

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

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

Abundant examples of this 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 be effectively guaranteed only 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 - attributing to rightholders the decision-making power to authorise or to prohibit the use of their work - which supposedly gives them a strong bargaining position. Exclusive rights concern the fixation, reproduction, distribution, rental, broadcasting and communication to the public, and - to a limited extent - the making available on demand of performances.

What has characterised performers' rights in comparison with authors' rights to date is the weak exercising of their exclusive rights. Unlike authors, performers are usually obliged by most producers to sign standard "all rights" (buy-out) contracts: according to these employment or recording contracts, most performers transfer all their exclusive rights at the time when the contract is signed in return for an overall lump sum which often is derisory or even sometimes without remuneration.

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

- a right to equitable remuneration for broadcasting and communication to the public of their performances,
- a right to equitable remuneration for rental, and
- remuneration for private copying as a counterpart for the use of the corresponding exception to the reproduction right.

Equitable remuneration rights and the remuneration granted under exceptions and limitations to certain exclusive rights do not give rightholders the possibility to authorise or to prohibit the exploitation of their work but do at least ensure them an income. They are nonetheless generally considered as non-transferable, which means that they remain in the hands of the performers concerned whatever the provisions of the contracts signed. Hence, most performers are depending much more on the remuneration rights and the remuneration from private copying than on the exclusive rights to receive an income from the exploitation of their rights.

This study 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 performance 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 34 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	SPEDIDAM
Germany	GVL
Greece	APOLLON DIONYSOS ERATO
Hungary	EJI
Ireland	RAAP
Italy	NUOVO IMAIE ¹
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

¹ Nuovo IMAIE was established on the 10 July 2010 by effect of the Law 100/10.

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

1. right to an equitable remuneration for the broadcasting and communication to the public of commercial phonograms;
2. satellite broadcasting and cable retransmission;
3. right of making available to the public;
4. remuneration for private copying as a counterpart for an exception to the exclusive reproduction right;
5. rental right; and
6. 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, the study touches briefly upon the Directive on the collective management of copyright and related rights (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. 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

1.1 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 quantities². 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 covered³.

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

²Article 3(d) Rome Convention

³ Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981, pp. 47-49

uses. A contracting state may also declare that it will not apply article 12 as regards phonograms whose producer is not a national of another contracting state⁴.

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 former⁵.

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))⁶. In an agreed statement, it is specified that the definition of a phonogram does not suggest that rights to the phonogram are in any way affected by their incorporation into a cinematographic or other audiovisual work.

This treaty extends the right to a remuneration to direct and indirect use. In the application of its article 15, phonograms made available on demand would be considered to have been published for commercial purposes⁷.

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 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

⁴ 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.

⁵ 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).

⁶ 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)).

⁷ 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.

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”.

European legal framework

EU Directive

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 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 issued two judgements in the cases of Phonographic Performance (Ireland) Limited v Ireland, Attorney General (“*the PPL case*”)⁸ and Società Consortile Fonografici (SCF) v Marco Del Corso, Procuratore generale della Repubblica (“*the SCF case*”)⁹. 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.

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.

⁸

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

⁹

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

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 are 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.

In SCF it was stated:

“The concept of “communication to the public” for the purposes of article 8(2) Directive 92/100/EEC must be interpreted as meaning that it does not cover the broadcasting, free of charge, of phonograms within private dental practices (emphasis added) engaged in professional economic activity... for the benefit of patients of those practices and enjoyed by them without any active choice on their part”.

In the PPL case it said:

“A hotel operator (emphasis added) which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under article 8(2) Directive 2006/115/EC”.

Although examining very different facts, the judgements set out the same criteria¹⁰ 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, the CJEU interprets “communication to the public” under Directive 2001/29 as something different to “communication to the public” under Directive 2006/115.

¹⁰which 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

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 phonograms. However, the extent of the remuneration right differs amongst the countries depending on the uses for which the remuneration is legally due and collected (see table 1.1). The methods of the calculation, payment and sharing of the remuneration differ as well (see table 1.2) from one country to another.

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

Uses for which an equitable remuneration is legally due and collected

As 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.

Until relatively recently, due to a decision of the French “Cour de Cassation” (Supreme Court), France was the only one of the covered countries where no remuneration was collected for broadcasting of programmes incorporating audio phonograms via television channels¹¹. In 2006 the national code for intellectual property (CPI) was revised to transpose the provisions of European Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. In this context, article L214-1 of the CPI of 1 August 2006 relating to broadcasting and communication in public places was amended. However, this amendment was quite unclear on this question.

Nevertheless, in 2008 an agreement was signed between performers, producers and broadcasting organisations which allowed again the collection of remuneration for this use. Still today, some uses of phonograms published for commercial purposes, notably for webcasting and musical call waiting, are still excluded from the scope of the equitable remuneration regime and are submitted to the exclusive rights.

Specifically, the wording states that where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose its direct communication in a public place, or its broadcasting or simulcasting. Nor can either party oppose the reproduction by or on the account of a broadcasting organisation of a phonogram in order for this phonogram to be embodied in an audiovisual work for a broadcast on its own channel or for broadcasting by other organisations paying the equitable remuneration. Such uses of phonograms published for commercial purposes shall entitle the performers and producers to an equitable remuneration.

¹¹ For many years, the collecting society SPEDIDAM has raised proceedings against television channels and producers for the application of the equitable remuneration principle in the field of television.

This new wording adds the act of reproduction of a phonogram by or for the account of a broadcasting organisation for its own programme to the category of acts which performers and producers cannot oppose, but for which they are entitled to equitable remuneration.

In this respect, it should be noted that this article in the French law contradicts the existing *acquis communautaire* in that it creates an exception to the performer's and phonogram producer's exclusive right to authorise reproductions of a phonogram. Such an act of reproduction is not in the exhaustive list of authorised exceptions contained in the Directive 2001/29/EC¹².

With the exception of the Czech Republic, all other countries covered in this study have a system of equitable remuneration in respect of communication to the public. In the Czech Republic no such equitable remuneration is envisaged. In practice, however, the collecting society INTERGRAM administers an exclusive right of performers corresponding to acts of communication to the public and of broadcasting, and collects the relating remuneration.

Most countries (with the exceptions of Ireland (for webcasting and simulcasting), France (for webcasting), consider that an equitable remuneration is due for "webcasting" and "simulcasting". In some countries (e.g. Croatia, the Czech Republic, the Netherlands), "webcasting" is considered to be a type of "broadcasting". In others (e.g. Spain, Sweden), it falls under the broad term of "communication to the public". Some countries (e.g. the Czech Republic, France, Lithuania) stipulate an equitable remuneration for "simultaneous retransmission by cable of the broadcast", therefore including "simulcasting". In other countries like Croatia, "simulcasting" is considered to fall under the term "broadcasting" as well.

The French legislator¹³ has narrowed the term "communication to the public" in their national legislation to "communication in public places", thus imposing an additional condition for performers to be granted equitable remuneration: the place where the communication to the public takes place must be of a public nature. This legislation also excludes commercial phonograms used for a show. As according to current international definitions, "webcasting" is not considered to be "broadcasting"¹⁴ and does not fall under the narrow term of "communication in public places", no equitable remuneration is currently collected in France for this type of use.

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, neither Croatia nor Lithuania have collected any sums for this use.

In Spain, the Spanish law 23/2006 of 7 July 2006¹⁵ 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 transferred their exclusive making available right) to receive equitable remuneration for their performance fixations made available on demand.

¹²Part of a complaint launched by SPEDIDAM to the European Commission against France

¹³ The same specificity is to be found also in the Belgian law.

¹⁴ According to the international and European definition, broadcasting is the transmission by wireless means for public reception of sounds or of images and sound or of the representations thereof (Rome Convention: article 3(f), WPPT: article 2(f), Directive 92/100/EEC further codified as 2006/115/EC: article 8(2)). This definition excludes the transmission via the Internet that is carried out by means of wire. This is also raised in the complaint to the European Commission by SPEDIDAM.

¹⁵ In the context of reviewing the national law to implement the provisions of Directive 2001/29/EC.

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	No	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	

Terms of equitable remuneration

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. Said situation is somewhat remedied by the fact that old tariffs, brought forward under old law are still binding awaiting the Commission's opinion on the newly submitted tariffs.

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 has been amended in 2012, now 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 lengthy 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 European 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.

As for Sweden, the claims of the performers and those of the producer against the user of a recording are to be addressed at the same time. For this reason, in this country the exercise of this right is managed by means of cooperation between the 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 organisations and users;	The user must pay SPRE (Société pour la perception de la remuneration equitable), which is jointly managed by	Law provides 50:50	Compulsory

	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></p> <ul style="list-style-type: none"> -public performance: performers 64 % / producers 36 %. - broadcasting 50/50 <p><i>Video:</i></p> <ul style="list-style-type: none"> -public performance and broadcasting: performers 20 % / producers 80 % 	<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 user and CMO For phonograms: if no agreement: if not by agreement tariffs are determined by way of a fixed percentage of the gross income referring to the use of the phonograms ; payment is made to producer who then pays performers' organisation	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	User	50:50	Compulsory

	by the managing board and confirmed by the Commission for Copyright and Related rights			
Slovakia	By agreement with user	User	50:50	Authorisation from Ministry of Culture
Slovenia	By agreement, which failing, by Copyright board established by the national Intellectual Property Office	User	50:50 unless otherwise agreed	Compulsory
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 for whose use remuneration is legally due and collected

Table 1.3 shows the types of fixed performances for which use 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), Greece, Italy, 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 Belgium, a new copyright and neighbouring rights act was published on 17 April 2014. It will broaden the scope of the equitable remuneration and will extend the field of application to audiovisual works. However, these new changes will only be effective as of 1 January 2015.

In the Netherlands there is a presumption of transfer of exclusive rights. In exchange the producer must pay (in theory) remuneration for each form of exploitation of the audiovisual fixation including for broadcasting and communication to the public.

A Dutch proposal for legislation currently pending in the Dutch parliament aims to improve the contractual position of audiovisual performers inter alia by introducing a right to remuneration linked to the presumption of transfer of the exclusive rights to the producer. It is expected that the plenary of this bill in the Parliament will take place in autumn 2014.

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 Sweden, according to 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 the so called "secondary uses" of recorded performances that relate to the exercise of exclusive rights, such as the inclusion of a sound fixation into a video subsequent to a first use. 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 - Type of fixed performance for whose use remuneration is legally due and collected

Countries	Phonograms (audio fixations)		Audiovisual fixations
	Type of phonogram subject to remuneration: published for commercial purposes or any phonogram	Type of carrier	
Austria	Any phonogram	Any carrier	No
Belgium	Commercial only	Any carrier	Yes effective on 01/01/2015
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	No
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	No
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 2013 it remains the main source of revenues, representing 76% of the total remuneration collected by the performers' collective management organisations in the 26 countries represented in this study. In 2010, it was 67% of the total remuneration collected.

In all countries the right to remuneration is exercised through a collective management organisation.

In most cases, collection of remuneration for acts of communication to the public has increased. A number of countries have recorded a significant increase in collections of equitable remuneration for acts of communication to the public. In Romania, revenues increased from €139.293 in 2005 to €989.819 in 2013. This is mainly due to increased collections for audiovisual fixations. Similarly successful collections have been made in France (€6.108.000 in 2005 to €17.135.217 in 2013), Slovenia (€320.000 in 2005 to €1.650.000 in 2013), Spain (€3.637.809 in 2005 to €12.390.574 in 2013) and Sweden (€5.381.670 in 2005 and €10.630.742 in 2013).

