International Protection of Performers. Taking a Look Back and Another One towards the Future
(Translation)

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I am very glad that ALAI offers us the possibility to speak about the situation of performers, even if we always feel a little unease to speak on such an issue within this organization. Speaking about neighboring rights is like speaking about the film "The good, the bad and the ugly" in which the gold-diggers had to combine their efforts in order to find the treasure. Fortunately, I only have to speak on the "good" today…

1. Looking back[5]

The chart attached indicates the protection enjoyed by performers on the basis of the international instruments covering their rights (that is: the Rome Convention of 1961, the TRIPS Agreement of 1994 and the WPPT de 1996), as well as the European directives relating to them (the Rental/Lending/Neighboring Rights Directive (92/100); the Satellite/Cable Directive (93/83); the Term of Protection Directive (93/98) and the Information Society Directive (2001/29)). The protection offered by these instruments has been compared in order to present the international developments having taken place in this field. The articles in *italics* indicate the important developments in the protection of performers in comparison with the 1961 Rome Convention, while the articles of the European directives in *italics* and in bold indicate those European rules which further strengthen the protection of artists in contrast with the international norms.

Thus, as far as the term of protection is concerned, we have passed from 20 years to 50 years (Article 17(1) of the WPPT in comparison with Article. 14 of the Rome Convention); furthermore, the Term of Protection Directive (93/98)

[5] For more information on the international development concerning the protection of performers, see: F. BRISON, *Het naburig recht van de uitvoerende kunstenaar,* Bruxelles, Larcier, 2001, p. 727.

adds to this the rule of "potential" extension (not linking the commencement of the term of protection necessarily to the date of fixation).

The WPPT recognizes moral rights for performers (Article 5 of the WPPT), as well as an "exclusive" nature of their economic rights. We should mention explicitly the "new" exclusive right introduced by the WPPT: the right to make available to the public in a way that the members of the public may access the performances from a place and at a time individually chosen by them (Article 10 of the WPPT).

As regards the exclusive economic rights, the directives go farther in some respects: for example, as far as reproduction is concerned, it is stated clearly that the right of reproduction equally covers "temporary" reproduction (Article 2 of the Information Society Information); the right of distribution is only submitted to "community" exhaustion (Article 9 of the Rental/Lending/Neighboring Rights Directive); the right of rental and even the right of lending have been more generally regulated within the European Union (Article 2 of the Rental/Lending/Neighboring Rights Directive).

The right to equitable remuneration for secondary utilization of commercial phonograms was recognized, for the first time in the Rome Convention in its Article 12. It is true that Article 12 of the Convention only offers a possibility of the Contracting States to foresee a right to remuneration. The Rental/Lending/Neighboring Rights Directive, in its Article 8(2) has accorded expressly this right to remuneration both to performers and to producers of phonograms. The WPPT, in its Article 15, has done the same. Nowadays, the Information Society Directive foresees even the obligation to foresee an equitable remuneration for private copying.

Concerning the exception to economic rights, Article 16(2) of the WPPT introduces the famous "three-step-test" (as a condition for the applicability of exceptions to economic rights). The Information Society Directive tries to harmonize the exceptions to economic rights in a complex way including an "exhaustive" list of exceptions (of which only one is obligatory).

As far as the questions of ownership, alienability, etc., the most protective rules are certainly foreseen in the European directives. Let us think in particular of the rule of inalienability of the right to remuneration for rental (Article 4(2) of the Rental/Lending/Neighboring Rights Directive) and the rule of the presumption of transfer of rights in favor of producers of phonograms (Article 2(5) of the same Directive).

As regards the TRIPS Agreement, it has brought about an important contribution to the international development of the protection of intellectual property right, first of all in the field of the enforcement thereof (Articles 41 to 64), also introducing certain substantive norms, even if the direct effect of the latter is the subject of discussion in several contracting States of the Agreement. In respect

of the European Union, it is also necessary to follow with attention the recent initiatives concerning enforcement measures to ensure respect for intellectual property rights, including the rights of performers.

Finally, the principle of co-existence of the rights of performers with those of authors (that is, the rejection of the supremacy of authors' rights over performers' rights) laid down in Article 1 of the Rome Convention and confirmed in other legal instruments, has received new significance since the WPPT recognized not only economic right, but also moral rights for performers (Articles 1(2) of the WPPT).

