in respect of private use. Article 10(3) of the Directive stipulates that this exception for private use is "without prejudice to any existing or future legislation on remuneration for reproduction for private use".

According to Article 5(2)(b) of Directive 2001/29/EC, 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 rightholders receive fair compensation*** *which takes account of the application or non-application of technological protection measures [...] to the work or subject-matter concerned".*

Such an exception is not only defined as covering non-commercial private uses, but as can be seen, is only allowed in national legislation of Member States under the condition of the payment of "fair compensation" to the rightholders.

Recital 39 of Directive 2001/29/EC 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".*

This is of particular importance and to an extent future-proofs the system of private copying. It aims to ensure that the transition from analogue reproductions to digital reproductions, and to digital reproductions made in cloud

storage facilities is covered within one law, which, **at the EU level**, does not need to be regularly updated to keep up with technology.

On the other hand, at national level, it is essential that Member States update their law to ensure that private copying remuneration is paid in respect of new carriers and devices. A national law which provides that private copying remuneration is payable in respect of cassette tapes but has not been updated to include smartphones, is clearly not fit for purpose. Regrettably, some Member States have been very slow in updating their national provisions to ensure that legislation keeps up with technology.

In addition, Recital 35 of the same Directive refers to the **notion of harm** caused to rightholders as being a valuable criterion for evaluating the "particular circumstances of each case" that should apply to determining the form, detailed arrangements and possible level of compensation.

The three step test

According to Directive 2001/29/EC the exception for private use, as with all the other exceptions envisaged in this Directive, is subject to the three-step test[96]. The concept of the three-step test was introduced in the field of neighbouring rights by the WPPT, in similar terms to those used for authors in the Berne Convention. Specifically, the three steps that the WPPT sets out are:

Contracting Parties shall confine any limitations of, or exceptions to, rights provided for in this Treaty to (i) certain special cases which (ii) do not conflict with a normal exploitation of the performance or phonogram and (iii) do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

The Directive provides Member States with a lot of flexibility. It allows Member States to provide for exceptions or limitations

88 Art 7(1)(c) Rome Convention
89 Article 15(1)(a) Rome Convention
90 Article 7 Rome Convention
91 Article 7 WPPT
92 Article 16(1) WPPT
93 Article 7 Beijing Treaty
94 Article 13(1) Beijing Treaty
95 The exceptions to the protection of copyright in literary and artistic works, to which article 13(1) of the Beijing Treaty refers to is dealt with in article 10(2) of the WCT, introducing the principle of the three step test.
96 Article 5(5) of Directive 2001/29/EC, similar to provisions of article 9(2) of the Berne Convention quoted above.

to the reproduction right for private copying and establishes the requirement that in these cases, **a mechanism of fair compensation for rightholders must[97] be introduced**. How a system of this type should be designed is largely up to the Member State. In addition to a system based on levies being applied to carriers and devices, some Member States have introduced private copying remuneration funded by the state (e.g., Finland, and - in the EEA - Norway).

This "flexibility" has led to a multiplicity of conflicts and corresponding court cases, notably at European level.

3.2.2.2. European Court of Justice ("CJEU") case law

Despite the above, very little exists in EU legislation with regard to the practical functioning of private copying and it is not dealt with at the international level either. For that reason, CJEU case law is extremely important in interpreting the very basic elements that exist in the acquis communautaire and developing the law in a way which takes into account developments in private copying technology and practice. For example, very recently we have seen the CJEU address the issue of cloud storage[98]; a subject which was of course not **explicitly** referred to in Directive **2001**/29/EC.

A large number of important CJEU rulings on private copying remuneration systems have influenced the interpretation of the existing law. These cases are frequently the result of an aggressive strategy by the ICT industry against private copying remuneration schemes, starting with national court cases and culminating in references to the CJEU. The following summarises the outcome of the most important cases:

Padawan v SGAE Case C-467/08[99]

Subject matter:
the concept of harm and "fair compensation"

Facts: SGAE is one of the bodies responsible for the collective management of intellectual property rights in Spain, including private copying remuneration. Padawan marketed various carriers such as CD-Rs and mp3 players. SGAE claimed payment from Padawan of the private copying levy under Spanish law, but Padawan refused on the grounds that the application of that levy to digital media, indiscriminately and regardless of the purpose for which it was intended (private use or other professional or commercial activities), was incompatible with Directive 2001/29.

This landmark case confirmed the need for rightholders to be compensated adequately and that "fair compensation" was an autonomous concept throughout the EU.

The key findings: It was held that the purpose of fair compensation is to compensate (rightholders) "adequately" for the use made of their protected works without authorisation. Additionally, the term "fair compensation" was declared to be an autonomous concept of EU law which must be interpreted uniformly in all Member States that introduced the private copying exception.

In determining the level of compensation payable, account must be taken of the possible harm suffered. Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm. Where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm - the fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy.

Stichting de Thuiskopie v Opus Case C-462/09[100]

Subject matter:
who is obliged to pay private remuneration?

Facts: In 2011, in the case of the Dutch umbrella organisation Stichting de Thuiskopie versus Opus (a German supplier of blank media), the CJEU was confronted with the question of whether it is the consumer (end user) or the manufacturer or importer of blank media that is expected to pay the levy.

The Court recognised that Directive 2001/29/EC does not specify who must pay the fair compensation and agreed that, in principle, the person who makes the reproduction without authorisation from the rightholder is the person who must pay the compensation. However, it stated that Member States may provide that the private copying remuneration should be paid by the persons who make carriers available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

It was of particular significance that the Court emphasised that any private copying system must be **effective in practice** and **guarantee** that the reward of the rightholders will effectively take place.

The key findings: Fundamentally, it was made clear that Directive 2001/29/EC does not specify **who** must pay the fair compensation. Nevertheless, the person who makes the reproduction without authorisation from the rightholder is, in principle, the person who must pay the compensation.

However, the Court went on to explain that Member States may provide that the private copying remuneration should be paid by the persons who make carriers available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

Importantly, the case confirmed that any private copying system must be effective in practice and guarantee that the remuneration of the rightholders will effectively take place.

VG Wort v Kyocera Case C-457/11 [101]

Subject matter: Can a private copy be "authorised"? Are technical protection measures necessary?

Facts: VG Wort is the German CMO that has exclusive responsibility for representing authors and publishers of literary works. Under German law, it is entitled to claim private copying remuneration on their behalf from manufacturers, importers and distributors of devices. It asked for information relating to printers sold or placed on the market and sought a declaration that Kyocera and other manufacturers were obliged to pay private copying remuneration.

The Court came to a highly significant conclusion that can have an impact on other areas where reproductions are made (e.g., the online environment), namely that granting authorisation to make a reproduction has no legal effect. Essentially, since the private copying exception is in place, no authorisation is needed.

Key findings: The Court found that where a private copying system is in place any steps taken by a rightholder to "authorise" the reproduction have no legal effect. It would have no effect on the harm caused to the rightholders due to the introduction of a private copying exception depriving them of that right. It cannot therefore have any bearing on the fair compensation owed.

Equally, the non-application of technical protection measures, i.e., technical measures that would attempt to prevent individuals from making copies, cannot have the effect that no private copying remuneration is due. Nevertheless, it would be open to a Member State to make the actual level of compensation owed to rightholders dependent on whether or not such technological measures are applied, so that those rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception.

Amazon.com v Austro-Mechana Case C-521/11 [102]

Subject matter: discretion of Member States, reimbursements of levies paid, attribution of private copying remuneration collected to cultural and social funds

Facts: Austro-Mechana is an Austrian CMO that collects private copying remuneration on behalf of all categories of rightholders. Customers in Austria bought, online, various kinds of recording media from Amazon which, under Austrian law, was deemed to have been placed on the market in Austria. Austro-Mechana sought payment from Amazon and, in addition, an order requiring Amazon to provide the accounting data necessary for it to quantify its claim.

The manner in which the private copying levy should take into account professional use was called into question. The Court found that an indiscriminate application of a levy was compatible with EU law **provided** that a reimbursement procedure was in place whereby an amount would be reimbursed if it were shown that the device or carrier was used for professional, not private, purposes. Further, the case confirms the validity of a CMO dedicating part of the private copying remuneration to fund social and cultural activities.

Key findings: The CJEU came to the conclusion that where a private copying system exists, Member States must ensure rightholders receive fair compensation but have broad discretion to determine the conditions under which it should be paid.

It considered it unnecessary to show that private copies have actually been made using the carrier or copying equipment. Consumers can be presumed to take full advantage of the copying functions associated with that equipment.

For what concerns the question of professional use, the Court stated that a system of fair compensation consisting of the indiscriminate application of a private copying levy on carriers/equipment is not incompatible with EU law as long as there is also a system of reimbursement where practical difficulties justify such a system and as long as the right to reimbursement is effective and does not make it excessively difficult to have the levy repaid.

Last but not least, the Court ruled that a system where part of the private copying remuneration is not transferred directly to the rightholder, but goes to social and cultural institutions instead, is compatible with EU law.

