

# HARMONIZING PHASE OF THE ROMANIAN LEGISLATION REGARDING PERFORMERS' RELATED RIGHTS

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## Abstract

*The Copyright System as established by the Bern Convention for the Protection of Literary and Artistic Works<sup>1</sup>, did not provide the necessary protection to those “parties” involved in bringing the work to the public, although it represented a major role in promoting the work. So it was necessary for the legal protection to be regulated in order to allow them to benefit from the entire moral and economic attributes resulted from their work. To remedy the absence of protection due to copyright applicable traditional rules, a new protection system was created: that of related rights<sup>2</sup>. On international level, this led to the adoption in 1961 of the **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**<sup>3</sup>, considered in the literature<sup>4</sup> as arising of the Bern Convention, alongside the TRIPS Agreement and the WIPO Treaties in this filed.*

**Keywords:** TRIPS Agreement, New Regulations in the field of Related Rights regarding Performers, Implementation of WIPO Performances and Phonograms Treaty, Protection of Performers, Beijing Treaty on Audiovisual Performances.

## Introduction

The Rome Convention is the result of a long-lasting process<sup>5</sup> initiated in 1928 during the Review Conference of the Bern Conference. The success of Rome Convention was not as strong as that of its model, the Bern Convention<sup>6</sup>. The difficulty to adhere to the Bern Convention was the result of the great diversity of national legislation, some still ignoring the establishment of special regulations for related rights, and others only partially acknowledging the related rights' system<sup>7</sup>, thus explaining the small number of states that have joined the Rome Convention compared with the number of those that joined the Bern Convention<sup>8</sup>.

The Convention covers 3 categories of holders of related rights<sup>9</sup>: performers, phonogram producers and broadcasting organizations.

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<sup>1</sup> Adopted on September 9<sup>th</sup>, 1886, completed in Paris on May 4<sup>th</sup>, 1896, reviewed in Berlin on November 13<sup>th</sup>, 1908, completed in Bern on March 20<sup>th</sup>, 1914, reviewed in Rome on June 2<sup>nd</sup>, 1928, reviewed in Brussels on June 26<sup>th</sup>, 1948, reviewed in Stockholm on July 14<sup>th</sup>, 1967 and in Paris on June 24<sup>th</sup>, 1971 and amended on September 28<sup>th</sup>, 1979.

<sup>2</sup> Also referred to as „neighboring rights”, according to doctrines and jurisprudence – see André Lucas, Henri-Jacques Lucas, *“Traite de la propriété littéraire et artistique”*, 3 édition, Lexis Nexis, 2006, p. 695. Along with the adoption of TRIPS Agreement, the „neighboring rights” term has been largely replaced with that of „related rights”, and nowadays both terms are used.

<sup>3</sup> Concluded on November 26<sup>th</sup>, 1961 and to which Romania adhered by Law no. 76/1998 (Official Gazette no. 148/14.04.1998).

<sup>4</sup> See André Lucas, Henri-Jacques Lucas, op. cit., p. 979.

<sup>5</sup> See André Lucas, Henri-Jacques Lucas, op. cit., p. 982.

<sup>6</sup> See André Lucas, Henri-Jacques Lucas, op. cit., p. 983. For instance, France adopted the Rome Convention only in 1987.

<sup>7</sup> See André Lucas, Henri-Jacques Lucas, op. cit., p. 983.

<sup>8</sup> Only 91 States adhered to the Rome Convention (See Annex no. 1 – p. 46), compared with 166 States, which adhered to the Bern Convention.

[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17)  
[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15)

<sup>9</sup> Art. 1.

Unlike the Bern Convention, the Rome Convention lays down precise definitions of the protected persons<sup>10</sup>. Thus, the performers are defined as follows<sup>11</sup>: actors, singers, musicians, dancers and other persons, who represent, sing, recite, declaim, play or otherwise perform literary or artistic works. The definition of performers is not a restrictive one<sup>12</sup> as that of phonogram producers<sup>13</sup> or of broadcasting organizations<sup>14</sup>, being the only one upon which the Contracting States may, by the national legislation, extend the protection provided by the Convention to the artists who do not perform literary or artistic works<sup>15</sup>.

In the specialty literature<sup>16</sup> it was considered that the minimum protection offered to the performers by the Convention is relatively modest; thus the rights granted to the performers by the Convention mainly refer to the fact that they can prevent any fixation or recording of their unfixed live performances, so any movie or sound recording could not be performed without the approval of the performer. In practice, this means that a performer can have an exclusive contract with a production company for the recording of his/her performances. Once the recording has been made, the performer may prevent its reproduction: when the original fixation was made without his/her consent, when the reproduction is made for other purposes than those for which the performer already gave his/her consent; if the recording is permitted by national law for certain purposes<sup>17</sup>. Thirdly, the performers may prevent broadcasting or communication to the public of their live performances, if they have not authorized such ways of using their performances. This right is applicable only upon live performances, and not upon those where the performance used for broadcasting or for communication to the public is already broadcasted or made from a fixation<sup>18</sup>.

The rights of broadcasting or communication to the public of fixed phonograms offered to the public for commercial purposes are established as rights to an equitable remuneration<sup>19</sup>.

The modest protection offered by the Convention to the performers considers, on one hand, the fact that some States do not have to acknowledge them as exclusive rights, and, on the other hand, the States are free to establish or not, by their national legislation, "*the methods by which the performers shall be represented in terms of the exercise of their rights, when a greater number of them share the same performance*"<sup>20</sup>. As appreciated within the specialty literature<sup>21</sup>, the Convention itself inflicts its own limits as it reduces protection in audiovisual broadcasting<sup>22</sup>.

<sup>10</sup> A se vedea *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984.

<sup>11</sup> Art. 3 (a).

<sup>12</sup> See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984.

<sup>13</sup> Referred to as "restrictive" in the specialty literature (see *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984);

<sup>14</sup> Referred to as "double restrictive" in the specialty literature (see *André Lucas, Henri-Jacques Lucas*, op. cit., p. 984).

<sup>15</sup> Art. 9.

<sup>16</sup> See *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1003; H. Desbois, A. Francon, A. Kerever, "*Les conventions internationales du droit d'auteur et des droits voisins*", Dalloz, 1976, p. 281.

<sup>17</sup> Art. 15 (1):

a) when it comes to private use;  
b) when using short parts, while reporting current events;  
c) when having an ephemeral fixation, made by a broadcasting organization through its own means and for its own shows/broadcasts;

d) when it is used only for education or scientific research.

<sup>18</sup> Art. 7.

<sup>19</sup> Art. 12.

<sup>20</sup> Art. 8.

<sup>21</sup> *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1004.

<sup>22</sup> Art. 19: Without taking into account any other provisions of this convention, the provisions of art. 7 shall cease to be applicable as soon as a performer will be given his/her consent for his/her performance to be included in an image fixation or or in an image and sound fixation.

### Actual Content

#### 1. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

The related rights system was introduced for the first time in the Romanian legislation<sup>23</sup> by the Law no. 8/1996 regarding copyright and related rights<sup>24</sup>, based on the Rome Convention<sup>25</sup>.

The Law no.8/1996 (art. 92)<sup>26</sup> translates into a clear manner the coexistence rule<sup>27</sup> of the copyright with the related rights as provided by art. 1 of the Rome Convention: *“The protection provided by this Convention leaves intact and does not affect in any way the protection of copyright upon the literary and artistic works. Consequently, none of the provisions of this Convention shall be construed as affecting this protection”*.

**The performers’ definition** provided by the Rome Convention was taken by Law no. 8/1996 (art. 95) as follows: **actors, singers, musicians, dancers and other persons who present, sing, dance, recite, declaim, play, perform, direct, conduct or execute in any way a literary or artistic work, a show of any kind, including folklore, varieties, circus or puppet shows.**

Performers’ definition involves a detailed analysis:

- For instance, the director of a theatre play or of a show (including opera or operetta) is included in the category of performers, unlike a movie or audiovisual work director who, according to art.66 of Law no.8/1996, is considered as author of the same. Including the director of a play or a show seems to have originated in the provisions of the above mentioned art. 9 of Rome Convention, the same being also practiced at the level of other EU countries, for instance France, although art. 9 of the Convention refers in its title to the circus and variety artists.

- Within the specialty literature, performers’ definition from Law no. 8/1996 was not construed as a whole, it was seen either declarative<sup>28</sup>, or limitative and in accordance with the text of the Rome Convention (art. 3)<sup>29</sup>. In other States, for instance in France<sup>30</sup>, the definition seems to be clearer and more restrictive: *“except the additional/auxiliary performers<sup>31</sup> (extras) considered as such according to the professional usage, the performer is the person who presents, sings, recites, declaims, plays or performs in any other manner a literary or artistic work, a variety, circus or puppet show”*.

- Including variety and circus artists within the performers’ category, although they do not perform or execute a spiritual work<sup>32</sup>, is also motivated based on the provisions of art. 9 of the Rome Convention.

- The difference in tone between the notion of “performing artist” and that of „performer”<sup>33</sup> takes into account the fact that the first applies to artists playing individually a song (soloists) and to

<sup>23</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *“Copyright and Related Rights - Treaty”*, All Beck Printing House, 2005, Bucharest, p. 461.

<sup>24</sup> Amended and supplemented by Law no. 285/2004, O.U.G. no. 123/2005 and Law no. 329/2006.

<sup>25</sup> The Rome Convention ratified by Romania by Law no. 76/1998 for Romania’s accession to the Rome Convention (1961) for the protection of performers, of phonogram producers and of broadcasting organizations.

<sup>26</sup> Copyright related rights shall not affect copyrights. Drepturile conexe dreptului de autor nu aduc atingere drepturilor autorilor. None of the provisions of this title shall be construed as a limitation of exercising the copyright.

<sup>27</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 463.

<sup>28</sup> Ioan Macovei, *“Intellectual Property Right”*, 2<sup>nd</sup> Edition, C.H. Beck Printing House, 2007, Bucharest, p. 388.

<sup>29</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 466.

<sup>30</sup> Art. L. 212-1 from the Intellectual Property Code.

<sup>31</sup> For instance, the performer who read the scenario within a movie. The auxiliary artist (extras) differs from performer, not only by the complementary, accessory feature to his/her role, but above all because his/her personality does not translate into his/her performance

<sup>32</sup> Ciprian Raul Romiţan, Mariana Liliana Savu, *“Performers’ Rights”*, Universul Juridic, Bucharest, 2008, p. 53.

<sup>33</sup> Which difference does not exist in the common (Anglo-Saxon) law, the used terminology being that of “performer”.

those performing works (actors), while the second applies to the artists collectively performing musical compositions (conductors, musicians in a group etc). Of course, a performing artist can also be a performer. During the deliberations on the Rome Convention, it was agreed that leaders of instrumental or vocal bands should be included in the performers' category.

- Long debated in the specialty literature is the extras' category<sup>34</sup>. Some authors assert that both theatre and movie extras are not considered as holders of related rights, the boundary between an extra and a real performer being determined by professional usages<sup>35</sup>. On the other hand, other authors state that extras might be included in the category of holders of related rights, provided that their role and position in the general assembly of the show is essential for transmitting the message and for unambiguously causing its transmission<sup>36</sup>.

Given the existing examples in other EU countries, such as France, that extras cannot be considered as performers, it is argued, on the one hand, ancillary, complementary to their performance and, on the other hand, on the exhaustive nature of the definition of performers as it is provided by the Law no. 8/1996.

- Another category of artists who raised issues in practice is that of those who "recite". Normally, according to the definition, reciting means saying aloud, from one's memory, a text (poetry or prose). So, recitation involves a text, and not any kind of text, but a poem or a fragment of prose, meaning an intellectual property right. The same is also the solution implemented by Law no. 8/1996, namely: „(...) *recites (...) a literary or artistic work (...)*”. As a consequence, those who present news/weather/various radio or TV shows cannot be included in performers' category. Of course, one can counter-argue by the fact that such a person brings his/her personal contribution to the recitation activity, but what is recited, within the presented cases, does not constitute a work of intellectual creation. However, that activity does not involve further asset exploitation, so those people cannot be granted adequate remuneration.

