

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

A E P O A R T I S



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Introduction

Under international, European and national legislation, performers are granted a protection for their performances in the field of music, audiovisual, dance or any other category of performing arts. Those rights are generally called performers' rights. Like authors' rights, performers' rights can be divided into two categories: moral rights and economic rights.

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

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

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

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

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

Recital 10 of the same Directive furthermore underlines that:

“If authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work (...). The investment required to produce products such as phonograms, films or multimedia products, and services such as ‘on-demand services’, is considerable.

Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment”.

European legislation relating to authors’ and performers’ rights clearly aims to give authors and performers an instrument to allow them to make decisions about the use of their own creations and performances and to enable them to generate an adequate income for this exploitation. This instrument can consist of the recognition of exclusive rights. An exclusive right is in theory a very powerful tool that gives rightholders the decision-making power to authorise or to prohibit the use of their work. Theoretically, this puts such rightholders in a strong bargaining position. Exclusive rights concern the fixation, reproduction, distribution, rental, broadcasting and communication to the public, and - to a limited extent - the making available on demand of performances.

In European legislation, these rights are set out in Directive 2006/115/EC and Directive 2001/29/EC, Directives which harmonise intellectual property law throughout EU and EEA Member States.

With regard to the exclusive right of fixation (see Directive 2006/115/EC, article 7), fixation occurs when a work or performance is recorded onto a medium of one form or another. Earlier international intellectual property legislation¹, referred to a fixation “in a material form”. However, no such reference is made in these Directives. Accordingly, there is no doubt that a fixation would include the recording of a work or performance in digital form such as on a .mp3 file.

The exclusive reproduction right (see Directive 2001/29/EC, article 2) grants performers the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction of fixations of their performances by any means and in any form, in whole or in part.

The exclusive distribution right (see Directive 2006/115/EC, article 9) is defined in Directive 2006/115/EC as the “exclusive right to make available to the public, by sale or otherwise (*fixations of performances*) including copies thereof”.

The exclusive “rental right” (see Directive 2006/115/EC, article 3 and examined at chapter 5 of this study) gives a performer, in respect of fixations of his/her performances, the exclusive right to authorise or prohibit the rental and lending thereof. The rental right is noteworthy on account of the fact that when it is transferred to a producer, the performer shall retain the right to obtain unwaivable equitable remuneration for the rental².

¹ Berne Convention for the Protection of Literary and Artistic Works, effective as of 5 December 1887, article 2(2)

² Directive 2006/115/EC, article 5(1)

An exclusive right for the communication to the public and the broadcasting of live performances is set out in article 8(1) of Directive 2006/115/EC and article 8(2) contains a specific regime of a guarantee of equitable remuneration paid by users for the broadcasting and the communication to the public of phonograms published for commercial purposes.

The exclusive making available right (see Directive 2001/29/EC, article 3) gives the right to performers, in respect of fixations of their performances, to authorise or prohibit the making available of those fixations 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. Chapter 3 examines this right in detail which is crucially important in the digital environment. It is particularly noteworthy that while making available can be considered as a form of communication to the public, performers have no right to remuneration under this article in the event that their making available right is transferred to a producer, contrary to the situation of broadcasting and communication to the public under Directive 2006/115/EC, article 8(2).

Some rights may be subject to certain exceptions and limitations, also set out in these Directives. Exceptions and limitations are optional provisions which Member States can choose to implement in their national legislation or not. An example of this is the exclusive reproduction which may be subject to the “private copying exception”³. This subject is examined in detail in chapter 4. In Member States which have implemented the private copying exception, (almost all EU Member States) a non-commercial reproduction made by a natural person would not be an infringing act, provided that rightholders receive fair compensation.

At the international level, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations from 1961 created the first basic exclusive rights for performers regarding the fixation of their live performances, broadcasting and communication to the public of these live performances, together with a reproduction right. Its main success was to introduce the guarantee of equitable remuneration for broadcasting and communication to the public of commercial phonograms.

The WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on 20 December, 1996 provided for an international protection of the rights of performers that, for the first time, took into account developments in the digital environment. The WPPT only covers the rights of performers in relation to their performances fixed in phonograms and grants them in respect of such performances the exclusive rights of reproduction, distribution, rental and making available⁴.

³ Directive 2001/29/EC article 5(2)(b)

⁴ WPPT articles 7, 8, 9 and 10 respectively.

With regard to reproduction (article 7), the Treaty provides that performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms.

Regarding distribution, article 8 defines the distribution right as the exclusive right of authorising the making available to the public of the original and copies of performances fixed in phonograms through sale or other transfer of ownership.

Article 9 covers the rental right and states that performers have the exclusive right of authorising the commercial rental to the public of the original and copies of their performances fixed in phonograms.

Article 10 addresses the exclusive right of making available of fixed performances and provides that the right applies to the making available to the public of 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.

The WPPT provides at article 15(1) that *“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.”* This provision is qualified by article 15(3) which states that *“Any Contracting Party may... declare that it will apply the provisions of paragraph (1) 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.”*

The European Union acceded to the WPPT in 2000.

The WIPO Treaty on Audiovisual Performances adopted in Beijing on 24 June 2012 (the “Beijing Treaty”) establishes a set of new international rules which aim at ensuring the adequate protection and remuneration of audiovisual performers. The majority of issues covered by the Treaty are already harmonised at EU level. The Treaty grants performers exclusive rights with respect to their unfixed and fixed performances. With regard to unfixed performances (see article 6), these include the right to authorise the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance as well as to authorise the fixation of their unfixed performances.

With regard to performances fixed in audiovisual fixations, performers enjoy the exclusive rights of reproduction (article 7), distribution (article 8), rental (article 9) and making available (article 10). The Treaty grants performers the exclusive right to authorise the broadcasting and communication to the public of their performances (article 11), however Contracting Parties are entitled to replace this right by a right to equitable remuneration or to derogate from this right entirely.

Also, the Beijing Treaty addresses the subject of transfer of rights, providing at article 12 that a Contracting Party may provide that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorisation provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation. National law may require this consent to be in writing. Independent of the transfer of exclusive rights, 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 in the Treaty.

Note that unlike the WPPT, the Beijing Treaty is not yet in force, having not, as at the end of October 2018, received the 30 ratifications as required by its article 26.

Exclusive rights are transferrable by nature. In practice, the consequence is that the producer (usually a record company or TV/film studio) will insist that performers transfer all of their exclusive rights to them before they sign a contract with the performer⁵. Accordingly, at the time that the performer makes a recording or gives a performance, he/she is entirely reliant on the terms of the contract that he/she has signed with the producer. Such contracts usually make provision for the payment to the performer of an overall lump sum, which is often derisory or sometimes even without remuneration.

Due to these commercial realities, very few performers' collective management organisations ("CMOs") are able to exercise exclusive rights on behalf of performers.

This situation is very different to the situation of authors and the way in which authors' exclusive rights are exercised. First of all, authors' rights were created sometimes centuries prior to performers' rights. Several European legislations have their origin in the 18th century, while performers' rights were first created during the second part of the 20th century. Authors' rights are traditionally more accepted and respected than performers' rights.

⁵ In a very small number of cases a CMO will be able to administer a tiny proportion of performers' exclusive rights. This is very much the exception rather than the rule.

Moreover, authors may create a work independently and then grant a mandate to a CMO to exercise the exclusive rights on their behalf. CMOs (which are in a far stronger bargaining position than individual authors or performers) can negotiate favourable and equitable contractual arrangements with producers.

It can be seen therefore that in the case of authors, the exclusive right is indeed a powerful tool. For performers however, that same exclusive right is in practice of far less benefit.

Consequently, collection made by performers' CMOs is mostly in respect of remuneration rights, while collection by authors' CMOs is predominantly based on the collective exercise of exclusive rights.

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

- 1) a right to equitable remuneration for broadcasting and communication to the public of their performances,
- 2) a right to equitable remuneration for rental, based on an exclusive right when transferred, and
- 3) a remuneration for private copying as a counterpart for the use of the corresponding exception to the reproduction right.

Remuneration rights granted under exceptions and limitations to certain exclusive rights do not give rightholders the possibility to authorise or to prohibit the exploitation of their work but do at least ensure them an income. They are generally considered as non-transferable, which means that they remain in the hands of the performers concerned, regardless of what the provisions of the contracts signed are. This is also the case for the equitable remuneration guaranteed for broadcasting and communication to the public of fixed performances (mostly for phonograms). Hence, most performers are depending much more on remuneration rights and the remuneration from private copying than on the exclusive rights to receive an income from the exploitation of their rights.

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

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

In order to do so, the study is based on data, both quantitative and qualitative, from 35 performers' organisations in 26 countries. The countries covered are Austria, Belgium, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

Country	Organisation
Austria	LSG
Belgium	PLAYRIGHT
Croatia	HUZIP
Czech Republic	INTERGRAM
Denmark	GRAMEX FILMEX
Finland	GRAMEX
France	ADAMI SPEDIDAM
Germany	GVL
Greece	APOLLON DIONYSOS ERATO
Hungary	EJI
Ireland	RAAP
Italy	NUOVO IMAIE
Latvia	LAIPA
Lithuania	AGATA
Netherlands	NORMA SENA
Norway	GRAMO
Poland	SAWP STOART
Portugal	GDA
Romania	CREDIDAM

Serbia	PI
Slovakia	SLOVGRAM
Slovenia	AIPA IPF
Spain	AISGE AIE
Sweden	SAMI TROMB
Switzerland	SWISSPERFORM
United Kingdom	BECS

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

- right to an equitable remuneration for the broadcasting and communication to the public of commercial phonograms;
- satellite broadcasting and cable retransmission;
- right of making available to the public;
- remuneration for private copying as a counterpart for an exception to the exclusive reproduction right;
- rental right; and
- the duration of the protection of performers' rights.

After describing the legal framework applying to each of them, the study describes their practical implementation and gives indications about the impact of the *acquis communautaire* in each field covered. On the basis of the main findings emerging from the data collected, the study draws conclusions and recommendations of a technical and legal nature to improve the situation of performers in Europe and offer a better environment for administering their intellectual property rights.

Finally, at chapter 7 the study touches briefly upon the Directive on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (2014/26/EU) which was adopted in 2014.

Although the question of the recognition and the definition of moral rights is of significant interest and worthy of special attention, it does not fall within the scope of this study which concentrates on economic rights. Moral rights have not been subject to harmonisation at Community level and are not part of the *acquis communautaire*. Moral rights were given to performers with regard to sound recordings at international level with the WPPT and are included in the Beijing Treaty at article 5. The Directive 2001/29/EC did not fully integrate all provisions of the WPPT and deliberately left moral rights out of its scope. Nevertheless, several national laws of European countries have granted moral rights to performers. Given this situation, one might certainly advise for the question of moral rights for performers to be considered at Community level.

Chapter 1: Right to an equitable remuneration for broadcasting and communication to the public of commercial phonograms

Legal framework

International legal framework

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

In the Rome Convention, a “phonogram” is defined as “any exclusively aural fixation of sounds of a performance or of other sounds”. In practice, a phonogram is any fixation of sounds, taking the form of a CD or a .mp3 file for instance.

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

Not all phonograms are covered by this remuneration clause: the article applies only to published phonograms and only if the publication was for commercial purposes. The Rome Convention only defines “publication” as the offering to the public (of a performance) in reasonable quantities⁶. It does not provide a definition of “commercial purposes”. In fact, almost all phonograms are published for a direct or indirect financial benefit.

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

Finally, the phonogram in question must be used for broadcasting or for “any communication to the public”. Other types of use are not covered⁷.

⁶ Article 3(d) Rome Convention

⁷ Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981, pp. 47-49

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

In addition, article 16 of the Rome Convention leaves room for numerous reservations. A Contracting State may at any time declare that it will not apply article 12 entirely - or partially - in respect of certain uses. A Contracting State may also declare that it will not apply article 12 as regards phonograms the producer of which is not a national of another Contracting State⁸.

Finally, a Contracting State which grants payments for secondary uses of a phonogram whose producer is a national of another Contracting State, may limit the protection to the extent to which and to the term for which the latter state grants protection to nationals of the former⁹.

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

Article 15(1) of the WPPT of 1996 provides performers and producers of phonograms with a right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

The WPPT updates the definition of “phonogram” as worded in the Rome Convention, by also allowing “representation of sounds” and omitting the words “exclusively aural” (see article 2(b))¹⁰. 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.

⁸ In a state that makes such a declaration, nothing would be payable either to the producer or to the performer if the producer is not a national of another Contracting State.

⁹ However, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the state making the declaration shall not be considered to make a difference to the extent of the protection (article 16(1)(a) iv, second sentence).

¹⁰ According to article 2(b) WPPT a phonogram is the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work. In the Rome Convention a phonogram is defined as any exclusively aural fixation of sounds of a performance or of other sounds (article 3(b)).

This treaty extends the right to remuneration to direct and indirect use. In the application of its article 15, phonograms made available on demand would be considered to have been published for commercial purposes¹¹.

The WPPT confirms that both performers and producers are entitled to remuneration. Nevertheless, the treaty still provides a possibility for Contracting States to apply exemptions to this right to equitable remuneration: according to article 15(3), any Contracting State 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.

The Beijing Treaty on the Protection of Audiovisual Performances adopted on 24 June 2012, provides in article 11 that performers in the audiovisual sector shall enjoy the exclusive right of authorising the broadcasting and communication to the public of their performances fixed in audiovisual fixations. It further stipulates that Contracting States may instead of the exclusive right establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.

This stipulation that Contracting States may establish a right to equitable remuneration instead of an exclusive right is however qualified by the provision in article 11(3) that Contracting States 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 at the end of October 2018, without 30 ratifications as required by its article 26, the Treaty has not yet entered into force.

European legal framework

EU Directives

According to article 8(2) of the European Directive 2006/115/EC (formerly Directive 92/100/EEC), Member States have to provide a right ensuring that a single equitable remuneration is paid by the user if a phonogram published for commercial purposes or a reproduction of such phonogram is used for broadcasting by wireless means or for any communication to the public. Member States shall further ensure that this remuneration is shared between the relevant performers and producers. In

¹¹ According to article 15(4) WPPT, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as being published for commercial purposes.

the absence of an agreement, Member States may lay down the conditions for sharing this remuneration between performers and producers.

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

European Court of Justice case law

In March 2012, the Court of Justice of the European Union (“CJEU”) issued two judgements in the cases of Phonographic Performance (Ireland) Limited v Ireland, Attorney General (“*the PPL case*”)¹² and Società Consortile Fonografici (SCF) v Marco Del Corso, Procuratore generale della Repubblica (“*the SCF case*”)¹³. The cases relate to the collection by collective management organisations of remuneration in respect of broadcasting and communication to the public as now set out in article 8 of Directive 2006/115/EC.

The SCF case concerned the playing of a radio in a dental practice and the Court concluded that the use of the radio in that specific situation did not amount to a communication to the public and accordingly no remuneration would be payable.

The PPL case concerned a complaint by PPL Ireland against the Irish government that the Irish government was in breach of EU law in exempting hotel operators from the obligation to pay equitable remuneration for the communication to the public of phonograms in hotel bedrooms. The CJEU concluded that PPL were correct and that such an exemption was in breach of EU law.

There were therefore two contrasting judgements regarding communication to the public. The explanation for this contrast is that both judgements made it clear that in every individual case, there needs to be an individual assessment of the facts.

¹²<http://curia.europa.eu/juris/document/document.jsf?text=&docid=120461&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=524262>

¹³<http://curia.europa.eu/juris/document/document.jsf?text=&docid=120443&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=526329>

Although examining very different facts, the judgements set out the same criteria¹⁴ which should be used when carrying out the individual assessment of each case. They are (i) the indispensable role of the user, (ii) the meaning of “public” and (iii) whether the communication is for profit.

Following on from SCF, the CJEU gave its judgement in *Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, Case C 351/12 (the “OSA” case) in February 2014. The OSA case also concerned the right of communication to the public but this time it related to authors' rights as found in Directive 2001/29 article 3(1) and not performers' rights found in Directive 2006/115.

The case involved a spa which had installed radio and television sets in the bedrooms of its establishments. The spa argued that no payments were due by them and that the SCF reasoning applied, but the CJEU found 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”.

Accordingly, in these cases the CJEU interpreted “communication to the public” under Directive 2001/29 as something different to “communication to the public” under Directive 2006/115.

However, this approach was departed from in subsequent case law:

*Reha v GEMA*¹⁵

The CJEU found that (at para 33):

*“... 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 phonogramme 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).*

¹⁴ Which 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

¹⁵ *Reha Training Gesellschaft für Sport und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs und mechanische Vervielfältigungsrechte eV (GEMA)*, Case C-117/15

In other developments concerning communication to the public case law, the CJEU has examined several cases¹⁶ involving hyperlinking and the extent to which this does, or does not, amount to an act of communication to the public.

GS Media BV v Sanoma Media Netherlands BV¹⁷

The CJEU was asked whether the posting, on a website of a hyperlink to protected works, freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29 and ruled that:

“Article 3(1)... in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’...it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.”(emphasis added)

The judgement revisits its prior jurisprudence on the interpretation of Article 3(1)¹⁸ which essentially found that posting a hyperlink constitutes an act of communication but if it is not made to a “new” public, or is not made by a different technical means to the previous communication, there would be no actual legal act of “communication to the public”.

The Svensson and Others v Retriever Sverige AB and BestWater cases concerned links to freely available works that were made available with the consent of the respective rightholders. The GS Media case clarified the position previously taken in these cases, saying¹⁹ that it does not necessarily follow from these cases that posting hyperlinks to protected works which have been made freely available on another website, without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of communication to the public.

¹⁶ Svensson and Others, C 466/12, BestWater International, C 348/13, Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler, C-527/15

¹⁷ GS Media BV v Sanoma Media Netherlands BV et al. Case C 160/15

¹⁸ In particular, Nils Svensson and Others v Retriever Sverige AB, Case C-466/12 and BestWater International GmbH v Michael Mebes and Stefan Potsch, Case C-348/13

¹⁹ At para 43

It introduces a subjective element²⁰ whereby it is necessary to assess whether the person “posting the link was doing so in pursuit of a profit²¹ and knew or could reasonably have known that the work had been published on the internet without the consent of the copyright holder”.

However, where it is established that such a person²² knew or ought to have known that that work had been “illegally” put on the internet, then a communication to the public would have occurred.

Case law on this subject has continued to evolve, for example in the “Filmspeler” and “Ziggo” cases²³.

Filmspeler

Here the CJEU held that “communication to the public”, within the meaning of article 3(1) of Directive 2001/29 must be interpreted as covering the sale of a multimedia player on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites freely accessible to the public on which copyright-protected works have been made available to the public without the consent of the rightholders.

Ziggo

Here it was held that the same concept of communication to the public covers the making available and management on the internet of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users to locate those works and to share them in a peer-to-peer network.

National legal framework

All of the countries studied provide in their national legislation a right to remuneration for broadcasting and communication to the public of commercial phonograms. However, the extent of the remuneration right differs amongst the countries depending on the uses for which the remuneration

²⁰ At para 47

²¹ See para 51

²² See para 49

²³ Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler Case C 527/15 and Stichting Brein v Ziggo BV and XS4ALL Internet BV Case C-610/15.

is legally due and collected (see table 1.1). The methods of the calculation, payment and sharing of the remuneration differ as well (see table 1.2) from one country to another.

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

Uses for which an equitable remuneration is legally due and collected

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

All countries covered in this study have a system of equitable remuneration in respect of communication to the public. In the Czech Republic, the system operates differently from those in other Member States insofar as the performers’ CMO INTERGRAM administers on behalf of performers the exclusive right corresponding to acts of communication to the public and of broadcasting, and collects the related remuneration.

With regard to the scope of what is actually covered by “communication to the public”, the French legislator has narrowed the term “communication to the public” in their national legislation²⁴ to “communication in public places”, thus imposing an additional condition for performers to be granted equitable remuneration i.e. the place where the communication to the public takes place must be of a public nature. With regard to communication in public places, communication during a show is excluded from the scope of the remuneration right, and then subject to the exclusive right. Also, within the scope of the law is the broadcasting of commercial phonograms.

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

²⁴ A similar provision existed under Belgian law, whereby equitable remuneration was not payable in some ‘non-public places’ (such as workfloors). However, in 2014 the law was changed, removing this restriction. Further, the Belgian legislation spoke of ‘phonograms’ and ‘radio-broadcasting’. This restriction has also been removed and the article now speaks of ‘performances’ and ‘broadcasting’.

In Spain, the Spanish law 23/2006 of 7 July 2006²⁵ amended the IP Law of 1996, rendering the act of making available on demand a specific act of communication to the public. 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. (see chapter 3: Making available to the public of services on demand).

Most countries consider that an equitable remuneration is due for “webcasting” and “simulcasting”.

In countries such as the Czech Republic and Lithuania, the legislation provides for an 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.

With regard to webcasting, in France, the legal framework has been amended²⁶ extending the scope of equitable remuneration to webradios, under certain conditions. Article 13 of this law adds a paragraph to article L. 214-1 of the intellectual property code, stating that “where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose its communication to the public by a radio service, within the meaning of article 2 of the law n° 86- 1067 of 30 September 1986 relating to the freedom of communication, to the exclusion of radio services the main program of which is dedicated mostly to a performer, to a single author, to a single composer or originates from a single phonogram”.

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

The phonographic producers have expressed their intention to breach this new legal provision regarding equitable remuneration for webcasting and their refusal to have the corresponding remuneration collected by SPRE (“Société pour la perception de la rémunération équitable”). In this regard, they challenged the constitutionality of this provision in front of the French Constitutional

²⁵ In the context of reviewing the national law to implement the provisions of Directive 2001/29/EC/EC.

²⁶ By a law n° 2016-925 “Creation, architecture and heritage” of 7 July 2016.

Council (“Conseil Constitutionnel”). The French performers’ CMOs SPEDIDAM and ADAMI decided to intervene in this procedure to defend the constitutionality of this provision and the Constitutional Council took a decision confirming its constitutionality.

In some countries (e.g. Croatia, the Czech Republic, the Netherlands...), “webcasting” is considered to be a type of “broadcasting”. In others (e.g. Spain, Sweden...), it falls under the broad term of “communication to the public”.

Table 1.1 Equitable remuneration for broadcasting and communication to the public of commercial phonograms – Terms of remuneration

Countries	Communication to the public	Broadcasting through the radio	Broadcasting through TV Channels	Webcasting	Simulcasting	Other ways of communication to the public
Austria	Yes	Yes	Yes	Yes	Yes	
Belgium	Yes	Yes	No	No	No	
Croatia	Yes	Yes	Yes	Yes	Yes	
Czech Republic	No equitable remuneration provided by law. In practice INTERGRAM administers the exclusive right for performers for communication to the public.	Yes	Yes	Yes	Yes	
Denmark	Yes	Yes	Yes	Yes	Yes	
Finland	Yes	Yes	Yes	Yes	Yes	
France	Yes	Yes	Yes	Should start for a part of webcasting	Yes	Cable simultaneous retransmission
Germany	Yes	Yes	Yes	Yes	Yes	
Greece	Yes	Yes	Yes	Yes	Yes	
Hungary	Yes	Yes	Yes	Yes	Yes	Podcasting
Ireland	No	Yes	Yes	No	No	
Italy	Yes	Yes	Yes	Yes (non interactive)	Yes	
Latvia	Yes	Yes	Yes	Yes	Yes	
Lithuania	Yes	Yes	Yes	Yes	Yes	
Netherlands	Yes	Yes	Yes	Yes	Yes	
Norway	Yes	Yes	Yes	Yes	Yes	
Poland	Yes	Yes	Yes	Yes	Yes	
Portugal	Yes	Yes	Yes	Yes	Yes	
Romania	Yes	Yes	Yes	Yes	Yes	Website background music
Serbia	Yes	Yes	Yes	Yes	Yes	
Slovakia	Yes	Yes	Yes	Yes	Yes	
Slovenia	Yes	Yes	Yes	Yes	Yes	
Spain	Yes	Yes	Yes	Yes	Yes	
Sweden	Yes	Yes	Yes	Yes	Yes	
Switzerland	Yes	Yes	Yes	Yes	Yes	
United Kingdom	Yes	Yes	Yes	Yes	Yes	

All countries provide a right to remuneration for performers and producers. In most countries the remuneration is determined by mutual agreement between collective management organisations and users. Some countries such as France, Poland and the United Kingdom envisage an administrative organ if no agreement is reached. In certain other countries (e.g. Croatia, Germany...), the collective management organisations determine the tariffs and the users have a possibility to challenge these tariffs. In Croatia, for instance, the proposed tariffs have to be submitted to and approved by a Commission for Copyright and Related Rights.

France has included in its legislation a direct reference to the revenues from the exploitation in order to determine the equitable remuneration and in Belgium royal decrees set out detailed tariffs.

In Hungary, the law was amended in 2012, stipulating that every modification in the tariffs that goes beyond a mere increase in line with yearly inflation has to be approved by the Government. In the field of broadcasting this could mean that adapting tariffs for new kind of uses will be more difficult and lengthier in the future.

In Greece, a proposal is being discussed according to which the competent body should be charged with the setting of the tariffs – rather than determining them by agreement between rightholders and users as is currently the case.

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

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

In the vast majority of the countries covered, the responsibility of collective management organisations for administering this remuneration has been made compulsory by law.

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

In countries such as Sweden, the claims of the performers and those of the producers against the user of a recording are to be addressed at the same time. For this reason, in this country the exercise of this right is managed by means of cooperation between the collective management organisations for performers and for producers. The position is similar in Denmark. There, the claim for remuneration may be made only through a joint organisation (of performers and producers) approved by the Ministry of Culture. The Ministry of Culture has detailed provisions on the procedure for approval of the joint organisation.

