ECONOMIC RIGHTS OF THE NEIGHBORING RIGHTS OWNERS PERFORMERS' RIGHTS MANAGEMENT

MARIANA SAVU*

Abstract

The scientific research theme aims to deepen a topical issue, i.e. to examine the legal requirements of performers' rights from Romania, by collective management, to do a critical analysis of the regulation in our country and to contribute thereby to the correction of the law, to its harmonization with the EU countries. Intellectual creation has some amazing features: it is invisible, it can be passed across borders, it can be multiplied to infinity and its value increases steadily over time. Any country that cares about its traditions and seeks to make progress in the field of culture, of science and education, must recognize, encourage and protect intellectual creation. The copyright neighboring rights or "les droits voisins" as they were called in doctrine and jurisprudence, have been regulated for the first time in the Romanian law by the Law no.8 /1996 on copyright and neighboring rights. The neighboring rights are intellectual property rights, other than the copyright, granted to performers for their own performances or executions, to sound recordings producers and audiovisual recordings producers for their own recordings, and to broadcasting organizations (radio and television) for their own transmissions and program services. Performers' rights can be managed mandatory or optionally by the collective management societies. The collective management of copyright and neighboring rights is a necessary step for implementation of certain rights in comparison with various ways of exploitation. Since the beginning, some of performers' economic rights proved difficult to assess individually. The technical progress and widespread mass exploitation have made individual control virtually impossible. Collective management primarily involves the collection of remuneration payable by users/importers and its distribution to those entitled to it, proportional to the actual use of each repertory, within 6 months from collection date.

Keywords: *performers; economic rights; compulsory collective management; optional collective management; performers' rights management organization.*

Introduction

Intellectual creation occupies a prominent place within economic, social and cultural development of each nation, and well-being of a country is also appreciated by its capacity to create, introduce, manage and exploit intellectual assets beyond its natural resources, its labor or capital. Creativity, said Dr. Kamil Idris[1] – General Manager of World Intellectual Property Organization - „is an inexhaustible resource characteristic of all nations, as it is manifested at all times and in any culture"[1]. Moreover, on the OMPI Dome in Geneva is a Latin inscription which has the following content: „the human spirit gives birth to works of art and inventions. Such creations provide a dignified life to the people and it is states' duty to protect arts and inventions".

Protection of intellectual property rights is of particular importance, because the essence, the goal and purpose is to protect the product of human intelligence and at the same time, to guarantee for the benefit of consumers the use of such product.

Ensuring a fair/compensating remuneration to authors and performers fosters creativity and urges publishers or producers of sound and audiovisual recordings to invest in new products and services.

* Attorney at Law, Ph. D. candidate (email: liliana.savu@credidam.ro)

[1] Kamil Idris, *OMPI General Manager's Message, for the World Day of Intellectual Property,* in the „Romanian Magazine of Industrial Property", no. 2/2003, p. 7.

At the same time, it can be said that, if we consider the provisions of art. 27 paragraph 2) of the Universal Declaration of Human Rights[2], according to which „everyone is entitled to the protection of his/her moral and material interests resulting from any scientific, literary or artistic creation which author he/she is", we can place the right to the protection of intellectual property among the fundamental human rights.

We can say that respect for intellectual property is nowadays one of the landmarks that determine the degree of civilization of a country. Cultural act, in order to be made at its true value, should be funded, and in a society where the state's financial contribution is reduced, the only real support to the cultural act is the implementation of legal provisions of intellectual property rights which immediately reflect into the patrimonial perception of holders' rights.

In the Internet era, within the planetary context, respect for intellectual property is one of the criteria which defines the degree of civilization of a country, because, as the author states, the respect for intellectual property cannot be achieved where poverty, corruption, abuse, ignoring of the law are all day-to-day realities[3].

Given the above, we may say that promotion and legal protection of intellectual property is absolutely necessary because the progress and welfare of a nation depend on people's ability to create in the areas of art, technology and culture. Furthermore, the promotion and protection of intellectual property stimulate economic growth, provide a significant number of new jobs and industries, improve the quality of life and, not at last, represent a mean to create a favorable image of the state in front of the international community.

This study aims to address the collective management of performers' rights, regarding: the beneficiaries of collective management, ways to use artists' performances, what are the collective management organizations and what is their role, the mandate granted by the artist to the collective management organization, the content of the mandate granted by the holder, the negotiation of remuneration/fees due by the users to the performers, categories of payers, methods of remuneration collection and distribution and, not at least, transparency of collecting organizations to the general public, to their own members and to ORDA[4].

ACTUAL CONTENT

1. NEIGHBORING RIGHTS TO THE COPYRIGHT

The rights related to copyright, or „neighboring rights" as they were called in French doctrine and jurisprudence, have been regulated for the first time in the Romanian law by adopting Law no. 8/1996 regarding copyright and neighboring rights[5]. Romanian Legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of

[2] It has been adopted and proclaimed by the Resolution of the United Nations General Assembly no. 217A (iii) dated December 10th, 1948.

[3] Ştefan Gheorghiu, *Intellectual Property – creativity reward or just a business?,* in „Info CREDIDAM", no.4/2005, pp.2-3.

[4] The Romanian Office for Copyright is a specialized body under the jurisdiction of the Government, acting as unique regulation authority for keeping records by national registry, for surveillance, licensing, arbitration and technical and scientific observance in the field of copyright and neighboring rights.

[5] Published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as amended and supplemented by Law no. 285/2004, as published in the „Official Gazette of Romania" , Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, as published in the „Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 regarding copyright and neighboring rights, as published in the „Official Gazette of Romania", Part I ,no. 657 dated July 31st, 2006. (Moreover all specifications regarding Law no. 8/1996 refer to the form amended and supplemented by Law no.329/2006).

Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961[6] and of the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, concluded at Geneva on October 29th, 1971[7].

The neighboring rights to the copyright are intellectual property rights, other than copyrights of which performers enjoy for their own interpretations or executions, producers of audio recordings and producers of audiovisual recordings, for their own recordings and the broadcasting and television organizations, for their own shows and program services.

1.1 Performers enjoying collective management.

In the legal sense of the Law no. 8/1996, we understand by performers: actors, singers, musicians, dancers and other persons who present, sing, dance, recite, declaim, play, interpret, direct, conduct or perform in any other way a literary or artistic play, any kind of show, including folk, variety, circus or puppet shows (art.95).

In practice there was raised the question whether the „figurants" can be considered as performers and can take advantage of neighboring rights as a result of exploiting their performance, although, as seen in the definition given by law to performers, „figurants" are not mentioned.

The extra artist (the figurant) is neither mentioned as being part of the category of performers by the French legal system. Thus, art. L 212-1 of the French Intellectual Property Code excludes the extra artist from the category of persons who may enjoy neighboring rights as a result of their performance in a play[8]. However, in France „special extra performance" is paid. If the figurant, by his/her performance, contributes to the creation, implementation, interpretation of a collective play/work, he/she gains the clear status of beneficiary and holder of rights related to copyright, even if the said performer ('figurant') has only one line, being treated as an episodic part.

According to the DEX (Romanian Explanatory Dictionary) we understand by 'figurant'/'extra' „a person participating in the action of a play, an opera or a movie only by his/her physical presence or by his/her gestures, attitudes etc., without saying any line"[9]. The AFTRA 10 Code defines the 'figurant' as „the person playing mute parts, but he/she can make himself/herself understood individually or as a whole, in groups or in a crowd"; and according to the „Urban Dictionary" the 'figurant' is „a performer who does not perform solo; a performer with no speaking part/line; a person with no status higher than that of simple group member"[11].

In a study referring to agreements and practices relating to remuneration for performers of audiovisual works, presented to the Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances that took place in Geneva on November 6th - 7th, 2003, they mention that none of the union agreements provides remuneration to 'figurants' for secondary uses[12].

---

[6] Romania acceded to the Rome Convention regarding the protection of performers, producers of phonograms and broadcasting organizations by Law no. 76 dated April 8th, 1998 published in the „Official Gazette of Romania", Part I, no. 148 dated April 14th, 1998.

[7] Romania acceded to the Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms by Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania", Part I, no. 156 dated April 17th, 1998.

[8] „À l'exclusion de l'artiste de complément". For details, please see *Code de la propriété intellectuelle*, Édition 2002, Litec, Paris, pp.177-178.

