

RELATED RIGHTS OF THE PRODUCERS OF PHONOGRAMS GENERATED BY BROADCASTING THEIR PHONOGRAMS

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Abstract:

The exploitation of phonograms by collective management is a topic of increasingly present among the right holders of copyright and related rights, but the issues raised by this activity are multiple and complex. From the type of the right set in our national legislation to individually or collectively management of this right, there are many interpretations that require further analysis. Phonograms broadcasting by radio broadcasting organizations is one of the first secondary uses which generated rights for the rights holders.

Keywords: *phonogram, commerce, commercial, broadcasting, remuneration.*

Introduction:

As legal framework, I will analyze the applicable provisions of Law no. 8/1996, Rome Convention, WIPO Treaty for the notion of phonogram, notion of phonogram published for commercial purposes, notion of commerce phonogram and the type of management for phonogram broadcasting.

Legal Framework:

- Law no. 8/1996, as supplemented and amended, on copyrights and related rights

Article 103 - (1) A sound recording or a phonogram, for the purposes of this law, shall be deemed to be the fixation of the sounds originating from an interpretation or performance or of other sounds or digital representation of such sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work.

(2) The producer of sound recordings shall be the individual or legal entity that has the initiative and undertakes liability for the organization and financing of the first fixation of the sounds, regardless whether it is a work in terms of the present law or not.

Article 105 - (1) Subject to the conditions provided for by Article 92 paragraph (1), the producer of sound recordings has the exclusive patrimonial right to authorize or to prohibit the following:

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...

f) the broadcasting and communication to the public of his/her own sound recordings, except those published for commercial purposes, case in which he/she is entitled only to an equitable remuneration;

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(2) The definitions from Article 14, 14¹, 14², 14³, 14⁴, Article 15 paragraph (1), Articles 15¹ and 15² shall apply by analogy to the rights provided for by paragraph (1) as well.

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Article 106⁵. - (1) For direct or indirect use of the phonograms published for commercial purposes or of the reproductions thereof by broadcasting or any means of communication to the public, the performers and producers of phonograms are entitled to single equitable remuneration.

(2) The quantum of this remuneration shall be established by methodologies, pursuant to the procedure provided for by Articles 131, 131¹ and 131².

(3) The collection of single remuneration is made subject to conditions provided for by Article 133.

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Article 112¹. – Should the owners of rights benefit from a mandatory remuneration, by effect of the law, they cannot object to the utilizations that generate it.

Article 15¹. - For the purposes of this law, broadcasting means:

a) broadcasting of a work by a radio or TV broadcasting organization, by any means servicing for the wireless transmission of the signals, sounds or images, or of representation thereof, including the public communication by satellite, for the purpose of reception by the public;

b) transmission of a work or representation thereof, by wire, cable, optic fiber or any other similar procedure, with the exception of computer networks, for the purpose of reception by the public.

Article 92. - (1) Related rights shall not prejudice the rights of authors. No provision of this Title must be construed in such a way as to limit the exercise of copyright.

(2) Patrimonial rights recognized in this Title may be assigned, either entirely or in part, subject to the conditions provided for by Articles 39-43 that apply by analogy. These rights may be the subject matter of exclusive or non-exclusive assignment.

Article 134 - (3) Remunerations collected by the collective management organizations are not and cannot be assimilated to their income.

(4) In the exercising of the mandate, pursuant to this law, the copyrights and related rights or the use thereof cannot be assigned or transferred to collective management organizations.

Article 123. - (1) Owners of copyrights and related rights may exercise their rights acknowledged by this law individually or through collecting societies, based on mandate, pursuant to this law.

(2) Collective management of copyrights can be provided only for works that have already been disclosed to the public, and the collective management of the related rights can only be provided for performances that have already been fixed or broadcasted, as well as for phonograms and videograms previously disclosed to the public.

(3) Owners of copyrights or of related rights cannot assign the patrimonial rights acknowledged by this law to the collecting societies.

Article 123¹. - (1) Collective management is mandatory for exercising the following rights:

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f) the right to equitable remuneration acknowledged to performers and producers of phonograms for communication to the public and broadcasting of commerce phonograms or of the reproductions thereof;

.....

 (2) For the categories of rights provided for by paragraph (1) the collecting societies also represent the owners of rights who have not mandated them.

