

# REMUNERATION PAYABLE TO PERFORMERS FOR THE BROADCASTING OF PHONOGRAMS. TYPES OF PHONOGRAMS

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## Abstract

*The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators. By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works. The moral and patrimonial rights of the author and neighboring rights stakeholders are protected both by the special law, mentioned above, and also by the common law provisions. Among them is included the Decree no.31/1954 concerning individuals and legal entities but also the Civil Code. One argued problem during the arbitrations, which take place at ORDA headquarters, institution that provides the Secretariat, also in the courts of law, when setting claims was promoted by Collecting Societies against bad payers users, was to analyze the two phrases commercial phonograms and phonograms published for commercial purposes.*

**Keywords:** *commercial phonograms, phonograms published for commercial purposes, Collecting Societies moral and patrimonial rights moral and patrimonial rights protection*

## 1. Introduction

The institution of copyright and related rights, as regulated in our system by Law nr.8/1996, deals with the protection of literary, artistic and scientific works and their creators.

By a definition that has a tradition in our doctrine, the legal institution of copyright (generally speaking) means all the legal rules governing social relations that arise from the creation, publication and use of literary, artistic or scientific works.

The special Law (Law no.8/1996<sup>1</sup>, hereinafter referred to as the Law) aimed not only to harmonize the national legislation with the one in the European Community Member States but also to create a reliable protection system for the copyright and related rights by creating the necessary tools in order to prevent and punish the rights violation.

The international legal frame for copyrights and related rights protection is particularly important as it also has an impact on the Romanian legal regulations in this field. However, given *the international vocation of the intellectual creation*, it is necessary to ensure an effective protection of the rights of authors and their creations, not only in their home country but equally in other countries where they are used and capitalized. For these reasons, *we consider the need for further harmonization and implementation of legislation on copyright*

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<sup>1</sup> Published in the „Official Gazette of Romania”, Part I, no. 60 dated March 26<sup>th</sup>, 1996, as supplemented and amended by the Law no. 285/2004, published in the „ Official Gazette of Romania”, Part I, no. 587 dated June 30<sup>th</sup>, 2004, as amended and supplemented by Government’s Emergency Ordinance no. 123/2005, published in the „ Official Gazette of Romania”, Part I, no. 843 dated September 19<sup>th</sup>, 2005, as amended and supplemented by the Law no. 329/2006 regarding the approval of Government’s Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, published in the „ Official Gazette of Romania”, Part I, no. 657 dated July 31<sup>st</sup>, 2006. (All further specifications regarding the Law no. 8/1996 refer to the form as supplemented and amended by Law no. 329/2006).

and related rights both in the Member States of the EU and in the acceding countries and beyond.

The moral and ancestral rights of authors and of related rights holders are protected both by the provisions of the special law, referred to above, and by the provisions of the common law. These include the Decree no. 31/1954 concerning the natural and legal persons, as well as the Civil Code<sup>2</sup>.

In the "Copyright and Related Rights" treaty by the Professor Viorel Ros and his collaborators, Dragos Bogdan and Octavia Spineanu – Matei, they show that the object of study "The Intellectual property law" studies "the protection of the authors of the works of mind and the result of their creative activities, namely the form creations (protected by copyright and related rights, and more recently by sui-generis rights) and the background creations (protected by industrial property rights), as well as the protection of the most important distinctive marks of trade activity".<sup>3</sup>

The rights related to copyright, or the "neighboring rights", as they were referred to in doctrines and jurisprudence, were regulated in the Romanian law for the first time by the Law no. 8/1996 on copyright and related rights. In the regulation of related rights protection by law no. 8/1996, the Romanian legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26<sup>th</sup>, 1961 and the Convention for the Protection of Phonograms Producers against unauthorized reproduction of their phonograms, concluded at Geneva on October 29<sup>th</sup>, 1971<sup>4</sup>.

For the purposes of the Law no. 8/1996, by performers we understand: actors, singers, musicians, dancers, and other persons who sing, dance, recite, declaim, play, perform, direct, conduct or execute in any other manner a literary or artistic work, a show of any kind, including folk, variety, circus or puppet shows (Article 95).