ACI ADAM BV and Others v Stichting de Thuiskopie Case C-435/12 [103]

Subject matter: relevance of "lawful source"

Facts : AACI Adam are importers of carriers such as CDs and CD-Rs. Under Dutch law they were obliged to pay private copying remuneration to the relevant national collecting society, Stichting de Thuiskopie.

ACI Adam argued that that amount claimed incorrectly took into account harm suffered by copyright holders as a result of copies made from unlawful sources. They took the view that private copying remuneration was payable only in respect of copies made from lawful sources. The CJEU agreed with them, stating that illegal exploitation of protected content should not be tolerated.

97 Directive 2001/29/EC article 5(2)(b): 2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: ...(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.
98 Austro-Mechana v Strato AG, Case C 433/20, discussed below.
99 https://curia.europa.eu/juris/liste.jsf?num=C-467/08
100 https://curia.europa.eu/juris/document/document.jsf?text=&docid=85089&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=537367
101 https://curia.europa.eu/juris/document/document.jsf?text=&docid=138854&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=537883
102 https://curia.europa.eu/juris/document/document.jsf?text=&docid=139407&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=538185
103 https://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=538608

Key findings: The Court stated that the objective of supporting the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or "pirated" works and subsequently decided that national legislation must distinguish between a situation where the source from which a reproduction for private use is made is lawful and that in which that source is unlawful. Otherwise, it "may infringe certain conditions laid down by Article 5(5) of Directive 2001/29/EC (the three step test) and constitute a distortion of the internal market."

Copydan Båndkopi v Nokia Danmark A/S Case-C 463/12[104]

Subject matter: determining which devices are subject to private copying remuneration

Facts: The case concerned Nokia mobile phones sold to individuals and businesses in Denmark, who resold them to both individuals and business customers. All of the phones in question had a built-in storage device, but some also had an external detachable memory card capable of storing digital works in addition to the SIM card. Copydan took the view that mobile phone memory cards should be covered by the private copying remuneration system. Nokia argued that a levy is only payable in respect of lawful reproductions for private use that are not authorised by the rightholder. It posed a large number of very specific questions, which the CJEU answered in a manner which largely supported the position of the rightholders and their claim that private copying remuneration should be paid even though the act of reproduction is not the key purpose of a device.

Key findings: The CJEU ruled that private copying remuneration is payable even if the means of reproduction is only an ancillary function on the device. However, if the prejudice to the rightholder may be regarded as minimal, there need be no obligation to pay fair compensation.

It stated that national law may provide that private copying remuneration is payable in respect of certain categories of media but not in the case of other kinds of media provided that those different categories of media and components are not comparable or the different treatment they receive is justified, which would be a matter for the national courts to determine.

It also found that the Directive does not preclude national legislation which provides for fair compensation in respect of reproductions of protected works made by a natural person by or with the aid of a device belonging to a third party.

EGEDA and Others v AISGE and Others, Case C-470/44[105]

Subject matter: Legality of State budget funding the payment of private copying remuneration

Facts : In this case the Spanish audiovisual performers' society, AISGE, together with several other Spanish CMOs responsible for collecting private copying remuneration, sought the annulment of a Spanish law which provided that private copying remuneration would be paid from the State budget instead of by means of a levy imposed on manufacturers/ importers of carriers and devices.

They argued that EU law requires that the liability to pay private copying remuneration is placed, in principle, with the natural persons causing the harm, whereas the scheme whereby private copying remuneration is paid from the State budget places the liability not only on those natural persons, but on **all** taxpayers. The Court agreed with them that the liability should be placed on natural persons.

Key findings: The Court confirmed that it is the natural persons benefiting from the private copying exception that are initially under a legal obligation to pay the compensation and not legal persons.

As a result, the Court ruled that a private copying system, as introduced in Spain, whereby the financing of the remuneration was derived from all the budget resources of the general State budget and therefore from all taxpayers **including legal persons**, was not in compliance with EU law.

VCAST Limited v RTI SpA, Case C-265/16[106]

Subject matter: cloud computing and the making of private copies

Facts : VCAST provided its customers with a system allowing users to store terrestrial TV programmes in the cloud. The user would select a TV programme and VCAST would then pick up the television signal and record it to a cloud data storage space, purchased by the user from another provider. The Italian TV organisation, RTI, claimed this was unlawful. They were successful on the grounds that VCAST was actively involved in the reproduction process.

Key findings: The Court ruled that it is contrary to EU law to provide legislation which allows a company to provide private individuals with a cloud service for the remote recording of private copies by actively involving itself in the recording.

Austro-Mechana v Strato AG, Case C-433/20[107]

Subject matter: the application of private copying remuneration to cloud storage

Facts: Austro-Mechana is the Austrian CMO that collects private copying remuneration in Austria. Strato AG is a company that provides a cloud data storage service which they claim is "as quick and simple to use as an (external) hard disk" and which "offers enough space to store photos, music and films in one central location." Austro Mechana argued that Strato AG was obliged to pay private copying remuneration, whereas Strato AG claimed that Austrian law chose not to apply the obligation to pay private copying remuneration to cloud storage.

The ruling confirmed the technology-neutral application of the private copying exception and that remuneration was payable for reproductions on **any medium**.

Key findings: The Court found in this important decision that the expression "reproductions on any medium", referred to in Article 5(2)(b) of Directive 2001/29/EC, also covers the saving, for private purposes, of copies of works protected by copyright on a server in which storage space is made available to a user by the provider of a cloud computing service.

With this ruling, the CJEU confirmed that cloud storage services fall within the scope of private copying. However, it also added that Article 5(2)(b) does not preclude Member States from making the providers of such cloud storage services not liable to pay private copying remuneration, provided that their national legislation provides in some other way for the payment of fair remuneration to rightholders. With this additional finding, the Court has introduced the easily criticised reasoning that harm can result from a chain of infringements, but that not every link in that chain should be held individually responsible. The reason this can be criticised is because the responsibility of one entity must then be borne by another.

Ametic v EGEDA, AIE, AISGE... Case C-263/21[108]

Subject matter: establishing a body responsible for administering the private copying remuneration system

Facts: In this case, AMETIC sought a declaration from the Court of the illegality of the one-stop-shop that the CMOs for performers, authors, producers, and publishers had set up together to collect and distribute the private copy remuneration in Spain. The Court completely dismissed the complaint in a short and unquestionably clear ruling.

Key findings: EU law and the principle of equal treatment does not preclude national legislation under which a legal entity established and controlled by CMOs can decide upon (i) exemptions and (ii) reimbursements from payment for private copying.

Nor does it preclude national legislation which empowers an entity to request access to the information required for the exercise of the powers of review necessary for administering the private copying remuneration system.

A summary of CJEU case law

From the above, the key principles that can be derived from CJEU case law are:

- Fair compensation is an **autonomous concept of EU law** which must be interpreted uniformly in all Member States.
- Account must be taken of the **possible harm** suffered. Copying by natural persons acting in a private capacity must be regarded as likely to cause harm.
- The mere fact that equipment or devices are able to make copies justifies payment of private copying remuneration.
- It is **unnecessary to show that private copies have actually been made** using the carrier or copying equipment.
- Any private copying system must be **effective in practice**.
- Any step taken by a rightholder to **"authorise" the reproduction has no legal effect**.
- A system where part of the private copying remuneration goes to **social and cultural institutions** is compatible with EU law.
- National legislation must distinguish between a situation in which the source from which a reproduction for private use is made is lawful and that in which the **source is unlawful**.
- Private copying remuneration is payable even **if the means of reproduction is only an ancillary function of the device.**
- A private copying system where the financing of the private copying is paid for by all taxpayers **including legal persons** does not comply with EU law.
- The expression "reproductions on any medium", includes copies made in a **cloud storage service**.
- An entity administering a private copying remuneration system and determining exceptions and reimbursements may **consist of CMOs only**.

104 https://curia.europa.eu/juris/document/document.jsf?text=&docid=162691&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=538879
105 https://ipcuria.eu/case?reference=C-470/14
106 https://curia.europa.eu/juris/document/document.jsf?text=&docid=197264&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=540428
107 https://curia.europa.eu/juris/document/document.jsf?text=&docid=256462&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=540711
108 https://curia.europa.eu/juris/document/document.jsf?text=&docid=265066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1747908

3.2.2.3 National legal framework

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

Nevertheless, the introduction of the private copying exception is optional and, as a consequence, the corresponding right to remuneration of rightholders does not exist in **all** EU countries. Prior to their departure from the EU, the United Kingdom was the only Member State that did not have a private copying exception and, consequently, a payment of the corresponding remuneration to rightholders. In the United Kingdom, when a consumer makes a private copy of a recording, it is in fact an infringement of the exclusive right of reproduction. In practice, no action can be taken against these consumers.

In Ireland, a private copying exception exists but there is no corresponding right to remuneration. As mentioned above, this is not in compliance with Article 5 of Directive 2001/29/EC.

In a number of EU Member States (Bulgaria, Cyprus, and Malta) both a private copying exception and a remuneration scheme exist, but there has been a failure to collect this remuneration. This may be for a variety of reasons, such as regulatory issues in setting up a private copying collection scheme or a failure in legislation to provide details on how a collection scheme should be established.

