The Implementation of the Information Society Directive in Spain: the Issue of the Right of Making Available. Other Topics Related to the Performers' Situation in Spain

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Introduction

I will introduce the international norms for the protection of performers rights in general terms, as the previous speakers have already referred to them:

1. The starting point is the Rome Convention 1961 about the protection of performers, phonogram producers and broadcasting organizations. This Convention was ratified by Spain 30 years later, in 1991.

The first time that intellectual property rights for performers have been regulated in Spain was on the occasion of the adoption of the Intellectual Property Law of 1987; it is from that moment that we can speak about performers' rights in the Spanish legislation (from the point of view of intellectual property rights proper and not considering civil or labor law).

2. The WIPO Performers and Phonograms Treaty of 1996 tries to ameliorate the basic protection of the Rome Convention 1961, as an update and adaptation of performers' and producers' rights to the new technologies and to its significance in the exploitation of performances. We are talking about "aural" performers in the phonographic field who have already their international treaty, but not of "audiovisual" performers who are suffering an unfair situation without adequate protection of their rights. Other speakers will treat in depth this subject this afternoon.

3. The Directive 92/100 of 19 November 1992 "on rental right and lending right and on certain rights related to copyright in the field of intellectual property" which has also regulated other rights as fixation, reproduction, broadcasting and communication to the public, in addition to the distribution right, has been implemented in Spain by means of the law of 31 December 1994.

The law in force at the present moment, after the transposition of the Directives is the Consolidated Text of Intellectual Property Law, approved by a Royal Legislative Decree of April 1996.

4. Finally, the Directive 29/2001 of 22 May 2001 regarding the harmonization of certain aspects of copyright and related rights in the information society tries

to apply the WIPO Internet treaties, to update the concepts and to adapt the norms to the digital environment. It also introduces in the EU the making available right provided for by the WPPT.

Having set up the international legal frame applicable to the Spanish territory, I will focus my exposition on the aspects which affect the rights of the performers in Spain, as a consequence of the implementation of the Directive of the Information Society 29/2001, specially the making available right. I also intend to offer information about the current situation as regards digital private copying in Spain and I will speak about the agreements recently reached between the industry and the rightholders.

Aspects of the Directive 29/2001 affecting Spanish performers

1. Regulation of the making available right

The main aspect to consider is the regulation of the making available right, included for performers in Article 3 of the Directive and how this could be applied, taking into account the Consolidated Text of the Spanish Intellectual Property Law (TRLPI) (Royal Legislative Decree 1/1996), which is the law in force at this moment.

The Directive has not been implemented yet, although there is a draft law in Spain and, as other participants have explained it, this draft law is now paralyzed and probably will not make progress until 2004.

The purpose of AIE following the process of the transposition, which has not ended yet, as I mentioned, is to make aware the government authorities about those aspects which concern the protection of performers.

Let as review some elements in our national legislation and in the Directive 91/2001 of EC:

a) the right of making available is expressly defined in Article 3 of the Directive;

b) the right of communication to the public is not foreseen in the Directive 29/2001 of the EC for the performers, but it is in the Directive 92/100 of the EC that was implemented in Spain through the law 43/1994, abrogated afterwards by the TRLPI in 1996;

c) we also have to take into account technical aspects of the right of making available. We can deduce that different ways of diffusion and different business models in the Internet can generate at the same time or alternatively various rights for the performers: reproduction right (private copying), communication to the public right, making available right and rental right; thus, the transposition has to lead to cover the blanks of the non specific regulation of the making available right.

2. Possibilities for the transposition

The making available right is provided for as an exclusive right by the Directive 29/2001 of the EC in its Article 3(2): "Member States shall provide for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: a) for performers, of fixations of their performances;…"

2.1. Transposition as an exclusive right

The making available right is an exclusive right from a legal point of view and we should normally expect a transposition in such a way, consequently subject to a transfer or assignment to the producer and in principle excluded from the collective management.

The wording of Article 3(2) can bring the legislator to such regulation, as being apparently more in accordance with an interpretation of the Directive.

In the Directive there are arguments that could make the legislator considering this option:

- Recital 25 that follows literally Article 3(2) and strengthens the idea of the transposition as an exclusive right.
- Recital 30 that could be interpreted as permitting the option between the transfer, assignment or contractual licenses for the rights not foreseen by the national legislation, as the making available right could be considered. The options of transfer, assignment, or contractual licenses are linked to the nature of the exclusive rights.
- Recital 53 which indicates that the rendering services "on demand" can be linked to the possibility of regulation by means of contractual agreements, but not only in such way.

We must take into account that studies on the "pure" making available right in a strict sense regard interactivity as a characteristic of the right. The legislator could link the making available right with "interactive" on-demand services, and consider that such services must be contractually regulated, as it corresponds to the nature of an exclusive right that can be assigned or transmitted.