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

Countries	Amount of the remuneration	Body liable for payment	Rules about sharing of the remuneration between performers and producers	Intervention of collective management organisations
Austria	Tariffs determined by agreement between the producer and user. Producer pays share to performers' organisation	User	50:50	Compulsory
Belgium	Royal decrees set out detailed tariffs	Not specified	50:50	Compulsory
Croatia	Percentage of income with a minimum amount set. Tariffs differed depending on type of user	User	Not specified in law, practice is 50:50	Compulsory
Czech Republic	Tariffs determined by agreements between collective management organisations and users	User	Not specified by law. In practice, agreement between producers and performers: 50/50	Compulsory
Denmark	Tariffs determined by agreements - If agreement cannot be made on the size of remuneration, each party is entitled to bring the dispute before the Copyright License Tribunal	User	Statutes provide for 50:50	Joint organisation of performers and producers approved by the Ministry of Culture
Finland	Tariffs determined by agreements, which failing, by the civil courts or arbitration Tribunal	User	50:50	Organisation approved by the Ministry of Culture
France	Remuneration based on the revenue of exploitation or failing that (in specific cases) a lump sum. Tariffs determined by agreements between collective management	The user must pay SPRE (Société pour la perception de la rémunération equitable), which is jointly managed by	Law provides 50:50	Compulsory

	organisations and users; failing an agreement, tariffs determined by an administrative commission comprised of representatives of users, of rightholders and of the government	performers and producers		
Germany	Tariffs are determined by collective management organisations and open to arbitration between collective management organisations and users and to further legal action.	User	<p>The law provides only that the producer of the phonogram is entitled to receive an equitable share of the remuneration of the performer.</p> <p>In practice, as agreed between performers and producers and stipulated in an annual allocation plan:</p> <p><i>Audio:</i> -public performance: performers 64 % / producers 36 %. - broadcasting 50/50</p> <p><i>Video:</i> -public performance and broadcasting: performers 20 % / producers 80 %</p>	<p>Can only be assigned to a collective management organisation, but not compulsory</p> <p>In practice: collecting society GVL</p>
Greece	The Minister of Culture may assign the power to a collective management organisation to negotiate tariffs with users	User	According to collecting societies' statutes	Compulsory
Hungary	By governmental approval	User	50:50 unless otherwise agreed	Compulsory
Ireland	A percentage of broadcasters' revenue and with regard to public performance usually	User	50:50	Collected via producers' organisation

	based on capacity of venue			
Italy	By agreement between users and CMO	User	50:50	Compulsory
Latvia	Determined by agreement between user and collective management organisation	User	50:50	Compulsory
Lithuania	Determined by agreement between user and collective management organisation. Based on users' receipts or a fixed sum	User	50:50	Compulsory
Netherlands	Tariffs fixed by collecting society	User	50:50	Compulsory
Norway	Negotiation with user, which failing by decision of tribunal	User	50:50 set by legislation	Compulsory
Poland	Tariffs approved by the Copyright Commission or by a board of the collective management organisation for each field of exploitation	User	Not specified in law, but in practice 50:50	Compulsory
Portugal	Negotiation with user and collected together with producers' organisation	User	50:50	Compulsory
Romania	Fixed methodology (negotiation, arbitration, judicial appeal) based on government decisions in respect of each type of exploitation	User	As determined in collective management organisation's statutes	Compulsory
Serbia	Tariffs negotiated with user's association passed by the managing board and confirmed by the Commission for Copyright and Related rights	User	50:50	Compulsory
Slovakia	By agreement with user	User	50:50	Authorisation from Ministry of Culture
Slovenia	By agreement, which failing, by Copyright board established by the	User	50:50 unless otherwise agreed	Compulsory

	national Intellectual Property Office			
Spain	Collective management organisations determine tariffs, often negotiated directly with an association representing an important group of users	User	50:50 unless otherwise agreed	Compulsory
Sweden	By agreement, which failing, by the court	User	In practice 50:50 but not specified in law	Not specified. In practice: collected via collective management organisation
Switzerland	Based on gross income of user	User	50:50 (with regard to cable transmission and broadcasted works performers may receive more than 50%)	Formally authorised by the government to act as a collective management organisation. No formal mandate required to collect in most cases.
United Kingdom	By agreement, which failing by the copyright tribunal	User	By agreement or application to the Copyright Tribunal	Compulsory

Types of fixed performances in respect of the use of which remuneration is legally due and collected

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

Type of fixation - Pursuant to international Treaties and to article 8(2) of Directive 2006/115/EC, remuneration is only due for phonograms published for commercial purposes. However, in certain countries (e.g. Croatia, Greece, Romania, Sweden and Switzerland) remuneration is due for any phonogram (including those incorporated in audiovisual fixations), or is extended to any kind of published phonograms (as is the case in Germany).

Germany (only for communication to the public of any recording/live broadcast), Belgium, Greece, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Switzerland have extended the right to remuneration to the broadcasting and communication to the public of audiovisual performance fixations.

In the Netherlands, as of July 2015 an unwaivable right to a proportionate equitable remuneration was implemented in the Dutch law with regard to audiovisual works for all forms of communication to the public, except for the making available right. However, solely main performers are entitled to this right. This right to remuneration arises if the rights concerned are transferred to the producer, either via the presumption of transfer of rights, or by agreement. The remuneration right is subject to mandatory collective management and the remuneration is to be paid by the end users.

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

In Poland as of September 2016, an amendment to the Copyright Act came into force, allowing broadcasters to license the rebroadcasting of their own programs, where they are vested with the exclusive copyrights, without the compulsory involvement of CMOs. In respect of such productions, performers are therefore remunerated based on the agreement concluded directly with the broadcaster.

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

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

Table 1.3 Equitable remuneration for broadcasting and communication to the public - types of fixed performances in respect of the use of which remuneration is legally due and collected

Countries	Phonograms (audio fixations)		Audiovisual fixations
	Type of phonogram subject to remuneration: published for commercial purposes or any phonogram	Type of carrier	
Austria	Any phonogram	Any carrier	No
Belgium	Commercial only	Any carrier	Yes
Croatia	Any phonogram	Any carrier	No
Czech Republic	Commercial phonograms	Any carrier	No
Denmark	Any phonogram	Any carrier	No
Finland	Any phonogram	Any carrier	No
France	Commercial phonograms only	Not specified by the law. According to the French Supreme Court, once a phonogram has been included in an audiovisual work no equitable remuneration is due. The new wording of article L214-1 in the law of 1 August 2006 seems to modify the situation	No
Germany	With regard to broadcasting, published phonograms only. For communication to the public any recording or live broadcast.	Any carrier	Yes

Greece	All sound recordings	Audio carriers	Yes
Hungary	Commercial phonograms	Not specified	No
Ireland	Commercial phonograms	Not specified	No
Italy	Commercial phonograms	Any carrier	Yes
Latvia	Commercial phonograms	Any carrier	No
Lithuania	Commercial phonograms	Not specified	No
Netherlands	Commercial phonograms	Not specified by the law. In practice: collection only for phonograms on audio carriers	Yes, in respect of “main performers”
Norway	Commercial phonograms	Any fixation	No
Poland	Commercial phonograms	Any fixation	Yes
Portugal	Commercial phonograms	Any fixation	Yes
Romania	Any performance fixed or broadcasted, commercial or non-commercial	CDs, audio tapes or similar	Yes
Serbia	All phonograms	Not specified	No
Slovakia	All phonograms	Any fixation	Yes
Slovenia	Yes	All carriers used to broadcast or to communicate to the public	No
Spain	Commercial phonograms	Not specified in law. In practice, any carrier	Yes
Sweden	Any phonograms, in practice commercial phonograms	The type of carrier is not decisive	No
Switzerland	All phonograms	All fixations	Yes
United Kingdom	Commercial phonograms	Any fixation	No

1.2 Practice

The amount collected for broadcasting and communication to the public represents an essential part of the revenues received by performers from collective management organisations. As in 2011 it remains the main source of revenues. In 2017 it represented approximately 59%, however over the period 2011-2017 it amounted on average to 67% of the total remuneration collected by the performers' collective management organisations in the 26 countries represented in this study. In all countries the right to remuneration is exercised through a collective management organisation.

Collection for communication to the public has gradually increased throughout the period 2011 to 2017. The amount collected in 2011 was € 137,010,328 and by 2017 it had risen to € 174,587,189. Taking into account inflation, this marks an increase of € 27,373,962.

The year 2014, was an exception and a significant decline was seen. A marked reduction in collections in Belgium, Poland, Spain and Sweden could be seen in respect of that year. However, in the following years collections in these countries had largely returned to previous levels.

As regards collections for broadcasting, there has been a significant decline. In 2011 the amount collected was € 173,802,428. whereas in 2017 the figure was € 163,720,821, a decrease of € 23,024,341 when inflation is accounted for.

The decline can be attributed to a large extent to the decrease in collection in Spain. In Spain the amount collected in 2011 was € 52,053,174 and in 2017 that amount had dropped to € 24,989,245. The downwards trend in Spain is due to two main factors. In the audiovisual sector, one of the main satellite operators that made payments to AISGE (the Spanish performers' CMO operating in the audiovisual sector) was acquired by a telecom company offering TV/IP services (retransmission, transmission and making available on demand), meaning that, effectively, that CMO lost one big user.

Secondly, new legislation in Spain (Law 21/2014, of November 4th, amending the Spanish Intellectual Property Law) provided a transitory period in which the major broadcasters could pay CMOs 70% of the amounts they were already paying until a new tariff was set (and agreed) in accordance with new regulations. So, in addition to losing the collections from one of the main satellite operators, AISGE lost 30% of the regular payments from other broadcasters. The situation is expected to improve in 2018, when it is anticipated that agreements with most users, implementing the new tariff, will be put in place. Thus, the substance of the right has not been altered, but the manner in which it is exercised has changed.

There has been a significant amount of litigation in the audio sector in Spain. AIE (the Spanish performers' CMO operating in the audio sector) successfully argued in court that equitable remuneration should be paid and that tariffs were fair. In one such instance, the court found that performers and producers of phonograms maintain their rights derived from the communication to the public of synchronised phonograms in films, television series and advertising.

Such litigation demonstrates that difficulties can arise (as in all Member States) in enforcing existing law. Such difficulties clearly have an impact on collection.

Collections in other countries have been more or less stable, with the Netherlands being a notable exception. In that country, 2011 collection was € 5,562,853 and in 2017, this had increased to € 9,608,686.

Overall, the amounts collected for communication to the public and broadcasting combined have remained stable between 2011 and 2017. In 2011 the total amount collected in respect of broadcasting and communication to the public was € 310,812,757. By 2017, that amount had increased to € 338,308,009, representing an increase, after inflation, of € 4,349,622 (or an increase of just slightly more than 1%).

A recurring theme throughout the countries covered in this study is that while the actual laws may not have changed, collection can be significantly affected by both litigation (predominantly against users refusing to pay a CMO) and the manner in which the right is exercised such as changes to the practical manner in which tariffs may be agreed, applied and the resulting amounts collected.

This may occur in all areas of collection however in 2017, particularly dramatic changes occurred with regard to private copying remuneration collection. This is examined in detail in chapter four.

In Ireland, litigation is ongoing concerning a unilateral decision by the producers' CMO to reduce payments to performers and to appoint a UK joint producers' and performers' CMO to determine performer distributions in respect of use occurring in Ireland. The position of RAAP, the relevant Irish performers' CMO, is that this is contrary to both Irish law and European law and very damaging for performers in Ireland and elsewhere. A reference to the European Court of Justice is expected and may influence collection and distribution practices across Europe.

In Portugal, the Portuguese CMO GDA has two major pending cases with the main Portuguese telecoms company, MEO, currently at the CJEU. Another major civil dispute in the Portuguese Intellectual Court concerning tariffs and performers protection involving the main Portuguese private TV broadcasters is ongoing.

In Slovenia, case law affected collection to the benefit of users, particularly with regard to negligent and uncompliant users. There, a tariff system granted discounts to compliant users on the basis that they do not cause any additional administration costs since they act in compliance with the law. However, the lower national courts concluded that such discounts are not permissible since they discriminate between users and thus the discounted tariffs should be applied to everyone. The Supreme court reversed this ruling, nevertheless, the lower national courts are continuing to ignore this reasoning, causing the rightholders significant damage.

Various cases are ongoing in Greece where some users refuse to pay the equitable remuneration or enter into negotiations.

In Romania, small radio stations' representatives are now allowed to participate along with the national ones when negotiating the level of remuneration to be paid.

In the Netherlands, the Dutch CMO NORMA negotiated a tariff, together with the CMOs for screenwriters and directors, for the broadcasting of (maximum) 40 channels by "RODAP" parties. RODAP is a collaboration of Dutch producers, broadcasters and users (such as cable companies). Given that RODAP consist of many parties, whom in some cases have had conflicting interests, it proved difficult to reach an agreement with all parties as a whole. As a consequence, the negotiation process took quite some time. While NORMA and the other CMO's concerned would have preferred to negotiate with fewer parties, the relevant Ministry insisted on a deal with RODAP as a whole.

After setting this tariff, there was a dispute about the payment to be made by the RODAP parties. This led to summary proceedings against RODAP that were eventually settled in February of 2016.

The implementation 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 (see chapter 7) has in some cases altered the manner in which CMOs operate and the manner in which for example tariffs are negotiated.

Table 1.4 Equitable remuneration for communication to the public - Collection for performers from 2011 - 2017

Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria	3,109,000	3,339,000	3,370,000	3,409,500	3,757,200	3,640,000	3,755,500
Belgium	7,904,190	7,823,058	8,416,326	4,203,328	8,753,018	9,009,609	9,410,929
Croatia	1,269,720	1,282,816	1,021,297	1,072,462	1,135,351	1,537,457	1,559,954
Czech Republic	3,064,592	3,287,724	3,289,726	3,367,308	3,192,089	2,820,300	3,143,309
Denmark	4,722,864	4,851,536	4,886,165	5,226,224	6,258,680	6,310,471	6,428,572
Finland	4,109,131	4,309,289	4,508,792	4,577,232	4,631,398	4,578,499	4,394,001
France	32,699,465	40,088,415	44,054,952	45,414,715	46,998,918	46,326,853	47,713,449

Germany	21,369,766	22,168,528	21,303,587	21,824,209	22,684,299	21,941,742	23,526,000
Greece	1,089,994	995,619	1,254,939	1,959,263	2,247,027	2,034,201	2,494,262
Hungary	1,104,094	2,244,516	1,292,267	1,276,201	1,617,808	1,421,461	1,409,767
Ireland	1,748,038	1,732,413	1,764,460	1,836,110	1,990,299	1,098,855	1,340,600
Italy²⁷	0	0	0	0	172,684	129,975	106,498
Latvia	313,180	341,656	391,290	433,284	488,038	459,303	509,237
Lithuania	363,631	382,765	418,091	458,280	491,557	486,990	498,037
Netherlands	14,630,590	15,602,567	16,760,945	16,778,714	17,752,974	18,593,297	20,183,155
Norway	3,204,220	3,401,425	3,415,697	3,207,798	3,437,772	3,504,661	3,591,931

²⁷ The collection for communication to the public is integrated into the collection for broadcasting. Please refer to table 1.5 below.

Poland	8,812,205	12,305,926	12,634,409	9,677,674	12,192,594	12,088,930	13,045,545
Portugal	2,058,766	2,034,625	1,640,042	1,055,229	1,309,289	2,731,350	1,639,540
Romania	1,029,728	728,923	989,819	1,128,166	1,606,201	2,429,712	2,701,823
Serbia	584,022	726,332	674,711	689,183	814,818	881,682	502,263
Slovakia	468,330	484,570	511,061	491,299	499,825	487,057	541,840
Slovenia	1,665,000	1,837,000	1,650,000	1,800,000	1,909,000	1,955,000	2,221,000
Spain	8,870,073	10,760,003	12,390,574	7,738,071	9,357,390	10,850,198	13,865,858
Sweden	10,561,706	10,178,552	10,630,742	7,264,718	7,380,063	8,186,534	7,653,650
Switzerland	2,258,025	2,118,854	2,187,645	2,199,840	2,566,034	2,655,247	2,350,466

Total	137,010,328	153,026,112	159,457,536	147,088,806	163,244,325	166,159,383	174,587,189
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Table 1.5 Equitable remuneration for broadcasting - Collection for performers from 2011 - 2017
Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria	4,348,000	4,319,900	5,029,200	4,482,000	4,703,000	5,192,100	5,190,550
Belgium	1,428,943	1,493,139	1,600,691	1,605,649	1,634,131	1,670,374	1,708,792
Croatia	1,873,190	1,872,249	1,875,363	2,054,047	2,123,639	2,330,816	2,454,178
Czech Republic	4,632,220	4,578,806	4,731,835	4,312,509	4,620,671	4,376,484	4,295,755
Denmark	7,084,296	7,277,305	7,329,247	9,439,207	10,907,438	10,449,295	12,164,059
Finland	3,767,788	3,980,823	4,323,634	4,525,441	4,413,240	5,299,866	5,871,183
France²⁸	8,422,486	9,384,289	9,072,234	9,116,318	8,653,760	8,723,284	8,636,949

²⁸ The figures in respect of the French collective management organisation, ADAMI are incorporated in table 1.4

Germany	39,170,001	39,882,186	39,813,565	39,431,133	40,628,567	40,760,775	39,168,000
Greece	3,951,605	3,231,614	2,665,204	2,575,705	2,064,241	2,766,913	2,105,272
Hungary	712,931	2,244,516	792,134	925,798	803,494	1,001,718	962,919
Ireland	1,151,825	1,321,068	1,267,135	1,405,810	1,389,823	795,723	821,658
Italy²⁹	12,515,195	12,738,861	8,355,358	21,013,349	19,526,235	16,432,284	15,156,848
Latvia	225,099	230,196	234,141	353,897	317,307	317,749	375,168
Lithuania	287,231	372,020	387,282	399,445	447,582	501,223	546,728
Netherlands	5,562,853	5,470,474	6,165,448	5,946,377	8,297,617	11,006,429	9,608,686

²⁹ Nuovo IMAIE was established on 10 July 2010 by effect of the Law 100/10. The amounts collected include remuneration for communication to the public and simulcasting of phonograms.

Norway	5,681,316	5,181,837	5,456,385	5,491,793	5,856,512	5,735,958	5,485,064
Poland	4,420,003	5,649,875	5,610,550	5,702,956	4,796,316	4,094,780	5,196,167
Portugal	896,226	956,720	1,481,876	1,109,692	2,070,303	1,325,404	812,427
Romania	3,543,566	3,846,473	4,498,189	3,366,825	3,565,124	3,893,057	3,625,971
Serbia	121,404	193,076	213,067	539,936	554,194	1,137,427	973,908
Slovakia	1,210,553	1,106,593	1,046,111	1,103,897	1,066,380	970,748	989,746
Slovenia	847,000	1,401,000	2,283,000	745,000	985,000	950,000	1,368,000
Spain	52,053,174	44,896,468	38,740,596	30,564,287	30,563,240	28,821,165	24,989,245
Sweden	6,984,730	8,450,941	8,165,200	5,370,981	6,422,965	6,837,578	6,319,308

Switzerland	2,910,793	4,393,909	4,131,245	3,630,328	4,438,846	4,692,843	4,894,241
Total	173,802,428	174,474,336	165,268,690	165,212,381	170,849,623	170,083,992	163,720,821

1.3 Conclusion

Equitable remuneration for broadcasting and communication to the public remains an essential source of income for performers. Collections in respect of these two rights combined remain stable throughout the vast majority of Member States. In 2017 it represented approximately 59% of overall collection however over the period 2011-2017 it amounted on average to 67%.

It is not least due to the compulsory administration by collective management organisations in the vast majority of countries which guarantees that the right to broadcasting and communication to the public is such an important source of income.

In a number of countries, the remuneration right for broadcasting and communication to the public of commercial phonograms was introduced following the implementation of article 8(2) of Directive 92/100/EEC of 19 November 1992 renamed 2006/115/EC after codification. It was introduced in 1993 in the Netherlands, 1994 in Spain, 1999 in Lithuania. In other countries it already existed previously: 1953 in the Czech Republic - for soloists, 1960 in Sweden, 1965 in Germany and 1985 in France.

As has been shown in the tables above, there are numerous differences between the national legislations concerning the extent of this remuneration right. This can partly be explained by the fact that certain countries have not fully implemented the Directive.

Despite a recent change in the law, the current wording of French law relating to equitable remuneration still does not comply with Directive 2006/115/EC and international Treaties. Indeed, the intellectual property code still provides that equitable remuneration applies to “the communication in public places” of phonograms published for commercial purposes whereas it should apply to “any kind of communication to the public” of these phonograms. The French legislator thus missed an opportunity, when adopting the law on “Creation, architecture and heritage” to put the French legal framework in conformity with EU law and international Treaties.

In Belgium, following a change in the law of 2014, equitable remuneration is now payable in some places (such as workfloors) which previously were deemed to be “non-public”.

With regard to sound recordings, it is noteworthy that article 8(2) of Directive 2006/115/EC allows room for manoeuvre in terms of national interpretations. Rewording of the provision could considerably reduce the differences between national legislations.

Given the fact that almost all phonograms are published for direct or indirect financial benefit, the reference in this Directive to “commercial purposes” that prompted the publication of phonograms could be omitted. The current wording does not add a new criterion and creates needless discussions with users³⁰.

Furthermore, the Directive does not define what is meant by “equitable” remuneration. According to the CJEU, while the concept of equitable remuneration in article 8(2) of the Directive is a Community concept that must be interpreted uniformly by all Member States, it is for each Member State to determine, for its own territory, the most appropriate criteria for assuring adherence to this concept.

However, the Court gives some direction to Member States. There has to be a proper balance between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. Whether the remuneration is equitable is to be assessed, in particular, in the light of the value of that use in trade³¹. Linking the amount of the remuneration to the revenues from exploitation, as for instance the French legislator has done, is an advisable option. It gives performers’ organisations a clear guideline in their discussions with users.

A recurring theme throughout the countries covered in this study is that while national laws may not have changed, collection can be significantly affected by both litigation (predominantly against users refusing to pay a CMO) and the manner in which the right is exercised such as changes to the practical manner in which tariffs may be agreed, applied and the resulting amounts collected.

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

³⁰ E.g. the collective management organisation SAMI reports discussions on this basis with broadcast organisations concerning the remuneration right for demo broadcasts and illegal recordings of performances.

³¹ Court of Justice of the European Union, February 6 2003, C-245/00 (SENA/NOS); for an analysis, see Seignette J., “Vergoedingen in de contractuele praktijk, wet en rechtspraak”, *AMI*, 2003, pp. 117 e.v.

Given the noticeable contractual pressure under which performers are regularly put by their contracting partners, it also seems useful to provide a reminder that the right to an equitable remuneration cannot be waived. In addition, it could be discussed what other (precautionary) measures could be envisaged in future to ensure that remuneration is paid to the respective performers' organisations. Time-consuming and costly litigation in order to enforce payment should be avoided.

Belgium, Germany, Greece, Italy, the Netherlands (in respect of main performers), Poland, Romania, Slovakia, Spain, and Switzerland have extended the right to remuneration to the broadcasting and communication to the public of audiovisual performance fixations.

It is also worth reminding that in certain countries the remuneration right indicated in article 8(2) of the Directive is not only applied to the broadcasting and communication to the public of phonograms, but also to that of audiovisual fixations. At a time when technologies are converging and when the same performance, subject to a single category of use such as its communication to the public, often includes both audio and audiovisual elements, there is little justification for excluding possibilities of remuneration in the whole audiovisual sector. As shown in other parts of this study, this extension could be a considerable step forward for performers.

At a time when both technology and digital business models are evolving rapidly, the line between what can be classified as "communication to the public" or "broadcasting" and what can be classified as "making available on demand" is becoming more and more difficult to determine. This creates significant substantive issues, specifically whether a performer's exclusive "making available on demand" right is involved, whether it is the performer's remuneration right under article 8(2) of the aforementioned Directive that is involved, or indeed whether both are involved.

While these may seem to be "legalistic" or "academic" issues, they could, under the existing *acquis communautaire*, have a profound impact on performers and the extent to which they may share in financial rewards accruing from the expansion of the digital market.

In the digital environment, the CJEU has examined several cases involving hyperlinking and the extent to which this does, or does not, amount to an act of communication to the public. While case law exists that provides a thorough explanation of the determinative criteria in assessing whether an act of communication to the public has occurred in the context of hyperlinking, this area of case law continues to evolve.

Chapter 2: Satellite broadcasting and cable retransmission

2.1 Legal framework

European legal framework

EU Directives

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

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

Communication to the public by satellite

While giving for the first time a single European definition of broadcasting and communication to the public *by satellite*, the Directive relates directly to the pre-existing right of communication to the public and broadcasting as introduced in Directive 92/100/EEC (now codified as 2006/115/EC). For that reason, the figures for collection and distribution corresponding to broadcasting and communication to the public by satellite are included in the chapter dealing with communication to the public and broadcasting in general (see chapter 1 above).

The Directive provides (in article 6) that each country must adhere to at least the level of protection for holders of rights related to copyright required by article 8 of Directive 92/100/EEC about

broadcasting and communication to the public, but that they may provide for more far-reaching protection.

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

The Directive defines communication to the public by satellite as the “*act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth*”.³²

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

Authorisation to broadcast or communicate a programme to the public by satellite may be done by agreement between a collective rights management organisation and the user. Under certain conditions, Member States have the possibility to organise the licensing in a way that rightholders of the same category of works (cinematographic works excluded) may all be covered by the collective agreement, independently from their being members or not of the rights management organisation³³.

Cable retransmission

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

³² Article 1(2)

³³ Article 3(2)

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”³⁴.

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

Directive 93/83/EEC however clearly introduces a 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”.

“Collecting society”³⁵ is defined in article 1(4) as:

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

The importance of the role that collective management organisations play in this area is reflected in the lack of ambiguity regarding their involvement.

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

³⁴ Article 1(3)

³⁵ For the purpose of this study, the term "collecting society" is replaced with that of "collective management organisation".

Article 9(2) covers the situation where a rightholder has not transferred the management of his/her rights to a collective management organisation. Interestingly, it explicitly organises a system whereby collective management organisations are deemed to be mandated to administer the cross-border cable retransmission right and 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 collective management organisation mandated to administer his/her 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 provides for ensuring a level playing field for rightholders and collective management organisations 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"³⁶.

Finally, the legislator has foreseen possible cases where cable retransmission in another country than the place of residence of the rightholder may have the consequence that the rightholder or the organisation managing his/her rights may claim remuneration only after a certain period of time. It is left to the Member States to decide on the time limit considered most appropriate:

"[The rightholder] shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter"³⁷.

³⁶ See article 9(2) of Directive 93/83/EEC

³⁷ See article 9(2) of Directive 93/83/EEC

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

Proposed legislation

Directive 93/83/EEC applies only to satellite broadcasting or cable retransmission. In particular, it does not apply to online transmissions and therefore does not take into account the technological developments of the digital age.

Following a public consultation in 2011, the Commission published a proposed Regulation in September 2016 entitled “Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes”.

The key aim of the Commission in the proposed Regulation was to take into account these technological developments and expand the scope of the country of origin principle accordingly. This was set out in Recital 7 of the proposed Regulation which stated that:

“(7) ... cross-border provision of online services ancillary to broadcast and retransmissions of television and radio programmes originating in other Member States should be facilitated by adapting the legal framework on the exercise of copyright and related rights relevant for those activities.”

The ancillary online services referred to were catch-up services and services which would give access to material that would enrich or otherwise expand television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content.

The proposed Regulation is yet to be voted on in plenary, however at present it appears likely that the Commission will have largely failed to achieve this key aim of expanding the scope of the country of origin principle. As currently amended, the proposed Regulation provides that the country of origin principle will apply only to news and current affairs programmes.

European Commission decision: The CISAC case

The Directive came under the spotlight as a result of the decision dated 16 July 2008 of the European Commission in the “CISAC” case³⁸. The decision analysed inter alia whether certain aspects of bilateral representation agreements between authors' collective management organisations regarding Internet, satellite and cable broadcasting were in breach of competition law. While the decision was focused largely on matters relating to competition law, it did address a number of specific points about the Directive.

It emphasised that the Directive does not provide that the applicable law is the law of the Member State where the uplink takes place. It specifies that the act of communication to the public is the “*act of introducing the programme-carrying signal into an uninterrupted chain of communication leading to the satellite and down towards the earth*”³⁹. Consequently, the applicable law will be the law of the Member State where this act of communication takes place⁴⁰.

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

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

The decision was appealed to the General Court and on 12 April 2013 it annulled (in part) the 2008 decision. The General Court did not contradict the legal findings of the Commission regarding the correct interpretation of the Directive. It did however annul the findings of the Commission relating to competition law aspects of the decision and held that the Commission, first, did not have documents proving the existence of a concerted practice between the collective management organisations as regards the territorial scope of the mandates which they grant each other and, secondly, did not render implausible CISAC’s explanation that the parallel conduct of the collective management organisations

³⁸ Case COMP/C-2/38.698

³⁹ See article 1(2)(a) of Directive 93/83/EEC

⁴⁰ See article 1(2)(b) of Directive 93/83/EEC

was not the result of concertation, but rather of the need to fight effectively against the unauthorised use of musical works.

National legal framework

In general terms, the Directive has been well implemented in national legislation. Each country guarantees a right to an equitable remuneration for re-broadcasting or cable retransmission. The compulsory management of this latter right by a collective management organisation has been recognised by each Member State. However, the wording varies on a country by country basis.

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

2.2 Practice

Table 2.1 below shows that from the 26 countries participating in this study, 19 countries reported collecting varying amounts⁴¹.