[9] Romanian Academy, „Iorgu Iordan" Institute of Linguistics, The *Explanatory Dictionary of Romanian Language, DEX,* Universul Enciclopedic Printing House, Bucharest, p. 378.

[10] The American Federation of Television and Radio Artists.

[11] See location: www.urbandictionary.com/define.php?term?=figurant

[12] Katherine M. Sand*, Study on Agreements and Remuneration Practices regarding Performers of Audiovisual Works in the United States of America, Mexico and the United Kingdom*, presented within „**Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances**", Geneva, November 6th-7th, 2003.

Likewise, Professor Viorel Roş explains that „'figurants', either for theatre or for cinema, are not considered as holders of neighboring rights, the limit between the 'figurant' and the performer being determined by the professional practices"[13].

Given the above, we consider that not having the freedom movement, the 'figurant' acts like a „machine" running some of the director's instructions. For this reason, the 'figurant' is not able neither to express his/her own personality while performing the act of an intellectual creation, nor to enjoy the neighboring rights as a result of exploiting such work.

In another opinion[14], Professor Ligia Dănilă believes that „you can include between those who enjoy neighboring rights, without any doubt, also those who are 'extras'/'figurants' in a show, provided that their part and position in the general framework of the show to be essential for transmitting the message and to be an unequivocal condition for its transmission". This eminent author considers that „such an analysis can be done, in case of dispute, based on studying the directing book of the show, on the text of the notes made as directing indications, or on other specific evidence". In order to strengthen these considerations, the author shows that her interpretation „ is also subsumed to the general definition of the author as given by the legislator in the 1st article of the law, which says that the author is the person or entity who created the work. However, this interpretation does not conflict with the provisions of article 3 of the Rome Convention". At the same time, the author proposes that the interpretation of the said article of the law should be made subsequently to a „nuanced analysis, varied from one case to another, from one show to another, of the role and contribution of the 'figurant' in the creation of the show and, as a consequence, to distinctly establish, according to each case, if the 'figurant' may or may not have the quality of holder of neighboring rights"[15].

1.2. Use of performers' artistic performances

Performer wants everyone to know that HE is the „father" of his/her interpretations and, at the same time, everyone respects him. He also wants to control the use of his performances, both at national and international level, and, at the same time, to be protected against any illegal use of his performances in order to enjoy and benefit from the fruits of his intellectual effort.

Any use of his performance, by any means, can be achieved only with the consent of the artist. This is the general rule which supports, however, some explicit and restrictive exceptions provided by most copyright laws.

As Paula Schepens[16] shows, „copyright (in the generic sense) should allow to establish a fair balance between the interests of the community, the public, who is entitled to information, training, education in order to reach full intellectual development and personal interests of the creator. The author needs his public, he needs to be understood and heard. The public, in turn, requires those who were destined by nature, and have that extra little thing called talent, which allows them the creation of a work, able to enthuse, to captivate the spirit, to broaden the worldview. The author cannot be isolated from the world. He must live in the community where he draws inspiration. He grew up in a certain culture that ancestors have left as legacy. He will bring to light what has been bequeathed, adding his own imprint of personality. We speak here about an interaction. Therefore there are limits against his absolute power".

For further creative and artistic work, in order to be able to fund this activity, performers and producers of phonograms or of audiovisual recordings should receive fair remuneration, proportional

---

[13] Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, op.cit., p. 466.

[14] Ligia Dănilă, *Figurants – subject for neighboring rights or just ornaments?,* in „ Romanian Magazine of Intellectual Property Right", no.4/2007, pp. 20-25; Ligia Dănilă, *Intellectual Property Right*, C.H. Beck Printing House, Bucharest, 2008, pp.33-35.

[15] Idem

[16] Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000, p.6

to the use of their work. To ensure the availability of such remuneration and to enable satisfactory obtaining of benefits from the investment, adequate legal protection of copyright and neighboring rights is needed.

In this respect, since 1990, the European Commission stressed the need to establish at Community level, a general and flexible legal framework in this field.

Harmonization of legislation on copyright and on neighboring rights to copyright shall help, as shown in the preamble to Directive 2001/29/EC on the harmonization of certain aspects of copyright and neighboring rights in the information society, the implementation of the four freedoms of the internal market and regards complying with the fundamental principles of law, in particular the principle of property, including intellectual property, free speech and public interest.

It is also shown in the preamble to said directive, by enhancing the legal certainty and providing a high level of protection of the intellectual property, a harmonized legal framework regarding copyright and neighboring rights will foster substantial investments in creativity and innovation, including network infrastructure, and will lead to growth and greater competitiveness of European industry, both in content delivery and information technology, and generally in a wide range of industrial and cultural sectors. This provides jobs preserving and encourages job creation.

In conclusion, we appreciate that without harmonization at community level, legislative activities at national level which have already been initiated in several Member States in order to meet the technological challenges can create significant differences in protection and therefore restrictions on the free movement of services and products incorporation or based on intellectual property, leading to refragmentation of internal market and to legislative inconsistency.

2. SHORT HISTORY REGARDING COLLECTIVE MANAGEMENT OF RIGHTS

Collective management of copyright arose when the first national laws on copyright began to be adopted, a practice that has developed over the centuries, with the evolution of scientific progress. Thus, one can say that copyright is collectively managed at the end of the eighteenth century.

Authors' first organizations were established in France. At first, the functions of professional associations – to fight, inter alia, for the full recognition and respect o copyrights – have been combined with elements of collective management of rights.

Establishment of the first organization of this kind is closely linked to the name of Beaumarchais. It was he who led the legal „battles" against theatres which had some delays in the recognition and respect for moral and economic rights of authors.

Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French authors continued efforts of Beaumarchais, so on April 28th, 1908 they founded the Society of French Writers (Société des gens des lettres – SGDL) which held its first general meeting upon the end of 1837 (this organization currently operates). Those organizations were not collective management organizations in the sense such type of organizations work today.

In 1847, the composers Paul Henrion and Victor Parizot, the writer Ernest Bourget, supported by their editor, filed a lawsuit against the „Ambassadeurs" (a „café-concert" located in Avenue des Champs-Elysées, Paris). They were unhappy that they had to pay for seats and food consumed at „Ambassadeurs", while they receive no remuneration for their works which were interpreted by that local orchestra, which is considered by them as a blatant contradiction. So they took the courageous – and logical – decision to no longer pay the meals as long as neither of themselves is paid for their works. The authors of the works interpreted in that local won the lawsuit and the owner of „Ambassadeurs" premises was obliged to pay them a considerable amount. This Court decision has created new opportunities for composers and lyricists of non-dramatic musical works, although it was obvious that they will not be able to control and enforce these new rights individually. Court decision led, in 1850, to the establishment of a collective agency which was

replaced by the Society of Music Authors, Composers and Editors (Société des auteurs, compositeurs et éditeurs de musique – SACEM), an organization that is successful even nowadays[17].

In the late nineteenth and early twentieth century, in almost all European countries, as well as in other countries, have established similar author bodies (the so-called interpretation rights organizations). Given that these bodies have worked very well through bilateral reciprocal representation contracts of repertoire, it became necessary to have an international body to coordinate their activities and to contribute to the more effective protection of authors' rights worldwide. Thus, in June 1926, delegates from 18 organizations have set up the International Confederation of Societies of Authors and Composers – CISAC.

In conclusion, we can say that copyright and technology have evolved in parallel: first in print, then the sound recording, film, broadcasting, photocopying, transmission by satellite and cable, video recording and more recently, the Internet. Today, this practice became current, in the world collecting societies operating in over 100 countries[18].

In Romania, the collective management of neighboring rights was regulated for the first time by the Law no. 8/1996, which by the amendments brought in July 2004 by Law no. 285/2004, n September 2005 by Government's Emergency Ordinance no. 123/2005 and in 2006 by the Law no. 329/2006 has undergone major amendments and supplements.

Following the adoption of such legislation, in Romania were created more bodies for the management of copyright and related rights, currently operating a number of 12 collective management organizations.

3. INTRODUCTORY NOTIONS REGARDING THE COLLECTIVE MANAGEMENT OF RIGHTS

The Collective Management Societies (organizations) are entities established by free association, having as main activity collection and distribution of rights which management is entrusted to them by the holders. The collective management organizations are subject to regulations on non-profit associations and may acquire legal personality by ORDA authorization. The collective management organizations are created directly by the holders of copyright or neighboring rights, natural or legal persons, and acting within the granted mandate and on the basis of statues adopted according to the procedure provided by law. These can be set separately for different categories of right management, corresponding to different fields of creation, as well as management of rights belonging to different categories of holders[19].