Collections in other countries, including Germany and Slovakia, have been more or less stable or have moderately increased (e.g. Austria).

As regards collections for broadcasting, table 1.5 below, highlights equally a continuous increase in remuneration. Whilst moderate increases have been noted in e.g. Belgium, Denmark and Norway, remuneration substantially increased e.g. in the Czech Republic (from €1.561.088 in 2005 to €4.731.835 in 2013), in France (from €6.374.364 in 2005 to €9.072.234 in 2013) and in Romania (from €668.393 in 2005 to €4.478.196 in 2013). Collections have remained more or less stable in Germany, Greece, Ireland, Lithuania, Slovakia and Sweden.

The summary of the collections as well as the tables below highlight that remuneration for acts of broadcasting and communication to the public remain an essential source of income for performers. Indeed, it comprises 76% of the entire revenue collected by performers' organisations in 2013.

Nevertheless, some countries (e.g. Greece, Romania, Slovakia, Spain and Sweden) report increased reluctance on the side of the user to pay the equitable remuneration due to performers' organisations. Consequently, members have been involved in a number of court challenges.

Table 1.4 Equitable remuneration for communication to the public - Collection for performers from 2005 - 2013
Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria	2.642.000	2.670.000	2.811.000	2.903.000	2.982.000	3.130.000	3.109.000	3.339.000	3.370.000
Belgium	5.920.552	6.172.872	6.049.709	6.615.758	6.843.121	6.711.551	7.904.190	7.823.058	8.433.878
Croatia	488.218	633.510	653.031	829.100	763.162	840.017	1.269.720	1.282.816	1.021.297
Czech Republic	1.350.747	1.240.083	1.266.590	1.074.341	2.020.565	2.526.320	3.064.592	3.287.724	3.289.726
Denmark	8.191.489	8.442.191	9.612.415	9.315.309	9.628.957	9.658.221	9.800.384	10.108.725	10.629.064
Finland	2.754.982	2.931.683	3.063.780	3.362.574	3.847.000	3.963.000	4.109.131	4.309.289	4.508.792
France ¹⁶	6.108.000	6.296.440	6.441.257	6.618.043	6.792.034	8.127.128	11.748.044	15.136.107	17.135.217
Germany	21.404.440	19.305.600	19.575.040	23.088.000	23.763.000	21.785.416	21.918.717	22.629.299	21.715.597
Greece	537.693	795.080	1.170.980	1.539.432	1.211.751	1.087.006	1.089.994	995.619	1.254.939
Hungary	779.005	776.504	866.927	1.147.353	1.179.722	1.214.648	1.104.094	2.244.516	1.292.267
Ireland	0	0	0	0	0	0	1.748.038	1.732.413	0 ¹⁷
Italy ¹⁸	0	0	0	0	0	0	0	0	0
Latvia	14.561	70.418	102.967	117.419	142.771	205.324	313.180	341.656	391.290
Lithuania	149.039	214.662	260.750	300.492	313.538	333.764	363.631	382.765	418.091
Netherlands	12,694,000	14.500.000	22.500.000	21.986.216	21.483.983	17.498.318	14.630.590	15.602.567	16.760.945
Norway	1.733.405	2.467.325	2.331.256	2.692.307	2.883.360	3.242.914	3,204,220	3,401,425	3,415,697

¹⁶ The French collective management organisation, ADAMI, declined to provide figures.

¹⁷ There is currently a dispute between the performers and the producers' organisation in terms of the share of equitable remuneration to be paid to the performers.

¹⁸ The collection for communication to the public is integrated into the collection for broadcasting. Please refer to table 1.5 below.

Poland	1.663.788	3.200.174	5.023.252	5.912.629	7.486.101	9.220.683	8.812.205	12.305.926	12.634.409
Portugal	0	0	205.000	914.629	1.393.510	1.736.413	2.058.766	2.034.625	1.640.042
Romania	134.293	156.812	330.699	667.790	583.354	813.238	1.029.728	728.923	989.819
Serbia	0	0	0	0	0	0	584.022	726.332	674.711
Slovakia	391.685	409.609	424.798	417.881	414.812	459.848	468.330	484.570	511.061
Slovenia	320.000	350.000	725.000	980.000	1.060.000	1.235.000	1.665.000	1.837.000	1.650.000
Spain	3.637.809	3.767.179	8.179.596	8.625.086	7.800.568	9.075.636	8.870.073	10.760.003	12.390.574
Sweden	5.381.670	5.729.336	6.150.403	6.487.509	5.346.727	7.496.206	10.561.706	10.178.552	10.630.742
Switzerland	1.004.386	989.620	1.042.581	1.325.921	1.505.211	2.066.522	2.258.025	2.118.854	2.187.645

Table 1.5 Equitable remuneration for broadcasting - Collection for performers from 2005 - 2013

Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria	3.473.000	3.859.000	3.801.000	4.131.000	4.045.000	4.233.000	4.348.000	4.319.900	5.029.200
Belgium	1.074.713	1.222.550	1.256.755	1.277.932	1.144.723	1.493.078	1.428.943	1.493.139	1.583.200
Croatia	1.167.044	1.133.404	1.210.624	1.370.413	2.206.368	2.143.276	1.873.190	1.872.249	1.875.363
Czech Republic	1.561.088	3.932.251	3.911.260	3.483.905	3.276.223	3.889.678	4.632.220	4.578.806	4.731.835
Denmark	12.101.872,02	12101872,02	11867158,21	13.369.792,09	12.951.706,61	14.487.089,49	14.037.491	14.258.067	14.619.567
Finland	4.221.859	3.632.651	3.668.472	3.990.772	3.493.861	4.167.579	3.767.788	3.920.823	4.323.634
France ¹⁹	6.374.364	6.226.781	6.336.717	6.800.438	8.593.701	9.187.825	8.422.486	9.384.289	9.072.234
Germany	34.458.400	39.954.400	36.734.900	35.919.000	37.384.000	38.198.068	38.239.559	38.615.991	38.335.673
Greece	3.094.197	3.948.495	4.574.221	6.185.102	4.633.772	4.862.716	3.951.605	3.231.614	2.665.204
Hungary	1.547.679	1.455.359	1.096.649	1.309.638	998.427	847.978	712.931	2.244.516	792.134
Ireland	1.226.973	1.708.403	2.368.374	2.303.059	1.821.268	2.360.413	1.151.825	1.321.068	0
Italy ²⁰	0	0	0	0	0	44.186	12.515.195	12.738.861	8.355.358
Latvia	139.837	203.449	268.931	424.559	231.409	210.392	225.099	230.196	234.141
Lithuania	183.898	217.951	271.752	318.102	222.615	221.216	287.231	372.020	387.282

¹⁹ The French collective management organisation, ADAMI, declined to provide figures.

²⁰ Nuovo IMAIE was established on the 10 July 2010 by effect of the Law 100/10. The amounts collected include remuneration for communication to the public and simulcasting of phonograms.

Netherlands	6.425.000	6.600.000	6.700.000	5.112.889	5.193.168	5.003.076	5.562.853	5.470.474	6.165.448
Norway	4.762.608	5.061.098	5.906.745	5.437.522	5.583.561	5.422.332	5.681.316	5.181.837	5.456.385
Poland	2.411.241	2.934.833	3.511.710	3.438.402	3.198.529	5.774.585	4.420.003	5.649.875	5.610.550
Portugal	749.358	1.410.662	957.151	808.564	629.453	902.195	896.226	956.720	1.481.876
Romania	668.393	1.835.099	3.045.327	3.882.136	3.454.845	2.902.242	3.386.072	3.760.996	4.478.196
Serbia	0	0	0	0	0	0	121.404	193.076	213.067
Slovakia	887.372	860.273	1.303.722	1.304.337	1.230.787	1.307.374	1.210.553	1.106.593	1.046.111
Slovenia	250.000	400.000	450.000	570.000	600.000	852.000	847.000	1.401.000	2.283.000
Spain	43.695.097	32.600.880	23.306.655	33.460.954	29.126.190	41.391.859	52.053.174	44.896.468	38.740.596
Sweden	6.093.414	6.064.861	6.817.518	7.009.320	5.768.396	5.793.289	6.984.730	8.450.941	8.165.200
Switzerland	2.739.415	2.917.716	2.738.828	2.913.827	3.151.619	3.288.278	2.910.793	4.393.909	4.131.245

1.3 Conclusion

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 and constituted 76% of the overall collections for performers in 2013.

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: in France the broad terms "communication to the public" have been restricted in national laws to the terms "communication in public places". Consequently in France, despite the fact that they fall under the broad terms "communication to the public", new types of use such as webcasting have been excluded from the remuneration right to date²¹. In most countries, however, new types of services, such as webcasting and simulcasting are now included in the collection for remuneration.

Moreover in France, the Supreme Court has excluded the broadcasting of commercial phonograms incorporated in audiovisual works from the categories covered by the remuneration right. This exclusion, which seems to contradict the general guarantee provided by article 8(2) of the Directive, is still applied despite the introduction of an amendment to the concerned article (L214-1) of the Intellectual Property Code on 1 August 2006²².

²¹To clarify all doubts, the Recommendation of the Commission of 18 October 2005 clearly cites webcasting, internet radio, simulcasting and near-on-demand services received either on a personal computer or on a mobile phone as belonging to the right of communication to the public, in the form of a right to remuneration in accordance with Directive 2006/115/EC - Recommendation of the Commission of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, article 1(f)(i) and (ii).

²² The new wording for article L214-1 reads as follows:

"Lorsqu'un phonogramme a été publié à des fins de commerce, l'artiste-interprète et le producteur ne peuvent s'opposer :

1° A sa communication directe dans un lieu public, dès lors qu'il n'est pas utilisé dans un spectacle ;

2° A sa radiodiffusion et à sa câble-distribution simultanée et intégrale, ainsi qu'à sa reproduction strictement réservée à ces fins, effectuée par ou pour le compte d'entreprises de communication audiovisuelle en vue de sonoriser leurs programmes propres diffusés sur leur antenne ainsi que sur celles des entreprises de communication audiovisuelle qui acquittent la rémunération équitable.

Dans tous les autres cas, il incombe aux producteurs desdits programmes de se conformer au droit exclusif des titulaires de droits voisins prévu aux articles L. 212-3 et L. 213-1.

Ces utilisations des phonogrammes publiés à des fins de commerce, quel que soit le lieu de fixation de ces phonogrammes, ouvrent droit à rémunération au profit des artistes-interprètes et des producteurs.

Cette rémunération est versée par les personnes qui utilisent les phonogrammes publiés à des fins de commerce dans les conditions mentionnées aux 1° et 2° du présent article.

Elle est assise sur les recettes de l'exploitation ou, à défaut, évaluée forfaitairement dans les cas prévus à l'article L. 131-4.

Elle est répartie par moitié entre les artistes-interprètes et les producteurs de phonogrammes".

Belgium, Denmark, Germany, Greece, Italy, the Netherlands, Poland, Romania, Slovakia, Spain, and Switzerland have extended the right to remuneration to the broadcasting and communication to the public of audiovisual performance fixations.

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

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 users²³.