The rights related to copyright are the intellectual property rights, other than copyright, enjoyed by performers for their own performances or executions, by producers of sound recordings and by manufacturers of audiovisual recordings for their own recordings and by broadcasting and television organizations for their own programs and program services.

An issue debated in arbitrations<sup>5</sup> that take place at the ORDA<sup>6</sup> headquarters, institution also ensuring their Secretariat, as well as to the courts when settling the claims promoted by the collecting societies against non-paying users, is to analyze two phrases, namely the "trade phonograms" and the "phonograms published for commercial purposes."

## 2. Paper Content

**I. Users<sup>7</sup>** claim, without bringing the proof, that the phrases "trade phonograms" and "phonograms published for commercial purposes" used in Articles 123<sup>1</sup> letter f) and 123<sup>2</sup> letter f) of the Law no. 8/1996 as amended and supplemented, "have a distinct meaning and different legal rules."

In relation to what they claim, it would mean that the nature of the phonogram is given by the way of using it. *For instance: a phonogram communicated to the public (in bars,*

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<sup>2</sup>See, for instance, Gh. Beleiu, op. Cit. 1999 and Fr. Deak, Treaty on succession law.

<sup>3</sup>Viorel Roş, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights, Treaty*, All Beck Printing House, Bucharest, 2005, page 1.

<sup>4</sup>Romania acceded to the Geneva Convention for the Protection of Phonogram Producers against piracy of phonograms by the Law no. 78 dated April 8<sup>th</sup>, 1998, published in the „Official Gazette of Romania”, Part I, no. 156 dated April 17<sup>th</sup>, 1998.

<sup>5</sup>See Order no. 2357/July 8<sup>th</sup>, 2010 al Minister of Culture and National Heritage, unpublished, for the assignment of the ORDA Referees Body.

<sup>6</sup>Romanian Office for Copyright.

<sup>7</sup>Broadcasting Organizations.

*shops, etc.) and broadcasted by a television station (generic name, according to the statement of the holder - "by cut") is collectively managed, and the same phonogram, if it is broadcasted by a radio station, should be optionally collectively managed.*

The Romanian Radio Broadcasting Company – SRR, argues that there may be "trade phonograms" and "phonograms published for commercial purposes" that can be "non phonograms"<sup>8</sup> or "phonograms that are not intended for sale"<sup>8</sup>. *For instance, audio post signals, jingles, TV advertisements, music curtains, social campaigns approved by CNA<sup>9</sup> etc. are non phonograms and consequently they were never reported on play lists to collective management organizations, nor was paid any remuneration for these phonograms. This was one of the reasons why CREDIDAM, the collective management organization, addressed the Court. The payment difference to CREDIDAM is represented by this lack of play-lists.*

*From discussions with right holders who created phonograms to order and performed them (no matter how they were generically called - promos, jingles etc.), I underline that: the only difference between a promo or jingle and a song fixed on a support that is sold in stores is their duration, the latter having a longer average of 2-3 minutes. In a broadcasted show, music draws attention. There are circumstances where a jingle can bring greater benefits to a radio station than a piece fixed on a support which is sold in stores. Such phonograms are created by order with the aim to be easily recognized and remembered by the listeners. A jingle is easily associated with the sound material, with the name of the show or with the spot. A jingle is also called a musical signature. It is obvious that, when those musical notes are played, we are not required anymore to mention the name of the show or of the station (eg. the EUROPA FM promo - if the musical notes should be played without text, surely that listeners could easily identify the radio station), as the listener just by hearing those sounds he/she knows that a certain show will follow.*