There has been a steady increase in collection during the period 2011-2017. In 2011, the amount collected amounted to € 29,481,093. In 2017, this had increased to € 44,613,569. After taking into account the effects of inflation, this represents an increase of € 12,937,075.

In percentage terms between 2011 and 2017, collection has consistently amounted to between 7% and 8% of performers’ CMOs total collection. It is proof that collective rights management is essential to enforce performers’ rights and to guarantee the payment of remuneration to performers.

⁴¹ Please note that the figures for collection corresponding to broadcasting and communication to the public by satellite are included in the chapter dealing with communication to the public and broadcasting (see chapter 1).

Belgium, Finland, Ireland, Italy and Norway are the only countries which have not recorded the collection of remuneration. This is for different reasons:

In Belgium in 2014 a new law was adopted introducing a remuneration right for performers when transferring the right to permit or prohibit the retransmission by cable. This right to remuneration is non-transferable (not by contract and not by presumption) and unwaivable and collective administration of the right is mandatory. Collection is to be made directly from the distributor. However, as a result of litigation and current contractual practices, no remuneration has been collected, for the time being.

In Norway, the whole system was legally contested by the distributors. One of the primary submissions, was that the modern way of TV distribution with digitally encoded signals is not retransmission in the legal sense of the word, but rather to be regarded as primary distribution (broadcasting). The secondary submission is that if the distribution is to be regarded as retransmission, the distributors have already cleared the retransmission rights through buy-out with the rightholders.

The majority of the litigation has now been completed. It can be concluded that the services provided by the distributors when they receive their signals via so called "direct injection" cannot be considered "retransmissions" under Norwegian law. The courts did however make remarks that there were still rights for the distributors to clear.

In Germany in 2015 a decision of a Higher Regional Court (OLG München, 6 Sch 7/14) concerned online video-recorders. According to that decision, the retransmission of a single recorded broadcast does not concern the cable retransmission right.

As of March 2014, the Dutch Supreme Court held that cable distribution as it now takes place in the Netherlands is no longer regarded as "cable retransmission" as it is no longer preceded by the required 'initial transmission' (intended for reception by the public).

This reasoning results from the employment of a so-called "media gateway" between the broadcaster and the cable operators receiving the signal. As a result, the Dutch legislator has constructed a compensatory subsection of article 4 of the Neighbouring Rights Act, stipulating that an actor that plays a main part in an audiovisual work must receive a proportionate equitable remuneration. This remuneration is to be collected by a CMO for every on-demand communication to the public of the protected work.

In Poland in 2016 a new provision has been introduced saying that collective management is not mandatory in the case of rights that TV and radio organisations hold with respect to their own transmissions, regardless of whether these rights have been transferred to them by another right holder.

In Latvia, some cable operators have refused to pay remuneration for the use of phonograms arguing that they are not being used for commercial purposes. Both cases are at the moment at the Supreme court awaiting a decision. Both lower courts held in favour of the Latvian CMO LaIPA.

In Switzerland some broadcasters claim that the retransmission by digital signal should be licensed individually instead of collectively as of now. The current legal situation is that it falls under collective management if the signal can also be received via analogue means.

Cable retransmission is not common practice in Italy with the cable market being only marginal in size.

Interesting to note is also that the Romanian Constitutional Court decided⁴² in June 2010 that the provisions regarding “must carry” retransmissions⁴³ are not constitutional. Therefore, cable operators must now also pay the related remuneration for the retransmission of programs included in the “must carry” package. This has had little effect on collection in Romania and the relevant CMO has been forced to launch many legal actions against cable operators who refuse to pay.

In Denmark, the Minister of Culture has appointed a committee to find models for the financing of Danish radio, TV and film production in the future. In this respect, calculation of future cable retransmission fees is likely to be a subject for an appointed committee.

⁴² Court decision no. 571/2010

⁴³ Article 121(1) of Law no. 8/1996

2.1 Cable Retransmission – Collection for performers 2011-2017

Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria⁴⁴	688,000	745,500	849,000	927,150	985,000	880,000	835,000
Belgium	0	0	0	0	0	0	0
Croatia	269,913	286,615	356,674	418,846	435,611	546,556	560,343
Czech Republic	585,898	663,732	750,713	817,089	926,528	955,666	1,086,441
Denmark	7,533,566	7,258,447	8,230,778	8,011,552	7,977,072	10,550,509	11,891,418
Finland	0	0	0	0	0	0	0
France	388,516	530,399	745,097	838,219	493,650	590,145	399,450
Germany	2,173,298	2,132,642	2,054,212	2,330,086	2,160,539	2,075,466	4,340,000
Greece	0	0	0	129,187	159,225	287,140	110,076
Hungary	382,931	555,230	611,056	531,174	623,100	496,093	455,661
Ireland	0	0	0	0	0	0	0
Italy	0	0	0	0	0	0	0

⁴⁴ IP TV included

Latvia	0	96,489	153,393	101,219	150,421	173,566	208,443
Lithuania	139,088	150,040	162,123	163,013	176,503	194,393	203,267
Netherlands	2,712,527	2,683,320	3,678,836	3,304,789	3,787,841	3,823,597	3,776,756
Norway	0	0	0	0	0	0	0
Poland	75,249	75,758	70,107	49,856	1,202,011	1,029,199	2,031,602
Portugal	1,357,205	2,002,555	2,086,114	1,642,208	2,441,129	3,363,242	2,759,428
Romania	2,093,743	1,235,492	311,267	2,590,366	2,276,275	2,290,401	2,523,869
Serbia	0	0	0	384,178	409,813	426,677	793,397
Slovakia	122,982	100,502	236,429	187,039	209,805	102,750	160,883
Slovenia	2,452,452	2,963,735	3,218,792	3,619,337	3,852,660	4,037,414	4,194,869
Spain	3,658,411	2,847,402	3,044,688	2,926,098	5,109,715	3,944,178	3,490,447
Sweden	1,594,423	1,289,630	1,237,975	163,779	177,453	196,660	162,234
Switzerland	3,252,892	3,554,004	3,667,489	3,824,051	4,485,235	4,551,498	4,629,987
Total	29,481,093	29,171,492	31,464,743	32,959,236	38,039,586	40,515,150	44,613,569

2.3 Conclusions

Council Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions was adopted on 27 September 1993.

In most European countries, it seems that national law has implemented European law well. This, combined with recourse to collective management has resulted in efficient collection and distribution of remuneration in the majority of countries. In those countries where there has been no collection, this is not as a result of a fault in the European legal framework; rather it is as a result of national peculiarities.

The proposed Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes was introduced on account of the fact that Directive 93/83/EEC applies only to satellite broadcasting or cable retransmission and that legislative provision must be made for technological developments.

One of the key elements of the proposed Regulation is to expand the scope of the country of origin principle, although the extent to which this will ultimately be achieved remains to be seen.

Chapter 3: Making available to the public on demand

3.1 Legal framework

International legal framework

The Rome Convention as well as the 1994 TRIPS Agreement were both limited in protecting performers by only preventing the broadcasting and the communication to the public of their live performances without their consent (article 7 Rome Convention, article 14(1) TRIPS)⁴⁵. Nevertheless, it should be remembered that in addition to this exclusive right, the Rome Convention (article 12), did include the principle of equitable remuneration for broadcasting and communication to the public of commercial phonograms.

Following on from this, one of the most important innovations of the WPPT was to give attention to the impact of digital technology on the use of the performances of the performing artist. This led to the recognition of the right to make performances available to the public on demand (referred to hereinafter as “the making available right”) as a new exclusive right of the performer. Pursuant to article 10 of the WPPT:

“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”.

This right has only been attributed as regards performances fixed in phonograms.

On 26 June 2012, the Beijing Treaty on the Protection of Audiovisual Performances was finally adopted following over a decade of negotiations and postponements. The new treaty brings audiovisual performers into the fold of the international copyright framework by providing minimal standards of protection for audiovisual performances.

⁴⁵ The term “broadcasting” is meant to refer to the transmission by wireless means for public reception of sounds or of images and sounds (article 3(f) Rome Convention and article 14(1) TRIPS Agreement). This type of transmission does not include the transmission by wire. “Communication to the public” is not defined in the Rome Convention or in the TRIPS Agreement. According to the Guide to the Rome Convention, published by WIPO, the term “communication to the public” refers to transmission to a different public, not present in the hall, by loudspeakers or by wire (p. 36). This may include transmission via the internet and related uses such as making available on demand.

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”.

The delay in negotiating an international instrument for audiovisual performance was mainly due to the disagreement between different countries regarding the transfer of rights. With different legal cultures and contractual negotiations, opinions differed on how this should be dealt with in this instrument.

At the end of the day, consensus was found on the wording of an article opening different possibilities to Contracting Parties.

Article 12 on the transfer of rights further provides that:

“Independent of the transfer of exclusive rights described [...], 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”.

Whilst article 12 is optional and leaves flexibility to the Contracting Parties, it nevertheless establishes in an international instrument the possibility for a right to remuneration for performers for the making available on demand of their performances, including in the form of a right to equitable remuneration. At a time when making available on demand is becoming of ever-increasing importance, and performers are not benefitting from this growth in the market, this is a step in the right direction, albeit a very small one. It can be viewed as recognition of the fact that the exclusive right alone is not helping performers and that an unwaivable equitable remuneration right would be justified.

The Treaty has not yet entered in to force and awaits ratification by the requisite 30 Contracting Parties.

European legal framework

At European level, Directive 2001/29/EC introduced an exclusive making available right for performers. Article 3(2) of Directive 2001/29/EC states that:

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

In 2014, the European Commission launched an extensive consultation process on the EU copyright acquis including on the remuneration of performers (including for making available on demand).

Following this, it published on 14 September 2016 a "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market"⁴⁶.

The proposal covers a wide range of subjects and states (at recital 4) that it is "based upon, and complements, the rules laid down in the Directives currently in force in this area, in particular... Directive 2001/29/EC...". It should be noted that the contents of the proposal did not aim to alter the substance of the making available right set out in said Directive 2001/29.

Nevertheless, the proposal does not ignore the issue of making available on demand.

The explanatory memorandum states:

"Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works... It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works

⁴⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>

and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content...

Finally, authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights. In addition, transparency on the revenues generated by the use of their works or performances often remains limited. This ultimately affects the remuneration of the authors and performers. This proposal includes measures to improve transparency and better balanced contractual relationships between authors and performers and those to whom they assign their rights. Overall, the measures proposed in title IV of the proposal aiming at achieving a well-functioning market place for copyright are expected to have in the medium term a positive impact on the production and availability of content and on media pluralism, to the ultimate benefit of consumers.”

Accordingly, it can be seen that the Commission acknowledges that certain difficulties arise in the context of making available on demand and that the position of rightholders needs to be improved, particularly with regard to the remuneration of authors and performers.

However, the question arises as to whether the substance of the proposal would achieve the stated aim in the explanatory memorandum to *“guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter”*.

Article 14 of the Commission’s proposal forms part of the Chapter entitled “Fair remuneration in contracts of authors and performers”. The article sets out a number of obligations which those to whom performers have licensed or transferred their rights (i.e. producers) must comply with. It does not however introduce any obligation for such licenses or transfers to contain a provision guaranteeing that a performer will in fact receive “fair remuneration”. As such, the title of the chapter is misleading.

The obligations contained in article 14 include the requirement to provide performers with *“timely, adequate and sufficient information on the exploitation of their... performances... notably as regards modes of exploitation, revenues generated and remuneration due.”*

It is self-evident that merely receiving information concerning remuneration, is not the same as receiving remuneration itself.

It is also self-evident that the provisions of article 14 would not improve the position of performers regarding their *“weak bargaining position in their contractual relationships, when licensing their rights.”* Performers may be entitled to receive increased information, but there is nothing in this article that would oblige or even put pressure on a producer to include a contractual provision for a payment of fair remuneration to a performer.

Essentially, the explanatory memorandum and its reference to the weak bargaining position of performers, implicitly highlights the fundamental difficulty that performers face, namely the ineffectual nature of their exclusive making available right.

Theoretically, an exclusive right puts a rightholder in a strong bargaining position. However, in practice if a performer wants to work (and with the exception of a very few famous performers) he/she will have no choice but to transfer all of their exclusive rights to a producer at the time that the performer makes a recording or gives a performance. Such contracts usually make provision for the payment to the performer of an overall lump sum which often is derisory or sometimes even without remuneration.

Due to these commercial and practical realities, very few performers' CMOs are able to exercise exclusive rights on behalf of performers, compounding the ineffectual nature of the making available exclusive right.

Also of relevance to performers is article 13 entitled *“Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”*.

At the heart of this article is the aim to protect certain rightholders from their works being made available on online platforms in a manner which would infringe the rights of those rightholders. In order to achieve this, it makes reference to the use of measures such as content recognition technology that would alert the platform in the event that works were available in an infringing manner. It also makes provision for complaints and redress mechanisms to be put in place in case of grievances from users.

Articles 15 and 16 deal with a contract adjustment mechanism and a dispute resolution mechanism respectively.

With regard to article 15, its content is simplistic and largely unrealistic.

To propose that “performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances” fails to take into account the Commission’s previous acknowledgement of the weak bargaining position of performers. The entitlement to “request” (and not e.g. “claim”) weakens this entitlement to the extent that it is essentially meaningless.

Further, in the absence of any guidance, it is impossible to quantify what remuneration (if indeed any has been paid) might be deemed “disproportionately low”. Clearly, this could lead to disputes, an issue which is covered in article 16.

Article 16, provides that disputes under article 15 (and article 14) “may be submitted to a voluntary, alternative dispute resolution procedure”. However, if a performer becomes involved in a dispute with a producer, this greatly damages the relationship between performer and producer which can have a highly detrimental effect on the prospect of that performer working again with that producer.

One amendment (to Article 14) that was adopted in plenary introduces the “principle of fair and proportionate remuneration”. It reads:

“Member States shall ensure that authors and performers receive fair and proportionate remuneration for the exploitation of their works and other subject matter, including for their online exploitation. This may be achieved in each sector through a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms”.

The proposal was scrutinised by the European Parliament and was subject to a very large number of amendments. Ultimately, it was approved in plenary on 12 September 2018.

If this wording will be in the final Directive following the conclusion of the trilogue discussions, it would remain to be seen whether the position of performers would be greatly improved. Despite calls from several organisations representing performers to introduce an unwaivable remuneration right subject to compulsory collective management, no such right was introduced.

Whereas the introduction of an unwaivable remuneration right subject to compulsory collective management would have marked a dramatic improvement for performers, measures aimed at improving transparency (as referred to in the explanatory memorandum) are unlikely to benefit most performers. As acknowledged by the Commission, performers are in a weak bargaining position and therefore increased information on the revenues generated by the use of their performances will be of no benefit when it comes to contractual negotiations between performers and producers.

If the provisions on the “principle of fair and proportionate remuneration” are to succeed in improving the situation of performers, much will depend upon the manner in which Member States implement the Directive in their national legislations.

National legal framework

All 26 countries covered in the present study have implemented Directive 2001/29/EC. Their national legislations provide performers with an exclusive making available right. In some countries, (including the Netherlands (1993), Lithuania (1999) and the Czech Republic (2000), the introduction of this right predated the adoption of Directive 2001/29/EC, whereas it dates back to 2003 in Croatia and Germany and 2005 in Sweden. France and Spain were the last countries to implement the Directive⁴⁷.

The French legislator did not mention the making available right explicitly, since article L212-3 CPI was thought broad enough by the French government and parliament to include this right as well⁴⁸. Accordingly, before the law was amended, French jurisprudence already considered that “the making available to the public through a network”, such as the Internet, is considered to be a communication to the public⁴⁹.

The law n° 2016-925 “Creation, architecture and heritage” of 7 July 2016 introduced provisions in the Intellectual Property Code that concern directly or indirectly the making available on demand of phonograms. It provides that making phonograms available by the way of physical support and by electronic means must be seen as different modes of exploitation within the contract concluded between a performer and the phonogram producer (Art. L 212-13 §3). This is of course an obvious finding as all international instruments make a distinction between distribution and making available on demand. But, curiously, the French Supreme Court (Cour de Cassation) rejected in 2013 the claims from SPEDIDAM against several commercial on demand platforms for the exploitation of phonograms,

⁴⁷ In France the amendment to the Law incorporating the Directive was promulgated on 1 August 2006 and published on 3 August 2006. In Spain the new law implementing the Directive was adopted on 7 July 2006 and published on 8 July 2006.

⁴⁸ Article L 212-3 of the CPI gives performers an exclusive right for the fixation of their performances, the reproduction of this fixation and its communication to the public.

⁴⁹ *Tb. Com.*, Paris, 3 March, 1997, *La semaine juridique (JCP)*, 1997, p. 22; Kerever, A., ‘*Chronique de jurisprudence*’, *RIDA*, 1997/172, 215.

initially authorised for physical distribution and exploited for on demand services without the corresponding authorisations.

In addition, the making available to the public of phonograms in such a way that members of the public may access them by their own initiative in the context of streaming is subject to a minimum guaranteed remuneration (Art. L 212-14). The terms and level of this remuneration shall be negotiated in a collective agreement by organisations representing performers and phonographic producers. If no agreement can be found in the year following the promulgation of the law, this remuneration will be established by a committee presided over by a representative of the State and equally composed of people representing performers and producers. It should be noted however that a collective agreement of 2008 already accepted the transfer of performers' rights for on demand uses for the payment of the single fee for the recording of a phonogram and its exploitation on physical carriers and that in September 2018, despite the new law, no new agreement was found between the union signatories of this agreement to provide any specific remuneration for streaming.

This legislative scheme was adopted in the wake of the "Schwartz agreement" adopted in 2015, which rejected the recognition of an unwaivable right to remuneration collected from the users by collective management organisations for the making available of performances on demand. Reference to the Schwartz agreement was directly used in the French Parliament to dismiss ADAMI's and SPEDIDAM's proposal for such a right in 2016.

In Portugal, the exclusive right to making available on demand was subject to collective mandatory management. However, Law nr 32/2015 amended Portuguese law and as a result, with respect to audio performances, the performers' making available right is no longer subject to collective mandatory management.

A similar event occurred in Slovenia with the implementation on 22 October 2016 of its Collective Management of Copyright and Related Rights Act. A consequence of this act is that the making available right is no longer listed as a compulsory collectively managed right.

In Spain, the making available right for on-demand services was considered to exist prior to the implementation of Directive 2001/29/EC as a specific form of communication to the public. But since the law 23/2006 was adopted on 7 July 2006, this type of right is explicitly recognised as a new exclusive right, as a type of "communication to the public"⁵⁰.

⁵⁰ Article 20(2)(i) of the Spanish IP Law

At the same time, Spain introduced a presumption of transfer of the performers' making available right to the producer if a contract is concluded with a phonogram or film producer concerning the production of a phonogram or a film, unless the contract stipulates otherwise⁵¹. Article 108 concerning broadcasting and communication to the public now stipulates that a performer who has transferred to a phonogram or film producer his exclusive making available right shall keep an unwaivable right to receive an equitable remuneration. It is further specified that equitable remuneration for making available shall be paid by the user (the person who is making the fixation available) and shared between performers and producers. The management of this remuneration is entrusted to collective management organisations by law⁵².

The substance of the right has not been altered, however Law 21/2014, of November 4th, amending the Spanish Intellectual Property Law, has affected the exercise of such right insofar as it introduced certain changes in the regulation of collective management – such as the process for the determination of the tariffs, the incorporation of a mediation body within the Ministry of Culture and the obligation of CMOs to develop a one-stop-shop for certain uses.

In Italy, in the audiovisual sector performers enjoy an unwaivable right to equitable remuneration for the making available to the public of their works (Law 633/41 article 84(3)).

In Slovenia, pursuant to Section 24 of Act No. 185/2015 of 1 July 2015 “rental” of a work is deemed to include the temporary making available of said work for the purpose of direct or indirect economic benefit. The explanatory report in the act specifically states that the definition of “rental” also covers video on-demand platforms or TV archives that provide temporary access to a work for the purpose of direct or indirect economic benefit.

3.2 Practice

Commercial business models for music or audiovisual services based on Internet or mobile phone technologies continue to develop at pace. The most common include pay-per-download, streaming systems (both subscription and otherwise) giving access on demand for a limited period of time and advertising supported websites, including those providing user generated content. All these services are based on the making available of music or films to the public on demand.

In the audiovisual sector, VOD and services such as Netflix and Amazon experienced very large growth with a 130.1% rise in the number of subscribers in the European Union between 2011 and 2016. Taking

⁵¹ Article 108(2) of the Spanish IP Law

⁵² Article 108(3)-(6) of the Spanish IP Law

all categories of online video services together, YouTube has the highest penetration rate in Europe with 93% of Internet users in Western Europe watching at least one video a month⁵³.

According to the International Video Federation, total spending on digital video throughout Europe increased from €1.23 billion in 2013 to €5.7 billion in 2017⁵⁴.

In the audio sector, growth in Europe grew was slightly reduced (4.3% in 2017 compared to 9.1% in 2016). Nevertheless, digital revenue continued to increase substantially (by 17.5%). This revenue accounted for 43% of the market. Streaming itself increased by 30.3% with revenues from paid subscription audio streams accounting for 70% of total digital revenues. However, revenue from physical media declined by 7.4%⁵⁵.

This growth is predicted to continue. Revenue in the European digital music sector is expected to show an annual growth rate of 4.7%, resulting in a market volume of € 3,517m by 2022⁵⁶.

These figures clearly highlight the large extent to which the market has turned away from traditional sources of revenue (sales of CDs etc.) and has moved to the digital sphere.

In Germany, streaming has overtaken CDs as the highest earning format in the German recorded music market for the first time, after rising 35.2% to represent a 47.8% marketshare in the first six months of 2018. Alongside audio streaming, the only other segment to show growth was video streaming, which increased by 27.2% to account for 2.2% of total revenues. Overall, music sales revenues in Germany amounted to € 727m from January 2018 to the end of June 2018 which is down 2% from € 742m in H1 2017⁵⁷.

In both audio and audiovisual sectors, the performer almost always transfers his/her making available right to the producer, at best, for a derisory single all-inclusive fee. Only a few famous performers manage to negotiate directly the payment of royalties for the exploitation of their performances.

Of all the countries covered in this study, only Spain allows a right to equitable remuneration to be exercised through collective management organisations in the audio and audiovisual sector. The Spanish performers' organisation AIE continued negotiations with users during the period 2014-2016.

⁵³ Online video sharing: Offerings, audiences, economic aspects, European Audiovisual Observatory, 2018

⁵⁴ International Video Federation 2014 – European Video Market 2018

⁵⁵ IFPI Global Music Report 2018

⁵⁶ Satista, June 2018

⁵⁷ BVMI, 2018

Agreements are in force with telecom companies in respect of the making available on demand of phonograms and audiovisual recordings and also (in respect of audiovisual recordings) with an audiovisual subscription service.

In respect of collection for making available, in 2017 collection occurred in only 8 of the 26 countries covered in this study (excluding those countries where a negligible amount was obtained).

In those countries where collection of remuneration took place, this was largely as a result of either extended collective agreements (e.g. Denmark, Finland), the introduction of new legislation (Spain), or where performers have mandated their collective management organisation to administer their exclusive right to making available (e.g. the Czech Republic). These remain the exception rather than the rule and overall collection of remuneration remains very low.

Remarkably, the total amount collected in 2017 had in fact decreased from the amount collected in 2013 in some countries e.g. Finland and Romania. This decline in collection suggests that even where collection is made, it is failing to reflect the growth in the digital market.

In the United Kingdom, on the other hand, lump sum payments could be obtained via collective bargaining agreements in the audiovisual sector for video on demand. It has to be noted however, that this set up only benefits those performers who are members of the trade union subject to this agreement. This means generally that performers based in other Member States do not benefit from these agreements and lose out on remuneration which is rightly payable to them.

Collection in Denmark increased very significantly. Between 2011 and 2016 the average amount collected in Denmark per year was € 497,656. However, in 2017 collection rose to € 7,247,573, the highest amount collected in any country.

The reason for this increase is due to the fact that a payment was made in respect of digital use covering a 3-year period (2015-2017) through tv-distributors from *Copydan*.

The country with the second highest collection was Germany. In 2017 it collected € 977,000 compared to € 555,807 in 2016 and € 386,602 in 2011. The reason for the increase was that GVL were able to conclude a new broadcasting agreement which covered payments for podcasting.

A number of countries showed a decline in collection. For example, collection in the Czech Republic in 2011 was € 188,071 but in 2017 it had decreased to € 57,983.

Collection occurred in Greece for the first time in 2017 (€ 52,517), following successful litigation.

In countries such as Hungary, Poland and Switzerland collections have been insignificant. Clearly, the figures in table 3.1 demonstrate that the exclusive right of making available cannot be effectively enforced in practice in a manner which would lead to a meaningful payment of remuneration to performers.

It has in some cases been necessary to file lawsuits in order to collect from some users. Two important court cases regarding the right of making available against Fear Moviles and Buongiorno are ongoing. Both judgements of the Provincial Court were favourable to AIE, recognising the right of performers to obtain an equitable remuneration for the making available of phonograms. Furthermore, in the case of Buongiorno the Provincial Court established that the remuneration right to performers for the making available is in conformity with Directive 2001/29/EC.

Table 3.1 Remuneration collected for making available on demand: 2011-2017

Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria	0	0	0	0	0	0	0
Belgium	0	0	0	0	0	0	0
Croatia	0	0	0	0	0	0	0
Czech Republic	188,071	154,268	130,932	101,960	93,760	96,654	57,983
Denmark	613,572	525,683	875,673	967,818	3,189	0	7,247,573
Finland	237,621	276,212	213,985	188,457	269,132	178,000	178,000
France	0	0	0	0	0	0	0
Germany	386,602	362,891	340,417	340,034	343,652	555,807	977,000
Greece	0	0	0	0	0	0	52,517
Hungary	0	0	0	397	4,184	980	725
Ireland	0	0	0	0	0	0	0
Italy	0	145,000	0	0	0	0	0
Latvia	0	0	0	0	0	0	0
Lithuania	0	0	4,938	7,594	6,522	9,537	19,010
Netherlands	0	651	1,565	993	125,000	208,000	0
Norway	0	0	0	0	0	0	0
Poland	0	0	0	0	0	3,291	2,405
Portugal	0	0	0	0	0	0	0
Romania	171	12,947	18,290	23,270	23,035	16,795	17,125
Serbia	0	0	0	0	0	0	0
Slovakia	0	0	0	0	0	0	0
Slovenia	3,400	51,000	34,000	3,000	1,500	0	0

Spain	244,721	495,880	650,093	282,951	189,038	157,118	150,550
Sweden	0	0	0	0	0	0	0
Switzerland	3,000	3,000	3,000	0	10,311	6,905	1,486
Total	1,677,158	2,027,532	2,272,893	1,916,474	1,069,323	1,233,097	8,704,373

3.3 Conclusion

As these figures in table 3.1 show, the economic situation of performers has not changed after the introduction of the making available right. In 2011 performers' organisations in 26 countries collected a total remuneration of only € 1,677,158 for the making available on demand of their performances.

Despite the growth in the digital market, this figure had declined to € 1,233,097 by 2016. The dramatic increase in collection in 2017 (to € 8,704,373) was as a result of one CMO whose collection had increased due to receiving a back-dated payment in respect of digital use covering a 3 year period. This increase can be seen as an anomaly, rather than an indicator of a growth in collection.

In 2017, the amount collected in respect of making available amounted to just 2% of performers' overall collection. This was the first time that making available collection had constituted more than 1% of overall collection. To put this into context, collection for broadcasting and communication to the public over the period 2011-2017 amounted to on average 67% of overall collection.