Nevertheless, the private copying remuneration system works well in all other European countries.

This situation does illustrate unfairness, whereby performers and other rightholders are remunerated in some Member States but not in others. It also illustrates a lack of harmonisation - in practice - between EU Member States.

Furthermore, a system such as that in the UK, which in effect allows a situation to exist where consumers are massively infringing the rights of creators, is highly hypocritical and creates a lack of respect for intellectual property rights[109].

Mechanism for setting rules

Although providing "fair compensation" is required when introducing a private use exception, there is no specific mechanism set out in EU law describing how exactly this should be done or how a remuneration system should be created. But in practice, collective management always intervenes.

In the vast majority of countries with a functioning private copying remuneration system, the remuneration is **collected by CMOs** from manufacturers or importers.

Two notable exceptions are Finland and Norway. In both countries, the government sets the level of private copying remuneration, which is allocated through the national budget. The Finnish and Norwegian governments are responsible for conducting surveys on the level of copying so as to determine the appropriate amount of remuneration payable. The remuneration is then distributed to rightholders by their CMOs.

Tariffs

Almost all countries operate a dual remuneration scheme with remuneration applicable on devices used for making copies and blank carriers. This includes mp3 players, computers, smartphones as well as external hard drives and memory cards/USB sticks. Anomalies do exist. For example, in Belgium private copying remuneration is payable in respect of personal computers, but in France it is not. Conversely, in France private copying remuneration is payable in respect of tablets but in Belgium, until very recently, it was not.

The calculation of tariffs is either set by legislation or a governmental body, commission or copyright tribunal, or tariffs are set by negotiation between the respective CMOs and the ICT industry.

In countries where the tariffs are set via agreement with the ICT industry, this is becoming increasingly difficult and importers and manufacturers have increasingly shown less willingness to negotiate. As a result, performers' organisations are forced to enter into costly and time-consuming litigation resulting in significant delays in collecting remuneration rightfully due to performers and other rightholders.

Where tariffs are set by legislation or government decision, tariffs should be revised on a regular basis in order to reflect market developments. The Netherlands is a good example of a country where this works well. An important market development is the increasing use of smartphones and their growing storage capacity. Dutch tariffs have taken this into account. During the period 2018-2020, the fixed tariff for a smartphone was set at €4.70. For the period 2021-2023, this amount was increased to €7.30.

On the whole, there is less and less disparity among Member States with respect to the devices and carriers that are – or are not - subject to private copying remuneration. Where disparity exists, it tends to be in the case of new technology. For many years, only a few countries applied tariffs to smartphones. Now almost all countries apply them.

It can now be seen that tariffs are being applied to smartwatches, for example in the Czech Republic, Netherlands, Poland and Slovenia. It is inevitable that it will take time for other countries to catch up and also introduce tariffs for these devices.

In approximately half of the Member States, private copying remuneration is payable in respect of refurbished devices such as smartphones. These are often imported from abroad and hence no private copying remuneration has been paid for them on the national market. Reflecting the shorter lifespan of these devices, tariffs are significantly lower compared to the unused equivalents.

The introduction of tariffs for cloud storage is proving to be very slow. It exists only in the Netherlands, where the tariff is calculated by applying a surcharge to the devices most associated with making copies "in the cloud". France and Switzerland do have tariffs that apply to nPVR (network personal video recorders) which also allow the user to record and store TV/cable programmes on a remote server.

Those countries that have not yet updated their private copying systems to take cloud storage into account, must do so urgently, both to protect rightholders and to comply with EU law. Any private copying regime must reflect technological progress. This view is in line with the ruling of the CJEU in Austro-Mechana v Strato AG.

Rules about sharing remuneration

Remuneration for private copying is shared between all categories of rightholders concerned: performers, authors and producers. The division between the various rightholders varies on a country-by-country basis and is sometimes to the detriment of performers. The share allocated to performers by these repartition keys varies widely from country to country.

In the majority of countries, part of the private copying remuneration is dedicated to the financial support of cultural, social and/or educational activities to the benefit of performers, as agreed by law or by agreement of the members of the CMO. This system was challenged before the CJEU in the Amazon case, however the Court held that "a system where part of the private copying remuneration is not transferred directly to the rightholder but goes to social and cultural institutions is acceptable, provided that it actually benefits those entitled and (is) not discriminatory".

109 Currently in the UK, there is an ongoing call for a system of private copying remuneration system (or "Smart Fund") to be introduced, which would address this situation: https://thesmartfund.co.uk The Smart Fund is a proposal by culture industry organisations to ensure creators and performers are remunerated fairly. Essentially, it would mirror "traditional" EU private copying systems, with the revenue collected from manufacturers of devices and carriers being administered by CMOs and paid out to creators and local community projects with a focus on digital creativity and skills.

3.3. PRACTICE

In all the countries covered by this study, where there are remuneration schemes for private copying, the administration of this unwaivable remuneration right by a CMO has been made compulsory. In practice, in most countries, CMOs for performers do not usually collect remuneration for private copying directly from the bodies liable for payment. Instead, collection is centralised by one or two umbrella organisations that represent all categories of rightholders (including authors, producers and publishers) and collect their remuneration[110]. This is the consequence of the creation of this remuneration for the common benefit of authors, performers and producers.

Where this is the case, the umbrella organisation allocates the private copying remuneration among the CMOs representing the different categories of rightholders for distribution to the rightholders concerned. These CMOs nevertheless take an active part in any negotiations and in decisions relating to management practices for this remuneration.

This cooperation between CMOs is another indication of the benefits of collective management. Remuneration can be collected by the umbrella organisation providing a single point of contact for those liable to pay the remuneration and then distributed efficiently among the different categories of rightholders.

In all Member States, excluding Ireland and the former Member State the United Kingdom, performers' organisations collect remuneration for private copying. It should be noted that while the relevant UK and Irish CMOs did not actually collect private copying remuneration, they did receive private copying remuneration by way of the bilateral agreements they have with CMOs that operate in countries where private copying remuneration is payable.

The amount collected accounts for an essential part of the revenues received by performers from CMOs. In 2013, remuneration for acts of private copying accounted for approximately 22% of the total revenue collected by the European performers' organisations. This percentage increased to almost 30% in 2014 and has remained stable until 2021.

Whilst the vast majority of countries have opted for a mechanism which provides that private copying remuneration is payable on certain devices and carriers, a different system applies in Finland and Norway where national law stipulates that compensation is allocated through the national budget.

Whilst the system seems to work in Finland and Norway, it may not necessarily be the right model for other countries. For example, in Spain in 2011, €16,263,894 was collected. However, in 2015 when private copying remuneration was paid via the national budget as a result of a change in legislation, the Spanish CMOs representing musicians and actors (AIE and AISGE) collected only €1,476,021. To put this in context, in 2015 its Portuguese neighbours GDA collected €995,092 on behalf of musicians and actors, despite having a population only one fifth of the size of Spain.

In 2020, after the national budget system had been abolished, the amount collected in Spain by performers' CMOs was €14,337,067.

As well as the disparity in amounts collected, there is also disparity in the manner in which the private copying remuneration collected is shared between authors, performers and producers.

Commonly, the amount collected is shared equally, with each of these categories of rightholders receiving one third of the amount collected.

In the case of Lithuania, this split is applied in both the music and audiovisual sectors.

In the case of France, remuneration collected for the audiovisual sector is subject to an equal one third split, but in the music sector it is different. For music, authors receive 50%. Performers and producers each receive 25%.

In Poland, in the music sector, authors also receive 50%, with performers and producers each receiving 25%. In its audiovisual sector, the split favours authors and producers. Authors receive 35%, performers receive 25% and producers receive 40%.

In Portugal, the split is the same in both the music and audiovisual sectors. Authors receive 40%, while performers and producers each receive 30%.

When determining how private copying remuneration is to be calculated, collected and distributed it has to be taken into account that audiovisual recordings may contain musical recordings (e.g. the use of a song in a film). As a result, the private copying remuneration attributed to performers is split between the audiovisual performers and those performers whose music is contained in the audiovisual recording. Thus, music performers are entitled to a share of the audiovisual collection.

Essentially, there are numerous ways in which the private copying remuneration is shared among the categories of rightholders and this varies between the music and audiovisual sectors. However, when the split is not on an equal one-third basis, it is the performers who receive the lowest share.

Private copying remuneration still represents the second most important source of income collected by performers' CMOs and as such is an extremely important source of income for performers. Moreover, as technology continues to evolve and new devices and carriers are being created, it is particularly important that national legislation and practice keeps up to date with technology.

Disputes with the ICT industry occur frequently, but when these are referred to the CJEU, the Court has largely found in favour of the rightholders and not the ICT industry. The ruling in the Austro-Mechana v Strato AG case is very important and useful in confirming that private copying remuneration is payable in respect of reproductions made on **any medium** including cloud storage. This should avoid disputes regarding whether a specific carrier should be within the scope of private copying remuneration.