*As for the advertising and social campaigns that have background music (a pre-existing phonogram or a phonogram created by order), the right holder claims that on the same music two or three commercials totally different can be performed but all of them representing the same product. For instance: the "Real" advertisement has about sixty spots using the same background music (the same phonogram). The rights granted by law were never transferred by their right holders. Therefore, no user has the right to fail reporting these artistic performances on the play-lists sent to the collective management organizations, because radio stations have only the quality of advertisements broadcasters, for an amount of money (calculated to the value of the advertising second), received for broadcasting such advertisements. Ads that do not have background music are exceptions. Only three commercials per year are created this way.*

**II.** Under the establishment of an optional collective management in case of broadcasting the phonograms published for commercial purpose, the **referees panel** which has determined the final form of the methodology<sup>10</sup> showed that the two concepts, "trade phonograms" and "phonograms published for commercial purposes", are two distinct terms for which the legislature has established different legal regimes. In order to clear up, the referees panel has defined the two notions, that law itself has failed to define, as follows "by the phrase **trade phonogram** we understand that phonogram which is communicated to the public or broadcasted by that category of users in front of whom it is impossible to individually exercise the right to an equitable remuneration for the holders of rights related to

<sup>8</sup>See unpublished SRR written notes (file no. 10.141/2/2010, CAB (Bucharest Court of Appeal) X<sup>th</sup> Civil and IP Section).

<sup>9</sup>National Audiovisual Council.

<sup>10</sup>Methodology regarding the remuneration payable to performers and phonogram producers for broadcasting the phonograms published for commercial purpose or reproductions thereof by the broadcasting organizations, published in the Official Gazette no. 668/2010, by the ORDA Decision no. 284/2010, amended by the Civil Judgment no. 153 A/2011 of the BAC, published in the Official Gazette no. 470/July 5<sup>th</sup>, 2011, by the ORDA Decision no. 216/2011.

copyright; by the phrase **phonogram published for commercial purposes** we understand the phonogram which is communicated to the public or broadcasted by *that category of users in relation to whom it is possible to individually exercise* the right to an equitable remuneration for the holders of rights related to copyright.

In this case, we understand that we speak of the right to equitable remuneration for the use of phonograms published for commercial purposes by broadcasting organizations, so that the collective management of such right is optional ..."

These two definitions are taken verbatim from the reasoning of the Civil Judgment no. 23A/February 5<sup>th</sup>, 2007<sup>11</sup> pronounced by the IX<sup>th</sup> Civil Section of the Bucharest Court of Appeal and for the intellectual property cases, a decision strongly criticized, both nationally and internationally, because of the confusion it brought regarding the management on the Romanian territory of the right of broadcasting the phonograms published for commercial purposes.

Although the law does not separately regulate the two phrases, we find that for phonograms published for commercial purposes the decision of the referees' panel was to consider the optional collective management solution.

Moreover, although the referees' panel held that "mandatory collective management is justified by the existence of those circumstances in which the using method of works or performances makes it impossible to individually follow the right regarding the equitable remuneration, hypothesis corresponding to the phrase trade phonogram", **does not specify how these circumstances can be determined.**

**III.** The types of phonograms indicated by the Court in conclusions of the session dated March 15<sup>th</sup>, 2011<sup>12</sup> are created **independently and without regard** to the so-called "categories" provided by the Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented. The criterion used to distinguish three types of phonograms is a technical criterion consisting of phonograms content and of the purpose for which they were created. Thus, the Court speaks of three types of phonograms, contained in the current methodology<sup>13</sup>, namely:

*"1. phonograms including performances, or other sound or digital representations thereof, which fixing was mainly done for the purpose of making them available to the public through selling the media on which are fixed such performances;*

*2. phonograms including performances, executions or other sounds created in order to identify and self-promote a broadcasting station or a program thereof, phonograms which producer is either that radio station or another phonogram producer, which created the phonogram at the order of this broadcasting station;*

*3. phonograms including performances, executions or other sounds created in order to broadcast them for promoting a product or service belonging to a third party in relation to the broadcasting station, as advertising for that product or service."*

Judicial distinctions remove the objective impossibility to include these types of phonograms within the categories established by the Law no. 8/1996, namely in the categories of "trade phonograms" and "phonograms published for commercial purposes ."