Furthermore, the Directive does not define what is meant by “equitable” remuneration. According to the Court of Justice of the EU, 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 trade²⁴. 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, as is shown in table 1.2, in general, remuneration is divided in equal shares between performers and producers. As this is current practice in most of the countries, a principle of equal shares between performers and producers could be enshrined in the Directive.

Given the noticeable contractual pressure under which performers are regularly put by their 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. The uncertainty arising from the aforementioned “SCF” and “PPL” cases only increases the risk of having to resort to litigation.

²³ 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.

²⁴ 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.

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. As shown in other parts of this study this extension could be a considerable step forward for performers.

Lastly, 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 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.

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 public²⁵, 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*”²⁶.

²⁵ See chapter of the present document dedicated to broadcasting and communication to the public.

²⁶Article 1(2)

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 organisation²⁷.

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.

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”²⁸.

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 or 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”²⁹ is defined in article 1(4) as:

²⁷Article 3(2)

²⁸Article 1(3)

²⁹ For the purpose of this study, the term "collecting society" is replaced with that of "collective management organisation".

“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.

Article 9(2) covers the situation where a rightholder has not transferred the management of his 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 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 cares 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"³⁰.

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 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:

³⁰See article 9(2) of Directive 93/83/EEC

"[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"³¹.

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.

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" case³². 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*"³³. Consequently, the applicable law will be the law of the Member State where this act of communication takes place³⁴.

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

³¹See article 9(2) of Directive 93/83/EEC

³² Case COMP/C-2/38.698

³³See article 1(2)(a) of Directive 93/83/EEC

³⁴ See article 1(2)(b) of Directive 93/83/EEC

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

This judgement may not be the last word on the subject since it may still be appealed to the Court of Justice of the European Union.

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 the candidate country 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, 17 countries, reported collecting varying amounts³⁵.

The vast majority of these countries have seen an increase in their collections from 2005-2013. It is proof that collective rights management is essential to enforce performers' rights and to guarantee the payment of remuneration to performers.

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

No remuneration for cable retransmission has been collected in Belgium since 1995 due to on-going litigation. Positively, however, a new law was adopted in 2014 introducing a remuneration right for performers when transferring the right to permit or prohibit the retransmission by cable. This right to a remuneration is non-transferable (not by contract and not by presumption) and unwaivable and collective administration of the right is mandatory. These new changes will only be effective as of 1 January 2015.

³⁵Please 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).

In Norway, the whole system is legally contested by the distributors. One of the primary submissions, is 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 Norwegian courts and the arbitration panels have so far ruled in favour of the distributors.

In 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. Today cable operators receive the TV program signals directly in an encrypted transmission from a so-called Media Gateway. Therefore the mandatory collective management of cable retransmission rights as implemented in the Dutch law on the basis of article 9 of the 93/83/EEC Directive does no ,longer apply.

In France, the rights in the audiovisual sector are subject to a presumption of transfer to the benefit of the producer. This transfer has been specifically mentioned in the implementation legislation³⁶. With regard to commercial phonograms, their retransmission simultaneously to broadcasting is covered by the equitable remuneration in application of article L 214-1 of the Intellectual Property Code.

Cable retransmission is not common practice in Greece and Italy with the cable market being only marginal in size or non-existent in the latter case. In Greece, remuneration received for subscription-based services are covered in the figures for broadcasting and communication to the public. Similarly, remuneration for cable retransmission is also collected together with remuneration for broadcasting and communication to the public in Serbia, whilst in the United Kingdom revenues received via collective bargaining agreements in the audiovisual field cover remuneration for cable retransmission (though are not accounted for separately).

In Slovakia, administering the rights of performers has been difficult due to national legislation according to which the user can challenge the contents of a contract or agreement via the courts. This is reflected in the figures in table 2.1 which shows a decrease in collection to €236.429 in 2013 compared to collection of €400.965 in 2005.

Interesting to note is also that the Romanian Constitutional Court decided³⁷ in June 2010 that the provisions regarding "must carry" retransmissions³⁸ are not constitutional. Therefore, cable operators must now also pay the related remunerations for the retransmission of programs included in the "must carry" package. The decision's impact on the overall collection will have to be seen in the coming years.

Similar discussions to remove the "must carry" exemption are also being held in Finland where cable retransmission is currently licensed via extended collective licensing schemes via CopyFinn.

³⁶ See article L 217-2 II of the French Intellectual Property Code

³⁷ Court decision no. 571/2010

³⁸ Article 121(1) of Law no. 8/1996

Whilst the provisions of the Directive apply exclusively to the simultaneous, unaltered and unabridged retransmission by a cable or microwave system of an initial transmission from another Member State³⁹, new digital platforms, however, have enabled programmes to be retransmitted simultaneously across different networks. The question arises as to whether the technologically specific Satellite Broadcasting and Cable Retransmission Directive needs to be reviewed and amended to be technologically neutral. This point has also been recently raised by the European Commission in 2011 in its consultation on the Green Paper on the online distribution of audiovisual works⁴⁰.

³⁹See article 1(3) of the Directive

⁴⁰COM(2011) 427 final

Table 2.1 Cable Retransmission –Collection for performers 2005-2013
Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria ⁴¹	481,000	487,000	486,000	521,000	600,000	635,000	688,000	745,500	849,000
Belgium	0	0	0	0	0	0	0	0	0
Croatia	0	42,114	58,535	83,525	127,207	301,591	269,913	286,615	356,674
Czech Republic	0	121,278	150,178	121,496	284,064	490,422	585,898	663,732	750,713
Denmark	0	3,572,380	3,822,295	3,374,536	4,000,191	4,452,481	7,533,566	7,258,447	8,230,778
Finland	0	0	0	0	0	0	0	0	0
France	0	0	0	0	0	0	0	0	0
Germany	0	4,225,000	2,780,000	3,391,000	3,565,000	4,227,219	4,224,834	4,336,067	4,166,914
Greece	0	0	0	0	0	0	0	0	0
Hungary	493,404	1,170,706	346,505	891,264	883,156	719,161	0	0	0
Ireland	0	0	0	0	0	0	0	0	0
Italy	0	0	0	0	0	0	0	0	0
Latvia	0	0	0	0	0	0	0	27,462	230,938
Lithuania	14,369	29,946	49,138	71,424	103,574	130,163	139,088	150,040	162,377
Netherlands	0	1,556,000	1,603,000	2,032,307	2,276,810	2,446,930	2,712,527	2,683,320	3,678,836
Norway	0	0	0	0	0	0	0	0	0
Poland	4,831	3,579	4,520	19,628	23,023	37,901	75,249	75,758	70,107
Portugal	1,183,541	739,393	781,617	1,230,138	1,150,159	1,262,641	1,357,205	2,002,555	2,086,114
Romania	1,468,902	1,240,155	724,580	817,741	897,188	2,210,127	2,093,743	1,235,492	311,267
Serbia ⁴²	0	0	0	0	0	0	0	0	0
Slovakia	400,965	400,964	291,175	43,257	48,616	130,136	122,982	100,502	236,429
Slovenia	0	9,200	23,000	52,000	105,000	108,000	103,000	91,000	98,000
Spain	1,435,748	1,457,357	3,812,024	2,652,285	3,682,192	3,948,097	3,658,411	2,847,402	3,044,688
Sweden	1,093,825	1,358,492	1,389,145	1,676,733	1,558,688	1,489,307	1,594,423	1,289,630	1,237,975
Switzerland	2,209,979	2,219,501	2,702,657	2,732,264	2,950,233	3,253,827	3,252,892	3,554,004	3,667,489

⁴¹ IP TV included

⁴² Collections are included in the figures for communication to the public.

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.

As retransmission is now also enabled on new digital platforms, the question arises as to whether the Directive should be rendered technologically neutral. This point has been subject to a public consultation launched by the Commission in 2011. Whether this consultation will lead to further legislative steps remains to be seen.

Chapter 3: Making available to the public of services 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)⁴³. 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 on 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.

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".

⁴³ 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 the making available of on-demand services.

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 states, 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.

The Treaty has yet to be ratified by 30 states before entering into force.

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.

On 13 July 2011, the European Commission launched for consultation the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market”⁴⁴. This document raised a number of issues important to performers for comments and discussions. It looked at the ways in which the audiovisual sector is changing in response to technology developments and consumer expectations.

The document is clearly aimed at the audiovisual sector, but much of its contents are equally applicable to the audio sector. In particular, the Green Paper inter alia raises an important question on the need to remunerate audiovisual rightsholders, including performers, for the online use of their works. In this regard, it asks whether additional measures should be taken at EU level to ensure the adequate remuneration of performers in relation to online uses of their performances in which they hold rights.

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). Furthermore the Commission launched a study conducted by Europe Economics and the University of Amsterdam in order to assess the current situation of performers (legally and economically).

⁴⁴ Available at http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf

As a next step, the new Commission is expected to come forward with legislative proposals to reform the copyright acquis in 2015/2016.

It is encouraging for performers that the issue of remuneration in this context has been added to the discussion by the Commission.

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 Directive⁴⁵.

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 well⁴⁶. 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 public⁴⁷.

On 7 March 2012, the French Court of Appeal rejected all demands of the French performers’ organisation, SPEDIDAM, to obtain remuneration for performers if their performances are made available via download platforms (such as iTunes, Fnac Music and Virgin Mega). According to the court, the authorisation given by performers to the producers regarding the exploitation of physical recordings also covers the exploitation of the recording on the Internet.

Performers authorised only, in initial contractual recording session forms, the making of a phonogram to be published for commercial purposes. According to the court’s reasoning, commercial downloading is also “for commercial purposes” and a commercial download is a publication for commercial purposes. It therefore disregards the definition of publication existing in international instruments. The court considered that the act of making available on demand of phonograms was included in the initial authorisation given for the publication for commercial purposes. The right of making available on demand is then absorbed and neutralised by the distribution right. Unfortunately, this judgement was upheld by the French Supreme Court (Cour de Cassation) on 11 September 2013.

In Sweden there is new legislation introducing an extended collective license scheme for radio and TV companies for programmes made available at the request of individuals, for example via the Internet after the regular transmission time.

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ *Tb. Com.*, Paris, 3 March, 1997, *La semaine juridique* (JCP), 1997, p. 22; Kerever, A., ‘*Chronique de jurisprudence*’, *RIDA*, 1997/172, 215.

In Portugal, the exclusive right to making available on demand is subject to collective mandatory management. In practice however no remuneration has been collected due to pressure from the producers' organisation. GDA is however now pursuing the implementation of this right via the courts.

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”⁴⁸.

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 otherwise⁴⁹. Article 108 concerning the 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 law⁵⁰.

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)).

3.2 Practice

In recent years, various commercial business models for music or audiovisual services based on Internet or mobile phone technologies have been developing considerably. 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. All these services are based on the making available of music or films to the public on demand.

According to the International Video Federation, spending on audiovisual content through digital platforms and services rose by 42.8% in 2013, to a total of €1.97 billion, including “paid for at the point of consumption” and subscription TV-based video-on-demand. The largest generator of digital video spending is still TV VOD, worth €787.2 million in 2013⁵¹.

At the global level the recorded music industry’s digital revenues grew by 4.3% in 2013. There was steep growth in both revenues and user numbers for subscription services, continued revenue growth from ad-supported services and stable income from download sales in most markets. Globally, digital now accounts for 39% of total industry global revenues.