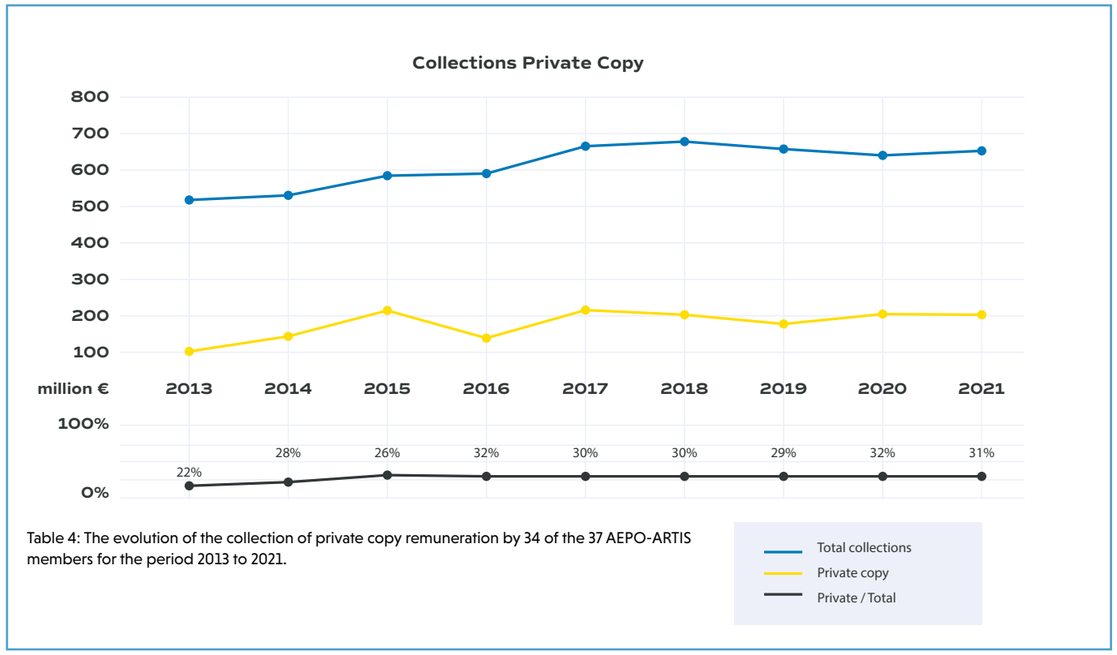


Table 4: The evolution of the collection of private copy remuneration by 34 of the 37 AEPO-ARTIS members for the period 2013 to 2021.

110 This practice was called into question in the case Ametic v EGEDA, AIE, AISGE... Case C 263/21, however the CJEU was very clear in determining that such a method of collection was completely valid.

3.4. CONCLUSION

In their national legislation, the vast majority of European countries introduced an exception for reproductions made for private use, linked to an entitlement to remuneration for rightholders. This is not the case in Ireland and the United Kingdom.

In the case of Ireland, the existence of a private copying exception without a corresponding right to private copying remuneration contravenes EU law and should be remedied.

In the case of the United Kingdom, the law essentially condones widespread copyright infringement and deprives rightholders of remuneration for the harm which they inevitably suffer as a result of their recordings being copied. If the United Kingdom were to introduce a private copying remuneration system, such as the Smart Fund, this would be a major step forward and bring them into line with EU Member States.

Countries such as Finland and Norway, where private copying remuneration is paid via a State budget, have fared reasonably well. However, a similar system which existed for some years in Spain was a failure and was abolished.

The amount of private copying remuneration collected represents an essential part of the revenues received by performers from collective management organisations. It still represents the second largest source of collection by performers' CMOs.
It is important that the success of this collection continues and for this to happen, private copying remuneration systems need to be future-proofed. Member States must ensure their private copying systems begin to take into account cloud storage. It is important that they do so in order to support performers, but also so that they comply with EU law and in particular the ruling of the CJEU in Austro-Mechana v Strato AG.

The calculation of tariffs is either set by legislation or by negotiation between users and the respective CMOs. In countries where the tariffs are set via agreement with the ICT industry, this is frequently difficult and can result in disputes and litigation. The CJEU in the AMETIC case has confirmed the validity of an entity administering a private copying remuneration system consisting of CMOs, and in doing so effectively endorses current practices.

Where tariffs are set by legislation, tariffs should be revised on a regular basis in order to reflect market developments. Unfortunately, there is a "patch-work" approach to this whereby some Member States are more progressive than others and adapt their tariffs in line with technology and consumer practices far more rapidly than others.

There is room for improvement with regards to the sharing of remuneration between the various rightholders. In some cases it is unbalanced, to the detriment of performers. A specification in law that each category of rightholders is entitled to an equal share could help counterbalance the negative effects of unbalanced market bargaining powers.

In the majority of countries, part of the private copying remuneration is dedicated to the financial support of cultural, social and/or educational activities to the benefit of performers, as agreed by law or by agreement of the members of the CMO. This system was challenged before the CJEU in the Amazon case, however the Court held that "a system where part of the private copying remuneration is not transferred directly to the rightholder but goes to social and cultural institutions is acceptable, provided that it actually benefits those entitled and (is) not discriminatory".

Provided that private copying remuneration systems adapt to cover new technologies, they ought to remain an effective mechanism to compensate rightholders for acts of private copying and continue to be an essential source of income for performers. The lack of a harmonised private copying remuneration system and in particular the lack of private copying remuneration being collected in countries where the private copying exception is not applied, is highly regrettable. Nevertheless, the private copying system continues to have a positive impact on the development and maintenance of Europe's cultural heritage.

CHAPTER 4

RENTAL RIGHT

4.1. INTRODUCTION

The concept of rental was clear during the **latter part of the 20th century.** It usually involved going to a high street shop, choosing from a large selection of films and paying money to get the film on tape or DVD for a limited and specific period of time (e.g., 24 hours). One would then return it to the shop.

At a later stage, some rental shops started to offer consumers the option of paying a monthly fee, which would entitle them to rent an unlimited number of films during that month.

EU law recognised that performers should receive a share of the profits made from this means of distributing recordings. Firstly, it defined rental[111] as **"making available for use, for a limited period of time and for direct or indirect economic or commercial advantage".** In the case of performers, "rental" applies to **"fixations of their performances".**

Secondly, it introduced an **unwaivable remuneration right** aimed at guaranteeing that these profits would be shared. The principle behind this is positive for performers. However, because the right is **not subject to compulsory collective management** and there is **no legal obligation on the users** to pay performers, in practice the amounts that performers receive is very low. In addition, rental is limited to the audiovisual sector, as the phonographic industry has chosen to prohibit the rental of phonograms.

In the **21st century, the concept of "rental"** is less clear.

The video-store has essentially transformed into an online platform. As a consumer, we have a large choice of services where one can select and pay for a specific film which can then be watched within a limited period (i.e., a few days). In most cases, these platforms explicitly state that the service they provide is **rental**. For example, Apple offers users the opportunity to "**Rent** movies from the Apple TV app[112]" and Amazon Prime states that "Selected Prime Video titles can be **rented** or purchased through the Amazon website and through the Prime Video app on supported devices[113]". The same terminology is used by distributors of TV-packages

111 Directive 2006/115/EC article 2(a)
112 https://support.apple.com/en-us/HT201611 (as at 5 July 22)
113 https://www.amazon.com/gp/help/customer/display.html?nodeId=GESDB6EUB6DPYST4 (as at 5 July 22)

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all over Europe who all offer an additional pay-per-view catalogue to their customers.

Even Netflix and music streaming platforms share a lot of similarities with 20th century rental shops. With some of these platforms, one **also** chooses from a large selection and pays an amount to watch or listen to films, TV programmes and music for **a limited and specific period of time**, i.e., the length of time covered by the subscription contract (usually one month).

It would seem indisputable that both of these types of services fall within the definition of the act of rental set out in EU law, i.e., the "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage". The main characteristic they have in common with the 20th century rental services is that they do not provide for a transfer of ownership of a recording.

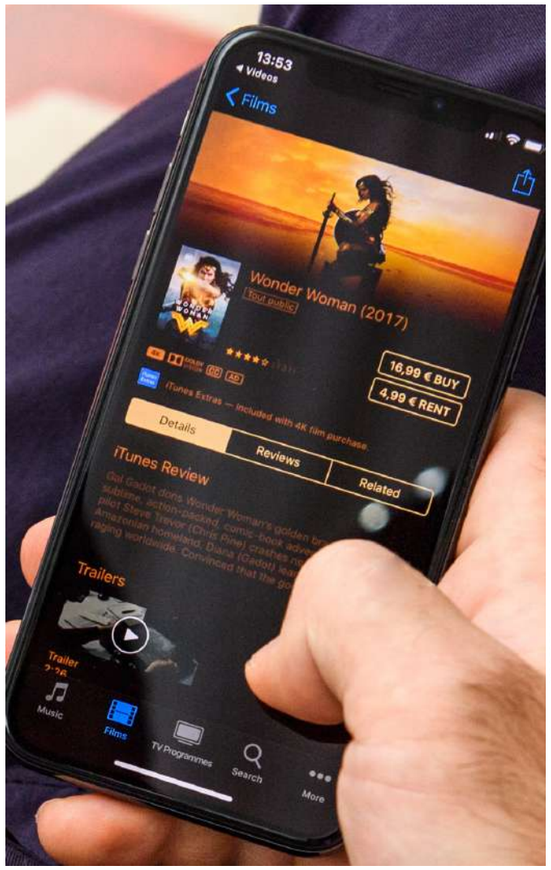
This approach is, for instance, recognised by the legislature in Slovenia. In Act No. 185/2015 of 1 July 2015, the explanatory report specifically states that the definition of "rental" also covers video on-demand platforms that provide temporary access to a work for the purpose of direct or indirect economic benefit.

