

Remuneration Rights in the EU *acquis*

Norwegian Copyright Association - Oslo – 6.02.2023
Prof. Raquel Xalabarder
rxalabarder@uoc.edu

What do I mean by “Remuneration Rights”?

- **Economic component** : entitlement to obtain economic income;
- They grant **no “control” (authorize or prohibit)** specific acts of exploitation;
- **Statutorily granted**: recognized by a copyright statute or instrument;
- Vested in a **copyright owner** (author, performer or producer);
- **Payment is done by the end user** or final exploiter;
- Often **unwaivable, inalienable**
- Subject to **collective management** by CMOs (mandatory, voluntary mandates, ECL).

Exclusive Rights + Remuneration Rights // Moral Rights

Remuneration rights in EU acquis

Exclusive Rights are harmonized

BUT ... Remuneration Rights are **hardly harmonized**

... and when so, a lot of **discretion for MS implementation**

✓ **Resale Right** (Works of art) - D 2001/84

✓ **Rental Right** (“Residual”) - D 2006/115

→ *may be extended to other rights – Rec.26 SCD*

✓ **Public Lending Right** - D 2006/115

✓ **Cable retransmission** (statutory license) - D 1993/83

✓ **E&L** (fair compensation / Three step test) – D 2001/29

✓ **Art.18 CDSM** – D 2019/790

LUKSAN:
unwaivable

Several kind of “Remuneration Rights”

A resale right (Art.14ter BC)

A derogation of an exclusive right (compensation for E&L - private copying - Art.9.2 BC)

A restriction on the exercise of an exclusive right (statutory license of cable retransmission)

An unwaivable Right to receive remuneration which “**survives**” the transfer of an exclusive right to producer (Art.5 RLD)

Why? Balancing © with other fundamental rights and public interests

Statutory **Derogation or Restriction** of an Exclusive Right

Why? Securing fair remuneration in specific markets, sectors

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

Several kind of Remuneration rights

- **Droit de suite (Art.14ter BC)**, National laws, EU Dir. (due to the first sale / exhaustion of distribution right after first sale)
- **Remuneration for Exceptions and Limitations** – to “compensate” damage
- **Public lending right (PLR)**
- **Non-voluntary licensing (statutory licensing)** – cable retransmission
- **Remuneration right for secondary acts of communication to the public (50% prod. / 50% perf.)** (Art.12 RC, Art.15 WPPT, Art.11.2 BTAP)
- **“Residual” Remuneration Rights** –
 - **Historically in national laws**; “Conceptualized” by **Art.5 RLD**
 - **Expanded** to many other rights, including MAOL (Spain, Poland, Belgium, Germany, Switzerland...) -- **Rec.26 SCD**
 - **Art.12.3 BTAP**: rights of equitable remuneration for “any use,” as an alternative to contractual royalties.

Art.5.1 Rental and Lending Directive (RLD):

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.*

Open questions ... for national implementation:

- Unwaivable... but can it be transferred to producer?
- Who pays fees: user or producer?
- Enforcement challenges... mandatory collective management?

As a result: limited effectiveness, no harmonization!

