The elements of the Directive 2014/26/EU on collective management and multi-territorial licensing that may influence the administration of performers’ rights in the online environment

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Abstract: Title III of the Directive 2014/26/EU of 26 February 2014, regulates multiterritorial licensing by collective management organisations of authors’ rights in musical works for online use. Nevertheless, the system of multi-territorial licences does not apply to related rights. This article intends to provide a general view of the legal and practical consequences arising from the exploitation acts, through the online environment, with regard to performers’ and producers’ intellectual property rights: the relevant rights involved (the differences between the making available and communication to the public rights) and the difficulties for performers on getting a fair remuneration in this environment. The experiences on collective management, with a particular focus on the Spanish transposition of the making available right and other legal systems are also explained.

Keywords: Directive 2014/26/EU; collective management; multi-territorial licensing; collective management organisations; performers’ rights; making available right; communication to the public right; digital music services; interactivity; webcasting.


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The content of Directive 2014/26/EU is divided into two different parts: one related to general rules applicable to the collective management organisations (hereinafter CMO) and, the second one, devoted to the establishment of a multi-territorial licensing system affecting CMO administering authors’ rights. Since this article takes part of a special issue tackling other aspects of this Directive, its content is limited to the relevant elements provided through Title III (multi-territorial licensing of online rights in musical works by CMO) that may affect the administration of performers’ rights in the online environment.

1.1 The system of multi-territorial licensing for authors right

Title III of the Directive 2014/26/EU is devoted to multi-territorial licensing by CMO of authors’ rights in musical works for online use. Through the reading of the Directive, it is made clear that such kind of licenses apply exclusively to authors’ rights and not to related rights (art. 2.2).

Such fact means that the licenses to be granted by CMO of authors’ rights allow strictly the exploitation of these rights. What would happen then with related rights of performers and producers in such context?

In order to try to answer this question, it is interesting to provide an overview of the main features of the licensing model envisaged by the Directive:

- ‘Multi-territorial licence’: Means a licence which covers the territory of more than one Member State (art. 3 m).
- The system is set up in two phases: In the first place, where a CMO mandates another CMO to grant multi-territorial licences for the online rights in musical works the mandated CMO shall distribute the amounts collected and shall provide the information related to right holders to the mandating CMO; in the second place, the mandating CMO shall be responsible for the subsequent distribution of such amounts
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and the provision of such information to right holders, unless the CMO agree otherwise (art. 28.3).

- **Non-exclusive nature of the representation agreements:** Any representation agreement between CMO whereby a collective management organisation mandates another collective management organisation to grant multiterritorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature. The mandated collective management organisation shall manage those online rights on a non-discriminatory basis (art. 29.1).

- **Obligation for the requested CMO to represent the requesting CMO:** Where a CMO which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another CMO to enter into a representation agreement to represent those rights, the requested CMO is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other CMO (art. 30.1).

- **Consequences of not granting multi-territorial licences:** Where a CMO does not grant or offer to grant multi-territorial licences for online rights in musical works or does not allow another CMO to represent those rights for such purpose by 10 April 2017, right holders who have authorised that CMO to represent their online rights in musical works can withdraw from that CMO the online rights in musical works for the purposes of multi-territorial licensing in respect of all territories without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing, so as to grant multi-territorial licences for their online rights in musical works themselves or through any other party they authorise or through any collective management organisation complying with the provisions of Title III (art. 31).

- **Licences for broadcasters:** The requirements under Title III shall not apply to CMO when they grant, on the basis of the voluntary aggregation of the required rights, in compliance with the competition rules under Articles 101 and 102 TFEU, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programs simultaneously with or after their initial broadcast as well as any online material, including previews, produced by or for the broadcaster which is ancillary to the initial broadcast of its radio or television program (art. 32).