Given the foregoing, it is necessary to frame and analyze the category of performers from case to case, as well as to develop at the national level some codes of conduct<sup>37</sup> with the professional associations and organizations of performers, which are designed to contribute to the enforcement of the related rights of performers.

Performers' right to an equitable remuneration for broadcasting and communication to the public of their performances and interpretations as provided by the Rome Convention (art. 12) is translated in the Law no. 8/1996<sup>38</sup>. As well as, the exclusive property right to authorize or prohibit the fixation of his/her performance or execution, understanding by fixation: *“incorporating sounds, images or sounds, and images or their digital representation on a support which allows them to be perceived, reproduced or communicated to the public by using a device”*.

Compared with copyrights and with the collective management forms, *de lege ferenda* is necessary to analyze art. 96 and art. 123<sup>1</sup> - 123<sup>2</sup> of the Law no. 8/1996 referring to the property rights of performers and their management forms. Thus, both for the performers and the phonogram producers the right for making available to the public of their phonograms and performances is separately covered by the property rights, but this right is not provided by articles 123<sup>1</sup> - 123<sup>2</sup>, which refer to the collective management forms, either mandatory or optional, covering only the public communication right. In this respect, detrimentally to the performers, it was concluded that such a right is not mentioned under any of the forms of management and thus it should be managed based on a special mandate. Such an opinion is unacceptable in relation to the provisions of art. 96.

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<sup>34</sup> See extensive Ciprian Raul Romițan, *Mariana Liliana Savu*, op.cit., p. 51-53.

<sup>35</sup> Viorel Roș, Dragoș Bogdan, *Octavia Spineanu-Matei*, op. cit., p. 466.

<sup>36</sup> Lîgia Dănilă, *“Extras – subjects of related rights or just a background?”*, Romanian Magazine for Intellectual Property Right no. 4/2007, p. 20-25.

<sup>37</sup> Art. 139 paragraph (19) of Law no. 8/1996, with subsequent amendments and supplements.

<sup>38</sup> Art. 98 paragraph (1) items g)-g)<sup>1</sup>.

Consequently, *de lege ferenda* is necessary to distinctively regulate the right of making available to the public, i.e. to amend art. 15 of Law no. 8/1996, as well as to include this right within the category of the optionally managed rights, i.e. to amend art. 123<sup>2</sup> of Law no. 8/1996.

However, *de lege ferenda* is necessary to correlate art. 123<sup>1</sup> paragraph (1) item f) regarding the right to an equitable remuneration which is acknowledged for the performers and phonogram producers for the communication to the public and broadcasting of commercial phonograms or of their reproductions, with art. 123<sup>2</sup> paragraph (1) item f) regarding the right to an equitable remuneration which is acknowledged for the performers and phonogram producers for the public communication and broadcasting of phonograms published or reproduced for commercial purposes. In fact it creates a false distinction between commercial phonograms and the phonograms published for commercial purposes, when, in fact, such a distinction does not exist, because all phonograms are published for commercial purposes<sup>39</sup>. This is the meaning of the definition of phonograms, according to art. 3 item b) of the Rome Convention and with art. 103 of Law no. 8/1996<sup>40</sup>, and in compliance with the provisions of WIPO Performances and Phonograms Treaty (art. 2(e), 8, 9, 12, and 13), in the sense that they consider that only fixed copies of the phonograms may be put into circulation as tangible objects. *De lege ferenda*, in order to eliminate any prejudice brought to the performers as a result of their use, appears more than necessary to define the phonograms published for commercial purposes. Such a legislative proposal may be regulated as follows: At the art. 106<sup>5</sup>, insert after paragraph (4), a new paragraph (5) with the following content: „For the purposes of this Law, it shall be deemed that a phonogram is published for commercial purposes when its copies are offered to the public in a sufficient quantity.”

The analysis of the implementation of Rome Convention into the Law no. 8/1996 leads us also to the art. 8 of the Convention, which considers the methods that States can adopt, by which the performers will be represented in terms of the exercise of their rights, when a greater number of them share the same performance. Correlatively, Law no. 8/1996<sup>41</sup> establishes that the interpretation or performance of a work is collective, if the individual performances form a whole, without the possibility, given the nature of the performance, to assign a distinct right to any of the participating performers upon the overall interpretation or performance. In order to exercise their exclusive rights regarding the authorization provided at art. 98 of Law no. 8/1996, the performers participating collectively in the same performance, such as members of a musical band, a choir, an orchestra, a ballet or a theatre troupe have to empower in writing a representative among them, with the consent of their majority, except the director, conductor or soloists.

Limiting the voting right of performers who participated in a joint performance or execution to a single vote by an assigned representative (art. 129 paragraph 2, 2<sup>nd</sup> Thesis), seems to have originated in the above Rome Convention, but it cannot be justified by the notion of exercising the rights because it takes into account the exercise of the property rights, meaning those to authorize and prohibit, or of the right to an equitable remuneration. As long as this rule is constituted by a holder of rights who granted a mandate to the collective management organization, i.e. one vote within the General Assembly<sup>42</sup>, then the legal provision by which performers who participated in a joint performance or execution have a single vote by their assigned representative seems to be a limitation of their right to vote. *De lege ferenda*, this provision might be removed from the Law no. 8/1996 or provided in the statutes of the collective management organizations in this field, also taking into

<sup>39</sup> Art. 106<sup>5</sup> paragraph (1) refers to the phonograms published for commercial purposes.

<sup>40</sup> It is considered a sound or phonogram recording, the fixation of sounds from a performance or of other sounds or of digital representation of these sounds, other than in the form of a fixation incorporated in a cinematographic work or in any other audiovisual work.

<sup>41</sup> Art. 99.

<sup>42</sup> Art. 129 paragraph (2).

consideration the draft Directive regarding collective management<sup>43</sup> according to which any restriction regarding members' rights to attend to and vote within the General Assembly must be acceptable and pro rata and should be based on the following criteria: duration of membership and remunerations paid or payable to a member in relation to a certain financial period of time. These criteria shall be provided in the Statutes of the collective management organizations and shall be made available to the public.

The provisions of Law no.8/1996 regarding performances of an artist based on an individual employment contract are in accordance with the international regulations, and the property rights transferred to the employer should be expressly provided for in this employment contract. This provision is also in compliance with those regarding the agreement on transfer of economic rights<sup>44</sup>, which must include, among others, the transferred rights in detail.

Analyzing the implementation of the provisions regarding performers within the Romanian legislation leads us to one of the gaps in the Law no. 8/1996. Thus, the Law does not refer to the transfer of exercise of performers' property rights subsequently to their death. The art.97 of Law no. 8/1996 refers only to performer's moral rights, which exercise, according to the civil law, is transferred by inheritance after the performer's death, on an unlimited period of time. If there are no heirs, the exercise of such rights shall go to the collective management organization that manages the rights of the performer or, where appropriate, to the organization having the largest number of members from that field. These provisions are compliant and correlated to the ones regarding authors (in art. 25) only regarding the moral rights; there is no such provision for the property rights. *De lege ferenda*, is necessary to supplement art. 97 paragraph (2) of Law no. 8/1996 with specifications regarding the property rights, as follows: "After the death of performer, his/her exercise rights under the art. 96 and art. 98 are transmitted by inheritance, as per the civil law, on an unlimited period of time. If there are no heirs, the exercise of such rights shall go to the collective management organization that manages the rights of the performer or, where appropriate, to the organization having the largest number of members from that field".

As stated in the specialty literature<sup>45</sup>, in absence of heirs, the collective management organization is granted only the exercise of the rights, meaning the right to authorize or prohibit performances' use, in accordance with the property rights as provided by art. 98. This means that the said collective management organization shall authorize such use under art. 98, shall collect appropriate remunerations and shall distribute such remunerations to the members of the collective management organization, according to the provisions of the Statute, and withholding the appropriate administrative fee. Practically, any other activities, in contradiction with said activities of a collective management organization are in conflict with provisions of the art.134 align. (2) lit. f) ("*the amounts resulting from unclaimed and undistributed remunerations deposited in bank deposits or from other operations within the limits of its object of activity, as well as those obtained by way of loss or damage as a result of or related to copyright or related rights infringements, are entitled to and distributed to right holders and may not be considered as revenues of the collective management organization*") and paragraph (3) of Law no. 8/1996 ("*The remunerations collected by the collective management organizations are not and should not be treated as their revenues*").

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<sup>43</sup> On July 11<sup>th</sup>, 2012, the European Commission adopted the draft Directive on the collective management of copyright and related rights and on the multi-territorial licensing of the rights upon musical works concerning their online use on the internal market.

<sup>44</sup> Art. 41.

<sup>45</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 299.

Another important element determined in practice by the accession of Romania to the Rome Convention was the possibility of the collective management organizations<sup>46</sup> to represent, based on reciprocity agreements, the rights of artists from abroad.

## 2. TRIPS Agreement – Trade Related Aspects on Intellectual Property Rights

### 2.1. History

After the Rome Convention, two significant developments were registered in the related rights field: the first one considers the appearance in 1994 of the TRIPS Agreement, and the second one by adopting in 1996 the WIPO Performances and Phonograms Treaty.

The TRIPS Agreement<sup>47</sup> is part of the Agreement establishing the World Trade Organization (WTO), signed on April 15<sup>th</sup>, 1994 in Marrakesh, which Agreement is administered by WTO. It terms of intellectual property, the Annex IC is relevant to this Agreement which provides minimum standards for various regulations in the field of intellectual property, regulations that have to be applied in the WTO Member States. At the same time, TRIPS represents one of the most important multilateral instruments concerning the globalization of the rules in the field of intellectual property, and as far as the copyright and related rights are concerned, this agreement includes many provisions that are to be found in the Bern Convention<sup>48</sup>.

Adopting the TRIPS Agreement represented an important step for the protection of neighboring/related rights<sup>49</sup>, being considered in the specialty literature<sup>50</sup> as a large-scale text as it applies to both copyright and related rights and to other intellectual property rights (trademarks, designs and models, patents and so on). The agreement involves many features compared to traditional conventions<sup>51</sup>: the first derives from its purely economic logics of free competition, similar to that of Community law, the importance of the commercial interest of states; the second derives from the “modernist ambition” of the Agreement to cover various gaps criticized in the classical conventions for their lack of realism and their failure to adapt to new technologies; the third derives from the strictly “journalistic” feature of the Agreement, implementing a more efficient regulatory system than the one in the conventional agreements.

The Agreement has not been adopted in order to replace the Rome Convention; this is stipulated in art. 2.2 which shows that TRIPS does not affect any of the obligations of contracting states under the Rome Convention. The TRIPS Agreement regulates the national treatment, but does not require WTO member states to join or to implement the Rome Convention, instead establishes a set of minimum protection standards<sup>52</sup> that member states must implement and which are similar to those provided by the Rome Convention; in this respect in the specialty literature<sup>53</sup> it was stated that in this manner the Agreement came closer to the substance of the Rome Convention. Thus, art. 14 regulates the rights of performers, phonogram producers and broadcasting organizations, but with some important changes:

<sup>46</sup> CREDIDAM, within AEPO-ARTIS, signed bilateral agreements for reciprocal representation with partner collective management organizations.

<sup>47</sup> The Agreement entered into force on January 1<sup>st</sup>, 1995 providing, for mandatory application, flexible periods by signatory countries, ranging from a year as a general term and up to five years for developing and transitory countries (valid period even for Romania) and to ten years for less developed countries. Except articles 3, 4 and 5 of TRIPS agreement which had to be applied also by Romania under the general term of entry into force with mandatory applying term of 1 year (i.e. from January 1<sup>st</sup>, 1996), the remaining TRIPS articles became mandatory for Romania as of January 1<sup>st</sup>, 2000. This Agreement was ratified by Romania through the Law no. 133/1994 for the ratification of Marrakech Agreement regarding the establishment of World Trade Organization.

<sup>48</sup> <http://www.orda.ro/default.aspx?pagina=208>

<sup>49</sup> Starting with this date they were also called as „related rights” (into English).

<sup>50</sup> *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1008.

<sup>51</sup> *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1009.