The reason for this economic situation is that the exclusive making available right is generally transferred to producers under contractual agreements. Only a few famous performers manage to negotiate directly the payment of royalties for the exploitation of their performances. In practice, however, this right has not been effective as the majority of performers receive no remuneration at all, or, at best, a derisory single all-inclusive fee. The EU law designed to protect and adequately reward performers has therefore failed.

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

In order to make the making available right effective for performers, a measure should be introduced in European law, complementary to the existing relevant provisions of Directive 2001/29/EC. Such a measure should guarantee that performers, in the event that they transfer their exclusive right for the making available of performances on demand, enjoy an unwaivable right to equitable remuneration compulsorily administered by a performers' collective management organisation. It would ensure that performers are finally remunerated for the making available of their audio and audiovisual performances in music and film recordings that are made available to the public by online and mobile services for on-demand use⁵⁸.

⁵⁸ Collective management organisations are in general in a better position than performers acting individually to negotiate and obtain global

A comparable situation only exists currently in Spain. Spanish performers' organisations are in the process of negotiating with users and enforcing the right to remuneration via the courts. Whilst enforcing this right has been challenging, the Spanish collective management organisations have entered into various agreements with key users established in Spain carrying out acts of making available on demand and are now successfully collecting remuneration for performers for the making available on demand of their performances.

Regrettably, the European institutions debating the reform of the copyright *acquis*, have neglected to give any meaningful consideration to the ineffectual nature of the making available right for performers, despite clearly being aware (as evidenced by the explanatory memorandum in the draft copyright Directive) of the weak position in which performers find themselves. This is in stark contrast to the lengthy efforts that they went to in creating other legislation in this area such as the CRM Directive.

The draft copyright Directive currently in trilogue discussions may be a step in the right direction, however the "principle of fair and proportionate remuneration" it introduces, grants performers a protection far inferior to the introduction of an unwaivable right to equitable remuneration subject to compulsory collective management. As such, an opportunity has been missed to guarantee the future livelihoods of European performers.

agreements providing for satisfactory remuneration for performers and to enforce them. Therefore, an alternative solution could also be to make it compulsory for the exclusive right of making available to be exercised through a collective management organisation, thus following the example of the way in which the cable retransmission right has been exercised.

Chapter 4: Limitation of the reproduction right for private use

4.1 Legal framework

International legal framework

The Rome Convention introduces the possibility of a performer preventing the reproduction of a fixation of his/her performance made without his/her consent. However, any Contracting State may provide for exceptions to the protection guaranteed by the Convention, including for private use⁵⁹.

The TRIPS Agreement also envisages the possibility of a performer preventing reproductions of fixations on a phonogram if this is undertaken without their authorisation⁶⁰. It does not provide explicit exceptions to the rights of performers, but it refers to those permitted by the Rome Convention⁶¹.

Neither the Rome Convention nor the TRIPS Agreement make any reference to the conditions set forth in the Berne Convention, generally known as the “three-step test”, under which exceptions to the reproduction right shall be permitted⁶².

The WPPT gives a performer an exclusive right of authorising the reproduction of his/her performances fixed in phonograms⁶³. 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 works⁶⁴.

The Beijing Treaty on the Protection of Audiovisual Performances, adopted on 26 June 2012, provides performers in its article 7 with the exclusive right of “authorising the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form”.

Article 13 further permits Contracting Parties to provide in their national legislation for exceptions and limitations to this right which are of the same kind as those for the protection of copyright in literary

⁵⁹ Article 15(1)(a) of Rome Convention

⁶⁰ Article 14 TRIPS Agreement

⁶¹ Article 14(6) TRIPS Agreement

⁶² According to article 9(2) Berne Convention granting protection to authors, limitations or exceptions to their exclusive right of reproduction should be limited to certain special cases, should not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author.

⁶³ Article 7 WPPT

⁶⁴ Article 16(1) WPPT

and artistic works. 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.

As at the end of September 2018, without 30 ratifications as required by its article 26, the Treaty has not yet entered into force.

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

European legal framework

EU Directive

The possibility of 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 article 5(2)(b)⁶⁵. 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”.

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

⁶⁵ Some grounds for a right to remuneration in the event of reproduction for private use were provided at the European level by Directive 92/100/EEC. According to this Directive, Member States shall provide for all performers the exclusive right to authorise or prohibit the reproduction of fixations of their performances, but they may also provide for limitations in respect of private use. 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 Directive 2001/29/EC the exception for private use, like all the other exceptions envisaged in this Directive, is submitted to the three-step test⁶⁶. 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. Article 16(2) WPPT stipulates that any limitation or exception should be confined to certain special cases which do not conflict with normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer⁶⁷.

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

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

Recital 39 further states that:

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

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

European Court of Justice case law

There has been a growing number of important Court of Justice of the EU (“CJEU”) decisions vis-à-vis private copying remuneration. These decisions provide guidance regarding specific aspects of these regimes.

These cases are the result of an aggressive strategy by the ICT industry against the private copying remuneration schemes starting with national court cases and culminating in references to the CJEU.

⁶⁶Article 5(5) of Directive 2001/29/EC, similar to provisions of article 9(2) of the Berne Convention quoted above.

⁶⁷ However, it should be underlined that the three-steps-test is subject to different interpretations.

New legal issues continue to arise in national courts, particularly in relation to new forms of reproduction that occur in the light of evolving technology. It can be anticipated that a number of these may result in future references to the CJEU for a preliminary ruling.

Padawan v SGAE

In the *Padawan* case⁶⁸, the CJEU stressed the legitimacy of private copying remuneration mechanisms in the EU. It highlighted that *“the purpose of fair compensation is to compensate (rightholders) ‘adequately’ for the use made of their protected works without authorisation”*⁶⁹. It added that *“fair compensation is an autonomous concept of EU law which must be interpreted uniformly in all Member States that introduced the private copying exception”*⁷⁰. *“In order to determine the level of that compensation account must be taken – as a valuable criterion – of the possible harm suffered”*⁷¹. *“Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm”*⁷².

Moreover, the Court stated that *“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”*⁷³. Accordingly, *“the fact that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users”*⁷⁴. It follows that *“the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29”*⁷⁵.

Stichting de ThuisKopie v Opus

In the *Opus* case⁷⁶, the CJEU found, that the 2001/29/EC Directive does not specify who must pay the fair compensation but says that its decision in the *Padawan* case (see above) shows that the fair compensation must be regarded as recompense for the harm suffered by the rightholder. It said that the person who has caused the harm to the holder of the exclusive reproduction right is the person

⁶⁸ Padawan SL v Sociedad General de Autores y Editores (SGAE): C-467/08

⁶⁹ Paragraph 39

⁷⁰ Paragraph 33

⁷¹ Paragraph 39

⁷² Paragraph 44

⁷³ Paragraph 54

⁷⁴ Paragraph 56

⁷⁵ Paragraph 59

⁷⁶ Stichting de ThuisKopie v Opus GmbH: Case C-462/09,

who reproduces a protected work without authorisation from the rightholder and that it is, in principle, that person who must pay the compensation.

The Court added that it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media 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.

The Court further imposed a duty of efficient enforcement of private copying levies schemes on Member States in order to guarantee that the reward of the rightholders will effectively take place. The Court held that in case of distance sales occurring from one Member State to consumers located in one or several other Member States where private copying remuneration systems are in effect, the distance seller should be held responsible for the payment of the remuneration applicable by virtue of the law of the country where such consumer is located.

VG Wort v Kyocera

On 27 June 2013, the CJEU gave its ruling in the *VG Wort* case⁷⁷.

VG Wort asked the national court to oblige *Kyocera* and others to provide information on the nature of the printers and other devices they sold or otherwise placed on the market and sought a declaration that *Kyocera* and others should pay it remuneration, by way of a levy on these devices marketed in Germany.

The key question referred by the German Court was whether *“the condition relating to fair compensation (Article 5(2) (a) and (b) of the Directive) and the possibility thereof (see recital 36 in the preamble to the Directive) [is] inapplicable where the rightholders have expressly or implicitly authorised reproduction of their works”?*

The Court stated that *“where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effect [emphasis added] under the law of that State”.*

It continues that *“such an act has no effect on the harm caused to the rightholders due to the introduction of the relevant measure depriving them of that right, and cannot therefore have any*

⁷⁷ *Wort (VG Wort) v Kyocera and Others*: C-457/11

bearing on the fair compensation owed [emphasis added] whether it is provided for on a compulsory or an optional basis, under the relevant provision of that Directive”.

In the preliminary reference from the Federal Court of Justice in Germany, the court was also asked whether *“the possibility of applying technological measures under article 6 of the Directive render inapplicable the condition relating to fair compensation within the meaning of Article 5(2)(b) of the Directive”?*

The Court’s understanding of "technological measures" to which the wording of article 5(2)(b) of Directive 2001/29 refers is that they *“are technologies, devices or components intended to restrict acts which are not authorised by the rightholders, that is to say to ensure the proper application of that provision, which constitutes a restriction on copyright or rights related to copyright, and thus to prevent acts which do not comply with the strict conditions imposed by that provision”.*

The Court reached the conclusion that due to the voluntary nature of technological measures, even where such a possibility exists, the non-application of those measures cannot have the effect that no fair compensation is due. Nevertheless, it would be open to the Member State concerned 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

On 11 July 2013, the CJEU ruled in the case *Amazon.com v Austro-Mechana*⁷⁸.

In its judgement, the Court reaffirmed its position that where Member States decide to introduce the private copying exception into their national law, they are required to provide for the payment of fair compensation to rightholders (reference to the *Padawan* case C-467/08). It noted that Member States enjoy however broad discretion and national legislation should determine the conditions surrounding payment of private copying remuneration.

The Court also noted that it is unnecessary to show that private copies have been made with the help of recording media, given that natural persons are rightly presumed to benefit fully from the making available of such media that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying (referring to the *Padawan* decision). It notes that:

⁷⁸ *Amazon.com v Austro-Mechana*: C-521/11

“the establishment of a rebuttable presumption of such use when the medium is made available to a natural person is in principle justified and reflects the fair balance to be struck between the interests of the holders of the exclusive right of reproduction and those of the users of the protected subject-matter”.

Moreover, the Court held that:

“with regard to the right to fair compensation payable to holders of the exclusive right of reproduction under the private copying exception it does not follow from the provisions of Directive 2001/29 that the European Union legislature envisaged the possibility of that right being waived by the person entitled to it”.

According to the Court, a system of fair compensation consisting in the indiscriminate application of a private copying levy on recording media for reproduction (including for commercial purposes) 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.

The Court also stated 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.

It stated at point 3 of the operative part of the judgement:

“Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation... cannot be excluded by reason of the fact that half of the funds received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled...”.

Finally, the Court considered that the payment of private copying remuneration in another Member State should not free the retailer from paying it in other Member States. However, a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law.

On 10 April 2014, the CJEU issued its judgement in the case of *ACI ADAM v Stichting de ThuisKopie*⁷⁹.

ACI ADAM and Others are importers and/or manufacturers of blank data media (e.g. CD-Rs) and under Dutch law are required to pay the private copying levy. They argued that the amount they pay incorrectly considers harm suffered by rightholders as a result of copies made from unlawful sources.

The referring court in the Netherlands stated that Directive 2001/29/EC does not specify whether reproductions made from an unlawful source must be taken into account in determining the fair compensation referred to in article 5(2)(b) of that Directive and sought a preliminary ruling from the CJEU.

The CJEU ruled that “... Article 5(2)(b) ... must be interpreted as precluding national legislation... which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful”.

The CJEU agreed with the Dutch court that article 5(2)(b) “does not address expressly the lawful or unlawful nature of the source from which a reproduction of the work may be made” (para 29).

However, it held that “the different exceptions and limitations provided for in article 5(2) of Directive 2001/29/EC must be interpreted strictly” (para 23, see also para 30).

It added that “the objective of proper support for 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” (para 36). “Consequently national legislation which makes no distinction between private copies made from lawful sources and those made from counterfeited or pirated sources cannot be tolerated” (para 37, see also para 41).

By not making a distinction, national law “may infringe certain conditions laid down by article 5(5) of Directive 2001/29/EC” (the so-called three-step test).

⁷⁹ *ACI Adam BV and Others v Stichting de ThuisKopie*: Case C 435/12

The CJEU further stressed that if a Member State has made the choice of introducing an exception contained in article 5 of Directive 2001/29/EC “it must be applied coherently so that it cannot undermine the objectives which Directive 2001/29 pursues with the aim of ensuring the proper functioning of the internal market” (para 34).

The Court considered that were Member States able to allow private copies from an unlawful source, that would in the Court’s opinion constitute a distortion of the internal market (para 35).

This requirement of coherence of the private copying system can also be found a few paragraphs later in the judgement of the CJEU.

The CJEU stated that “it is also important to bear in mind that an interpretation of that provision according to which Member States which have introduced the private copying exception, provided for by EU law and including, [...], the concept of ‘fair compensation’ as an essential element, are free to determine the limits in an inconsistent and unharmonised manner which may vary from one Member State to another, would be incompatible with the objective of that Directive [...]” (para 49) being the aim of ensuring the proper functioning of the internal market.

The CJEU also reconfirmed the principle set by the Court in the earlier *Padawan* judgement that it is open to Member States to establish a levy for the purpose of financing fair compensation chargeable not directly to the private persons concerned but to the manufacturers of such equipment which can then pass on the costs to the end user (para 51 and 52).

The CJEU furthermore took note of recital 44 of the same Directive according to which “the scope of those exceptions or limitations could be limited even more when it comes to certain new uses of copyright works and other subject matter” (para 27). It continued that “neither that recital nor any other provision of that Directive envisages the possibility of the scope of such exceptions or limitations being extended by the Member States” (para 27).

Finally, the CJEU stressed that Member States must safeguard a *fair balance* between the rights and interests of rightholders on the one hand, and those of users of protected subject-matter, on the other (see para 53 - 57).

Copydan Båndkopi v Nokia Danmark A/S

On 5 March 2015, the CJEU issued its judgement in the case of *Copydan Båndkopi v Nokia Danmark A/S*⁸⁰.

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 that is different from the SIM card. Copydan took the view that mobile phone memory cards should be covered by the fair compensation system. Nokia argued that a levy is only payable in respect of lawful reproductions for private use that are not authorised by the rightholder.

The Court found that:

- Private copying remuneration is payable even if the means of reproduction is only an ancillary function on the device. The extent to which a function is “ancillary” may affect the amount of fair compensation payable. If the prejudice to the rightholder may be regarded as minimal, there need be no obligation to pay fair compensation.
- National law may provide that private copying remuneration is payable in respect of certain categories of media but not in 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 court to determine.
- A levy system focused on producers and importers complies with the Directive if it is justified by practical difficulties; that the persons responsible for payment are exempt from the levy if they can establish that they have supplied the memory cards to persons other than natural persons for purposes clearly unrelated to copying for private use, and that the system provides for a right to an effective levy reimbursement system.
- Member States may provide for an exemption from the obligation to pay private copying remuneration where the harm caused is “minimal”. It is up to the national court to decide what is “minimal”.

⁸⁰ *Copydan Båndkopi v Nokia Danmark A/S*: C 463/12

- Where a private copying exception exists, an act purporting to authorise a reproduction of the work in question is devoid of legal effect, does not generate any obligation to pay remuneration on the part of the user and has no bearing on the fair compensation owed.
- The implementation of technological measures for devices used to reproduce protected works can have no effect on the requirement to pay fair compensation. However, the implementation of such measures may have an effect on the actual level of such compensation.
- The Directive precludes national legislation which provides for fair compensation in respect of reproductions made using unlawful sources.
- The Directive does not preclude national legislation which provides for fair compensation, in accordance with the exception to the reproduction right, 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.

Hewlett-Packard Belgium SPRL v Reprobel SCRL

On 12 November 2015, the CJEU issued its judgement in the case *Hewlett-Packard Belgium SPRL v Reprobel*⁸¹.

Of particular interest in this case was the question of whether Directive 2001/29/EC precludes national legislation which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit even indirectly from some of the compensation of which they have been deprived.

The CJEU held that such a provision was not compatible with Directive 2001/29/EC.

EGEDA and Others v AISGE and Others

On 9 June 2016, the CJEU delivered its judgement in the case *EGEDA and Others v AISGE and Others*⁸². The CJEU held that Directive 2001/29/EC precludes a scheme for fair compensation for private copying

⁸¹ *Hewlett-Packard Belgium SPRL v Reprobel SCRL*: C 572/13

⁸² *EGEDA, DAMA, VEGAP v. the Spanish State*: C-470/14

which is financed from the general state budget, such as was the case in Spain, where it is not possible to ensure that the costs of that compensation are solely borne by the users of private copies.

The Court, referring to earlier case law, stated that it is the natural persons benefiting from the private copying exception that ultimately are obliged to pay the compensation as opposed to legal persons. The Court found that the position in Spain was that the financing of the private copying remuneration came from all the budget resources of the general state budget and therefore from all taxpayers including legal persons. Accordingly, the Spanish scheme was not in compliance with EU law.

Microsoft/Nokia V SIAE

On 22 September 2016, the Court of Justice of the EU issued its judgement in the case of *Microsoft/Nokia V SIAE*⁸³.

In this reference from the Italian courts, the CJEU recited existing private copying case law. Among other things it stressed that under the *Copydan* judgement, the levy must not be applied to the supply of copying devices to persons other than natural persons for purposes clearly unrelated to private copying. Further there must be a system that provides for a right to reimbursement of the private copying levy which is effective and does not make it excessively difficult to obtain repayment of the levy paid.

The Italian legislation contained no provision exempting producers and importers who show that the devices and media were acquired by persons other than natural persons, for purposes clearly unrelated to private copying.

Regarding the possibility of reimbursements, the Italian legislation provided that reimbursement may be requested only by a final user who is not a natural person. The reimbursement may not, however, be requested by a producer or importer of the media and devices.

The CJEU explained that the effect of the *Copydan* judgement was that such a system is compatible with EU law only if there is provision for the producers and importers to be exempted from payment of the levy where they can show that they have supplied the devices to persons other than natural persons for purposes clearly unrelated to private copying.

⁸³ *Microsoft/Nokia V SIAE and others*: C 110/15.

Political discussions at EU level

The subject of private copying remuneration has in recent years come under intense pressure due to the lobbying efforts of the ICT industries.

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

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

On this basis, a platform gathering representatives of rightholders, of the ICT industry and of consumer organisations was set up. It has been working on certain technical aspects to improve where needed some practical modalities linked to the remuneration schemes, their management and their enforcement. Although some considerable process could be made, the platform came regretfully to a premature closure in early 2010 as the ICT industry walked away from the negotiations.

In November 2011, Commissioner Barnier appointed a high-level mediator to continue the stakeholder discussions on private copying. He proposed António Vitorino, a Portuguese politician and a former European Commissioner responsible for Justice and Home Affairs to take on this role and tasked him to explore possible approaches to harmonisation of both the methodology used to impose private copying remuneration and the systems of administration of such remuneration. Mr Vitorino commenced discussions with stakeholders in April 2012 and delivered a set of recommendations⁸⁴.

In these recommendations he stated that copies made by end users for private purposes in the context of a digital service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies. Mr Vitorino acknowledged the fact that performers are often unable (due to commercial and/or contractual pressure), to negotiate reasonable

⁸⁴ http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

(or, indeed, any) licensing fees but did not propose any practically realistic solution which would compensate for the damage that such a system would cause to performers.

Other recommendations included the proposal that levies in cross-border transactions should be collected in the Member State in which the final customer resides. Further, the liability to pay levies should be shifted from manufacturers and importers to retailers, provided that the tariff systems are simplified and that manufacturers and importers are obliged to inform collective management organisations about their transactions concerning goods subject to a levy. As an alternative he proposed that clear and predictable ex ante exemption schemes should be established for those operators that could be deemed, in principle, not to bear liability.

He also contended that levies should be made more visible to the final consumer and sought to ensure greater consistency with regard to the process of setting levies, specifically with regard to the definition of "harm" (i.e. the harm caused to rightholders by acts of copying made by virtue of the private copying exceptions) so that it can be interpreted uniformly across the EU. He argued that this should be combined with a simplification of the procedural framework in which levies are set.

In 2014, the European Commission launched an extensive consultation process on the EU copyright acquis including on private copying remuneration. However, private copying remuneration was not one of the issues addressed in the proposal for a Directive on Copyright in the Digital Single Market published on 9 September 2016⁸⁵.

National legal framework

Mechanism for setting rules:

In most of the countries studied, remuneration for private use had already been introduced and applied prior to the implementation of Directive 2001/29/EC. It was introduced in German law in 1965 on hardware and extended in 1985 to blank tapes, in 1985 in France, in 1987 in Spain, in 1990 in the Czech Republic, in 1993 in the Netherlands, in 1999 in Lithuania and in 1999 in Sweden. In Croatia, it was introduced in 2003.

Provisions relating to the exception to the reproduction right for private use were partly redrafted in some national laws up until 2006 (see Spanish or French laws) as part of the implementation process

⁸⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>

of Directive 2001/29/EC. In Lithuania, although this exception predated the adoption of Directive 2001/29/EC, its management (collection and distribution) was set up in 2004.

Since then, there have however been many revisions/amendments of national laws.

Most Member States of the EU realised quite early that in view of technical developments and the resulting massive use of reproductions made by individuals, a ban on private copying could not be enforced. Therefore, of the 26 countries participating in this study, 24 countries have introduced in their national legislation an exception for private use, linked to an entitlement to remuneration for the rightholders (see table 4.1 below). As shown in table 4.1, the terms of the remuneration systems show a number of similarities but specific provisions differ from country to country.

A different mechanism applies however in Norway and until recently in Spain.

In Norway, the government amended its copyright law in 2005 stipulating that compensation is allocated through the Norwegian national budget (rather than payable on devices and media by manufacturers and importers as is the case in the majority of countries – see below). The national budget for 2014 was NOK 45.5 million which is distributed by NORWACO⁸⁶ to its member organisations. In 2018, the amount had increased to approximately NOK 48 million.

A similar mechanism was put in place in Spain on 31 December 2011, abolishing the previous system⁸⁷. According to that law, remuneration for private copying would be paid via the national budget based on the estimation of the damage caused to rightholders. In June 2012, the Spanish Senate adopted an amendment setting this estimate at € 5m per year⁸⁸. In comparison, in 2011 video and audio societies collected € 80m in accordance with a set of criteria determined by the former Government and following the negotiations between industry and rightholders. Spanish rightholder organisations launched a complaint against the Spanish government to the European Commission arguing that the Spanish system was not in compliance with EU law^{89 90}.

⁸⁷ <http://www.norwaco.no/eng>

⁸⁷ Despite these latest developments, the study describes the private copying remuneration system in Spain from 2011-2017.

⁸⁸ ENMIENDA NÚM. 2529 Del Grupo Parlamentario Popular en el Senado (GPP)

⁸⁹ The complaint was submitted by EGEDA, AGEDI, AIE, AISGE, DMA, SGAE and VEGAP on 1 August 2012.

⁹⁰ AEPO-ARTIS submitted a complaint to the European Commission in May 2013 on the same grounds considering the detrimental impact of the Spanish system not only on local performers but all European performers whose performances are subject to acts of private copying in Spain.

In 2016, the Spanish rightholders succeeded in arguing at the CJEU⁹¹ that the Spanish system did not comply with EU law⁹².

Thereafter, the Spanish parliament adopted legislation to comply with the Judgement, replacing the system of equitable compensation financed by the General State Budget with a more conventional system whereby equitable compensation is paid by importers and manufacturers of reproduction equipment and similar devices.

Of the countries participating in this study only Ireland and the United Kingdom have no exception and no corresponding remuneration scheme⁹³. Rightholders in these countries nevertheless benefit from remuneration for private copying from those countries which do provide for private copying remuneration.

Private copying remuneration in general has also come under political attack in some countries. In Belgium, the private copy remuneration system has been the subject of several political initiatives aimed at reducing its application or indeed proposing to abolish it all together. So far, none of these initiatives have led to any new legislation.

In Sweden, there will be a government led review of the private copying mechanism. In May 2018, the Swedish parliament took the view that technical developments have changed the conditions for the current compensation system and that the current situation is uncertain and unclear. As a result, the Swedish government should therefore set up an investigation. It was stated that the possibility of introducing a system in which the state is responsible for the payment of private copying remuneration should be considered.

In Switzerland, there has been a parliamentary initiative requesting the abolition of the private copying remuneration scheme in Switzerland. The initiative failed.

Devices and media to which such remuneration applies:

To date, the vast majority of countries operate a dual remuneration scheme with remuneration applicable on equipment and blank carriers: Austria, Belgium, Croatia, the Czech Republic, Finland,

⁹¹ See EGEDA and others: C-470/14

⁹² See reference above to EGEDA and others: C-470/14

⁹³ This is also the case in Cyprus. In Luxemburg and Malta an exception for private copying exists, but without relating remuneration schemes for the rightholders (which is not in line with the provisions of the Directive 2001/29/EC/EC).

France, Germany, Greece, Hungary, Italy, Latvia, Lithuania⁹⁴, Poland, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden and Switzerland. In Denmark, levies are payable on blank video and audio carriers only.

In the digital age, the means by which individuals can make private copies of copyright protected content are greater than ever before. Accordingly, it becomes ever more important to adapt the private copying regime in order to reflect the technological progress and the actual habits of users. This view is in line with the provisions of the EU Copyright Directive (see recitals 38 and 39 above).

Nevertheless, in some countries remuneration is not applied on all carriers that are used to reproduce recordings (e.g. MP3-players, DVD-recorders, CD-burners, computer external hard-disks, memory-cards for cell phones with storage capacity).

In Sweden, for instance, it was only decided in October 2012, that rightholders are entitled to compensation for private copying on USB flash drives and external hard drives. Since the end of 2013 a levy has been payable on computers, tablets and game consoles with internal hard drives and since 2014 also on mobile phones.

In the Netherlands, on 27 March 2012, the Dutch Court of Appeal upheld a challenge initiated *inter alia* by NORMA, a Dutch performers' organisation, against the Dutch government for failing to add new devices, such as MP3 players and video recorders with a hard drive, to the list of items for which a private copying remuneration is payable.

The court ruled that the government's omission to extend the list of devices is not in accordance with Dutch law. Referring to figures presented by NORMA showing that as of 2007 digital devices are a substantial part of the market and are materially used for private copying, the court decided it is assumable that rightholders have suffered damages as a result of the private copy exception. Therefore, taking into account the rulings of the Court of Justice of the EU (*Padawan, Opus* – see also above), the court concluded that government:

“cannot, without substantive reasons, exclude one or more categories of devices, if they are used more than a negligible degree for making private copies, which causes damage to rightholders. To restrict private copy levies to one or two devices that are becoming less significant, instead of extending the system to other devices that are of increasing importance, does not appear to be a coherent system.

⁹⁴ In force since March 2012.

There is no justification to arbitrarily and unilaterally impose the costs to the users of blank CDs and DVDs only”.

Accordingly, the court ordered the Dutch government to pay damages to the rightholders for the loss suffered. The government has now updated the list of devices to also include HDD recorder/set-top-box, external HDD, phones with MP3 player/smartphones, tablets and PCs/Laptops, e-readers and wearables with storage capacity. It has also been announced that consumer use of blank CD-r and DVD-r has decreased significantly in recent years and is expected to decrease even further in the near future. Therefore, it has been decided that levying on these devices should be discontinued as from 1 January 2018. On the contrary, the increased use of smartphones has resulted in an increase in the levy payable (from €3.50 to € 4.70), effective as of 1 January 2018.

An issue of increasing importance that has arisen in many countries covered in this study is that of smartphones and whether or not remuneration is payable in respect thereof.