Article 123². - (1) The following rights may be managed collectively:

.....
 f) the right to equitable remuneration acknowledged to the performers and producers of phonograms for the communication to the public and broadcasting of the phonograms published for commercial purposes or of the reproductions thereof.

(2) For the categories of rights provided for by paragraph (1), the collecting societies represent only the owners of rights who have mandated them and draw up methodologies within the limit of the managed repertoire, if the conditions provided for at Article 130 paragraph (1) letter a) are fulfilled, or negotiate the license agreements directly with the users.

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 • Rome Convention for protection of performers, producers of phonograms and broadcasting organizations, ratified by Romania by Law no. 76/1998 – Article 12: If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

• WIPO Treaty on performances, and phonograms, ratified by Romania by Law no. 206/2000 – Article 15 (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

2. Content

Domestic law has one definition of the notion of phonogram, and two references to the notion of “phonogram published for commercial purposes”, and one of the two references may be deemed as a definition of this second notion.

Phonogram is deemed to be the registration or the fixation exclusively of the sounds originating from an interpretation or performance or of other sounds or digital representation of such sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work.

At first glance, we would be tempted to believe that the musical work or phonogram incorporated in an audiovisual work loses the protection that it enjoys, in reality however, should we construe this law text together with the special provisions of Articles 65-67 and 70 from Law no. 8/1996, as amended and supplemented, on cinematographic works and other audiovisual works, it evidently results that only the music especially created may lose its freestanding protection, as this is the only one which is fixed concurrently with the audiovisual work, as the other phonograms used within it are preexisting phonograms, keeping the freestanding protection, generating rights from any broadcasting or communication to the public of the audiovisual work in which they are incorporated.

A literary work used for screening is clearly a preexisting work as well as any musical composition inserted in various stages of the movie, other than music specifically created for that movie. It is detached interpretation of the doctrine in terms of phonograms used in an audiovisual work.*

We stated that only the music especially created for the audiovisual work may lose its freestanding protection, and only insofar as the author of the especially created music assigns to the producer of the audiovisual work the exclusive rights on using the overall work. We notice that this assignment is not part of the cases of assignment presumption between the authors of the audiovisual work and the producer for using the overall work (provided by art. 70 from Law no. 8/1996, as amended and supplemented), therefore the assignment of the especially created music must be especially entered into, otherwise the producer may not use the overall work. Unless otherwise provided for by the assignment contract, the author of the especially created music keeps all the separate use rights of his/her own contributions, as well as the right to authorize and/or prohibit uses other than the specific one of the work, entirely or in part. This aspect is inasmuch obvious as the lawmaker, as we stated above, chose to except the assignment of the especially created music from the presumptions of assignment between the authors of the audiovisual work and the producer even in case of its use within the audiovisual work. Therefore, an express provision regarding further uses is inasmuch necessary.

Another notion found in our legislation is the one of “phonogram published for commercial purposes”, not defined by the our Copyright Law, however defined by the WIPO Treaty ratified by Romania by Law no. 206/2000 as being the phonogram made available to the public by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen, whereas Article 11 from the Rome Convention refers to the copies in commerce of the phonogram as an implicit definition of the phonogram published for commercial purposes, confining itself therefore to the physical product on which the phonogram is fixed (CD, DVD, vinyl, and any type of support).

Our Copyright Law has however no limitations on the collective management of phonograms, only on the ones fixed on physical support, providing expressly that collective management may be made only for fixed performances or only previously broadcasted or for phonograms previously disclosed to the public. A phonogram only previously broadcasted or disclosed to the public is not necessarily found on the market on physical support, and even in this latter case, its broadcasting generates related rights for the holder. From this point of view, the provision from the Rome Convention seems obsolete in the context of the latest digital technology development, as sales on physical support dropped dramatically. Otherwise, we would admit the theory according to which, in case the phonogram is not published on physical support [which must be found on the market], it could not generate related rights from broadcasting/any other use.

Our Copyright Law uses another notion, namely the notion of “commerce phonogram”, however without any definition in this case either. This notion appears only once in the law text, namely in Article 123¹ letter f), and it is not found in any act or treaty to which Romania acceded. Although it seems an obvious material error [as to which it is true that no institution took any measures in order to correct it], it was deeply exploited by the users of phonograms and vastly debated in the law courts, however for controversial reasons and arguments.

