

# Remuneration Rights for authors and performers in the EU *acquis*

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## AIE v iTunes (JM n.1 Madrid, 31.03.2017, Spain)

- Phonogram performers
- 1.4 M Euros in damages
- Remuneration rights for making available online (July 2006 – Dec.2014)
- Licenses obtained from Phonogram Producers and Authors
- Art.108.3 TRLPI : unwaivable remuneration right for performers “retained” after the transfer of their exclusive right of making available to producers, under mandatory collective management

iTunes:

- Art.108.3 is contrary to EU *acquis* (D 2001/29, Art.56 TFUE) and asked for a preliminary request to CJEU

## AIE v iTunes (JM n.1 Madrid, 31.03.2017, Spain)

### Court ruling:

- Art. 108.3 not contrary to EU *acquis*, “subsidiarity principle” → MS may grant further protection to authors and performers
  - Same mechanism for rental right in D 92/100 not a foreign system to EU *acquis*
  - Not all differences in national laws are contrary to EU *acquis*.
  - Not a “double payment”, but rather a statutory mechanism to guarantee economic return to performers
- *AP Madrid (sec.28), 02.03.2015, AIE v. BUONGIORNO MY ALERT*

### IMPORTANT:

- Territoriality principle (*lex loci protectionis*) + Non-discrimination
- Spanish RR benefit Spanish authors + EU authors + Berne authors

## Other Remuneration rights in National Acts ... and online platforms

### **SPOTIFY - Phonograms**

Need to distinguish **making available online** (Art.108.3 TRLPI : remuneration for performers) from **communication to the public** (Art.108.4 TRLPI : remuneration shared by producers + performers)  
*ex Art.8.2 D R&L*

### **FILMIN - Audiovisual RECORDINGS (PERFORMANCES) & WORKS (AUTHORS)** – Art.108.5 TRLPI + Art.90.4 TRLPI

Current CJEU: **AGEDI/AIE v. ATRESMEDIA** (TV broadcaster): a phonogram synchronized in audiovisual recording ... does it stop being a phonogram? So no remuneration for phonogram authors and performers when movie is shown on TV, etc?

NOT THE ISSUE TODAY.

## What do I mean by “Remuneration Rights”?

**Economic component:** Exclusive rights v. Remuneration rights

Within same scope (**shared scope**)

**No right to control** (only remuneration)

### **Common characteristics:**

- They are recognized by a copyright statute or instrument;
- They may vest in any copyright owner (be it author, performer or producer);
- They grant no “control” faculty to authorize or prohibit any acts of exploitation;
- They grant an entitlement to obtain economic income;
- The payment is done by the end user or final exploiter-;
- They are very often unwaivable, inalienable and managed on a collective basis by CMOs (mandatory, voluntary mandates, ECL).

A mere right of  
**remuneration** (resale right  
under Art.14ter BC)

A restriction of an  
**exclusive right** (e.g.  
compensation for private  
copying - Art.9.2 Berne  
Convention, E&L)

A Right to receive  
remuneration which  
**“survives” the transfer** of  
an exclusive right to  
producer (e.g. Art.5.1  
Rental & Lending Directive)

Statutory **Derogation or  
Restriction** of an Exclusive  
Right

Statutory remuneration,  
upon the **Exercise** of an  
Exclusive Right **“Residual”**

**Exclusive Rights ...  
harmonized (sort of)**

**But**

**Remuneration Rights  
are hardly harmonized  
in EU *acquis*  
... and when so, they  
leave a lot of discretion  
for MS implementation**

Resale Right - D 2001/84

Rental Right (Residual)  
Public Lending Right  
– D 2006/115

Cable retransmission  
– D 1993/83

E&L (compensated / 3ST)  
– D.2001/29

CJEU *Luksan*: unwaivable

Remuneration Rights  
are **hardly harmonized**  
in EU *acquis*

... and when so, they  
leave a lot of **discretion**  
for **MS implementation**

Art.5.1 Rental and Lending  
Directive:

***Unwaivable right to equitable remuneration.***

*Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer **shall retain** the right to obtain an equitable remuneration for the rental.*

**Can it be transferred to producer?**

**Who pays fees: user or producer?**

**Mandatory collective management?**

***.... As a result: no harmonization!***



Table 3  
Rights managed by SAA members (2014)

Country	SAA member	Cable retransmission	Private copying	Other retransmission rights*	Online/ on demand uses	TV broadcasting	Video sales	Educational uses	Video rental	TV archives	Video lending	Cinema/ Public performance
Austria	Literar-Mechana	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Austria	VDFS	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Belgium	SABAM	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Belgium	SACD / SCAM	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Czech Republic	DILIA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Estonia	EAAL	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Finland	Kopiosto	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
France	SACD	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
France	SCAM	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Germany	VG Bild-Kunst	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Germany	VG Wort	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Hungary	Filmjus	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Italy	SIAE	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
The Netherlands	LIRA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
The Netherlands	VEVAM	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Poland	ZAPA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Portugal	SPA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Slovakia	LITA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Spain	DAMA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Spain	SGAE	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Sweden	Copyswede	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Switzerland	SSA	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Switzerland	SUISSIMAGE	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
UK	ALCS	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
UK	Directors UK	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
	<b>TOTALS</b>	24	23	19	17	16	15	15	11	11	9	8
	<b>Percentage</b>	96%	92%	76%	68%	64%	60%	60%	44%	44%	36%	32%