The owner of the exclusive right may assign it. It serves as a basis for contractual agreements.

Besides, Recital 53 indicates that the non-interactive forras of on-line services must continue to be subject to Article 6(4), first and second paragraphs. This means that it is possible for the Member States to intervene where the nigtholders do not apply voluntary measures. This indicates that the legislator does not link the non-interactive forms of on line services to contractual regulations; this

makes possible, also in other cases, that we do not regard the making available right as the right of communication to the public.

The Directive does not foresee, specifically, remuneration as a consequence of the assignment of the exclusive right by the performer to the producer that could be collected by collecting societies. This means that this option of transposition does not suit the legitimate interests of the performers, who would be obliged to assign their rights to producers without a compensatory remuneration.

It should be possible for the legislator to establish in respect of the making available right a presumption of assignment at the moment of the conclusion of a contract between the performer and the producer, without the regulation in the Directive of a compensatory remuneration; this could make the problem bigger.

Besides, the Directive does not provide neither for collective management for such right nor for compulsory management.

The possibility for the artist to trust individually the management of the right to a collecting society exists, but it would be a mere faculty and this should be foreseen by the societies in their bylaws.

There is also another option of transposition as an exclusive right which would involve, in case of assignment, an unwaivable remuneration for the performer. We are going to see now this option.

2.2. Transposition as an exclusive right involving in case of assignment an unwaivable remuneration for the performer

This possibility has its source in the nature of the making available right as an exclusive right.

As an exclusive right, it can be transmitted, assigned and licensed contractually.

Nevertheless, the possibility of remuneration is not foreseen in Article 3(2) of the Directive. Taking this into account and the nature of the right, this is a difficulty for the transposition of the right, following this option. This is even more serious, if the making available right is not linked to the communication to the public, considering that the latter implies remuneration.

We can see in the Directive some legal arguments that can serve for this way of transposition:

– Recital 10: this recital foresees appropriate reward for the authors and performers for the use of their works (it is curious that this recital does not speak about a performance, but only about a work) and an adequate legal protection for the intellectual property rights in order to guarantee the performers to reach such remuneration; this may serve as an argument to recognize a right to a remuneration for the making available right.

– Recitals 11 and 12: those texts are linked to Recital 10 and insist in the need of protection of the authors' and performers' rights and the adequate protection of the works and performances, which strengthens the argument applicable to Recital 10.
– Recital 26: it brings a clear argument in favor of a remuneration system, by means of collective license agreements in some cases of the making available right.
– Recital 29: although this recital refers to the rental and lending rights, its last sentence refers to the fact that each on-line service in an act that must be subject to authorization, and thus may serve as an argument that the act of making available does not exhaust rights, which means that each new act must be authorized by the entitled rightholder who consequently must be adequately compensated each time.

Article 3(3) itself provides that the rights referred to in paragraphs (1) and (2) shall not be exhausted by any act of communication to the public or making available to the public.

Once we have seen the support that the Directive 2001/29 of the EC offers for this way of transposition, the reality is that no Article of the Directive provides for the making available right as an exclusive right that in case of assignment goes along with an equitable remuneration to the performer and there is no provision that such remuneration should be subject to compulsory collective management. This means that such obligation for the legislator does not exist.

Nevertheless, this obligation exists in the case of Directive 92/100 about rental and lending in its Article 4(1). Besides, Article 4(2) and (3) establish that the equitable remuneration right is unwaivable and its management may be entrusted to collecting societies.

Art. 4(1) of the Directive 92/100 of 19 November 1992 "on rental right and lending right and on certain rights related to copyright in the field of intellectual property" provides for an equitable remuneration concerning the rental right, for the performers regarding the fixation of their performances, in case of transfer or assignment of the right to a phonogram producer or a movie producer.

The rental and lending rights have been transposed in this way to the Spanish legislation. The Consolidated Text of IP of 1996, provides for them in Article 109.

The wording of Article 109 concerning performers is linked to the corresponding provision concerning authors in Article 90 of the Consolidated Text, and gives us a basis for transposing the making available right in a way that, in case of its assignment or transfer to the producer, implies for the performer the maintenance of an equitable remuneration, unwaivable and subject to obligatory collective management.

We have one problem: it is that these aspects are not made explicit in Directive 29/2001, as it happened in the text of the Directive 92/100 regarding rental and lending rights; so this way of transposition has serious difficulties.

2.3. Transposition as a special form of the right of communication to the public

How to link a transposition as an exclusive right with the existence of a right to remuneration for performers that could be collectively managed?

