

COLLECTIVE MANAGEMENT OF THE RELATED RIGHTS OF PHONOGRAM PRODUCERS

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Abstract

The collective management activity of intellectual property rights has grown lately globally, it is very challenging for all market players. Also, the legal framework must be carefully analyzed and interpreted because in the middle, there are many rights holders as regards their property rights.

Because until now there is no European Directive to apply uniform to all collective management organizations, the activity is governed more by principles which are found in different Directives.

Keywords: *phonogram, collective management, equitable remuneration, exclusive right, producer*

Introduction

I will analyse the collective management activity for neighbouring rights of music producers, I will consider the need of such activity and the impossibility of the administration of such rights individually. Our legislation is not very clear so it is necessary to interpret the community and international provisions.

Legal frame:

I. Community decisions: Directive 92/100/CEE, Directive 2001/29/CE and Directive 93/83/CEE

II. Decisions provided in the international treaties and conventions which Romania affiliated to: Convention from Rome and OMPI Treaty

The right of phonogram producers to the equitable remuneration by broadcasting and public performance of their phonograms

The right of phonogram producers to the compensation remuneration for the private copy of works reproduced upon the sound recordings

The exclusive patrimony right of phonogram producers to the cable retransmission of their own sound recordings

The exclusive patrimony right of phonogram producers to prohibit or authorize the reproduction of their own sound recordings exclusively for the purpose of public performance

I. Community decisions

Directive 92/100/CEE of the Council from 19.11.1992 regarding the rental and loan right and certain related rights to the copyright in the field of intellectual property provides in its preamble the considerations (19) *because it is necessary to introduce a regime that ensures an equitable remuneration, to which it cannot be renounced, for the authors and interpreters or performers, who must have the possibility to entrust the management of this right to a collecting organization that represents them,* (21) *because this equitable remuneration must take into account the importance of the relevant authors' and interpreters' or performers' contribution to the phonogram or movie but also* (25) *because the member states may foresee, for the rightholders of related rights, more protective decisions than those provided at Art. 8 of the current directive, under these conditions, the Directive provides at Art. 4 that the right to an equitable remuneration cannot make the object of a renouncement.*

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Also, the directive provides at par. (3) of the same Art., that the management of the right to obtain an equitable remuneration may be entrusted to certain collecting organizations, representing authors or interpreters or performers and at par. (4) that the member states may regulate if and in what extent the management by the collecting organizations of the right to obtain an equitable remuneration may be imposed, as well as from whom this remuneration may be required or requested.

With respect to the broadcasting of phonograms from the radio and television organizations, but also with respect to their public performance, the Directive provides at Art. 8 Broadcasting or television and public performance par. (1) that the member states provide for the interpreters or performers the exclusive right to authorize or prohibit the broadcasting or television by radioelectric waves and public performance of their performances, **except for the case whereby the performance is itself broadcasted/ television or performed starting from an attachment** and at par. (2) of the same art. that the member states provide a right to ensure that a sole equitable remuneration is paid by the user, when a **phonogram published for trading purposes, or a reproduction of this phonogram**, is used for the purpose of a broadcasting/ television through the radioelectric waves or for any public performance and that this remuneration is divided among the interpreters or the relevant performers and phonogram producers. In default of an agreement between the interpreters or the performers and phonogram producers, the member states may establish the conditions of the remuneration distribution among them.

Directive 2001/29/CE of the European Parliament and of the Council from

22.05.2001 regarding the attenuation of certain issues of the copyrights and related rights in the informational society.

Taking into account the following considerations of the Directive:

(23) the current directive must attenuate in a wider extent the copyright over the public performance acts. This right must be understood in a wide respect, as covering any communication to the public that is not present in the provenience place of communication. This right includes any transmission or transmission, of any kind, of a work to the public, by cable or without cable, **including the broadcasting**. This right should not include any other act.

(26) with respect to the distribution by the broadcasting and television organizations, with the services on request, of their radio and television programs, **including the music of the trading phonograms** as integral part of them, it has to be encouraged the conclusion of collective license contracts to facilitate the recovery of involved rights.

(30) the rights provided in the current directive may be transferred or may make the object of certain license contracts, without affecting the relevant internal legislation regarding the copyright or the related rights.

(61) the Directives 92/100/CEE and 93/98/CEE should be amended to conform to the provisions of OMPI Treaty regarding the interpretations or performances and phonograms.