\* Satellite, IPTV

## Are National “Residual” Remuneration rights contrary to EU *Acquis*?

### COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

#### Remuneration Rights are “accepted” by International Instruments

- Audiovisual Works: broadcasting & communication to the public (Art.11 BC, Art.8 WCT)
- Works of Art: Resale right (Art.14ter BC)
- Phonograms: broadcasting & communication to the public (Art.12 RC, Art.15 WPPT)
- Audiovisual Performances: broadcasting & com.publ. (Art.11.2 BT), online (Art.12.3 BT)
- EU *acquis* : cable retransmission, rental right, lending compensation, resale right

→ **Optional**, when conventional minima MS are free to set conditions (and fail to make them unwaivable & mandatory CMO), MS may implement other remuneration rights in national laws

It does **not affect conventional minima** (no formalities, minimum term + rights) → Greater protection may be granted by MS (art.19 BC)

## Beijing Treaty on Audiovisual Performances (2012)

Art.11.2 Beijing Treaty allows Member States to:

*“... **establish a right to equitable remuneration** for the direct or indirect use of performances fixed in audiovisual fixations for **broadcasting or for communication to the public.**”*

Furthermore, Art.12.3 Beijing Treaty allows Member States to introduce a general right of equitable remuneration for “any uses” of audiovisual performances:

*“Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with **the right to receive royalties or equitable remuneration** for **any use** of the performance, as provided for under this Treaty including as regards Articles 10 [that is, making available online] and 11 [that is, broadcasting and communication to the public].”*

## COMPLIANCE WITH EU LAW

- **Principle of Subsidiarity** → harmonization only when necessary to secure market conditions (free movement of goods and services)

Recital 7 InfoSoc D.: to overcome **substantial differences** that create legal uncertainty for the functioning of the internal market, not to overcome **any differences!**

- **Harmonization relies on national laws (Art.118 TFUE, not yet)**
- **EU *acquis* expressly “fosters” different solutions** (optional, implementation discretion) to be adopted by MS
- **EU Commission is aware of different RR in national laws** (Green Book 2011 audiovisual online exploitation) and has not done anything to overcome it.
- **No MS has been sued** for incorrect implementation of *EU acquis!*

## COMPLIANCE WITH EU LAW

- **MS cannot “extend scope of rights” harmonized**  
(CJEU: *Svensson*)
  - ✓ MS cannot “add more acts” within the harmonized concept of communication to the public
  - ✓ Harmonized rights must be uniformly interpreted and applied in all MS (“autonomous concepts of EU law”)
- **But a statutory “residual” remuneration right (upon transfer of exclusive right to producer) does not “add” or “extend” ... rather it “secures” the right**
  - ✓ It is a statutory mechanism to “guarantee” remuneration.
  - ✓ Is it an issue of (national) contract law?
  - ✓ Retaining a “residual” remuneration right for an act of exploitation does not extend scope of exclusive right

## COMPLIANCE WITH EU LAW

### Art.56 TFUE; freedom to provide services

Existence v Exercise / Goods v. Services

- Residual Rem.Rights grant no *ius prohibendi*
- If communication to public right is not “exhausted”, neither should its remuneration.
- CJEU: *Basset v. SACEM* (1987) different territorial remuneration obligations, even “ex post” transactional costs are OK
- CJEU : A restriction may be justified if:
  - General interest reasons / goal (IP rights)
  - Accurate to achieve this goal
  - Restricted to achieving this goal

CJEU: *Coditel I, Musik Vertrieb, Christiansen, Phil Collins, FAPL, Sky Osterreich*

## National remuneration rights

...are in **COMPLIANCE WITH EU LAW**

- **Rec.26 (Satelite & Cable D) allows MS to “extend” the residual mechanism** in Art.5 R&LD to exclusive rights granted to performers (when they transfer them to producers)
- **“for the sake of consistency”** (with rental remuneration right) it would be appropriate to extend it to transfer of other exclusive rights of authors
- CJEU *Luksan* ##86-87: rental “residual” mechanism should be also applicable to transfer of other exclusive rights (reproduction – private copy remuneration)

## Proposal Directive CDSM (Parliament)

FINAL REPORT Voss (Sept.2018) proposed:

### -Art.14. Principle of Fair and Proportional Remuneration

**1. Member States shall ensure** that authors and performers receive fair and proportionate remuneration **for the exploitation** of their works and other subject-matter, **including** for their **online exploitation**. **This may be achieved in each sector through a combination of agreements**, including collective bargaining agreements, **and statutory remuneration mechanisms**.

2. Paragraph 1 shall not apply when an author or performer grants a non-exclusive usage right for the benefit of all users free of charge.

3. Member States shall take account of the **specificities of each sector** in encouraging the proportionate remuneration for rights granted by authors and performers.

4. Contracts shall specify the remuneration applicable to each mode of exploitation.



# Directive CDSM (D 2019/790, 17 April 2019)

## Art.18 : Principle of Appropriate and proportionate Remuneration

**1. Member States shall ensure** that **where authors and performers license or transfer their exclusive rights** for the exploitation of their works or other subject matter, **they are *entitled* to receive appropriate and proportionate remuneration.**

2. In the implementation in national law of the principle set out in paragraph 1, **Member States shall be free to use different mechanisms** and take into account the principle of contractual freedom and a fair balance of rights and interests ...

## **Some final thoughts**

**Granting AV Authors Exclusive Rights (harmonized), but failing to secure appropriate remuneration for them ... is as much as granting them no rights at all!**

**Under EU *acquis* this remains a matter for MS (in fact, now, an obligation!)**

**Stay tuned ...**

**Remuneration rights ... will be the next harmonization frontier!**

Thanks!

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