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“PERFORMERS’ RIGHTS”

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AEPO-ARTIS	The Association of European Performers' Organisations
par.	paragraph
ANAF	National Tax Agency
ANPC	National Authority for Consumers Protection
ANV	National Customs Authority
art.	article
B.Of.	Official Bulletin
BIUPPI/BIRPI	United International Bureaux for the protection of Intellectual Property /Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
acc. prov.	According to provisions
Tax.c.	Tax code
c.c.	Criminal code
C.p.c.	Criminal procedure code
Fisc.proc.c.	Fiscal procedure code
ICC	International Chamber of Commerce
COMPI	Convention Establishing the World Intellectual Property Organisation
coord.	coordinator(s)
ed.	edition
Pb.h.	Publishing house
etc.	<i>et caetera</i> (and others)
GATT	General Agreement on Tariffs and Trade
GBLAAC	Global Business Leaders Alliance against Counterfeiting
GD	Government's Decision
Ibidem	in the same place (in the same work)
IC	Copyright-based industries
Idem	identic, similar
BPGI	The Border Police General Inspector
GIRP	General Inspectorate of Romanian Police
IIPCAG	Interpol Intellectual Property Crime Action Group
IMPACT	International Medical Products Anti-Counterfeiting Taskforce
INTA	The International Trademark Association
INTERPOL	International Criminal Police Organization
IPDA	International Performers Database Association
ISMA	International Security Management Association
lett.	letter
Off.G.	Official Gazette of Romania, Part I
MIA	Ministry of Internal Affairs
MCIT	Ministry of Communication and Information Technology
MPF	Ministry of Public Finance
no.	number
GO	Government Ordinance
EGO	Government Emergency Ordinance
OECD	Organization for Economic Cooperation and Development
EAPO	Eurasian Patent Organisation

OEB/EPO	European Patent Organisation
WTO	World Trade Organisation
WIPO	World Intellectual Property Organisation
WHO	World Health Organisation
WCO	World Customs Organisation
UNO	United Nations Organisation
q. w.	quoted work
ORDA	Romanian Copyright Office
OSIM	State Office for Inventions and Trademarks
p.	page
p2p	Peer-to-peer
par.	paragraph
pt.	point
pp.	pages
Rospatent	Federal Service for Intellectual Property, Patents and Trademarks
SCAPR	Societies' Council for the Collective Management of Performers' Rights
SRR	Romanian Radio Broadcasting Company
SRTV	Romanian Televisions Society
USA	United States of America
PCT	Patent Cooperation Treaty
ECT	European Community Treaty
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
VAT	Value added tax
EU	European Union
foll.	the following
vol.	Volume
VRDB	Virtual Recording Database
vs	versus, against
WCO	World Consumers Organisation

ARGUMENTUM

„Any harmonization of copyright and related rights must be based on a high level of protection, as these rights are essential to intellectual creation. Their protection contributes to maintaining and developing creativity in the interest of authors, performers, producers, consumers, culture, industry and the general public. As a result, intellectual property has been recognized as an integral part of property”¹.

„The world today is marked by a new planetary dimension, given to the circulation and valorisation of information, regardless of the geographic area from which it originates. Having information and using it in real time at its full value has become one of the criteria for assessing the development of a society today”, asserted the General Manager of CREDIDAM, a management organisation, during an interview.

A poll conducted in Poland shows that: *music in itself has become less and less valuable for consumers but, on the other hand, it is increasingly being used as part of cultural phenomena and products. Music is very important for the activity of clubs, cinemas and computer games, but it does not serve these people as the subject of direct consumption, which consists of listening to a phonogram.* This situation mainly concerns young people who use music products in a completely different way than older people, for example, they listen less often on all the songs on an album, because they are more inclined to listen to a single piece of music.

The great conductor *Sergiu Celibidache* said: „*recording kills the life of music, the uniqueness that characterizes each performance. Recording leads to a standardization of feelings and aesthetics.*”² *“When I conduct, I become one with the music played. That is, to correct myself: I do not play music, I always have the feeling that I'm creating it. No, there is no lack of modesty, but immersion in the depths of art that I confuse myself with.”*

Originally a disciple and then opponent of *Furtwangler*, he used to say that *“... the disc cannot be live music, as photography cannot be the living man it represents.”* Today, the technical means through which large music works are brought to the attention of the public, enjoy a marathon development, the discussion on the *“talent”* to listen to live music in a concert hall has lagged behind.

However, the legal instruments to keep up with the infringement of *“performers’s”* rights are given a particular importance.

The composer, conductor and violinist *George Enescu* said, *“When more interest is shown to the performer than the author, when the manner in which you perform a trill or the success of an arpeggio causes more enthusiasm than the talent spent to write a sonata or a work, it means that the end is near: let this prophetic tone be forgiven!”*³.

One of the elements that legitimate the institution of related rights is precisely the *“execution manner”* of phonograms or of artistic performances in the audiovisual field by each individual artist.