Collective management means: managing for the benefit of authors community. The amounts thus collected shall go to their final recipient, meaning the author himself. In the „Guidelines on the collective management of copyright", Paula Schepens says: „Everyone gets as he/she deserves! Rights should not serve collective goals. It's not about a fee but about the author's wages. So, collectively gathered, but individually assigned/distributed. Collective management is the only way that guarantees the legitimate interests when the author has before him/her a multitude of users"[20].

Collective management of copyright is generally used to facilitate the effective exercise of these rights to authors and to promote the lawful exploitation of works and cultural benefits. As Salah Abada, Director of the Section Creativity and Copyright of the UNESCO, shows, „in modern

[17] Mihaly Ficsor, *Collective management of copyright and related rights*, WIPO, 2002, pp.18-19.

[18] Tarja Koskinen-Olsson, the *Collective Management of Reproduction.* This study was developed under the cooperation agreement between WIPO and IFFRO in 2003.

[19] See Rodica Pârvu, Ciprian Raul Romițan, *op.cit*., pp.77-78.

[20] Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000.

society, collective management is one of the best means to ensure respect for exploited works and fair remuneration of the creative effort to cultural enrich, facilitating quick access to the public in a lively and constant enrichment culture".

According to art.4 paragraph 3) of Council Directive 92/100/CEE dated November 19th, 1992 regarding rental right and lending right, and certain rights related to copyright in the field of intellectual property, „Managing the right to obtain a fair remuneration may be entrusted to some collective management organizations representing authors or performers".

4. NECESSITY TO ENSURE THE COLLECTIVE MANAGEMENT OF COPYRIGHT AND NEIGHBOURING RIGHTS

Over the past 15 years, the issue of the collective management of copyright and neighbouring rights was debated on a European level. For this purpose, the European Commission has made an analysis in order to establish whether the "current rights management methods do not hamper in any way the functioning of an internal market, especially considering the increased strength of the information society".

Thus, the European Commission underlined in its communication dated the 19th of April 2004, the need to set up a European legislation on the collective management and the good functioning of the collective management organizations[21].

Moreover, the Commission highlighted the issue of the digital rights management and spoke about the emergence of DRM (Digital Rights Management) systems, "which could be used for authorizing rights, for monitoring behaviours and for applying rights". This new type of system was considered by the Commission as being the most important instrument in the field of digital rights management, in the context of the internal Market. However, the Commission stated that the inoperability of the DRM systems' infrastructure is a necessary prior condition which ensures the access of right holders and of users.

As shown before, the collective management bodies represent an important link between the authors and users of works protected by copyright, because they guarantee to their authors, as holders of such rights, remuneration for the use of their works. In a wider sense, collective management means the exercising of the copyright and neighbouring rights by a body which acts for the interest of and on behalf of right holders.

The members of a collective management organization can be all the holders of copyright or of rights related to copyright, such as: authors, composers, publishers, writers, photographs, musicians, performers or players, etc. The radio broadcasting bodies cannot become members of a collective management organization, because they are considered as belonging to users, even though they hold certain rights on their own shows.

Once they subscribe to a collective management organization, the members provide to it a series of personal information and declare the works they created. All the supplied information is an integral part of the collective management organization's documentation and allows it to establish the connection between the use of works and the remuneration for such use, as well as to make it possible for conveying the due amounts to the right holders. The works declared by the members of the collective management body represent the "national" or the "local" repertoire (versus the "international repertoire", which is made of the foreign works managed by the international collective management bodies).

[21] http://europa.eu.int/comm/internal_market/copyright/management/management_fr.htm

The declaring of the repertoire by artists actually represents the contents of the mandate given to the collective management organization.

Subsequent to the performed survey and to the documents provided by the CREDIDAM collective management organization, the repertoire is declared on standard forms or online, following ISO accredited procedures.

Such procedures contain punctual explanations, so that the artist is able to easily identify how the form should be filled in.

For example:

A) Definitions and abbreviations:

- CREDIDAM® **Member** – performer or player, respectively actor, stunt, singer (vocal performer), instrument player, conductor, dancer, ballet dancer, director (radio theatre), circus artist;
- CREDIDAM® **Repertoire** – the totality of performances or plays, previously fixed or radio-broadcast, respectively the totality of performances in the audio field (phonograms) and of the artistic performances in the audiovisual field (performances made during TV shows, TV theatre, feature film/TV series, previously radio broadcast concerts);
- **Repertoire statement** – affidavit, under private signature, according to the dispositions of art. 292 from the Criminal Code (forgery and use of forgery);
- The audiovisual field will hereinafter be called "**AV**";
- The artistic performance in the audio field will be called: "**Music phonogram/Radio phonogram**";
- The field on the standard forms will be called "**R-Columns**";

B) Process description

I. Manner of declaring:

a) By filling in the standard forms found at the CREDIDAM® headquarters or by downloading from the www.credidam.ro website;

b) Online, by accessing the personal account, using the username and the password;

The permanent and timely declaration of the repertoire by the CREDIDAM® members, in complete and accurate form, in compliance with the provisions concerning this procedure, is the fundamental/mandatory conditions for benefiting from the distribution of remunerations related to the neighbouring rights.

II. Repertoire declaring:

CREDIDAM® records/enters in its data base the performances from the audio field (phonograms) and the artistic performances from the audiovisual field, bearing neighbouring rights, in relation to which the CREDIDAM® member must prove his/her participation, by submitting certified copies of the original and signed copies of contracts, certificates, copies of album covers, etc.

The format of such repertoire statement will be filled in horizontally, complying with the guidelines and with the legend on the right side of the form. This form will be filled in only by the holders of neighbouring rights falling in the category of actors/stunts/dancers/ballet dancers/singers/instrument players, who attended the recording/fixing of a performance such as a feature film/documentary film/commercial/video clip. The repertoire statement must be accompanied by the contract attesting the artistic performance or the certificate according to which the CREDIDAM® member transferred his/her neighbouring rights or not.

Rules for filling in:

- R1- "Film name" – is an mandatory column; the name of the film/commercial/video clip will be inserted, with capital letters, perfectly legible; no additional observations will be inserted; no abbreviations will be used;

- R2- ”Name of the director”- only the name of the film/commercial/video clip director will be filled in, with capital letters, without any additional observations, without abbreviations;
- R3- ”Sub-gender” – depending on the type of the declared artistic performance, the sub-gender will be filled in based on the legend on the right side of the form, i.e. FA-for feature film, FD-for documentary film, RE- for commercial/advertising spot and CP-for music clip/video clip;
- R4- ”Function”- is an mandatory column, which will be filled in according to the legend on the right side of the standard form, and to the proposed abbreviations;
- R5- ”Lead artist”- is an mandatory column; the name of the lead artist will be filled in, without any additional observations, or abbreviations;
- R6- ”Total number of participants”- the number of participants to the recording/fixation of the declared performance;
- R7- ”Character name”- only the name of the performed character will be filled in, without any additional observations;
- R8- ”Producer”- is an mandatory column; the television channel which radio broadcasts the declared artistic performance will be inserted;
- R9- ”Year of recording”- is an mandatory column; the date when the performance was radio broadcast by the television channel will be filled in;
- R10-”Duration”- the duration in minutes and seconds, of the declared artistic performance, will be filled in.

Each repertoire statement/standard form must include the legible name of the holder, the CREDIDAM® ID Card number, the signature and the date.

In case the repertoire statements are incomplete and illegible, and the operator ascertains that the artistic performances cannot be entered in the data base due to the lack of information or to incorrect information, the CREDIDAM® member will be notified by a written notification sent by mail/e-mail or facsimile, regarding the determined incongruities and a 10 days deadline since the notification date will be given for clarification/settlement.

In case the above deadline is not complied with by the performer and the issues concerning the declared repertoire are not solved due to the holder’s fault, CREDIDAM® will be exonerated from any responsibility regarding possible impairments of the neighbouring rights connected to the respective repertoire.

Online statement/updating: the CREDIDAM® member will access his/her personal account/box from the CREDIDAM® website, using his/her username and password and will follow every step indicated for filling in all fields.