However, despite falling within the definition of rental, sharing some of the characteristics of 20th century rental, and even calling the services they provide "rental", these 21st century types of use are deemed not to be covered by the **rental right** but are instead deemed to be covered by a completely different right: **the making available right**.

This is because the **rental right is deemed to apply only to tangible/physical copies**. In other words, if a film is **fixed on a DVD** and a consumer pays to access and use it for 48 hours it is "rental". If it is **fixed in a computer file** and accessed via Amazon Prime for 48 hours it is "making available".

This "logic" is something that this study will try to explain or find justification for, but inevitably will fail to do so.

This issue is not an academic technicality. The categorisation of rental applying only to tangible/physical copies has important legal and practical consequences for performers. For acts of "20th century rental", performers are generally entitled to receive a payment of equitable remuneration. For acts of "21st century making available", in the vast majority of countries, performers do not receive equitable remuneration.



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4.2. LEGAL FRAMEWORK

4.2.1. International legal framework

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

An unequivocal exclusive right of authorising distribution through sales[114] and commercial rental to the public of phonograms was given to the performer by the **WPPT**.

WPPT Article 9 - Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

Although the WPPT does not grant a right to equitable remuneration for the rental of phonograms, in Article 9(2) it does explicitly mention that Contracting Parties that already have such a system in place, may maintain that system.

In the agreed statement on Article 9, it is stated that the expressions "copies" and "original and copies," being subject to the right of rental, refer exclusively to fixed copies that can be put into circulation as **tangible objects**.

The WPPT only concerns the rental of performances fixed in phonograms[115]. With regard to audiovisual fixations, Article 9 of the **Beijing Treaty** on Audiovisual Performances provides performers with the exclusive right to authorise the commercial rental to the public of their performances fixed in audiovisual fixations.

Beijing Treaty Article 9 - Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in audiovisual fixations as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

In contradiction to the WPPT, the Beijing Treaty does not mention that Contracting Parties that already have a system of equitable remuneration for rental in place, may maintain that system. In addition, it even provides that granting the exclusive In contradiction to the WPPT, the Beijing Treaty does not mention that Contracting Parties that already have a system of equitable remuneration for rental in place, may maintain that system. In addition, it even provides that granting the exclusive right of rental to performers should only be an obligation if the commercial rental has led to widespread copying of the audiovisual fixations to the extent that they would materially impair the exclusive right of reproduction of performers[116].

None of the international treaties on performers' rights provide a definition of "rental".

4.2.2. European legal framework

In contrast to the international treaties, the European legal framework does provide a definition of rental. Article 1(2) of its 1992 "Rental Directive[117]" specified that "rental means **making available** for use, **for a limited period of time** and for direct or indirect economic or commercial advantage[118]".

In Article 2, the Rental Directive granted performers the exclusive right to authorise rental for phonograms and audiovisual fixations. For audiovisual performers, the same article obliged Member States 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.

The remuneration right

Article 4 of the 1992 Rental Directive imposed on Member States the principle that **"where a 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 performer shall retain the right to obtain an equitable remuneration for the rental."**

The Directive made the right to equitable remuneration **unwaivable** and applicable in the case of the abovementioned presumption of transfer.

This Directive precedes the WPPT and this provision is therefore a "system in place" to which Article 9(2) of the WPPT refers.

The Rental Directive was updated and replaced by Directive 2006/115/EC. This Directive made no changes to the exclusive rental right or the right to fair remuneration arising from the transfer of that exclusive right.

The administration of this right to obtain an equitable remuneration **may** be entrusted to CMOs, but in practice it rarely is[119]. Member States **may** regulate whether and to what extent administration by CMOs of the right to obtain an equitable remuneration may be imposed as well as the matter of

114 Article 8(1) WPPT: Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.
115 Article 9(2) WPPT.
116 Article 9(2) Beijing Treaty.
117 Directive 92/100/EEC, subsequently codified as Directive 2006/115/EC.
118 Article 2(1)(a) in Directive 2006/115/EC (codified version).
119 Article 5(1) to 5(3) Directive 2006/115/EC

from whom this remuneration may be claimed or collected[120] . Again, it rarely is. The fact that these two provisions are **not obligations** weakens the rental system, since the most efficient possible benefit of such a system, which is implemented in some EU countries, is a remuneration collectively managed and collected from the users.

The relevance of the rental right today

From a financial point of view, in 2022 the rental right is of very little significance. In any case, it has always been limited to the audiovisual sector. The phonographic industry did not allow the rental of phonograms.

Its relevance is likely to continue to decrease, at least for the period it is applied only to physical media and not streaming, as is currently the case.

Nevertheless, it is highly significant in terms of legal theory. It is a clear example of a performer being granted an exclusive right **and** retaining a remuneration right once the exclusive right is transferred. Accordingly, the legal concept of the co-existence of an exclusive right and a remuneration right is a part of the acquis communautaire, and its validity cannot be disputed in other contexts, such as making available on demand or "streaming".

As can be seen, performers have been granted an exclusive rental right under international and EU law. The law recognises the fact that when one transfers the exclusive right, the

"The law is such an ass"
George Chapman 1654

number of times that the relevant recording will be rented is unknown. For that reason, it was **logical** to grant performers a remuneration right that would apply after the exclusive rental right was transferred.

That remuneration right would, by its nature, determine an appropriate level of remuneration. If the film/music was rented frequently, a significant level of remuneration ought to be received by the performer. If it was not rented frequently, little or no remuneration would be payable.

This logic is transferrable to the situation where a performer transfers their making available right. It is nonsensical that a film "rented" from, e.g., Amazon Prime, should not be subject to a payment of equitable remuneration purely on the basis of a legal anomaly which unnecessarily and illogically distinguishes between physical and non-physical recordings.

To further explore this lack of logic, the law continues not to draw a distinction between physical and non-physical "phonograms". In the 1960s and 1970s, a phonogram was commonly a vinyl record. In the 1980s and 1990s, it was frequently a cassette tape or a CD. And now in the 21st century, a phonogram is most commonly a **non-tangible/non-physical** digital file, i.e., the mp3/FLAC file that one uses to listen to streamed music.

Why the law makes this antiquated distinction in one area but not the other is hard to accept.

4.2.3. National legal framework

From the 26 countries participating in this study, the national laws in 18 countries expressly grant an **exclusive rental right** to performers. Austrian, Finnish, French, Irish, Norwegian, Slovenian and Swiss legislation does not explicitly envisage any rental right for performers.

In practice, however, the performers' exclusive right is often transferred to the phonogram or audiovisual producer in individual contracts without a specific remuneration. This practice is extended in the audiovisual sector by the presumption of transfer incorporated in the law in Belgium, the Czech Republic, Germany, Lithuania, the Netherlands, Spain and Sweden if a contract concerning the production of a film is concluded. This often means no remuneration is paid for the transfer of this right.

In some countries, the lack of payment could be explained in that those rights have only been recently introduced into national law and accordingly the collection of remuneration has not yet begun (e.g., Serbia and Croatia). In others (e.g., Latvia, Lithuania, Poland and Slovakia) rental is simply not common practice or the provisions of the EU Directive have not been implemented sufficiently to protect performers (e.g., France) or not at all (e.g., Ireland).

In those countries which grant performers a right to an equitable remuneration, upon transfer of the exclusive rental right to a producer, the terms for determining the remuneration and the body liable for payment differ. Some national laws stipulate that remuneration is due either by the user or by the producer. Some leave that question unanswered.

Some countries have made it compulsory for this remuneration right to be payable by the user and administered by CMOs[121]. In these countries, this remuneration is determined by mutual agreement between the CMOs and the users. In other countries, remuneration is negotiated via collective bargaining agreements with the producers by the respective unions in the audiovisual field.

In Denmark, Sweden and the United Kingdom, in accordance with collective agreements signed between producers and the actors' unions with regard to the rental right of performers, the producer pays an amount to the union for further distribution to the rightholders.

In Denmark, Sweden and the United Kingdom, in accordance with collective agreements signed between producers and the actors' unions with regard to the rental right of performers, the producer pays an amount to the union for further distribution to the rightholders.

4.3. PRACTICE

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

In countries where the remuneration is payable by the user (generally the video-shop or distributor), the remuneration right is normally administered by CMOs.

