

**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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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)³⁸. 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".

³⁸ 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”³⁹. 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).

³⁹ 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 Directive⁴⁰.

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 well⁴¹. 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 public⁴².

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.

⁴⁰ 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.

⁴¹ 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.

⁴² *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”⁴³.

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 otherwise⁴⁴. 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 law⁴⁵.

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 2013⁴⁶.

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.

⁴³Article 20(2)(i) of the Spanish IP Law

⁴⁴Article 108(2) of the Spanish IP Law

⁴⁵Article 108(3)-(6) of the Spanish IP Law

⁴⁶International 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 growth⁴⁷.

For example, revenue from recorded-music sales in Italy in the first half of 2014 increased 6.6% compared with the same period of 2013⁴⁸.

According to Dutch entertainment-industry association NVPI, "in 2013 the total revenue of the Dutch music industry increased by 1.1% to €130 million"⁴⁹.

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%⁵⁰.

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.

⁴⁷IFPI Digital Music Report 2014

⁴⁸Music and Copyright, August 2014

⁴⁹ NVPI study: Jaarcijfers audio 2013 at www.nvpi.nl/marktinformatie-audio-2013

⁵⁰ 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, Germany⁵¹, 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.

⁵¹Only 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 use⁵².

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.

⁵² 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.