Any update of the repertoire, performed on the CREDIDAM® website must be validated by the holder of neighbouring rights either by an electronic signature, or by the submission at the CREDIDAM® headquarters, of a copy printed and signed by the holder. Otherwise, the repertoire declared on the website will not be validated and will not be entered in the CREDIDAM® data base, in order to generate remunerations.

By the repertoire updating it is understood the declaring of fixed artistic plays/performances, in the interval between the last repertoire statement and the current repertoire statement.

The repertoire update is made monthly and it is a statutory obligation of the CREDIDAM® members, the same as that of submitting the contracts related to the repertoire statements in the audiovisual field, so as to determine whether the patrimonial rights were transferred or not. Considering that in the audiovisual field the collective management is optional, we state that during the periods when the holder of neighbouring rights fails to declare his/her repertoire, he/she does not mandate CREDIDAM® to manage his/her repertoire and it is presumed that he/she opted for the individual management of the repertoire fixed during the respective period.

Capacity of mandate of the collective management bodies.

The collective management mandate represents a (contractual) power of attorney given by the holders of patrimonial copyright or neighbouring rights, to certain collective management bodies, in order to act in the performers' name and to manage their rights related to their repertoire[22].

The mandate concerning the collective management of patrimonial rights, copyright or neighbouring rights, is granted directly, by a written contract, by right holders.

Each right holder who granted a mandate to the collective management organization is entitled to one vote within the General Assembly. The performers or players who attended a collective performance or play of a work are entitled to a single vote at the General Assembly, by the representative appointed according to the procedure stipulated in art. 99 paragraph 2)[23].

As per art.129 paragraph 3) from the law, the mandate concerning the collective management of patrimonial rights, copyright or neighbouring rights may also be granted indirectly, by holders, by written contracts, concluded between collective management bodies in Romania and foreign bodies, which manage similar rights, based on the repertoires of the members thereof. The indirect mandate does not grant a voting right to the right holders.

Any holder of copyright or neighbouring rights may entrust through a mandate, the management of his/her rights over his/her own repertoire, to a collective management organization. The respective body must accept the management of such rights based on collective management, to the extent of its object or domain of activity. *Per a contrario,* if the rights, for whose management the collective management organization is empowered, do not fall under the scope of its object of activity, it may reject the request.

The collective management bodies may not have as object of activity the use of the protected repertoire for which they received a collective management mandate.

In the case of the mandatory collective management, if a holder is not associated to any organization, the organization in this field with the greatest number of members will have competence. The claim, by the unrepresented right holders, of the amounts they are entitled to, can be lodged within 3 years from the notification date. After such term, the undistributed or unclaimed amounts will be used according to the Resolution of the General Assembly, except for the management expenses.

For exerting their mandate, according to Law no. 8/1996 on copyright and neighbouring rights, the collective management bodies are not transferred or assigned copyright and neighbouring rights or the use thereof.

The quality of CREDIDAM member is obtained starting from the moment when the holder of neighbouring rights mandates this collective management organization, in writing (by filling in the management mandate), in order to manage his/her rights.

This entitles the associate to take part in the social life of the association and to enjoy equality of treatment.

In the application for registering with CREDIDAM, each right holder undertakes the obligation to mandate this association exclusively for managing his/her patrimonial rights coming from the exploitation of the previously fixed or broadcast artistic performances, whose right holder he/she is, according to the law or to the association's Memorandum of Incorporation.

The management mandate given to the collective management organization by each member, in his/her own name is subject to the dispositions of Law no. 8/1996 on copyright and neighbouring rights, as well as to the dispositions of the common law in this field.

---

[22] Rodica Pârvu, Ciprian Raul Romițan, *op.cit.* p.67.

[23] According to art. 99 paragraph 2) of Law no. 8/1996, performers who are collectively involved in the same interpretation or execution, such as members of a musical group, of a chorus, of an orchestra, of a ballet or of a theatre troupe, should mandate in writing a representative among them, with the consent of members' majority. The director, conductor and soloists are exempted from these provisions (paragraph 3).

The management mandate (act of adhesion) includes the member's commitment to comply with the dispositions from the Memorandum of Incorporation and not to perform any act or fact that might prejudice the association or the members thereof, as well as the option regarding the collective management of the rights susceptible of being collectively managed.

Each member of the collective management organization undertakes to pay, upon signing the management mandate (act of adhesion) the fee for joining the association.

Such joining tax is established annually by the Board of Directors. The quality of member is not transmissible.

The documents issued by the association for its underage member are issued on the underage member's name, and the management mandate will be countersigned by one of his/her parents or legal representatives (custodian, curator, etc.).

The quality of CREDIDAM member is lost in the following cases:

a) Upon request (renunciation):

- the renunciation application will be made in writing, with at least 6 month prior to the end of the calendar year, will be motivated and becomes effective on the 1st of January of the following year;

- the failure to comply with the 6 months term leads to the automatic extension of the mandate by another year.

The statutory disposition represents the particular application of the legal rules solely in relation to the time interval when the calculations between the principal and the mandate, according to the provisions of art. 1541 from the Code of Civil Procedure. According to art. 1541 from the Civil Code in force on the adopting date of the Memorandum of Incorporation: *"The mandate must, whenever asked to, inform the principal about his/her works and supply it with everything there is to be received based on the mandate, even when what is received would not have been owed to the principal"*.

Because the legal dispositions concerning the mandate's obligation to answer before the principal is not limited in time in terms of its execution, in relation to the specific nature of the legal relationships between the collective management bodies, on behalf of and for the principal's interests, according to the law, the statutory disposition forces CREDIDAM, within a precise time interval, to complete the calculation operation with the principal who revoked the mandate, in compliance with the principal of the annuity of the financial year and for avoiding to discriminate the budgetary execution annually approved by the General Assembly.

The CREDIDAM Memorandum of Incorporation can only be interpreted in relation to the law, but also to the legal rules of interpretation applied by similarity to those in the matter of conventions, respectively to art. 977 – 985 from the Civil Code in force on the adopting date of the Memorandum of Incorporation.

Consequently, the literal meaning of the used terms cannot be transformed into an absolute one, because the real intention of those who adhere to the CREDIDAM Memorandum of Incorporation is that of voluntarily conform to certain rules which discipline and constrain the collective management organization, by imposing it, also in the hypothesis when the mandate is given up, according to the incident budgetary exercises, to be diligent when collecting the rights due to the principal for the period previous to the mandate revocation, which may be collected after the revocation request date and to cautiously proceed to making estimates for the budgetary projection, in relation to the disciplining of the revocation procedures.

b) Is terminated by law :

- when the member of the collective management organization becomes a member of another collective management organization abroad, having the same object of activity or concluded a representation contract with it;

- when subsequent to a final and binding court order, he/she is prosecuted for one of the facts stipulated and sanctioned by Law no. 8/1996;

- after the death of the CREDIDAM member:

- in case a member dies, the remunerations will continue to be distributed in the account of the entitled persons, until depletion, in line with the dispositions of Law no. 8/1996, being collected by the legal heirs and/or legatees of the late.

- the identification of heirs, as well as the proof of the death, will be made based on the heir certificate, and on the death certificate, within at most 3 years since the death for the categories of rights which are mandatory managed collectively and within at most 6 months for the categories of rights managed optionally.

- if there are no legal heirs, the exercise of such rights belongs to CREDIDAM, in compliance with the dispositions of Law no. 8/1996 and of the Civil Code.

The revenues due to members, whose quality terminated by law, will continue to be received by the association, which will transfer them to the persons legally entitled thereto, until depletion. From the distributed amounts, the management fee (commission) will be withheld.

6. COLLECTIVE MANAGEMENT FORMS

The performers' rights can be mandatory managed collectively and/or optionally by the collective management bodies.

The performers' rights must be analyzed on a multidisciplinary basis, as they are connected to the civil law, labour law, fiscal law, civil procedural law, criminal law, criminal procedural law, and Community law.

The collective management of copyright and neighbouring rights represents a necessary stage for the materialization of certain rights in relation to the numerous means of exploitation. Certain patrimonial rights of the performers or players have proven from the beginning to be difficult to analyze individually. The technical process and the mass exploitations generalization have made the individual control almost impossible.