- **No obligation to grant multi-territorial licences:** We must bear in mind that, according to Title III of the Directive 2014/26/EU, CMO of authors’ rights are not obliged to grant multi-territorial licences. In fact, the Directive foresees that a CMO requests another CMO to represent its repertoire on a multi-territorial basis provided that the former “cannot or does not wish to fulfil the requirements itself” (Whereas 40 of the Directive 2014/26/EU). Nevertheless, the requested CMO is obliged to accept the mandate if it is already offering multi-territorial licences. Finally, CMO granting multi-territorial licences shall comply with the conditions established in art. 24 of the Directive 2014/26/EU.
The above-outlined features of the licensing scheme established by the Directive can be considered in general a positive set of rules to enable an adequate management of the online rights for authors. Of particular interest in our view are the two phases of the system that, firstly, entitles the mandated CMO to license the rights on behalf of the mandating CMO and, secondly, allows the mandating CMO to distribute the revenue to the authors it represents.

Nevertheless not all the provisions are sufficiently clear, in our view. For instance, what are the consequences of the non-exclusive nature of the representation agreements? If the same repertoire is granted by one CMO to another CMO for licensing and to other different CMO for the same territory (as non-exclusivity is allowed) which one would be entitled to license, since the scope of licensing of two or more CMO would overlap in this situation. It is a matter of discussion on the interpretation of the Directive and for the transposition at national level.


The Directive 2014/26/EU establishes a set of rules for authors’ rights that has to be put in place before April 2017, which is not applicable to performers’ and producers’ rights since they are excluded from this part of the Directive.

How should we reconcile the situation where authors’ rights must be managed under the framework of the Directive and where performers’ and producers’ rights should be managed under a different framework, which mixes legal sources and conventional practices?

In the case of producers, we have to bring up the so-called ‘IFPI simulcasting agreement’, approved by the European Commission. It established the rules for a pan-European licence that allowed simulcasters located in the European Economic Area (EEA) to seek and obtain a multi-territorial license from any one of the rights administration societies (producers’ CMO) established in the EEA which are party to the Reciprocal Agreement between producers’ CMO, to simulcast into the signatories territories. This model was one of the experiences tried to be put in practice by producers’ CMO. In case of performers no similar model has been reported.

Besides, the legal background of the digital rights regulation for the online environment is the basis for considering the way to follow for the management of the different rightholders’ rights. In this respect, the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, sets up the following rules:

- As to authors, Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them (art. 3.1).
As to performers and phonogram producers, Member States shall provide for the exclusive right to authorise 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
b. for phonogram producers, of their phonograms (art. 3.2 a and b).

This language highlights that in the three cases (authors, performers and phonogram producers) the right of making available on demand is an exclusive right to authorise or prohibit. The nature of the right allows the right holder, in principle, to dispose of the right by licensing it or transferring it, depending on the cases.

In the case of authors, article 3.1 of Directive 2001/29/EC together with the outline of the licensing system of Title III of Directive 2014/26/EU, shapes a set of rules to undertake the management of the online rights for these right holders. Of course, the system has to be checked in practice after the deadline foreseen by the Directive: April 2017.

Moreover, even though the Directive 2014/26/EU does not formally establish that licensing in the online environment shall compulsorily fall under collective management, in our opinion collective management has been set up by the EU lawmaker as the best way to manage this kind of licences. In this regard, Recital 2 of the directive 2014/26/UE states that “collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including non-domestic markets”. This is significant, since it provides legal certainty in the administration of the rights in the online environment.

As to the phonogram producers’ rights, art. 3.2 (b) of Directive 2001/29/EC establishes the exclusive right of making available their phonograms, although there is no licensing system legally regulated. Notwithstanding other experiences, such as the ‘IFPI Simulcasting Agreement’ mentioned above, the current practice of individual producers/majors consists of negotiating a licence directly and individually with the internet services (users) that make available the content on demand. This point will be developed later on, referring to the Spanish actual case. In any case, the territorial scope of licensing has been discussed by the European Commission since 2005, when the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) was published. This is explained in Lipszyc et al. (2006) and Gotzen (2014).

Regarding the performers’ rights, art. 3.2 (a) of Directive 2001/29/EC grants them also an exclusive right of making available the fixations of their performances. As in the example of producers’, no legal regulation exists for a licensing system and in most of the cases the transposition of this Directive in EU Member States sets up a purely exclusive right. Nevertheless, there are a few exceptions: Spain, Portugal and Hungary, that we will study later on.