However, this was not the end of this regrettable error, as it also influenced the type of collective management in case of phonogram broadcasting. On this subject, the Decision of the Court of Appeal Bucharest no. 23A/2007 amending the Arbitration Decision from 10 April 2006 [Decision of the Romanian Copyright Office no. 74/2006] is very well known. Therefore, the Court of Appeal Bucharest motivates the concerned Decision as follows:

“Having regard to the considerations above, and seeing the dynamics of the amendments to the Copyright Law, the Court concludes that the two collocations “commerce phonograms” and “phonograms published for commercial purposes” used by the lawmaker in Article 123¹ paragraph

(1) letter f) and in Article 123² letter f) from Law no. 8/1996 as it is in force upon the arbitration (therefore with the amendments made by Law no. 285/2004 and Government Emergency Ordinance no. 123/2005) must be construed as follows:

- the collocation "commerce phonogram" means the phonogram communicated publicly or broadcasted by that category of users in relation to which it is impossible to exercise individually the right to equitable remuneration by the holders of the rights related to copyright;

- the collocation "phonogram published for commercial purposes" is that phonogram communicated publicly or broadcasted by that category of users in relation to which it is possible to exercise individually the right to equitable remuneration by the holders of the rights related to copyright.

g) From the analysis of the provisions of Article 123¹, 123² and of Article 131¹ paragraphs (1) and (4) from the Law, the Court finds that the different regime of the legal relations on exercising the right to equitable remuneration, depending on the category of phonograms, "commerce phonograms" and "phonograms published for commercial purposes" respectively is evident.

Therefore, in the case of commerce phonograms, the holders of the rights related to copyright may not exercise the right to remuneration individually, but only through a collective management organization, even though they granted no mandate for this purpose to such an organization. Concurrently, users may not refuse the payment of the remuneration due to the reason that the collective management organization has no mandate from the holder of the right or due to the reason that it would pay the due remunerations directly to the right holders [Article 131¹ paragraph. (4)].

On the contrary, in case of phonograms published for commercial purposes, the right holders related to the copyright may exercise the right to remuneration either individually, or through a collective management organization. In such situations, collective management organizations may collect the remuneration only if they can prove that they represent the holder of related rights, and the ratio of using the works for which the user fulfilled the payment obligations by direct contracts with the holders of rights shall be taken into account as well in determining the quantum of the remuneration [Article 131¹ paragraph (4)].

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Therefore, in case there is a limited category and with a low number of users on a certain market, users who are included in a database, which is easily accessible to the holder of the related right, and which could be verified by a reasonable effort from the latter, the holder of the related right may exercise individually its rights, due to the fact that he/she has the possibility to identify easily the users and to negotiate his/her rights with them.

On the contrary, if the number of users is very high, and difficult to be accessed by the holders of the related rights, they cannot exercise individually their right to an equitable remuneration, and in this case collective management shall be mandatory, with the applicable legal consequences.

By applying the above criterion, the Court believes that, in reference to broadcasting companies, they are part of the category of users easily accessible to the holders of the related rights, due to the fact that the number of broadcasting companies is limited in Romania, and there is a special procedure by which such companies obtain the operation agreement, and the holders of rights have the reasonable possibility to identify them, and to negotiate individually the equitable remuneration corresponding to the phonogram use.

Therefore, the phonograms published by the broadcasting companies from the Romanian territory have the legal status of "phonograms published for commercial purposes".

On the contrary, in case of users who use phonograms in order to assure or to create a pleasant environment for the development of commerce, such as: alimentation units, discotheques, commercial units or service providing units, sports and leisure, tourism and transportation units, the

Court believes that the phonograms used by the latter by communication to the public or by broadcasting have the legal status of commerce phonograms, for which the collective management of the right to remuneration is mandatory. In such situations, it is practically impossible for the rights holders, as well as for the respective companies, to exercise their rights and obligations on the collection and payment of the equitable remuneration, respectively. “

The coexistence of Article 123¹ paragraph 1 letter f) with Article 123² paragraph 1 letter f) from Law no. 8/1996, as amended and supplemented, would lead to the entirely erroneous conclusion that the producers of phonograms and the performers would be the beneficiaries of two rights to equitable remuneration, one for communication to the public and for broadcasting of commerce phonograms, which is exercised by mandatory collective management (Article 123¹ paragraph 1 letter f), and another for communication to the public and for broadcasting of phonograms published for commercial purposes, for which collective management is elective (Article 123² paragraph 1 letter f). However, Law no. 8/1996, as amended and supplemented, regulates only a single right to equitable remuneration for public communication and broadcasting, namely only in case of phonograms published for commercial purposes (Article 105 and Article 106⁵), and this right is exercised only through the beneficiary management organizations (Article 106⁵ paragraphs 2-4).