ARCA<sup>14</sup> thesis is correct, according to which *"first we must note that we can not define the contents of both concepts, but only of one of them, namely of the - phonograms published for commercial purposes - concept, for which definitions are included in the Rome*

<sup>11</sup>Published in the Official Gazette no. 572/August 21<sup>st</sup>, 2007.

<sup>12</sup>Unpublished, file no. 10.141/2/2010 settled by BCA, IX<sup>th</sup> Civil Section and for causes on IP.

<sup>13</sup>Civil Judgment no. 153 A/2011 of BCA, published in the Official Gazette no. 470/05.07.2011, Desizen ORDA no. 216/2011.

<sup>14</sup>Romanian Association for Audiovisual Communications , an association which has as members companies owning radio and television stations.

*Convention or in the WIPO Treaty on phonograms, but not of the - trade phonograms – concept, phrase which is currently present only within the Romanian law of copyright, but without being defined here"* (see paragraph 1, page 1 of the written notes<sup>15</sup> submitted by ARCA). In our opinion, the thesis promoted by ARCA defenders is developed by practitioners in this field, who are aware that, technically speaking, the use by the Law no. 8/1996 of various phrases for the same concept (the concept of "trade phonograms" and of "phonograms published for commercial purposes") is incorrect. The European Community law does not know the technical-legal concept of - "trade phonograms" and "phonograms published for commercial purposes." Therefore, we consider that the classification of these types of phonograms judiciary identified – in the so-called two categories of phonograms as provided by Law no. 8/1996 – in order to determine the legal regulations applicable to the management of each type of phonogram, is impossible and unnecessary.

In reality, phonograms broadcasting determines a **mandatory collective management (an extended legal mandate)**.

**IV.** In relation to domestic legislation as well as to directives and treaties to which Romania acceded, we consider that the two phrases "trade phonogram" and "phonogram published for commercial purposes" are synonyms for the following reasons:

**1.** According to **art. 103 paragraph 1** of Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, a "**sound recording or phonogram shall be considered**, for the purposes of this law, the fixation of sounds coming from a performance or an execution, or of other sounds or digital representation of these sounds, other than in the form of a fixation incorporated in a cinematographic work or in another audiovisual work."

*According to the definition, any sound coming from a performance / execution and fixed on an analog or digital support, as appropriate, is a phonogram. There is only one exception defined by law, namely that sound coming from a performance / execution fixed and embedded in a cinematographic work or in another audiovisual work that cannot be defined as a phonogram ( that does not mean that its use does not generate remuneration). This exception exceeds users who own radio stations, because they cannot ever use the audiovisual part when they broadcast a phonogram.*

*Phonogramme ( fr )<sup>16</sup> = recording of sound vibrations on photographic paper tape, tape recorder, disc, film etc. by electrical, mechanical means etc.*

**2.** The Law no. 8/1996, with subsequent amendments and supplements, regulates as a **single right to equitable remuneration for both communication to the public and broadcasting, namely only in the case of phonograms published for commercial purposes** (see the provisions of **art. 98 letters g and g<sup>1</sup>** and **art. 105 letter f**, both related to the provisions of **art. 106<sup>5</sup>**), and this right is exercised only through the beneficiary management organizations (**art. 106<sup>5</sup> paragraphs 2-4**).

According to art. 106<sup>5</sup> of the law, for direct or indirect use of phonograms published for commercial purposes, or of a reproduction thereof, by broadcasting or by any methods of communication to the public, performers and phonogram producers have the right to a single equitable remuneration.

Moreover, the provisions of **art. 112<sup>1</sup>** clearly show the consequence of protecting by right to remuneration: "**If right holders shall, by law, benefit of a mandatory remuneration**

<sup>15</sup>See ARCA unpublished written notes (file no. 10.141/2/2010, BCA X<sup>th</sup> Civil and IP Section).

<sup>16</sup>Definition by the Explanatory Dictionary of the Romanian Language.