The reason why moral and patrimonial rights of performers should be recognized resides, as it has been well underlined, in the fact that *“some artists mark the performance of the work with the sign of their personality; the conductor completes the score with his own annotations; the soloist plays his instrument in an absolutely individual way, the actor plays a composing role. There are creative contributions that, during the performance, are related to the work itself, but which, in practice, are difficult to*

1 Directive 2001/29

2 Viorel Cosma, *Sergiu Celibidache. The Farewell Concert*, ARC Printing House – 2000, Bucharest, 1998, p.80.

3 Bernard Gavoty, *George Enescu’s Memories*, Curtea Veche Publishing House, Buchares, 2005, p.197.

dissociate, for what the artist adds, thanks to his inventive work, cannot be established with precision" ⁴.

At international level, the first acknowledgment of legal protection for related rights was embodied in the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, concluded in Rome on the 26th of October 1961. In Romania, the legal protection of performers was explicitly regulated only in 1996 by *Law no. 8/1996 on copyright and related rights*, with subsequent amendments and supplements.

In specialized literature⁵, the question arises whether the enumeration of the law in terms of performers has exemplary value or limiting value. According to an opinion⁶, the enumeration has an indicative title because art.95 of the Law no. 8/1996 refers to "*other people*" who can perform or execute a literary or artistic work in a number of ways, including dancing, reciting, performing, directing, conducting, etc. or "*in any other way*". In another opinion⁷, it was noted that the enumeration has a limiting value, in accordance with the model of art. 3 let. a) of the Rome Convention, which expressly states which are the holders of related rights.

The judgment of the Court in the famous trial in which *Wilhelm Furtwangler* asked the *Court of Sena* to ban the marketing under his name, in France, of his sound recordings in conjunction with the *Vienna Philharmonic*, during 1939 to 1945, is the basis for the legal protection of performers. The court reasoned that: *he only agreed with broadcasting the recordings, not with selling them on audio media. W. Furtwangler demanded the deletion of his name from the discs in circulation and even their withdrawal from the trade market.*

The judgment of the French Court in the *Furtwangler* case, which was in favour of the German conductor, laid the foundation for the wording of certain principles on the protection of performers' performances: *"the protection of artists' performances or executions is indisputable and they enjoy moral and patrimonial rights; the talent of the performer is similar to that of the writer or composer; the performer is an artist, and bringing the original work to the public in a remarkable manner depends on the quality of his preformation."*

CHAPTER I

PERFORMERS' RIGHTS SINCE ACKNOWLEDGMENT AND UP TO THE PRESENT

Section 1 Generic Concepts regarding Intellectual Property

1.1.1. Intellectual creation. The end of the thirteenth century brought forth a new "*commodity*" called *intellectual creation*. It has some amazing features: *it is invisible, it can be border crossed, it can be multiplied to infinity, and its value grows constantly over time.*

1.1.2. Object of intellectual property rights. In the "Copyright and Related Rights" treaty, distinguished professor Viorel Roş and his collaborators, Dragoş Bogdan and Octavia Spineanu-Matei, show that the field of "Intellectual Property Right" has as its subject of study "the protection of the authors of works of the soul and the result of their creative activity, namely the creations of form (protected by copyright and related rights,

⁴ Liliana Mariana Savu, „Considerations on defining the notion of performers”, in the Romanian Journal of Intellectual Property Right, Year V, No. 2 (15), June 2008, p. 110.

⁵ Ciprian Raul Romiţan, Mariana Liliana Savu, Performers' Rights, Universul Juridic Publishing House, Bucharest, 2008, p. 51.

⁶ Ioan Macovei, Treaty of Intellectual Property Right, C.H. Beck Publishing House, Bucharest, 2010, p. 500

⁷ Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, Copyright and Related Rights. Treaty, All Beck Publishing House, Bucharest, 2005, p. 466.

and more recently by sui-generis rights) and of substance (protected by industrial property rights), as well as the protection of the most important distinctive signs of commercial activity"⁸.

Secțiunea 2 Copyright and Related Rights

1.2.1. Copyright. By virtue of the provisions of Article 2 par. (1), the Berne Convention of 1886 for the Protection of Literary and Artistic Works, underlie the subject of copyright, arguing that it is constituted by "*literary, artistic and scientific works, regardless of the way or form of expression, their value or destination, such as: books, brochures and other writings; conferences, orations, sermons and other works of the same nature; dramatic or drama-musical works; choreographic works and pantomimes; musical compositions with or without words; cinematographic works to which the works expressed by an analogue process to cinematography are assimilated; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works, to which the works expressed by an analogue process to photography are assimilated; applied artworks; illustrations, geographic maps; plans, sketches, and plastic works related to geography, topography, architecture, or science.*"

1.2.2. Related rights. Copyright-related rights, or "*neighbouring rights*" as they were referred to in doctrine and jurisprudence, were first regulated in Romanian law by the enactment of the Law No. 8/1996 on copyright and related rights.

Section 3 Performers

1.3.1. Emergence and evolution of Performers' Rights. The history of Performers takes us for the first time back in 534 b.c.⁹, when *Thespis* wins the first public contest for the poets of tragedy in the ancient Greece, the term *thespian* itself comes from his name, and introduces the masks into actors' play, and later becomes one of the reference elements of ancient Greek and Roman theatre.