The collective management presupposes first of all the collection of the remunerations owed by users/importers and the distribution thereof to those entitled, pro rata with the real use of everybody's repertoire, within at most 6 months since the collection date.

According to art.123 paragraph 1) from Law no. 8/1996, the holders of copyright and neighbouring rights can exert such rights acknowledged by this law either individually or, based on a mandate, through the collective management bodies. Based on the analysis of this text, one can say that the rule is represented by the exercising of rights personally and not through intermediaries, by the right holders, and the exception is represented by the possibility to exert such rights through the collective management bodies.

The patrimonial rights acknowledged through this normative act may not be transferred to the collective management bodies by the holders of copyright of neighbouring rights.

The collective management of copyright is made only for the works previously made public, and the collective management of neighbouring rights can be made only for performances or plays previously fixed or radio broadcast, as well as for phonograms or videograms previously made public.

Law no. 8/1996 on copyright and neighbouring rights restrictively and expressly establishes the categories of rights which can be mandatory managed collectively and those that can be managed optionally.

Thus, according to the dispositions from art.123^1 paragraph1) the collective management is mandatory for the exercising of the following rights:

a) the right to compensatory remuneration for private copy[24];

[24] We understand by *levy (compensating remuneration* the right of the authors of works reproduced after sound or audiovisual recordings, after paper works, reproduced on any other type of support, as well as of publishers,

b) the right to a fair remuneration for public lending stipulated in art. 14^4 paragraph 2)[25];

c) the resale right[26];

d) the right to the radio broadcast of musical works[27];

e) the right to the public communication of music works, except for the public projection of cinematographic works[28];

f) the right to a fair remuneration acknowledged for performers and phonogram producers for the public communication and radio broadcast of commerce phonograms and the reproductions thereof[29];

g) the right to cable retransmission[30].

The law stipulates that for the categories of rights provided in art.123^1 paragraph 1), the collective management bodies also represent the right holders who did not grant a *mandate* to them.

Moreover, art.123^2 paragraph 1) presents the rights which can be managed collectively, meaning optionally. Such rights are:

---

producers of phonograms and videograms and performers to receive an amount of money for private copying done under the law (Rodica Pârvu, Ciprian Raul Romițan, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p.90). We understand by *private copy* reproducing a work without author's consent, permitted by law without the author's consent, when done for personal use or normal circle of a family, provided that the work has been previously brought to the attention of the public, and the reproduction is not contrary to the normal exploitation of the work and does not impair either the author or the holder of rights of use (Rodica Pârvu, Ciprian Raul Romițan, *op.cit.* p.28).

[25] According to art. 14^4 paragraph 2) of Law no. 8/1996 „ Lending by the library does not require consent of the author and entitles him to an equitable remuneration. This right may not be waived".) We understand by *lending*, to make available for use, for a limited time and without economic or commercial advantage, directly or indirectly, of a work through an institution allowing public access for such purpose (art.14^4 paragraph 1). We understand by *fair/equitable remuneration* the right of performers and phonogram producers to receive an amount of money for direct or indirect use of phonograms published for commercial purposes or of their reproductions via radio broadcasting or any other means of communication to the public (Rodica Pârvu, Ciprian Raul Romițan, *op.cit.* p.90).

[26] We understand by *resale right* the right of the author of an original work of graphic or plastic art, or of a photographic work , to get a share of the net selling price obtained for any resale of the work, subsequent to the first transfer by the author, as well as the right to be informed of the location of his work.

[27]We understand by *broadcasting*: a) issuing a work by a radio or television broadcasting organization, by any means of wireless transmission of signals, sounds or images, or of their representation, including its public communication by satellite in order to be received by the public; b) transmission of a work or of its representation, by wire, cable, optical fiber or any other similar procedure, except for computer networks, in order to be received by the public (art. 15^1).

[28] We understand by *public communication of musical works* the communication made in a place opened to the public or in any other place where people gather in a number exceeding the normal circle of a family and acquaintances, regardless the method of communication either by direct presentation by the performers or by using electronic or electroacoustic means (television, radio receivers, tape recorders, stereos, computer equipments - PC, CD-player, amplifying equipments and any other devices playing sound or audiovisual recordings), for the purpose of creating the environment in order to perform other activities not requiring the use of musical works (see the Methodology for the use of musical works through public communication and remuneration representing royalties due to authors of musical works). The *Musical work* is „an expressive sound order codified in a graphic score" (Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Decision no. 134A dated May 24th, 2007, published in the Off. Gazette no. 610 on September 4th, 2007, p.10).

[29] We understand by *commercial phonogram* a phonogram which is communicated or broadcasted to the public by that category of users in report to which it is impossible to individually exercise the right to equitable remuneration by the holders of rights related to copyright; and we understand by *phonogram published for commercial purpose* a phonogram which is communicated or broadcasted to the public by that category of users in report to which it is possible to individually exercise the right to equitable remuneration by the holders of rights related to copyright.

[30] We understand by *cable retransmission*, as defined by law: a) a simultaneous retransmission of a work by an operator, unaltered and in full, by wire, cable, optical fiber or by any other similar procedure, except computer networks, for its reception by the public or b) by a short wave broadcasting system, for reception by the public of an initial transmission, by wire or wireless, including by satellite, of program or television broadcasting services, intended for reception by the public.

a) the right to reproduce music works on phonograms or videograms;

b) the right to the public communication of works, except for music works and the artistic performances from the audiovisual field;

c) the lending right, except for the case stipulated in art. 123^1 paragraph 1) item b);

d) the right to radio broadcasting of artistic works and performances in the audiovisual field;

e) the right to a fair remuneration resulting from the transfer of the rental right stipulated in art. 111^1 paragraph 1)[31];

f) the right to a fair remuneration acknowledged for performers and phonogram producers for the public communication and radio broadcasting of phonograms published for commercial purposes of the reproductions thereof.

For the categories of rights stipulated in art.123^2 paragraph 1), the collective management bodies represent only the right holders who granted a mandate to them and elaborate methodologies, to the extent of the managed repertoire, if the conditions stipulated in art. 130 paragraph 1) item a)[32] are fulfilled, or directly negotiate with the users the license contracts. The collective management bodies will allow, upon the users' request, the analysis, at the bodies' headquarters, of the managed works repertoire, from among those requested by the applicant, in the form stipulated in art. 126 paragraph 2)[33], as well as the list of Romanian or foreign copyright and neighbouring rights holders, that it represents. This collective management activity is under the supervision and control of the Romanian Copyright Office, as guarantor for the application of the law.

Upon request, the collective management bodies authorize the use of intellectual creation works, only based on the documents attesting the existence of the mandate given by the holders of copyright or of neighbouring rights, except for the cases when the collective management is mandatory.

All the rights acknowledged by the law, except for the ones stipulated in art. 123^1 and 123^2, they can be managed through the collective management bodies, only to the extent of the special mandate given by the right holders.

Regarding the negotiations with an individual title, concerning the rights acknowledged by Law no. 8/1996, the existence of the collective management bodies does not prevent the holders of copyright and of neighbouring rights to address to certain intermediaries, which can be both specialized natural persons and legal entities, in order to be represented.

As it can be seen, based on the analysis of the texts in art. 123^1 item f) and art.123^2 item f), the law giver wanted to differently regulate the social relationships concerning the remuneration owed for the radio broadcasting of the "commerce phonograms", as opposed to the same radio broadcasting activity of the "phonograms published for commercial purpose".

For the correct interpretation of the law, we deem that the text found in art. 123^1 is the correct one, being in line with the dispositions of art. 12 from the Rome Convention and with art.15 paragraph1 from the WIPO Treaty*"*.

In relation to the technical-juridical dispute regarding *"commerce phonograms"* and *"phonograms published for commercial purposes"*, our point of view is and still remains the same,

[31]According to art. 111^1 paragraph 1) of Law no.8/1996 „If an author or performer has transferred or ceded his/her right to rent or loan, with respect to a phonogram or a videogram, to a producer of phonograms or of audiovisual recording, he/she retains the right to obtain equitable remuneration".

[32] According to art.130 paragraph 1) item a) collective management organizations have the obligation to grant non-exclusive license to users, by their request, made before using the protected repertoire/playlist, in exchange for a remuneration, by written non-exclusive license.