<sup>52</sup> Art. 14.

<sup>53</sup> *André Lucas, Henri-Jacques Lucas*, op. cit., p. 1026.

- the producers of phonograms are guaranteed the right to rent their phonograms, which means that they can authorize or prohibit the rental for commercial purposes to the public of the original or copied phonograms.

- the term of protection granted to performers and phonogram producers was modified, thus it could not expire before the expiration of the 50 years period from the end of the year when the performance took place, i.e. when the fixation was made.

The Agreement contains important provisions regarding enforcement measures and disputes settlement.

As far as performers are concerned, according to art. 14.1, they are able to prevent unauthorized fixation of their performance in a sound recording, for instance on a CD. Fixation right under the Agreement applies only to audio fixations, not to audiovisual ones. This means that artists should be able to prevent the unauthorized recording of their concerts, but actors do not have the same opportunity to prevent the unauthorized filming of their performances. At the same time, artists are able to prevent the reproduction of such fixations of their performances, as well as the broadcasting and communication to the public of their live performances.

Art. 14.6 refers to exceptions and limitations to the rights of performers, which are in accordance with the Rome Convention, such as, for instance, the private copy.

Given the above, the standards imposed by the Rome Convention were improved by the TRIPS Agreement as far as the performers are concerned.

General obligations imposed on States by the TRIPS Agreement regarding the enforcement measures are: administrative and civil measures, ways of appeal, provisional measures, measures provided to the states' borders and criminal proceedings.

## 2.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

The TRIPS Agreement was implemented by the Law no. 8/1996 regarding performers, the legislation being harmonized at this level: duration of protection, rights, limitations, exceptions and sanctioning measures. Regarding the latter aspect, it is necessary to **analyze legal liability for infringement of the rights of performers**<sup>54</sup>. This subject matter is incorporated by the Chapter III, Section II, art. 138<sup>7</sup>-145 of the Law no. 8/1996, with subsequent amendments and supplements.

Infringement of performers' rights incurs civil liability, either administrative or criminal, as appropriate<sup>55</sup>, and artists may request to the Court to order, as applicable: the acknowledgment of their rights, determining the violation of the said rights and the compensation for caused damages. In **determining damages**<sup>56</sup>, the Court has to take into consideration the criteria provided by art. 139 paragraph (2) of the Law no. 8/1996; however, to avoid any wrong construe of this article, *de lege ferenda*, it should consider the following wording:

*"In determining compensations, the Court takes into consideration:*

*a) criteria such as negative economic consequences, especially the lost profits, unjust profits made by the offender and, when appropriate, other elements beside the economic factors, such as moral damages incurred by the right holder;*

*b) if the criteria set out at item a) above can not be applied, there will be granted damages representing three times the amounts which would have been legally payable for the type of use subject to the illegal act."*

For full coverage of the property or moral damage and in order to eliminate the exposure to danger, the performers may ask the Court to order the implementation of any of the **remedies** provided by art. 139 paragraph (14) of Law no. 8/1996: submission of returns achieved by the

<sup>54</sup> Ciprian Raul Romițan, Mariana Liliana Savu, op. cit., p. 111-122.

<sup>55</sup> Art. 138<sup>7</sup> paragraph (1).

<sup>56</sup> Defending the rights by the means of civil law.



unlawful act, destroying the equipment and tool owned by the perpetrator, shutdown/removal from the market/commercial circuit and spreading the information about the decision of the Court.

**Precautionary measures** may be ordered by the Court pursuant to art. 139 paragraph (3) and the following of the Law no. 8/1996 and they are divided into 5 categories: for preventing an imminent damage (provision of security, payment of fines), providing for damage repair (measures taken upon movable and immovable assets, blocking bank accounts and so on), seizure or surrendering to competent authorities the goods suspected of infringement of a right in order to prevent their introduction on the commercial market, measures to ensure evidence or findings of a state of facts<sup>57</sup>, seizure of objects and documents that constitute evidence of the infringement of rights<sup>58</sup>.

The administrative liability is provided at art. 139<sup>2</sup> – 139<sup>4</sup> of Law no. 8/1996, with subsequent amendments and supplements. For the performers, the administrative offenses provided at art. 139<sup>2</sup> are applicable, namely:

d) if users fail to comply with the provisions of art. 130 item h);

e) in case of fixation of their artistic performances or of broadcasted radio or TV shows without the consent of the holder of rights acknowledged by this law.

The administrative punishments provided at art. 139<sup>2</sup> are also applicable to legal persons. If the offender, a legal person, performs activities which involve, according to its object of activity, the communication to the public of works or products bearing copyrights and related rights, the penalties limits are twice increased. Administrative offences and sanctions are found and applied by officers or police agents within the Minister of Administration and Internal Affairs with relevant expertise in this field. The offender can pay, within 48 hours of receipt of the minutes of finding the offence, half of the minimum fine provided.

The art. 139<sup>4</sup> paragraph (1) of the Law no. 8/1996, is problematic in practice: Constitute an offence, if not a crime, and they are punishable by a fine of RON 10.000 up to RON 50.000 and seizing pirated-goods or access control pirated devices, the facts/acts carried out by natural or legal persons authorize to allow access inside the premises, to the equipments, to the transportation means, to private goods or services, in order for another person to commit an offence or violation provided by this law – in the sense that the listed facts are minor, if not criminal, or there can be no facts that would constitute, at the same time, offenses and crimes, because the degree of social danger of an act is determined only by the legislator, when regulating certain acts as crimes and others as offences<sup>59</sup>. In this regard, it is necessary for *de lege ferenda*, to appropriately amend art. 139<sup>4</sup> paragraph (1) of Law no. 8/1996.

**Defending performers' rights by means of criminal law**<sup>60</sup> includes analyzing the offences' content regarding the related rights of performers and the defense procedural means. As a general rule for such offences to exist, is that **acts are performed without the authorization or consent of performers**<sup>61</sup>. The active subject might be any natural or legal person who fulfills the requirements provided by law for criminal responsibility and the passive subject is the representative of the performer.

This subject matter is incorporated by art. 139<sup>6</sup>, art. 139<sup>8</sup>, art. 140 and art. 143 of Law no. 8/1996, with subsequent amendments and supplements. Thus constituting crimes **the facts carried out without the consent of the holders of related rights: making available to the public**, including via Internet or by other computer networks, of products bearing related rights<sup>62</sup>, so that the

<sup>57</sup> Art. 139 paragraph (6).

<sup>58</sup> Art. 139 paragraph (10).

<sup>59</sup> Bucharest Court of Justice, Decision no. 1866/1998.

<sup>60</sup> Ciprian Raul Romițan, Mariana Liliana Savu, op. cit., p. 119-122.

<sup>61</sup> Ciprian Raul Romițan, Mariana Liliana Savu, op. cit., p. 119.

<sup>62</sup> Art. 140 paragraph (2): We understand by products bearing related rights any artistic fixed performances, phonograms, videograms and shows or services of programs owned by broadcasters and TV organizations

public can access them freely at any place or at any time elected individually; **reproduction** of products bearing related rights; **distribution, rental or import** on the internal market of products bearing related rights, other than the pirated-goods<sup>63</sup>; **public communication** of products bearing related rights; **broadcasting** products bearing related rights; **cable retransmission** of products bearing related rights; **fixation for commercial purpose** of artistic performances or of broadcasted radio or TV programs.

Given the issues raised in regulatory practices as crimes of some facts provided by art. 140 of Law no. 8/1996, with subsequent amendments and supplements, *de lege ferenda*, it should be necessary the regulation as offences (art. 139<sup>2</sup>) of the following facts: the public communication of phonograms and performances without paying the equitable remunerations due to producers of phonograms and performers, as well as the possession of pirated goods at the premises of legal entities, to be used for unauthorized public communication.

### 3. Implementation of WIPO Performances and Phonograms Treaty<sup>64</sup>

#### 3.1. History

An important aspect not covered under the TRIPS Agreement was the need to update the substance of related rights regarding the online use based on digital technology and Internet. This was regulated by WIPO Performances and Phonograms Treaty, signed on December 20<sup>th</sup>, 1996<sup>65</sup>. The number of states (90) that have ratified the Treaty is compared with that of the countries that have ratified the Rome Convention (91)<sup>66</sup>. The principle of national treatment provided by the Rome Convention is also overtaken by WPPT (art. 4) and as we can see from its title, it takes into account only performances and phonograms, not the radio and television organizations.

WPPT includes **updated definitions** (art. 2) of those provided by the Rome Convention:

- **performers**<sup>67</sup>: actors, singers, musicians, dancers or other persons who present, sing, tell, declaim, play, perform or execute in any way a literary or artistic work, or folkloric expressions.

- **publishing a fixed performance or a phonogram**<sup>68</sup> - making available to the public copies of fixed performances or copies of a phonogram with right holder's consent and provided that the copies are made available to the public in a sufficient quantity;

- **broadcasting**<sup>69</sup> - wireless transmission of sounds or images, or of sound or their representation, for the public to receive them; this term also covers such a transmission via satellite; transmission of encoded signals is treated as broadcasting if the decoding means are provided to the public by the broadcasting organization and based on its consent;

- **communication to the public of a performance or phonogram**<sup>70</sup> - transmission to the public by any means, otherwise than by broadcasting, of sounds coming from a performance or of sound or representation of sounds fixed on a phonogram. For the purposes of art. 15, the expression 'communication to the public' includes to make audible to the public either the sounds or the representation of sounds fixed in a phonogram.

Considering the above, the influence of new technologies upon the definition of broadcasting and communication to the public, is obvious.

<sup>63</sup> Art. 139<sup>6</sup> paragraph (8): We understand by pirated goods: all copies, no matter the support they are on, including covers, recorded without the consent of the holder of rights or of the person legally authorized by him/her, and which are directly or indirectly, totally or partially copied from a products bearing copyrights or related rights, or from their packaging or covers.

<sup>64</sup> Hereinafter referred to with the English abbreviation WPPT.

<sup>65</sup> Ratified by Romania by the Law no. 206/2000.

<sup>66</sup> See Annex no. 2 – p. 47.

<sup>67</sup> Art. 2 item a).

<sup>68</sup> Art. 2 item e).

<sup>69</sup> Art. 2 item f).

<sup>70</sup> Art. 2 item g).

It is interesting the specification of folklore expressions in the definition of performers, as they are from the adoption moment of WPPT, explicitly introduced in the definition, being a signal indicating that related rights play an important role in the protection of unrecorded cultural expressions. Performers play a vital role in communicating these expressions to the public, thus protecting their performances and any records made in this occasion indirectly protect folklore.

The rights granted to performers are the **moral ones (the right to paternity** – of pretending to be mentioned as such, unless the use of the performance requires the omission of this specification; **the right to integrity** – of being against any distortion, mutilation or other modification of its performances that would damage his/her reputation) and, additionally, **WPPT updates the property rights upon performances:**

- **unfixed ones:** the performer has the exclusive right to authorize fixation of his/her performance, and consequently, the exclusive right shall also be applied upon the right of broadcasting and communication to the public, unless the said performance is a broadcasted performance.

- **fixed ones:**

- **the reproduction right**<sup>71</sup> - the performers enjoy the exclusive right to authorize the direct or indirect reproduction of their performances fixed on phonograms, regardless the way or form of reproduction.

- **the distribution right**<sup>72</sup> – the performers enjoy the exclusive right to authorize the making available to the public of the original or copies of their performances fixed on phonograms, either by sale or by any other transfer of property. None of the WPPT provisions bring prejudice to the possibilities that the contracting parties have for determining any conditions under which the exhaustion of the distribution right applies after the first sale or after another transfer of property operation of the original or of a copy of the performance or of the fixed performance, carried out with the consent of the performer.

- **the rental right**<sup>73</sup> – the performers enjoy the exclusive right to authorize the commercial rental to the public of the original and copies of their performances fixed on phonograms, even if they were previously distributed by the performers themselves or with their consent.

- **the right of making available to the public**<sup>74</sup> – the performers enjoy the exclusive right to authorize the making available to the public, by wire or wireless means, of their performances fixed on phonograms, in such a manner that anyone could access them at a place and at a time elected individually. This provision covers on-demand services, for instance consumers can select from their personal computer at home a performance, anytime they choose.