1.3.2. Protection of Performers' Rights at present. Examples can continue indefinitely because the history of art is indissolubly linked to that of performers and of performing art in general.

CHAPTER II

CATEGORIES OF PERFORMERS AND REGULATIONS THEREOF

Section 1 Performers as holders of Related Rights

II.1.1. Performers. As we have shown before, copyright-related rights are intellectual property rights, other than copyright, enjoyed by performers for their own performances or executions, by producers of sound recordings and producers of audiovisual recordings for their own recordings, and by radio and television broadcasting companies for their own shows and program services.

II.1.2. Mutes. According to the DEX (the explanatory dictionary of Romanian language), mute means "a person who participates in performing a theatre play, a work or a film only for physical presence or through gestures, attitudes, etc. without expressing any line"¹⁰.

Section 2 Domestic, European and Worldwide legal rules governing Performers

II.2.1. International treaties and conventions. The international legal framework for the protection of copyright and related rights is particularly important as it has effects also on the legal regulations in this field in Romania.

⁸ See also, Viorel Roș, Dragoș Bogdan, Octavia Spineanu – Matei, Copyright and related rights, Treaty, All Beck Publishing House, Bucharest, 2005, p. 1.

⁹ See in this regard, Performing Arts Timeline: <http://www.infoplease.com/ipea/A0153763.html>, online source acced on 18.11.2013, 21:10

¹⁰ Romanian Academy, „Iorgu Iordan” Institute of Linguistics, Explanatory Dictionary of Romanian Language, DEX, Universul Enciclopedic Publishing House, Bucharest, p. 378.

II.2.2. European regulations. The author, being the "*father*" of his works, wants everyone to know this and, at the same time, treat him with respect.

II.2.3. Domestic law

II.2.3.1. Governing rules. The governing rules are provided by the Law no.8/1996 on copyright and related rights.

II.2.3.2. Domestic law in the field of copyright management

II.2.3.3. Domestic law in the field of the management of related rights

II.2.3.4. Domestic law in the field of private copy

CHAPTER III PERFORMERS' RIGHTS

Section 1 Definition of „performers” concept

III.1.1. Considerations on defining the “performers” concept. As I have already stated before, within the meaning of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, concluded in Rome on the 26th of October 1961, we understand by "*performers*", pursuant to Article 3 lett. a), actors, singers, musicians, dancers and other people who represent, sing, recite, declare, play or otherwise perform literary or artistic works.

Section 2 Moral rights and regime thereof

III.2.1. Legal nature and object of moral rights. Modern laws have tried to solve the conflict between certain "*moral*", "*spiritual*" or "*personal*" interests (attached by the authors to their works) and the irrevocable judgment of the public, through enshrinement of the moral rights including several prerogatives, which, at legal level, connect the work with its author.

III.2.2. The moral rights of performers as enshrined in the Romanian Law. Under Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented, the moral rights of authors are governed by Article 10.

Section 3 Patrimonial rights and regime thereof

III.3.1. Legal nature and object of patrimonial rights. The patrimonial rights of performers, as well as copyright or other categories of right holders, are of an exclusive nature, determined by the authorization to do or not to do, *erga omnes* legally binding and subject to criminal penalties

III.3.2. The legal regime of performers’ patrimonial rights. The legal regime of patrimonial rights of performers in Romania is similar to the French one.

III.3.3. Controversy in the field of performers’ patrimonial rights. From the analysis of the wording of art.123¹ par. (1) letter f) and art. 123² par. (1) letter f), we distinguish between the remuneration due for broadcasting "*phonograms of commerce*" apart from the same broadcasting activity of "*phonograms published for commercial purposes*".

CHAPTER IV TRANSFER OF PERFORMERS' RIGHTS

Section 1 Transfer of the rights through licensing

IV.1.1. Licensing procedures

IV.1.1.1. RADIO STATIONS

IV.1.1.2. TV STATIONS

IV.1.1.3. CABLE RETRANSMISSION

IV.1.1.4. PUBLIC COMMUNICATION ON THE INTERNET

IV.1.1.5. PUBLIC COMMUNICATION /AMBIENT/FOR PROFIT

IV.1.1.6. PUBLIC COMMUNICATION OF ARTISTIC PERFORMANCES IN THE AUDIOVISUAL FIELD CINEMA THEATRES (CINEMAS)

IV.1.2. Performers' Rights in European and International Legislation. *With the support of AEPO-ARTIS, we have obtained a series of information from 34 performers' organisations from 26 countries, on the rights of performers, the impact of some of the main aspects of the *acquis communautaire* on the rights of performers and, in particular, on the collective management of their rights.*

IV.1.2.1. The right to an equitable remuneration for broadcasting and communication to the public. All countries grant a right to remuneration to performers and producers.

IV.1.2.2. Satellite broadcasting and cable retransmission. Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission was adopted on the 27th of September 1993.

IV.1.2.3. The right to make available to the public. As shown by the figures in Table 3.1, the economic situation of performers has not changed since the introduction of the right to make available.

IV.1.2.4. Remuneration for private copying as compensation for an exception to the exclusive reproduction right. Of the 26 countries, 24 countries have introduced in their domestic legislation an exception for private use related to the right to remuneration for right-holders, except for Ireland and the United Kingdom.