[33] According to art 126 paragraph 2 of the law regarding copyright and related rights, such repertoire/playlist is submitted to ORDA a database protected by law, both in writing and in electronic format, as established by general manager's decision, and contains at least the name of the author, the name of the holder of rights, title of the work, identification elements of the performers, phonograms and videograms.

the law not making any distinction between the two wordings and the juridical regime applicable for the phonograms is unique.

The legislation in Romania transposed the dispositions of the international regulations, having as purpose the homogenization of the standards regarding the protection of intellectual property rights at international level.

Phonograms have a unique definition in each of these international instruments:

a) art. 3 paragraph 1 item b) from the Rome Convention[34] defines the phonogram as: "any fixation of an audio reproduction of the sound of a representation or of other sounds".

b) art. 2 paragraph 1 item b) from the WIPO Treaty[35] on phonograms and public reproduction (WPPT) defines the phonogram as the fixation of the sound of a representation or of other sounds or the production of sounds, other than in a fixed form and incorporated in a cinematographic or audiovisual work.

Moreover, art.12 from the Rome Convention establishes: "when *a phonogram published for commercial purposes* or a reproduction of such phonogram is used directly for radio broadcasting or for any other type of communication to the public, the one using it will pay to performers or players or to the phonogram producers or to both, a fair and unique remuneration".

Art. 15 The WIPO Treaty[36] establishes the fact that the performers and phonogram producers will benefit of a right to a fair and unique remuneration for the direct or indirect use of the phonograms published for commercial purposes for radio broadcasting and for any public communication.

We ascertain that on an international scale, there is no distinction between "commerce phonograms" and „phonograms published for commercial purposes".

The distinction made by the Romanian law is artificial and contradictory, as long as the subsequent amendments from Law no. 8/1996 only intended to transpose the international regulations, which contain no difference, in this sense.

According to art. 20 from the Romanian Constitution, in which the provisions of international treaties to which Romania is a part, prevail, in case when there are incongruities or contradictions between them and the regulations from the national legislation, the regime applicable to phonograms is unique and there isn't necessary to make any distinction in this field[37].

De lege ferenda, through the bill on the amendment and supplement of Law no. 8/1996 on copyright and neighbouring rights, with subsequent amendments and supplements, drafted by the Government in order to be submitted to the Romanian Parliament for adopting, the envisaged purpose is to eliminate the drafting errors found in the text of Law no. 8/1996, including the elimination of the notion of *"commerce phonogram"* from art. 123^1 paragraph 1, item f from Law no. 8/1996, and the replacement thereof by the wording *"phonogram published for commercial purposes"* (wording used throughout the contents of the Law). Moreover, item f in art. 123^2 from Law no. 8/1996 will be eliminated, in order to remove any doubt in relation to the obligatory nature of the management activity in the case of phonogram radio broadcasting.

[34] Law no. 76/1998 for Romania's accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961, published in the Off. Gazette no. 148/1998.

[35] The World Intellectual Property Organization

[36] WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000.

[37] See Civil Resolution no.57A/2011 of BCA Civil Section IX and for IP causes, unpublished.

7. NEGOTIATION OF REMUNERATIONS

In order to start the negotiation procedures, the collective management organization must submit to the Romanian Copyright Office an application, accompanied by the methodologies proposes for negotiation, according to art. 130 paragraph (1) item a) from Law no. 8/1996.

The methodologies proposed and submitted to the Romanian Copyright Office are negotiated within a commission set up based on a decision of the General Manager of the Romanian Copyright Office, issued within maximum 5 days since the reception of the application for the start of the negotiation procedures. The decision of the General Manager of the Romanian Copyright Office will be published in the Official Gazette of Romania, Part I, on the expense of the collective management bodies.

According to art. 131 paragraph 2) from the Law, the final part, the negotiation commission is composed of: one representative for each main collective management organization, which function each for one category of rights and one representative for each main associative structure mandated by the users, appointed from among them, and one representative of each of the first 3 major users, established based on their turnover and market share in the field, provided they are declared at the Romanian Copyright Office on their own responsibility, as well as of the public radio broadcasting and television societies, if applicable.

In the view of being appointed within the above mentioned commission, the collective management bodies submit to the Romanian Copyright Office, together with their methodologies, the list of the associative structures of their users and the list of their major users, which will be convened for negotiations, as well as the identification data thereof.

The main negotiation criteria:

a) the category of right holders, members or non-members, and the field for which the negotiation is being carried;

b) the category of users represented during negotiations by the associative structures or by the other users appointed to negotiate;

c) the repertoire, confirmed by the Romanian Copyright Office, managed by the collective management organization, for its own members, as well as for the members of other similar foreign bodies, based on their representation contracts;

d) the percentage of use of the repertoire managed by a collective management organization;

e) the percentage of uses for which the user fulfilled the payment obligations by direct contracts with the right holders;

f) the revenues obtained by users from the activity which uses the repertoire constituting the scope of the negotiation;

g) in case there are no revenues, the European practice in the field will be used;

h) the European practice on the results of negotiations between the users and the collective management bodies.

If the collective management is obligatory, the methodologies will be negotiated without taking into consideration the criteria stipulated in paragraph (1) items c) and e), the repertoires being considered extended repertoires.

The negotiation of methodologies takes place according to the schedule established by the two parties, over a time span of maximum 30 calendar days since the setting up of the commission.

The understanding between the parties in relation to the negotiated methodologies will be recorded in a protocol, which will be submitted at the Romanian Copyright Office, Part I, on the expense of the collective management bodies, based on a decision of the General Manager of the Romanian Copyright Office, issued within 5 days since the date of submission. The methodologies thus published are enforceable against all the users in the field for which negotiations were carried

and against all the importers and manufacturers of supports and devices for which the compensatory remuneration for private copy is owed.

Based on the analysis of these legal texts, it results that the negotiation stage must be extremely serious, the parties being bound to concretely establish their claims, which means actual elements, grounded on the general principles established by the law[38].

8. ARBITRATION PROCEDURE

According to art.131[1] paragraph 3) from Law no. 8/1996, the Romanian Copyright Office can be requested to start the arbitration procedure[39] performed by arbitrators, in the following situations:

a) the entities forming a party which will attend the negotiation were not able to agree on a mutual point of view that needs to be presented to the other party;

b) the two negotiating parties were not able to agree on a unique form of the methodology, within the deadline stipulated in paragraph (1);

c) the collective management bodies were not able to agree on the conclusion of a protocol for the distribution of remunerations and for the establishment of the commission owed to the sole collector.

Within 5 days since the request for arbitration, the Romanian Copyright Office will convene the parties in the purpose of appointing, by drawing of lots, 5 titular arbitrators, who will form the arbitration court, and 3 backup arbitrators. The latter will replace the unavailable titular arbitrators, in the drawing of lots order. The appointment of arbitrators through the drawing of lots will also be made in case the convened parties are absent.

Moreover, within 5 days since the appointment of arbitrators, the Romanian Copyright Office will convene at its headquarters the appointed arbitrators and the parties, for the setting up of the arbitration court. The arbitration court establishes: the gross fee, based on negotiations with the parties, the first term, but not longer than 5 days, and the place of arbitration, informing the parties about its decision.

The two parties under arbitration, the collective management bodies and the users or other payers, respectively have an equal contribution to the settlement of the fee. The amounts will be deposited at the Romanian Copyright Office's pay desk, before the first arbitration term. The failure to make the payment in time leads to the withdrawal of the right of the party which did not pay the fee, to submit the evidence and to draw conclusions during the arbitration period.

The arbitrators must, within 30 days since the first arbitration term, submit to the Romanian Copyright Office, the decision including the final form of the methodologies submitted for arbitration, in the view of delivering it to the parties. As an exception, the arbitrators may request, on a grounded basis, to the Romanian Copyright Office, the extension of such term, by maximum 15 days. The arbitrators may collect their fee from the Romanian Copyright Office's pay desk only after the submission of the arbitration award.

The arbitration award concerning the final form of the methodologies will be delivered to the parties by the Romanian Copyright Office and will be published in the Official Gazette of Romania, Part I, on the Office's expense, based on a decision of the General Manager, issued within five days since the submission date thereof. The methodologies thus published are enforceable

---

[38] For details see Arbitration Resolution dated July 25th, 2007, published in the Off. Gazette no. 586 dated August 27th, 2007, according to the ORDA General Manager's Decision no. 262 dated July 31st, 2007. The Arbitration Panel was composed of the following arbitrators: Ana Diculescu-Şova; Cristian Iordănescu; Alexandru Ţiclea; Mihai Tănăsescu; Gheorghe Gheorghiu.