- **the right to an equitable remuneration for broadcasting and communication to the public.**

The protection term provided under WPPT<sup>75</sup> is of 50 years, calculated from the end of the year during which the performance was fixed on a phonogram.

The limitations and exceptions<sup>76</sup> provided for the protection of performers must be of the same nature with the ones provided in respect of copyright protection upon the literary and artistic works, of course with the observance of the 3 steps: in certain special cases, when they do not affect to the normal use of the performance and no unjustified harm is caused to the performer's legitimate interests.

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<sup>71</sup> Art. 7.

<sup>72</sup> Art. 8.

<sup>73</sup> Art. 9.

<sup>74</sup> Art. 10.

<sup>75</sup> Art. 15.

<sup>76</sup> Art. 16.

WPPT requires<sup>77</sup> to Member States to provide an adequate legal protection and effective legal punishments against neutralization of the efficient technical measures used by the performers within the exercise of their rights and which, as far as their performances are concerned, restrict their achievement of acts that are not authorized by performers or allowed by law.

At the same time, WPPT provides<sup>78</sup> obligations regarding information on rights management<sup>79</sup>. Thus, the States must provide adequate and effective legal punishments against any person who carries out one of the following acts aware or, as far as the civil punishment are concerned, having reasonable grounds to believe that such an act shall involve, enable, facilitate or conceal the impairment of a right under the WPPT:

- Suppresses or changes, without authorization, any information regarding rights management that is presented in electronic form;
- Distributes, imports for the purpose of distribution, broadcasting, communication to the public or makes available to the same, without being authorized, performances, copies of fixed performances or copies of phonograms, aware of the fact that the information referring to right management, in an electronic form, was suppressed or changed without authorization.

### 3.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.

Harmonization of the provisions of Law no. 8/1996 with the WPPT was performed under the Law no. 285/2004<sup>80</sup> amending and supplementing the Law no. 8/1996.

Also reiterated by the provisions of WPPT and of Law no. 285/2004 amending and supplementing the Law no. 8/1996, **single equitable remuneration due to performers** is an intellectual property right<sup>81</sup>, and it is due for the direct or indirect use of phonograms published for commercial purpose or of their reproductions by broadcasting or by any method of communication to the public<sup>82</sup>.

Harmonization with the WPPT regarding the technical protection measures was conducted according to **Chapter III „Protection measures, procedures and punishments”, Section I “Technical protection measures and information regarding rights management”, art. 138<sup>5</sup>-138<sup>6</sup> of Law no. 8/1996**. Thus, the performer may establish technical measures of protection of the rights acknowledged by law. By technical measures<sup>83</sup> we understand the use of any technology, any device or component which, by its normal operation, is designed to prevent or to restrict acts that are not authorized by the right holders. Technical measures are considered as effective when the use of any work or of any other object of protection is controlled by the right holders by applying an access code or a protection procedure, such as encryption, coding, scrambling or any transformation of the work or of another object of protection, or by a copying control mechanism, whether the measures meet the objective of protection. The right holders who have established technical measures of protection are required to make available to the beneficiaries of the exceptions provided by the law the necessary means for legal access to that work or to any other object of protection. The foregoing shall

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<sup>77</sup> Art. 18.

<sup>78</sup> Art. 19.

<sup>79</sup> Art. 19 paragraph (2): By expressing the information regarding the rights management we understand the information which allow us to identify the performer, the performance, the phonogram producer, the holder of any right upon the performance or upon the phonogram or information regarding the conditions or methods of use of the performance or phonogram, as well as any number or code representing such information or information about the terms and conditions of use or interpretation of execution or phonogram, and any numbers or code that represent such information, when any of these items of information is associated to the copy of a fixed performance or to the copy of a phonogram, or it appears in connection with the communication to the public or making available to the public of a fixed performance or a phonogram.

<sup>80</sup> Published in the Official Gazette no. 587 on June 30<sup>th</sup>, 2004.

<sup>81</sup> Ciprian Raul Romițan, Mariana Liliana Savu, op. cit., p. 124.

<sup>82</sup> Art. 106<sup>5</sup> of Law no. 8/1996.

<sup>83</sup> Art. 138<sup>5</sup> paragraph (2).

not apply to protected works which are made available to the public according to the contractual provisions agreed between the parties, so that everyone in the public can have access to them in any place and at any time chosen individually.

At the same time, the holders of rights, including performers, may provide in an electronic format associated to a work or to any other object of protection, or within the context of their public communication, information regarding the rights management<sup>84</sup>. In this respect, by information regarding the rights management we understand any information provided by the right holders which allows the identification of a work or of any other object of protection, belonging to the author or to another right holder, as well as the conditions and methods of use of that work or of any object of protection, as well as any other number or code representing such information<sup>85</sup>.

In relation to the draft Directive regarding the collective management of copyright and related rights and multi-territorial licensing of rights in musical works in terms of online use on the internal market, which as indicated by its title refers only to musical works, the development of digital rights management systems, governed by the WPPT, becomes increasingly necessary in order to serve authorization rights, to secure payments, tracking behavior and enforcement of rights<sup>86</sup>.

The Development of new digital technologies and the Internet, which now has become the most important factor in the spread and use of works and products bearing related rights, determines the need of a mutual effort from all the right holders as well as from all the involved factors such as: collective management organizations, governmental bodies, users, consumers. In this way, performers' rights shall be defended and managed in an effective manner, without any prejudice to them. One first step taken by CREDIDAM<sup>87</sup> in this field consists of developing the Methodology for fixing the remuneration due to the holders of related rights for the public communication of commercial phonograms via online or mobile services. This Methodology covers the use by communication to the public, without the possibility of free downloading, without (3 categories depending on the number of phonograms: 1-20 phonograms – RON 5, 21-200 phonograms – RON 7, 21-1.000 phonograms – RON 10, over 1.000 phonograms – RON 20) generating or not revenues<sup>88</sup> for the users; users being considered any natural or legal person who communicates to the public commercial phonograms via online or mobile services and who are responsible for the contents of the web page. In this manner it distinguishes between services offered to the public hearing.

#### **4. Implementation of European Directives in the field of Copyright and Related Rights.**

**Eight Directives were adopted at European level in the field of copyright and related rights:**

a) The Directive 91/250/CEE of the Council of May 14<sup>th</sup>, 1991 on the legal protection of computer software, published in the Official Journal of the European Communities no. L 122 dated May 17<sup>th</sup>, 1991;

b) The Directive 92/100/CEE of the Council of November 19<sup>th</sup>, 1992 on the rental and lending right and certain copyright related rights in the field of intellectual property, published in the Official Journal of European Communities no. L 346 dated November 24<sup>th</sup>, 1992, amended by the Directive 2006/115/CE of the European Parliament and of the Council dated December 12<sup>th</sup>, 2006;

c) The Directive 93/83/CEE of the Council of September 27<sup>th</sup>, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable

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<sup>84</sup> Art. 138<sup>6</sup> paragraph (1).

<sup>85</sup> Art. 138<sup>6</sup> paragraph (2).

<sup>86</sup> European Commission Communication of April 19<sup>th</sup>, 2004.

<sup>87</sup> Together with the collective management organization UPFR (The Union of Phonogram Producers in Romania).

<sup>88</sup> See Annex no. 3 – p. 48.

retransmission, published in the Official Journal of the European Communities no. L 248 dated October 6<sup>th</sup>, 1993;

d) The Directive 93/98/CEE of the Council of October 29<sup>th</sup>, 1993 on the harmonization of the protection duration of copyright and certain related rights, published in the Official Journal of the European Communities no. L 290 dated November 24<sup>th</sup>, 1993;

e) The Directive 96/9/CE of the European Parliament and of the Council of March 11<sup>th</sup>, 1996 on the legal protection of databases, published in the Official Journal of the European Communities no. L 077 dated March 27<sup>th</sup>, 1996;

f) The Directive 2001/29/CE of the European Parliament and of the Council of May 22<sup>nd</sup>, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, published in the Official Journal of the European Communities no. L 006 dated January 10<sup>th</sup>, 2002;

g) The Directive 2001/84/CE of the European Parliament and of the Council of September 27<sup>th</sup>, 2001 on the resale right for the benefit of the author of an original work of art, published in the Official Journal of the European Communities no. L 272 dated October 13<sup>th</sup>, 2001;

h) The Directive 2004/48/CE of the European Parliament and of the Council of April 29<sup>th</sup>, 2004 on the enforcement of the intellectual property rights, published in the Official Journal of the European Communities no. L 157 dated April 30<sup>th</sup>, 2004.

The last legislative acts, including the drafts, adopted by the European Commission in the field of copyright and related rights are:

- The Directive 2011/77/UE of the European Parliament and of the Council regarding the amendment of Directive 2006/116/CE on the term of protection of copyright and certain related rights<sup>89</sup>.

- The Directive 2012/.../UE of the European Parliament and of the Council on certain permitted uses of orphan works<sup>90</sup>.

- The draft Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works in terms of online use on the internal market<sup>91</sup>.

Of the relatively large number of adopted Directives, it results a particularly high interest at the EU level in order to regulate in the best conditions of copyrights and related rights.

#### 4.1. Analysis of the European Directives regarding Performers.

**The Directive 93/83/CEE of the Council of September 27<sup>th</sup>, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable retransmission** regulates the mandatory collective management for the cable retransmission right, including for the performers, i.e. only by the means of collective management organizations<sup>92</sup>. If there are several collective management organizations, which manage rights in this category, the right holder may assign by himself/herself the organization empowered to manage his/her rights, and the right holder may claim his/her rights over a period of time which shall not be less than 3 years.

**The Directive 93/98/CEE of the Council of October 29<sup>th</sup>, 1993 on the harmonization of the protection duration of copyright and certain related rights** provides at art. 3 a protection term

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<sup>89</sup> Analyzed below.

<sup>90</sup> <http://register.consilium.europa.eu/pdf/en/12/pe00/pe00036.en12.pdf> - adopted on October 4<sup>th</sup>, 2012, it has not been published yet in the Official Journal of the EU.

<sup>91</sup> Adopted on July 11<sup>th</sup>, 2012 by the European Commission:

[http://ec.europa.eu/internal\\_market/copyright/docs/management/com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf).

Currently, as procedural phase, the draft was submitted to the European Parliament in order to express its position and opinion.

<sup>92</sup> Art. 9.

of 50 years for performers beginning with the performance date, calculated from January 1<sup>st</sup> of the year following the generating performance<sup>93</sup>.

**The Directive 2001/29/CE of the European Parliament and of the Council of May 22<sup>nd</sup>, 2001 on the harmonization of certain aspects of copyright and related rights in the information society**, regulates for the performers:

- the reproduction right<sup>94</sup> – the exclusive right to directly or indirectly, temporarily or permanently authorize or prohibit by any means and in any form, in whole or in part.
- the right of making available to the public<sup>95</sup> by wire or wireless means, in such a manner that the public could access them at any place and any time they choose. This right is not exhaustible by any action of communication to the public or making available to the public<sup>96</sup>.
- exceptions and limitations – the most important and effective regarding the payment of remuneration is: the private copy (art. 5).
- obligations as to technological measures (art. 6).
- obligations concerning rights-management information (art. 7).

**The Directive 2004/48/CE of the European Parliament and of the Council of April 29<sup>th</sup>, 2004 on the enforcement of the intellectual property rights**<sup>97</sup> regulates regarding performers:

- performers' entitlement to apply for the application of the measures, procedures and remedies (art. 4).
- the presumption of holder of related rights for performers (art. 5).
- the measures for preserving evidence (art. 7).
- the provisional measures (art. 9), corrective measures (art. 10), injunctions (art. 11), alternative measures (art. 12), damages and legal costs (art. 13-15).