In those countries currently collecting equitable remuneration for the rental right, performers' CMOs have seen a steady decline in revenues. Undoubtedly, the rise of streaming has influenced the value of the rental right. For consumers, the rental of physical media is almost negligible compared to the amount of streaming being carried out.

120 Article 5(4) Directive 2006/115/EC
121 This is the case, for instance, in the Czech Republic, Slovakia, Spain and Switzerland.

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4.4. CONCLUSIONS

The rental right and the related remuneration right were introduced in national legislation following the implementation of Directive 92/100/EEC (now Directive 2006/115/EC).

The Directive does not determine by whom this remuneration should be paid and how it is to be administered. The administration by CMOs is optional, although **it has proven to be the only mechanism that has been able to make the remuneration right effective in practice.**

In those countries where national legislation does not determine who should pay the remuneration, as well as in those countries where the producer is designated the party liable for payment, performers generally do not receive remuneration or receive at the most a one-off buy-out fee when concluding individual contracts with producers.

Where **the body liable for payment is stipulated in law to be the user and the right is administered by a CMO, remuneration is generally paid**. Where there is no collective management, the right is generally of very little benefit in practice. As is the case with the other performers' rights, performers are not in a position to manage and enforce these rights by themselves. Making the administration of the rental remuneration right subject to compulsory collective management would have been clearly beneficial to performers.

The arbitrary, antiquated and illogical distinction of making the rental right apply only to tangible objects means that the financial value of the rental right today is minimal. The approach taken by Slovenia, whereby the definition of rental also covers video on-demand platforms, is to be commended.

Although of little financial significance today, rental provides a clear illustration in EU law of the co-existence of an exclusive right with a remuneration right. **It demonstrates beyond doubt that there is no legal difficulty whatsoever with the co-existence of these two types of right.** This is a clear precedent for a right to equitable remuneration to be introduced in the context of making available.

CHAPTER 5

TERM OF PROTECTION OF PERFORMERS' RIGHTS

5.1. INTRODUCTION

Performers' neighbouring rights are temporary in time. As with authors' rights, the legislator has decided to grant a property right to the result of an artistic activity, but after a certain period of time the work or performance to which the right relates becomes part of what is called "the public domain". There is, however, a difference in the way in which the term of expiry of the property right is calculated.

While authors receive protection for a duration that is connected to their life (by granting a protection until death plus additional years), performers receive protection that is connected to the moment of the performance itself (or the publication of its fixation). Once fixed, different terms exist for performances fixed in phonograms and those fixed in an audiovisual recording.

5.2. LEGAL FRAMEWORK

5.2.1. International legal framework

The 1961 **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 was incorporated for the first time in a phonogram in which the fixation was made[122].

Even though the 1996 **WPPT** grants performer's rights[123] in their unfixed performances, the term of protection is a minimum period of 50 years[124] "computed from the end of the year in which the performance was fixed in a phonogram". Producers, however, can get a longer term of protection. For producers of phonograms, the term of 50 years only starts at the end of the year of the fixation of the phonogram if the producer fails to publish the phonogram. If the producer publishes the phonogram within 50 years of fixation, the term will only start at the end of the year in which it was published.

Similarly, the 2012 **Beijing Treaty** on Audiovisual Performances grants performers a 50 year term of protection, "computed from the end of the year in which the performance was fixed.[125]"

5.2.2. European legal framework

A joint start for actors and musicians

Pursuant to Article 3 of **Directive 2006/116/EC** (formerly Directive 93/98/EEC), a performer's 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 will expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier[126].

This introduced a potential extension vis-à-vis the duration of the protection set out in the WPPT, since publication or communication to the public of a fixation of a performance can take place years after the performance (only insofar 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.

20 extra years for musicians only

Following a number of consultations and assessments, a proposed directive amending the existing Term Directive and **extending the term of protection of performers' rights** was finally adopted by the European Council on 12 September **2011**. Article 1(2) of the "Term Extension Directive[127]" extends the term of protection for sound recordings in the EU from 50 to 70 years from the date that the recording was first published or communicated to the public. Consequently, the term of protection for performers whose performance is fixed in a sound recording is also extended from 50 to 70 years.

One important aspect of the 2011 Directive for a term extension of performers' rights deserves specific attention: the main reason invoked by the European legislator for this Directive introducing an extended term was to improve the situation of performers. The European Commission's Proposal for the Directive states:

"The proposal aims to improve the social situation of performers, and in particular session musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances[128]".

The text goes on to say:

"This proposal is in line with the objectives of the EU to promote social welfare and inclusion. Performers, and especially session musicians, are among the poorest earners in Europe, despite their considerable contribution to Europe's vibrant cultural diversity[129]".

Additional measures

To help to achieve this objective, the Directive proposes several additional measures aimed at strengthening the position of performers and ensuring that they will not be deprived of the benefits they ought to be able to expect to receive from their rights. The Directive specifies why this is necessary in Recital 9[130], which refers to the standard practice that many performers (particularly non-featured artists, or "session musicians") face, i.e., transferring their exclusive rights to the producer for a one-off or "non-recurring" remuneration. In Recital 6, it stresses that the revenue performers should derive from their rights "should be available to performers for at least their lifetime[131]".

This is supplemented by Recital 10, which provides:

"In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced."

The following accompanying measures were set out in Article 1(2) of the Directive:

Annual supplementary remuneration for performers receiving non-recurring remuneration

The Directive ensures that performers receiving non-recurring remuneration (i.e. a one-off payment) also benefit in practice from the term extension. This means that non-featured performers not benefiting from royalties on the exploitation of the recordings are granted an **unwaivable right to obtain annual supplementary remuneration** from the record producer from the 50th year of the term of protection up to the 70th year.

The record producer[132] must, at least once a year, allocate 20% of revenue (before deduction of any costs) derived from the reproduction, distribution and making available of the sound recording to performers that received a lump-sum buy-out at the time of the recording. The collection and distribution of this annual supplementary remuneration is to be administered by CMOs.

In the calculation of the overall amount to be allocated to performers, no account should be taken of revenue that the producer has derived from the rental of recordings, of revenue from broadcasting and communication to the public or of compensation for private copying (on the ground that in most EU countries and on the basis of the acquis communautaire, these uses are subject to remuneration already shared between performers and producers).

Furthermore, record producers must, on request, provide performers with any information necessary to secure payment of that remuneration.

The **legal importance of this provision** of the Directive should not be underestimated. It is another clear example of an **unwaivable right to remuneration** being granted to performers following the transfer of their exclusive rights, **including the right of making available.**

Some commentators have questioned whether a remuneration right can legally co-exist with an exclusive right, such as the exclusive making available right. This Directive, along with the provisions regarding the right to remuneration upon transfer of the exclusive rental right in Directive 2006/115/EC, is clear evidence that this is both possible and desirable. It recognises the weak position of certain performers and remedies this by providing them with a remuneration right. As explained in Chapter two, a similar approach should be adopted and applied to **all** performers (both audio and audiovisual) in the event that they transfer the making available right and should cover the entire term of protection[133].

"Use it or lose it" clause

A second additional measure introduced by the 2011 Term directive is the so-called "use it or lose it" clause. This clause can be invoked by all performers, regardless of whether they benefit from recurring remuneration (royalties) or not. If record producers fail to use a record for exploitation, i.e., offer copies for sale in sufficient quantities or not make it available by wire or wireless means (50 years after its first publication), performers have the unwaivable right to terminate the contract with the record producer.

This right may be exercised if the producer fails to carry out both of the acts of exploitation within a year of having been notified by a performer of their intention to terminate the contract. Performers may terminate their contracts in accordance with the applicable national law.

The aim of this provision is to guarantee a real exploitation of the recording for which the rights were transferred to the producer, often with the benefit of exclusivity.

"Clean slate" provision

A third and last additional measure introduced by the 2011 Term Directive is the so-called "clean slate" provision. This "clean slate" provision only concerns performers who have transferred their rights in return for a recurring remuneration. According to this provision, a royalty or remuneration rate should be paid to performers during the extended period, writing off any "unrecouped" advances.

The term "unrecouped" requires some explanation. When the initial record contract is signed, the producer will usually make an advance payment to the performer to finance the making of the recording. This amount must be repaid from the revenue generated from the exploitation of the recording. No payment will be made by the producer to the performer until this amount has been repaid. At that stage, the advance

122 Article 14 Rome Convention
123 Including moral rights, Article 5 WPPT
124 Article 17(1) WPPT; if no fixation of the performance has been made, no protection term has been envisaged (since it was not considered necessary).
125 Article 14 Beijing Treaty
126 Article 8 Directive 2006/116/EEC
127 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights
128 https://data.consilium.europa.eu/doc/document/ST-12217-2008-INIT/en/pdf at page 2
129 https://data.consilium.europa.eu/doc/document/ST-12217-2008-INIT/en/pdf at page 6.
130 Recital (9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights in return for a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits (non-featured performers) but sometimes also for performers who appear in the credits (featured performers).
131 However, the decision to give performers lifetime protection as a minimum has still not been taken.
132 Member States may regulate to what extent this should apply to micro enterprises.
133 Again, this is a further reason why the term of protection ought to be extended for performers in the audiovisual sector.

payment is said to have been "recouped". This provision is important since the advance may not have been recouped, even after 50 years. However, this does **not** mean that the producer has not made a profit. Under standard contractual practice, the advances are repaid **only from the performers' royalties.** As a result, the producer may have recovered the amount it advanced to the performers and be earning a profit, while the performer is still not receiving any payment.