[39] *Arbitration* is a mean for resolving the dispute between two parties by a third party or by a group of third parties, called *arbitrator* or *arbitrators,* who resolve differences through an Arbitration Resolution enforceable by law (Rodica Pârvu, Ciprian Raul Romiţan, *op.cit*. p.4).

against all users in the field for which negotiations took place and no deductions from the payment of the owed remunerations are granted, others than those stipulated in the published methodologies[40].

According to art. 131^2 paragraph 9) from Law no. 8/1996, within 30 days since the publication of the arbitration award in the Official Gazette of Romania, Part I, the parties can file an appeal against it before the Court of Appeal in Bucharest, which will advise in relation to the cause, in civil session. The arbitration award is enforceable by law until the delivery of the solution regarding the maintaining or the modification of methodologies. The award given by the Court of Appeal in Bucharest is final and binding and will be submitted to the Romanian Copyright Office and will be published in the Official Gazette of Romania, Part I, on the expenses of the Romanian Copyright Office, based on the decision of the General Manager, issued within 5 days since the servicing date.

The methodologies negotiated or established according to the legal dispositions are not enforceable against the users who, on the starting date of the procedure concerning the negotiation of methodologies, undergo a direct negotiation process of a license contract or have already completed such negotiations with the collective management bodies.

A new request for the start of the negotiation procedures in relation to the tariffs and methodologies can be filed by the collective management bodies or, if applicable, by the associative structures formed by users, by major users, by public radio broadcasting societies or by television societies only after 3 years since the publication data thereof in a final form, in the Official Gazette of Romania, Part I.

In the case of negotiations stipulated in art. 107 paragraph 4), either party can file a new request for the starting of the methodologies negotiation procedures only after 2 years since the publication thereof in final form, in the Official Gazette of Romania, Part I.

The remunerations established in fixed form can undergo annual changes, starting with the first month of the year following that when the methodologies were published, by the collective management bodies, based on the inflation index, established at national level. Such modifications will be submitted at the Romanian Copyright Office, and afterwards they will be published in the Official Gazette of Romania, Part I, on the expense of the collective management bodies, based on a decision of the General Manager of the Romanian Copyright Office, issued within five days since the submission date. The modifications become effective starting with the month following their publication.

The remunerations collected by the collective management bodies are not and cannot be assimilated to their revenues.

9. COLLECTING THE AMOUNTS OWED BY USERS

The collecting of the amounts owed by users or by other payers is made by the collective management organization whose repertoire is being used.

If there are several collective management bodies for the same domain of creation, and the managed rights fall into the category of those stipulated in art. 123^2, the beneficiary bodies will establish the following, in a protocol which will be submitted at the Romanian Copyright Office for publication in the Official Gazette of Romania, Part I, on their expense:

a) the criteria for distributing the remuneration among the bodies;

[40] For detail see Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Resolutions no.115A and no.116A dated May 2nd, 2007, published in the Off. Gazette no. 562 dated August 16th, 2007; Resolutions no. 29A dated March 7th, 2006 and 116A dated June 15th, 2006, published in the Off. Gazette no. 841 dated October 12th, 2006.

b) the collective management organization which will be appointed from among them, based on a decision of the General Manager of the Romanian Copyright Office, as collector in the field of the respective right holders;

c) the means of emphasizing and justifying the expenses regarding the real coverage of the collecting costs of the collective management organization.

If for these cases, the beneficiary collective management bodies fail to submit to the Romanian Copyright Office the above mentioned protocol, within 30 days since the effective date of the methodologies, the Romanian Copyright Office appoints from among them the collector in the field of the respective right holders, based on representation, through a decision of the General Manager.

For the above mentioned situation, the unique collector appointed by the Romanian Copyright Office may not distribute the collected amounts either among the beneficiary bodies, or to its own members, until after the submission to the Romanian Copyright Office, of a protocol concluded among the beneficiary bodies, in which the criteria for the distribution of the collected amounts are established. The collecting expenses in this case, are separately highlighted and they must be justified based on documents regarding the real coverage of the collecting costs of the management organization which is the collector in the field of the respective right holders.

Upon the expiry of the 30 days term, any of the collective management bodies may request the Romanian Copyright Office to start the arbitration procedure performed by the arbitrators, for the establishment of the criteria concerning the distribution of the remuneration among the categories of beneficiaries.

The collective management organization, which is a sole collector, must issue the authorization by non-exclusive license, in writing, on behalf of all the beneficiary collective management bodies, and ensure the transparency of all the collecting activities, as well as that of the related costs in relation to the beneficiary collective management bodies. They must support the collecting activity.

The collective management bodies may agree in a protocol which will be published in the Official Gazette of Romania, Part I, based on a decision of the General Manager of the Romanian Copyright Office, the appointment of a joint collector on a field of payers, of the remunerations owed to the categories of right holders represented by them. Moreover, the collective management bodies may set up, with the approval from the Romanian Copyright Office, joint collecting bodies for several fields, which will function based on the legal dispositions regarding the federations made up of private law natural persons without patrimonial purpose, as well as according to the express dispositions regarding the organizing and functioning of the collective management bodies from this law.

9.1 Remunerations owed to right holders

a) unique fair remuneration

b) fair remuneration for the rental or lending of the right

c) compensatory remuneration for private copy

In practice, the distribution of the collected remunerations by the collective management organization of performers is carried out as follows:

CREDIDAM undertakes the obligation to collect and distribute the remunerations according to the management mandate received from the right holders, according to the legal dispositions. The distribution of the collected amounts will be made in compliance with the law, with the Memorandum of Incorporation and with the distribution regulation, approved by the General Assembly. The amounts coming from the remunerations collected by CREDIDAM will be directly distributed to right holders, to performers or players, pro rata with the real use of their own performances, minus a management share (commission) for covering the functioning expenses.

The management share (commission) for the members of the CREDIDAM collective management organization is the maximum percentage stipulated by Law no. 8/1996 with subsequent amendments and supplements. For non-members, the management share (commission) is given by the real expenses incurred with the management of rights (collecting and distribution), but not more than 25%.

The amounts thus remaining will be taxed according to the legal dispositions in the matter.

The distribution of the remunerations to the rights beneficiaries will be made twice a year.

If the bilateral contracts concluded with the partner management companies abroad stipulate otherwise, the distribution to the foreign beneficiaries will be made according to such contracts.

The distribution of the collected rights will be made according to the regulation for the distribution of remunerations towards the holders of neighbouring rights, as follows:

Compensatory remuneration for private copy

The reserve fund for the requests of right holders submitted within 3 years since the collection date is set up. The size of the reserve fund is of 20% from the amounts collected annually for private copy. This can undergo annual changes based on a resolution of the General Assembly, depending on the cashing collected from this source.

The compensatory remuneration owed to performers for private copy will be *distributed to them* in relation to the national market research, which will be done annually by a specialized institution. The Board of Directors appoints the institution and the conditions for performing such market research which establishes the percentages for copying the artists' performances by categories of performance (acting, directors of shows, except for film directors, dancing, music and stunts), by categories of genders (classical music, light music – jazz, rock, pop, folk, dance, manele music, etc. and folklore music) and by categories of origin of the artistic performances (Romanian, European and American).

The value of each phonogram/videogram is given by its radio broadcasting duration and by the amount collected during the period constituting the object of the distribution, in relation to the total number of play lists declared by the Radio and TV channels. The distribution of the amounts to the performers will be made considering, in the absence of a convention recorded with CREDIDAM upon the declaration of the repertoire, the criteria stipulated in radio broadcasting of phonograms/videograms.

Fair remuneration for public lending, internet and reproduction.

For the public lending, the amounts will be distributed according to the information provided by the institution which allows public access to the performances or plays of performers. According to this information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated in relation to the radio broadcasting of phonograms/videograms.

For the Internet, the amounts are distributed according to the information supplied by the institution which allows public access to the performances or plays of the performers. According to this information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated in relation to the radio broadcasting of phonograms/videograms.

For reproduction, the remuneration collected based on the special mandate will be distributed as follows:

- The percentage of 80% will be distributed as follows: 50% for the leading role (in case the cast includes several actors or the director's book includes several actors for the same type of role, the resulting amount will be distributed equally to all participants), 30% for the secondary part, 10% for the cameo role and 10% for the actor whose image is on the DVD/VHS, etc cover or for the artists taking part in the promotion.