IV.1.2.5. Rental right. The rental right and the related right to remuneration have been introduced into domestic legislations following the implementation of Directive 92/100/EEC.

Section 2 Transfer by inheritance

IV.2.1. Inheritance reserve. The part of the inheritance which, in the presence of certain categories of heirs, is obliterated by the law of the deceased's free will, and which consequently shall be passed on to the heirs even against the deceased's will.

IV.2.1.1. Legal characteristics of such reserve

IV.2.1.2. There are certain categories of heirs

CHAPTER V

CAPITALIZATION OF PERFORMERS' RIGHTS

Secțiunea 1 Nature of the Contract

V.1.1. The Mandate granted by Right-holders to the Collective Management Organisations. CREDIDAM, as a Romanian private legal entity *without a patrimonial purpose, established by the will of the associates, has its main object of activity to collect and distribute the remuneration due to the right-holders, performers, both Romanian and foreign, whose artistic performances are used on the territory of Romania, depending on the entrusted mandate.*

V.1.2. Nature of the contract. In order to be able to capitalize his/her patrimonial rights, the performer must conclude a written assignment contract, which provides the conditions for assignment, in whole or in part, such assignment being either exclusive or non-exclusive. If the assignment contract is not concluded in writing, the sanction is not the nullity of the contract, but the impossibility to prove it by the signatory parties.

V.1.3. Case study

Section 2 The Contract between Performers and Authors

Section 3 The Contract between Performers and Producers

CHAPTER VI

LEGAL LIABILITY FOR THE BREACH OF PERFORMERS' RIGHTS

Section 1 Legal liability

VI.1.1. Overview. According to art.138⁷ par.(1) of the Law no. 8/1996 on copyright and related rights, infringement of the rights acknowledged and protected by this law entails civil, contraventional or criminal liability, as the case may be, according to the law.

VI.1.2. Complaint withdrawal and Reconciliation of the Parties. We take into consideration the phrase "*for the withdrawal of the preliminary complaint and the reconciliation of the parties*" in the text of art.139¹ par.(2).

Section 2 Defending rights by means of civil law.

According to the provisions of art. 139, par. (1), thesis I of Law no. 8/1996, the holders of the rights acknowledged and protected by this normative act may ask the Courts or other competent bodies to order.

VI.2.1. Establishment of compensation

VI.2.2. Remedies

VI.2.3. Provisional measures

Section 3 Contraventional Liability

VI.3.1. Contraventions provided by Law no. 8/1996. If, until the amendment and supplementation of Law no.8/1996 on copyright and related rights by the Law no. 285/2004, the principle of contraventional liability was established without being materialized in the provisions of the law [art. 139 par. (1)] providing that the infringement of the rights acknowledged and guaranteed by it, inter alia, entails the contraventional liability, without incriminating an act constituting contravention], after the adoption of Law no. 285/2004, this situation was remedied. Therefore, some facts that constitute contravention are incriminated in articles 139² to 139⁴.

VI.3.2. Considerations on distinguishing Contraventional Liability from the Criminal Liability

VI.3.2.1. Introductory elements regarding the definition of contravention

VI.3.2.2. Considerations regarding the text of art. 139⁴ paragraph 1 from Law no. 8/1996

Section 4 Defending Performers' Rights by means of criminal law

VI.4.1. Overview. Law no. 8/1996 on copyright and related rights incriminates as offences, a number of deeds which impair rights related to copyright. It has been significantly changed not only with respect to the content of the offences of the previously regulated rights related to copyright but also with respect to the procedural means of protection of the rights of the right holders to eliminate the dead ends found during the application of Law no. 8/1996.

VI.4.2. Offenses related to the breach of Performers' Rights incriminated by Law no. 8/1996

VI.4.2.1. Offence stipulated in art. 139⁶ from Law no. 8/1996

VI.4.2.2. Offence stipulated in art. 139⁸ from Law no. 8/1996

VI.4.2.3. Offence stipulated in art. 140 from Law no. 8/1996

VI.4.2.4. Offence stipulated in art. 143 from Law no. 8/1996

CHAPTER VII MANAGEMENT OF PERFORMERS' RIGHTS

Section 1 Collective Management Organizations in Romania

VII.1.1. CMOs establishment and operation. The organisations for collective management of copyright and related rights are legal entities established by free association, whose main object of activity is the collection and distribution of rights the management of which is entrusted to them by the right-holders.

VII.1.1.1. Statute of the collective management organisations. The Statute is an act or a set of formal provisions by which the collective management organisations regulate their purpose, structure and operation.

VII.1.1.2. Collective management organisations' organization and operation. Neither the General Manager nor any other person who is remunerated as an employee of the organisation can be part of the Managing Board of the Collective Management Organisation.

VII.1.1.3. Collective Management Organisations' capacity as Proxy. The collective management mandate is a (contractual) mandate granted by the holders of patrimonial copyrights or related rights to the collective management organisations in order to act on their behalf and to manage the rights regarding their own repertoire.

VII.1.1.4. Obligations of Collective Management Organisations. According to art. 130, par. (1), the collective management organisations have a number of obligations to comply with in order to run their activity.