The Directive provides at Art. 3 *The right of public performance of works and the right to make available for the public of other protected objects*

Par. (1) *The member states provide the exclusive copyright to authorize or prohibit any public performance of their works, by cable or without cable, including to make available for the public their works, so that anyone to be able to access them from any place and any time.*

Par. (2) *The member states provide the exclusive right to authorize or prohibit the making available for the public, by cable or without cable, so that anyone to be able to access them from any place and any time:*

a) *For the interpreters or performers, of the attachments of their interpretations or performances;*

b) For the phonogram producers, of their phonograms;

c) *For the producers of the first attachments of movies, of the original and copies of their movies;*

d) *For the broadcasting or television organizations, of the attachments of programs distributed by them, independently if the distributions are wired or wireless, including by cable or by satellite.*

And at Art. 5 par. (2) letter b) of the same Directive no. 2001/29/CE it is provided that "*the states may provide exceptions and limitations from the reproduction right provided at Art. 2 [...] for reproductions on any support, issued by a natural person for its personal use and for the purposes that are not directly or indirectly trading, with the condition that the rightholders receive equitable compensations.*"

The latter article must be interpreted in considering the item 38 of the Preamble of Directive (item 38) whereby it is shown the fact that "*The member states should be allowed to provide an exception or limitation from the reproduction right for certain reproduction types of audio, video and audio-video materials for its personal use, accompanied by an equitable compensation. Such an exception may involve the introduction or maintenance of remuneration systems in order to compensate the prejudice caused to the rightholders.*"

Directive no. 93/83/CEE of the Council from 27.09.1993 regarding the coordination of certain decisions regarding the copyright and the related rights applicable to the distribution of programs by satellite and cable retransmission

Taking into account the considerations of the Directive:

(24) *because the harmonization of the legislation foreseen in the current directive involve the harmonization of decisions that warrant a high level of protection for the authors, interpreters or performers, the phonogram producers and the broadcasting and television organizations; because this harmonization should allow the broadcasting and television organizations to profit from the differences between the protection levels by moving the activities in the detriment of audiovisual productions;*

(28) *because, in order to avoid that the interventions of third rightholders over certain elements of programs to prohibit the good development of contractual agreements, it is required to be foreseen, by the obligation of requiring from a collecting organization, an exclusive collective performance of the authorization right, in the extent that the features of cable retransmission require it; because the authorization right as that rests intact and only its performance is regulated in a certain extent, which involves the fact that the transfer of right to authorize a cable retransmission rests possible; because the current directive is not reflected on the exercise of moral rights;*

The Directive provides at Art. 9 (1) *that the Member states to ensure that the right of copyright holders and of the related rights to grant or refuse the authorization of a cable operator for the cable retransmission of a show cannot be performed but by a collecting organization.*

(2) *Unless the holder did not entrust the management of his rights to a collecting organization, the collecting organization that manages the rights of the same category may be considered empowered with the management of his rights. If there are several collecting organizations that manage the rights of this category, the holder may appoint himself the collecting organization that will be considered empowered to manage his rights.*

II. Decisions provided in international documents which Romania affiliated to

According to Art. 15 par. 1 of the Worldwide Organization Treaty of Intellectual Property regarding the interpretations, performances and phonograms, ratified by Romania by Law no. 206/2000

The interpreters or the performers and the phonogram producers have the right to an equitable and sole remuneration if the phonograms published for trading purposes are directly or

indirectly used for broadcasting or for any kind of communication to the public", and according to par. 4 of the same article " the phonograms made available for the public by wire or wireless means, so that anyone is able to access them at the place and time individually chosen, are considered as phonograms published for trading purposes.

According to the International Convention at Rome for the protection of interpreters or performers, of the phonogram producers and of the broadcasting organizations, ratified by Romania by the Law no. 76/1998

Art. 3 In respect of the current convention, it is understood by:

b) phonogram - any exclusively sound attachment of the sounds resulting by a performance or other sounds;

d) publication - making available for the public, in a sufficient quantity, of certain copies of a phonogram;

Art. 12 When a phonogram published for a trading purpose or a reproduction of this phonogram is directly used for the broadcasting or for any kind of communication to the public, the one that uses it will pay the interpreters or performers or the phonogram producers or both of them an equitable and sole remuneration.