Which is the difference between the commerce phonogram and the phonogram published for commercial purposes, in the context in which Law no. 8/1996 has no definitions for these notions? This is obviously a rhetorical question, as there is no difference between them. Has the Court indicated at least one example of commerce phonogram and one example of phonogram for commercial purposes? This is so due to the fact that the same phonograms are used in case of broadcasting as well as in case of environmental communication to the public. However one may see that the notion of “commerce phonogram” is used ONLY ONCE (in Article 123¹ paragraph 1 letter f)) in Law 8/1996, unlike the notion of “phonogram published for commercial purposes”, which is used in Law 8/1996 (in many articles) as well as in the WIPO Treaty (Article 15), ratified by Romania by Law no. 206/2000 on the ratification of the WIPO Treaty on performances and phonograms, and in the Rome Convention (Article 12) ratified by Romania by Law no. 76/1998, phonogram whose broadcasting creates a new right to single equitable remuneration for artists and producers. The only definition of the notion of phonogram published for commercial purposes is given by the WIPO Treaty which, according to Article 15 paragraph 4 “phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes”, in the context of regulating the same right to equitable remuneration for the communication to the public and broadcasting of phonograms.

In supporting the mandatory nature of managing the rights of the producers of phonograms, in case of phonogram broadcasting, we indicate the following rules (noted as management principles in our law, as well as in the Community legislation and in international Treaties):

a) the producers of phonograms are entitled only to a SINGLE EQUITABLE remuneration (Article 106⁵ and Article 105 paragraph (1) letter f) from Law 8/1996); this rule must be correlated with the one referring to the fact that producers may not prohibit the use of their own phonograms, if they benefit from an equitable remuneration (Article 112¹ from Law 8/1996); therefore, producers of phonograms have no exclusive right to authorize or to prohibit the broadcasting of their phonograms, which is a stronger protection than the one conferred by our lawmaker by the right to single equitable remuneration.

b) the single equitable remuneration is determined BY METHODOLOGIES (such as the one from this case), according to Article 106⁵ paragraph (2) and the collecting society has the legal obligation (provided for by Article 130 paragraph 1 letters a and b from Law no. 8/1996) to draft methodologies (such as the present case) in view of authorizing the users, against remuneration “in case of those works whose operating manner RENDERS IMPOSSIBLE INDIVIDUAL

AUTHORIZATION by the holders of rights”. This circumstance – impossibility of individual authorization – strengthens the mandate of the management organization to represent the rights and interests of all the producers of phonograms in case of negotiation and determination of the final form of the methodology. The impossibility for individual authorization presumes the incapacity of the producer of phonograms, and of the artist respectively, to control the use of their own phonograms, and to verify the remunerations directly from the user.

c) The methodology drafted by the collecting societies refers to two categories of right holders – performers and producers of phonograms, more precisely to all the artists, and producers respectively, not only the members of the collecting societies.

Therefore, the collecting societies are acknowledged by the law the legal mandate to represent all the producers of phonograms with a view to negotiating and determining this remuneration (also to determine the final form of the methodology). In the relations between the producers of phonograms and broadcasters, the management organization is the representative of all the producers, and concurrently the guarantor assuring the observance of their rights in the relations with the broadcasters, due to the fact that the producers receive the remuneration from the management organization and not from the broadcaster.

In reality, the Court of Appeal grounded its decision by a formal reasoning concerning the qualification of management, starting from the material error that resides in the distinction between the commerce phonogram and the phonogram published for commercial purposes. This reasoning is substantially false, and generates conflicts, interpretations and speculations outside the law, and in reality there is no such distinction. The phonogram is the same as product made by the producer, as is the scope and form of the phonogram use (by broadcasting).