⁴⁸Article 20(2)(i) of the Spanish IP Law

⁴⁹Article 108(2) of the Spanish IP Law

⁵⁰Article 108(3)-(6) of the Spanish IP Law

⁵¹International Video Federation 2014 – European Video Yearbook 2014

At the European level, Europe saw digital growth of 13.3%, leading to its first overall market increase since 2001. Five of the region's largest markets, France, Italy, Germany, Netherlands and the UK, returned to overall growth⁵².

For example, revenue from recorded-music sales in Italy in the first half of 2014 increased 6.6% compared with the same period of 2013⁵³.

According to Dutch entertainment-industry association NVPI, "in 2013 the total revenue of the Dutch music industry increased by 1.1% to €130 million"⁵⁴.

The Belgian Entertainment Association (BEA) reports that the market share attributable to streaming and download combined in 2013 was 30%, reflecting a continuing upward trend in revenue from the digital sector. In 2012, that figure was only 20.5%⁵⁵.

In both audio and audiovisual sectors, the performer almost always transfers his 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.

From 26 countries participating in this study, the vast majority of countries have not collected any remuneration whatsoever for performers for the making available on demand of their performances.

In 9 countries, some marginal collection of remuneration could be obtained in 2013, either through collective bargaining agreements (e.g. the United Kingdom), extended collective agreements (e.g. Denmark, Finland) 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.

In the Czech Republic, for instance, only a very small number of performers in the audio sector have retained their making available right and have transferred the administration of this right to the collective management organisation INTERGRAM with regard to the use of ringtones. However, the amount raised by this administration concerns only a very few performers and the total collection by the Czech collective management organisation for the exercise of this right averaged around €200.000 per annum for the years 2008-2010 and only €130.932 in 2013.

In the Netherlands, actors have transferred their making available rights to NORMA, which is currently (together with another collective management organisation) approaching providers of video-on-demand services to negotiate a remuneration scheme for making available on demand. Together with other collective management organisations, NORMA entered into an agreement with a VOD platform named 'Ximon', which is intended to make all Dutch movies available to the public. However, to date only minimal collection of remuneration has been recorded.

⁵²IFPI Digital Music Report 2014

⁵³Music and Copyright, August 2014

⁵⁴ NVPI study: Jaarcijfers audio 2013 at www.nvpi.nl/marktinformatie-audio-2013

⁵⁵ GFK Retail and Technology/BEA Music

As performers generally transfer their exclusive right to the producer, the possibility to mandate a performers' collective management organisation to administer such a right is limited and remains the exception rather than practice.

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.

In countries such as Hungary, Germany⁵⁶, Slovenia and Switzerland collections have been insignificant. Clearly, the figures in table 3.1 demonstrate that the exclusive right to making available cannot be effectively enforced in practice in a manner which would lead to a meaningful payment of remuneration to performers.

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. Spanish performers' organisations are currently in the process of negotiating with users and of enforcing the right to remuneration via the courts.

Whilst until 2010 no collections have yet been recorded, the Spanish performers' organisations, AIE, and AISGE have successfully entered into agreements with key users established in the Spanish market carrying out acts of making available on demand of music, such as Apple, Spotify, Mobistar, Orange, Vodafone, Digital + and Imagenio. Bearing in mind the difficulties in Spain vis-à-vis the operation of legal services, total collection in Spain increased from €244.721 in 2010 (first year of collection) to €650.093 in 2013.

⁵⁶Only with regard to catch up TV-/Radio on demand services for pre broadcasted programmes and only with regards to the phonograms included in these programmes.

Table 3.1 Remuneration collected for making available on demand: 2005-2013
Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria	0	0	0	0	0	0	0	0	0
Belgium	0	0	0	0	0	0	0	0	0
Croatia	0	0	0	0	0	0	0	0	0
Czech Republic	32	40	0	205.253	231.671	203.223	188.071	154.268	130.932
Denmark	0	214.584	195.349	2.223	25.599	703.715	613.572	525.683	875.673
Finland	0	0	0	189.000	283.139	228.584	237.621	276.212	213.985
France	0	0	0	0	0	0	0	0	0
Germany	0	0	0	0	95.000	115.201	397.522	371.277	345.733
Greece	0	0	0	0	0	0	0	0	0
Hungary	2.991	23.266	225	0	417	0	0	0	0
Ireland	0	0	0	0	0	0	0	0	0
Italy	0	0	0	0	0	0	0	145.000	0
Latvia	0	0	0	0	0	0	0	0	0
Lithuania	0	0	0	0	0	0	0	0	0
Netherlands	0	0	0	0	0	0	0	651	1.565
Norway	0	0	0	0	0	0	0	0	0
Poland	0	0	0	0	0	0	0	0	0
Portugal	0	0	0	0	0	0	0	0	0
Romania	0	0	0	0	0	0	171	12.947	18.290
Serbia	0	0	0	0	0	0	0	0	0
Slovakia	0	0	0	0	0	0	0	0	0
Slovenia	0	0	0	1.100	2.700	3.700	3.400	51.000	34.000
Spain	0	0	0	0	0	0	244.721	495.880	650.093
Sweden	0	0	0	0	0	0	0	0	0
Switzerland	0	0	0	3.000	3.000	3.000	3.000	3.000	3.000

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 2013 performers' organisations in 26 countries collected a total remuneration of only €2.273.271,61 for the making available on demand of their performances. Less than 1% of total collection.

The reason for this is that the 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 on-demand services, which has become a significant new market and continues to grow rapidly, 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 use⁵⁷.

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 until 2010 no collections have yet been recorded, 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.

⁵⁷ Collective management organisations are in general in a better position than performers acting individually to negotiate and obtain global agreements providing for satisfactory remuneration for performers and to enforce them. Therefore, an alternative solution could also be to make it compulsory for 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 performance made without his consent⁵⁸. 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 the performer an exclusive right of authorising the reproduction of his performances fixed in phonograms⁶³. It does not provide an explicit exception for private use. It simply states that Member States may provide for the same kind of limitations or exceptions as they provide in their national legislation in connection with the protection of copyright in literary and artistic 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 states 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 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.

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

⁵⁹Article 15(1)(a) of Rome Convention

⁶⁰Article 14 TRIPS Agreement

⁶¹Article 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.

⁶³Article 7 WPPT

⁶⁴Article 16(1) WPPT

European legal framework

EU Directive

The possibility of Member States providing for an exception to the reproduction right in the event of private copying and the conditions attached to an exception of this nature were 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.

According to Directive 2001/29/EC the exception for private use, like all the other exceptions envisaged in this Directive, is submitted to the three-steps-test⁶⁶. The concept of the three-steps-test was introduced in the field of the neighbouring rights by the WPPT, in similar terms to those used for authors in the Berne Convention. 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.

⁶⁵Some 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”*.

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

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

How a system of this type should be designed relies on national competence.

European Court of Justice case law

Recently, there have been a number of important Court of Justice of the EU decisions vis-à-vis private copying remuneration. These decisions provide guidance regarding specific aspects of these regimes. Several new references have been made in recent months with decisions by the Court still having to be made.

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 Court of Justice of the EU.

- *Padawan v SGAE*

In the Padawan case⁶⁸, the Court of Justice of the EU 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.

⁶⁸Padawan SL v Sociedad General de Autores y Editores (SGAE): C-467/08, 21 October 2010

⁶⁹ Paragraph 39

⁷⁰ Paragraph 33

⁷¹ Paragraph 39

⁷² Paragraph 44

⁷³ Paragraph 54

⁷⁴ Paragraph 56

⁷⁵ Paragraph 59

- *Stichting de ThuisKopie v Opus*

In the Opus case⁷⁶, the Court of Justice of the EU 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 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 to 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 Court of Justice of the EU gave its ruling in the VG Wort case (C-457/11).

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.”*

⁷⁶Stichting de ThuisKopie v Opus GmbH: Case C-462/09, 16 June 2011

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 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 Court of Justice of the EU ruled in the case C-521/11 *Amazon.com v Austro-Mechana*.

In its judgement, the Court has 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 those 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:

“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” (reference to Luksan case: C-277/10).

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, provided that it actually benefits those entitled and the detailed arrangements for the operation of such establishments are not discriminatory. These points are to be verified by the national court.

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.

- *ACI Adam BV and Others v Stichting de ThuisKopie*

On 10 April 2014, the Court of Justice of the EU issued its judgement in the case of ACI Adam BV and Others v Stichting de ThuisKopie (Case C-435/12).

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 takes into account harm suffered by rightholders as a result of copies made from unlawful sources.

The referring court in the Netherlands stated that Directive 2001/29 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).

The CJEU further stressed that if a Member State has made the choice of introducing an exception contained in article 5 of the 2001/29/EC Directive *“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).

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.

Already in 2005, the European Commission started addressing the question of private copying. In particular, they wanted to assess the degree of use of DRMs (and in particular TPMs or “technical protection measures” limiting or preventing acts of reproduction) as well as the way Member States had applied the exception for private copying and related compensation schemes.

At that time it remained uncertain whether or not the use of TPM to prevent or limit the number of reproductions for private, non-commercial purposes would become general practice and would have the effect of significantly reducing or even stopping acts of private copying. Since then, the use of TPM has proved to remain limited and sometimes easily circumvented. In addition, they may have adverse side-effects like a lack of interoperability, thus preventing also a number of authorised uses.

After extensive consultations and analysis, 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 recommendations⁷⁷.

⁷⁷ http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

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 (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 include 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 seeks 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. As a next step, the new Commission is expected to come forward with legislative proposals to reform the copyright acquis in 2015/2016 and private copying remuneration is likely to be one of the issues addressed.

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, which only recently joined the European Union, 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 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 various revisions/amendments of national laws (e.g. France in 2011, Lithuania in 2012 and Spain in 2011).

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 will be 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 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 has allocated NOK 45.5 million which is to be distributed by NORWACO⁷⁸ to its member organisations.

A similar mechanism was put in place in Spain on 31 December 2011, thereby abolishing the previous system⁷⁹. According to the new law, remuneration for private copying will 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 year⁸⁰. 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 have since launched a complaint against the Spanish Government to the European Commission arguing that the Spanish system is not in compliance with EU law⁸¹.

AEPO-ARTIS has also submitted a complaint 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.

The matter will now also be dealt with by the CJEU following a preliminary reference from the Spanish courts⁸².

On 4 November 2014 a further amendment to the Spanish law was adopted (Law 21/2014) which aims at limiting the scope of the private copying exception in Spain and thereby to justify the amount of compensation paid via the state budget.

Of the countries participating in this study only in the Ireland and the United Kingdom (the latter until recently) have no exception and no corresponding remuneration scheme⁸³. Rightholders in these countries nevertheless benefit from remuneration for private copying from those countries which do provide for private copying remuneration.

⁷⁸ <http://www.norwaco.no/eng>

⁷⁹ Despite these latest developments, the study describes the private copying remuneration system in Spain from 2005 – 2010.

⁸⁰ ENMIENDA NÚM. 2529 Del Grupo Parlamentario Popular en el Senado (GPP)

⁸¹ The complaint was submitted by EGEDA, AGEDI, AIE, AISGE, DMA, SGAE and VEGAP on 1 August 2012

⁸² EGEDA and others, C-470/14

⁸³ 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).

On 1 October 2014, the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 was implemented⁸⁴ introducing the private copying exception into UK law.

The implementation follows long and often heated debate about its scope. In particular the Regulations are considered deficient, in that they fail to make provision for the payment of fair compensation to rightsholders.