**The Directive 92/100/CEE of the Council of November 19<sup>th</sup>, 1992 on the rental and lending right and certain copyright related rights in the field of intellectual property, published in the Official Journal of European Communities no. L 346 dated November 24<sup>th</sup>, 1992, amended by the Directive 2006/115/CE of the European Parliament and of the Council dated December 12<sup>th</sup>, 2006** regulates for performers:

- the entitlement as holder of rental rights (art. 3).
- the unwavable right of performers to an equitable remuneration (art. 5)
- the exclusive right to authorize or prohibit fixation of their performances (art. 7).
- the exclusive right to authorize or prohibit the broadcasting and communication to the public of their performances (art. 8 paragraph 1), as well as the right to an equitable remuneration when a phonogram published for commercial purpose or its reproduction is used for the purpose of broadcasting or for any communication to the public (art. 8 paragraph 2).
- the distribution right (art. 9).
- the limitations and exception (art. 10).

#### **4.2. Analysis of the implementation within the Romanian Legislation - *De lege ferenda*.**

Harmonization of the provisions of Law no. 8/1996 with the European Directives in the field of copyright and related rights was carried out under the Law no. 285/2004 for the amendment and supplementation of Law no. 8/1996 and of OUG no. 123/2005 approved by the Law no. 329/2006 on

<sup>93</sup> Art. 8.

<sup>94</sup> Art. 2.

<sup>95</sup> Art. 3.

<sup>96</sup> Art. 3 alin. (3).

<sup>97</sup> The harmonized provisions, in conformity with the Directive 2004/48/CE of the European Parliament and of the Council of April 29<sup>th</sup>, 2004, on the enforcement of the intellectual property rights, shortly named Enforcement Directive, was analyzed at an earlier point.

the approval of Government's Emergency Order no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights<sup>98</sup>.

Concerning the **Directive 93/83/CEE of the Council of September 27<sup>th</sup>, 1993 on the harmonization of certain provisions regarding copyright and related rights applicable to satellite broadcasting and cable retransmission**, it was harmonized at the level of Law no. 8/1996, including as far as the mandatory collective management of the cable retransmission is concerned for artists' performances. Thus, according to art. 123<sup>1</sup> paragraph (1) item g) in the Law no. 8/1996: the collective management is mandatory for exercising the cable retransmission right, which means that collective management organizations also represent those right holders who did not grant an empowerment<sup>99</sup>. At the same time, under the Directive, the holders of copyrights or of related rights, including the performers, may exercise their rights for authorizing or prohibiting the cable retransmission only through a collective management organization<sup>100</sup>.

The remuneration amount regarding copyright and related rights is determined by a methodology negotiated between the collective management organizations for copyright and related rights and the cable distribution associative structures. Also, by the transposition of the Directive provisions, in case of cable retransmission is provided optional mediation procedure performed by one or more mediators selected by the parties so that their independence and impartiality can not be questioned. The Mediators task is to assist negotiations and notify proposals to the parties.<sup>101</sup> It is the only property right, the only case in the Law no. 8/1996, for which such a procedure of optional mediation is provided. The mediation does not preclude arbitration procedure provided by Law no. 8/1996, mandatory under art. 131<sup>2</sup> paragraphs (3)-(9).

From the calculation of remuneration payable for cable retransmission, according to art. 121 paragraph (2) of the Law no. 8/1996, are excluded the mandatory cable retransmission programs, according to the law (must carry). *De lege ferenda*, the previously mentioned paragraph must be deleted in order to avoid prejudicing the right holders.

According to the **Directive 93/98/CEE of the Council of October 29<sup>th</sup>, 1993 on the harmonization of the protection duration of copyright and certain related rights**, the art. 102 of Law no. 8/1996 provides that the duration of the property rights of performers is of 50 years after the date of the performance. However, if the fixation of the performance is lawfully published or lawfully communicated to the public within this period, the duration of rights shall be of 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. Duration shall be calculated beginning with January 1<sup>st</sup> of the year following the performance which generated the right.

**The Directive 2001/29/CE of the European Parliament and of the Council of May 22<sup>nd</sup>, 2001 on the harmonization of certain aspects of copyright and related rights in the information society**, transposed into the Law no. 8/1996, represents one of the most important legal acts adopted at the UE level and regarding technology development, implementation of a harmonized framework on all new forms of exploitation of copyright and related rights. Recital 9 of the Directive restates the need for a higher degree of protection of copyright and related rights, since such rights are crucial for the intellectual creativity. Protection of these rights provides maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the general public. At the same time, recital 10 of the Directive specifies appropriate reward for authors and performers in order for them to continue their artistic and creative work.

For the purposes of the European Directives in this field, including the Directive on the harmonization of certain aspects of copyright and related rights in the information society, in

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<sup>98</sup> Published in the Official Gazette no. 657 on July 31<sup>st</sup>, 2006.

<sup>99</sup> Art. 123<sup>1</sup> paragraph (2).

<sup>100</sup> Art. 121 paragraph (1).

<sup>101</sup> Art. 121 paragraph (3)-(4).



accordance with **art. 98** of Law no. 8/1996, **the performers have the following exclusive property rights to authorize or prohibit:**

- the fixation of their performances;
- the reproduction of fixed performances. By reproduction<sup>102</sup>, we understand achieving all or part of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including realization of any sound or audiovisual recordings of a work such as and its temporary or permanent storage by electronic means.
- the distribution of fixed performances. By distribution<sup>103</sup>, we understand the sale or any other type of transmission, either binding or for free, of the original or copies of a work, as well as their public availability. According to the provisions of the Directive, the distribution right is exhausted with the first sale or with the first transfer of ownership upon the original or copies of a work, on the internal market, by the right holder or with his/her consent.
- the rental of fixed performance;
- the lending of fixed performance;
- the import for the internal market sale of fixed performances;
- the broadcasting and public communication of his/her performance, except when the performance has already been fixed or broadcasted, in which case performers are entitled only to an equitable remuneration;
- the making available to the public of fixed performances, so that they can be accessed in any place and at a time individually chosen by the public;
- the cable retransmission of fixed performances.

As far as the **private copy** is concerned, this has turned many changes in the Law no. 8/1996, and currently it represents<sup>104</sup> the reproduction of a work without the consent of the author, for personal use or for the use of a normal circle of a family, provided that the work would have been previously disclosed to the public, and the reproduction is not contrary to the normal use of the work and does not prejudice the author or the holder of the rights of use. In the case of private copy, for the support on which sound or audiovisual recordings can be performed or on which reproductions can be performed for the works graphically expressed, as well as for the devices designed for making copies, a compensation shall be paid, which is to be distributed to the right holders category as follows:

- in the case of supports and devices for recording sound copies, through analogue processes, 40% of the remuneration turns, in negotiable parts, to the authors and to the publishers of recorded works, **30% turns to performers**, and the remaining 30% turns to the producers of sound recordings;
- in the case of supports and devices for recording audiovisual copies, through analogue processes, the remuneration is equally divided between the following categories: authors, **performers** and producers;
- in the case of copies registered by digital processes, on any type of support, the remuneration shall be equally divided between the beneficiaries corresponding to each of the categories previously provided, and, within each category, as agreed.

The dynamics of private copy and of adequate remuneration is still subject to mediation at the European Commission level<sup>105</sup>, making the future of private copy rather uncertain. Our opinion is

<sup>102</sup> Art. 14 of Law no. 8/1996.

<sup>103</sup> Art. 14<sup>1</sup> of Law no. 8/1996.

<sup>104</sup> Art. 34 din Legea nr. 8/1996.

<sup>105</sup> [http://ec.europa.eu/commission\\_2010-2014/barnier/headlines/speeches/2012/04/20120402\\_en.htm](http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm)

António Vitorino, former Portugal Defense Minister and former European Commissioner for Justice and Internal Affairs was appointed as mediator. On October 3<sup>rd</sup>, 2012, took place a new series of consultations attended to by several associations of the collective management organizations in Europe, including AEPO-ARTIS. The consultations focused on topics such as: the category of payers, professional uses, transparency, methodologies regarding determination of prices and alternative methods to the remuneration for private copy. The probable term when the mediator will submit his recommendations to Commissioner Barnier is November/December 2012.

that for fulfilling the aforementioned objectives of the Directive regarding the harmonization of certain aspects of copyright and related rights in the information society it is necessary to maintain the notion of private copy and its corresponding remuneration, thus achieving a fair compensation of right holders for the use of their works and products bearing related rights, which cannot be monitored. Since in this matter, as stated in the specialty literature<sup>106</sup>, the Romanian legislator established a legal license, this should be maintained in order to ensure a high level of protection of copyright and related rights.

In relation to the persons who must pay compensatory remuneration for private copy, i.e. in accordance with art. 107 paragraph (2) of Law no. 8/1996, manufacturers and/or importers of media and devices, *de lege ferenda*, it is necessary the supplementation of the legal provisions also with the intra-communitarian operators, as follows: “*The compensatory remuneration for private copy is payable for the media and devices referred to in art. 34 paragraph (2), whether the method used is analogical or digital, both by the manufacturers and importers in Romania and by the operators which introduce on the Romanian market and distribute such media and devices within the intra-communitarian area”*. At the same time, through the correlation with the provisions of the Law no. 8/1996 which provides for the renegotiation of the methodologies every three years, *de lege ferenda*, the enlisting regarding the media and devices subject to compensatory remuneration for private copy and the amount of such remuneration should also be renegotiated every 3 years, and not every 2 years, as currently provided.

In relation to the notion of communication to the public as regulated by the Directive (art. 3) and harmonized at the level of the Law no. 8/1996, the following remarks should be taken into account<sup>107</sup>:

- the notion covers all the communications to the public when not present at the place where the communication originates;

- the Law no. 8/1996 (art. 15) does not specially lists the representation in the methods of use by communication to the public, but representation is included in the definition of the communication to the public, so, also for those communications where the public is present at the place where communication originates.

- there are two methods of communication to the public, meaning: either the public is present at the place where the communication originates or the public is not present where the communication originates, and in the latter case we have here the right of making available to the public, so the public is potentially appreciated “in abstracto”, not “in concreto”.

- as the notion of “public” is not defined, then it has to be understood in a very broad sense, as opposed to that of the „normal circle of a family”, applicable for the private copy, the latter being regarded<sup>108</sup> as outdated, obsolete, difficult to operate with and apply in the age of information.

Considering the above mentioned, the continuous harmonization at the Community level appears as a necessity, including in Romania, in order to meet such technological challenges and to ensure the best defense in terms of intellectual property rights.

## **5. New Regulations in the field of Related Rights regarding Performers.**

### **5.1. Directive 2011/77/UE of the European Parliament and of the Council for the Amendment of the Directive 2006/116/CE on the Term of protection of Copyright and Related Rights.**

#### **5.1.1. Analysis.**

On October 11<sup>th</sup>, 2011, there has been published in the Official Journal of the European Union<sup>109</sup>: the Directive 2011/77/UE of the European Parliament and of the Council of September

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<sup>106</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 476.

<sup>107</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 263-268.

<sup>108</sup> Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 308.

<sup>109</sup> Nr. L 265/5.

27<sup>th</sup>, 2011 for the amendment of Directive 2006/116/CE, on the duration of protection of the copyright and related rights, the so called “Time Directive”<sup>110</sup>. The new Directive, which extends the protection duration of property rights for performers, is in this respect a real victory for the performers and it is another important step to the acknowledgment of their rights<sup>111</sup>. The Directive was adopted by a majority of Member States; Belgium, the Czech Republic, the Netherlands, Luxembourg, **Romania**, Slovakia, Slovenia and Sweden **voted against it**, and Austria and Estonia abstained from voting.

The purpose of the Directive was to bring at the same level the protection duration for the property rights of performers with those of authors<sup>112</sup>. Thus, the Directive extends the term of protection for sound recordings (performances fixed on phonograms) in the European Union **from 50 to 70 years** beginning from the date on which the registration was for the first time published or communicated to the public. Consequently, the term of protection for the performers whose performances are included on a sound recording is also extended from 50 to 70 years. Extension of the term of protection will allow performers to gain remunerations for a longer period of time and, anyhow, for their lifetime<sup>113</sup>.

At the same time, extending the term would also bring benefit to the producers who will generate additional revenue by the selling disks both online and in stores<sup>114</sup>.