We find that the entire argumentation of the arbitration panel on elective collective management, applicable in case of broadcasting, is based on a MATERIAL ERROR, appeared in the process of drafting Law no. 329/2006 on approving Government Emergency Ordinance no. 123/2005, to amend Law no. 8/1996 on copyrights and related rights. From the analysis of the amendments in time of Law no. 8/1996, one may easily see that the first version of the law (1996) stated a mandatory collective management on radio broadcasting, TV broadcasting or public presentation of sound recordings, and the first amendment to this law by Law no. 285/2004 also provided very clearly the mandatory collective management for these types of use. Subsequently, by the coming into force of Government Emergency Ordinance no. 123/2005, the material error referred above occurred, error also maintained by the approving Law no. 329/2006.

This point of view is affirmed in the very EXPOSITION OF MOTIFS of the bill for amending and supplementing Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented, drafted by the Government in order to subject it for approval to the Parliament. The bill amending the Law and the exposition of motifs, currently at the stage of public debate, can be found for consultation on the site of the Ministry of Culture and National Patrimony (<http://www.cultura-net.ro/DezbateriDetalii.aspx?ID=346>). The bill aims at correcting this error, in the sense of removing the notion of “commerce phonogram” from Article 123 index 1 paragraph 1, letter f) from Law no. 8/1996, by replacing it with the collocation “phonogram published for commercial purposes” (collocation used throughout the law). Concurrently, letter f) of Article 123 index 2 shall be removed from Law no. 8/1996, in order to avoid any doubt concerning the mandatory regime of management in case of phonogram broadcasting.

The Court of Appeal attempted to offer a justification of the previously mentioned legal provision, although it is not the will of the lawmaker, on the contrary, it is a MATERIAL ERROR which led to the ERRONEOUS IDEA that the same use, in this case, the broadcasting, may create different categories of phonograms and distinct equitable remunerations, ALL DEPENDING ON THE CATEGORIES OF BROADCASTERS, namely broadcasters whose identification is easier or broadcasters whose identification is more difficult!!!!?????

Decision 153A of the Court of Appeal Bucharest (published in the Official Gazette no. 470/2011 by Decision of the Romanian Copyright Office no. 216/2011 as being the Methodology for the application of Law no. 8/1996, as amended and supplemented, in the field of broadcasting, as a use generating related right to the copyright) presents nevertheless an entirely different approach of the notions of phonogram published for commercial purposes and commerce phonogram as well as of the type of management of the two types of registrations, as quoted below. We shall use a longer quote from the considerations of this resolution, especially as it is an absolutely different interpretation than the one given also by the Court of Appeal in 2007, but also a lot more interesting.

<<The first aspect that must be clarified, [...], is the one of the contents of the notions "commerce phonograms" and "phonograms published for commercial purposes", notions for which Law no. 8/1996 establishes a different legal regime in Article 123¹ letter f) and in Article 123² letter f).

Firstly, the Court cannot accept the assertion of the plaintiffs in appeal in the sense that there is no difference between the two notions, and that the existence of the two notions would only be the consequence of a material error slipped into the text when the law was amended in 2004.

Thus, should the existence of the two notions be a mere material error, it would have been removed by the lawmaker upon adopting Law no. 329/2006 approving Government Emergency Ordinance no. 123/2005, amending Law no. 8/1996, or by a subsequent amendment, but close in time to the moment of the amendment that included such an error.

Moreover, the use of the two notions within Law no. 8/1996 is not a mere inadvertency of language used by the lawmaker, without any legal consequences, but it involves also a difference of applicable legal regime, which leads to the conclusion that the lawmaker took into account certain distinctions between phonograms, distinctions with a nature to attract for these a distinct regime in reference to the mandatory or elective nature of the collective management of some or other of these categories of phonograms.

Therefore, taking into account the fact that the lawmaker differentiated between the two categories of phonograms only with respect to the regime of collective management, the two notions may be outlined only by starting from the general criteria in relation to which it was established in Law no. 8/1996 that certain copyrights and related rights must be collectively managed, whereas collective management is elective for other such rights.

However, by analyzing the categories of rights for which differences of legal regime were established in reference to the mandatory or elective nature of collective management, the Court finds that in reference to the rights for which the regime of mandatory collective management was established (Article 123¹) the lawmaker presumed that there is a impossibility of the holders to manage individually the respective rights.

Concurrently, the rights provided at Article 123² are rights which, due to their particularities, may be individually managed. Therefore, it was established for these rights that collective management is elective.