2. Looking ahead

Those questions which on which we concentrate our attention concern the right to equitable remuneration for secondary use and the application of the principle of national treatment in respect of private copying. We limit our comments on the first issue: the right to equitable remuneration.

The right to equitable remuneration for secondary use of phonograms published for commercial purposes, as mentioned above, was recognized for the first time in the Rome Convention, in its Article 12. It is true that Article 12 of the Convention only offers a possibility of the Contracting States to foresee a right to remuneration. The Rental/Lending/Neighboring Rights Directive, in its Article 8(2) has accorded expressly this right to remuneration both to performers and to producers of phonograms. The WPPT, in its Article 15, has done the same.

2.1. A theoretical analysis of the right to remuneration

2.1.1. *Its scope of application*

The right to remuneration extends broadcasting and any other communication to the public of phonograms published for commercial purposes or a reproduction thereof (which, otherwise, is not covered by this compulsory license, since a reproduction always necessitates the authorization of the right holders).

The Belgian law presents some peculiarities in this respect[6]. In fact, Article 41 of the Belgian law which includes the compulsory license by virtue of, and in accordance with, Article 12 of the Rome Convention and Article 8(2) of the Rental/Lending/Neighboring Rights Directive, applies this license to "all performances of performers" even if has not fixed on a phonogram, irrespective of

[6] The law of June 30, 1994, on copyright and related rights (Moniteur Belge, July 27, 1994), as modified by the laws of April 3, 1995 and of August 31, 1998 (Moniteur Belge, April 29, 1995, and November 14, 1998).

whether or not the phonogram has been published for commercial purposes. This extension of compulsory license has been criticized by the audiovisual sector. The audiovisual producers insist on the necessity of an exclusive right to control the sequence of the different forms of exploitation of their works, in order that they may *recoup their investment*. In practice, although several royal decrees have been published fixing the equitable remuneration for the utilization of commercial phonograms in the different sectors, no royal decree has been promulgated for fixing the equitable remuneration for the utilization of performances fixed on an audiovisual carrier. It seems that until now this broadening of the scope of application of the compulsory license introduced in the Belgian law has not been applied in practice.

Otherwise, the Belgian law is particular also because it not has only broadened but also reduced the scope of application of the compulsory license in comparison with the requirements of the international and European instruments mentioned above. By virtue of the same Article 41 of the Belgian law, the compulsory license is only applicable to the acts of broadcasting and communication to the public "in a public space". Therefore all other communication to the public is not covered by the compulsory license, but rather by an exclusive right of the right holders.

2.1.2. *Distinction between "broadcasting" and "webcasting"*

We have to examine whether the act of "webcasting" is covered by the concept of "broadcasting" (and thus by the scope of application of the compulsory license) or not (in which latter case, the exclusive right of right holders is applicable for it, submitted to the prior authorization thereof).

Among the arguments for distinguish between "webcasting" and "broadcasting" we may mention, for example, that the concept of "broadcasting" only covers wireless communication (*see* Article 3 of the Rome Convention; although this interpretation may be regarded as too rigid; the concept may require a more flexible interpretation in accordance with Article 6(3) of the Rental/Lending/Neighboring Rights Directive); "broadcasting" only extends to "point to multipoint" transmissions (*see* Article 1 of the Television without Frontiers (85/552); although it is questionable whether the definitions or descriptions of terms in other legal instruments which do not have direct relationship with copyright and neighboring rights are really applicable in that respect too with unintended consequences); and the principle of restrictive interpretation of exceptions to economic rights, as it exists in the countries following the "continental" tradition of authors' rights.

What is more important is that we may also raise the argument that "webcasting" may be covered by the new right of making available introduced by Article 10 of the WPPT, and by Article 3(2) of the Information Society. For this, it

should be well understood the meaning of Article 10 of the WPPT and Article 3(2) of the Information Society Directive; namely that it means "on demand", interactive communication (*see* recital 25 of the Information Society Directive). The qualification of the acts of "webcasting" from this viewpoint does not seem always easy, taking into account how different forms it may take going from on-demand webcasting to simulcasting and to various intermediary forms, for example, real-time transmissions or pre-established programs, as it is reflected in the Belgian and Dutch legal literature.[7]

Finally, the last argument which is sometimes raised is the "three-steps-test" foreseen in Article 16(2) of the WPPT (as well as Article 5(5) of the Information Society Directive). Nevertheless, this test only applies to the protection expressly granted for the performers in the WPPT, and to the exceptions provided in Article 5 of the Directive, but it does not apply to Article 8(2) of the Rental/Lending/Neighboring Rights Directive. Since these legal instruments do not provide a "general" communication to the public, it is difficult to reject the existence of a compulsory license for a non-existing exclusive right.