In Greece, litigation was raised against mobile phone companies for the remuneration of performers and authors from private copying via mobile phones. One case found that remuneration was payable whereas the court came to the opposite conclusion in another case.

In Latvia, the performers’ CMO LaIPA expressed its view in the working group of the Ministry of Culture that mobile telephones should be covered by the private copying remuneration scheme. So far, no decision has been taken by the Ministry.

In Lithuania, litigation is ongoing with one of the biggest smartphone manufacturers, because they do not recognise an obligation to pay private copying remuneration.

In Poland the list of devices on which a levy is charged is closed (contrary to the provision of the Polish Copyright Act stating, that all devices capable of producing copies are subject to a levy). The list lacks devices such as smartphones and tablets. It also makes it impossible for newly developed devices to be subject to a levy without the necessity to change the ministerial decree.

In Portugal, Law nr 49/2015 of 5th June extended the scope of the private copying remuneration scheme to include most digital devices including smartphones.

In Switzerland, discussions have been held to extend the list of devices to include smartwatches.

In France, Article L. 311-4 and L. 331-9 of the intellectual property code have been modified by article 15 of the Law n° 2016-925 “Creation, architecture and heritage” of 7th July 2016. French Law now provides for a private copying remuneration for reproductions made remotely, in the cloud, via “NpvR” services.

Indeed, article L. 311-4 paragraph 2 now provides that the private copying remuneration is also paid by the editor of a radio or television service or its distributor, as defined by the Law n° 86-1067 dated 30th September 1986, that provides a natural person, via a remote access, with the reproduction for private use of a program linearly broadcasted by this editor or its distributor, provided this reproduction is requested by this natural person prior to the broadcast of the program or during it for the remaining part. The framework does not apply to VOD services since only linear broadcasting is covered. In such a case, the amount of remuneration due is based on the number of users of the storage service offered by the editor or the distributor, as well as on the storage capacities made available by the editor or the distributor, assessed by the means of surveys.

Calculation of tariffs:

The calculation of tariffs is either set by legislation or other governmental body, commission or copyright tribunal (e.g. the Czech Republic, Denmark, Finland, France, Greece, Latvia, Lithuania, Italy, Poland, Romania, Serbia, Slovakia, Slovenia, Spain (only analogue) and Switzerland).

For example, in France, Article L. 311-5 determines the composition of a private copying commission which sets the tariffs for the remuneration due to rightholders. It has been complemented by a decree (arrêté) of 18th November 2015. Article L. 311-6 states that the remuneration is collected by an organisation accredited by the ministry of culture, and sets the requirements to be accredited. Copie France, a collecting society founded by collective management organisation of rightholders entitled to receive the private copy remuneration in France, has been appointed.

In other countries tariffs are set by negotiation with the respective collective management organisations (e.g. Austria, Croatia, Germany, Hungary, the Netherlands, Spain (digital) and Sweden).

Remuneration schemes applied in the countries covered either consist of a percentage of the selling price or of fixed amounts. Remuneration schemes based on percentages (as is the case in the Czech Republic, Greece, Lithuania (for carriers), Poland, Romania, Slovakia and Switzerland) are problematic since wholesale prices tend to decrease, whereas the recording capacity of the equipment or carriers is continuously increasing and the number of copies made for private use seems to increase alike. In Croatia tariffs are no longer taking the form of percentages but are now fixed amounts. This is also the case in Sweden and in Lithuania (for equipment).

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

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

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

Member States had notably different positions on the regime and associated remuneration applicable to copies resulting from illegal sources such as unauthorised P2P systems. However, the Court of Justice of the EU has clarified the situation by stating that private copying remuneration may only be from a lawful source⁹⁵.

Moreover, copies made for professional purposes should be excluded from the private copying exception⁹⁶ and therefore should not be levied, subject to practical modalities to be agreed on. Most countries have already amended/or are amending national provisions in this regard either in form of

⁹⁵ See *ACI Adam BV and Others v Stichting de Thuiskopie*

⁹⁶ See reference to *Padawan, Copydan* etc. cases above

exemptions (e.g. Greece, Serbia and Sweden) or reimbursement mechanisms (e.g. Denmark and Lithuania) or both (e.g. France and Switzerland)⁹⁷.

Body liable for payment:

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

Indeed, in the *Padawan* case (as subsequently reinforced in the *Copydan* case), the CJEU held that the parties liable to pay this compensation are those who make the digital reproduction equipment available to private users, or provide them with copying services, with a possibility for them to pass on to private users the burden of the costs as is current practice. This is considered by the Court as being consistent with a "fair balance" between the persons concerned⁹⁸.

Rules about sharing remuneration:

Remuneration for private copying is shared between all categories of rightholders concerned: performers, authors and producers⁹⁹. The division between the various rightholders is stated in national legislations or in general agreements. In the majority of countries (e.g. in the Czech Republic, Finland, France (audio), Greece, Hungary, and Lithuania) equal shares are paid. In Croatia, the Czech Republic, the Netherlands, Poland, Romania (audio), Serbia, Slovakia, Slovenia and Spain (audio/analogue¹⁰⁰) the division made is unbalanced and does not involve equal shares for the various categories of rightholders. The remuneration is considered to be non-transferable via individual contracts.

Cultural purposes:

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.

⁹⁷ The mechanisms are currently being challenged in front of the European Court of Justice in the case C-521/11 ("*Amazon.com International Sales e.a.*")

⁹⁸ *Padawan SL v Sociedad General de Autores y Editores de España SGAE* (Case C-467/08); see also *Stichting de Thuiskopie v Opus GmbH*: C-462/09

⁹⁹ With the exception of Denmark, where 5% is paid to broadcasters and Belgium where publishers are categorised as rightholders.

¹⁰⁰ Until 31 December 2011.

The amount dedicated for these purposes is either set by law (e.g. Croatia, Denmark, France, Lithuania, Serbia and Spain¹⁰¹) or by agreement of the members of the collective management organisation (e.g. the Czech Republic, Greece, Hungary, the Netherlands, Norway, Poland and Switzerland) and can range from 5% (e.g. in Germany) to 50% (e.g. in Austria, Finland for video) of the remuneration collected for acts of private copying.

Whilst this possibility of contributing to the performers' welfare and cultural activities was recently challenged before the CJEU, in the *Amazon v Austro-Mechana* case¹⁰², the Court upheld such systems, provided that they are actually benefiting those entitled and the detailed arrangements for the operation of such establishments are not discriminatory.

Compulsory intervention of collective management organisations:

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

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

¹⁰¹ Until 31 December 2011

¹⁰² See third question raised by the Austrian Court in CJEU case C-521/11 « *Amazon.com* ... »:

« 3) En cas de réponse affirmative à la question 1 ou à la question 2.1: Résulte-t-il de l'article 5 de la Directive 2001/29/EC ou d'autres dispositions du droit de l'Union que le droit à une compensation équitable à faire valoir par une société de gestion collective n'existe pas lorsque cette dernière est tenue, de par la loi, de reverser la moitié des recettes non pas aux ayants droits, mais de la consacrer à des établissements sociaux et culturels? »

Table 4.1 Private Copying – Terms of Remuneration

Country	Mechanism for setting rules	Devices and media to which such remuneration applies	Calculation of tariffs	Body liable for payment	Rules on sharing of remuneration between the different rightholders	Contribution to cultural activities
Austria	Statutory law	Blank tape: audio analog, audio digital, CD-R/RW, MP3-player, Jukebox etc; video carrier analog and digital; hard discs, DVD-/BluRay-recorder and SAT-receiver	Tariffs set by Austro-Mechana	First seller of the media or equipment		50% to social and cultural activities
Belgium	By Royal Decree, that incorporates the results of negotiations between the rights holders and the representatives of the industry	Memory Card and USB stick, MP3 player, MP4 player, mobile phone with MP3 and/or MP4 function, external hard disc drive, devices with internal support, CD-R data, CD-R Audio, Minidisc, Audio cassette DAT, audio cassette analogue, Video cassette analogue, DVD, devices, possibly integrated, without internal support Since 2013 also tablets	Differs from one type of carrier/equipment to another	Manufacturer and importers	According to article 58 of the Belgian Copyright Act the remuneration is split three ways between the authors, producers and performers 1/3 for the authors/composers, 1/3 for the producers and 1/3 for the performing artists	-
Croatia	Legislation	Digital carriers, analogue carriers, IT devices, other devices (digital and analogue audio and video recorders)	Tariffs set by collective management organisation, but actual remuneration is set as result of negotiations Fixed amount for the carriers (distinction	Manufacturers and importers of equipment or carriers	Audio: 4:3:3 authors/performers/producers Audiovisual: shares between audio and video part are set differently for each type of carrier and device In audio part: 4:3:3 authors/performers/producers	On basis of Croatian Copyright act 2003, 30% for social and cultural aims.

			analogue and digital) and the equipment		In video part: 7:3 authors, producers/performers	
Czech Republic	Stipulated in the law (rate schedule attached in the annex of the IP law)	On equipment and carriers (audio and video). Litigation is ongoing to determine whether mobile phones will also be subject to a payment of remuneration.	Stipulated in the law (rate schedule attached in the annex of the IP law) % of the selling price of the equipment and the carriers	Manufacturer or importer, or the conveyor instead, unless that person allowed the identification of the manufacturer or the importer (article25)	By law (article 104) Audio: 25 % performers 25 % producers 50 % authors Audiovisual: 15 % performers and authors of choreographic and pantomimic works 25 % producers 60 % other authors	Not determined by law, but under decision of the collective management organisation general assembly 15 % from the unidentifiable income collected by collecting society for performers is allocated to cultural activities.
Denmark	Legislation	Remuneration applies to recording discs and memory cards.	Set in legislation	Importer or manufacturer	According to agreement: 5 % for broadcasters, the remainder is divided in thirds between producers, authors and performers	Law states that 33% of the collected remuneration should be used for cultural purposes, e.g. supporting upcoming artists, musicians etc.
Finland	Legislation	Blank media (cassettes, cd's, DVD's, hard discs), MP3-players, recordable video players	Government decides	Importers and manufacturers	Audio scheme: 51% phonogram producers and performers 44% musical authors 5% other authors Video scheme: 69,4% other authors 11,4% musical authors	-

					11% film producers 8,2% phonogram producers and performers	
France	By legislation and the decisions taken by a commission provided for by the law to set up the tariffs.		Determined by a private copying Commission provided for by the law Calculated functions of the kind of media, the length or the capacity of storage it allows, and its use	Manufacturers and importers of blank devices and media pay to Copie France which is jointly managed by performers, producers and authors, editors of a radio or television service or its distributor, who provide a natural person, via a remote access, with the reproduction for a private use of a program linearly broadcasted	Audio: 50% to authors, 25% to performers, 25% to producers Audiovisual: 1/3 to authors, 1/3 to performers, 1/3 to producers. Up to 1% of the sums collected shall be attributed to the funding of usage surveys realised by the private copying commission.	25% of collections according to the law The law provides for that this amount has to be used for support to creation, live performances and artist training. Examples of cultural activities that are financially supported: festivals, concerts, theatre shows, ...
Germany	Legislation	On equipment and carriers (audio and video)	Rates decided by agreement, failing which, by reference to the rate schedule contained in the annex of the IP Law, article 54(d)(1) Amounts calculated depending on the intensity of copying-activities to be proven by empirical studies and have to be in proportion to the value of the carrier or device.	Manufacturer, importer and retailer (article 54)	Shares not determined by law; the law only stipulates that each rightholder is entitled to receive an equitable share (article 54(h)). By agreement between parties involved: Audio 42 % to be shared between performers (64%) and phonogram producers (36 %) 58 % authors Audiovisual: 21 % to be shared between performers (64%) and phonogram producers (36 %)	Up to 5% can be used according to collecting society's statutes to cultural and social purposes

					50 % to film producers and other rightholders 29 % authors	
Greece	Legislation (Law 2121/1993)	Recording equipment for sound or image or sound and image, equipment or parts incorporated or not in the main computer unit operating in conjunction therewith, used solely for digital reproduction or digital transcription to or from analogue media (with the exception of printers), magnetic tapes or other devices for the reproduction of sound or image or sound and image, including digital reproduction devices - such as CD-RW, CD-R, portable optical magnetic discs with a capacity of more than 100 million digits (over 100 Mbytes), storage media/disc of less than 100 million digits (less than 100 Mbytes)	Percentages imposed specifically by law, i.e.: 6% of the value of the devices for the reproduction of sound or image or sound and image, (including devices or parts not incorporated or not susceptible to incorporation in the main computer unit (with the exception of scanners), magnetic tapes or other devices suitable for the reproduction of sound or image or sound and image as well as digital reproduction devices - with the exception of storage media/ disc of less than 100 million digits (less than 100 Mbytes) and - 4% of the value of storage media (disc) with a capacity of less than 100 million digits (less than 100 Mbytes)	Importers/ manufacturer of such media/equipment	55% to the authors, 25% to the performers and 20% to the producers	Although there is no legislative or other statutory obligation, a percentage varying from 2% to 3% to activities such as cinema/audiovisual works festivals
Hungary	Legislation	Audio cassettes, video cassettes	Private copying remuneration shall be determined by the	The remuneration shall be paid by the manufacturer of blank	Audio: 45% shall be due to the composers and writers, 30% to	80% is dedicated for cultural, professional and

		<p>CD-R, CD-RW, DVD (DVD-R/+R, DVD-RW/+RW, DVD-RAM)</p> <p>Other optical disc with grand capacity (from 2007)</p> <p>Minidisc, Memory cards etc;</p> <p>set-top-boxes)</p>	<p>collective management organisation of rights in literary and musical works (Artisjus) in agreement with the collective management organisations of rights of other interested authors and owners of related rights (including performers). At the determination of the remuneration, it shall be taken into account whether, in the case of the works, performances, films and sound recordings concerned, effective technological measures for the protection of copyright and related rights are applied.</p> <p>Depends on capacity, except for analogue audio- and videocassettes, on what tariffs are calculated per piece</p>	<p>audiovisual and audio carriers, in the case of manufacture abroad by the person obliged under the law to pay customs duties, or – in the absence of obligation to pay customs duties – by the person who imports them and their first distributor, under joint obligation, to the organisation performing the collective management of rights in literary and musical works within eight days from the completion of the customs clearance or, in the absence of obligation to pay customs duties, from the date of putting the carriers into circulation or from the commencement of stocking for the purposes of putting them into circulation, whichever is earlier. For the payment of the remuneration, all domestic distributors shall be jointly responsible.</p>	<p>the performers and 25% to the producers of phonograms</p> <p>Audiovisual: 13% to the producers of movie pictures, 22% to the cinematographic creators of movie pictures, 4% to creators of fine arts, designs and authors of artistic photographs, 16% to script writers, 20% to composers and lyricists, and 25% to performers.</p>	<p>social activities. However significant changes are to be expected from 2012, because of legislative changes (effective from 1 January 2012) in the Copyright Act. Under the terms of the new regulation, max. 25% of private copying levies can be used for cultural etc. purposes in the future.</p>
Ireland	No private copying exception in law	-	-	-	-	-

Italy	Legislation	Devices and carriers (audio and video) enabling recording	Set by Decree of the Minister of Culture	Manufactures and importers	<p>Collected by SIAE for all right holders and then shared as follows:</p> <p>audio 50% authors; 50% producers (half to be paid to performers through their collecting societies)</p> <p>video 30% to the authors 70% in three equal parts to the original producers of audio-visual works, to the producers of videograms, to the performers (through their collecting societies)</p> <p><u>Total share of performers' remuneration:</u> 25% of the audio private copy (collected from producers) 23,33 of video private copy (collected from SIAE)</p>	By law 10% of private copy remuneration collected by SIAE shall be assigned to promote cultural activities By law 50% of the video private copy remuneration assigned to performers should be dedicated to the promotion, training and professional support for artists and performers.
Latvia	Legislation Based on Ministry of Culture organised usage survey	CD, DVD's, USB, PC's	Cabinet of Ministry of Culture working groups. The blank tape levy shall be determined as a percentage rate from the first alienation price and paid in the following amount: - For all types of CDs - 6 %; - For all types of DVDs – 6 %;	Importers/ manufacturer	<p>Authors: 38,66%</p> <p>Film producers: 6,67%</p> <p>Performers: 24% Actors: 6,67%</p> <p>Producers: 24%</p>	-

			- USB flash drives – 4 %.			
Lithuania	Article 20 of the Lithuanian Law from 2004 and as amended in 2011	Audiocassette, videocassette, minidisc, DVD, CD, Blu-Ray disc The list was expanded by amendment of legislation on 21 December 2011. The list now covers all media (tape, CD, DVD, Blue Ray, USB media, flash memory cards), on HDDs, all equipment, which has internal memory and playback/recording functions (MP3 players, media players, jukeboxes, TVs with recording function, tablets, etc.) mobile phones and computers	New tariffs came into force on January 1 st 2016. The amendments reduced the tariffs for all devices and media and did some minor changes in list.	First seller of the media or equipment	For audio media 40% - Authors 30 % - Performers 30% - Producers of a phonogram For video media 40% - Authors 30 % - Performers 30 % - Producers of a phonogram As of March 2012: For audio media 1/3 - Authors 1/3 - Performers 1/3 - Producers of a phonogram For video media 1/3 - Authors 1/3 - Performers 1/3 - Producers of a phonogram	Pursuant to the Governmental Resolution 25% of remuneration collected from the audiovisual recording media, shall be assigned to National Cinema Sponsorship Program. Also this document determines that collective right associations have a right to 25% of royalties, which they get from responsible association, to designate to programs of creative activities
Netherlands	Legislation	Data cd-r/rw, empty dvd-r/rw, empty dvd+r/rw, audio cd-r/rw, HI MD, VHS tapes, cassette tapes, Minidisc: HDD recorder/set-top-box, External HDD, phones with MP3 player/smartphones, tablets and PCs/Laptops, e-readers	After article16 of the Dutch Copyright Act, tariffs are fixed by a body named SONT (Stichting Onderhandeligen Thuiskopievergoeding) representing the interests of rightholders and users. They were reduced by 30% as a	Manufacturer or importer of carriers (Article16(c)).	Not specified by law. By agreement between parties involved. Audio: 30% performers, 30% producers, 40% authors. Audiovisual: 25.5% performers; 40.75 % producers; 33.75% authors	10% - NORMA 3% - SENA

			result of the European judgment (ACI-Thuiskopie) that confirmed that copies from illegal sources do not fall within the scope of the private copy exception. As of 1 January 2015, a national rule applied by which one tariff applies for all devices (€ 4,23 including VAT).			
Norway	Legislation	-	-	The compensation is allocated through the Norwegian national budget	The remuneration collected by Norwaco is divided between the various right holder organisations, members of Norwaco. Norwaco receives a letter every year from government in which it details that the compensation must be distributed to the individual rightholders, that it must be based on legal source, it should not take account of rights that have been acquired and must be based on facts (i.e. survey data)	The Arts Council of Norway manages the collective compensation by means of financial support to various projects.
Poland	Copyright Act and Regulation of the Minister of Culture	Those devices and blank carriers listed in the Regulation of the Minister of Culture	Fees are set in the Regulation of the Minister of Culture as a % of a sale's price of a device or a carrier	Manufacturer and importers	In virtue of Copyright Act: The amount received in the form of fees from the sale of tape recorders and other similar devices as well as blank	An amount is dedicated by agreement of the members of the collecting society

		<p>Article 20(1)</p> <p>1) of tape recorders, video recorders and other similar devices;</p> <p>2) of blank carriers used for fixing, within the scope of personal use, works or objects of related rights,</p> <p>Newer media has been added in 2009 including MP3-player, Memory Card, USB Stick, Digital jukebox, ...</p> <p>This closed list of devices on which a levy is charged is contrary to the provision of the Copyright Act which states that all devices capable of producing copies are subject to a levy).</p>			<p>carriers related thereto, shall be distributed as follows:</p> <p>1) 50% - to artists</p> <p>2) 25% - to artistic performers</p> <p>3) 25% - to producers of phonograms</p> <p>The amount received in the form of fees from the sale of video recorders and other similar devices as well as blank carriers related thereto, shall be distributed as follows:</p> <p>1) 35% - to artists</p> <p>2) 25% - to artistic performers</p> <p>3) 40% - to producers of videograms</p>	
Portugal	Law 62/98, redrafted by Law 50/2004 and 2014	<p>Audiocassettes, minidisc, audio CD R, DC RW, Data CD R, CD RW, CD 8cm, videocassettes, DVD+ R, RW, R, RW and RAM</p> <p>Since 2014 this list has been extended to also cover most of the digital devices including smartphones, memory cards, hard disks</p>	% set by legislation	Importers/manufacturers	<p>40% to authors</p> <p>30% to performers</p> <p>30% to producers</p>	By Law 62/98 20% of the total of the remunerations collected by AGE COP are allocated to a special fund for cultural and for promotional purposes of cultural incentive

Romania	The mechanism is established in Law no. 8/1996 (article 107 of the Law)	<p>HDD digital TV sets and videotape recorders MP3 player, MP4 player, IPOD media player Blu ray recorder, HD DVD Recorder Audio recorder, Minidisc recorder, Video recorder CD recorder, DVD recorder, MP3 recorder CD writer, DVD writer CD writer - computer integrated DVD writer - computer integrated External Hard disc, Hard disc - computer integrated Memory Sticks Mobile Phones with music and video reproduction function, MP3, MP4, AAC, WMA, WAV, Real (iPhone) Memory cards (other than phone memory cards) Blu ray Disc, HD DVD Disc Audio Tapes, Minidisc, Video Tapes (VHS, Super VHS (except: Video 8, Digital 8, Hi8, DVM, VHS-C, Super VHS-C), D-VHS, HD video tapes CD blank, DVD blank, CD data</p>	<p>% from the value in custom for importers, respectively to the invoiced value without VAT The percentages are established by the Law: - physical media: 3%; - devices: 0.5% The negotiations for the establishment of the list of physical media and devices for which such remuneration is owed, are carried out, every 3 years, according to the proceedings provided for in article 131 of Law no. 8/1996</p>	Manufacturers and importers of physical media or devices	<p>Audio: 40% to the authors and publishers 30% to performers 30% to the producers Audiovisual: The remuneration shall be divided in equal shares between the following categories: authors, performers and producers</p>	-
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		Mobile Phone memory card ¹⁰³				
Serbia	Legislation	CDs, DVDs, Blue Rays, tapes, memory sticks... Digital players, HiFi CD, HiFi DVD Recorders, VCRs, digital jukeboxes, blue ray, CD, DVD burners	Government approves list of devices for which remuneration is legally due Either negotiations or by Commission for Copyright and Related rights examines and approves authors, phonograms, videograms, performers joint proposal	Importers and manufacturers of devices and media	Set by law: 40:30:30	Set by law and cannot exceed 3% of gross income
Slovakia	Copyright Act	The Copyright Act (which is in force since 1 st January 2016) contains an annex which specifies the devices/media on which a levy is charged (such as game console, smart TV, mp3 player, mp4 player etc.) The Act no. 618/2003 of December 4, 2003, Copyright Act which had been in force till 31 st December 2015 listed the type of devices/media on which levy is charged in more general/vague way which	Set by law, percentage from price, 6% blank recording medium, 3% technical device designated for making of reproductions, 3% reprographic equipment or other technical equipment, 5% personal computer, 3 % paid reproduction services	Manufacturer, recipient from a Member State, importer from a third country or another person who will launch it for the purpose of sale for the first time on the market in the Slovak Republic	Upon agreement within collecting societies Audio: 6,55% literary, dramatic, audiovisual, choreograph. works and plastic arts 36,2% musical works 9,144% performers 48,106% performers and producers Audiovisual: 26,54% literary, dramatic, audiovisual, choreograph. works and plastic arts 3,46% musical works 9,975% performers 28,65% performers and producers 21,375% film producers	-

¹⁰³ According to the List negotiated in 2009 (Decision no. 61/2009)

		made it more difficult to apply the provision.				
Slovenia	Legislation	All devices and media for used for reproduction including HDs, USB, PCs, MP3 or MP4 players	Set by Government decree	Manufacturer/ first time importer	Set by law: 40% authors, 30% performers, 30% producers The performers and producers' share is divided equally between audiovisual and audio	Not permitted by law
Spain	The Spanish Parliament validated on 12 July 2017 the Royal Decree-Law approved by the Government on 3 July 2017, which replaces the system of private copying remuneration financed from the General State Budget, with a system whereby the remuneration is paid by importers and manufacturers of reproduction equipment and similar devices. It entered into	Audiocassette, Minidisc-r, Minidisc-rw, Audio-cd r, Audio-cd rw, Data-cd r, Data-cd rw, Videocassette, DVD-r data, DVD-rw data, DVD-r video, DVD- rw video, MP3-player, CD writer (internal), CD recorder (external), DVD writer (internal), DVD recorder (external), DVD harddisc recorder, Blu-Ray writer (internal), Blu-Ray recorder (external), HD-DVD writer (internal), HD-DVD recorder (external), Memory Card, USB Stick, Harddisc, MP4, Mobile phone/MP3	The law distinguishes between the analogue and digital equipment and carriers: - For analogue equipment and carriers, the rates are fixed in the law (Article25.5) for both audio and video; - For digital equipment and carriers list of equipment and carriers concerned and tariffs determined by negotiation between the collective management organisations and the debtors. In case of no agreement, decision by the Ministries of Culture and Industry	Manufacturer and importer In addition, the distributors are liable for the payment of the remuneration unless they prove to have paid the remuneration already to the manufacturer or importer (article25)	Specified in Royal Decree 1434/1992 (article 36) for analogue equipment and carriers: Audio 25 % performers 25% producers 50% authors Audiovisual 33% performers, authors and producers each For digital equipment and carriers the negotiating parties are to fix the distribution between the categories of rightholders	% determined through regulation: 20% of amount collected for private copying

	force on 1 August 2017					
Sweden	Legislation	Carriers (A/AV): cassettes (audio and VHS), minidisks, CD-R/-RW, DVD-R/-RW, MP3, DVD-player etc. w internal memory, USB flash drives and external hard discs/drives, computers, tablets and game consoles with internal hard disks (inbuilt memory), (since 2014 also on) mobile phones	Compulsory collective management – in practice umbrella organisation Copyswede (CS) negotiates and collects on behalf of concerned categories of right holders (represented by its member organisations) Fixed amounts (distinction analogue and digital) in law – modified by negotiations with Industry taking into consideration market conditions, other compensation etc.	Importer/ manufacturer	Not specified in law – sharing based on surveys on source of copying (where from and type of content) and agreed by concerned categories of right holders	-
Switzerland	Legislation	Blank tapes, CDs, dvd, mp3 players, cases on mobiles and tablets pending	Decision by copyright tribunal 3% of costs	Importer	50/50 between performers and producers	10%: cultural (8%) and social (2%) purposes
United Kingdom	Exception in legislation without payment of compensation	-	-	-	-	-

4.2 Practice

Table 4.2 shows that in all the countries covered (excluding Ireland), performers' organisations collected remuneration for private copying.

The amount collected represents an essential part of the revenues received by performers from collective management organisations. In 2011, remuneration for acts of private copying accounted for approximately 22% of the total revenue collected by the performers' organisations of the countries under examination. This percentage remained stable during the years 2011-2016 (averaging 23% during that period).

The year 2017 saw a very large increase in private copying collection with the result that in that year, private copying remuneration accounted for 31% of overall collection. The reason for this drastic change in collection was due to an anomalous situation in the two largest Member States in terms of collection, Germany and France.

In 2017, the German CMO GVL collected € 31,956,000, which amount included back payments which had accrued over the preceding three years. Putting this into context, the average amount collected by GVL over the period 2011-2016 was € 8,577,167.