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, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania⁸⁵, Poland, Romania, Serbia, Slovakia, Slovenia, Spain⁸⁶, Sweden and Switzerland. In Denmark and until recently in the Netherlands, 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 end 2013 a levy is now also payable on computers, tablets and game consoles with internal hard disks (inbuilt memory) and since 2014 also on mobile phones.

In the Netherlands, a court only recently affirmed that private copying levies should also apply to digital media. 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 disk, 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 as assumable that rightholders have suffered damages as a result of the private copy exception.

⁸⁴<http://www.legislation.gov.uk/ukdsi/2014/9780111116036/contents>

⁸⁵ In force since March 2012

⁸⁶ Only until 31 December 2011

Therefore, taking into account the also recent ruling 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. 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.

Equally, following a decision of the Latvian Constitutional Court (December 2012), the government in Latvia (according to the usage survey) updated the list of blank tape levies.

Whilst continued technological progress deters any regulation involving the definitive listing of specific types of carriers and equipment and favours general regulations, some governments have responded to this challenge by providing for a revisable system, e.g. in Belgium, France, Hungary, Italy and Romania. On a regular basis, the French public authorities, for instance, revise the list of equipment and blank carriers, as well as the applied tariffs. A series of conditions established in the law need to be taken into account, including the level of reproduction and further private use, the extent of the prejudice caused and the applicability and efficiency of anti-copying devices.

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). 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 have notably different positions on the regime and associated remuneration applicable to copies resulting from illegal sources such as unauthorised P2P systems.

In France, the law has been amended in 2011 following a decision by the Conseil d'Etat⁸⁷, establishing that private copying remuneration must only take into account copies made from non-infringing sources. Similar provisions exist also in Denmark, Germany (excluding obviously illegal sources), Finland, Greece, Lithuania (since March 2012), Norway, Serbia, Spain and Sweden. In other countries such as Belgium, Croatia, Czech Republic, the Netherlands, Poland, Slovakia and Slovenia the law does not make an express distinction regarding the legal character of the source.

However, the Court of Justice of the EU has now clarified the situation by stating that private copying may only be from a lawful source⁸⁸.

The Dutch government already announced that starting January 2015, the system will be modified accordingly. Other national laws are also expected to be brought in line with the ruling.

Moreover, copies made for professional purposes should be excluded from the private copying exception⁸⁹ and therefore should not be levied, subject to practical modalities to be agreed on. Most countries have already/or are amending national provisions in this regard either in form of exemptions (e.g. Greece, Serbia and Sweden) or reimbursement mechanisms (e.g. Denmark and Lithuania) or both (e.g. France and Switzerland)⁹⁰.

⁸⁷ On 11 July 2008, the French Conseil d'Etat (supreme administrative court) issued a decision cancelling the French Private Copying Commission's decision of 20 July 2006 according to the principle that "private copying remuneration must only take into account legal copies".

⁸⁸ See *ACI Adam BV and Others v Stichting de ThuisKopie*

⁸⁹ See reference to Padawan case above

⁹⁰ 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.*").

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, the Court of Justice of the EU 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 concerned⁹¹.

Rules about sharing remuneration:

Remuneration for private copying is shared between all categories of rightholders concerned: performers, authors and producers. The division between the various rightholders 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, Lithuania (as of March 2012 equal shares are paid), the Netherlands, Poland, Romania (audio), Serbia, Slovakia, Slovenia and Spain (audio/analogue⁹²)) this division made is unbalanced and does not involve equal shares for the various categories of rightholders - performers, authors and producers. 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.

The amount dedicated for these purposes is either set by law (e.g. Croatia, Denmark, France, Lithuania, Serbia and Spain⁹³) 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 Court of Justice of the EU⁹⁴, 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.

⁹¹ Padawan SL v Sociedad General de Autores y Editores de España SGAE (Case C-467/08); see also Stichting de Thuiskopie v Opus GmbH (Case C-462/09)

⁹² Until 31 December 2011

⁹³ Until 31 December 2011

⁹⁴ See third question raised by the Austrian Court in ECJ 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 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? »

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 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.

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; harddisc drive in 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	Tariffs set by collective management organisation, but actual	Manufacturers and importers of equipment or carriers	Audio: 4:3:3 authors/performers/producers Audiovisual: shares between audio and video part are set	On basis of Croatian Copyright act 2003, 30% for

		analogue audio and video recorders)	remuneration is set as result of negotiations Fixed amount for the carriers (distinction analogue and digital) and the equipment		differently for each type of carrier and device In audio part:4:3:3 authors/performers/producers In video part: 7:3 authors, producers / performers	social and cultural aims.
Czech Republic	Stipulated in the law (rate schedule attached in the annex of the IP law)	On equipment and carriers (audio and video)	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 (article104) 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 only applies to recording discs and memory cards, not to recording equipment (hard discs, set top boxes)	Set in legislation	Importer or manufacturer	According to agreement: 5 % for broadcasters, the reminder 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	CD-R, RW Data, DVD-Ram, DVD-R, RW-Data, walkman that integrate either a hard disc or a flash card, USB key flash card musical or not, sound hi-fi living room devices, recordable DVD, the great capacity devices (more than 80 Go), multimedia Walkman, living room multimedia devices, flash-cards non-dedicated, USB key non-dedicated, external hard discs and external multimedia hard discs, all external systems of storage using disc or flash card (SSD), storage	Determined by a 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	Audio: 50% to authors, 25% to performers, 25% to producers Audiovisual: 1/3 to authors, 1/3 to performers, 1/3 to producers	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, ...

		system such as NAS or NDAS (desktop version), the system that contain one or several computer port(s) (RJ45 type), flash cards and hard discs dedicated to the recording or to the listening of sound works integrated to GPS navigation service (included in a car and/ or an auto radio), tactile multimedia tabs, flash cards and USB key, External hard disc, bundles sales.				
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	Up to 5% can be used according to collecting society's statutes to cultural and social purposes

					performers (64%) and phonogram producers (36 %) 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 analog 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)	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

			with a capacity of less than 100 million digits (less than 100 Mbytes)			
Hungary	Legislation	<p>Audio cassettes, video cassettes</p> <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 (e.g. CF, MMC, MS, Smart Media, SD, Mini SD, MicroSD, xD, Microdrive)</p> <p>external storage devices (e.g. Pendrive, USB Flash Drive, SSD) (from 2009)</p> <p>Storage units integrated to portable multimedia devices (e.g. portable music players)</p> <p>Storage units integrated to mobile phones</p> <p>Storage units integrated to entertainment devices (e.g. video recorders-players, DVD-writers, -recorders, -players, televisions, set-top-boxes) (from 2007 and 2009 – set-top-box)</p>	<p>Private copying remuneration shall be determined by the 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</p>	<p>The remuneration shall be paid by the manufacturer of blank 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</p>	<p>Audio: 45% shall be due to the composers and writers, 30% to 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>80% is dedicated for cultural, professional and social activities. However significant changes are to be expected from 2012, because of legislative changes (effective from 1January 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>

		External storage devices (external harddisc and HDD) since 2011	videocassettes, on what tariffs are calculated per piece	of putting them into circulation, whichever is earlier. For the payment of the remuneration, all domestic distributors shall be jointly responsible.		
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 ⁹⁵	Manufacturers and importers	Collected by SIAE for all right holders and then shared as follows: audio 50% authors; 50% producers (half to be paid to performers through their collecting societies) 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) <u>Total share of performers' remuneration:</u> 25% of the audio private copy (collected from producers)	By law the 50% of the video private copy assigned to performers should be dedicated to the promotion, training and professional support for artists and performers.

⁹⁵By Law the Decree that set tariff is subject to a triennial update. The last Decree was issued on June 2014 and the previous one in 2010. Both Decrees are now under the Court's decisions, following the lawsuit promoted by consumers' organisations and by several new ITC companies as new bodies liable to payment.

					23,33 of video private copy (collected from SIAE)	
Latvia	Legislation Based on Ministry of Culture organised usage survey	CD, DVD's, USB, PC's	Cabinet of Ministry of Culture working groups	Importers/ manufacturer	Authors: 38,66% producers: 6,67% Performers: 24% 6,67% Producers: 24%	Film Actors: -
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	For disc media tariffs are flat 6% of the wholesale price; for USB media, flash memory cards equipment they are fixed amounts from 0.3 EUR to 8 EUR on the wholesale price; for mobile phones, media players, jukeboxes, TVs with recording function – fixed amounts from 0.4 EUR to 12 EUR on the wholesale price; for tablets and PCs the flat rate of 6 EUR on the wholesale price is imposed regardless of internal memory capacity. Differentiation is based on the memory capacity. For multifunction devices	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

			from 0,6% to 3% on the wholesale price			
Netherlands	Legislation	Data cd-r/rw, empty dvd-r/rw, empty dvd+r/rw, audio cd-r/rw, HI MD, VHS tapes, cassette tapes, MiniDiscs Since end 2012: HDD recorder/set-top-box, External HDD, phones with MP3 player/smartphones, tablets and PCs/Laptops	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	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
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	<p>Devices and blank carriers listed in the Regulation of the Minister of Culture</p> <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>	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	<p>In virtue of Copyright Act:</p> <p>The amount received in the form of fees from the sale of tape recorders and other similar devices as well as blank 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>	An amount is dedicated by agreement of the members of the collecting society
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 MP3players, external hard drives, memory cards, ...</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)	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	% 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 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 article131 of Law no. 8/1996	Manufacturers and importers of physical media or devices	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	-

		VHS (except: Video 8, Digital 8, Hi8, DVM, VHS-C, Super VHS-C), D-VHS, HD video tapes CD blank, DVD blank, CD data Mobile Phone memory card ⁹⁶				
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	A blank recording medium, a technical device designated for making of reproductions, a reprographic equipment or other technical equipment, a personal computer, paid reproduction services	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,	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%	-

⁹⁶ According to the List negotiated in 2009 (Decision no. 61/2009)

			5% personal computer, 3 % paid reproduction services		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	
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	Article 25 of the Law on Intellectual Property. (information based on law in place until December 2011) The Spanish government, by means of a Royal Decree and as	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-	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	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) Since 1 January 2012, the compensation is allocated through the Spanish national budget	Specified in Royal Decree 1434/1992 (article36) 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

	published in the Bulletin of the State on 31 December 2012, modified the system of remuneration for private copying, where <i>inter alia</i> the compensation is to be paid via the state budget.	DVD writer (internal), HD-DVD recorder (external), Memory Card, USB Stick, Harddisc, MP4, Mobile phone/MP3	management organisations and the debtors. In case of no agreement, decision by the Ministries of Culture and Industry			
Sweden	Legislation	Carriers (A/AV): cassettes (audio and VHS), minidiscs, 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	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	-

			Industry taking into consideration market conditions, other compensation etc.			
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, 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 2008, remuneration for acts of private copying accounted for approximately 21% of the total revenue collected by the performers' organisations of the countries under examination. In 2010 that percentage had remained stable, accounting for 26% of collections. In 2013, however, the collection dramatically decreased and now only amounts to 15% of the total collection).

Whilst the collection in 2013 amounted to €57.835.963 in 2010 the collection was €100.390.146. A dramatic decrease of nearly half of the collection. It reflects the urgent need to adapt the private copying remuneration system to the new technological developments, including some cloud computing services.

Despite this significant decrease, private copying remuneration still represents the second most important source of income for performers.