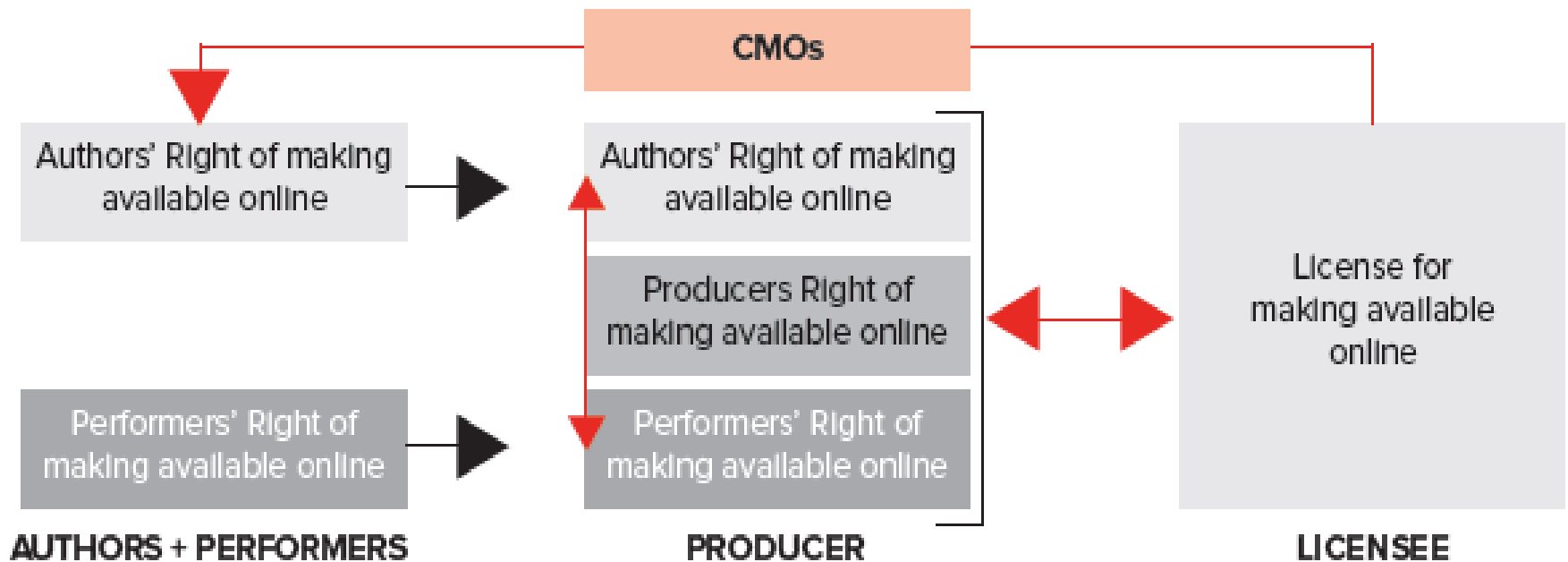
Table 3

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	SUISSIMAGE											
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

Here's how "Residual" Remuneration Rights work (online licensing scenario)



Statutory “Residual” Remuneration Rights

Most effective when:

- ✓ Unwaivable and inalienable
- ✓ Paid by user / licensee
- ✓ Managed by CMOs (mandatory, if necessary)

- ✓ Remuneration **retained** by A&P after transferring exclusive rights
- ✓ **Sanctioned by EU *acquis*** and Int’l instruments: Art.5 RLD, Art.12.3 BTAP (“*royalties or equitable remuneration for any use*”)
- ✓ **Used (successfully) in national laws** to secure rem. in **complex markets, sectors**
- ✓ **Do not duplicate rights** / depend on transfer + license of exclusive rights
- ✓ Do not turn exclusive rights into statutory licenses
- ✓ ***ius prohibendi***, licensing & revenue streams remain **in hands of producers**
- ✓ **Do not disturb the pre-existing contract** (transferred rights)
- ✓ Allow for foreseeability in production costs / investment returns
- ✓ **Flow of remuneration to A&P, via CMOs**, also for **new exploitation means** (without revising pre-existing contracts)
- ✓ **Better collective negotiation of fees** for A&P

They require a statutory enactment!

Article 18

Principle of appropriate and proportionate remuneration

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

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

Art.18 CDSM Directive

- Principle of **Appropriate and Proportionate** Remuneration
Equitable, fair, adjusted, proportional, lump-sum in specific cases
 - It applies to **ANY license or transfer** of exploitation rights
(in any form, in exclusive or not, presumed, etc)
 - It applies to **NEW, as well as OLD productions / contracts**
All rules apply to works & performances protected as of 7 June 2021
 - **Art.18 underlies the “contractual corpus”**
The better Art.18 is implemented, the less need for other ex-post mechanisms (e.g. MS may exclude “Adjustment” and “Revocation” in some specific areas)
 - **Art.18 is not “only” a contractual rule, but an obligation on MS!**
(no need for protection against contractual override!)
-

**“Copy-paste” will not suffice!
MS need to go further ... how?
Mechanisms for its implementation**

Art.18(2) CDSM: *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.*

Recital 73 CDSM: *Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.*

Voss report (EU Parliament) - Amendment 80:

Principle of fair and proportionate remuneration

1. ... This may be achieved in each sector through a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms.

Mechanisms for its implementation

➤ **Contractual freedom ... and improving contract law**
Arts.19-22. Absolutely necessary... BUT it will hardly suffice

➤ **Sectorial collective bargaining agreements**

A significant role to play ... (also to help implementation of other rules)

- *Transparency: adjusted to sectors (how, how often, modes, merchandising, etc); MS may not apply it to contracts under CBA*
 - *Adjustment: “disproportionately low”... all revenues, rem. practices in specific sectors; MS may exclude it in some specific areas; obligation only in the absence of a CBA;*
 - *Revocation: procedure, deadlines, windows; MS may exclude it in contracts under CBA*
- BUT... parties' willingness to negotiate; on conditions conducive to its success + enforcement; for new productions/contracts only!