The Recital 4 of the Directive also specifies another aspect of how important is to extend the term of protection, and also the socially acknowledged importance of the creative contribution of performers which must be reflected in a level of protection that acknowledges their creative and artistic contribution.

The Directive guarantees that the performers who receive a nonrecurring remuneration also enjoy the extension of the term of protection. This means that non-featured performers, who do not enjoy remunerations for the exploitation of their recordings, are granted a firm right to benefit an **annual additional remuneration** from the producer of the recording (after the 50 year period of time of the term of protection). The right to benefit an annual additional remuneration may not be waived by the performer<sup>115</sup>.

The producer of the recording (before deducing the costs) has to give 20% of the incomes from the reproduction, distribution and making available to the public of the sound recording, percentage that will be managed by the collective management organizations<sup>116</sup> and distributed (at least) once per year<sup>117</sup>. The member States guarantee that the phonogram producers should provide, upon request, to the performers who are entitled to receive the annual additional remuneration any information required for the payment of such remuneration<sup>118</sup>.

When calculating the overall amount intended for the payments one should not take into account the revenues gained by the producer from renting the recordings, the revenues resulted from broadcasting and communication to the public or from compensatory remuneration for private copy

<sup>110</sup> The draft for the amendment of the Directive 2006/116/CE was signed by the European Parliament and by the European Union Council on September 27<sup>th</sup>, 2011.

<sup>111</sup> [http://www.credidam.ro/cgi-bin/cdd\\_site/cdd.cgi?act=det\\_event&evid=23](http://www.credidam.ro/cgi-bin/cdd_site/cdd.cgi?act=det_event&evid=23)

<sup>112</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm)

<sup>113</sup> This clarification is particularly important because, as stated in Recital 5 of the Directive, performers generally start their careers young and the 50 year term applied upon the fixation of their performance often does not protect their performances throughout their entire lifetime. As a result of this fact, some performers face a lack of incomes toward the end of their lives.

<sup>114</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm)

<sup>115</sup> Art. 3 paragraph (2b).

• <sup>116</sup> This obligation has to be guaranteed by the Member States - Art. 3 paragraph (2d).

<sup>117</sup> Art. 3 paragraph (2c).

<sup>118</sup> Art. 3 paragraph (2c), 2<sup>nd</sup> Thesis.

(based on the fact that in most EU countries and on the European legislative acts, such uses are subject to the remuneration already distributed between performers and producers).

The Directive introduces the provision „use it or lose it”<sup>119</sup> applicable if the producers of recordings fail to provide for sale on the market sufficient quantities of copies of a sound recording or they do not make them available by wire or wireless technical means (for 50 years after the first publication), then **the performers have the firm right to terminate the contract concluded with that recordings producer**. This right may be exercised if the **producer**, although it has been notified by the performer about his/her intentions to terminate the contract, **fails to fulfill for a year any of the exploitation acts**. If there are many performers in a recording, they can terminate their contracts in accordance with the applicable national legislation.

The Directive also includes a “clean slate” provision<sup>120</sup> for contracts whereby performers transfer their own right based on royalties for the exploitation right. According to this provision, **a percentage of the royalty or remuneration shall be paid to the performers, any unrecovered advances being recovered during the extended period**. Moreover, the Member States should be able to provide that certain clauses of the contracts that establish recurrent payments **can be renegotiated**. The Member States should have procedures at hand **in case those renegotiations fail**.

The Member States must implement the Directive (legislative acts and lawful acts) until November 1<sup>st</sup>, 2013 and must communicate immediately to the European Commission the texts of these provisions<sup>121</sup>. At the same time, the Member States must communicate to the European Commission the texts of the main provisions of the national law, which they adopt in the field covered by the Directive<sup>122</sup>.

By November 1<sup>st</sup>, 2016, the Commission has to present before the European Parliament, the Council and the European Economic and Social Committee a report regarding the implementation of the Directive, taking into account the development of the digital market, accompanied where appropriate by a proposal for the additional amendment of the Directive 2006/116/CE<sup>123</sup>.

By a statement<sup>124</sup> of AEPO-ARTIS<sup>125</sup> they show that this umbrella organization of the collective management organizations for European performers shall develop recommendations regarding the implementation of the provisions of the Directive, taking into consideration that the method by which the national legislation of each Member State will be essential for the effective implementation of the Directive.

The European Commission shows<sup>126</sup> that only in the UK almost 7.000 performers would suffer damages in the next 10 years, if the Directive had not been adopted, because most of these performers are not well known stars, who have earned millions of Euro along their careers. On the contrary, there are thousands of session musicians<sup>127</sup> who contributed to the production of sound

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<sup>119</sup> “Use it or lose it” - Art. 3 paragraph (2a).

<sup>120</sup> “Clean slate”.

<sup>121</sup> Art. 2 paragraph (1).

<sup>122</sup> Art. 2 paragraph (2).

<sup>123</sup> Art. 3.

<sup>124</sup> [http://www.aepo-artis.org/pages/7\\_1.html](http://www.aepo-artis.org/pages/7_1.html)

<sup>125</sup> The purpose of the Association of European Performers’ Organizations, among others, is the development and insurance of the acknowledgment for the collective management of performers’ rights across Europe, the development of the cooperation between the collective management organizations for the performers across Europe or the growing importance of protection of performers’ rights. Currently, AEPO-ARTIS reunites 31 collective management organizations in Europe - [http://www.aepo-artis.org/pages/14\\_1.html](http://www.aepo-artis.org/pages/14_1.html), including ADAMI and SPEDIDAM in France, Dyonisos and Erato in Greece, BECS in UK or AISGE in Spain.

<sup>126</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/term/110910\\_memo\\_copyright\\_performers\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/110910_memo_copyright_performers_en.pdf)

<sup>127</sup> Musicians employed for a single sound recording and paid only once, in full, at the time of audio recording.

recordings during the 50's or 60's. The Impact Assessment<sup>128</sup> carried out by the European Commission previously to the adoption of this Directive, shows that extending the term of protection will offer the artists additional annual revenues ranging from de Euro 15 to 2.000.

### 5.1.2. De lege ferenda

Given the implementation deadline of the Directive by the Member in the States, namely until November 1<sup>st</sup>, 2013, the Directive should be expeditiously translated Romanian legislation. Within the current context when in Romania are organized consultations regarding the amendment and supplementation of the Law no. 8/1996<sup>129</sup>, the translation of Directive appears to be more as necessary and appropriate. *De lege ferenda*, translating the Directive into the Romanian legislation must consider first:

- the extension of protection duration of performers rights from 50 to 70 years;
- a distinctive regulation of the contract to be concluded between producers and performers for artistic performances fixed in phonograms.

At the same time, *de lege ferenda*, the following amendments and supplements of Law no. 8/1996 are required:

- Art. 102 paragraph (1) shall be amended with the following content:

*"The Duration of property rights of performers is of 70 years from the date of performance."*

- At Title II *Rights Related to Copyright and sui-generis rights*, after Chapter III<sup>1</sup> *Rights of Producers of Audiovisual Recording*, insert a new Chapter, Chapter III<sup>2</sup> *Common Provisions for Performers and Producers of Sound and Audiovisual Recordings – the Transfer Contract concluded between phonogram producers and performers OR at Chapter IV Common Provisions for Authors, Performers and Producers of Sound and Audiovisual Recordings*, after article 112<sup>1</sup>, insert a new article (or more articles), article 112<sup>2</sup> and the subsequent, with the following content:

*"(1) If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it 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 by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter referred to as «contract on transfer or assignment»).*

*(2) The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer.*

*(3) Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.*

<sup>128</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf)

<sup>129</sup> As a result of the legislative proposal for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, registered to the Senate of Romania under no. L212/23.04.2012, consultations were organized between the collective management organizations, including CREDIDAM, UCMR-ADA, PERGAM, DACIN-SARA or VISARTA, considering mutual proposals for the amendment and supplementation of Law no. 8/1996. At the same time, the Romanian Office for Copyright (ORDA) requested to the collective management organizations to transmit their proposals concerning the amendment and supplementation of the Law no. 8/1996.

(4) Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual additional remuneration from the phonogram producer for each full year immediately following the 50<sup>th</sup> year after the phonogram was lawfully published or, failing such publication, the 50<sup>th</sup> year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

(5) The overall amount to be set aside by a phonogram producer for payment of the annual additional remuneration referred to in paragraph (4) shall correspond to 20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50<sup>th</sup> year after it was lawfully published or, failing such publication, the 50<sup>th</sup> year after it was lawfully communicated to the public.

(6) The phonogram producers must provide, upon request, to the performers who are entitled to receive an annual additional remuneration specified at paragraph (4) any necessary information for ensuring the payment of such remuneration.

(7) The right to obtain an annual additional remuneration, as specified at paragraph (4), is managed by the collective management organizations.

(8) If a performer has the right to a recurrent remuneration, neither the advance payments, nor the discounts defined in the contract will not be deductible from the payments toward the performer following the 50<sup>th</sup> year after it was lawfully published or, failing such publication, the 50<sup>th</sup> year after it was lawfully communicated to the public.

(9) Unless expressly otherwise agreed, a contract on transfer or assignment concluded before November 1<sup>st</sup>, 2013 shall be deemed to continue to produce effects even following the date when the rights of the performer would have ceased to be protected.

(10) The contracts on transfer or assignment by which a performer is entitled to recurrent payments and which are concluded before November 1<sup>st</sup>, 2013 can be amended following the 50<sup>th</sup> year after it was lawfully published or, failing such publication, the 50<sup>th</sup> year after it was lawfully communicated to the public.”

The effects of extending the protection duration of performers rights, in terms of their remuneration, can not be currently quantified, but they will certainly contribute to the strengthening of the „related rights institution”<sup>130</sup>, in general, and to “mitigate piracy, in order to ensure the communication of the works to the public, as well as the means of existence of those who put their talents to serve the consumers of their works, for those who made an occupation from communicating the works in order to be able to recover investments”<sup>131</sup>, in particular.

## 5.2. The Beijing Treaty on audiovisual performances<sup>132</sup>

### 5.2.1. Analysis

On June 24<sup>th</sup>, 2012, the Diplomatic Conference of the World Intellectual Property Organization (WIPO)<sup>133</sup> adopted the Beijing Treaty on Audiovisual Performances. David Kappos, head of USPTO<sup>134</sup>, said about the Treaty that it is a win both for the creative industry in the audiovisual field and for the labor market, allowing the forces of the two areas to work even more

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<sup>130</sup> Viorel Roş, Univ. Prof. Dr. - Preamble, “Performers Rights”, Ciprian Raul Romiţan, Mariana Liliana Savu, Universul Juridic, Bucharest, 2008, p. 7.

<sup>131</sup> Viorel Roş, Univ. Prof. Dr. - Preamble, “Performers Rights”, Ciprian Raul Romiţan, Mariana Liliana Savu, Universul Juridic, Bucharest, 2008, p. 7.

<sup>132</sup> The translation from English of the Beijing Treaty on audiovisual performances is unofficial and it is made by the author.

<sup>133</sup> Meeting in Beijing from June 19<sup>th</sup> to 26<sup>th</sup>, 2012.

<sup>134</sup> United States Patent and Trademark Office.

closely in fighting global piracy. The head of the U.S. Copyright Office, Maria Pallente, said that the Treaty represents an important step forward for the protection of performances worldwide.

Both the International Federation of Actors (FIA) and the International Federation of Film Producers Associations have also supported the Treaty, with the desire to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible and to facilitate the enforcement of private contracts and collective agreements around the world<sup>135</sup>.

For WIPO adopting this Treaty basically meant the revival of the organizations' activities in the field of copyright and related rights, because, except for amendments to existing treaties, since 1996 there was not adopted any other treaty in the field<sup>136</sup>. WIPO Officials stated<sup>137</sup> about this Treaty that, for the first time during the evolution of related rights, the Treaty will provide to performers the necessary protection in the digital environment. The Treaty will also help to protect performers' rights against the unauthorized use of their performances in the audiovisual environment. The impact of the Treaty will strengthen the property rights of actors and of other performers and can provide them additional revenues resulted from their work. At the same time, the Treaty will provide the international legal frame for the audiovisual industry.