III. In the light of these community and international decisions, according to internal legislation, the producer of sound recordings may individually exercise his rights over the phonograms or by a collecting organization, based on a mandate.

The rights of the producers of phonograms that may be managed by a collecting organization are:

- The right to equitable remuneration for the broadcasting of their own phonograms
- The right to equitable remuneration for the public performance of their own phonograms
- The right to compensation remuneration for the private copy for the works reproduced upon the sound recordings
- The exclusive patrimony right of cable retransmission of their own phonograms
- The reproduction right of their own phonograms for the purpose of public performance or broadcasting

The first four categories of rights are jointly mandatorily managed, by a collecting organization, given the fact that these are not susceptible to be individually managed, while the last category falls within the collective management by a collecting organization, based on especially granted mandates awarded by the rightholders.

In the internal legislation, three types of managements are provided in the Title III of Law no. 8/1996 amended and completed, as follows:

i. The mandatory collective management, whereby the first four categories of rights are managed, as we showed above – Art. 123¹. This type of management is characterized by the fact that the collecting organization represents all the holders of a creation field, including those that did not grant him a mandate.¹

ii. Optional collective management, whereby other categories of rights belonging to other holders are managed, like the mechanical reproduction right of music works, belonging to the authors or the broadcasting right of works and artistic performances in the audiovisual field – Art. 123². This type of management is characterized by the fact that the collecting organization represents all the holders of a creation field, including those that granted him a mandate, meaning its own members.

¹ Viorel Ros, Dragos Bogdan, Octavia Spineanu Matei, Dreptul de autor si drepturile conexe, Tratat, p. 492 Formele gestiunii colective

iii. The collective management based on a special mandate, whereby the last category of rights, above mentioned, belonging to the phonogram producers is managed - the reproduction right of phonograms for the purpose of public performance or broadcasting - Art. 123³. This type of management is characterized by the fact that the collecting organization represents only the holders of a creation field that granted him a special mandate and only for the object of mandate.

The three types of managements provided in our legislation don't represent all the categories of collective management of the intellectual property rights, the most often met in the legislations of other states being the collective management on an extended repertoire. This type of management is situated between the mandatory and the optional collective management, the collecting organization representing all the rightholders of a certain field, except for those that opted to manage their own rights directly in the relations with the users of their works and that exploit them as that.

During the last period, the collective management activity in the sound recording field has been magnified, on the one hand, due to the importance of this segment in the detriment of the sale activity of musical products, the industry being more and more based on these incomes from secondary use and, on the other hand, due to the development of collecting organizations that activate in the musical field. The proof in this respect is also that the number of collecting organizations in this field - currently 7 compared to 3 such organizations that were operating only 5-6 years ago.

Not the same is the situation of collective management in other creation fields, too, referring here especially to the audiovisual field, especially to the movies, where the rightholders have good exploitation receipts of the rights, individually, so that, in the broadcasting field, at least, the need of such a collective management is not justified. Further, in the audiovisual field, the collective management is only mandatory in the case of cable retransmission rights of audiovisual works (movies) and in the case of private copy of the works reproduced upon audiovisual recordings.

IV. The right to equitable remuneration recognized to the phonogram producers for the broadcasting and public performance of their recordings by broadcasting and television bodies is mandatorily collective managed²

This issue results by the corroboration of several law texts, as follows: Art. 105 par. 1 letter f) of Law no. 8/1996 amended and completed, recognizes the exclusive patrimony right of the phonogram producers to authorize or prohibit the broadcasting and public performance of its sound recordings, except for those published for trading purpose, *case that it only has the right to equitable remuneration*. In accordance with this Article, Art. 106⁵ par. (1) of Law no. 8/1996 provides that for the broadcasting or by any public performance way, the interpreters or performers and phonogram producers have the right to a sole equitable remuneration, being in fact taken over the provisions of Art. 12 of the Convention at Rome and of Art. 15 par. 1 of the OMPI Treaty above mentioned. This equitable remuneration is established according to Art. 106⁵ par. (2) and (3) of Law no. 8/1996, meaning by a methodology negotiated by the involved parties (rightholders, by the collecting organizations and users, by the professional associations) or established according to the special procedure provided by law - by institutionalized arbitrage near the Romanian Office for the Copyrights, and after the establishment of tariffs included in the methodology, the collection is issued by the collecting organizations.