➤ **Statutory “Residual” Remuneration Rights**

... complex markets, complex productions with multiple contributions!

Next challenge: applicable law?

© Law – *lex loci protectionis*
Art.5.2 BC / Art.8.1 Rome I

Contract law
Art.3 Rome I

“Extent of protection” includes

- Exclusive Rights,
- E&L + compensation,
- Term (but shorter rule –Art7.8BC)
- Remuneration rights

Droit de suite, PLR, Statutory licenses...

→ Also statutory “residual” remuneration rights?

Yes! They depend on a transfer of rights, but they are “statutorily” granted, accordingly, they should be subject to LLP + national treatment / no discrimination

- Law chosen by parties
 - Law closest to contract
- EU “contract corpus” is clearly subject to Lex Contractus (Arts.18-22 CDSM)***

... unless most closely related to one country (to avoid **choice of law fraud**):

Rec.81: chosen contract law will not govern when “*all other elements relevant are located in one or more (EU) MS*” ... in this case, these contractual obligations will apply as implemented in *lex fori* (mandatory laws/public order exception?)

Questions regarding Remuneration Rights in Spain

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

- Phonogram performers (AIE)
- 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 contended that :

- 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 (**EU *acquis***)
 - Not all differences in national laws are contrary to EU *acquis*.
 - **There is no “double payment”**, but rather a statutory mechanism to secure 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 A&P + EU + national treatment (BC, RC)

RAAP

AIE v SPOTIFY - Phonograms

Added complexity → need to distinguish:

- “residual” remuneration right for **making available** for performers (Art.108.3 TRLPI)
- from single remuneration right for **communication to the public** (Art.108.4 TRLPI : single remuneration shared by producers + performers) *ex Art.8.2 D R&L*

Spotify had been licensed by producers → exclusive right of making available

How to draw the line?

- Interactive as a requirement (live streaming is CP: *TVCatchup C-More*)
- “Blurred” areas (lists chosen, influenced by user)... deplete MA?
- In 1996, MA was basically “download” ...

ATRESMEDIA

AIE & AGEDI v ATRESMEDIA (C-147/19) 18 Nov. 2020

AGEDI (Phonogram producers) + **AIE** (Performers) sued **Atresmedia** (TV broadcaster), **claiming 17 M €** as shared compensation for communication to the public of phonograms, from June 2003 to Dec.2009

(based on Art.108.4 + 116.2 TRLPI) (Art.8.2 CSD, Art.12 RC, Art.15 WPPT)

- Juzgado del Mercantil n.4bis, Madrid (10.06.2013) → granted claim & damages, but excluding phonograms synchronized in “movies, TV series and commercials” because **synchronization amounts to a transformation “of the phonogram” into a new work!!!**
- On appeal by AGEDI / AIE, Audiencia Provincial Madrid (sec.28) (25.01.2016) ECLI:ES:APM:2016:3842 → reversed it and granted full claim (also for synchronized phonograms)
- On appeal by Atresmedia, Supreme Court → asked CJEU
- Supreme Court (09.02.2021) ECLI:ES:TS:2021:354 → confirming JM ruling!!

AIE & AGEDI v ATRESMEDIA (C-147/19) 18 Nov. 2020

*... The single equitable remuneration [referred to in Article 8(2) EU Rental Directive] must not be paid by the user where he or she makes **a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated***

Once synchronized in an audiovisual recording (of an audiovisual work), the phonogram “disappears”

Single equitable Remuneration shared by Producers & Performers (Art.8.2 SCD, Art.12 RC) is not applicable!

Good law? Yes, but..

Moreover, the decision:

- Risks causing significant legal and commercial uncertainty, and costs;
- Disregards the fundamental policy objectives of EU Copyright Law; and
- Amounts to unjustified discrimination between authors of works, and sound recording right holders.

... it is bad law!