In France, the French CMOs ADAMI and SPEDIDAM collected a combined amount of € 86,911,917 in 2017. This amount included a number of back payments due from preceding years. Again, putting this figure into context, the average amount collected over the years 2011-2016 was € 60,351,691.

In 2016, the total amount collected across all countries covered by this study was € 132,678,692. In 2017, that amount had increased to € 179,685,545. In other words, there was an increase between 2016 and 2017 of approximately € 47,000,000.

Looking at the combined increases in France and Germany for the year 2017 we see that these total approximately € 50,000,000. Thus, the increases in these two countries explain the drastic increase in total collection between the years 2016 and 2017.

The reason for the change in Germany was due to prolonged negotiations that GVL had been having with those responsible for paying private copying remuneration in respect of additional devices. The delay in reaching an agreement with these parties meant that payments due over the period while

these negotiations continued were withheld from GVL. By the time that an agreement was reached, back-payments payable to GVL in respect of previous years had accrued, resulting in the high figure ultimately paid to GVL in 2017.

The position in France was similar whereby long delays in payment resulted in a considerable amount of back-payments eventually being paid in 2017 amounting to approximately 20% of the total amount collected. Negotiations are currently ongoing regarding private copying remuneration tariffs and it is anticipated that these will decrease in the coming years.

The period 2011-2016 is more representative of the overall trend in private copying remuneration collection. During these years, we see that the increase is much smaller, but still significant. The amount collected in 2011 was € 98,311,640, whereas the amount collected in 2016 was € 132,678,692. Accounting for inflation during the period 2011-2016, that represents an increase of € 29,137,910 or approximately 28%.

Accordingly, the year 2017 can be considered as an anomaly in terms of the total amount collected. However, what is not an anomaly is the fact that in most Member States there can be considerable delays in negotiating terms with those responsible for paying private copying remuneration. As is the case in France and Germany, and as seen below, this can result in significant delays in collection and back-payments becoming due.

It can be seen that collection of private copying remuneration can be particularly volatile. In the event that e.g. a manufacturer or importer refuses to pay private copying remuneration (as was the case in Sweden in respect of the sale of smartphones) litigation may ensue with the result that private copying remuneration due in respect of one year may not in fact be paid to the relevant CMO until the litigation has been resolved some years later.

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

As can be seen in Spain, a change in the national law (e.g. the implementation and subsequent abolition of private copying remuneration being paid from the general state budget) can also impact collection greatly.

In that country an intensive campaign against the payment of private copying remuneration fuelled heated public debates and led to the abolishing of the private copying remuneration system as was in place until 31 December 2011 only to replace it with a system where compensation was paid via the national budget. The legislative changes had a drastic impact on the remuneration of performers. Whilst private copying remuneration amounted to € 19,859,149 in 2005, it decreased to a mere amount of € 1,122,806 in 2015.

However, the Spanish Parliament validated on 12 July 2017 the Royal Decree approved by the government on 3 July 2017, which replaces the system of equitable compensation in force to date, financed from the general state budget, and returned to a more traditional system whereby private copying remuneration is paid by importers and manufacturers of reproduction equipment and similar devices.

However, since the amounts provisionally allocated to repair the damage caused by the use of the general state budget scheme are objectively lower compared to those of the countries in the same environment, falling below the EU average, Spanish CMOs expect that the amounts established will be adjusted during the regulatory development of the new system.

The same volatility can arise with respect to decisions of the CJEU such as the *ACI ADAM* case originating in the Netherlands, which alter the scope of how private copying remuneration ought to be calculated (whether or not “illegal” copies ought to be taken into account) and therefore alter the amount which is payable throughout the EU/EEA.

In Serbia the low level of remuneration may be explained due to the fact that collection only started in 2009, nevertheless they have succeeded in continuing to collect throughout the period 2013-2017

Collections in Sweden have dropped considerably, from € 1,374,619 in 2011 to € 207,643 in 2017. This can be explained by the fact that even if Copyswede (the organisation in Sweden responsible for the collection of private copying remuneration) has been successful in several court cases, no money has yet been paid by the electronic business since they contest the amount they should pay. Therefore, collections have dropped, but there is a big debt being accumulated.

In addition to the problems involved with collecting money following successful court cases, the position is becoming increasingly difficult in countries where the tariffs are set via agreement with the ICT industry. It requires parties to cooperate. In Sweden, industry has shown less and less willingness to negotiate. As a result, lengthy litigation had to be initiated in order to set tariffs for new devices (e.g. smartphones). Similar cases were also reported from the Czech Republic and Switzerland.

Even where tariffs are set by a governmental body, as opposed to agreement with the ICT industry, difficulties may still arise (as was the case in Italy) where device manufacturers mount legal challenges against the tariffs that have been set. This is the case in Slovenia, where the Copyright Act entered into force on 1 January 2016 containing an annex which specifies the devices/media on which a levy is charged (such as games consoles, smart TV, mp3 player, mp4 player etc.) However, the intellectual property office failed to issue a licence for the collecting of remuneration (BTL rights) since 2009. Accordingly, no remuneration for acts of private copying could be collected.

Following the judgement of the CJEU in the *Padawan* case (see above), performers' collective rights management organisations also have to deal with pressure from importers/producers regarding the exclusion of professional uses. The *Copydan* case was useful in clarifying that a levy system, focussed on producers and importers, complies with the Directive if it is justified by practical difficulties and that the system provides for a right to an effective levy reimbursement system. Nevertheless, each case must be judged on its specific facts and thus conflicts may arise between CMOs and importers/producers/electronics industry.

Table 4.2 Private copying – Collection evolution 2011-2017

Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria	642,000	3,063,000	937,000	810,000	0	2,361,956	3,448,752
Belgium	7,510,513	7,310,161	7,483,656	1,187,424	8,359,240	7,130,201	7,130,201
Croatia	286,239	260,633	291,621	286,076	259,361	310,283	350,738
Czech Republic	970,373	1,113,781	1,141,998	1,176,980	1,230,351	1,348,601	1,595,307
Denmark	433,660	883,009	84,545	186,916	611,869	295,703	1,434,485
Finland	563,225	498,628	515,799	491,156	388,802	1,607,975	913,269
France	49,287,804	45,839,974	69,392,215	56,644,118	68,089,835	72,856,203	86,911,917
Germany	11,007,407	10,929,785	9,127,839	9,932,446	4,282,575	6,182,952	31,956,000
Greece	638,595	347,115	343,229	140,156	225,452	127,718	131,834
Hungary	2,129,950	2,473,954	2,461,552	4,764,682	5,102,257	5,404,645	4,749,314
Ireland	0	0	0	0	0	0	0
Italy¹⁰⁴	2,269,020	11,663,728	10,546,387	15,084,159	12,398,490	19,010,687	19,734,982
Latvia	24,850	28,206	76,962	117,078	67,219	65,000	64,671

¹⁰⁴ Nuovo IMAIE was established on the 10 July 2010 by effect of the Law 100/10.

Lithuania	26,878	482,733	880,735	936,332	1,041,480	814,173	770,787
Netherlands	1,655,129	698,505	1,529,860	297,257	12,004,500	7,845,000	10,070,000
Norway	411,773	353,405	0	0	0	0	0
Poland	394,435	386,897	600,951	695,258	638,327	505,197	824,796
Portugal	556,627	184,028	297,045	125,049	588,812	2,279,912	2,131,529
Romania	385,782	248,532	432,634	541,248	1,574,726	1,334,841	1,367,101
Serbia	0	0	46,725	10,358	15,091	7,008	9,112
Slovakia	95,786	48,599	51,907	57,978	183,580	230,735	526,933
Slovenia	0	0	0	0	0	0	0
Spain	16,263,894	2,900,685	2,855,520	1,093,317	1,122,806	0	2,142,146
Sweden	1,374,619	1,302,581	1,334,780	835,073	490,605	166,180	207,643
Switzerland	1,383,081	1,192,456	1,259,688	1,975,693	2,136,580	2,793,722	3,214,374
Total	98,311,640	92,210,357	111,692,648	97,388,754	120,811,958	132,678,692	179,685,545

4.3 Conclusion

Of the 26 countries participating in this study, 24 countries have introduced in their national legislation an exception for private use, linked to an entitlement to remuneration for the rightholders, with the exception of Ireland and the United Kingdom.

The amount collected represents an essential part of the revenues received by performers from collective management organisations. In 2011, remuneration for acts of private copying accounted for approximately 22% of the total revenue collected by the performers' organisations of the countries under examination. This percentage remained stable during the years 2011-2016 (averaging 23% during that period).

In monetary terms, this resulted in collection reaching approx. €179,685,545 in 2017 compared with an average during 2011-2016 of approximately € 108,849,015.

The year 2017 however saw a very large increase in private copying collection with the result that in that year, private copying remuneration accounted for 31% of overall collection. The reason for this drastic change in collection was due to an anomalous situation in Germany and France. In those countries, large back-payments were collected in 2017 that rightfully were payable in preceding years. These back payments explain the increase in collection for that year. It is anticipated that collection in 2018 will be approximately in line with the trend in collection during the period 2011-2016.

Private copying remuneration still represents the second most important source of income for performers and as such is an extremely important source of income.

Whilst the vast majority of countries have opted for a mechanism which provides that private copying remuneration is payable on certain devices and media, a different system applies in Norway where national law stipulates that compensation is allocated through the national budget. The possibility of introducing such a system in Sweden is being examined.

Whilst the system seems to work in Norway, it may not necessarily be the right model for other countries.

A similar system existed in Spain and had a drastic impact on the remuneration of performers. Private copying remuneration amounted to € 19,859,149 in 2005 but under the national budget mechanism

had decreased to a mere € 1,122,806 in 2015. However, following the judgement of the CJEU in the *EGEDA* case, that mechanism was abolished and a more traditional system whereby private copying remuneration is paid by importers and manufacturers of reproduction equipment and similar devices was put in place, effective as of 1 August 2017.

In the vast majority of countries where private copying remuneration is payable on certain devices and media, the terms of the remuneration systems show a number of similarities.

Further, all countries that have implemented the exception linked the remuneration right to compulsory collective management. The remuneration is collected by collective management organisations from manufacturers or importers. This approach has also been supported by the CJEU in the *Padawan* case.

Moreover, from these countries the vast majority of them operate a dual remuneration scheme with remuneration applicable on equipment and blank carriers. This approach is important since any private copying regime must reflect technological progress and the actual habits of users. This view is in line with the provisions of the EU Copyright Directive (see recitals 38 and 39 above).

The calculation of tariffs is either set by legislation or other governmental body, commission or copyright tribunal or tariffs are set by negotiation with the respective collective management organisations.

In countries where the tariffs are set via agreement with the ICT industry this is becoming increasingly difficult and importers and manufacturers have shown less and less willingness to negotiate (e.g. France, Germany and Sweden). 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.

Where tariffs are set by legislation or government decision, tariffs should be revised on a regular basis in order to reflect market developments. One such market development is the increasing use of smartphones. The Netherlands is a good example of how tariffs should be reviewed. Having already introduced a levy on smartphones, it took into account the increased use of smartphones in the Netherlands and increased the levy payable (from €3.50 to € 4.70) effective as of 1 January 2018.

The findings of the study also indicate that there is room for improvement with regards to the sharing of remuneration between the various rightholders. In the majority of cases it is unbalanced, to the

detriment of performers. A specification that each category of rightholders is entitled to an equal share could help counterbalance the negative effects of unbalanced market bargaining powers.

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 collective management organisation. 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*”.

Performers’ organisations are in particular concerned vis-à-vis the increasing pressure (political and via the courts) against private copying remuneration schemes at national and EU level. At the national level, political initiatives to reduce or abolish the private copying system (for example in Belgium and Switzerland) did not succeed. At the EU level, while there are currently no concrete initiatives set out and in particular there are no provisions relating to private copying in the Proposal for a Directive on copyright in the Digital Single Market, EU policy makers continue to be lobbied by the ICT industry to reform the status quo. This pressure is of particular concern considering the importance attached to it as a guaranteed source of income for performers.

However, recent CJEU Judgements (such as *Copydan* and *EGEDA*) indicate the Court’s approval of the current private copying mechanisms, continue to follow the logic of the *Padawan* judgement and indicate its support for the application of existing principles to technological developments.

Provided that private copying remuneration systems adapt to advancing 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. Certain aspects could be improved and widely accepted principles could be confirmed at EU level in order to create a harmonised private copying remuneration system in the interest of all stakeholders. However, a radical overhaul of the system (an issue which has been raised at the national level in for example Belgium and Switzerland and is currently being investigated in Sweden where consideration is being given to the possible introduction of a state funded system) would cause great financial prejudice to performers (as was shown to be the case in Spain) and accordingly, have a highly negative impact on the development and maintenance of Europe’s cultural heritage.

Chapter 5: Rental right

5.1 Legal framework

International legal framework

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

In the TRIPS Agreement an exclusive rental right “to authorise or to prohibit the commercial rental to the public of originals or copies of [their] copyright works” is attributed to the producers of phonograms and “any other rightholders in phonograms as determined in a Member’s law”¹⁰⁵. This provision gives rise to differing interpretations. Some argue that the TRIPS Agreement itself provides a rental right, others that it refers the decision to the national legislator as to whether and to which rightholders on a phonogram a rental right should be given¹⁰⁶.

An unequivocal exclusive right of authorising commercial rental to the public was given to the performer by the WPPT. This only concerns the rental of performances fixed in phonograms¹⁰⁷.

With regard to audiovisual fixations, the Beijing Treaty on Audiovisual Performances¹⁰⁸ finally provides performers with the exclusive right of authorising the commercial rental to the public of their performances fixed in audiovisual fixations.

Neither the TRIPS Agreement, the WPPT, nor the Beijing Treaty on Audiovisual Performances provide for a definition of “rental”. The first definition of the term under international legislation was in fact to be found in the European Directive 92/100/EEC. This specified that “rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage”¹⁰⁹.

¹⁰⁵ Article 11 and 14(4) TRIPS Agreement - the provision also stipulates that if on 15 April 1994 a system of equitable remuneration is in force, such a system may be maintained provided that the commercial rental is not resulting in the material impairment of the exclusive reproduction rights.

¹⁰⁶ E.g. Brison, F., *Het naburig recht van de uitvoerende kunstenaar*, nr. 351 (arguing that otherwise the rental right could have been simply mentioned in article 14(1), enumerating the different acts a performer can prevent); contra: e.g. Kerever, A., “*Droit d’auteur et mondialisation*,” *Les Cahiers de Propriété Intellectuelle*, 1997, 35.

¹⁰⁷ Article 9(2) WPPT

¹⁰⁸ Beijing Treaty on Audiovisual Performances, Article 9

¹⁰⁹ Article 1(2) Directive 92/100/EEC; article 2(1)(a) in Directive 2006/115/EC (codified version).

European legal framework

At EU level, Directive 2006/115/EC (originally Directive 92/100/EEC) grants a rental right to all performers. Pursuant to its article 3(1) (formerly article 2(1) of Directive 92/100/EEC) performers have the exclusive right to authorise or prohibit the rental and lending of fixations (both originals and copies) in physical media of their performances.

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

The administration of this right to obtain an equitable remuneration may be entrusted to collective management organisations¹¹⁰. Member States may regulate whether and to what extent administration by collective management organisations of the right to obtain an equitable remuneration may be imposed as well as the matter relating to the party from whom this remuneration may be claimed or collected¹¹¹.

However, these provisions are considerably weakened in terms of the audiovisual field given the fact that Directive 2006/115/EC introduces a presumption of transfer of rental right in the event of a film production. Pursuant to article 3(4) (formerly article 2(5)), Member States are obliged to implement in their national legislation a rebuttable presumption that performers have transferred their rental right to the film producer, when a contract concerning the production of a film is concluded.

National legal framework

Exclusive rental right

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

¹¹⁰ Article 5(1) to 5(3) Directive 2006/115/EC (formerly article 4(1) to 4(3) of Directive 92/100/EEC)

¹¹¹ Article 5(4) Directive 2006/115/EC (formerly article 4(4) of Directive 92/100/EEC)

legislation does not explicitly envisage any rental right for performers. French law only grants a rental right to producers, notably to phonographic producers^{112 113}.

Remuneration right in the event of transfer of the rental right

In those countries which grant the performer a right to an equitable remuneration¹¹⁴, if the performer transfers his rental right to the producer, the terms for determining the remuneration and the body liable for payment differ, as shown in table 5.1.

National laws stipulate that remuneration is due either by the user (e.g. as in Croatia, the Czech Republic, Germany, Greece, Hungary, Lithuania, Poland, Slovakia, Spain and Switzerland), or by the producer (e.g. Denmark, the Netherlands, Norway, Sweden and the United Kingdom).

Some countries have made it compulsory for this remuneration right to be administered by collective management organisations. This is the case, for instance, in the Czech Republic, Slovakia, Spain and Switzerland. In Germany there is no compulsory intervention of collective management organisations, but a performer can only assign his remuneration right to a collective management organisation (and not to the producer). In practice, the collective management organisation GEMA is administering this remuneration right also on behalf of performers. In Denmark, Sweden and the United Kingdom, remuneration is negotiated via collective bargaining agreements by the respective unions in the audiovisual field.

In countries where remuneration is collected by collective management organisations, this remuneration is determined by mutual agreement between the collective management organisations and the users.

¹¹² Article L213-1 of the CPI.

¹¹³ The French performers' organisation, SPEDIDAM, recently filed a complaint with the European Commission vis-à-vis the non-compliance by France with its international obligations. It argues, inter alia, that French law does not grant performers the exclusive rights recognised in the different EU Directives including the rental right and therefore deprived French performers of the benefit of equitable remuneration

¹¹⁴ In the law in the Czech Republic the term "reasonable remuneration" is used (article 49(3) and article 74).

Table 5.1 Rental right - Terms of remuneration

Countries	Equitable remuneration in case of a transfer of exclusive right	Determination of the remuneration	Body liable for payment	Intervention of collecting societies
Austria	No	-	-	-
Belgium	Yes	-	-	-
Croatia	Yes	Not determined	User	No
Czech Republic	Yes	Tariffs determined by agreements between collective management organisations and video-shops	User	Compulsory collective management
Denmark	Yes	Collective agreements through unions in the audiovisual field	Producer	Collective bargaining in audiovisual sector
Finland	No	-	-	-
France	No	-	-	-
Germany	Yes	Negotiations/arbitration	User	Authors' society GEMA is collecting on behalf of performers
Greece	Yes	Set by agreement between collective management organisations and users (current agreement set at 2.5% of renter's income)	User	Yes

		Rental right in practice is transferred by the performer to the phonogram or audiovisual producer in the individual contract without a specific equitable remuneration		
Hungary	Yes	Although authorisation of rental right is subject to collective management by law, in practice this is a “sleeping right”: producers reject to give such an authorisation, thus there is no tariffs-announcement on this kind of remuneration	User	Compulsory collective management
Ireland	No	-	-	-
Italy	Yes	Tariffs determined by agreements between collective management organisations and organisations representing the sector	User	In practice collective management organisations
Latvia	Yes	By agreement		
Lithuania	Yes	By agreement	User	The rights to remuneration shall be enforced through the association of collective administration of related rights No collective administration in practice
Netherlands	Yes	Not determined. The law only stipulates that the producer is obliged to fulfil an equitable remuneration for the rental to the performer in case of transfer of the right (which is unwaivable) Hence, remuneration related to the actual rental use of the work is not compulsory: single (buy-out)	Producer	Yes, but has never succeeded to enforce this right effectively

		remuneration is possible. The equitability of the amount paid can be controlled by the Court, but until now, this has not been done		
Norway	No	Unless otherwise agreed, an agreement concerning the production of a film of the performance of a performing artist shall also include the right to rent out copies of the film	Producer (audiovisual)	No
Poland	Phonograms: No Audiovisual: Yes	Acts of the competent collective management organization, in particular tables of remuneration (tables may be approved by the Copyright Commission – in case of approval tables receive semi-imperative character)	User	Yes
Portugal	No	-	-	-
Romania	Yes	Upon agreement	Producer or user depending on contractual arrangements	If payable from the user, only through the collective management organisations
Serbia	Yes	Not set	Not specified	Not specified
Slovakia	Yes	Upon agreement with user	User	Mandatory collective management
Slovenia	No	-	-	-

Spain	Yes	Tariffs fixed by collective management organisations and then implementation negotiated with the users; communicated to the Ministry of Culture (tariffs depending on the surface of the shop)	User	Compulsory collective management
Sweden	Yes	Collective agreements through unions in the audiovisual field	Producer ¹¹⁵	Collective bargaining in audiovisual sector
Switzerland	No	Yes	User	Yes
United Kingdom	Yes	Collective agreements through unions in the audiovisual field	Producer	Collective bargaining in audiovisual sector

¹¹⁵ This is not very clearly stated in article 29 of Swedish IP Law but follows from the assumption that the rental right itself is primarily transferred to the recording producer. The producer becomes accordingly the body from whom the unwaivable remuneration right is to be claimed. Article 29 is a rule "of contract", which means that the right of remuneration is only applicable in the relationship between the rightholder and the producer.

5.2 Practice

The exercise of the remuneration right

A comparison between tables 5.1 and 5.2 (below) shows that it is in countries where the remuneration is payable by the user (generally the video-shop) that the remuneration right is normally administered by collective management organisations.

In countries where the body liable for payment has not been indicated (e.g. Serbia) or where the producer has been designated as being liable for payment, there is usually no administration of the remuneration right by collective management organisations with the exception of the Netherlands (though the Dutch performers' organisation has never succeeded to enforce this right effectively – see below).

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

It should be noted that most producers of phonograms prohibit the use of the rental 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 collection of remuneration has not yet begun (e.g. Serbia and Croatia). In others (e.g. Latvia, Lithuania, Poland and Slovakia) rental is just 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).

Generally speaking, remuneration is, however, collected where it is payable by the user and administered by collective management organisations. This is the case in the Czech Republic, Germany, Spain, and Switzerland.

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

However, even in those countries currently collecting equitable remuneration for the rental right, performers' collective management organisations have seen a steady decline in revenues. In the Czech Republic remuneration fell from € 46,174 in 2011 to € 43,940 in 2017. In Switzerland, the drop in collection has even been more significant from € 57,855 in 2011 to € 12,574 in 2017.

Among the countries studied, it is repeatedly found that the Internet has influenced the value of the rental right. The rental of physical media is losing importance in favour of new modes of exploitation via the Internet. These modes of exploitation are in most circumstances covered by the making available right and not the rental right. Chapter three focusses on the making available right and how this right fails to remunerate performers fairly. Of the 26 countries covered in this study, only 5 collected in respect of rental and only one (Germany) collected in excess of € 100,000.

Overall collection has fallen consistently during the period 2011-2017. In 2011, € 2,106,020 was collected and by 2017 that amount had decreased to € 1,783,023. Taking into account the effects of inflation that represents a decrease of € 479,828.

Table 5.2 Rental right –Collection for performers through collective management from 2011 - 2017

Gross amounts in euro (VAT not included)

Country	2011	2012	2013	2014	2015	2016	2017
Austria¹¹⁶	27,750	22,000	21,740	21,750	21,700	21,700	21,700
Belgium	0	0	76,211	85,835	100,828	95,812	100,902
Croatia	0	0	0	0	0	0	0
Czech Republic	46,174	45,074	41,517	40,947	41,963	41,838	43,940
Denmark	0	0	0	0	0	0	0
Finland	0	0	0	0	0	0	0
France	0	0	0	0	0	0	0
Germany	1,926,759	1,677,653	2,060,465	1,596,546	1,474,503	1,313,041	1,605,000
Greece	0	0	0	0	0	0	0
Hungary	0	0	0	0	0	0	0
Ireland	0	0	0	0	0	0	0
Italy	0	0	0	0	0	0	0
Latvia	0	0	0	0	0	0	0

¹¹⁶ Collection is for rental and lending

Lithuania	0	0	0	0	0	0	0
Netherlands	0	0	0	0	0	0	0
Norway	0	0	0	0	0	0	0
Poland	0	0	0	0	0	0	0
Portugal	0	0	0	0	0	0	0
Romania	0	0	0	0	0	0	0
Serbia	0	0	0	0	0	0	0
Slovakia	0	0	0	0	0	0	0
Slovenia	0	0	0	0	0	0	0
Spain	47,482	23,045	0	0	0	0	0
Sweden	0	0	0	0	0	0	0
Switzerland	57,855	55,429	35,152	21,424	15,213	27,371	12,574
Total	2,106,020	1,823,201	2,235,085	1,766,502	1,654,207	1,499,762	1,784,116

5.3 Conclusion

The rental right and related remuneration right were introduced in the national legislations following the implementation of Directive 92/100/EEC (currently referred to as Directive 2006/115/EC). Today, 18 countries, of 26 countries participating in this study, grant their performers an explicit rental right and a remuneration right in the event of transfer.

The Directive does not determine by whom this remuneration should be paid and how it is to be administered (the administration by collective management organisations is only optional).

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 at the most a one-off buy-out fee when concluding individual contracts with producers).

In some countries, the lack of payment could be explained in that those rights have only been recently introduced into national law and accordingly collection of remuneration has not yet begun (e.g. Serbia and Croatia).

In others (e.g. Latvia, Lithuania, Poland and Slovakia) rental is just 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).

Where the body liable for payment is stipulated in law to be the user and the right is administered by a collective management organisation, remuneration is generally paid. Accordingly, only in Austria, Belgium, the Czech Republic, Germany, and Switzerland, is remuneration currently collected by performers' organisations.

The findings therefore once more highlight that collective management organisations play an essential role. Performers are not really in a position to manage and enforce the payment of their remuneration right, retained even when they have transferred their exclusive rental right to their producers. Making the administration of the remuneration right by collective management organisations compulsory is therefore clearly beneficial to performers.

It is clear that the rental of physical media is losing importance in favour of new modes of exploitation via the Internet. These modes of exploitation are in most circumstances covered by the making available right and not the rental right. Given the decline of the traditional rental market, the right to remuneration should be adapted to cover also new digital services. Such services could therefore in future be covered by a right to equitable remuneration for performers for the making available on demand of their performances, administered by performers' collective management organisations while producers will be able to maintain their existing business models (see chapter 3).

Chapter 6: Duration of the protection of performers' rights

6.1 Legal framework

International legal framework

The Rome Convention provides a minimum duration of protection of 20 years calculated from the end of the year in which the performance took place, or when it is incorporated (for the first time) in a phonogram, in which the fixation was made¹¹⁷.

In the TRIPS Agreement protection is extended to a minimum period of 50 years calculated from the end of the calendar year in which the fixation (on a phonogram) was made or the performance took place¹¹⁸.

The WPPT indicates the same duration (at least 50 years¹¹⁹).

Similarly, the Beijing Treaty on Audiovisual Performances, adopted on 24 June 2012¹²⁰, grants to performers a 50 years term of protection, "computed from the end of the year in which the performance was fixed"¹²¹.

European legal framework

Pursuant to article 3 of Directive 2006/116/EC (formerly Directive 93/98/EEC) the performers' rights expire 50 years after the date of the performance. However, if a fixation of the performance has been lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier¹²².

¹¹⁷ Article 14 Rome Convention

¹¹⁸ Article 14(5) TRIPS Agreement

¹¹⁹ 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).

¹²⁰ The Beijing Treaty on Audiovisual Performances is not yet in force. As at 1 September 2018 it had only 20 of the 30 necessary ratifications/accessions.

¹²¹ Article 14, Beijing Treaty

¹²² Article 8 Directive 2006/116/EEC

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

During 2006 and 2007, the European Commission carried out consultations and analysis on the effects of the Term Directive and the possible need to amend it. It delivered an impact assessment¹²³ on the basis of which in July 2008, it tabled a proposal for a Directive amending the existing Term Directive and extending performers' rights term of protection.