Whilst in some few countries, collections increased (Belgium, the Czech Republic and France), a country-by-country analysis of the collections suggests a downward trend in private copying remuneration for performers. Between 2008 and 2013, collection decreased in particular in Germany (34%), Spain (89%) and Sweden (47%).

In Germany, since the implementation of a new remuneration system regarding the remuneration for private copying in 2008 there has been several legal disputes. Before the legislative amendment in 2008 the amount of remuneration for different levies was stipulated by law in the German Copyright Act. Since 2008 the amounts are not stipulated by law anymore but are subject to negotiation. The respective clause in article 54a of the German Copyright Act now says: *"in determining the amount of remuneration, account shall be taken of such properties of the appliances and storage mediums as are relevant to exploitation, in particular the capacity of appliances, as well as the storage capacity of storage mediums and the extent to which they are rewritable"*. For that reason there have been several legal disputes about the remuneration amounts and the respective shares between the different collective management organisations. Currently importers are only paying compensation for PCs claiming that mobile phones and ipods are not used for private copying. Rightholders have the burden of proof – by undertaking costly empirical studies – that private copying is taking place on these devices.

In Spain, 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 is 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 €2.110.120 in 2013.

In Serbia the low level of remuneration may be explained due to the fact that collection only started in 2009.

In Slovenia, 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.

In the Netherlands there was a considerable drop from €17.762.000 collected in 2005 to €1.529.860 in 2013. This may be due to a confusing situation regarding national law. The Dutch government omitted to extend the list of devices and as a result the system has become less significant. This situation has only been changed recently as the Dutch Court of Appeal ruled that the Dutch government acted against Dutch law and ordered it to pay damages to rightholders. The government has recently updated the list of devices.

Updating the list of devices to which private remuneration is payable according to new technological developments is essential for the system to remain significant.

The immediate impact on the collection of remuneration can be seen in Belgium. Here, the list of carriers and equipment for which private copying remuneration is payable was extended to include digital carriers and devices by decree on 17 December 2009. The result of this amendment already shows in the collection of remuneration for 2010 which increased considerably to €6.081.929 from €4.015.455 in the previous year. In 2013, remuneration for private copying increased to €7.125.011.

In Lithuania collection decreased staggeringly from €202.284 in 2008 to €26.878 in 2010. However, the update of the list of devices and media on which a private copying levy is payable has already made an impact with collections increasing to €880.735 in 2012.

Equally, following a decision of the Latvian Constitutional Court (December 2012), the Latvian government updated the list of devices and media for which a levy is payable. Already in 2013, collection increased to €76.962 from €28.206 in 2012.

In countries where the tariffs are set via agreement with the ICT industry, this is becoming increasingly difficult. 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. mobile phones). Similar cases were also reported from the Czech Republic and Switzerland.

Where collection of private copying remuneration is a percentage of the sale price of devices, revenue collected has gone down possibly also due to low or declining prices of devices (e.g. the Czech Republic, Lithuania, Poland, Slovakia and Switzerland).

France, in common with many countries, has seen significant developments in the market for physical and digital media carrying devices. The rise in sales of blank CDs reached a peak around 2003 and continuously declined in the following years. In addition, the increase in sales of blank DVDs has also slowed down in the recent years. During the same period, the sales of digital carriers such as memory cards, USB sticks, MP3 players and external hard drives developed quickly and though collections did increase somewhat in 2009, 2010 and again in 2013 in France, it has not been equal to the revenue

from the sales of more traditional carriers. It has to be taken into account that these devices tend to have a much higher storage capacity and are sold at prices that become readily affordable for the consumer. Given the huge recording capacity offered by some of these devices offered for sale not only to professionals but to any consumer, the tariffs payable in respect of these products have not increased in proportion to the increase in storage capacity which they provide.

Following the judgement of the Court of Justice of the EU in the Padawan case (see above), performers' collective rights management organisations also have to deal with pressure from importers regarding the exclusion of professional uses.

Table 4.2 Private copying – Collection Evolution by country 2005-2013
Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria	2.922.000	2.429.000	2.494.000	2.249.000	1.075.000	846.000	642.000	3.063.000	937.000
Belgium	6.148.141	5.945.935	6.180.213	5.158.926	4.015.455	6.081.929	7.510.513	7.310.161	7.125.011
Croatia	0	38.995	38.995	422.653	440.941	313.474	286.239	260.633	291.621
Czech Republic	392.423	546.780	1.024.178	1.310.746	1.491.697	911.244	970.372	1.113.781	1.141.998
Denmark	0	523.746	357.763	7.335	828.070	208.836	433.660	883.009	84.545
Finland	0	0	0	0	1.961.812	1.516.169	1.084.679	952.079	979.047
France ⁹⁷	15.307.595	14.777.559	15.590.374	14.768.220	17.092.986	17.285.602	15.367.846	15.797.085	21.978.024
Germany	24.279.680	22.885.360	23.147.520	18.537.000	31.941.000	39.435.309	1.679.046	13.301.148	15.987.309
Greece	275.171	543.286	433.346	498.115	351.214	667.514	638.595	347.077	343.229
Hungary	1.526.942	3.477.301	2.021.353	2.471.678	1.947.703	2.346.167	2.129.950	2.473.954	2.461.552
Ireland	9.341	9.423	22.830	23.504	21.279	27.519	0	0	0
Italy ⁹⁸	0	0	0	0	0	1.341.051	2.269.020	11.663.728	10.546.387
Latvia	153.757	164.453	155.153	115.188	66.484	26.830	24.850	28.206	76.962
Lithuania	57.567	34.431	16.973	202.284	189.038	26.878	482.733	880.735	0 ⁹⁹
Netherlands	12.775.000	5.024.000	4.247.000	4.152.000	3.201.000	3.522.000	1.655.129	698.505	1.529.860
Norway	0	0	0	0	0	396.861	411.773	353.405	0
Poland	101.295	1.080.367	778.086	1.209.261	821.498	688.293	394.435	386.897	600.951
Portugal	877.522	1.520.766	1.038.356	693.485	823.351	551.593	556.627	184.028	297.045
Romania	173.392	156.773	200.212	364.436	147.692	258.698	385.782	248.532	432.634
Serbia	0	0	0	0	68.295	29.122	0	0	46.725
Slovakia	111.522	111.522	153.140	158.117	124.293	92.278	95.786	48.599	51.907
Slovenia	0	0	0	105.000	110.000	0	0	0	0
Spain	19.859.149	15.839.667	15.195.892	13.517.002	21.250.572	22.381.911	16.263.894	2.900.685	2.110.120
Sweden	2.532.929	2.654.139	3.151.624	4.081.727	4.334.777	2.709.214	1.374.619	1.302.581	1.334.780
Switzerland	997.435	1.301.737	1.178.864	2.384.730	2.252.584	1.464.299	1.383.081	1.192.456	1.259.688

⁹⁷ The French collective management organisation, ADAMI, declined to provide figures.

⁹⁸ Nuovo IMAIE was established on the 10 July 2010 by effect of the Law 100/10.

⁹⁹ 2013 figures were not available at the time of the preparation of the 2014 update of the AEPO-ARTIS study.

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 latter introduced an exception into its national law effective as of October 2014 without however the payment of compensation to rightholders.

The amount collected represents an essential part of the revenues received by performers from collective management organisations. In 2008, remuneration for acts of private copying accounted for approximately 21% of the total revenue collected by the performers' organisations of the countries under examination. In 2010 that percentage had remained stable, accounting for 26% of collections. In 2013, however, the collection dramatically decreased and now only amounts to 15% of the total collection).

Whilst the collection in 2013 amounted to €57.835.963 in 2010 the collection was €100.390.146. A dramatic decrease of nearly half of the collection. It reflects the urgent need to adapt the private copying remuneration system to the new technological developments, including some cloud computing services.

Despite this significant decrease, private copying remuneration still represents the second most important source of income for performers. Accordingly, the importance of private copying remuneration should not be underestimated.

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

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

In Spain, for instance, this system has come into effect only recently, on 1 January 2012, following intense political pressure from the ICT industries. With nearly 6 months without any remuneration being paid to rightholders, in June 2012 the Spanish government finally set the level of compensation at €5m per year. In comparison, whilst private copying remuneration amounted to €19.859.149 in 2005, it decreased to a mere €2.110.120 in 2013. Such compensation is clearly not equivalent to the collection up until 2010 and indisputably represents a considerable decrease in performers' income.

Spanish rightholder organisations supported also by AEPO-ARTIS have filed a joint complaint against the Spanish Government to the European Commission arguing that the new law is incompatible with EU law for several reasons.

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 Court of Justice of the EU in the recent Padawan case.

Moreover, from these countries the vast majority of them operate a dual remuneration scheme with remuneration applicable on equipment and blank carriers. Some countries have only recently adjusted the private copying regime to cover also devices (e.g. Belgium, Lithuania, the Netherlands and Portugal). 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) and has recently been affirmed by a court in the Netherlands.

The dramatic decrease of private copying remuneration by nearly 50% from 2010 – 2013 confirms the importance of adapting the regime to new technological developments including online services (e.g. cloud computing).

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. Germany and Sweden). As a result, performers' organisations are forced to enter into costly and time-consuming litigation.

Where tariffs are set by legislation or government decision, tariffs should be revised on a regular basis in order to reflect market developments.

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. Whilst this system has recently been challenged before the Court of Justice of the EU in the Amazon.com 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. These points are to be verified by the national court.

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

In response to this pressure, the European Commission appointed a high-level mediator, Mr António Vitorino, a former EU Commissioner in order to examine the issue of private copying and its related exceptions. The mediator explored possible EU level approaches to the methodology with regard to private copying remuneration and the systems of administration of such remuneration. He proposed a set of recommendations at the end of January 2013 which may form the basis of a proposal for legislation.

He recommended that it be clarified 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. This would prove extremely detrimental to performers.

The possibility of the vast majority of performers to negotiate reasonable (or, indeed, any) licensing fees is very small. Mr Vitorino acknowledges this in his report, but does not propose any practically realistic solution which would compensate for the financial damage that such a system would cause to performers.

Whether there is any legal capacity to grant a form of “license” or “authorisation” (as envisaged by Mr Vitorino) in a Member State where a private copying exception is in place is questionable. Positively, the decision of the Court of Justice of the EU countered the recommendation of Vitorino in the VG Wort case. Not only does it provide that any act “authorising” a reproduction has no legal effect, it also states that any such purported “authorisation” would have no bearing on fair compensation owed.

Currently, private copying remuneration systems remain an effective mechanism to compensate 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 all stakeholders. However, a radical overhaul of the system, such as that which occurred in Spain, or an adoption of certain of the recommendations of Mr Vitorino (for example, his proposals regarding licensing fees), would cause great financial prejudice to performers 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”¹⁰⁰. 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 given¹⁰¹.

An unequivocal exclusive right of authorising commercial rental to the public is finally given to the performer by the WPPT. This only concerns the rental of performances fixed in phonograms¹⁰².

Neither the TRIPS Agreement nor the WPPT provide for a definition of “rental”. The first definition of the term under international legislation is in fact to be found in the European Directive 92/100/EEC. This specifies that “rental means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage”¹⁰³.

European legal framework

At Community 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 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 organisations¹⁰⁴. Member States may regulate whether and to what extent administration by collective management organisations of the right to obtain an equitable

¹⁰⁰Article 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.

¹⁰¹ 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.

