

Remuneration Rights for authors and performers in the EU *acquis*

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Prof. Raquel Xalabarder

rxalabarder@uoc.edu

AIE v iTunes (JM n.1 Madrid, 31.03.2017, Spain)

- Phonogram performers
- 1.4 M Euros in damages
- Remuneration rights for making available online (July 2006 – Dec.2014)
- Licenses obtained from Phonogram Producers and Authors
- Art.108.3 TRLPI : unwaivable remuneration right for performers “retained” after the transfer of their exclusive right of making available to producers, under mandatory collective management

iTunes:

- Art.108.3 is contrary to EU *acquis* (D 2001/29, Art.56 TFUE) and asked for a preliminary request to CJEU

AIE v iTunes (JM n.1 Madrid, 31.03.2017, Spain)

Court ruling:

- Art. 108.3 not contrary to EU *acquis*, “subsidiarity principle” → MS may grant further protection to authors and performers
- Same mechanism for rental right in D 92/100 not a foreign system to EU *acquis*
- Not all differences in national laws are contrary to EU *acquis*.
- Not a “double payment”, but rather a statutory mechanism to guarantee economic return to performers

→ *AP Madrid (sec.28), 02.03.2015, AIE v. BUONGIORNO MY ALERT*

IMPORTANT:

- Territoriality principle (*lex loci protectionis*) + Non-discrimination
- Spanish RR benefit Spanish authors + EU authors + Berne authors

Other Remuneration rights in National Acts ... and online platforms

SPOTIFY - Phonograms

Need to distinguish **making available online** (Art.108.3 TRLPI : remuneration for performers) from **communication to the public** (Art.108.4 TRLPI : remuneration shared by producers + performers)
ex *Art.8.2 D R&L*

FILMIN - Audiovisual RECORDINGS (PERFORMANCES) & WORKS (AUTHORS) – Art.108.5 TRLPI + Art.90.4 TRLPI

Current CJEU: **AGEDI/AIE v. ATRESMEDIA** (TV broadcaster): a phonogram synchronized in audiovisual recording ... does it stop being a phonogram? So no remuneration for phonogram authors and performers when movie is shown on TV, etc?
NOT THE ISSUE TODAY.

What do I mean by “Remuneration Rights”?

Economic component: Exclusive rights v. Remuneration rights

Within same scope (**shared scope**)

No right to control (only remuneration)

Common characteristics:

- They are recognized by a copyright statute or instrument;
- They may vest in any copyright owner (be it author, performer or producer);
- They grant no “control” faculty to authorize or prohibit any acts of exploitation;
- They grant an entitlement to obtain economic income;
- The payment is done by the end user or final exploiter-;
- They are very often unwaivable, inalienable and managed on a collective basis by CMOs (mandatory, voluntary mandates, ECL).

A mere right of remuneration (resale right under Art.14ter BC)

A restriction of an exclusive right (e.g. compensation for private copying - Art.9.2 Berne Convention, E&L)

A Right to receive remuneration which **“survives” the transfer** of an exclusive right to producer (e.g. Art.5.1 Rental & Lending Directive)



Statutory Derogation or Restriction of an Exclusive Right

Statutory remuneration, upon the **Exercise** of an Exclusive Right **“Residual”**

Exclusive Rights ... harmonized (sort of)

But

Remuneration Rights
are **hardly harmonized**
in EU **acquis**
... and when so, they
leave a lot of **discretion**
for MS implementation

Resale Right - D 2001/84

Rental Right (Residual)
Public Lending Right
– D 2006/115

Cable retransmission
– D 1993/83

E&L (compensated / 3ST)
– D.2001/29
CJEU *Luksan*: unwaivable

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Art.5.1 Rental and Lending
Directive:

*Unwaivable right to equitable
remuneration.*

*Where an author or performer has
transferred or assigned his rental
right concerning a phonogram or an
original or copy of a film to a
phonogram or film producer, that author
or performer shall retain the right to
obtain an equitable remuneration for
the rental.*

Can it be transferred to producer?
Who pays fees: user or producer?
Mandatory collective management?
.... As a result: no harmonization!

Table 3
Rights managed by SAA members (2014)

Country	SAA member	Cable retransmission	Private copying	Other retransmission rights*	Online/on demand uses	TV broadcasting	Video sales	Educational uses	Video rental	TV archives	Video lending	Cinema/Public performance
Austria	Literar-Mechana											
Austria	VDFS											
Belgium	SABAM											
Belgium	SACD / SCAM											
Czech Republic	DILIA											
Estonia	EAAL											
Finland	Kopiosto											
France	SACD											
France	SCAM											
Germany	VG Bild-Kunst											
Germany	VG Wort											
Hungary	Filmjus											
Italy	SIAE											
The Netherlands	LIRA											
The Netherlands	VEVAM											
Poland	ZAPA											
Portugal	SPA											
Slovakia	LITA											
Spain	DAMA											
Spain	SGAE											
Sweden	Copyswede											
Switzerland	SSA											
Switzerland	SUSSIMAGE											
UK	ALCS											
UK	Directors UK											
TOTALS		24	23	19	17	16	15	15	11	11	9	8
Percentage		96%	92%	76%	68%	64%	60%	60%	44%	44%	36%	32%

* Satellite, IPTV

Are National “Residual” Remuneration rights contrary to EU *Acquis*?

COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Remuneration Rights are “accepted” by International Instruments

- Audiovisual Works: broadcasting & communication to the public (Art.11 BC, Art.8 WCT)
- Works of Art: Resale right (Art.14ter BC)
- Phonograms: broadcasting & communication to the public (Art.12 RC, Art.15 WPPT)
- Audiovisual Performances: broadcasting & com.publ. (Art.11.2 BT), online (Art.12.3 BT)
- EU *acquis* : cable retransmission, rental right, lending compensation, resale right

→ **Optional**, when conventional minima MS are free to set conditions (and fail to make them unwaivable & mandatory CMO), MS may implement other remuneration rights in national laws

It does **not affect conventional minima** (no formalities, minimum term + rights) → Greater protection may be granted by MS (art.19 BC)

Beijing Treaty on Audiovisual Performances (2012)

Art.11.2 Beijing Treaty allows Member States to:

“... establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.”

Furthermore, Art.12.3 Beijing Treaty allows Member States to introduce a general right of equitable remuneration for “any uses” of audiovisual performances:

“Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 [that is, making available online] and 11 [that is, broadcasting and communication to the public].”

COMPLIANCE WITH EU LAW

- **Principle of Subsidiarity** → harmonization only when necessary to secure market conditions (free movement of goods and services)

Recital 7 InfoSoc D.: to overcome **substantial differences** that create legal uncertainty for the functioning of the internal market, not to overcome **any differences!**

- Harmonization relies on national laws (Art.118 TFUE, not yet)
- EU *acquis* expressly “fosters” different solutions (optional, implementation discretion) to be adopted by MS
- EU Commission is aware of different RR in national laws (Green Book 2011 audiovisual online exploitation) and has not done anything to overcome it.
- No MS has been sued for incorrect implementation of EU *acquis*!

COMPLIANCE WITH EU LAW

- **MS cannot “extend scope of rights” harmonized (CJEU: Svensson)**
 - ✓ MS cannot “add more acts” within the harmonized concept of communication to the public
 - ✓ Harmonized rights must be uniformly interpreted and applied in all MS (“autonomous concepts of EU law”)
- **But a statutory “residual” remuneration right (upon transfer of exclusive right to producer) does not “add” or “extend” ... rather it “secures” the right**
 - ✓ It is a statutory mechanism to “guarantee” remuneration.
 - ✓ Is it an issue of (national) contract law?
 - ✓ Retaining a “residual” remuneration right for an act of exploitation does not extend scope of exclusive right

COMPLIANCE WITH EU LAW

Art.56 TFUE; freedom to provide services

Existence v Exercise / Goods v. Services

- Residual Rem.Rights grant no *ius prohibendi*
- If communication to public right is not “exhausted”, neither should its remuneration.
- CJEU: *Basset v. SACEM* (1987) different territorial remuneration obligations, even “ex post” transactional costs are OK
- CJEU : A restriction may be justified if:
 - General interest reasons / goal (IP rights)
 - Accurate to achieve this goal
 - Restricted to achieving this goal

CJEU: *Coditel I, Musik Vertrieb, Christiansen, Phil Collins, FAPL, Sky Österreich*

National remuneration rights

...are in **COMPLIANCE WITH EU LAW**

- **Rec.26 (Satelite & Cable D) allows MS to “extend” the residual mechanism** in Art.5 R&LD to exclusive rights granted to performers (when they transfer them to producers)
- **“for the sake of consistency”** (with rental remuneration right) it would be appropriate to extend it to transfer of other exclusive rights of authors
- CJEU *Luksan* ##86-87: rental “residual” mechanism should be also applicable to transfer of other exclusive rights (reproduction – private copy remuneration)

Proposal Directive CDSM (Parliament)

FINAL REPORT Voss (Sept.2018) proposed:

-Art.14. Principle of Fair and Proportional Remuneration

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

2. Paragraph 1 shall not apply when an author or performer grants a non-exclusive usage right for the benefit of all users free of charge.
3. Member States shall take account of the **specificities of each sector** in encouraging the proportionate remuneration for rights granted by authors and performers.
4. Contracts shall specify the remuneration applicable to each mode of exploitation.

Directive CDSM (D 2019/790, 17 April 2019)

Art.18 : Principle of Appropriate and proportionate Remuneration

- 1. Members States shall ensure that **where authors and performers license or transfer their exclusive rights** for the exploitation of their works or other subject matter, **they are entitled to receive appropriate and proportionate remuneration.****
2. In the implementation in national law of the principle set out in paragraph 1, **Member States shall be free to use different mechanisms** and take into account the principle of contractual freedom and a fair balance of rights and interests ...

Some final thoughts

**Granting AV Authors Exclusive Rights (harmonized),
but failing to secure appropriate remuneration for
them ... is as much as granting them no rights at all!**

**Under EU *acquis* this remains a matter for MS (in fact,
now, an obligation!)**

Stay tuned ...

**Remuneration rights ... will be the next harmonization
frontier!**

Thanks!

rxalabarder@uoc.edu