In the described context, performers are owners of an exclusive right of making available the fixations of their performances, which in theory could be managed by them individually. However, in practice such possibility is only reserved to the most well known performers, since only they have the necessary bargaining position. Other performers, such as those who are starting their careers, nearing the end of them, or simply performing in a more specialised or less popular music sector are in a weaker
position to negotiate. In these circumstances, the only option for performers is to transfer their exclusive rights to the phonogram producer. Note that the majority of performers find themselves in this situation and only a minority is in a position to discuss a deal with the producer.

In short, the explained legal context for the three groups of right holders points out a scenario where:

- Authors’ rights shall be licensed under a regulated system, which implies that authors’ CMO will be in the position of negotiating with internet services on behalf of the right holders they represent and distribute the collected amounts to them, using the net of representation agreements of such CMO.

- Individual phonogram producers will negotiate with performers the transfer of their exclusive making available rights, in order to be able to negotiate in their turn a licence with internet services individually, having in their hands both the producers’ and performers’ rights. Neither phonogram producers’ CMO, nor performers’ CMO will intervene in this process.

As a result, individual phonogram producers will receive a payment for the use of their exclusive right through their licences and in turn will pay performers under the conditions of the individual contracts signed with them. In practice, this scheme is already applied and as it depends on such contracts, it is bringing an unfair scenario for performers in general, because of the weak and unequal position the majority of them have in respect to a negotiation with the producer.

In addition, other practical problems arise, since the type of agreements signed between the producer and the performer do not correspond to the business models currently in place. Let us point out some situations for further reflection:

- In a significant number of cases, models of agreements are used which are based on physical sales, where discounts were applied for outdated concepts, such as packaging and others.

- The question of the assignment of agreements between producers is also of concern, since the performers lose the contact with the original producer who has transferred the agreement to another one and do not get a remuneration for the use of their performances in the new business models.

- As to the non-featured performers, they usually transferred their exclusive rights in return for a one-off payment in the past and are not remunerated for the use of their performances in the new streaming services.

Those outmoded practices have an impact on the negotiation by performers with the producer and on the overall remuneration paid to them; a reflection on them is therefore desirable.

The European Commission launched a public consultation, on issues identified in the Communication on Content in the Digital Single Market. Section 5 of the questionnaire referred to the “Fair remuneration of authors and performers” due to the evident concern on the matter expressed by different stakeholders. A report on the responses to the Public Consultation on the Review of the EU Copyright Rules, (European Commission, Directorate General Internal
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Market and Services), published in July 2014, highlights the need for action to improve the remuneration for these right holders.8

As a conclusion to this point, a legally established system is appropriate where performers would be able to manage their rights in the online environment through their CMO and be remunerated by means of representation agreements, as currently established for authors. It does not mean to transfer the model for authors to performers, but to adapt it to their particular situation and needs. Some experiences have emerged in European countries, based on a remuneration right for performers for the making available on demand or based on an exclusive right, in both cases collectively managed by performers’ CMO. This question will be considered later on.

2 The right of making available to the public and its transposition in Spain for performers

As explained above, art. 3.2 (a) of the Directive 2001/29/EC sets up for performers an exclusive right of making available the fixations of their performances.

The right of making available to the public is defined in the article of the Directive quoted above, as an exclusive right to authorise 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.

As to the transposition in Spain of the Directive 2001/29/EC, the Consolidated Text of the Copyright Act (hereinafter TRLPI), amended by law 23/2006, sets up in article 108.1.b)9 an exclusive right for audio and audiovisual performers for the right of making available to the public (included as a subset of the communication to the public).

Such exclusive right is presumed to be assigned to the producer, under the provisions of article 108.2,10 without prejudice to the unwaivable right to equitable remuneration granted by the law to be paid from the person who makes available the subject-matter, (article 108.3).11

The said remuneration will be obtained by the performer through the performers’ collective management society compulsorily (article 108.6).12

3 The management of the making available right in Spain

As noted above, the implementation of Directive 2001/29/EC into Spanish Law and therefore, the transfer of the making available right established in the 1996 WIPO Treaties: WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT),13 was conducted by Law 23/2006 of July 7, which modified the revised text of the Intellectual Property Law, enacted by Royal Decree 1/1996 of April 12.