Of WIPO 184 members, 48 of them signed the Treaty and 122 signed the "Final Act" of the Treaty, essentially stating the participation of the Member States of WIPO in the negotiations and recognition of the outcome, i.e. adoption of the Treaty. Romania, although attended the Diplomatic Conference in Beijing, has signed neither the Treaty nor its Final Act.

The Conference was attended by 156 members, plus 6 Intergovernmental organizations and 45 non-governmental organizations, accounting the highest turnout ever for a WIPO Diplomatic Conference.

The European Commission stated that the Treaty sets rules that will ensure an accurate protection and remuneration of actors and will allow their performances to be made available to the public either by distribution or through physical supports such as DVDs or via Internet<sup>138</sup>. The Commissioner Michel Barnier said that the Treaty is very important and that actors are the ambassadors of cultural expressions and exchange. They have to be able to earn their living from their artistic contributions, because without the means to express themselves, no cultural expression would be possible.

Treaty negotiations began in 1996, when the so called WIPO Treaties regarding the Internet were adopted<sup>139</sup>: WCT (WIPO Copyright Treaty<sup>140</sup>) and WPPT (WIPO Performances and Phonograms Treaty<sup>141</sup>). These Treaties' targets were the singers, musicians and other performers, but not actors. In 2000 was organized a Diplomatic Conference on the adoption of the Treaty in the audiovisual field, but it failed because of art. 12 of the draft Treaty, regarding the transfer of rights. The U.S., sustained by India, insisted on the provisions regarding the transfer of rights, meaning that major film producers felt that they need to ensure their ability to distribute movies at global level. EU was against this provision of the Treaty. Thus, this issue became for more than 10 years one of the most important on the agenda of WIPO Committee regarding Copyright and Related Rights<sup>142</sup>.

The Beijing Treaty regarding the audiovisual performances includes a number of 30 articles. Any Member State of WIPO may become a part of this Treaty. Intergovernmental organizations may

<sup>135</sup> <https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances>

<sup>136</sup> <http://www.ip-watch.org/2012/06/29/wipo-lauded-for-new-beijing-treaty-on-audiovisual-performances/>

<sup>137</sup> [http://www.wipo.int/pressroom/en/articles/2012/article\\_0013.html](http://www.wipo.int/pressroom/en/articles/2012/article_0013.html)

<sup>138</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/490&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>139</sup> WIPO Internet Treaties.

<sup>140</sup> <http://www.wipo.int/treaties/en/ip/wct/index.html>

<sup>141</sup> <http://www.wipo.int/treaties/en/ip/wppt/index.html>

<sup>142</sup> WIPO Standing Committee on Copyright and Related Rights (SCCR) (*IPW*, WIPO, 24 June 2011).

become parties if this Treaty if they declare that they have responsibilities in the field of action of the Treaty and if their national legislation covers the provisions of the Treaty. The European Union can also be party of this Treaty.

The Treaty is open for signature by eligible parties within 1 year after its adoption, performed within 3 month period of time after 3 eligible parties have deposited instruments of ratification or accession to the Treaty. According to WIPO information, the Treaty has not entered yet into force.<sup>143</sup>

The Beijing Treaty on audiovisual performances was adopted taking into account, inter alia, the following desires of the contracting parties:

- to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible;
- the need to include some new international rules for the purpose of providing proper solutions to the questions resulting from the economic, social, cultural and technological development;
- the impact of the development and convergence of information, as well as of communication technologies upon the production and use of audiovisual performances;
- the need to maintain a balance between the rights of performers on their audiovisual performances and the public interest, especially in terms of education, research and access to information;
- the WIPO Performances and Phonograms Treaty (WPPT) does not extend the protection provided to performers upon their audiovisual fixed performances.

Regarding the relation between the Treaty and other conventions and treaties in this field, none of the provisions of this Treaty shall derogate from existing obligations of the Contracting Parties as established under the WIPO Performances and Phonograms Treaty (WPPT) or under the International Conference for the Protection of Performers, Phonogram Producers and Broadcasting Organizations. The protection established by this Treaty has no effect upon the protection provided for literary and artistic works, and as a consequence none of the provisions of the Treaty shall be construed as prejudicing such a protection.

Art. 1 paragraph (3) of the Treaty sets very clearly the fact that This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty (WPPT), nor shall it prejudice any rights and obligations under any other treaties.

The Treaty also presents 4 definitions necessary for its adoption:

- performers<sup>144</sup> – actors, singers, musicians, dancers, and other persons who act,<sup>145</sup> sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

This definition also includes performers who perform a literary or artistic work which is created or fixed for the first time during a performance.

- audiovisual fixation<sup>146</sup> - means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.

- broadcasting<sup>147</sup> - means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

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<sup>143</sup> [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=841](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=841)

<sup>144</sup> Art. 2 lit. (a).

<sup>145</sup> Termenul utilizat în Tratat este de „act” – care se referă la a juca (teatru).

<sup>146</sup> Art. 2 lit. (b).

<sup>147</sup> Art. 2 lit. (c).



- communication to the public<sup>148</sup> - means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation.

The beneficiaries of the protection provided by this Treaty<sup>149</sup> are the performers who are nationals of the Contracting Parties and of other contracting parties, as well as performers who are not nationals of a Contracting Party, but who have their habitual residence in one of them. Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided by this Treaty. This requirement does not apply to a Contracting Party to the extent that another Contracting Party applies the exclusive right or the right to an equitable remuneration or to authorize broadcasting and communication to the public of performances fixed on audiovisual fixations only on certain uses or will restrict the application in another form. A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party, with respect to the exclusive rights or the right to an equitable remuneration or to authorize broadcasting and communication to the public of fixed performances, to those rights that its own nationals enjoy in that other Contracting Party.

The Treaty also indicates<sup>150</sup> the moral rights enjoyed by a performer for his/her live or fixed performance:

1) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance;

2) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations. Concerning this right, the Treaty also makes certain clarifications: considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications provided for this right. Consequently, this right has to be construed only for the changes that are objectively prejudicial to the performer's reputation in a substantial way. The mere use of new technologies is not equivalent to the changes provided in this regard.

The legal management of the moral rights under the Treaty is part of the standard legal management for this type of rights: they cannot be alienated, i.e. even after the transfer of property rights, they remain in the possession of the performer; after the performer's death they will be maintained at least until the expiry of the property rights and shall be exercised by persons or institutions authorized by the legislation of the Contracting States.

The moral rights of performers as regulated by Law no. 8/1996 (art. 96), according to the French system, including the right to claim the acknowledgment of authorship on his/her own performance, the right to claim his/her name or pseudonym to be indicated or communicated in every show and every use of his/her performance and the right to demand respect for the quality of his/her performance and to oppose to any distortion, falsification or other significant change in the performance or any breach of his rights, which would seriously damage his honor or reputation. As shown in the specialty literature<sup>151</sup>, the right of disclosure and withdrawal, regulated for the authors, cannot be withheld for performers, because in case of disclosure right, the performance of the artist is equivalent to the disclosure of his/her work, and in case of withdrawal right, a performance act once

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<sup>148</sup> Art. 2 lit. (d).

<sup>149</sup> Art. 3.

<sup>150</sup> Art. 5.

<sup>151</sup> *Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, op. cit., p. 467.*

carried out it cannot be withdrawn. In other words, the right of disclosure and of withdrawal is not of the nature of the creation – performance – made by the performer.

The Romanian Jurisprudence<sup>152</sup> reveals many cases where the Court found the violation of the moral rights of performers, especially of the right to demand respect for the quality of his/her performance and to oppose to any distortion, falsification or other significant change in the performance or any breach of his rights, which would seriously damage his honor or reputation and the Court ordered compensations for the breach of moral rights of performers.

Regarding property rights, art. 6 of the Treaty refers to the exclusive economic rights of performers in their unfixed performances, such as: the right of broadcasting, the right of communication to the public, except when the performance is already broadcasted, and the fixation right.

On fixed performances the performer shall have the following property rights:

a) Right of reproduction<sup>153</sup> (direct or indirect, in any form or manner). This right and its exceptions shall be totally applied in the digital environment and especially for the use of digital performances. Thus, the storage of a protected performance in a digital form in an electronic environment constitutes an act of reproduction as defined by the Treaty.

b) Right of distribution<sup>154</sup> (through sale or other transfer of ownership). The Contracting Parties are free to determine when this right becomes worn, respectively after the first sale or another transfer of the right on the original or a copy of the performance fixed with performer's consent. This right refers exclusively to the fixed copies which may be put into circulation as tangible objects.

c) Right of rental<sup>155</sup> (for commercial purpose, immediately after the distribution of audiovisual fixations by or subsequently to performer's authorization). The Contracting Parties are exempt from this obligation unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of the performer. This right, just like the distribution right, refers exclusively to the fixed copies which may be put into circulation as tangible objects.

d) Right of making available to the public<sup>156</sup> (through wire or wireless means in such a way that the public may access it from a place and at a time individually chosen by it).

e) Right of broadcasting and communication to the public<sup>157</sup>. Regarding these rights, the Contracting Parties may notify the Director General of WIPO, if they will establish a right of equitable remuneration for the direct or indirect use of the fixed audiovisual performances for broadcasting or communication to the public. The Contracting Parties may also declare that they will set conditions on the national legislation for the exercise of the right to an equitable remuneration. Any Contracting Party may declare that it will apply these provisions only regarding certain uses of the fixed audiovisual performances or that it will limit their applying in another manner or that it will not apply these provisions at all.

The Treaty also includes provisions regarding the transfer of rights<sup>158</sup>. Thus, the Contracting Parties may provide in the national legislation that as long as the performer consented to the fixation

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<sup>152</sup> The most well known such cases are: Oana Pellea vs. Gigi Becali – during the president's election campaign in 2004, when he used images with Amza Pellea (a great Romanian actor), broadcasting without consent a video at the local televisions containing images from the Romanian history movie „Mihai Viteazul” („Michael the Brave”), video which damaged the public image of the actor Amza Pellea. The daughter of Toma Caragiu (great Romanian actor) vs. Golden Pages – TV commercials in which there were used images from the movie „Operațiunea Monstru” („The Monster Operation”) with Toma Caragiu, damaging the public image of Toma Caragiu.

<sup>153</sup> Art. 7.

<sup>154</sup> Art. 8.

<sup>155</sup> Art. 9.

<sup>156</sup> Art. 10.

<sup>157</sup> Art. 11.

<sup>158</sup> Art. 12.

of his/her performance, the right of reproduction, broadcasting and communication to the public will be owned or exercised by or transferred to the producer of the audiovisual fixation, subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law. Thus, the national legislation may regulate the written form of the contract between the producer and the performer and that it should be signed by the two contracting parties or by their duly authorized representatives. Independent of the transfer of exclusive rights described above, national laws may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, including for the right of making available to the public, of broadcasting and communication to the public.

Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions<sup>159</sup> as they provide for in connection with the protection of copyright in literary and artistic works. Of course, limitations and exceptions must be provided for special cases, not to breach the normal use of the performance and not to unreasonably prejudice the legitimate interests of the performer<sup>160</sup>.

The term of protection<sup>161</sup> granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed.

The Treaty also sets obligations regarding technological measures<sup>162</sup> and information regarding the rights management<sup>163</sup>. Thus, the Contracting Parties must provide the legal protection and effective measures against the circumvention actions of the technological measures used by the performers in connection with exercising their rights and which represent restrictive acts regarding their performances and which are not authorized by the performer or permitted by law. These provisions must be construed by correlation to those regarding limitations and exceptions, in the sense in which the contracting parties may adopt effective and necessary measures in order to ensure that the beneficiaries can enjoy the limitations and exceptions provided by the national legislations; where technological measures were applied to a audiovisual performance and the beneficiary has legal access to that performance under circumstances in which the holders of right did not take effective measures of protection in relation to that performance in order to authorize the beneficiary to enjoy the limitations and exceptions provided by the national law. Without prejudice to the legal protection of an audiovisual work in which the performance is fixed, the obligations regarding the technological measures are not applicable to the unprotected performances or to those which are not protected anymore according to national laws.