VII.1.1.5. The rights of collective management organisations' members. Every member has the right to request, in person or through an authorized representative, detailed information and documents regarding the amounts he has been allocated in the last 12 months, their source, the method of calculating the rights and the deductions applied, as well as checking the conformity of these data with the provisions of the Distribution Regulation.

VII.1.1.6. Drafting and negotiation of methodologies. In order to start the negotiation procedures, collective management organisations must submit to the Romanian Copyright Office, an application, accompanied by the methodologies proposed for negotiation, according to the provisions of art. 130 paragraph 1 letter b).

VII.1.1.7. Arbitration procedure. According to art. 131¹ par. 3 of Law no. 8/1996, the Romanian Copyright Office may be asked to start the arbitration procedure performed by arbitrators.

VII.1.2. Collective Management Organisations in the field of Copyright

VII.1.2.1. COPYRO

VII.1.2.2. DACIN-SARA

VII.1.2.3. UCMR-ADA

VII.1.2.4. VISARTA

VII.1.2.5. AOTO

VII.1.2.6. ARDAA

VII.1.2.7. OPERA SCRISĂ.RO

VII.1.2.8. PERGAM

VII.1.3. Collective Management Organisations in the field of Related Rights

VII.1.3.1. A.D.P.F.R.

VII.1.3.2. CREDIDAM

VII.1.3.3. UPFAR-ARGOA

VII.1.3.4. UPFR

VII.1.3.5. ARAIEX

VII.1.3.6. SOPFIA

VII.1.3.7. UNART

VII.1.3.8. UPVR

***VII.1.3.9. Collective management organisations that have ceased their activity
AGICOA ROMÂNIA; APM; UPIF***

Section 2 Compulsory and facultative collective management

VII.2.1. Overview. *The Law no. 8/1996 on copyright and related rights establishes restrictively the categories of rights to be collectively managed on compulsory basis and those that can be managed collectively on a facultative basis.*

VII.2.2. Transparency of Collective Management Organisations

VII.2.2.1. Aspects regarding the cancellation of paragraphs 2 and 3 in ORDA's decision no. 399/2006 invoked by ORDA in the material sent to the collective management organizations.

VII.2.2.2. Legal provisions of ORDA's Decision no. 99/2015

VII.2.2.3. Legal provisions of ORDA's Decision no. 10/2016

VII.2.2.4. Legal provisions of ORDA's Decision no. 120/2016

VII.2.2.5. Regarding the concept of sole collector

VII.2.2.6. Regarding the legal regime of collective management organisations

VII.2.2.7. Regarding the issues raised by ORDA and possible remedies

VII.2.2.8. Conclusions. *There are a number of differences between the two procedures and the main reason is that in the case of the "private copy" field, the sole collector represents and collects for several categories of right-holders (authors, performers and phonogram producers), which also determines a distinct regime for the two procedures.*

Section 3 Collection and distribution of royalties

VII.3.1. Collection of the amounts owed by users. The collection of the amounts owed by users or by other payers is made by the collective management organisation whose repertoire is used.

VII.3.2. Remuneration due to right-holders

VII.3.2.1. Sole equitable remuneration. According to art. 106⁵ par. (1), for the direct or indirect use of the phonograms published for commercial purposes and of the reproductions thereof, by radio-broadcasting or by any other means of communication to the public, performers and phonogram producers are entitled to a sole equitable remuneration.

VII.3.2.2. Remuneration owed by cable distributors. According to art. 121 par. (1) of Law no. 8/1996, the holders of copyright or of related rights may exert their rights of authorizing or forbidding cable retransmission only via a collective management organisation.

VII.3.2.3. Equitable remuneration for the rental or lending of the right. According to art. 111¹, if an author or performer transferred or transmitted its rental or lending right, in relation to a phonogram or videogram, to a producer of phonograms or audiovisual recordings, he/she keeps his/her right to receive an equitable remuneration.

VII.3.2.4. Compensatory remuneration for private copy. According to the provisions of art. 107 of Law no. 8/1996, the authors of works susceptible of being reproduced by sound or audiovisual recordings on any type of carrier, and those whose works are susceptible of being reproduced on paper, either directly or indirectly, in the conditions as stipulated by art. 34 par. (1), have the right, together with the publishers, the producers and the performers, if applicable, to a compensatory remuneration for private copy, in the sense of art. 34 par. (2)¹¹.

VII.3.3. Collection and distribution of compensatory remuneration for private copying

¹¹ For more information, see Rodica Părvu, Ana Maria Marinescu, *Compensatory remuneration for private copy*, in the Romanian intellectual property Journal issue no. 2/2005, pp. 9-36.

VII.3.3.1. Collection of the compensatory remuneration for private copy. According to art. 107¹ of the law, the compensatory remuneration for private copy shall be collected by a collective management organisation as sole collector for the works reproduced after sound and audiovisual recordings and by another collective management organisation as sole collector for the works reproduced from paper, in the conditions provided by art. 133 paragraphs (6) to (8).

VII.3.3.2. Distribution of the compensatory remuneration for private copy. The compensatory remuneration for private copy collected by management organisations as sole collectors shall be distributed to beneficiaries, in accordance with art. 107².