From a conceptual point of view, the implementation of these rights by the Spanish lawmaker did not show significant differences with respect to the International and EU Law. The making available right was not established as an autonomous right but as a subset of an existing and consolidated (at national and international level) right: the communication to the public right (just as the WCT sets up the making available right).
This way, the ‘umbrella solution’ (Ficsor, 2002) was adopted [although the WPPT did not follow this solution, see Lipszyc (2004)]. Specifically, the definition of the making available right lays down in the letter i) of the second section of article 20 of the TRLPI: “making works available to the public, through wire or wireless procedures, so that any person may access such works from the place and at the time such person may choose”.

The above-mentioned definition adopts concepts from Article 10 of the WPPT. Consequently, the legislation requires certain factors to determine whether an act of exploitation falls under the making available right. In particular, public must: access a specific performance, from the place and at the time chosen by them. An interesting exposition of these concepts can be found in Ficsor (2003).

This definition allows categorising easily the relevant acts of exploitation as a making available acts and, consequently, applying the specific framework provided in favour of the specific kind of right holder foreseen in the TRLPI. In relation to the subject of this article, exploitation of phonograms in which the performances of the performers were fixed, the difference between the acts of exploitation is greatly important since the applicable framework and the management will depend on the qualification of the act of exploitation as a making available act or as other kind of communication to the public act.

Article 108.1 of the TRLPI grants, in favour of performers, the exclusive right to authorise or prohibit making available the fixation of the performances to the public as a subset of communication to the public. Nevertheless, the two succeeding sections of this article set up a legal system that is different to those established for the communication to the public of phonograms and audiovisual recordings (art. 108.4 and 108.5 of the TRLPI).

Although article 108.1 of the TRLPI establishes the making available right as an exclusive right, article 108.2 stipulates an assumption of assignment (similarly to art. 110 of the TRLPI), unless otherwise agreed upon, of this exclusive right in favour of the phonogram producer or audiovisual producer when both the performer and the producer enter into an agreement.

Provided that this transfer of the exclusive right takes place in favour of the producer of phonograms, the Spanish legislator, under the basis of the rest of the provisions of communication to the public (art. 108.4 TRLPI) and the rental right system, grants a right to obtain an equitable remuneration in favour of performers, from those who carry out making available acts. As with the remuneration for communication to the public of audiovisual recordings (art. 108.5 TRLPI), the Spanish Law does not recognise a new right or mode of exploitation, but extends the system of these rights in a similar way to the consolidated right of communication to the public of phonograms. However, while the management and collection of the equitable remuneration for the communication to the public of phonograms is shared by performers and producers of phonograms (since it is a ‘single amount’ in respect of both right holders), the making available legal system (and its management) is different. Article 116.1 of the TRLPI guarantees “the exclusive right to license communication to the public of phonograms and the reproductions thereof, in the manner specified in Article 20.2 i)”, i.e., in respect of the making available right. However, the second section of this article grants the right to obtain an equitable and single amount shared with performers in relation to the communication to the public except ‘in the manner specified in Article 20.2.i)’, which is excluded from the single and equitable remuneration, while the producer of phonograms maintains the exclusive right
to authorise such making available acts (notwithstanding the remuneration right in favour of performers established in art. 108.3 TRLPI).

Therefore, the communication to the public of phonograms (in a broad sense) involves two legal systems which lead to different ways of management depending on the specific right involved in the act of exploitation.

On the one hand, if a user carries out the exploitation of phonograms through any mode of communication to the public foreseen in art. 20.2 TRLPI (except letter i), the user is obliged to pay a single and equitable remuneration in favour of both performers and producers of phonograms; this remuneration shall be collected through “the appropriate collecting society”. Nowadays, and since the year 2003, producers of phonograms by means of a joint collecting body, established for this purpose, carry out the management jointly.

On the other hand, in the case that a user makes phonograms available to the public, the user shall obtain the due licence from the producers of phonograms and the user shall pay an equitable remuneration to performers through the collecting society, administratively authorised to manage that right (in this case, the collecting society of musical performers, AIE).

Which of these modes of communication to the public are used will have a great importance for the user since, regarding the first case; the user won’t be subject to an authorisation to carry out these acts. The user just needs to pay an equitable remuneration to regularise the acts of exploitation. Furthermore, we have to bear in mind that the ‘equitable’ nature of the remuneration involves, and forces the collecting societies to abide by the fixed tariffs related to that right on the basis of criteria which guarantee this equity, seeking a fair balance between the use of the phonograms and the amount to pay. Besides, these remunerations are subject to control by the public Administration according to their powers of surveillance or by the public bodies in charge of the competition rules, Comisión Nacional de los Mercados y la Competencia (CNMC), and, finally, by the courts of justice.