Furthermore, Member States should be able to provide that certain terms in contracts which provide for recurring payments can be renegotiated. Member States must have procedures in place should renegotiations fail.

Unjustified discrimination

The scope of the Directive is **regrettably limited to the musical field only**. In other words, the duration of performers' rights in recordings of performances other than in sound recordings, such as in films/TV programmes, remains at only 50 years.

Even in the musical field **this discrimination between sound and audiovisual recordings leads to some absurd situations**; an opera recorded on an audiovisual fixation will be protected only for 50 years whereas the same opera, regarding its musical part on the sound recording, will be protected for 70 years.

According to Article 3(2) of the Directive[134], the Commission was obliged to submit a report by **January 2012**, assessing the possible need for an extension of term to performers and producers in the audiovisual sector and, if necessary, submit a proposal for an amendment.

No such report was produced[135]. By April 2019, the report had still not been produced. In light of this, AEPO-ARTIS made an application to the EU Ombudsman, who found that there had been maladministration on the part of the European Commission.

Subsequently, in December 2020, almost nine years late, the Commission opened a short consultation period and published an evaluation report[136] in which it stated that:

"...the results of the consultation do not point to a need, at this stage, and based on the available evidence, to extend the term of protection of performers and film producers in the audiovisual sector. However, this matter will be also examined in the broader context of the assessment of the functioning of the 2011 Term Directive, which the Commission will carry out as a next step to prepare ***the report required under Article 3(1) of that directive."***

This evaluation by the Commission can be very strongly criticised for perpetuating the discrimination against performers in the audiovisual sector. Regardless of the financial benefits or otherwise, **there is no justification whatsoever for performers in the audiovisual sector having a shorter period of protection than performers in the audio sector.**

In addition, specific elements of the report can be criticised.

Firstly, the report focused largely on the royalties (or lack thereof) payable to performers under contract. It concluded that since royalties were payable in very few cases, extending the term of protection would be of limited benefit other than in the case of very successful performers who were able to negotiate royalties. However, the report did note that performers receive an income via their remuneration rights that are collectively managed by their CMOs. Within the EU these include common remuneration rights for rental, lending, private copying, cable retransmission and in some Member States, broadcasting, public performance and making available. The income derived from these rights would continue to be paid throughout the period of extension and the report even acknowledged that this would "probably have a positive effect on performers."[137] For this reason alone, an extension of term should have been granted.

Secondly, the report was based on a number of false premises, indicating the Commission's lack of knowledge of the sector. The report indicates that "...performers... do not hold a right to remuneration for broadcasting and communication to the public." While this is true under the acquis communautaire, it is certainly not true under a number of Member States' national laws.

It is to be hoped that these errors will be corrected in the report on the functioning of the 2011 Term Directive that the Commission is obliged to submit to the European Parliament under Article 3(1) of that Directive. It is also to be hoped that this report will be published without any further delay. The Directive provides that the report should be produced no later than November 2016 and therefore there has already been an unacceptable delay.

In 2022, the Commission appointed an external consultancy firm to conduct a study as input for this review. Work was undertaken by that firm in the first months of 2022 and its findings were submitted to the Commission in summer of that same year. As of November 2022, the Commission has still not published the report.

5.2.3. National legal framework

The 2011 Directive is applied in all Member States. The national laws implementing the Directive follow more or less the content of the Directive.

In the Netherlands, the "clean slate" provision was not implemented. The Dutch legislator felt that this provision would cause legal uncertainty and that performers as well as producers could abuse this provision.

In Italy, the law does not appoint one single CMO to administer the supplementary remuneration but states that it should be managed by all performers' CMOs operating in the market. In practice, this renders the management of this remuneration difficult if not impossible.

In Polish law there is an additional qualification in the element of the legislation dealing with the "use it or lose it" clause with respect to offering phonograms to the public, namely that the amount of phonograms offered must be such that, considering its character, shall fulfil the reasonable needs of the public.

In Belgium, the specific right of performers to receive from the phonogram producer any information which may be necessary in order to secure payment of that remuneration, was also given to the CMO in charge of the collection and distribution of the annual supplementary remuneration.

5.3. THE DIRECTIVE IN PRACTICE

In the legislation of a number of EU Member States, the extension of the term of protection of phonograms has a positive effect on the extent or size of the protected repertoire, and a corresponding positive effect on the remuneration that can be paid to performers for its use.

In addition, an important issue for performers and their CMOs is whether the law and specifically the accompanying measures are effective in practice.

Annual supplementary remuneration for performers receiving non-recurring remuneration

For non-featured performers in the audio sector, there is evidence that they are beginning to benefit from this right. We can see that this remuneration has started to be collected and distributed in the majority of EU Member States.

A common problem is that it has proved difficult to adequately obtain information from phonogram producers that would enable a performers' CMO to trace the performers who are entitled to receive this remuneration since this information is held or ought to be held by the producers. Unfortunately, for a number of phonograms, information regarding non-featured artists who should benefit from this remuneration is not always easily available (despite common principles on performers' moral rights and their right to be identified as a performer in the performance). With the dematerialisation of phonograms (i.e. the change from physical formats such as vinyl and CDs to digital files), this problem may increase in the future if non-featured artists are not included in the metadata accompanying the file.

134 Article 3(2) in Directive 2011/77/EU stipulates that: "By 1 January 2012, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee, assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC".
135 In spite of the fact that AEPO-ARTIS had frequently reminded the Commission of its obligation.
136 Available on request here https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2020)342&lang=en
137 At page 12, paragraph 4 SWD (2020)342

A common complaint from performers' CMOs is that tracing these performers is therefore a costly procedure and that **the cost is borne by the performers' CMO and not by the producers,** despite the fact that the obligation to pay the remuneration and provide all necessary information applies to the producers. In the context of the debates on the "CRM Directive"[138], AEPO-ARTIS requested that producers should be obliged to make such information available to CMOs, but unfortunately no such provision was incorporated in the final document. This should still be an element to incorporate in EU law.

It should be reiterated that this provision is of **no benefit** to the hundreds of thousands of performers around Europe who are active in the audiovisual sector for the simple reason that they were discriminatorily excluded from the benefit of the extended term of protection.

However, for performers in the audio sector it seems that this supplementary provision is of actual benefit to non-featured performers and that its financial importance will increase in the future.

"Use it or lose it" clause

From anecdotal evidence, there have been no reports to CMOs of performers exercising the right to terminate the contract with the record producer under the aforementioned "use it or lose it" provisions. This is unsurprising for the reason that the mere existence of a recording on a streaming platform could be deemed to constitute "use". Furthermore, the fact that such a recording forms part of the catalogue of the producer and that that catalogue is licenced in its entirety to platforms such as Meta (particularly Facebook) and TikTok for considerable amounts of money might also be deemed to constitute "use".

"Clean slate" provision

Similarly, most CMOs are not aware of any performer benefiting from the "clean slate" provision. In practice, it is highly unlikely that, if a recording has not been very commercially successful during the initial period of 50 years, there will be any significant use of the work in the following 20 years. Therefore, the amount of remuneration generated by this provision is minimal.

In practice, this provision has been superseded to some extent by a welcome initiative on the part of major record labels to write off unrecouped amounts after a 20 year period. This initiative was first made by Sony Music and was followed by Warner Music Group. It is understood that Universal Music Group may apply the same principle. Nevertheless, it should be noted that recoupable amounts are dealt with on a cumulative basis. In other words, if a performer has received a **number of advances** (for example if they recorded several albums), the debt will not be written off until 20 years after the **last** advance was made.

5.4. CONCLUSIONS

Since 1993, performers in Europe have enjoyed a protection of at least 50 years after delivering a performance. In September 2011, the Term Directive extended this term of protection for performers' rights in **sound recordings** from 50 to 70 years.

This Directive has undoubtedly provided benefits to some performers by protecting a larger repertoire of sound recordings and by creating in addition the annual supplementary remuneration, however it continues to perpetuate the discrimination against performers in the audiovisual sector. In its (delayed) report on the need for the term of protection to be extended to performers in the audiovisual sector, the Commission failed to take into account a number of important factors and consequently reached the wrong decision in not granting this additional protection to performers in the audiovisual sector.

It is hoped that this will be rectified when the Commission carries out its (already delayed) review of the Directive itself.

In addition to the actual extension itself, a number of additional measures are provided, however only one of these (the annual supplementary remuneration) has produced visible results. This provision whereby a sum of 20% of part of producers' revenue should be allocated through collective management to those performers not benefitting from recurring royalty payments, has proved to be beneficial to some performers. However, the requisite information from producers is difficult to obtain and it is unacceptable that the cost of obtaining it is borne by performers' CMOs.