Exclusive rights offer several advantages for the right holders: the possibility of the prohibition of the intended utilization, a stronger legal position in the negotiations with the users, as well as the possibility of imposing certain conditions for the utilizations (for example, the obligation to send the program indicating the performances used, the refusal of allowing the use of several performances of the same artist in order to prevent conflict with the exploitation of the phonograms on which such performances are recorded, etc.), and, in general, greater autonomy in the process of negotiations with users (facilitating the quicker establishment of new tariffs for new forms of exploitations and in reaction to any other developments in the market).

Obviously, this may also present certain inconveniences for the other actors having a role in "webcasting" (webcasters, copyright owners, the public at large). Finally, also the question should be raised whether, in those cases where the right owners are ready to grant authorization, an exclusive right, in the absence of the intervention of an authority, is truly in their interest in comparison with a compulsory license (*see* the problematic situation in the field of cable distribution in Belgium). In the case of a compulsory license, it may be mentioned as an advantage that the law itself fixes a key for the obligatory distribution of the remuneration between the performers and the producers which may seem to be better balanced than what they may obtain in negotiations with the producers.

[7] See in particular: B. MICHAUX, Webcasting ou diffusion musicale sur internet: licence obligatoire ou droit exclusif des titulaires des droits voisins?, A&M, 2002, 479 e.s.; B. AALBERTS et H. BANNINK, Internet kills the radiostar, AMI, 2001, 101 e.s.

2.2. The practical implications of the right to remuneration

Where compulsory license is applied, what does it mean that the artists have a right to an "equitable remuneration"?

Recently, the European Court of Justice has expressed its position on this issue in its decision of February 6, 2003 (C–245/00). It concerned the dispute between the collective management society of performers and producers of phonograms, SENA, on the one hand, and the public radio broadcaster of the Netherlands, NOS, on the other.[8]

First, the Court of Justice stated that the concept of equitable remuneration should be interpreted in a uniform way in the European Union. For this purpose, it referred to recital 17 of the Rental/Lending/Neighboring Rights Directive, in which it is provided that the equitable remuneration should take into account the importance of the artist's contribution. The applicability of this recital to the equitable remuneration due for the secondary use of commercial phonograms (not covered by the analysis made by the Court) is questionable, since it may be deduced from it (implicitly but clearly) that the recital is not linked to Article 8(2) of the Directive which recognizes the right to remuneration for secondary uses, but to Article 4 on the unwaivable right to remuneration of performers for rental.

If this is the case, other recitals in other directives may also be applied. Thus, recital 17 of the Satellite/Cable Directive (in fact, strictly speaking, related to the right of broadcasting by satellite) according to which, at the moment of determining the remuneration, the interested parties should take into account all the parameters of the broadcasting, such as the effective audience and the potential audience. Furthermore, recital 35 of the Information Society Directive (strictly speaking, related to the facultative exceptions of the Member States to the right of reproduction, along with an equitable remuneration, in particular in the case of private copying), refers to the principle of fair compensation to compensate rightholders adequately for the use of their works or other subject-matter, for the determination of which account should be taken of the particular circumstances of each case, in respect of which a valuable criterion would be the possible prejudice suffered by the rightholders.

The Court of Justice has declared that there are no uniform criteria for determining this equitable remuneration. This task is left to the Member States of the European Union, subject only a double control. First, the equitable remuneration should create a balance between the financial interests of the rightholders, on the

[8] See in particular: F. BRISON, Recente arresten van het GEA en HJEU in verband met het auteursrecht (June 2002 – April 2003), A&M, 2003, 203–205.

one hand, and the interests of the broadcasters to broadcast. This may seem surprising. Would it not be better to speak of the interest of the public to receive the broadcast programs or, still in a more limited manner, of the only interest of the broadcasters of not being confronted with the possibility of refusing the authorizations indispensable for their broadcasts? Second, the criteria should not be contrary to the community law (we may think, for example, of the prohibition to discriminate among the nationals of the European Union).