By contrast, the granting of licences by the producers of phonograms for their making available right is not under the ‘equitable remuneration’ system and, consequently, the producer fixes individually the price for granting this licence. However, the payment in favour of the performers will fall under the same terms as those made for the rest of other modes of communication to the public.

On a practical basis, the rise of digital music services is raising some doubts, in respect of the relevant act of exploitation arising from those services. Some factions of the recording music industry attempt to identify the making available right with internet, i.e., any service that allows accessing phonograms through internet (web or mobile apps) shall be deemed as a making available act.

In opinion of the authors of this article, this understanding arises from an erroneous base since it turns the ‘medium’ of exploitation into the ‘mode of exploitation’ and, obviously, internet is not a mode of exploitation of intellectual property rights, but a medium through which acts of exploitation of works, recordings or performances can be carried out, accruing intellectual property rights in favour of the legitimate right holders. These acts of exploitation can involve a making available act or an act, of communication to the public, depending on the interactivity provided to the user.

Firstly, those services allowing the access to a specific performance or phonogram, at the time and in the place chosen by the user shall be deemed as a making available act.
We can mention some services, as an example such as music online stores, services that allow the downloading of songs or LPs for a price. Furthermore, there are other services based on other technology such as the streaming ones, which allow accessing a specific phonogram or performance in the place and at the time chosen by the user without the need to download the content in the device through which to access the content.

Secondly, there are digital music services that involve an act communication to the public of phonograms provided that their interactivity does not allow to choose the specific performance or phonogram or it does not allow accessing at the time chosen [in this sense, Garrote Fernández-Díez (2003)].

The ‘place’ chosen by the public is the least controversial element among the three ones which comprise the making available criteria because the existing technologies allow accessing the content almost anywhere. However, there are services that do not allow choosing specific phonograms or performances or they do not allow choosing them at any time such as simulcasting or webcasting services.

On the one hand, there is no doubt about simulcasting (simultaneous broadcast) since it is the simultaneous broadcast of an existing transmission for another medium such as the terrestrial or satellite TV or FM radio stations. Nowadays, almost all broadcasters simultaneously transmit through terrestrial or radio waves and internet.

On the other hand, we can find webcasting services (understood in scope of this article as those services streaming phonograms via internet) where both communication to the public and making available of phonograms may be carried out depending on the interactivity offered to the users. As pointed out above, in the case of services allowing the access in the place and at the time chosen by the public, a making available act will take place. However, there are other services allowing access to music but not to a specific phonogram or not at the time chosen by the public.

We can find many different offerings in the market of services based on the communication to the public of phonograms. Other examples are: online radios that only differ from the traditional ones in the technology used, or ‘smart’ radios offering a personalised service taking into account, for example, the music genre the user prefers or music according to the ‘mood’.

To sum up, each particular act of exploitation of phonograms (but not the medium used) must be analysed in order to classify it within the relevant right involved and the applicable system of management. Therefore, only those services allowing the public to access phonograms, through wire or wireless procedures, in the place and at the time chosen by them can be deemed as making available acts.

Accordingly, an act of exploitation can be only classified as a making available act of a fixed performance if every element of interactivity analysed in this article is fulfilled. Otherwise, these acts will involve acts of communication to the public subject to clearance under the terms of art. 108.4, 108.6, 116.2 and 116.3 of the TRLPI.

4 The implementation of the making available right in other countries

As said earlier in this article, most of the countries have implemented the making available right related to performers as an exclusive right (granting the power to authorise or prohibit certain act of exploitation). However, this nature of the right involves an obvious disadvantage: the loss of the right when signing an agreement with the producer. Once this transfer has taken place, the performer may neither be able to control the
exploitation acts carried out by third parties, nor to obtain a fair remuneration arising from making the fixed performances available to the public by said third party.