As Article 123¹ paragraph 1 letter f), as well as Article 123² paragraph 1 letter f) approach the right to equitable remuneration acknowledged to the performers and to the producers of phonograms for phonogram broadcasting, the only conclusion that results is that the distinction between the two categories taken into account by the aforementioned legal provisions is given by the category of phonograms whose use by broadcasting creates this right, and this conclusion, which is strengthened by the circumstance that the lawmaker used different denominations for the two categories of phonograms, the ones taken into account by Article 123¹ paragraph 1 letter f) are named "commerce phonograms", and the ones taken into account by Article 123² paragraph 1 letter f) are named "phonograms published for commercial purposes".

From this perspective, the Court finds that it was erroneously noted in the challenged arbitration resolution that the distinction between the two legal categories of phonograms must be made in relation with the user, due to the fact that the application of such a criterion would lead to

the conclusion that the same phonogram is either a commerce phonogram, or a phonogram published for commercial purposes, depending on the user.

Moreover, the conclusion of the arbitration panel is erroneous in the sense that, "this case, ... is concerned with the right to equitable remuneration for using phonograms published for commercial purposes by the broadcasting companies, and therefore the collective management of this right is elective, ...".

Thus, the present methodology concerns the use of phonograms by broadcasting, use which is taken into account at Article 123¹ letter f), as well as at Article 123² letter f) from Law no. 8/1996. Therefore, as long as the use modality of phonograms is the same - broadcasting, it concerns commerce phonograms, as well as phonograms published for commercial purposes, and the difference of legal regime is given by the category of phonograms used by broadcasting.

In reference to the types of phonograms, the Court finds that, in relation to the purpose for which they are created, purpose attracting also a specific use manner thereof, 3 types of phonograms may be identified.

A first type of phonogram is the one which includes interpretations, performances or other sounds or digital representations thereof, whose fixation was mainly made for disclosing such to the public, including by selling the supports on which the respective interpretations are fixed. The best known and most frequent phonograms of this type are the ones that include music performances and interpretations, and the main purpose for their accomplishment is to disclose such phonograms to the public by selling the supports which contain their reproductions. Phonograms of this type or the reproduction thereof are subsequently taken over by different users and are used in various modalities, including by broadcasting. The use by broadcasting of some or other phonograms of this type is made in relation with the free choice of each broadcasting organization, according to its own criteria, with variations of use of some or other phonograms of this type and, concurrently, with variations of broadcasting frequency of the same phonogram. Moreover, when the phonogram of this type is made, one cannot know certainly that it would be taken over and broadcasted. These characteristics render impossible the individual management of the right to equitable remuneration in the vast majority of the cases, right which is acknowledged to the producers of phonograms and to the performers for broadcasting, which makes this type of phonogram fall into the legal category of "commerce phonograms", category taken into account by the provisions of Article 123¹ letter f) from Law no. 8/1996, and their applicable legal regime is the one of mandatory collective management.

A second type of phonograms is represented by the phonograms which include interpretations, performances and other sounds, made for purposes of identification and self-promotion of a broadcaster or of one of its programs, phonograms whose producer is either the respective broadcaster, or another producer of phonograms that made the phonogram as ordered by the respective broadcasting station.

A characteristic of this type of phonogram is the fact that they have no interest in use other than for the respective broadcaster, and there is no interest of the public to purchase the supports that include the reproductions of such phonograms, and no interest of other broadcasting stations to take over and use phonograms that identify or promote another broadcasting station or one of its programs.

Therefore, due to the fact that this type of phonograms is destined to the use by a single broadcaster, the management of the right to equitable remuneration of the producers and performers may be made individually.

Therefore, taking into account the purpose for which this type of phonograms is made, exercising the right to remuneration for broadcasting, of the producer of the phonogram, as well as of the performers, may be made directly in relation with the beneficiary of the phonogram (the respective broadcasting station) within the contractual relations entered into for making the respective phonogram, either by paying a lump sum, or by paying periodic sums.

Moreover, if the broadcaster which is the beneficiary of the identification or self-promotion phonogram is its producer as well, it is obvious that the broadcasting of the concerned phonogram shall be made by it in exercising its capacity as a producer of the phonogram, and the payment to itself for the broadcasting of the respective phonogram is not an issue. In the analyzed situation, only the payment of the remuneration corresponding to the right of the performers could be an issue, and this issue can be solved either within the contract entered into by the performers and the respective station with a view to making the phonogram, or by other modalities that are specific to the case when the performers are concurrently employees of the broadcasting station that produces and uses the concerned phonogram.