¹⁰²Article 9(2) WPPT

¹⁰³Article 1(2) Directive 92/100/EEC; article 2(1)(a) in Directive 2006/115/EC (codified version).

¹⁰⁴Article 5(1) to 5(3) Directive 2006/115/EC (formerly article 4(1) to 4(3) of Directive 92/100/EEC)

remuneration may be imposed as well as the matter relating to the party from whom this remuneration may be claimed or collected¹⁰⁵.

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 legislation does not explicitly envisage any rental right for performers. French law only grants a rental right to producers, notably to phonographic producers¹⁰⁶¹⁰⁷.

Remuneration right in the event of transfer of the rental right

In those countries which grant the performer a right to an equitable remuneration¹⁰⁸, 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.

¹⁰⁵Article 5(4) Directive 2006/115/EC (formerly article4(4) of Directive 92/100/EEC)

¹⁰⁶Article L213-1 of the CPI.

¹⁰⁷ 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

¹⁰⁸ In the law in the Czech Republic the term "reasonable remuneration" is used (article 49(3) and article74).

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.

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 renters income) Rental right in practice is transferred by the performer to the phonogram or audiovisual producer in the individual contract without a specific equitable remuneration	User	Yes
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 fulfill 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) remuneration is possible. The equitability of the amount paid can be controlled by the Court, but until now, this has not been done	Producer	Yes, but has never succeeded to enforce this right effectively
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 ¹⁰⁹	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

¹⁰⁹ 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, 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 €58.060 in 2005 to €41.517 in 2013. In Spain the drop in collection has even been more significant from €114.871 in 2005 to €23.045 in 2013.

Possible explanations for this include the increasing market of new platforms offering on-demand content (please refer to chapter 3 in this regard) as well as losses associated with the increase in copyright infringement on- and offline.

Furthermore, the steady erosion of average retail prices and the availability of cheap product via newspaper kiosks and magazine/newspaper cover-mounts have made traditional DVD rental a less compelling value proposition for European consumers.

This is reflected in rental market statistics. According to the International Video Federation, European consumer spending on DVD and Blu-ray disc rental declined by 18.6% over 2012 to €730.4 million¹¹⁰.

Consequently, the numbers of video rental outlets have also declined from 34,474 in 2005 to 17,729 in 2010. The physical rental market is expected to diminish further in Europe.

To the contrary, digital rental, not captured by the terms of Directive 2006/115/EC, had strong growth increasing by 43.1% to €287.5 million in 2013,

The current definition of “rental” contained in the Directive may traditionally have been viewed as implying the making available for use of only physical carriers or devices.

However, such new uses allow users to select and watch video content over a network including via services where content may be accessed only for a limited amount of time. In these cases, carrier devices are no longer needed. Nor is there any return of the copy used.

It seems logical that performers should nevertheless be remunerated for the use of their performances in this regard. This view is supported by the fact that the Directive states that “*copyright and related rights protection must adapt to new economic developments such as new forms of exploitation*”¹¹¹. 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 (see chapter 3).

¹¹⁰International Video Federation 2014 – European Video Yearbook 2014

¹¹¹Recital 4 of the Directive

Table 5.2 Rental right –Collection for performers through collective management from 2005 - 2013
Gross amounts in euro (VAT not included)

Country	2005	2006	2007	2008	2009	2010	2011	2012	2013
Austria ¹¹²	22,000	23,000	22,000	23,000	25,000	25,000	27,750	22,000	21,740
Belgium	0	0	0	0	0	0	0	0	0
Croatia	0	0	0	0	0	0	0	0	0
Czech Republic	58,060	53,300	50,255	34,596	47,030	48,465	46,174	45,074	41,517
Denmark	0	0	0	0	0	0	0	0	0
Finland	0	0	0	0	0	0	0	0	0
France	0	0	0	0	0	0	0	0	0
Germany	871,500	856,800	849,800	1,746,000	2,363,000	1,661,048	1,973,088	1,709,621	2,088,049
Greece	0	0	0	0	0	0	0	0	0
Hungary	0	0	0	0	0	0	0	0	0
Ireland	0	0	0	0	0	0	0	0	0
Italy	0	0	0	0	0	0	0	0	0
Latvia	0	0	0	0	0	0	0	0	0
Lithuania	0	0	0	0	0	0	0	0	0
Netherlands	0	0	0	0	0	0	0	0	0
Norway	0	0	0	0	0	0	0	0	0
Poland	0	0	0	0	0	0	0	0	0
Portugal	0	0	0	0	0	0	0	0	0
Romania	0	0	0	0	0	0	0	0	0
Serbia	0	0	0	0	0	0	0	0	0
Slovakia	0	0	0	0	0	0	0	0	0
Slovenia	0	0	0	0	0	0	0	0	0
Spain	114,871	51,553	56,618	39,206	52,499	47,874	47,482	23,045	0
Sweden	0	0	0	0	0	0	0	0	0
Switzerland	110,065	105,876	104,763	92,585	77,859	80,063	57,855	55,429	35,152

¹¹² Collection is for rental and lending

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, 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 the Czech Republic, Germany, Spain, 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.

Furthermore, 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 made¹¹³.

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 place¹¹⁴.

The WPPT indicates the same duration (at least 50 years)¹¹⁵.

Similarly, the Beijing Treaty on Audiovisual Performances, adopted on 24 June 2012, grants to performers a 50 years term of protection, "computed from the end of the year in which the performance was fixed"¹¹⁶.

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 earlier.

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 event¹¹⁷.

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 assessment¹¹⁸ 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.

¹¹³Article 14 Rome Convention

¹¹⁴Article 14(5) TRIPS Agreement

¹¹⁵Article 17(1) WPPT; if no fixation of the performance has been made, no protection term has been envisaged (since it was not considered necessary).

¹¹⁶Article 14, Beijing Treaty

¹¹⁷Article 8 Directive 2006/116/EEC

¹¹⁸Available at: http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

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 concludes 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"*¹¹⁹.

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"*¹²⁰.

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 producer¹²¹ 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.

¹¹⁹ http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

¹²⁰ http://ec.europa.eu/internal_market/copyright/termprotection/term-protection_en.htm

¹²¹Please note that Member States may regulate to what extent this should apply to micro enterprises.

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.

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 have two years from the date of entry into force of the Directive to implement the new provisions. The entering into force will take 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”.

End 2014, no such report has yet been communicated.

National legal framework

Generally, national laws provide a 50-year term of protection with Member States still having to implement the provisions of Directive 2011/77/EU amending Directive 2006/116/EC. However, there are small differences in the various national legislations as regards the choice of the act considered as the starting date from which the term should be calculated in the event of a lawful publication or communication to the public.

In countries such as Croatia, Germany, Lithuania, the Netherlands and Sweden the Directive has been implemented in its entirety¹²².

In other countries, such as the Czech Republic, France and Spain, the law has established that in the event of a (lawful) publication, the rights shall expire 50 years from the date of that publication (therefore not taking into account any other communication to the public) or in the event of a (lawful) communication to the public, from that date onwards (not taking into account any publication).

The 2011 Directive has now been implemented in the vast majority of Member States (Austria, Belgium, Croatia, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovakia, Slovenia, Sweden and the UK).

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 would 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.

¹²² In the Netherlands, according to article 12 of the Neighbouring rights act the reference starting date is not the date when the recording was published, but the date when it was brought into circulation. The term lasts 50 years after the performance or after the moment when the recording was first lawfully brought into circulation or, if earlier, communicated to the public.

The Directive has not yet been implemented in France, Poland, Romania, Serbia and Spain.

6.2 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 will have 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.

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.

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 pipe line.

The Commission should now 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.

Regrettably, the position taken by the Commission is that it '*naturally remain committed to present such a report*'. However, '*considering that the deadline for the implementation of the Directive has not yet passed and taking into account that the required report can only be delivered after a thorough and in-depth analysis, the Commission will have to wait a certain time before being in the position to make an assessment and present a report*'.

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 and has to 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 to performers and their performers' organisations. This chapter therefore provides a short summary of the Directive.

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”*) (article 13).
- 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 in articles 14 and 15 covering 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 collective management organisations to disclose inter alia 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 Conclusions

AEPO-ARTIS welcomes the adoption of the CRM Directive. It should be seen as a tool forming part of the *acquis communautaire* which could improve the current situation of performers and result in economic, practical and artistic benefits to the cultural sector of Europe.

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 of a general nature.

Whilst the Directive does not take into account the specificities of performers and the management of performers’ rights, it can be argued that it does provide the flexibility to do so to the national legislator.

In order to ensure the success of the Directive in strengthening the rights of performers, the distinct characteristics of performers’ rights management must therefore be taken into account in the implementation and application of this Directive at national level.

Chapter 8: Conclusions and Key Recommendations

8.1 Conclusions

The various Directives adopted between 1992 and 2001 (and their subsequent codifications) 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.

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.

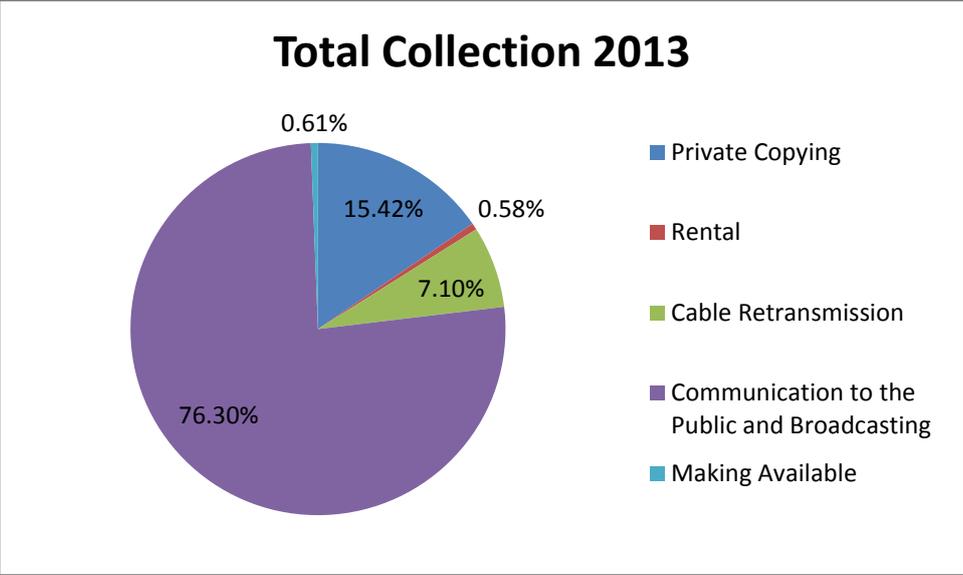
This right was then adopted in a number of national laws, and was confirmed within the *acquis communautaire* by effective legal provisions insofar as they guarantee the collection of such remuneration from the users to the benefit of performers (and also to the benefit of producers of phonograms).

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.

Total collection of remuneration of 34 performers' organisations has however decreased. In 2013 a total of € 332.203.624 was collected compared to €388.379.768 in 2010 and € 375.117.650 in 2008.