In order to avoid these detriments, some national frameworks have implemented the making available right by granting some legal tools that aim to protect performers from the complete loss of control of the remuneration from the making available acts of exploitation by the users. Apart from the Spanish legislation, other countries have developed these means of protection to soften the rigidity derived from a strict implementation of the wording of the 1996 WIPO treaties and the Directive 2001/29. In this regard, it should be recalled that theses mechanisms of protection are not alien to the EU Law. The rental right (established in the Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property)\textsuperscript{23} was set up as an exclusive right but “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” (art. 5 of the Directive 2006/115/EC). Furthermore, this “right to obtain an equitable remuneration for rental cannot be waived by authors or performers”. The reader of this article can clearly note that the rental right system established by the EU legislator resembles to the one established by the Spanish lawmaker for the making available right [in this regard, see Sánchez Aristi (2007) and Reinbothe and Von Lewinski (1993)].

However, other countries, such as France, have not expressly implemented the definition of the making available right. In relation to neighbouring rights, the French case-law has stipulated that the general ‘public communication’ right (understood in a lato sensu way) includes the making available right (see Tafforeau, 2013).\textsuperscript{24} Concerning Latin America countries, this right is being gradually incorporated as explained by Antequera Parilli (2007).

Therefore, we can mention two different examples of national legal systems that go beyond the inflexible implementation of this right, as regards performers.

4.1 Portugal: the compulsory collective management of the making available right held by performers

Directive 2001/29 was implemented in Portugal by means of the Law 50/2004 of Copyright and related Rights in the Information Society of August 24. This law amended, among others, the article 178 of the Code of Copyright and related Right enacted on September 17, 1985.\textsuperscript{25}

Article 178 of the Law establishes the different economic rights in favour of performers. A letter d) was introduced in the first section of the article with the aim of laying down the making available right of performers: d) “A colocação à disposição do público, da sua prestação, por fio ou sem fio, por forma que seja acessível a qualquer pessoa, a partir do local e no momento por ela escolhido”. The making available right was defined in a verbatim way in respect of the International treaties and Directive 2001/29.

Thereby, the law implemented the making available right as an exclusive right granting the right to authorise or prohibit. However, a new Section 4 was added to article 178 in order to lay down a compulsory collective management of this right: 4 – “O direito previsto na alínea d) do n.º 1 só poderá ser exercido por uma entidade de gestão colectiva
de direitos dos artistas, que se presumirá mandatada para gerir os direitos de todos os titulares, incluindo os que nela não se encontrem inscritos, assegurando-se que, sempre que estes direitos forem geridos por mais que uma entidade de gestão, o titular possa decidir junto de qual dessas entidades deve reclamar os seus direitos”.

We can note that the stronger protection of the making available right in favour of performers derives from the mean of managing it. The Portuguese legislator took into account that the exclusive right only had an effective result provided that it was administrated in a collective way. The relevant collective management society in charge of its management is Direitos Dos Artistas (GDA). Accordingly, the user attempting to exploit the fixed performances shall compulsorily obtain a license from GDA. In this way, performers obtain the proper remuneration in exchange of the authorisation to exploit their performances.

To sum up, the making available right held by performers was set up as an exclusive right subject to compulsory collective management.

Unlike the making available right of performers, this right was not set up as a compulsory collective management right in the case of producers of phonograms, by means of article 184 of the Code of Copyright and Related Right.

Another legal system, the Hungarian, also chose this solution based on the compulsory collective management of the right.

4.2 Hungary: the collective management of the making available right under an opt-out system

The current Law that entered into force on September 1, 1999, Act No. LXXVI of 1999 on Copyright,26 aimed at implementing the international obligations adopted by Hungary such as the 1996 WIPO Treaties. Consequently, the making available right was foreseen in respect of all right holders (the WPPT Treaty was ratified by Hungary on November 17, 1998).

Accordingly, Hungarian legislation became one of the earliest national frameworks to adopt the making available right. The first section of Article 73 of the Act on Copyright established that the performer’s consent should be sought for making his performance available to the public by cable or any other device or in any other manner so that the members of the public can choose the place and time of the availability individually.

Once again, the Law followed the guidelines provided by both the 1996 WIPO Treaties and the Directive 2001/29 in relation to the wording of the definition of the right and its nature: an exclusive right subject to ‘performer’s consent’.