CHAPTER VIII

PERFORMERS' RIGHTS IN INTERNATIONAL, COMMUNITY AND COMPARATIVE LAW

Section 1 Comparative law study regarding the moral rights of performers

VIII.1.1. Moral rights of performers from the perspective of international treaties and conventions. In 1951, the Berne Meeting convened a committee of experts in Rome who set the text of a draft international convention, before the Rome Convention Draft of 1961.

VIII.1.1.1. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations does not contain provisions on the moral rights of performers, but only references to their patrimonial rights.

VIII.1.1.2. The Beijing Treaty on audiovisual performances, is the most recent international instrument adopted, targeting performers.

VIII.1.2. Moral rights of performers from the perspective of European Directives

VIII.1.2.1. Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights stipulates at art. 9 that its provisions are without prejudice to the provisions of the Member States which regulate moral rights.

VIII.1.2.2. Directive 2011/77/EU of the European Parliament and of the Council on the amendment of Directive 2006/116/EC on the term of protection of copyright and of certain related rights, the latest European Directive in the field, which extends the term of protection for the sound recordings (the artistic performances fixed in phonograms) in the European Union from 50 to 70 years, from the date on which the recording was published or made public for the first time, does not contain any references to the moral rights of performers, like the other European directives as well.

VIII.1.3. Moral rights of performers from the perspective of Comparative Law

VIII.1.3.1. Moral rights of performers in France. Prior to the adoption in 1985 of the *Copyright Law*, in France the jurisprudence recognized the performer's three prerogatives relevant to moral right.

VIII.1.3.2. Moral rights of performers in Germany. The current relevant provisions are set by paragraphs 73 to 84 of the Law on the 9th of September 1965, and similarly to the French Law, performers' enjoy an autonomous status, as compared to that of the authors.

VIII.1.3.3. Moral rights of performers in the UK. The moral rights of performers in the UK were first regulated in the Act on Musical and Performing Artists of 1925, a law that sought to protect artists from exploiting their fixed or broadcasted performances without their consent.

VIII.1.3.4. Moral rights of performers in the USA. The moral rights of performers in the United States of America are not protected.

VIII.1.3.5. *Moral rights of performers in Slovenia.* Article 32. letter a) of the Slovenian Law on copyright and related rights, published in the RS Official Gazette Numbers 21/95, 9/01, 30/01, 43/01, 17/06, 44/06, 139/06 and 16/07, provides for the making available right.

Section 2 Comparative law study regarding the patrimonial rights of performers

VIII.2.1. Patrimonial rights of performers from the perspective of international treaties and conventions

VIII.2.1.1. *The Rome Convention*, stipulates in art. 7 that the protection provided to performers should allow them to oppose the various forms of unauthorized use.

VIII.2.1.2. *The TRIPs Agreement* incorporates the provisions of the Rome Convention, but in a vague manner, dictating numerous restrictions on the application of the above mentioned Convention, particularly in the case of performers, who thus lost the benefits of several provisions of the Convention.

VIII.2.1.3. *The Treaty of the World Intellectual Property Organisation (WIPO) on performances and phonograms* also incorporates the provisions of the Rome Convention.

VIII.2.1.4. *The Beijing Treaty concerning audiovisual performances*¹², the latest international treaty in the field, provides that the performer has certain patrimonial rights over fixed performances.

VIII.2.2. Patrimonial rights of performers from the perspective of European Directives

VIII.2.2.1. *Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property* has led to the harmonization of the laws of the Member States with a view to complying with the international conventions on which copyright and related rights are founded, since the proper protection, through rental and lending rights, of copyrighted works and objects protected by related rights, as well as the protection of objects by the right of fixation, the reproduction right, the distribution right, the radio and television broadcasting rights and the public communications rights, can therefore be considered to be of fundamental importance for the economic and cultural development of the European Community.

VIII.2.2.2. *Council Directive 93/83/EEC of the 27th of September 1993 on the harmonization of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission* was adopted in order to protect copyright. At the time of the adoption of this Directive, a distinction was made between public direct satellite communication and public telecommunication satellite communications retransmitted by cable networks. Since individual reception was possible and accessible for both uses, any differences in legal treatment were removed at the time of the adoption of the Directive.

VIII.2.2.3. *Council Directive 93/98/EEC of the 29th of October 1993 harmonizing the term of protection of copyright and of certain related rights.* Since, with regard to the duration of the protection of related rights, some Member States introduced a period of fifty years after the legal publication or after the legal public communication.

VIII.2.2.4. *The Directive 2011/77/EU of the European Parliament and of the Council regarding the amendment of Directive 2006/116/EC concerning the term of protection of copyright and of certain related rights* extends the duration of protection to 70 years for the patrimonial rights of performers.

¹² A se vedea pe larg, Liliانا Savu, „The Beijing Treaty concerning Audiovisual Performances”, Romanian Journal for Intellectual Property Rights no. 4/2012, pp. 103-115.

VIII.2.2.5. *The Directive 2001/29/EC of the European parliament and of the Council of the 22nd of May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* reiterates the patrimonial rights of performers, such as the right to reproduce or to make available to the public, and the exceptions thereof, in particular to reproduction rights, regulating one of the most important sources of income for right-holders in the digital age.