*[if of the remuneration referred to in art. 106<sup>5</sup>], they cannot argue the uses generating it." Per a contrario, since artists can not prohibit the broadcasting of their records/performances, they were compulsory acknowledged the right to remuneration.*

Even if we were to assume, theoretically, that by 'phonogram published for commercial purposes' means the phonogram which is communicated to the public or broadcasted by that users' category in relation to which the right to equitable remuneration can be individually exercised, from a practical point of view, it is impossible to individually authorize and manage such phonograms.

3. Coexistence of the provisions of **art. 123<sup>1</sup> paragraph 1 letter f** (which refers to "*trade phonograms*") with those of **art. 123<sup>2</sup> paragraph 1 letter f** (which refers to "*phonograms published for commercial purposes*") of the law, which users rely on, leads to a **completely erroneous conclusion**, claiming that performers and phonogram producers would be beneficiaries of two rights to equitable remuneration, one for public communication and broadcasting of **trade phonograms**, which is exercised through mandatory collective management (art. 123<sup>1</sup> paragraph 1 letter f), and another for public communication and broadcasting of **phonograms published for commercial purposes**, for which the collective management is optional (art. 123<sup>2</sup> paragraph 1 letter f).

We do not understand what would be the reason why the legislature would admit the existence of two rights to equitable remuneration, since in the whole body of Law no. 8/1996, with subsequent amendments and supplements, **is only mentioned the phrase of phonogram published for commercial purposes and a single right to equitable remuneration is regulated**. If the legislature had intended to make a distinction in order to avoid any confusion, it ought to define the two phrases.

ORDA<sup>17</sup> point of view, as sole regulator, is "*By the G.E.O. no. 123/2005, because of a material error, the remuneration has been included both in the category of rights optionally collectively managed (art. 123<sup>2</sup> paragraph 1 letter f), and in that of the rights mandatory collectively managed (art. 123<sup>1</sup> paragraph 1 letter f). In conclusion, the equitable remuneration payable to performers and producers of phonograms for broadcasting the phonograms published for commercial purposes or of reproductions thereof **is mandatory collectively managed**, which means that collective management organizations will also represent right holders who have not granted a mandate and it is regulated in **art. 123<sup>1</sup> paragraph 1 letter f and paragraph 2 of Law no. 8/1996, as amended and supplemented**. Therefore, this **single equitable remuneration** can not be individually managed by a performer or producer of phonograms".*

ORDA<sup>18</sup> also stated: "*given that for the proper resolution of the case it is necessary to apply **art. 123<sup>1</sup> letter f**, we specify that, because of a material error, the content of this text is also included in the text of **art. 123<sup>2</sup> letter f***". For the correct interpretation of the law we must point out that the text of art. 123<sup>1</sup> is the accurate one, as it is in accordance with art. 12 of the Rome Convention and with art. 15 paragraph 1 of the WIPO Treaty".

In the technical-legal dispute related to "*trade phonograms*" and "*phonograms published for commercial purposes*," our point of view is and remains still the same, i.e. the law makes no distinction between the two phrases and the legal regime applicable to phonograms is unique.

Legislation in Romania has transposed the provisions of international regulations, which aimed to the uniformization of standards for the protection of intellectual property at international level.

<sup>17</sup>See ORDA unpublished letter no. 2187/2006, submitted upon the request of the Referees Body, during the arbitration with the television organizations.

<sup>18</sup>See ORDA unpublished letter no. 1442/2007, submitted upon the request of the Court, to the file no. 5313/2006.

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

a) Art. 3 paragraph 1 letter b) of the Rome Convention<sup>19</sup> defines phonogram as: "any fixation of a sound reproduction of sounds, either of a representation of a sound or of other sounds."

b) art. 2 paragraph 1 letter b) of the WIPO Treaty<sup>20</sup> on phonograms and public reproduction (WPPT) defines phonogram as fixation of the sound of a representation or of other sounds or of sounds production, other than in the form fixed and embedded in a cinematographic or audiovisual work.