The essence of equitable remuneration, as well as the circumstance that, both according to the national and community law, and international treaties, this remuneration is collected by the

² Mihaly Ficsor, *Gestiunea colectiva a drepturilor de autor si conexe*, 2010, *Universul Juridic*, p.85, 212. From the practical point of view, the remuneration right or the exclusive right of interpreters of performers and of the phonogram producers regarding the broadcasting and communication to the public of their performances registered on phonograms or of their phonograms, is similar to that of the issuance rights of composers and of the script writers that have been examined above. It results that this right of interpreters or performers and of the phonogram producers cannot be issued but by an appropriate collective management system.

collecting organizations, has as base the protection of related rights of phonogram producers by ensuring an equitable remuneration and by ensuring the right to refer to the collecting organizations for the recovery of this remuneration (Art. 129¹ of Law no. 8/1996), but also by ensuring the use of phonograms within the radio and television programs as culturing and information free access, under the conditions that it is proven (but it is also presumed from the community law and the treaties which Romania takes part to) that the individual management of the related rights is impossible (both for the rightholders who cannot check the use degree of their own works and for the radio and TV organizations that cannot conclude direct license contracts with all the holders), ensuring this way a correct balance between the rights and interests of related rightholders, as well as between them and the rights and interests of users (radio and television organizations).

V. The right to the compensation remuneration to the phonogram producers for the private copy of works reproduced upon the sound recordings is mandatorily managed collectively³

This right results as mandatorily collectively managed by a collecting organization results by the provisions of Art. 107¹ of Law no. 8/1996 amended and completed, and at Art. 107 it is widely described the way that this right will be collected, by the establishment of a "List" of machines and supports established by the issuance of copies. The internal provisions don't represent but the transcript of the provisions of Art. 5 par. (2) letter b) of the Directive no. 2001/29/CE above mentioned.

However, the right to the compensation remuneration for private copy is mandatorily collectively managed, for all the rightholders both for the works reproduced upon sound recordings and for the works reproduced upon the audiovisual recordings, by a sole collective organization. It is also the single management case where the organization is not liable to the issuance of a license as non-exclusive authorization, this case the payment of right not being made to the collective organization by the one who makes the copy (even if it is included in the price or support that allows the copy) but by the importer or producer of such machines and supports, so that it is not imposed, not justified the licensing or authorization procedure.

VI. The exclusive patrimony right of phonogram producer to authorize or prohibit the cable retransmission of their own sound recordings

The mandatory collective administration of this right is provided as that in our legislation for all the rightholders at Art. 121 par. (1) of Law no. 8/1996, decisions that transcript the text of Directive 93/83 provided at Art. 9 par. (1), above mentioned.

The decisions according to which the cable distributors were exempted from the payment of copyrights and related rights for the mandatorily cable retransmitted programs (*must carry*) have been abrogated, given the admission of the non-constitutionality exception of par. (2) of Art. 122 by the Decision of Constitutional Court no. 570/2010.

Also, by the Decision of the Appellate Court Bucharest no. 263A/2010 published in the OG by the ORDA decision no. 327/2010 it was established that the rights for cable retransmission will be collected by a collecting organization for each creation field and not by a sole collective organization, for all the copyright and related holders.

On the other hand, the provision of an exclusive patrimony right to authorize or prohibit the cable retransmission of certain works protected under the conditions whereby, for the broadcasting by televisions of the same works, it is provided a right to equitable remuneration, it seems to me entirely inappropriate for the practical conditions and impossibly to apply, as long as the cable operator does not intervene in the content of a television body, taking over as that in its entirety. If a

³ Mihaly Ficsor, *Gestiunea colectiva a drepturilor de autor si conexe*, 2010, *Universul Juridic*, p.95, 246. The national legislation that introduced tributes for the private copy provide that these cannot be pretended but by the collective organizations.

holder may prohibit the cable retransmission of his work and may not prohibit the transmission by television of that work (112¹ of Law no. 8/1996), the right to prohibit the cable retransmission rests without an object.

VII. The exclusive patrimony right of phonogram producers to authorize or prohibit the exclusive reproduction for the purpose of public performance of his own phonograms

This collective management form falls within the collective management based on a special mandate, provided at Art. 123³ of Law no. 8/1996 amended and completed, given the exclusive character of the reproduction right provided in the case of phonogram producers at Art. 105 par. 1 letter a) of Law no. 8/1996 and, certainly, his express non-falling within the other collective management forms.