VIII.2.2.6. *The Directive 2004/48/EC of the European parliament and of the Council of the 29th of April 2004 on the enforcement of intellectual property rights* pays down that Member States are required to provide for the necessary measures, procedures and remedies to ensure compliance with the intellectual property rights referred to in the Directive.

VIII.2.3. Patrimonial rights of performers from the perspective of Comparative Law

VIII.2.3.1. *Patrimonial rights of performers in France*

VIII.2.4. Domestic treatment, common points of interest and possible reservations on equitable remuneration in international conventions

VIII.2.4.1. *Domestic treatment in international conventions*

VIII.2.4.2. *Article 2 of Rome Convention*

VIII.2.4.3. *Article 4 of WPPT in 1996*

VIII.2.5. Common points of interest in international conventions

VIII.2.5.1. *Articles from 4 to 6 of Rome Convention*

VIII.2.5.2. *Article 3 of WPPT*

VIII.2.6. Possible reserves on equitable remuneration

VIII.2.6.1. *Article 12 of Rome Convention*

VIII.2.6.2. *WPPT for article 15*

VIII.2.7. Statement of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions regarding the Creative Content Online in the Single Market

VIII.2.7.1. *Introduction*

VIII.2.7.1.1. *Creative content online*

VIII.2.7.1.2. *Results of the poll*

VIII.2.7.1.3. *Objectives of the statement*

VIII.2.7.2. *Issues and proposals*

VIII.2.7.3. *Availability of creative content*

Section 3 Community Regulations on Collective Management of Rights

VIII.3.1. *Council Directive no. 93/83/EEC of the 27th of September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*

VIII.3.2. *Directive 2001/29/EC of the European Parliament and of the Council, of the 22nd of May 2001, on the harmonization of certain aspects of copyright and related rights in the information society*

VIII.3.3. *Directive 2001/84/EC of the European Parliament and of the Council, of the 27th of September 2001, on the resale right for the benefit of the author of an original work of art*

VIII.3.4. *Directive 2004/48/EC of the European Parliament and of the Council, of the 29th of April 2004, on the observance of intellectual property rights*

VIII.3.5. Directive 2006/115/EC of the European Parliament and of the Council, of the 12th of December 2006, on rental right and lending right and on certain rights related to copyright in the field of intellectual property

VIII.3.6. Directive 2014/26/EU on the Collective Management of Rights.

CHAPTER IX COLLECTIVE MANAGEMENT OF PERFORMERS' RIGHTS. CASE STUDY: CREDIDAM

Section 1 Overview on the management of performers' related rights

IX.1.1. Collective management of Performers

IX.1.2. Collective Management Organisation of Performers' Rights

Secțiunea 2 Romanian Center for Performers' Rights Management

IX.2.1. Brief History of the CREDIDAM Activity

IX.2.2. CREDIDAM obligations

IX.2.3. CREDIDAM capacity as Proxy

IX.2.4. CREDIDAM organization and operation

IX.2.5. Forms and conditions for the collective management of performers' rights

IX.2.6. Collection of the amounts owed by users and distribution thereof to right-holders

IX.2.6.1. Compensatory remuneration for private copy. Within CREDIDAM there is a reserve fund constituted for the requests of rightholders lodged within 3 years since the date of collecting. The size of the reserve fund is subject to the annual approval of the General Meeting.

IX.2.6.2. Equitable remuneration for public lending. The amounts shall be distributed according to the information supplied by the institution which allows public access to artistic performances. Based on such lists, the amounts will be distributed to performers whose artistic performances are included on the respective lists.

IX.2.6.3. Equitable remuneration for public communication and radio broadcasting of commerce phonograms or reproductions thereof

IX.2.6.3.1. Radio broadcasting of phonograms. The amounts will be distributed according to the real use resulting from the information received from users. The value of each phonogram is given by its of radio-broadcasting duration and by the amount collected for the broadcasting period.

X.2.6.3.2. Public communication. The remuneration collected from the use of phonograms for ambient purposes will be distributed the same as the compensatory remuneration for private copy.

IX.2.6.4. Distribution of the amounts collected from cable distributors. The amounts shall be distributed based on the list of radio broadcast stations retransmitted by cable distributors.

IX.2.6.5. Undistributed or unclaimed amounts. The undistributed amounts are those amounts for which, within 3 years since the collecting date, the body did not receive the information necessary for the distribution thereof.

IX.2.6.6. CREDIDAM repertoire and how it is declared by the Members

IX.2.7. Taxation rules in CREDIDAM activity

IX.2.7.1. The way in which CREDIDAM operates as a collective management organisation. According to art. 124 of the Law, "The collective management

organisations of copyright and related rights, jointly referred to as collective management organisations, are, within the meaning of this law, legal entities established by free association, which main activity is to collect and distribute the rights entrusted to them by the right-holders."