– The most appropriate way is to consider the parallelism or analogy with the communication to the public right in our law. This seems the most adequate way as the right to communication to the public is initially provided for as an exclusive right which is then transformed into a remuneration right, implying an obligation to pay a single equitable remuneration for the use of a phonogram published with commercial purposes or of a copy of such a phonogram (Article 108 of the Law).
– Means to link the making available right to the communication to the public right:

Under the Spanish Law – starting from the definition of communication to the public in Article 20.2 the linking it to the definition of the making available right might be done in one of the following ways:

a) To include it in Article 20.2 of the Law – that enumerates the ways of communication to the public – a new point reproducing the definition of the making available right under the Directive.
b) To consider that the acts enumerated in Article 20.2 i) and j) take into account, as cases of communication to the public, the public access in any way, of the works incorporated in a database and the making of any of the acts enumerated in Article 20.2, in respect of a protected database. So that making available acts that require technically a database would be incorporated under cases mentioned in points i) and j) of Article 20.2.
c) To include a new paragraph in Article 20 (Article 20.5) that would regulate specifically the making available right in the scope of the right of communication to the public.
d) To modify Article 108 – which provides for a right to remuneration for the performers regarding the right of communication to the public – in extending this right to remuneration to making available.

Nevertheless, although the making available right has been introduced by the Spanish legislator in the scope of communication to the public, the implementation of the making available right has been carried out in a very dangerous and negative way for performers.

The Spanish government prepared a draft law to modify the Intellectual Property Law, in order to implement the Directive. This draft law goes beyond the mere transposition of the Directive, and is also used to make a deep reform concerning a lot of aspects regulated in the Law.

Putting aside the discussion of considering or not the making available right as being covered by the communication to the public right or as a specific right, the draft law considers it as being covered by the communication to the public right.

This is correct from our point of view. The problem is that, in contradiction with Article 12 of the Rome Convention and Article 15 of WPPT, the draft law makes an exception to the obligation of paying a single equitable remuneration to performers and producers (in the case of commercial phonograms which are used in any way for communication to the public, when they are made available to the public).

The making available right is going to be possibly the most important right within the bundle of rights not only for authors, but also for performers. It is hard to explain why such a right does not lead to remuneration in the case of phonograms that have a certain purpose (sale to the public for private use), when they are used in the scope of communication to the public (for what performers consent would not have been previously asked) and are excepted of the remuneration if such communication to the public adopts the modern modality of making available.

As the draft bill has been paralyzed as we explained in the beginning, this circumstance should be profited, in view of the legislative future reform, to either:

– To support an exclusivity leading to maintaining the making available right and taking into account the traditional weakness of the performer, in relation to the producer and the use of assignment of the right in a contractual way, to set up a remuneration, in the same way as the rental right. We have seen before, a lot of arguments in the Directive, even though the Information Society Directive is not so clear than the rental and lending directive.
– Or to support the right as a special case of the communication to the public, asking the Spanish government to maintain a remuneration in favor of the performer, when its performance is going to be used in phonograms already commercially published in this modality.

A different regulation contrary to these principles is against the latter and the spirit of the international treaties and even worse against the sense of justice and fairness.

There is another issue to talk about. We would like to inform the audience that at the end of July of the current year, an agreement has been reached between the collecting societies and the most important association that groups the manufacturers of media used for the recording of works, performances and productions.

We are referring to the right of compensatory remuneration for private copying, which is foreseen in Article 15 of the Rome Convention, in Article 10 of Directive 92/100 and in Article 5 of Directive 2001/29.

The origin of the agreement comes up from the jurisdictional scope. The authors' Collecting Society of Intellectual Property rights, SGAE was obliged to file claims before the Court, asking for the right that some digital media (CD-Data) were considered available to make recordings of works and performances and because of that had to be subject to the compensatory remuneration for private copying that the legislator had introduced in Spain.

We have to take into account that such right is considered in Spain as an exception to the reproduction right; its tariff is fixed by the legislator itself, since the year 1992. It is true that in such moment only analogical media existed in the market for a massive use. But the norm did not distinguish between both media.

All the claims made by Spanish Authors Society finished with judgments in which the Court stated about the availability of such digital media to make the recordings of the works and performances.

In this sense, the agreement extends its efficacy until 31st. December 2005 and is set up for specific media that permit the recording of musical works (CD-audio or CD for music) and audiovisuals (DVD) as well as other "all-terrain" that permit the recording of music and images (CD Data) and (DVD Data).

We don't know what is the intention of the legislator. In particular, we do not know whether the legislator, who was unable to solve these kinds of problems in 1997, with the venue of all of these media, would like to modify the actual terms of our law. If this was the intention, it should be welcome. But we have to insist that the interested parties themselves have solved the situation and all of this, apart from the question of technological protective measures. We are sure that, if in the future a technological protection measure appears that could prevent reproduction without authorization of the author or performers, the right-holders could waive their right to remuneration for private copying. This is unfortrenately not very likely since we can see that any protection measure is curcumvented within a few days of its existence. As long as this is the situation the fair compensation system has to exist for the performer and the author for the non authorized reproduction of their performances and works.