Nevertheless, this Law provided a tool of protection tending to promote the collective management of the right granted to performers to the detriment of an individual administration of these rights. As in the Portuguese case, the Hungarian legislation is aware of the need of protection of this right and the importance of the collective management as the only solution to avoid the complete loss of an exclusive right.

Thus, Article 91 of the Copyright Act stipulates an ‘opt-out’ system (or ‘extended collective administration’) of collective management. The principles of this system are based on an assumption of collective management of intellectual property rights. Therefore, by virtue of the first section of the article 91, collective management societies administer the intellectual property rights granted by the Copyright Act.
However, the second section of this article establishes that the provision of the first section shall not apply if a right holder covered by the society’s collective administration of rights objects beforehand in a written declaration to the authorisation of the use of his works or performances of neighbouring rights, within the framework of collective administration of rights. The organisation performing collective administration of rights shall comply with such a declaration, if it is made more than three months before the end of the calendar year.

Note that this provision provides a general assumption of collective management of the intellectual property right while it stipulates a mechanism to allow right holders to exclude the management of their right from the administration of the collective management society. In other words, collective management societies will manage these rights, unless a relevant right holder opts out from this legal system in order to administer the right on his/her own.

The difference between the Hungarian case and both the Spanish and the Portuguese ones arises from the legally binding nature of the collective management. While Portugal and Spain have opted for a compulsory collective management system, Hungary opted for an opt-out system that also entails the strengthening of the collective administration of the making available right.

In any case, all of these three frameworks attempt to ensure a proper protection of the making available right avoiding the practical elimination of an exclusive right and the subsequent vulnerability of performers in the digital environment.

4.3 The Beijing treaty as an example of improving the protection of the making available right

As already pointed out in the first section, both the WPPT and the Directive 2001/29 set up the making available right as an exclusive right. These instruments did not foresee an alternative to the transfer of the exclusive right so the protection granted by them became to some extent ineffective in relation to performers.

Fortunately, the option based on the possibility to grant a remuneration right once the making available exclusive right is transferred was established by the 2012 Beijing Treaty on Audiovisual Performances.

On the one hand, article 10 of the Beijing Treaty stipulated the exclusive making available right in a similar way to the WPPT and Directive 2001/29 some years ago. However, article 12 of this Treaty clearly established the possibility to provide a remuneration right in exchange for the transfer of the right in favour of the producer: 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 and 11.

Although this treaty is not applicable to performances fixed on phonograms but on audiovisual recordings, in our opinion it avoids possible doubts about the adequacy of establishing a remuneration right once the exclusive one is transferred. The European Union signed the treaty on January 19, 2013 which confirms the compatibility of the exclusive right with a remuneration system once the exclusive right is transferred.
5 Conclusions

As stated in Section 1 of this article, Title III of the Directive 2014/26/EU on multiterritorial licensing of online rights in musical works does not apply to the collective management of performers’ rights. Therefore, this article has intended to describe the specificities of the collective management of this kind of right holders and their ‘de facto’ situation, as regards to the online environment taking as a reference the regulation for authors.

We have to bear in mind that the exploitation of recording music usually entails the transfer of the performers’ exclusive rights by means of the recording agreement in favour of the producer. Provided that the making available right is one of the exclusive rights involved in said transfer, performers become vulnerable when facing the exploitation of their fixed performances through interactive services.

Some national lawmakers opted to revise the rigidity of the system established by both International and EU Law so that performers can take part in the profits arising from such exploitation acts (such as Spain, Portugal or Hungary). Legal mechanisms tending to protect performers once the exclusive right is transferred were granted in relation to the communication to the public of phonograms and the rental right in the scope of the EU Law. Therefore, a proper mechanism should be provided concerning the making available right.

In opinion of the authors of this article, the system laid down in Spain entails a fair balance among right holders while avoiding the lack of protection of performers in the online environment. This system manages to translate the protection granted in the ‘analogue’ environment to the online one.