IX.2.7.2. CREDIDAM does not carry out an economic activity characterized by obtaining profits. The Tax Code defines activity as *any activity carried out by a person for the purpose of obtaining income.*

IX.2.7.3. Tax on non-residents' income. The tax inspectorates estimate that non-residents' income tax rate is of 16% and not 10%, considering that such income, also derived from intellectual property rights, would benefit from a different share in relation to the *nationality of the beneficiaries.*

IX.2.7.4. Accurate calculation and payment of the VAT due. As far as the VAT collected is concerned, in my opinion, it is important to understand correctly the timing of the occurrence and the VAT chargeability.

IX.2.7.5. Social contributions withheld at source for the income from intellectual property rights. Deductions at source for the remuneration paid to holders of related rights, in this case to performers, are set out within the content of the thesis.

IX.2.8. Regulation, surveillance and control body

Section 3

CREDIDAM participation in international organisations with vocation in the field of the protection of performers' rights

CREDIDAM is a member of several international and European organisations, and cooperates with them in the field of collective management of the performers' rights. Among the international and European organizations we mention:

IX.3.1. The Association of European Performers' Organisations (AEPO – ARTIS)

IX.3.2. The International Performers Database Association (IPDA)

IX.3.3. Societies' Council for the Collective Management of Performers' Rights (SCAPR)

IX.3.4. Virtual Records Database (VRDB)

Section 4 Case studies.

IX.4.1. Exclusive patrimonial right of performers to authorize or prohibit the cable retransmission of performances already fixed in phonograms

IX.4.2. Controversial aspects of taxation

IX.4.2.1. Payment of Value Added Tax. With regard to Decision no. 48 of 19.07.2017, pronounced by the High Court of Cassation and Justice, stating that: „ In the interpretation of the provisions of art. 126 par. (1) letter a) and of art. 129 of Law no. 571/2003 on the Tax Code, with further amendments and supplements, of art. 98 par. (1) letter g¹), and of art. 106⁵ of Law no. 8/1996 on copyright and related rights, with further amendments and supplements, the collection, by the collective management organisation, of the remunerations owed to performers for the broadcasting or for the public communication of audio recordings containing the fixation of their artistic performances does not represent a taxable operation in terms of the value added tax. Binding, according to the provisions of art. 521 para. (3) of the Code of Civil Procedure. Pronounced in open session today, the 19th of June 2017”.

IX.4.2.2. Aspecte care vizează impozitul pe profit în Spania. Ca exemplu putem da Sentința Tribunalului Suprem din Madrid, nr. recurs 2290/2008.

IX.4.3. TV Broadcasting

IX.4.3.1. The first ground for appeal concerned the lack of thoroughness of the judgment sought for misinterpretation of the evidence in question and misapplication of the quality of the user within the meaning of Law no. 8/1996.

IX.4.3.2. The second ground for appeal concerned the lack of thoroughness of the judgment sought for failing to prove the tort.

IX.4.3.3. The appellate Court also held that the challenge of the lack of thoroughness presented at point C of the defendant's appeal is grounded, reasoning its decision on the contrary.

IX.4.3. Payment of remuneration due to performers for the use of phonograms or reproductions thereof by cable distributors. Collective management organisation. Exceptions.

CHAPTER X

CONCLUSIONS AND PROPOSALS "DE LEGE FERENDA"

Section 1 Current context

Section 2 Right to an equitable remuneration for broadcasting and public communication due to performers and phonogram producers

Section 3 Legal implications of qualifying the right to equitable remuneration for broadcasting and public communication as an exceptional patrimonial right

X.3.1 Significant amendment of Law no. 8/1996 on copyright and related rights and impossibility to enforce art. 123¹ paragraph (2)

X.3.2 Affecting the mandatory collective management in the sense that the impairment of right-holders to individually exercise it causes them a great prejudice

X.3.3 Breaching of Article 27 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on the 10th of September 1948, and at the same time of Article 33 of the Romanian Constitution

Section 4 „De lege ferenda” proposal

Section 5 „De lege ferenda” proposal on the notion of „phonogram”

A N N E X E S

Annex no. 1 Contract Models

Assignment Contract; Cooperation Contract; Production Contract

Annex no. 2 Collective management organisations from abroad with which CREDIDAM has concluded bilateral agreements

Annex no. 3 Working procedure with representatives of CREDIDAM members

Annex no. 4 Type Form

Audience request / Legal Advice requests / Requests for information

Annex no. 5 Procedures for drafting, filing and resolving audience requests / legal advice requests / requests for information with CREDIDAM

Annex no. 6 Request for receiving the remuneration due by the performer

Annex no. 7 Request for receiving the remuneration for related rights

Annex no. 8

Table 1.1 Equitable remuneration for broadcasting and communication to the public of commercial phonograms - Terms of remuneration

Table 1.2 *Equitable remuneration for broadcasting and communication to the public - Terms of remuneration*

Table 1.3 *Equitable remuneration for broadcasting and communication to the public - Type of fixed performance for the use of which a remuneration is legally due and collected*

Table 1.4 *Equitable remuneration for communication to the public - Collection for performers from 2005 to 2013. Gross amounts in euro (excluding VAT)*

Table 1.5.1 *Rental rights – Terms of remuneration*

Table 1.5.2. *Equitable remuneration for broadcasting - Collection for performers from 2005 to 2013. Gross amounts in euro (excluding VAT)*

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