By information regarding the rights management we understand information identifying the performer, his performance or the holder of any right on the performance, or information regarding the terms and conditions of use of performance and any numbers or codes representing such information, when any of these information elements is attached to a fixed audiovisual performance<sup>164</sup>.

Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty:

- a) to remove or alter any electronic rights management information without authorization;
- b) to distribute, import for distribution, broadcast, communicate or make available to the public, without authorization, performances or copies of performances fixed in audiovisual fixations

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<sup>159</sup> Art. 13.

<sup>160</sup> Art. 10 of the WIPO Copyright Treaty is applied *mutantis mutandis* to the art. 13 in the Treaty.

<sup>161</sup> Art. 14.

<sup>162</sup> Art. 15.

<sup>163</sup> Art. 16.

<sup>164</sup> Art. 12 of the WIPO Copyright Treaty is applied *mutantis mutandis* to the art. 16 of the Treaty.

knowing that electronic rights management information has been removed or altered without authorization.

The protection provided by this Treaty must be applied to the fixed performances existing at the moment of entering into force of the Treaty and to all the performances that will appear after the Treaty entering into force, for each of the Contracting Parties. The Contracting Parties may notify WIPO that they will not apply the provisions of the Treaty regarding the right of reproduction, broadcasting and communication to the public (one, many or all) of the audiovisual performances existing at the moment of entering into force of the Treaty. If one of the Contracting Parties will apply such a notification, then other Contracting Parties may limit the application of the provisions of the Treaty regarding the right of reproduction, broadcasting and communication to the public of the performances carried out after the entering into force of the Treaty, for that Contracting Party.

The Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in unlawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of complying with the moral rights and the rights of reproduction, broadcasting and communication to the public after the entry into force of this Treaty for the respective Contracting Parties.

The Contracting Parties undertake to adopt, in accordance with their national legal systems, the measures necessary to ensure the application of this Treaty and shall ensure that the sanctioning procedures are allowed under their national legislation so as to ensure effective action against any act of infringement of rights covered by this Treaty.

The Treaty also contains administrative provisions regarding the establishment of a General Assembly of the Contracting Parties<sup>165</sup> that shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty; it shall also decide the convocation of any diplomatic conference for the revision and supplementation of this Treaty.

### 5.2.2. De lege ferenda

Adopting the Treaty in the Romanian legislation, *de lege ferenda*, has to take into account:

- **to insert the folklore expressions in the definition of performers:** actors, singers, musicians, dancers and other persons, who represent, sing, recite, declaim, play, perform, direct, conduct or perform in any other manner literary or artistic works or folklore expressions, any kind of show, including folklore, varieties, circus or puppet shows.

- **to define audiovisual fixations, according to art. 2 item b) of the Treaty**, as follow: the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device, for instance by supplementing art. 98 and introducing a new paragraph, the paragraph (2<sup>1</sup>).

- **to distinctively regulate the right of reproduction, distribution, rental, broadcasting, communication to the public and making available to the public of audiovisual performances.** As mentioned above to the previous chapter, a distinctive regulation of the right of making available to the public appears more than necessary, in the conditions under which the Beijing Treaty itself distinctively regulates such right (art. 10) from the right of communication to the public (art. 11).

- **to apply national treatment**, meaning to those performers who are nationals of the Contracting States.

- **to correlate the moral rights** of performers also for their audiovisual performances.

- the provisions of the Treaty regarding the transfer of rights involves a **corresponding change in art. 101 of the Law no. 8/1996** by including the right of broadcasting, communication to the public and making available to the public: Unless provided otherwise, the performer who participated in an audiovisual work, an audiovisual recording or a sound recording, is presumed that he/she will give to its producer, in exchange for an equitable remuneration, the exclusive right to use

<sup>165</sup> Every contracting party, a State, will have one vote in the Assembly and will vote only per se.

his/her fixed performance by reproduction, distribution, import, rent, lending, broadcasting, communication to the public and making available to the public.

- **to correlate the limitations and exceptions for audiovisual performances**, complying with the rule of the 3 steps: to be expressly provided by law, not to contravene to the normal use of the performance and not to prejudice the interests of the performer.

- **the protection duration of 70 years of the performers' rights for audiovisual performances**, in accordance with the "Time Directive" and with the Beijing Treaty which provides that the terms of protection shall be of at least 50 years computed from the end of the year in which the performance was fixed.

- **to correlate the provisions regarding the technological measures and those regarding DRM with those regarding the audiovisual performances.**

At a formal level, implementing the Treaty in the Romanian legislation does not seem to raise too many issues, as the Copyright and related rights law already includes such provisions. There can be analyzed, by correlation with the "Time Directive", the implementation of a special Chapter in the Law no. 8/1996 dedicated to the contract regarding the cinema works and other audiovisual works with special provisions on the audiovisual performances or a distinctive regulation within the provisions referring the performers.

In practice, it persists the problem<sup>166</sup> of performers who participated in the making of the Romanian movies created before 1996 that are currently reproduced on DVDs. In such circumstances, even if rights were transferred to the producer or achieved by an employment contract, at that time the main use being by public communication through public projection in a cinema, and by no means, through uses determined by technical development such as the reproduction on DVDs. In order to regulate this situation, the right to reproduce audiovisual performances should be included at least in the category of the collectively managed rights on a voluntary basis or draft agreements on a minimum period of 5 years, providing due remunerations, should be elaborated with the producers, based on the model of the French system.

## Conclusions

**The Analysis carried out in this Report reveals a high degree of harmonization of the Romanian law with the international treaties and conventions and with the EU Directives in this field. From this point of view, the Law no. 8/1996 regarding copyright and related rights is a good example for the legislation of other states and one of the most comprehensive within the EU<sup>167</sup>.** Certainly, as for any legal frame, the Law no. 8/1996 involves some supplements and amendments regarding performers which were detailed in the previous paragraphs. The analysis on the harmonization phase revealed, on one hand, amendments and supplements to the Law no. 8/1996 related to its drawing up and correlation and, on the other hand, amendments and supplements related to the substance and nature of performers' related rights.

<sup>166</sup> In 2008, the daughter of Toma Caragiu brought to justice TVR Media because the latter reproduced and marketed the Collection "Momente de aur - maeștrii comediei: Toma Caragiu" („Golden Moments – Masters of Comedy: Toma Caragiu”) without paying the appropriate remuneration to the heir in accordance with the revenues earned by TVR Media. The Court had admitted the petition of the heir and decided for her to receive a proper compensation. The same happened to Ștefan Bănică junior for "Momente de aur - maeștrii comediei: Ștefan Bănică senior" („Golden Moments – Masters of Comedy: Ștefan Bănică senior"). Doina Petre, the actress playing Veronica in the movie with the same title, received compensation from CNC and Campion Film SRL, for nonpayment of related rights. In June 2008, Doina Petre (Lulu Mihăescu) brought to justice the National Center for Cinematography (CNC) and SC Campion Film SRL, claiming to be paid approximately RON 70.000 as "compensation for nonpayment of related rights during the period 2003 to 2008", as a result of marketing the DVD including the movies "Veronica", "Veronica se întoarce" („Veronica is back"), "Saltimbancii" („The Tumblers") and "Mama".

<sup>167</sup> Ciprian Raul Romișan, Mariana Liliana Savu, op. cit., p. 140.

However, the continuous process of harmonization is determined both by the dynamics of new technologies and use of products bearing related rights, as well as by the legislative evolution; an example in this sense is, on one hand, at the Community level, by the adoption of **Directive 2011/77/UE of the European Parliament and of the Council on the amendment of the Directive 2006/116/CE regarding the term of protection of copyright and of certain related rights**, and, on the other hand, at international level, by the adoption of the **Beijing Treaty on Audiovisual Performances**. At the same time, **the draft Directive on Collective Management** is of real interest for the collective management dynamics, including that of performers.

**Multiple efforts** are needed for harmonizing the Law no. 8/1996 with the two legal acts previously mentioned, both on the part of the authorities in this field, as well as on the part of the collective management organizations, but the real **challenge will be to find the best solutions for their implementation**.

Thus, in case of Directive 2011/77/UE of the European Parliament and of the Council regarding the amendment of Directive 2006/116/CE on the term of protection of copyright and related rights and of certain related rights there should be established, inter alia, as follows:

- For the annual additional remuneration:
  - o Who is the producer responsible for making the payment?
  - o Whom are the performers who enjoy remuneration?
  - o Centralization of the information regarding the 20%.
- For the „use it or lose it” provision:
  - o There has to be a written proof of notification (i.e. the registration of notification)
  - o The need to make available the physical copies, as well as the need to make them available online to the public has to reveal the market reality.

The Beijing Treaty on Audiovisual Performances should not be construed as a model, but as a set of minimum standards of protection regarding the national treatment provided by every Member State. At the same time, compared to the situation of the states that have implemented the WPPT, one should be relatively optimistic toward the number of states that will adopt this Treaty. From this point of view, to better protect the rights of performers, WIPO has to encourage the states to adopt the WPPT and the Beijing Treaty on audiovisual performances. At the international level, WIPO strategy in this field should be changed and improved in order to limit the loss for performers.

A particular attention should be paid to the draft Directive regarding collective management, as it does not take into account the specificities of the activity of the collective management organizations for performers, because in the digital environment the collective management organizations for performers represent the most important link between right holders and users. Collective management organizations do more than just collect and distribute remunerations, so they play a vital role in protecting performers' rights.

The analysis of harmonization phase also reveals a legislative issue at the level of the *acquis communautaire*, i.e. the protection provided to performers is weaker compared to that provided to authors. Consequently, the performers have a weaker position in the negotiations with producers or users.

All these aspects should be taken into account also in Romania in order to achieve the best possible protection of performers' rights.

**Annex no. 1****Statistics on the Total Number of States that acceded to the Rome Convention<sup>168</sup>**

Year	The number of states that acceded
1970	10
1980	22
1990	34
2000	67
2012	91

Among the States that acceded to the Rome Convention there are<sup>169</sup>: Albania, Argentina, Armenia, Austria, Azerbaijan, Barbados, Belgium, Brazil, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, the United Arab Emirates, Switzerland, Estonia, Finland, France, Germany, Greece, Italy, Japan, Lithuania, UK, The Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russia, Slovenia, Spain, Sweden, Turkey, Ukraine, Hungary, Venezuela.

**Annex no. 2****Statistics on the Total Number of States that acceded to the WIPO Performances and Phonograms Treaty<sup>170</sup>**

Year	The number of states that acceded
2002	37
2012	90

Among the States that acceded to the Rome Convention there are<sup>171</sup>:

Albania, Argentina, Armenia, Austria, Azerbaijan, Barbados, Belgium, Brazil, Bulgaria, Canada, Croatia, The Czech Republic, Denmark, the United Arab Emirates, Switzerland, Estonia, Finland, France, Germany, Greece, Italy, Japan, Lithuania, UK, The Netherlands, Norway, Poland, Portugal, The Republic of Moldova, Romania, Russia, Slovenia, Spain, Sweden, The United States of America, Turkey, Ukraine, Hungary, the European Union, Venezuela

**Annex no. 3**

**Remunerations provided for the communication to the public of commercial phonograms to be found in storing media available at the user's web address (URL), consisting of their listening by the public, with income generated for the user.**

<sup>168</sup> Official data given by WIPO:

[http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty\\_id=17&lang=](http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=17&lang=)

<sup>169</sup> Official data given by WIPO:

[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17)

<sup>170</sup> Official data given by WIPO:

[http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty\\_id=20&lang=en](http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=20&lang=en)

<sup>171</sup> Official data given by WIPO:

[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17)

	Monthly no. of listenings			
	≤ 300.000	300.001 600.000	– 600.001 1.000.000	– ≥ 1.000.001
Nr. of phonograms used per month				
1-500	RON 50 /ogc	RON 100 /ogc	RON 100 /ogc	RON 200 /ogc
501-1.000	RON 75 /ogc	RON 150 /ogc	RON 225 /ogc	RON 300 /ogc
over 1.000	RON 100 /ogc	RON 200 /ogc	RON 300 /ogc	RON 400 /ogc

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