In any case, should the issue of remuneration remain unsolved based on the contractual relations established with a view to producing phonograms of this type or in another modality that involves an individual management, the right to equitable remuneration acknowledged by the law to the producers of phonograms and to the performers may be exercised also within the elective collective management, pursuant to Article 123² letter f) from Law no. 8/1996.

A third type of phonograms is the one which includes interpretations, performances and other sounds, made with a view to being broadcasted for the promotion of a product or service, belonging to a third party in relation with the broadcasting station, as an advertising form of the respective product or service. The interest for using these phonograms belongs only to their beneficiary, who advertises a product, service or event through these phonograms.

This type of phonograms includes also phonograms from the second type of phonograms presented above, insofar as the phonogram is broadcasted by a broadcaster other than the one promoted by the phonogram, and the characteristic element of this type of phonogram is however the circumstance that the broadcasting is made for a fee or, in any case, based on an understanding with the beneficiary of the phonogram.

Therefore, phonograms of this type are the ones whose broadcasting produces income for the broadcasting stations, and their broadcasting is made as a rule based on advertising contracts.

As a result, considering the scope for making such a phonogram, and the circumstance that its use is only in the interest of its beneficiary, the exclusive right to decide upon the using manner of the phonogram by the beneficiary is, as a rule, assured by the clauses of the contracts entered into with a view to making the respective phonogram, and also by establishing the remunerations due to the producer of the phonogram and to the performers for any manner of use decided by the beneficiary, and these remunerations may be established in the form of a lump sum or in the form of periodic sums.

As in the case of the phonograms from the second type described above, in case the issue of remuneration is not solved based on the contractual relations established with a view to producing the phonograms of this type or by other means that involves an individual management, the right to equitable remuneration acknowledged by the law to the producers of phonograms and to the performers may be exercised also within the elective collective management, pursuant to Article 123² letter f) from Law no. 8/1996.

Consequently, the Courts shall establish, as a first point of the concerned methodology, that the phonograms corresponding to the first type described hereinabove fall into the legal category of the commerce phonograms taken into account by Article 123¹ letter f) from Law no. 8/1996, and their management is a mandatory collective one, whereas the phonograms corresponding to the second and third type fall into the legal category of phonograms published for commercial purposes, taken into account by Article 123² letter f) from Law no. 8/1996, and their collective management is elective and conditioned by the failure to fulfill the right to remuneration by an individual management.

Therefore, the contents of point 1 of the methodology shall be the following:

"1. Commerce phonograms, pursuant to Article 123¹ paragraph 1 letter f) from Law no. 8/1996, are phonograms which include interpretations, performances or other sounds or digital representations thereof, whose fixation was mainly made for the purpose of disclosing them to the public by selling the supports on which the respective interpretations are fixed.

Phonograms published for commercial purposes, pursuant to Article 123² paragraph 1 letter f) from Law no. 8/1996 are:

- phonograms which include interpretations, performances and other sounds, made for purposes of identification and self-promotion of a broadcasting station or of one of its programs, phonograms whose producer is either the respective broadcasting station, or another producer of phonograms that made the phonogram as ordered by the respective broadcasting station;

- phonograms which include interpretations, performances and other sounds, made with a view to being broadcasted for the promotion of a product or service, belonging to a third party in relation with the broadcasting station, as an advertising form of the respective product or service."

Establishing the contents of the notions of "commerce phonogram" and "phonogram published for commercial purposes" as presented above, the criticism [...], according to which establishing the elective joint management regime leads to the infringement of the provisions of Article 106⁵ from Law no. 98/1996, may not be accepted.