Ultimately, the main beneficiary of this term extension is the phonographic industry. If the measures that are theoretically beneficial to performers are to actually benefit performers in practice, increased co-operation with producers (including the supply of data they hold) will be required, particularly with regard to sharing the burden of tracing performers entitled to the annual supplementary remuneration.

CHAPTER 6

CONCLUSIONS AND KEY RECOMMENDATIONS

6.1. CONCLUSIONS

1. The introduction of performers' rights was essential

Performers' rights are a relatively modern innovation. Internationally recognised in the 1960s, they are the building blocks which allow performers to pursue their chosen profession. They continue to evolve to this day and the way in which they develop is critical.

Historically, performers have been granted rights which are very similar to those of authors. This may seem fair, but a right that is beneficial to an author may be of less (or no) benefit when granted to a performer.

This is particularly the case with exclusive rights. Insufficient attention has been paid to the specific aspects of the rights of performers – as a unique category of rightholder – by both the international community and by the European Union and its Member States.

2. Remuneration rights can beat exclusive rights and "soft law" doesn't work

The choice made in the 1990s to structure performers' rights on the basis of exclusive rights has proven to be ineffective in the 21st century.

Where performers are granted a remuneration right subject to compulsory collective management, they are guaranteed to receive a reasonable financial benefit. Conversely, where they have been granted an exclusive right, such an outcome is highly uncertain.

The imbalanced commercial negotiating power between performers and producers has led to contractual practices that are one-sided, unfair and out-dated. In the music sector, the lack of a remuneration right for online exploitation makes it impossible for many musicians to make a living from their profession as the market shifts towards a digital music market. Producers are able to maximise their profits, while minimising their risks. In the audiovisual sector, the continuing practice of buy-outs prevents performers from sharing in the success of the works to which they make a vital contribution.

The exclusive making available right, as the only tool provided to performers to assist them in obtaining fair remuneration from new technological uses, **has clearly failed**. This must change if there is to be a thriving music and film industry in Europe. In fact it must change in order to **comply with the CDSM Directive**. The Directive obliges Member States to introduce a mechanism to **ensure** performers receive "appropriate and proportionate remuneration".

Introducing soft law such as the mere principle of "fair contracts" between producers and performers does not work in practice. The most reliable way in which this can be done is to introduce a right to equitable remuneration for online exploitation. This presents no legal or practical difficulties, as the approach taken in countries such as Spain has shown.

138 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

3. Performers in the audiovisual sector are still discriminated against

Performers in the audiovisual sector are still less well protected than their fellow performers in the music sector.

The term of protection of audiovisual performances is **twenty years** shorter than that of musical performances. That limits the period in which actors may benefit from existing remuneration mechanisms that currently exist under EU law. There are also **fewer remuneration mechanisms** available to audiovisual performers (as compared to performers in the music sector), which in turn limits the possibilities available to CMOs to collect on their behalf.

There is no justification for this whatsoever.

4. Collective management is a necessity

Collective management for performers has historically proven to be necessary. It has been, and always will be, impossible for individual performers to manage certain aspects of their rights themselves. With the advent of a digital single market for music and audiovisual content it is only becoming harder. Given the increasing number of diverse remuneration sources, the need for collective management has never been greater than today.

Collective management is an evolving area. Not only do CMOs exist, so too do independent management entities and agents; both of which manage rights on behalf of rightholders. Record labels too have started to play a collective management role when they license their **catalogue** on behalf of all rightholders involved.

Performers' CMOs are open, inclusive, non-profit and non-discriminatory organisations, run by performers and working purely on behalf of their members. In many cases they give back to society as a whole by dedicating income to social and cultural activities.

Today more than ever, collective management of performers' rights is a complex area. If better data were to be provided to CMOs by producers and end-users, this would greatly improve the lives of CMOs and benefit performers. Nevertheless, performers' CMOs have learned **"to do more, with less"**.

5. Precarious status quo

With regard to the **rights that performers' CMOs manage**, the level of income for performers has remained relatively stable over the past decade. Nevertheless, performers' rights are now at a crossroads and the situation is extremely precarious.

The stated aim of certain music platforms is to replace linear radio, and the growth of TV and film streaming platforms jeopardises the future of linear TV and cable retransmission. The remuneration collected by CMOs for these types of use has been essential to performers, but it is inevitable that in the very near future it will decline. In the absence of **technology neutral protection**, this decline will make it increasingly difficult to have a sustainable career as a performer.

The current **private copying remuneration system** has survived constant attacks from various opponents but remains under threat. It is an essential source of remuneration for performers but must urgently adapt to modern technology. Some Member States lag far behind others. It is unacceptable that their private copying systems have failed to evolve, to such an extent that in 2022 levies are not even applicable to devices such as smartphones or even desktop computers in some countries.

So far, CJEU case law has evolved in a way that preserves the system and most recently has confirmed the need to future-proof the collection of private copying remuneration by confirming that cloud data storage is subject to private copying levies. Nevertheless, performers remain just **"one bad court judgement away" from a major loss of income**.

6. Lack of transparency

With effect from June 2022, performers in the EU are entitled to receive transparent information from producers regarding the exploitation of their performances. It is still too early to see what impact this has had.

Major record labels in particular have concluded multi-million-euro agreements with platforms such as TikTok and Facebook. The terms of these agreements are confidential. In the audiovisual sector, buy-out practices continue to limit the possibility for actors to receive information on the revenues generated from their work. If that remains the case, it will be impossible for performers to determine whether they are receiving a fair share of the value of their work.

The recognition by the EU legislature that performers are entitled to receive transparent information from producers is to be commended. However, **historically performers have been unwilling to confront producers for fear of being "blacklisted"**.

Time will tell the extent to which performers will be able to benefit from this right in practice.

6.2. KEY RECOMMENDATIONS

1. Introduce a right to equitable remuneration for on-demand streaming

Every EU Member State must comply with their obligation in article 18(1) of the CDSM Directive i.e. to "ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration". In particular, this must apply to all acts of **interactive streaming** including by User-Generated Content (UGC) platforms.

In order to reduce the imbalance in contracts between performers and producers, where a performer has transferred or assigned their exclusive right of **making available on demand**, an **unwaivable right to equitable remuneration** subject to compulsory collective management and payable by the user should be introduced.

The introduction of such a right will go some way to reducing the imbalance in contracts between performers and producers.

2. Ensure that performers are adequately remunerated for passive streaming and online rental

Commercial practices should be adapted to ensure that existing legislation is applied in a technology neutral way. If this cannot be achieved, governments should play an active role in assisting to reach a solution.

A very large percentage of streaming on digital platforms consists of passive streams. This is mainly in the case of music, where these "non-interactive acts of communication to the public" should be covered by article 8(2) of Directive 2006/115/EC and accordingly equitable remuneration must be paid to performers. As Member States have often provided legal frameworks for the negotiation and fixation of the tariffs for such equitable remuneration, **they should take an active role in accelerating this process**.

In the audiovisual sector, **large digital streaming platforms are offering users the chance to rent a film for a limited period of time**. If these platforms and their consumers are still applying essentially the same practices for which a legal framework has existed for thirty years, then it is incomprehensible that this framework is no longer applied.

3. End discrimination against performers in the audiovisual sector.

Directive 2011/77/EU on the **term of protection** of copyright and certain related rights must be amended to ensure that audiovisual performances are protected for a period of 70 years i.e. the same length of time as for musical performances.

The EU must ratify the **Beijing Treaty** in a manner that ensures that audiovisual performers will be adequately remunerated when fixations of their performances are communicated to the public in any way, including online.

4. Ensure that a modern future-proof system of private copying remuneration exists in all Member States

All Member States must ensure that performers are adequately remunerated when private copies of their recordings are made. Levies must be urgently and regularly reviewed to ensure that they cover all "modern devices", such as smartphones, as well as new technology, such as cloud data storage providers.

5. Monitor performers' right to transparent information about the exploitation of their recordings

It is essential that performers receive transparent information from producers, particularly with regard to modes of exploitation that they no longer fully control themselves and the details of which are frequently obscured. Without this, they cannot determine whether what they are receiving is what they are entitled to under their contracts.

The extent to which producers will provide sufficiently transparent information remains to be seen. This must be closely monitored. In the event that producers do not meet their obligations, they must be held to account.

AEPO ARTIS

ASSOCIATION OF EUROPEAN PERFORMERS ORGANISATIONS

AEPO-ARTIS is a non-profit making organisation that represents 37 European performers' collective management organisations from 27 different European countries. The number of performers, from the audio and audiovisual sector, represented by its 37 member organisations can be estimated at 650,000.

AEPO-ARTIS aspires to ensure all performers benefit from the use of all their performances. As the paramount voice of performers' collective management organisations in Europe, AEPO-ARTIS strives to promote the collective management of rights and to protect, strengthen and develop performers' neighbouring rights as well as to highlight the contribution that performers make to Europe's rich and diverse cultural sector.

We develop, strengthen and protect **performers' rights**.

AEPO - ARTIS +32 (0)2 280 19 34 aepo-artis@aepo-artis.org www.aepo-artis.org