This proposal was finally adopted by the European Council on 12 September 2011. The text adopted by the Council corresponds with the European Parliament report agreed in April 2009 and therefore concluded the legislative procedure in first reading.

The Directive extends the term of protection for sound recordings (fixation of the performance in a phonogram) 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 embodied 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 is to improve the situation of performers:

*"The proposal aims to improve the social situation of performers, and in particular session musicians, taking into account that performers are increasingly outliving the existing 50 year period of protection for their performances"*¹²⁴.

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"*¹²⁵.

¹²³ Available at: http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

¹²⁴ http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

¹²⁵ http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

To achieve this objective, the Directive proposes several measures aimed at strengthening the position of performers and ensuring that they will not be deprived of the expected benefits of their rights:

Annual supplementary remuneration for performers receiving non-recurring remuneration

The Directive ensures that performers receiving non-recurring remuneration also benefit from the term extension. It means that non-featured performers not benefiting from royalties on the exploitation of the recordings are granted an unwaivable right to obtain an annual supplementary remuneration from the record producer (following the 50th year of the term of protection).

The record producer¹²⁶ must dedicate 20% of revenue (before deduction of costs) derived from the reproduction, distribution and making available of the sound recording which is to be administered by collective management organisations and distributed (at least) once a year.

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

National rules as regards non-distributable revenues may apply.

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

"Use it or lose it" clause

If record producers fail to offer for sale in sufficient quantities copies of a sound recording or do 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.

¹²⁶ Please note that Member States may regulate to what extent this should apply to micro enterprises.

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 the performer of his intention to terminate the contract. Where there are several performers in a fixation, they may terminate their contracts in accordance with the applicable national law.

"Clean slate" provision

The Directive also includes a "clean slate" for contracts where performers transfer their right on a royalty basis. According to this provision, a royalty or remuneration rate is to be paid to performers during the extended period, writing off any un-recouped advances.

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

It is noted that national rules and agreements compatible with the Directive remain unaffected.

Member States had two years from the date of entry into force of the Directive to implement the new provisions. The entering into force took place on the twentieth day following the publication in the Official Journal of the European Union which took place on 11 October 2011.

Despite some major elements likely to improve the situation of performers, the scope of this proposal 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, remains 50 years. However, according to the Directive, the Commission must submit a report assessing the possible need for an extension of term to performers and producers in the audiovisual sector and if necessary submit a proposal for amendment. 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".

No such report was communicated.

In April 2017, Vice-President Ansip on behalf of the Commission responded to a Parliamentary question acknowledging its failure to comply with its obligation. He stated *“The Commission is aware of the delays in terms of submitting reports on the application of Directive 2011/77/EU and on the possible need to extend the term of protection of rights to cover performers and producers in the audiovisual sector... The reports, including the updated information, will be submitted in the near future.”*

Regrettably, as at October 2018 no such reports have been submitted.

National legal framework

The 2011 Directive has now been implemented in all Member States with the exception of Cyprus.

The national laws implementing the Directive follow more or less the terms 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 collective management organisation to administer the supplementary remuneration but states that it should be managed by all performers’ collective management organisations operating in the market. This renders the management of this remuneration in practice 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 it shall fulfil the reasonable needs of the public.

6.2 The Directive in practice

The main issue for performers and their collective management organisations is whether the law and specifically the accompanying measures will be effective in practice.

Annual supplementary remuneration for performers receiving non-recurring remuneration

With the exception of a very small number of countries (e.g. Croatia, Germany, Hungary, Spain...) collective management organisations have not collected any annual supplementary remuneration so far.

In some countries, the implementation of the Directive happened only recently and therefore there has been insufficient time to make the necessary arrangements. In certain Member States (e.g. France) it has been necessary to establish a new performers' collective management organisation approved by the state to collect the remuneration and in other countries e.g. Greece it has been necessary to modify an existing collective management organisation's statutes.

A common problem arising in many countries is that it has proved difficult to adequately obtain information from producers that would enable the performers' collective management organisation to calculate the remuneration payable. In some countries negotiations are ongoing between producers and performers' collective management organisations to establish a workable system. In those countries where annual supplementary remuneration has been collected, concerns have been expressed about producers not providing the requested information required to calculate the remuneration and an inability to contrast the information received with independent sources.

Nevertheless, most collective management organisations have reported that they expect to be able to collect some annual supplementary remuneration within the next two years.

"Use it or lose it" clause

So far, there have been no reports of performers exercising the right to terminate the contract with the record producer under the aforementioned "use it or lose it" provisions.

"Clean slate" provision

Similarly, most collective management organisations are not aware of any performer benefiting from the "clean slate" provision.

6.3 Conclusions

In September 2011, the EU Council of Ministers adopted the Commission and European Parliament Directive to extend the term of protection for performers' rights in sound recordings in the EU from 50 to 70 years.

Even if this Directive has so far had limited practical effects on performers' rights, its adoption is an important step towards a better recognition of the value of performing artists' work and creativity.

In addition to the actual extension itself, a number of additional measures are provided. One of the most important issues is the 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. To date only a few countries have succeeded in collecting anything in respect of this provision. The requisite information from producers is difficult to obtain.

Other measures include what is called the "use it or lose it clause" whereby if a producer does not exploit a performance after the 50 year period, the performer will have the right to do so. There is also what is referred to as the "clean slate" provision, by which labels will not be entitled to make any deductions from the contractual royalties due to some performers during the extended term. How effective these measures will be remains to be seen and depends on their successful implementation at national level and in particular its operation in practice. Currently, there are no reports of performers benefitting from them.

The implementation of this Directive should be closely followed. While it was officially adopted "*to promote social welfare and inclusion*" on the ground that "*performers, and especially session musicians, are among the poorest earners in Europe, despite their considerable contribution to Europe's vibrant cultural diversity*" it has failed so far to benefit them.

The main beneficiary of this term extension is the phonographic industry. If the measures that are theoretically beneficial to performers are to actually benefit them in practice, the coming years will need to show that this industry will cooperate with performers' organisations for a decent implementation of the Directive.

Regrettably, the Directive does not answer all the needs of performing artists in Europe. In particular, the extension of the term of protection granted to performers should not be limited to their sound

recordings but should also cover their audiovisual fixations, as no objective reasoning can justify that the latter be protected for a shorter period of time.

According to the 2011 Term Directive, article 3(2) obliges the Commission to prepare an impact assessment on the subject by January 2012. Whilst the deadline was already somewhat unrealistic at the time of the adoption of the Directive, no such work is yet in the pipeline.

The Commission should now comply with its obligation. It is regrettable that despite Vice-President Ansip's assurance in April 2017, no such reports have been submitted.

Chapter 7: Directive on the Collective Management of Copyright and Related Rights

7.1 Legal framework

On 4 February 2014, the Directive on “*collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*” (Directive 2014/26/EU or CRM Directive) was adopted containing a provision that it should be implemented into national law by 10 April 2016.

Though the Directive addresses issues vis-a-vis the collective management of rights rather than performers' rights per se, it is an important piece of legislation for performers and their CMOs. Nevertheless, AEPO-ARTIS was not consulted in the preparation of this Directive by the Commission and most of its conception is based on the operation and realities of author's collective management organisations, not of performers' organisations.

On a number of issues, the Directive created complex and detailed obligations, out of proportion with the resources that performers' organisations may have and introduced nothing that would benefit performers' CMOs. In some countries, performers' CMOs may be managed by a staff of less than 8 people making compliance with these obligations extremely difficult while at the same time consuming much in the way of resources.

This chapter therefore provides a short summary of the Directive followed by a commentary on how the Directive has been implemented in the Member States.

The Directive 2014/26/EU is structured in four parts:

Title I: General provisions

Title II: Governance and transparency

Title III: Multi-territorial licensing of musical works by authors' collecting societies

Title IV: Enforcement measures

Of particular interest to AEPO-ARTIS are Titles I, II and IV. Title III specifically and only addresses authors' collective management organisations.

Title I (General provisions) contains general provisions on subject matter (article 1), scope (article 2) and definitions (article 3) including on who is a rightholder and a member and what is a collective management organisation.

Title II (collective management organisations) establishes rules regarding the representation of rightholders, membership and organisation of collective management organisations.

Chapter 1 stipulates that collective management organisations must act in the best interest of the rightholders they represent and do not impose any obligations which are not objectively necessary (article 4). It therefore sets out the provisions regarding inter alia the withdrawal of rights (article 5), membership rules including the participation of members in the decision-making process (article 6), minimum powers of the general meeting of the members including proxy voting (article 8) and the creation of a supervisory function enabling members to monitor and exercise control over the management of the collective management organisation (article 9).

Chapter 2 sets out rules on the management of rights revenue. This includes, inter alia, provisions stipulating that

- The income must be collected diligently and must be separated from the organisation's own assets (article 11).
- Applicable deductions must be set out in agreements with rightholders (article 12).

Remuneration must be distributed 9 months from the end of the financial year (*“unless objective reasons related in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject matter with rightholders prevent the collective management organisation or, where applicable, its members from respecting this deadline”*). The use of non-distributable funds shall be determined by the general assembly (article 13).

Chapter 3 deals with the management of rights on behalf of other collective management organisations and articles 14 and 15 cover issues such as deductions and distribution periods.

Chapter 4 sets out the rules for relations with users. Positively with the support of the European Parliament and the Council a user information obligation was inserted in the text of the Directive (article 17). Introducing an obligation for improved availability of this essential information on the part of users is of great assistance to the efficient administration of performers' rights.

Chapter 5 deals with transparency and reporting and requires CMOs to disclose information on amounts collected and paid and deductions made (article 18), on representation agreements (article 19), on the organisation and functioning of the organisation including statutes, membership terms, ... (article 21) and the annual publication of a transparency report (article 22).

7.2 Implementation of the CRM Directive

All Member States participating in this study have implemented the Directive. Subject to the issues highlighted below, performers' CMOs have had few significant difficulties in meeting the requirements of the Directive. In many cases, performers' collective management organisations already had measures in place, particularly with regard to transparency and governance, which met or exceeded the obligations of the Directive and therefore only minor changes were required with regard to their operation.

Nevertheless, a number of issues give cause for concern.

By virtue of the way in which the definitions of "rightholder" and "member" (contained in article 3(c) and 3(d) respectively) have been transposed into national law, there is the possibility that in some Member States the wording of the national legislation would allow legal entities (which may often be commercial entities as opposed to actual performers) to become members of a collective management organisations. This is potentially the case for example in Lithuania, Slovenia, Denmark, Italy, Sweden, Poland and Slovakia. The concern is that this may result in such entities attempting to claim or being entitled to claim a share of the remuneration collected which ought to be paid to actual performers.

Further, such entities could be able to exercise undue influence on the direction of the collective management organisation. If such entities were in this position, there is a possibility that it would turn a performers' collective management organisation into an organisation motivated by financial profit as opposed to being motivated by improving the welfare of performers. Clearly, this was never the intention of the European Commission when drafting the Directive.

Similarly, there are concerns regarding the transposition of article 8(10) of the Directive and specifically the wording:

*“Every member of a collective management organisation shall have the right to appoint any other person or **entity as a proxy holder** to participate in, and vote at, the general assembly of members on his behalf...”*.

It must be noted, however, that this should not be possible in case of “conflict of interest”.

For the reasons set out above, it is not in the interest of performers for legal entities to be able to hold a large number of proxy votes. It appears that such a possibility may exist in some Member States such as Lithuania and Slovenia.

In order for collective management organisations to meet obligations concerning the collection and distribution of revenues, it is essential that the necessary information is supplied to them by “users” as defined in Article 3(k). This is crucial for the management of performers’ rights. While one recording can be made by one author and one producer, it may involve the performances of dozens of performers, sometimes more than a hundred of them. Performers’ organisations are responsible for distributing collected remuneration to all of them on very strict terms.

In most Member States, the national legislation matches the provisions of the Directive but frequently does not specify what information should be provided. Additionally, it is rare that sanctions exist in respect of non-compliance.

Regrettably, in almost no cases is there an obligation on producers to provide information, while they are the only entities who know exactly who all the performers are who were recorded on sound and audiovisual productions. If producers (in addition to users) were obliged to provide such information it would allow CMOs to further improve the collection and distribution of revenues and facilitate the implementation of the strict rules included in the Directive. Such obligations upon producers are still to be obtained from the European legislator.

Certain issues arise concerning the compatibility of the Directive with provisions of national law not specifically related to the collective management of rights. For example, the Directive provides in Article 13(4), (5) and (6) that the prescription period in respect of non-distributable funds shall be three years. National legislation in Member States varies considerably regarding the prescription period with some Member States providing a 5-year prescription period and others as much as 10 years. This will have to be solved on a Member State by Member State basis.

7.3 Conclusions

In drafting the Directive, the EU legislator intended to put in place a legislative measure including rules on governance and transparency which could be applicable to CMOs across the board and independent of their area of activity. As a result, the terms of the Directive are necessarily of a general nature.

While it is still too early to form a definitive position on the effects of the Directive, there is a distinct possibility that in at least some Member States, legal (and very often commercial) entities could use the Directive to establish a foothold within performers' collective management organisations and exert influence which instead of strengthening the rights of performers would in fact have a highly prejudicial and very negative effect.

Omission of an obligation on producers to provide detailed information, which would improve and facilitate the collection and distribution of revenues, is regrettable. It contrasts with the obligations on performers' collective management organisations whose task in identifying recordings and performers is particularly complex and costly.

Chapter 8: Conclusions and Key Recommendations

8.1 Conclusions

The various Directives adopted between 1992 and 2001 (and their subsequent codifications) together with Directive 2014/26/EU (the “CRM Directive”) have established, within European Union Member States, a globally harmonised level of protection for performers’ intellectual property rights. Before then, these rights had been granted to performers for several years in some Member States, but in other countries performers were not protected, or only to a very limited extent.

This study on the impact of these Directives on the protection of performers’ rights highlights their positive impact but also their limits.

The weakness of the exclusive right

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

Information available on the content of performers’ individual contracts beyond the scope of this study indicates that only a very limited number of performers enjoy a real ability to negotiate on the grounds of their exclusive rights and benefit from their prerogatives.

For most performers contracting with audiovisual or sound recording producers, the contractual link results in a global transfer of all their exclusive rights, for the whole protection period, and, moreover, for a fixed and final fee. It is the widely held view among performers (and the collective management organisations that act on their behalf) that the typical fixed and final fee is in general insufficient and that it does not represent equitable remuneration for the transfer of the exclusive rights.

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

It is only when exclusive rights are subject to some guarantees that they become useful to the vast majority of performers.

With regard to collection for making available on demand in 2017, only 4 countries out of the 26 covered in this study collected more than € 100,000. Those countries are Denmark, Finland, Germany and Spain. Fourteen countries collected nothing at all.

In many countries which succeeded in collecting at least minimal remuneration, there has in fact been a **decline** in the amounts collected, despite the growth in the digital market.

The guarantee of remuneration rights

Performers' rights were born, on an international level, under the auspices of the remuneration right. The Rome Convention, adopted in 1961 did, although in an imperfect manner, establish the first right to remuneration: the right to equitable remuneration for the broadcasting and communication to the public of commercial phonograms.

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

In general, remuneration rights including for broadcasting and communication to the public and rental as well as rights that are based on compulsory collective management such as the cable retransmission right are essential and constitute an important source of income for performers.

In general terms, the total collection of the performers' organisations has remained stable during the period 2011-2017. The increase which can be observed in 2017 is as a result of a collection of a large amount of back payments of private copying remuneration, which had accrued over the preceding years. In 2011, a total of € 442,388,668 was collected compared to € 573,094,521 in 2017, an increase of € 97,762,016 (approximately 21%) after taking into account inflation throughout the Eurozone during the period 2011-2017.

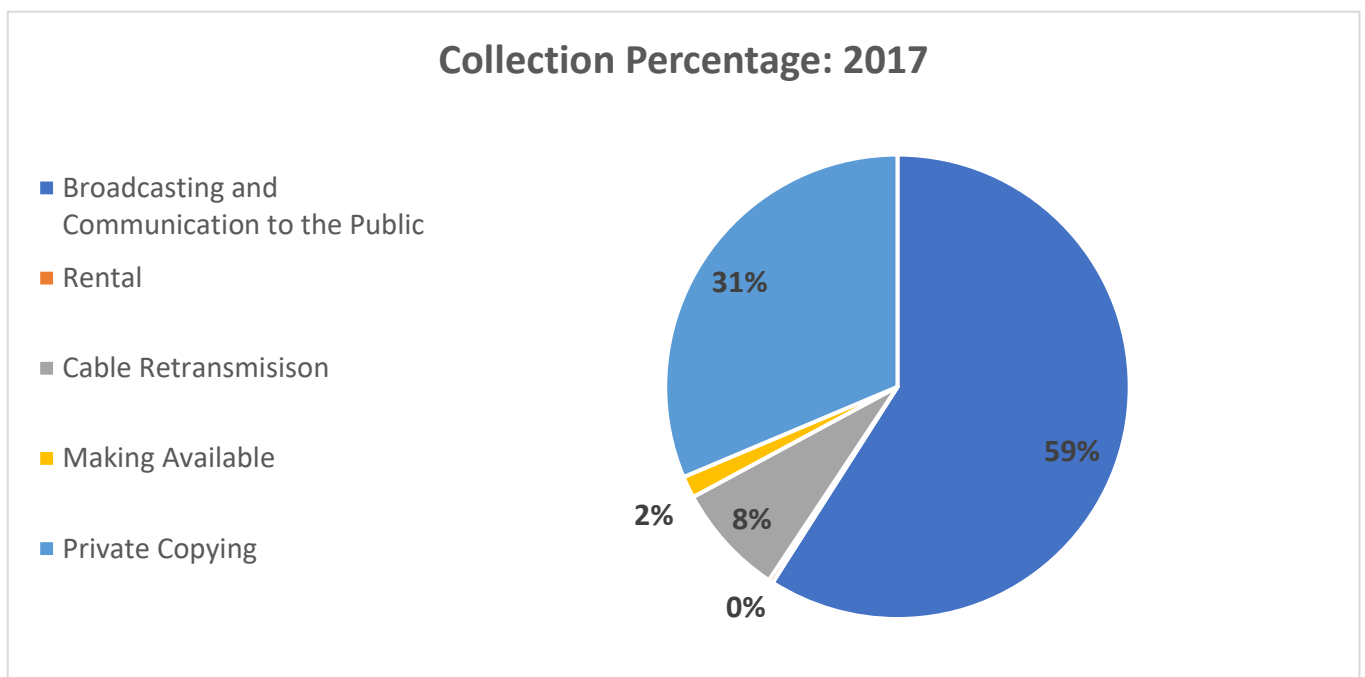
However, the percentage increase in collection over the period 2011-2016 is more representative of the overall trend and reveals an increase of almost 10% in real terms during the period 2011-2016.

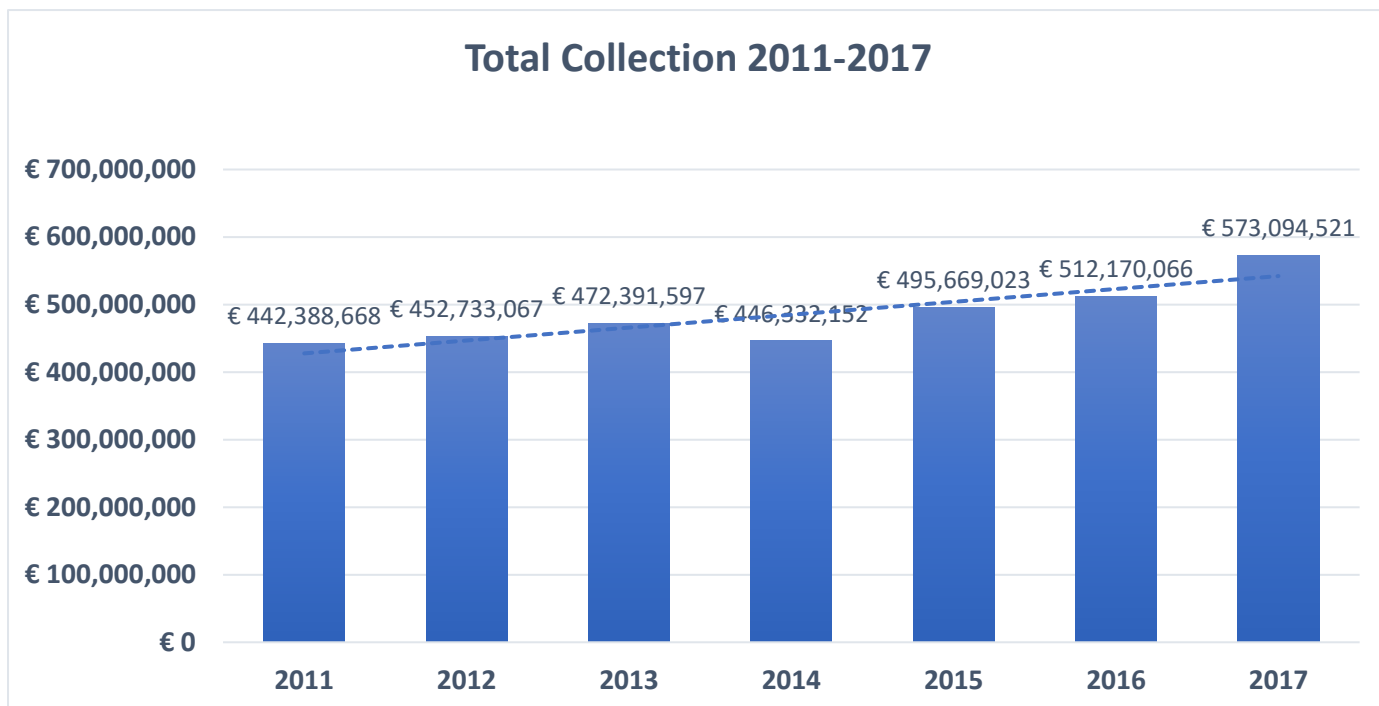
The AEPO-ARTIS study demonstrates that in 2017, 90% of performers' collections stem from the right to equitable remuneration for broadcasting and communication to the public and remuneration for acts of private copying. In addition, 8% of the total collection comes from cable retransmission rights based on compulsory collective management as per EU Directive 93/83/EEC.

In 2011, the position was very similar. 92% of performers' collections stemmed from the right to equitable remuneration for broadcasting and communication to the public and remuneration for acts of private copying and 7% of the total collection came from cable retransmission rights.

Most significantly, there has been almost no change with regard to collection for making available. In 2011 it amounted to only 1% of total collection. Indeed, at no time during the period 2011-2016 did it amount to more than 1%. In 2017 there was a very slight increase, to 2%. This increase can be accounted for by an increase in just one country covered by this study, namely Denmark. In 2016, there was zero collection in Denmark. In 2017, the amount collected was € 7,247,573.

Total collection from cable retransmission rights has also remained stable, increasing only marginally from 7% in 2011 to 8% in 2017.





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

Equitable remuneration for broadcasting and communication to the public remains an essential source of income for performers. Collections for this right have consistently increased in the vast majority of Member States. In 2011, it constituted approximately 70% of the overall collection for performers. In 2017 the figure in percentage terms had greatly decreased to 59%. The average collection percentage for the period 2011-2017 is 67%.

The drop in percentage terms in 2017 can be attributed to a large monetary increase in collection of private copying remuneration in 2017. In monetary terms, collection in respect of equitable remuneration for broadcasting and communication to the public has in fact remained stable during the period 2011-2017.

Collection in 2011 was € 310,812,757 and in 2017 the amount had increased to € 338,308,010. Accounting for inflation, that represents an increase of € 4,349,622 or slightly more than 1%.

The fact that the right to broadcasting and communication to the public is such an important and protected source of income is not least due to the compulsory administration by collective management organisations (in the vast majority of countries) of this right.

It is noteworthy that article 8(2) of Directive 2006/115 allows room for manoeuvre in terms of national interpretations. Rewording of the provision could considerably reduce the differences between national legislations. Given the fact that almost all phonograms are published for direct or indirect financial benefit, the reference in the Directive to “commercial purposes” that prompted the publication of phonograms could be omitted. The current wording does not add a new criterion and creates needless discussions with users.

Furthermore, the Directive does not define what is meant by “equitable” remuneration. According to the CJEU, while the concept of equitable remuneration in article 8(2) of the Directive is a Community concept that must be interpreted uniformly by all Member States, it is for each Member State to determine, for its own territory, the most appropriate criteria for assuring adherence to this concept¹²⁷.

However, the CJEU gives some direction to Member States. There has to be a proper balance between the interests of performers and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. Whether the remuneration is equitable is to be assessed, in particular, in the light of the value of that use.

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

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

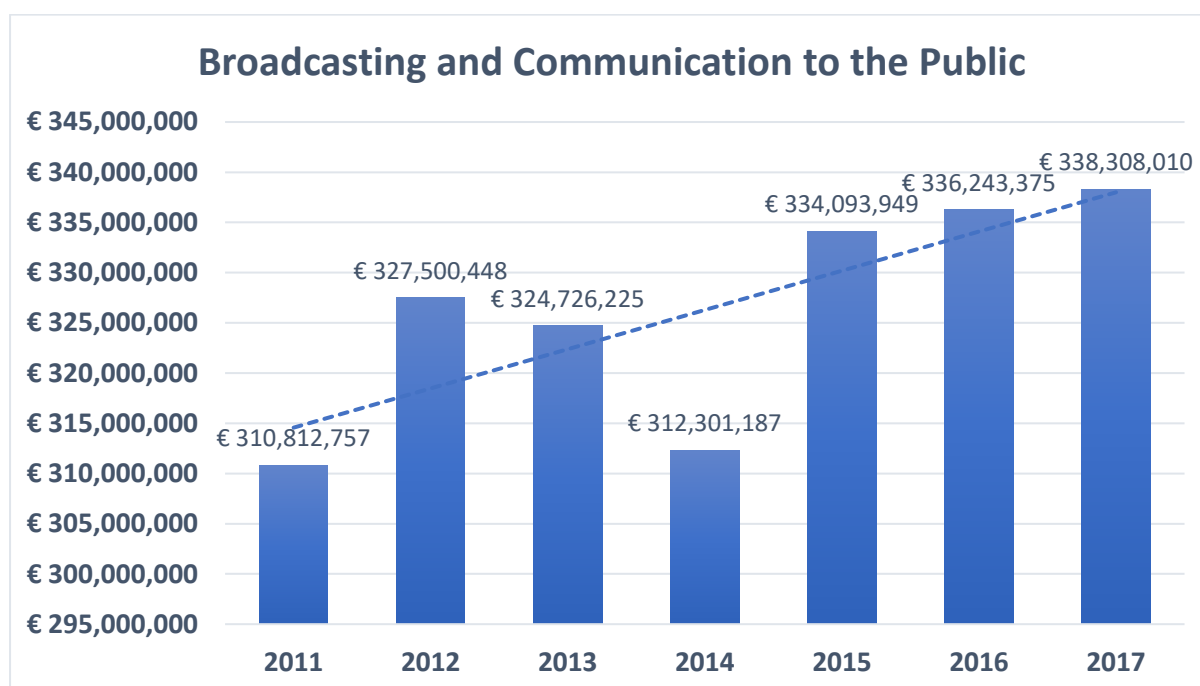
Given the noticeable contractual pressure under which performers are regularly put by their contracting partners, it also seems useful to provide a reminder that the right to an equitable remuneration is generally considered to be unwaivable. In addition, it could be discussed what other (precautionary) measures could be envisaged in future to ensure that remuneration is paid to the respective performers’ organisations. Time-consuming and costly litigation in order to enforce payment should be avoided.