Moreover, art. 12 of the Rome Convention establishes: "when a *phonogram published for commercial purposes*, or a reproduction of such phonogram, is directly used for broadcasting or for any kind of communication to the public, the one who uses it will pay the performers, or producers of phonograms, or to both of them, an equitable single remuneration".

Art. 15 of the WIPO Treaty<sup>21</sup> establishes that the performers and producers of phonograms shall enjoy the right to a equitable single remuneration for the direct or indirect use of phonograms published for commercial purposes, for broadcasting and for any communication to the public.

We notice that internationally there is no distinction between the concept of "trade phonograms" and of "phonograms published for commercial purposes."

The difference made in the Romanian law is artificial and contradictory, as long as subsequent changes in the law nr. 8/1996 only pursue to implement international regulations where no difference is made in this respect.

According to the provisions of art. 20 of the Constitution where the provisions of international treaties to which Romania is a party prevail, if there are inconsistencies or contradictions between them and the regulations of the national legislation, the Court will hold that the arrangements applicable to phonograms is unique and no distinction is necessary in this field<sup>22</sup>.

Courts' opinion is unitary. In this respect we invoke the ICCJ Decision no. 9699/November 27<sup>th</sup>, 2009<sup>23</sup>, the Civil Judgment of the Constanta Court of Appeal no. 287/C/December 4<sup>th</sup>, 2008<sup>24</sup>, the Civil Judgment no. 1195/2010<sup>25</sup> of the Bucharest Court III<sup>rd</sup> section, judgment which is also maintained under this aspect by the Bucharest Court of Appeal, XI<sup>th</sup> Civil Section for the IP cases, by the Civil Judgment no. 57A/February 15<sup>th</sup>, 2011<sup>26</sup>.

We quote: "The Court holds that a distinction between the phonograms published for commercial purposes and the trade phonograms cannot be sustained, resulting from the combination of the provisions of art.123<sup>1</sup> paragraph 1, letter f and of art. 123<sup>2</sup>, paragraph 1 letter f of the Law nr. 8/1996 in the direction shown by the defendant, based on the criteria considered while pronouncing the civil judgment no. 23A/2007 issued by the Bucharest Court of Appeal IX<sup>th</sup> Civil Section, namely after the effective opportunity of the holder of related right to individually exercise his/her rights.

This interpretation leads to the conclusion that the same phonogram can be described as phonogram published for commercial purposes when it is subject to use as background

<sup>19</sup>Law no. 76/1998 for Romania accession to Convention on the protection of performers, phonogram producers and broadcasting organizations, concluded in Rome on October 26<sup>th</sup>, 1961, published in the Official Gazette no. 148/1998.

<sup>20</sup>World Intellectual Property Organization .

<sup>21</sup>WIPO Treaty on performances, executions and phonograms ratified by Romania by the Law no. 206/2000.

<sup>22</sup>See the unpublished Civil Judgment no. 57A/2011 of the BCA IX<sup>th</sup> Civil Section and for the IP cases.

<sup>23</sup>Unpublished.

<sup>24</sup>Unpublished.

<sup>25</sup>Unpublished.

<sup>26</sup>Unpublished. See also the conclusions dated February 10<sup>th</sup>, 2011 and March 17<sup>th</sup>, 2011 in the file no. 28.956/3/2010 in trial at the Bucharest Court of Justice, V<sup>th</sup> Civil Section (unpublished).

music, subject to satellite retransmission etc. or trade phonogram when it is subject to radio broadcasting or broadcasting through the TV stations.

This conclusion cannot be accepted as such a distinction of the legal regulation cannot be made only for the reason of an actual possibility of the holder of related rights to individually exercise the rights, as it would remove the existence of a clear, accurate rule known with many particular, exceptional circumstances, which would lead to the violation of the principle of equality and non-discrimination consisting of applying the same legal rules in identical circumstances."