- The percentage of 20% for the film soundtrack will be distributed depending on the part played by the respective performers or players.

If one of the above mentioned categories is inexistent, the related remuneration will be redistributed pro rata, in the following order: leading roles, secondary roles, cameo roles, etc.

Radio broadcasting of phonograms/videograms

The amounts will be distributed according to the real use resulting from the information received from users (play lists). The value of each phonogram/videogram is given by the radio broadcasting duration and by the amount collected for the radio broadcasting period (the collected amount will be divided by the total number of radio broadcasting seconds, thus obtaining the value per second, which will be multiplied by the number of seconds for each play/performance, thus resulting the value per play/performance). The amount calculated for a phonogram/videogram will be distributed to all the performers who participated to the respective recording, in accordance with the repertoire statement, or with the attendance sheet.

The criteria used to establish the score for each participant to a phonogram/videogram are, in the absence of a convention registered with at the time of declaring the repertoire:

a) The role or title within the recording (fixing).

b) The number of persons participating in the fixing.

The amounts collected from the users which radio broadcast or retransmit by cable works doubled by performers or players will be distributed to the CREDIDAM members, pro rata with the real use of the repertoire, in compliance with the score system based on the declarations given by the performers or players on their own responsibility under private signature.

Public communication

The remuneration collected from the public communication of phonograms/videograms for ambient/lucrative purposes will be distributed as a compensatory remuneration for private copy, respectively according to the provisions concerning private copy.

The remuneration collected from the public communication of the artistic performances in the audiovisual field in cinematographs will be distributed according to the information provided by the user and to the collected amounts. Based on such information, the amounts will be distributed to the performers whose artistic performances are found on the respective lists, in relation to the criteria stipulated for the radio broadcasting of phonograms/videograms.

Distribution of amounts collected from cable distributors

The amounts will be distributed according to the list of radio broadcast channels retransmitted by cable distributors, according to the distribution system stipulated for the radio broadcasting of videograms and phonograms on television channels. The list of retransmitted channels is communicated by the cable distributor, or can be asked by CREDIDAM from the National Audiovisual Council.

The rights susceptible from being collectively managed for which the express agreement of the members is necessary, according to art.123^2 and to art.123^3 will be distributed solely to the performers or players who mandated CREDIDAM for collecting the remunerations pro rata with the direct cashing related to the use of each artistic performance.

Undistributed or unclaimed amounts

The undistributed amounts are the amounts for which within 3 years since the collecting date, CREDIDAM did not received the information necessary for distributing them.

The unclaimed amounts are the distributed amounts, but whose holders failed to request them for 3 years since the notification date or amounts owed to the deceased CREDIDAM members, whose legal heirs did not claim them for 3 years since the date of their distribution.

The undistributed or unclaimed amounts have the following regime:

- with the open vote of the majority of members present at the General Assembly, the undistributed or unclaimed amounts are included in the amounts designated for the distribution of the collected rights following the rule of distribution of the private copy.

- with the open vote of the majority of members present at the General Assembly exerted in the conditions stipulated by this law, the use for mutual purposes of the undistributed or unclaimed amounts can be decided, based on:

- the granting of temporary aids to the association's members undergoing temporary work incapacity, medically certified and verified by the Board of Directors

- the initiation, support and development of certain social, cultural informative and documentation projects or programs, regarding the association's members or the users of their performances

- with the open vote of the majority of members present at the General Assembly, it can be decided to support through mutual programs and projects, the authority's activities following the public-private partnership rules.

Conclusions

The lead path addressed was a concrete analysis of the collecting and repartition way of performers' rights.

This work is of particularly interest for: performers, authors, producers, users, collective management societies etc. and will contribute to the comprehensive acknowledge of the above mentioned rights and interests.

Therefore, allow me to consider a must the thoroughgoing study for "negotiations and arbitrage" provisions in performers' intellectual property rights, both at national level and at EU or international level. It will be useful for all actors in Copyright issues.

References

- Kamil Idris, *OMPI General Manager's Message, for the World Day of Intellectual Property,* in the „Romanian Magazine of Industrial Property".
- Ştefan Gheorghiu, *Intellectual Property – creativity reward or just a business?,* in „Info CREDIDAM", no.4/2005.
- Law no. 8/1996 published in the „Official Gazette of Romania", Part I, no. 60 dated March 26th, 1996, as amended and supplemented by Law no. 285/2004, as published in the „Official Gazette of Romania" , Part I, no. 587 dated June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, as published in the „Official Gazette of Romania", Part I, no. 843 dated September 19th, 2005, as amended and supplemented by Law no. 329/2006 regarding the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 regarding copyright and neighboring rights, as published in the „Official Gazette of Romania", Part I ,no. 657 dated July 31st, 2006. (Moreover all specifications regarding Law no. 8/1996 refer to the form amended and supplemented by Law no.329/2006).
- Romania acceded to the Rome Convention regarding the protection of performers, producers of phonograms and broadcasting organizations by Law no. 76 dated April 8th, 1998 published in the „Official Gazette of Romania", Part I, no. 148 dated April 14th, 1998.
- Romania acceded to the Geneva Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms by Law no. 78 dated April 8th, 1998, published in the „Official Gazette of Romania", Part I, no. 156 dated April 17th, 1998.
- „À l'exclusion de l'artiste de complément". For details, please see *Code de la propriété intellectuelle*, Édition 2002, Litec, Paris.
- Romanian Academy, „Iorgu Iordan" Institute of Linguistics, The *Explanatory Dictionary of Romanian Language, DEX,* Universul Enciclopedic Printing House, Bucharest.
- Paula Schepens, *Guide sur la gestion collective des droits d'auteur* (La Societe de Gestion au Service de l'Auteur et de l'Usager), UNESCO, 2000.
- Mihaly Ficsor, *Collective management of copyright and related rights*, WIPO, 2002.

- 10.Tarja Koskinen-Olsson, the *Collective Management of Reproduction.* This study was developed under the cooperation agreement between WIPO and IFFRO in 2003.
- http://europa.eu.int/comm/internal_market/copyright/management/management_fr.htm.
- Rodica Pârvu, Ciprian Raul Romiţan, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005.
- Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Decision no. 134 A dated May 24th, 2007, published in the Off. Gazette no. 610 on September 4th, 2007.
- Law no. 76/1998 for Romania's accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26th, 1961, published in the Off. Gazette no. 148/1998.
- WIPO Treaty on performances, executions and phonograms, ratified by Romania by Law no. 206/2000.
- See Civil Resolution no.57A/2011 of BCA Civil Section IX and for IP causes, unpublished.
- For details see Arbitration Resolution dated July 25th, 2007, published in the Off. Gazette no. 586 dated August 27th, 2007, according to the ORDA General Manager's Decision no. 262 dated July 31st, 2007. The Arbitration Panel was composed of the following arbitrators: Ana Diculescu-Şova; Cristian Iordănescu; Alexandru Ţiclea; Mihai Tănăsescu; Gheorghe Gheorghiu.
- Bucharest Court of Appeal, Civil Section IX and intellectual property cases, Resolutions no.115A and no.116A dated May 2nd, 2007, published in the Off. Gazette no. 562 dated August 16th, 2007;
- Resolutions no. 29A dated March 7th, 2006 and 116A dated June 15th, 2006, published in the Off. Gazette no. 841 dated October 12th, 2006.
- See location: www.urbandictionary.com/define.php?term?=figurant
- Katherine M. Sand*, Study on Agreements and Remuneration Practices regarding Performers of Audiovisual Works in the United States of America, Mexico and the United Kingdom*, presented within „Informal Ad-hoc Meeting on Audiovisual Interpretations and Performances", Geneva, November 6th-7th, 2003.
- Viorel Roş, Dragoş Bogdan, Octavia Spineanu – Matei, *Author rights and Neighboring Rights,* Treaty, All Beck Publishing House, Bucharest, 2005.
- Ligia Dănilă, *Figurants – subject for neighboring rights or just ornaments?,* in „Romanian Magazine of Intellectual Property Right", no.4/2007.
- Ligia Dănilă, *Intellectual Property Right*, C.H. Beck Printing House, Bucharest, 2008.