References


The elements of the Directive 2014/26/EU

Notes


7 “Concerns continue to be raised that authors and performers are not adequately remunerated, in particular but not solely, as regards online exploitation. Many consider that the economic benefit of new forms of exploitation is not being fairly shared along the whole value chain. Another commonly raised issue concerns contractual practices, negotiation mechanisms, presumptions of transfer of rights, buy-out clauses and the lack of possibility to terminate contracts. Some stakeholders are of the opinion that rules at national level do not suffice to improve their situation and that action at EU level is necessary.” Public Consultation on the review of the EU copyright rules. European Commission, COM (2013, p.34).

8 “According to many authors and performers, in particular in the audio-visual sector, only the creation of an unwaivable remuneration right for the benefit of authors and performers, in particular if it is managed by collective management organisations, would be suitable to ensure adequate and fair remuneration in the case of online exploitation.” Report on the responses to the Public Consultation on the Review of the EU Copyright Rules. Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright (pp.80–81) [online] http://ec.europa.eu/internal_market/consultations/2013/copyrightrules/docs/contributions/consultation-report_en.pdf (accessed 15 January 2015).

9 “The performer shall have the exclusive right to authorise the communication to the public: b) In any case, of the fixations of his performances, by means of making available to the public in the manner laid down in Article 20.2.i).” Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.1.b).

10 “If the performer enters into contracts, either individually or collectively, with a phonogram or audiovisual recordings producer referring to the production of these it shall be assumed, except for agreement to the contrary in the contract and without prejudice to the unwaivable right to equitable remuneration to which the following Paragraph refers, that he has assigned his right to making available to the public to which Paragraph 1.b) refers”. Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.2.

11 “If the performer has assigned or transferred to a phonogram or audiovisual recordings producer his right of making available to the public to which Paragraph 1.b) refers with
reference to a phonogram or an original or a copy of an audiovisual recording, he shall preserve his unwaivable right to a equitable remuneration to be received by whom makes it available to the public". Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.3.

12 “The right to the remuneration referred to in Paragraphs 3, 4 and 5 refer shall be exercised through the copyright collecting societies. The exercise of the rights through the appropriate collecting societies shall include negotiation with users, the calculation, collection and distribution of the remuneration due and any other action necessary to ensure the effectiveness of the said rights”. Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.6.


14 “Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, 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”. WPPT, WIPO (1996), Article 10.

15 Provided that the Law makes a clear distinction between the making available right (referring to the definition established through article 20.2.i) and the communication to the public right, it must be understood that Sections 4 and 5 of Article 108 of the Law include the rest of modalities of public communication except the one referred by means of article 20.2. i).

16 The wording of this stipulation (in fine) can be applicable to the making available right, which lead to the redundancy of article 108.2 of the TRLPI: “Article 110. Where the performance is given in compliance with an employment or free-lance contract, it shall be understood, unless otherwise specified, that the employer or commissioning party acquires therein such exclusive rights to license reproduction and communication to the public as are provided for under this Title and may be deduced from the nature and subject of the contract. The provisions of the foregoing paragraph shall not apply to the remuneration rights recognised in paragraphs 3, 4 and 5 of Article 108 of this Act”. Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.4 and 108.5. The difference of both provisions is based on the relevant instrument through which the transfer or transmission of the exclusive rights is made: while the public communication (and reproduction) the transfer requires an employment or free-lance agreement, the making available exclusive right can be transferred through a broader list of legal instruments since article 108.2 of the TRLPI refers to “production agreements” of phonograms and audiovisual recordings.

17 “The exercise of the right through the appropriate collecting societies shall include negotiations with users, the calculation, collection and distribution of the remuneration due and any other action necessary to ensure the effectiveness of the said rights” Royal Legislative Decree 1/966, dated 12th April, enacting the consolidated text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the current legal provision on the subject, Article 108.6.

18 Some provisions regarding tariffs have been added by means of the recent Law 21/2014 of November 4, amending the Intellectual Property Law.

19 iTunes (the Apple store for Music), is an example of this kind of services that make phonograms available to the public.

20 Services based on making phonograms available to the public through streaming have become more and more popular. Services such as Spotify or Deezer allow users to access specific phonograms without the need to download them.

21 Notwithstanding the legal restrictions to access the different services from other countries.

22 There are many services providing this kind of music service (such as Last.fm, one of the pioneers). Nevertheless, there are other services such as Spotify and Deezer that also provide radio stations through which a public communication is carried out.

24 CA Paris, Pole 5, 12th Ch., 22 March 2011.