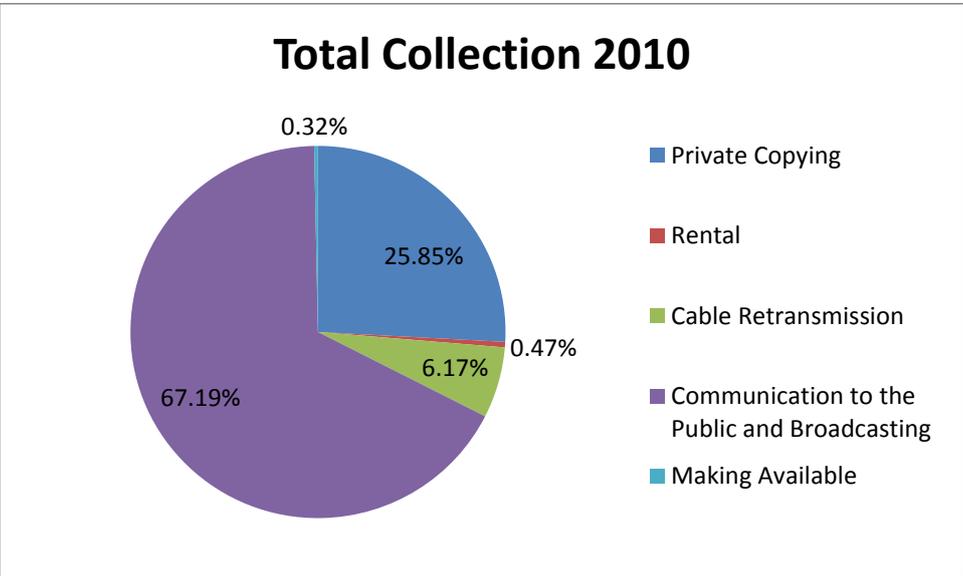
There is a drop in collection of around €50.000.000 from 2010 to 2013. This figure can be explained looking at the collection for remuneration for private copying alone. Whilst the collection in 2013 amounted to €57.835.963 in 2010 the collection was €100.390.146. A dramatic decrease of nearly half of the collection. On the one hand, it reflects the severe pressure against the private copying regime by the ICT industry (which led to the abandoning of the levy system in Spain causing a dramatic drop in collection) and on the other hand the urgent need to adapt the private copying remuneration system to the new technological developments, including some cloud computing services.

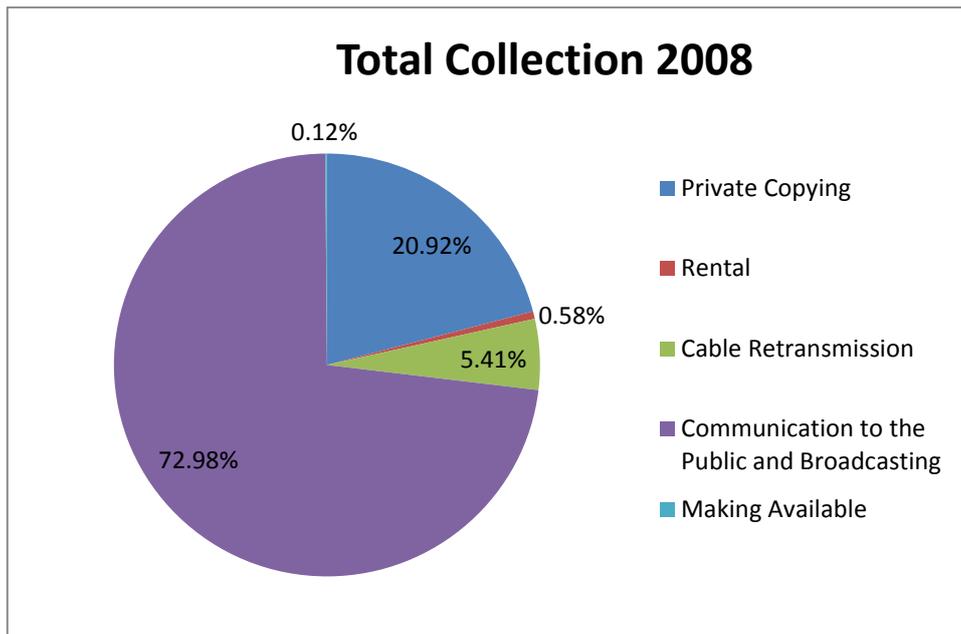
The AEPO-ARTIS study demonstrates that approximately 92% of performers' collections stem from the right to equitable remuneration for broadcasting and communication to the public and remuneration for acts of private copying. In addition 7% of the total collection stems from cable retransmission rights based on compulsory collective management as per EU Directive 93/83/EEC.



Similarly in 2010 approximately 93% of performers' collections stemmed from the right to equitable remuneration for broadcasting and communication to the public and remuneration for acts of private copying. In 2008 the total collection of these rights amounted to approximately 95%.

Total collection from cable retransmission rights has also remained stable comparing the figures from 2008, 2010 and 2013.





This study provided an overview of the situation of performers' rights and assessed the content and the actual exercise of the main categories of rights assigned to performers in the *acquis communautaire* drawing on data, both qualitative and quantitative, from 34 performers' organisations in Europe.

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 2013, it constituted approximately 76% of the overall revenue of performers in 2013 (67% in 2010 and 73% in 2008).

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 Court of Justice of the EU, 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 concept¹²³.

However, the Court of Justice of the EU 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.

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.

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*

¹²³Case C-245/00 Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS), Judgment of the European Court of Justice of 6 February 2003

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 which has no exception and no corresponding remuneration scheme and the United Kingdom which has an exception in place but without corresponding payment of remuneration.

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.

It is however evident that private copying remuneration is declining.

In 2013, private copying remuneration dropped dramatically and now accounts to around half of the remuneration collected in 2010. Whilst the collection in 2013 amounted to €57.835.963 in 2010 the collection was €100.390.146. On the one hand, it reflects the severe pressure against the private copying regime by the ICT industry (which led to the abandoning of the levy system in Spain causing a dramatic drop in collection) and on the other hand the urgent need to adapt the private copying remuneration system to the new technological developments, including some cloud computing services.

In 2010 it accounted for approximately 26% of the total remuneration collected by the performers' organisations of the countries under examination and in 2013 the amount dropped to 15%.

Despite this, 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, 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 and Spain 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.

In Spain, for instance, this system has come into effect only recently, on 1 January 2012, following intense political pressure from the ICT industries. After nearly 6 months without any remuneration being paid to rightholders, in June 2012 the Spanish government finally set the total level of remuneration to rightholders at €5m per year. This amount is approximately €75m less than the amount which the Spanish government had calculated as representing the harm done to rightholders in the audio and audiovisual sectors by private copying in the previous year.

It indisputably represents a huge decrease in performers' income and has significant impact on performers in Spain but also in the rest of Europe.

Furthermore, it has to be stressed that the compensation has been set without any evaluation of the prejudice suffered by rightholders due to acts of private copying (including availability of storage devices, storage capacity, the use of devices for reproduction purposes, ...) and rightholders have neither been able to take part in any negotiations to that effect with the Spanish government.

Moreover, this system implemented by the Spanish government renders all tax payers liable for the payment of this remuneration. Such a system effectively cuts the link between the act of private copying and the payment of fair remuneration due to rightholders.

It is for these reasons that Spanish rightholder organisations, as well as AEPO-ARTIS have filed complaints against the Spanish Government to the European Commission arguing that the new law is incompatible with the EU acquis.

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, with the exception of the United Kingdom, 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 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) and has recently been affirmed by a court in the Netherlands.

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 has also been supported by the Court of Justice of the EU in the recent 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. 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 recently been challenged before the Court of Justice of the EU in the Amazon.com 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. These points are to be verified by the national court.

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.

In response to this pressure, the European Commission appointed a high-level mediator, Mr António Vitorino, a former EU Commissioner in order to examine the issue of private copying and its related exceptions. The mediator explored possible EU level approaches to the methodology with regard to private copying remuneration and the systems of administration of such remuneration. He proposed a set of recommendations at the end of January 2013.

His recommendation that it be clarified 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, is extremely worrying for performers.

As indicated above, the vast majority of performers are not able to negotiate reasonable licensing fees. Mr Vitorino acknowledged this in his report, but does not propose any practically realistic solution which would compensate for the damage that such a system would cause to performers.

Consequently, AEPO-ARTIS welcomes the decision of the Court of Justice of the EU in the VG Wort case countering this recommendation of Mr Vitorino. Not only does it provide that any act "authorising" a reproduction has no legal effect, it also states that any such purported "authorisation" would have no bearing on fair compensation owed.

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 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, such as that which occurred in Spain, or the introduction of certain recommendations of Mr Vitorino (for example, his recommendations regarding licensing for digital usage), would cause great financial prejudice to performers and accordingly, have a highly negative impact on the development and maintenance of Europe's cultural heritage.

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).

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, 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 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, even in those countries currently collecting equitable remuneration for the rental right, performers' collective management organisations have seen a steady decline in revenues. Possible explanations for this include the increasing market of new platforms offering on-demand content as well as losses associated with the increase in copyright infringement on- and offline.

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.

As retransmission is now also enabled on new digital platforms, the question arises as to whether the Directive should be rendered technologically neutral. This point has been subject to a public consultation launched by the Commission in 2011. Whether this consultation will lead to further legislative steps, remains to be seen.

Making available to the public of services on demand

The study confirms that 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. 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. This is exemplified in our findings where it can be seen that in 2005, collections in respect of making available were effectively zero and by 2013, the amount collected still only amounted to less than 1% of total collections. 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 on-demand services, which has become a significant new market and continues to grow rapidly, 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.

Term of Protection

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 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 the producers' revenue should be allocated through collective management to those performers not benefitting from recurring royalty payments for the extended period of term.

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 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 and depends on their successful implementation at national level and operation in practice.

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.

Regrettably, the position taken by the Commission is that it '*naturally remain committed to present such a report*'. However, '*considering that the deadline for the implementation of the Directive has not yet passed and taking into account that the required report can only be delivered after a thorough and*

in-depth analysis, the Commission will have to wait a certain time before being in the position to make an assessment and present a report'.

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 92% of performers' collections stem from remuneration rights has of course also 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 is a member. A remuneration right is merely 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 remunerations directly collected by his collective management organisation from the users are not dependent upon any authorisation from the performer and/or his 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, collection and distribution of rights 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.

Strengthening performers' rights and their administration

Today, approximately 92% 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 7% stem from cable retransmission rights which is 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, in most cases the user, should be clearly determined**
- **it should be stated that remuneration must be paid and equitably shared between the categories of rightholders concerned**
- **where a remuneration right is granted to performers, it should not be transferable to any other body except for the specific purposes of collective management.**

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

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 are 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.

Consideration on the future of private copying remuneration is on-going and it is crucial that any conclusion which may be reached does not result in a decrease in revenue paid to performers.

So-called alternative models have been proposed. The system in Spain whereby private copying remuneration is paid by the state budget has been shown to be wholly insufficient and completely arbitrary. As implemented in Spain, it will have an immensely damaging effect on performers.

Moreover, it has been proposed that compensation for acts of private copying could be included in a license fee paid to the rightholder by the service provider (e.g. iTunes, Spotify etc.). Whilst such an approach does not take into account the commercial realities of performers as they have very little bargaining power and would therefore deprive performers of the second most important source of remuneration, it is also legally questionable. The Court of Justice of the EU held in the VG Wort case that where Member States have implemented a private copying exception any act "authorising" a reproduction has no legal effect. It also states that any such purported "authorisation" would have no bearing on fair compensation owed.

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. A radical overhaul of the current system is, however, neither justified nor required.

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 be extended to apply to new online services such as cloud computing.

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 for on-demand services 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.

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.

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.

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.