¹²⁷ Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS), Judgment of the European Court of Justice of 6 February 2003: C-245/00

It is worth reminding that in certain countries the remuneration right indicated in article 8(2) of the Directive is not only applied to the broadcasting and communication to the public of phonograms, but also to that of audiovisual fixations. At a time when technologies are converging and when the same performance, subject to a single category of use such as its communication to the public, often includes both audio and audiovisual elements, there is little justification for excluding possibilities of remuneration in the whole audiovisual sector. This extension would be a considerable step forward for performers.

Lastly, as technology and digital business models are evolving rapidly, the line between what can be classified as “communication to the public” or “broadcasting” and what can be classified as “making available on demand” is becoming more and more difficult to determine. This will create significant substantive issues, specifically whether a performer’s exclusive “making available on demand” right is involved, or the performer’s remuneration right under article 8(2) of the aforementioned Directive.

While these may seem to be “legalistic” or “academic” issues, they could, under the existing *acquis communautaire*, potentially have a profound impact on performers and the extent to which they may share in financial rewards accruing from the expansion of the digital market.



Limitation of the reproduction right for private use

Of the 26 countries participating in this study, 24 countries have introduced in their national legislation an exception for private use, linked to an entitlement to remuneration for the rightholders, with the exception of Ireland and the United Kingdom.

For rightholders in those countries with remuneration schemes for private copying, it is incomprehensible that they should return empty-handed from other Member States like the United Kingdom and Ireland, while British and Irish rightholders receive remuneration collected abroad.

Whilst it may appear as if private copying remuneration collection is increasing, the figure remains relatively stable. In 2011 the amount collected was € 98,311,640 and in 2017 it was € 179,685,545 representing an increase of € 74,052,826 after inflation has been taken into account. However, the 2017 figure can be seen as an anomaly on account of the fact that there was a very high collection in Germany in 2017 made up of a number of back payments (totalling approximately € 26,000,000) that were in fact payable during the preceding years. In the same year, around 20% of the amount collected in France was in fact back payments that should have been paid in preceding years.

With regard to private copying remuneration collection between the years 2011 and 2016, the amount collected in 2016 was € 132,678,692. When one takes into account inflation during the period 2011-2016, that represents an increase from 2011 of € 29,137,910.

In 2017, private copying remuneration accounted for 31% of total collection. Over the preceding 5 years, this average was 27%. One can see therefore that there can be significant volatility in respect of private copying remuneration. This can be as a result of various factors such as difficulties in obtaining payments from those parties that are legally obliged to make payments and changes in the national private copying remuneration legislation or practices. As technology evolves, so too will the types of devices/carriers in respect of which private copying remuneration is payable. It remains to be seen what effect if any this will have on overall private copying remuneration collection.

The results of the study highlight that the amount of private copying remuneration collected continues to represent an essential part of the revenues received by performers from collective management organisations and therefore remains the second most important source of remuneration.

In the digital age, more and more opportunities exist for private copies to be made. However, the current system of private copying remuneration is under attack both at the European and at the

national level, despite it being wholly justified that performers should receive fair remuneration for this increased use of their performances. It is vital that this source of income is protected in order to enable performers to continue performing and contributing to the development of our society's cultural heritage.

Whilst the vast majority of countries have opted for a mechanism which requires that private copying remuneration is payable on certain devices and media, a different system applies in Norway where national law stipulates that compensation is allocated through the national budget. Whilst the system seems to work sufficiently well in Norway, it may not be the right model for other countries and indeed this was proven to be the case in Spain.

In Spain, when the private copying system was amended whereby compensation was paid via the national budget, private copying remuneration decreased from € 16,263,894 in 2011 to only € 2,142,146 in 2017. It is anticipated that the change in legislation in July 2017 when the private copying system returned to a more traditional system whereby private copying remuneration is paid by importers and manufacturers of reproduction equipment will improve the situation for performers.

In the vast majority of countries where private copying remuneration is payable on certain devices and media, the terms of the remuneration systems show a number of similarities but specific provisions differ from country to country. Although the Directive does not prescribe compulsory collective management of this remuneration right, where the exception for private use is introduced, all countries that made use of the exception linked the remuneration right to compulsory collective management. Results show that collective management has been an effective tool in collecting performers' remuneration.

To date, most countries operate a dual remuneration scheme with remuneration applicable on equipment and blank carriers. This approach is important as in the digital age, the means by which individuals can make private copies are greater than ever before. Any private copying regime must therefore reflect technological progress (for example the increased use of smartphones) and the actual habits of users. This view is in line with the provisions of Directive 2001/29/EC (see recitals 38 and 39 above).

The remuneration is mainly collected from the manufacturer or the importer of the carriers and - in those countries that operate a dual remuneration scheme - the manufacturer or the importer of the equipment. This approach was supported by the CJEU in the *Padawan* case.

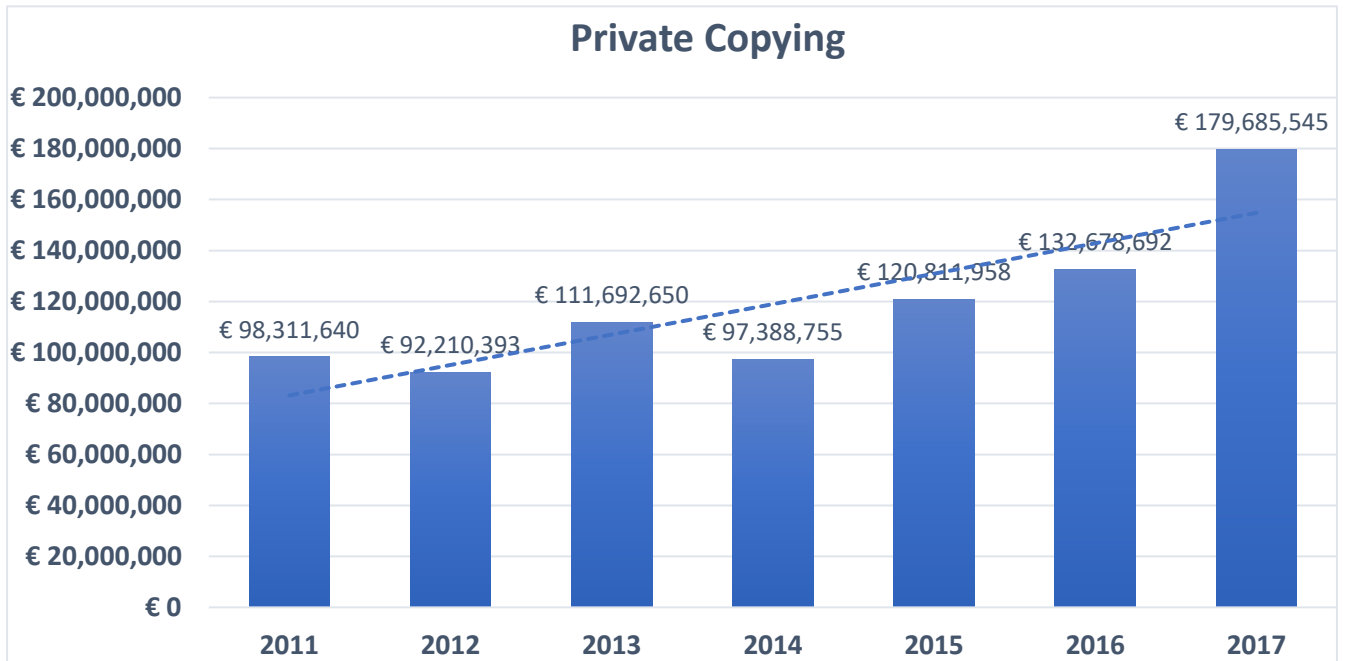
The calculation of tariffs is either set by legislation or other governmental body, commission or copyright tribunal, or tariffs are set by negotiation with the respective collective management organisations. In countries where the tariffs are set via agreement with the ICT industry this becomes increasingly difficult and importers and manufacturers have shown less and less willingness to negotiate. As a result, performers' organisations are forced to enter into costly and time-consuming litigation. This results in considerable volatility with a low amount being collected one year and then a higher amount, often consisting of the collection of various back payments, being collected at a subsequent year. Where tariffs are set by legislation or government decision, tariffs should be revised on a regular basis in order to reflect market developments.

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

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. The deductions to be made are set by law or by agreement of the members of the collecting society. Whilst this system has been challenged before the CJEU in the *Amazon* case, 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 the detailed arrangements for the operation of such establishments are not discriminatory.

Performers' organisations are in particular concerned vis-à-vis the increasing pressure (political and via the courts) against private copying remuneration schemes at national as well as at EU level, especially considering the importance attached to it as a guaranteed source of income for performers.

Currently, private copying remuneration systems remain an effective mechanism to remunerate rightholders for acts of private copying and are an essential source of income for performers. Certain aspects could be improved (such as the regular adaptation of the payment of private copying remuneration to new technological developments such as cloud computing and smartphone usage) and widely accepted principles could be confirmed at EU level in order to create a harmonised private copying remuneration system in the interest of all stakeholders. The fact that private copying remuneration was not one of the issues addressed in the proposal for a Directive on Copyright in the Digital Single Market and that recent CJEU case law (such as the *Copydan* case) has not departed significantly from the status quo, other than to apply the law to technical advances, has meant that this is an area of performers' rights in which the legal regime remains relatively stable.



Rental right

The rental right and related remuneration right were introduced in the national legislations following the implementation of Directive 92/100/EEC (currently referred to as Directive 2006/115/EC). Today, 18 countries, of 26 countries participating in this study, grant their performers an explicit rental right and a remuneration right in the event of transfer.

The Directive does not determine by whom this remuneration should be paid and how it is to be administered (the administration by collective management organisations is only optional).

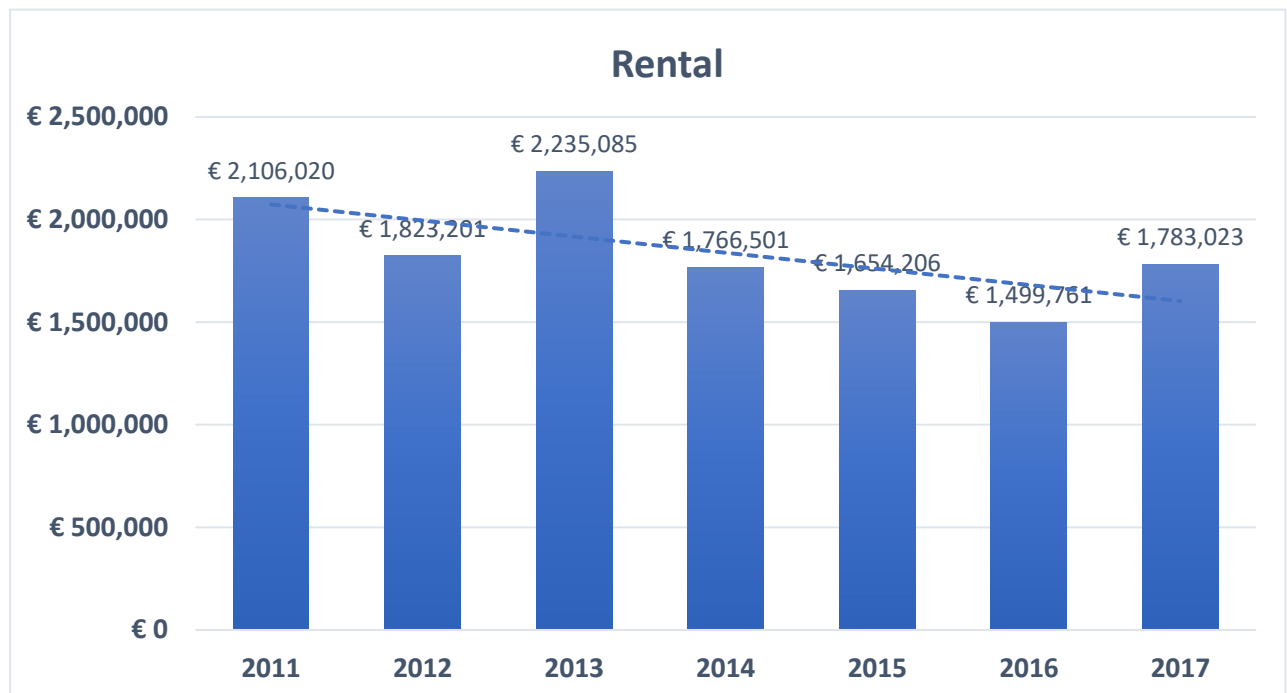
In those countries where national legislation does not determine who should pay the remuneration, as well as in those countries where the producer is designated as the party liable for payment, performers generally do not receive remuneration (or at the most a one off buy-out fee when concluding individual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

Where the body liable for payment is stipulated in law to be the user and the right is administered by a collective management organisation, remuneration is generally paid. Accordingly, only in the Czech

Republic, Germany, Spain and Switzerland, is remuneration currently collected by performers' collective management organisations.

The findings therefore once more highlight that collective management organisations play an essential role. Performers are not really in a position to manage and enforce the payment of their remuneration right, retained even when they have transferred their exclusive rental right to their producers. Making the administration of the remuneration right by collective management organisations compulsory is therefore clearly beneficial to performers.

However, it is clear that the rental of physical media is losing importance in favour of new modes of exploitation via the Internet, a gap that EU legislators should mend.



Satellite broadcasting and cable retransmission

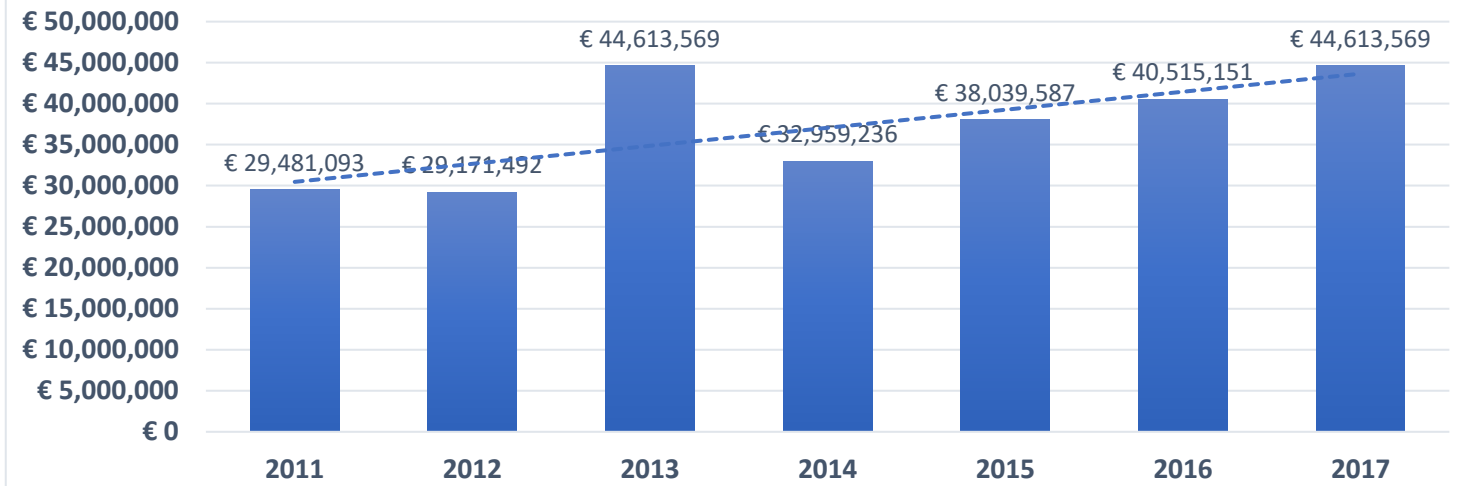
Council Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions was adopted on 27 September 1993.

In most European countries, it seems that European law has been implemented well at national level. This, combined with recourse to collective management has resulted in efficient collection and distribution of remuneration in the majority of countries. In those countries where there has been no collection, this is not as a result of a fault in the European legal framework; rather it is as a result of national peculiarities.

The proposed Regulation published by the European Commission in September 2016 on the exercise of copyright and related rights applicable to certain online transmissions aims to expand the scope of the country of origin principle so that it would apply in a manner similar to that in Directive 93/83/EEC, but in a way that was adapted to the digital era.

It is yet to be voted on, however at present it appears likely that the Commission will have largely failed to achieve this key aim and that the country of origin principle will apply only to news and current affairs programmes.

Satellite Broadcasting and Cable Retransmission



Making available to the public on demand

The study confirms that in the vast majority of countries the economic situation of performers has barely changed after the introduction of the making available right. The right is generally transferred to producers under contractual agreements. Only a few famous performers manage to negotiate the payment of royalties for the exploitation of their performances. As explained in chapter three, it is noteworthy that the explanatory memorandum of the draft copyright Directive explicitly recognises this issue: (*“Finally, authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights”*¹²⁸).

In practice, this right has not been effective as the majority of performers receive no remuneration at all, or, at best, a derisory single all-inclusive fee. This is exemplified in our findings where it can be seen that in 2017, in only 4 countries out of the 26 covered in this study, was collection more than € 100,000 despite the growth in the market. In many countries collection had actually decreased compared to previous years. The EU law designed to protect and adequately reward performers has therefore failed.

¹²⁸ At page three, paragraph 2 thereof.

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

In order to make the making available right effective for performers, a measure should be introduced in European law, complementary to the existing relevant provisions of Directive 2001/29/EC. Such a measure should guarantee that performers, in the event that they transfer their exclusive right for the making available of performances on demand, enjoy an unwaivable right to equitable remuneration payable by the user and which is compulsorily administered by a performers' collective management organisation.

It would ensure that performers are finally remunerated for the making available of their audio and audiovisual performances in music and film recordings that are made available to the public by online and mobile services for on-demand use.

It remains to be seen what impact a final version of the draft Directive on Copyright in the Digital Single Market may have on performers.

The explicit introduction into legislation of a “principle of fair and proportionate remuneration” may be intended to ensure performers receive a fair share of revenues derived from the online exploitation of their performances. However, the manner in which the draft Directive is worded and the omission of an unwaivable remuneration right subject to compulsory collective management, leaves a great deal of discretion to Member States and therefore any effect a final Directive may have, may be limited and vary from country to country.



In September 2011, the EU Council of Ministers adopted the Commission and European Parliament Directive to extend the term of protection for performers' rights in sound recordings in the EU from 50 to 70 years.

Even if this Directive will have limited practical effects on performers' rights, its adoption was an important step towards a better recognition of the value of performing artists' work and creativity.

In addition to the actual extension itself a number of additional measures were provided. One of the most important issues was the provision whereby a sum of 20% of the producers' revenue should be allocated through collective management to those performers not benefitting from recurring royalty payments for the extended period of term. To date, collection has only occurred in a very small number of Member States. Whether or not this measure will benefit performers in practice will depend upon the extent of the cooperation of the producers with performers' CMOs.

Other measures included were what is called the "use it or lose it" clause whereby if a producer does not exploit a performance after the 50 year period, the performer will have the right to terminate his contract. There is also what is referred to as the "clean slate" provision by which record labels will not be entitled to make any deductions from the contractual royalties due to some performers during the extended term.

How effective these measures will be, remains to be seen as to date performers are yet to exercise them.

Regrettably, the Directive does not answer all the needs of performing artists in Europe. In particular, the extension of the term of protection granted to performers should not be limited to their sound recordings but should also cover their audiovisual fixations, as no objective reasoning can justify that the latter be protected for a shorter period of time.

The Commission should at last comply with its obligation as laid down in article 3(2) of the 2011/77/EU Directive and assess the need for extending the Directive to audiovisual performances. The Directive provides that a report on this issue should have been submitted by the Commission to the European Parliament by 1 January 2012.

It is regrettable that despite Vice-President Ansip's assurance in April 2017 that the Commission would submit reports on the possible need to extend the term of protection of rights to cover performers and producers in the audiovisual sector, no such reports have been submitted.

8.2 Key Recommendations

Understanding specificities of performers' rights and the importance of collective rights management

On the basis of the findings, it is possible to make some key recommendations to improve the fair treatment of performers and the administration of their rights at EU level.

The fact that 90% of performers' collections stem from remuneration rights has of course had a considerable impact on how performers' rights are managed.

The characteristic of an exclusive right is that it gives the rightholder the right to authorise or prohibit the use of a work, which may be done through the collective management organisation of which he/she is a member. A remuneration right is a right to receive a payment when a work is used. It does not give the rightholder the possibility to authorise or prohibit its use and the remuneration directly collected by his/her collective management organisation from the users is not dependent upon any authorisation from the performer and/or his/her organisation.

These organisations collect the revenue payable under a remuneration right and are obliged by law to distribute it (i) not just to their members; but (ii) also to non-members, whose recordings are being used and protected under national and EU legislation.

In addition, performers (with the exception of a very few famous performers) have no bargaining powers and do not have the capacity to negotiate with producers and/or are unable to control the use of their recordings individually.

Accordingly, collective management is the only way for these performers to benefit from and manage their intellectual property rights. The findings of the study demonstrate that performers' rights have been most effective where these are compulsorily managed by performers' collective management organisations.

In the online environment, performers' collective management organisations are a vital link between individual rightholders and the users of creative works. In order for cross-border licensing of online rights to develop, it is essential to avoid dismantling and disorganising the functioning of collective management organisations. A system based on multi-territorial licensing without bilateral agreements

between collective management organisations would not improve the management or the licensing of performers' rights for online use.

Users would have to address a vast number of societies to obtain authorisation. Given the fact that one recording can sometimes involve a hundred performers, as is the case for musical orchestras for instance, one can easily imagine the difficulties such a system would undoubtedly raise.

Reciprocal agreements between collective management organisations established in different EU countries ensure, however, that authorisation for the use of performers' rights can be granted to the users on the whole repertoire that they wish to use, while ensuring that money collected can be distributed to each and every rightholder. A well-functioning network of reciprocal agreements between collective management organisations is accordingly essential and equally in the interest of users.

Furthermore, encouraging competition between collective management organisations is likely to have a detrimental effect on performers. A small number of collective management organisations would manage the rights of those most famous performers whose names are well-known and for which all necessary information is easily available in order to collect and distribute. Smaller collective management organisations, on the other hand, would have fewer means to administer the rights of less famous but more numerous performers (session musicians, members of bands and orchestras...), whose identification and related collection and distribution is more complicated and costly. The wishes of the most famous performers would be prioritised whereas the needs of the huge mass of less famous performers would be neglected.

As explained in Chapter seven, the CRM Directive, while well-intended, was to an extent flawed, with most of its content being based on the operation and realities of authors' collective management organisations, not of performers' organisations. It is important that EU legislation, and the institutions that created it, take into account the specificities of performers and their CMOs, and make these specificities a priority. Some of the obligations contained in that Directive are financially impractical for CMOs in smaller Member States operating on a very low budget. For larger CMOs operating on a larger budget, these obligations have proved much less of an obstacle.

The omission of an obligation on producers to provide detailed information, which would improve and facilitate the collection and distribution of revenues, is regrettable. It contrasts with the obligations on performers' collective management organisations whose task in identifying recordings and performers is particularly complex and costly.

Strengthening performers' rights and their administration

Today, approximately 90% of performers' collections stem from remuneration rights including the right to equitable remuneration for communication to the public and broadcasting, the right to equitable remuneration for rental and compensation for private copying. A further 8% stem from cable retransmission rights which are based on compulsory collective management. These rights are therefore of particular importance.

Taking into account the findings of the study, it appears that some general rules should be laid down within the legal provisions to guarantee the efficiency of collective management and to strengthen performers' rights, namely that:

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

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

Removing current inequalities by extending the duration of term for audiovisual performances

The extension of the term of protection and the accompanying measures to the benefit of performers in Europe adopted in September 2011 was an important step towards a better recognition of the value of performing artists' work and creativity, nevertheless the Directive does, regrettably, not answer the needs of performing artists in Europe.

In particular, the extension of the term of protection granted to performers should not be limited to their sound recordings but should also cover their audiovisual fixations, as no objective reasoning can justify that the latter be protected for a shorter period of time.

The Commission should therefore comply with its obligation as laid down in article 3(2) of the 2011 Directive and assess the need for extending the Directive to audiovisual performances without any further delay.

Maintaining private copying remuneration schemes whilst harmonising the administration of such regimes at EU level to the benefit of all

As can be seen from the data and information provided in this study, remuneration for private copying is the second most important source of income for performers.

So-called alternative models have been discussed and one such model was introduced (and subsequently abolished) in Spain. The system in Spain whereby private copying remuneration was paid by the state budget was shown to be wholly insufficient and completely arbitrary. The change in legislation returning to the more traditional system is to be welcomed.

Whilst existing private copying remuneration systems remain an effective mechanism to remunerate rightholders for acts of private copying and are an essential source of income for performers, certain aspects could be improved and widely accepted principles could be confirmed at EU level in order to create a harmonised private copying remuneration system in the interest of rightholders, the ICT industries and consumers.

Guaranteeing the remuneration of performers based on the availability of devices and media used for the reproduction of protected works, is in AEPO-ARTIS' view the most suitable system to compensate performers for acts of private copying. This logic remains relevant in the digital age where the means by which individuals can make private copies of copyright protected content are greater than ever before. Here also the ability of rightholders to control and license acts of private copying continues to be unrealistic. Therefore, the current private copying system should apply to developments in technology such as cloud computing and the widespread use of smartphones and continue to evolve as technology progresses.

A guarantee of remuneration for the making available to the public on-demand

For any right which performers are granted to be effectual, the performers' poor contractual bargaining position means that it is necessary for such a right to either be unwaivable, or in the event

that it may be waived, assigned or transferred, that the performer retains a right to an unwaivable equitable remuneration. Failing such a measure, the making available right will remain purely theoretical for most performers who will derive no benefit therefrom, as has proven to be the case so far.

For on-demand uses, a measure should be introduced in European law, complementary to the existing relevant provisions of Directive 2001/29/EC (the “Information Society Directive”). Such a measure should guarantee that performers, in the event that they transfer their exclusive right for the making available of performances on demand, enjoy an unwaivable right to equitable remuneration.

This remuneration should be collected from users and managed by performers’ collective management organisations.

Specifically, AEPO-ARTIS proposes the incorporation within legislation of the following wording:

“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.”

The proposal has the advantage of being simple and easy to implement. Existing contractual practices between performers, producers and users need not be amended. The only change would be that performers would be guaranteed a payment of remuneration collected by an established collective management organisation.

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

At a time when we see that more and more online services are benefitting from the talent of performers and exploiting their performances for financial gain, while failing to give anything

meaningful back to performers in return, it is crucial to have legislation in place that will adequately protect and reward performers. We await the outcome of the legislative process to see whether the EU law-makers take this rare opportunity to introduce legislation that would give meaning to the protection of performers in the digital environment.

As raised in chapter three, the measures contained in the draft Directive on copyright do not make provision for the introduction of an unwaivable remuneration right for performers. Regrettably, any measures short of such a right are likely to be of little practical benefit to performers. Further, the provisions of article 13 addressing the so called “value-gap” will not address the needs of most performers unless they are combined with an unwaivable right to remuneration. In its current wording, the article would only benefit a very few performers. It would mostly benefit the corporate “creative” businesses who enter into contracts with performers and have the upper hand in “negotiations” with respect to how they should be paid in return.

The legislative progress of the draft Directive on Copyright in the Digital Single Market should be monitored closely. At the stage of any national implementation, it is important that it would ensure that the “principle of fair and proportionate remuneration” referred to in the draft Directive is effective in practice, unlike the ineffectual exclusive right granted in Directive 2001/29/EC which has failed to benefit performers.

At a time when more and more online, on-demand, commercial services are being developed, the obvious gap between the protection that European law intended to give to performers and the impossibility of their actually enjoying it urgently needs to be resolved.