The Court recognized the system and the criteria applied in the Netherlands: in the absence of agreement between the parties, the courts decide about the sums of the equitable remuneration (with the possible involvement of an expert); the courts apply the combination of duly fixed different factors, such as: the number of hours of the broadcast, the audience, the remunerations paid to the copyright holders, the remunerations paid by the commercial broadcasters and the remunerations paid by broadcasters in other Member States. None of these criteria has, however, been examined separately by the Court concerning its relevance for the determination of the equitable remuneration.

In conclusion, some critical observation on this decision… Unfortunately, the Court has not offered any guidance on the "conceptual" level in order to better understand the concept of equitable remuneration. We have made already some observations on the recitals in various European directives which, after having examined, might be applied in this case, and on the balance which should be reflected in such remuneration. Furthermore, the questions posed by the parties have remained without response. Thus, the question of the relation between the equitable remuneration of performers and the remuneration paid for obtaining authorization from the authors for the same act, which concerns not only the question of a possible difference between an equitable remuneration as a counterpart of a compulsory license (for the performers) and the remuneration paid after negotiations on the basis of an exclusive right (for the authors), but also the relation between the performers' neighboring rights and copyright (*see* Article 1 of the Rome Convention and Article 14 of the Rental/Lending/Neighboring Rights).

Finally, on the "practical" level, the Court has done nothing to settle the problem between the SENA and the NOS. The parties have left empty-handed with the task of trying to resolve the problem themselves. The real meaning of equitable remuneration has remained unknown.

	Rome Convention of 1961	**TRIPs 1994**	**WPPT 1996**	**EU Directives from 1992 to 2001**
Definition	Art. 3 (a) [Art. 9]	-	***Art. 2(a)***	-
Duration	Art. 14	Art. 14(5)	*Art. 17(1)*	***Art. 3(1) Dir. 93/98***
Moral rights	-	-	*Art. 5*	-
Exclusive rights	- ("possibility of preventing")	-	*x*	X
• First fixation	Art. 7(1)(b)	Art. 14(1)	***Art. 6(ii)***	Art. 6(1) Dir. 92/100
• Reproduction	Art. 7(1)(c)	Art. 14(1)	*Art. 7*	***Art. 2 Dir. 2001/29***
• Distribution	-	-	*Art. 8*	***Art. 9 Dir. 92/100***
• Rental/lending	-	-	*Art. 9*	***Art. 2 (1) Dir. 92/100***
• First communication to the public	Art. 7(1)(a)	Art. 14(1)	*Art. 6(i)*	Art. 8 (1) Dir. 92/100
• First broadcasting	Art. 7 (1) (a)	Art. 14 (1)	*Art. 6(i)*	Art. 8 (1) Dir. 92/100
• Rebroadcasting/ retransmission	[Art. 7(2)]	-	-	[Dir. 98/83]
• On-demand	-	-	***Art. 10***	***Art. 3(2) Dir. 2001/29***
Right to remuneration				
• Secondary utilization	Art. 12	-	***Art. 15***	Art. 8(2) Dir. 92/100
• Private copying	-	-	**-**	***Art. 5 (2)b Dir. 2001/29***
Rental	-	-	**-**	Art. 4 Dir. 92/100
Exceptions		Art. 14(6)	***Art. 16***	Art. 5(5) Dir. 2001/29
• Private use	Art. 15(1)(a)			Art. 5(2)(b) Dir. 2001/29

	Rome Convention of 1961	**TRIPs 1994**	**WPPT 1996**	**EU Directives from 1992 to 2001**
• Reporting	Art. 15(1)(b)			Art. 5(3)(c) Dir. 2001/29
• Ephemeral fixation	Art. 15(1)(c)			Art. 5(2)(d) Dir. 2001/29
• Teaching & research	Art. 15(1)(d)			Art. 5(2)(c) + Art. 5(3)(a) Dir. 2001/29
• Others	Art. 15(2) Art. 19			***Art. 5 Dir. 2001/29***
Ownership				
• Alienability	-	-	Art. 5 (1)	Art. 2(4), 7(2), 9 (4) and ***4 (2) Dir. 92/100***
• Contractual rules	-	-	-	**-**
• Audiovisual production	-	-	-	***Art. 2(5) Dir. 92/100*** [Art. 2 (7) Dir. 92/100]
• Joint exercise	Art. 8	-	-	-
• Collective management	-	-	-	Art. 81-82 Traité UE
Sanctions	-	***Art. 41-64***	Art. 23	Draft Directive
Co-existence with copyright	Art. 1	**-**	***Art. 1(2)***	Art.14 Dir. 92/100