It discriminates Authors v Producers & Performers

It causes unnecessary economic damage to P&P

- Trade custom... ever since the Rome Convention (accepted by all parties, internationally)
- Synchronization contracts were all agreed on the basis of a “subsequent” remuneration right (by CMOs)

... and specially to Performers

- Performers do not participate in the sync contract
- Recording contracts did not provide for a remuneration

It creates confusion and complexity in the market

It is contrary to Art.12 Rome Convention (a “reproduction of a phonogram”)

Two questions submitted to the CJEU:

- (1) Does the concept of the “**reproduction of a phonogram published for commercial purposes**” referred to in Article 8(2) of Directives 92/100 and 2006/115 include the reproduction of a phonogram published for commercial purposes in an audiovisual recording containing the fixation of an audiovisual work?
- (2) In the event that the answer to the previous question is in the affirmative, is a television broadcasting organisation which, for any type of communication to the public, uses an audiovisual recording containing the fixation of a cinematographic or audiovisual work in which a phonogram published for commercial purposes has been reproduced, under **an obligation to pay the single equitable remuneration** provided for in Article 8(2) of the aforementioned directives?

(1)
Synchronizing a phonogram in a movie... does it qualify as a “reproduction” of phonogram?

(2) **If so, must a TV channel broadcasting it pay single equitable remuneration in Art.8.2 SCD?**

The CJEU reshaped them into one “different” question :

(27) In those circumstances, it must be found that, by its questions, which it is **appropriate to examine together**, the referring court asks, *in essence*, **whether Article 8(2) of Directive 92/100 and Article 8(2) of Directive 2006/115 must be interpreted as meaning that the single equitable remuneration referred to in those provisions must be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.**

(31) In those circumstances, it is necessary to determine **whether a audiovisual recording containing the fixation of an audiovisual work, such as that referred to in paragraph 27 above, must be classified as a ‘phonogram’ or ‘reproduction of that phonogram’** within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115.



Article 8(2) SCD must be interpreted in accordance with RC / WPPT

- **Art.3b) Rome Convention:** any ‘**exclusively aural**’ fixation of so performance or of other sounds. It follows that **the fixation of image sounds cannot come within that concept**, since such a fixation c described as ‘exclusively aural’.
- **Art.2b) WPPT :** the ‘fixation of the sounds of a performance or of of a representation of sounds, **other than in the form** of a fixation i a cinematographic or other **audiovisual work**’.
- Recitals 40 + 45: it follows from the ‘**Guide to the Copyright and F Treaties Administered by WIPO**’ (FICSOR) that:

*... the WPPT has updated the definition of ‘phonogram’ in A the Rome Convention, with ‘the effect ... that, in a case **when audiovisual fixation does not qualify as a work**, a fixation of a performance or of other sounds, or of a representation o incorporated in such an audiovisual fixation, **is to be regarded “phonogram”**’ (CJEU, AG dixit ... not FICSOR)*

CJEU :

A phonogram synchronized in an audiovisual work/recording is not a phonogram

... neither a reproduction of a phonogram!!

→ No obligation to pay!

- Recital 45: quoting from the '**Guide to the Copyright and Related Rights Treaties Administered by WIPO**' (FICSOR) :

*that agreed statement is intended to specify that 'phonograms may only be used in [a cinematographic or other audiovisual work] on the basis of **appropriate contractual arrangements**, duly taking into account the rights of producers of phonograms provided for in [the WPPT]. If they are used again independently from the audiovisual work, they are to be regarded as phonograms'.*

FICSOR : this comment was referring to the synchronizing of the phonogram in the movie

Quite a surprise!

Norwegian law (Section 21 fifth paragraph):

“[The remuneration right for authors and performers] does not apply to sound recordings that are included in a film if the otherwise chargeable use of the sound recording has already been approved in connection with the incorporation into the film.”

Article 8 SCD ‘Broadcasting and communication to the public’: (2) ‘Member States shall provide a right in order to ensure that a **single equitable remuneration** is paid by the user, if **a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting** by wireless means **or for any communication to the public**, and to ensure that this remuneration is **shared between the relevant performers and phonogram producers**. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.’

(1) A synchronization of a phonogram in a movie... does it qualify as a “reproduction” of a phonogram? YES!

(2) if so, must a TV channel broadcasting it pay single equitable remuneration in Art.8.2 SCD? YES!

Be very careful what you ask for!

Some final thoughts

Granting Authors & Performers Exclusive Rights, but failing to secure **appropriate remuneration** for them (specific markets, sectors) ... is as much as granting no rights at all!

Remuneration rights are **most effective** when set as unwaivable & inalienable rights, paid by the user, and managed by CMOs.

Under EU *acquis* Residual remuneration rights **remain a matter for MS** (confirmed by Art.18 CDSM)

Atresmedia may be “overcome” by introducing (in national law) a “residual” remuneration right (shared by producers & performers) paid by the user ...

Thanks!

rxalabarder@uoc.edu