Therefore, in the initial form of the law, all the phonograms were included in a single legal category, namely in the category of "phonograms published for commercial purposes", however the law failed to establish a mandatory collective management regime. Upon the amendment of the law in 2004 (by Law no. 285/2004), the lawmaker introduced the notion of "commerce phonogram", establishing for this category of phonograms a mandatory collective management legal regime. Hence, although the notion "phonogram published for commercial purposes" was used throughout the law, the same notion was no longer used in establishing the management regime, therefore the lawmaker implicitly introduced a distinction between two categories of phonograms, some of which had a mandatory collective management regime, named by the lawmaker "commerce phonograms", and the remaining phonograms, which had an individual management regime were not itemized in Article 123². Subsequently, by Government Emergency Ordinance no. 123/2005, letter f) of Article 123² paragraph 1 was included, establishing that for the phonograms which are not subjected to the mandatory collective management regime, management may be not only individual, but also collective, and for these latter phonograms the lawmaker used the notion of "phonograms published for commercial purposes". Upon introducing the notion of "commerce phonogram", the lawmaker did not amend however all the other provisions in which the generic notion of "phonogram published for commercial purposes" was used, and therefore the notion of "phonogram published for commercial purposes" used throughout the law in other articles than 123² letter f) shall be understood to refer either to both legal categories, in case the legal regime of management is a matter of no concern, or to that legal category of phonograms, whose management regime is compatible with the respective provision

Therefore, the provision included in Article 106⁵ from Law no. 8/1996 may concern both legal categories of phonograms, but only insofar as for the category of phonograms published for commercial purposes [Article 123² letter f)] management is also performed collectively. >>

Therefore, according to this recent interpretation of the Court of Appeal Bucharest, there is a difference of legal regime between the commerce phonogram and the phonogram published for commercial purposes, as a premiere in the European legislations. To put this into the practice of broadcasting, I could exemplify as follows: the phonogram "Un arici pe-un camp de maci", performed by Florin Chilian, is a commerce phonogram when it was used to promote the newspaper *Jurnalul National*, and a phonogram published for commercial purposes when it was broadcasted entirely by any radio or TV station OR the phonogram "We love to entertain you", performed by the band Voltaj, is a commerce phonogram when it assures the promotion of the TV station Prima TV, and a phonogram published for commercial purposes when it is broadcasted entirely by any radio or

TV station. There are obviously phonograms especially created to promote a radio or TV station or to promote a certain product, however it does not mean that they are not published for a commercial purpose, it does not mean that they have a different legal regime.

Therefore, a regrettable error of the lawmaker generated different interpretations in the doctrine, although the attempts to approach this subject are rather shy**, but especially in the case law with a negative impact on the attempt to apply the provisions with the title of methodological norm.

Conclusions

In fact, the name of these works as being published for commercial purposes comes indeed from their publication on the market in sufficient copies, and the term was used for the first time by the Rome Convention, notion which, as presented above, became obsolete in my opinion. Phonograms are works which essentially must be available to the public. In the past, they were made available to the public by marketing audio tapes, CD, vinyl and any other recording fixation form. Phonograms become published for commercial purposes as of their official release in a territory – USA, Europe or worldwide. This characteristic thereof – advertising has distinguished and will further distinguish them from videograms, which can be rarely found on the market – music videograms, and I refer especially to music videos, are never found on the market, and cannot be purchased as phonograms by the consumer public. In fact, movies as videograms have an entirely different course than phonograms as far as protection is concerned – they first appear in cinemas (at that time the movie is not available on DVD), and they appear after a rather long period of time on DVD (home video) and only subsequently they can be seen on TV, and this type of protection is never found in case of phonograms. A fixed concert, which is also a videogram, appears on DVD within approximately 1 year after the end of the tour, and subsequently, after another period, it can be seen on TV by the public.

Phonograms can be however made available to the public nowadays by being broadcasted or used on the Internet, and never being fixed on a support to be included in the commercial circuit.

References

- Gheorghe Gheorghiu, *Audiovisual works*, 2004, Publishing House Lumina Lex, pp. 115-116 "In many occasions, audiovisual works either as a starting point or incorporates previous works For those situations where the audiovisual work is based on a preexisting work, Law no. 8/1996 regulates at the article. 68 paragraph. (1) the right of audiovisual adaptation, as << exclusive right of the copyright holder of a pre-existing work to transform it or include it in an audiovisual work>>..... Not in all cases there is also an adaptation or modification of preexisting work, sometimes a simple reproduction, for example, assuming a known musical composition is inserted in certain scenes of the movie”.
- Viorel Ros, Dragos Bogdan, Octavia Spineanu Matei, *Dreptul de autor si drepturile conexe TRATAT (Copyright and Related Rights TREATY)*, 2005, Publishing House All Beck “In relation with the right to authorize or prohibit the broadcasting and public communication of his/her own sound recordings, other than the ones published for commercial purposes [Article 105 paragraph 1 letter f)] we believe that it has an erroneous wording as negation lacks, which could make the text and the regulated exception logical.”