*In the report entitled "International review of license charges in management companies for music broadcasting" prepared by CAPACENT<sup>27</sup> in April 2006 for the Ministry of Culture in Denmark, at page 6, there are defined the following terms, we quote:*

*"Dividing transmitters in commercial and non-commercial categories was made at the same time with the definitions applied by the so-called AUVIS<sup>28</sup> publications of Eurostat, as the application of these categories seems to be quite widespread in the 18 countries."*

*Definitions:*

*"The non-commercial radio transmitters (users in the Romanian legislation) are those broadcasters which have a public obligation and which can be fully or partially funded by license fees or by government subsidies."*

*"The commercial radio transmitters (users in the Romanian legislation) are those broadcasters which are usually funded by advertising or sponsorship."*

*As it can be seen, the users are divided into commercial and non-commercial ones and not the phonograms. In Romania, the only radio station that can be considered non-commercial, as defined above, is SRR (and all its owned stations) while commercial radio stations are all the other licensed broadcasters in the Romanian territory.*

**4. According to art. 123<sup>1</sup> paragraph 1, letter "f" of the Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplements, "The collective management is mandatory in order to exercise the following rights: ... the right to equitable remuneration acknowledged for the performers and producers of phonograms for ...broadcasting trade phonograms or reproductions thereof". The paragraph 2 reads: "for the categories of rights provided in paragraph 1, the collective management organizations also represent the right holders who have not granted a mandate."**

In France, the doctrine is divided between believing that these organisms have the capacity of assignees of copyright holders (such as SPEDIDAM<sup>29</sup>), or they are only the Agents of the latter.<sup>30</sup>

Consequently, the right to equitable remuneration acknowledged for the performers and producers of phonograms for the public communication and broadcasting of trade phonograms / phonograms published for commercial purposes or of reproduction thereof is **compulsory** collectively managed and not necessarily regards only the repertoire of that collective management organization, but the **extended repertoire**.

This is the meaning of the provisions of art. 12 of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded at Rome on October 26<sup>th</sup>, 1961* and of art. 15 paragraph 1 of the *WIPO Treaty on Performances and Phonograms ratified by the Law no. 206/2000*. For phonograms, the

<sup>27</sup>CAPACENT is the institution which drew up the, International analysis of license fees in management companies for music broadcasting", upon the request of the Ministry of Culture in Denmark.

<sup>28</sup>Statistics regarding the Audiovisual Services.

<sup>29</sup>The Collective Management Organization for Performers in France.

<sup>30</sup>See Viorel Roş, Dragoş Bogdan, Octavia Spineanu- Matei, Copyright and related rights, All Beak Publishing House, page 495 and the French doctrine quoted therein. Also see the unpublished Civil Judgment no.57A/2011 of BCA IX<sup>th</sup> Civil Section and for the IP Cases.



mandate of the collective management organization as the only collector in Romania for the performers, is an extended legal mandate, with the right to collect remuneration for both members and non-members, Romanian and foreign artists. For non-members, the collective management organization has the obligation to publicly notify the right holders in order to receive the remuneration collected for the use of the phonograms published for commercial purposes or of the reproductions thereof. Thus, art. 129<sup>1</sup> of the Law no. 8/1996, with subsequent amendments and supplements, states: "*In case of the compulsory collective management, if a right holder is not attached to any organization, the jurisdiction lies with the organization in the area having the largest number of members. Claiming by the unrepresented right holders of the payable amounts can be made within three years from the date of notification.*"

### 3. Conclusions

*Lex ferenda*, by the draft Law amending and supplementing Law no. 8/1996 on copyright and related rights, with subsequent amendments and supplemental, as prepared by the Government in order to be submitted to the Romanian Parliament for adoption, which is currently under debate, it seeks to eliminate material errors which appear in the text of the Law no. 8/1996, including the deletion of the phrase of "trade phonogram" in art. 123<sup>1</sup> paragraph 1 letter f of the Law no. 8/1996, by replacing it with the phrase "phonogram published for commercial purposes" (phrase used throughout the law). At the same time, the letter f of the art. 123<sup>2</sup> of Law no. 8/1996 is deleted in order to remove any doubt regarding compulsory management rules for the broadcasting of phonograms.

### References

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