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Right to equitable remuneration versus exclusive rights – more protection for performers?

This short contribution is dedicated to my dear and esteemed colleague Dr. Pal Tomori with whom I have the pleasure to work with for nearly thirty years now. I am honored to have the chance to contribute to his Liber Amicorum and I wish him all the best for the coming years.

1. Exclusive rights versus remuneration rights

When it comes to copyright – or especially performers' neighboring rights – one cornerstone is the exploitation rights providing the creator (authors or performers) the possibility to benefit from the exploitation of their creative contribution by other users. There are two different mechanisms established well nationally and internationally. The so-called exclusive rights, which can be transferred – or on which basis licenses can be granted – or the so-called rights to equitable remuneration or remuneration rights, which are provided for certain uses allowed by law.

The exclusive rights have the advantage to keep control of any use. The rightholder can decide to whom rights are granted or not and on which conditions. They can be sold in the limits of the provisions of contractual law. Since they are the basis to prohibit any unauthorized use, they are often regarded as stronger than remuneration rights. But is that really the case?

Remuneration rights are – often explicitly by law or at least by legal tradition – regarded as unwaivable and unalienable. In many countries they can also be exercised – on the basis of compulsory collective management – only by collective management organisations. Sometimes the same protection results by the legal restriction of

* Az AEPO-ARTIS (The Association of European Performers' Organisations) elnöke, a SCAPR elnökségi tagja, a GVL igazgatója.

their transferability. In many countries they can only be transferred in advance to a collecting society.

This enables the authors or performers, who are in a weak bargaining position towards their producers, to keep these rights, while exclusive rights will be transferred by contract to the producer.

2. Case: Broadcasters claim based on transferred authors' and performers' rights

In Germany, where I come from, we had a very practical case to see how important this difference is. Under German Law, broadcasters are granted a specific neighboring right for their broadcasts. However, this is much more limited than the neighboring right of performers. It does not provide a right of communication to the public in venues, which can be accessed without entrance fees. Only in case of an entrance fee they do have this right based on Art. 8 para. 3 EU-Rental-Directive 2006/115/EG. Since most of the public places playing radio or TV do not charge an entrance fee, these cases were very limited and no significant income could be generated based on the broadcasters' neighboring rights from public performance. Due to that, the Collective Management Organisation of Commercial broadcasters in Germany tried to monetize these uses by venues without entrance fees based on the transfer of the respective rights of authors and performers, who had contracts with their broadcasters.

In these contracts all rights for communication to the public were transferred or exclusively granted to the broadcasters. On this basis their Collective management organization claimed payments from the public venues based on the derivative rights of authors and performers. Regarding the authors' rights this was legally valid, since authors are being granted exclusive rights based on Art. 22 German Copyright Act. The international basis for this exclusive right for communication to the public are Art. 11 para. 1 No. 2, Art. 11bis para. 1 No. 1 and 2 and Art. 11ter para. 1 Berne Convention. The basis in the European Acquis is Art. 3 para. 1 EU-InfoSoc-Directive 2001/29/EG.

For performers, the situation is different: Based on Art. 78 para. 2 No. 2 and 3 German Copyright Act they are owner of an unwaivable and unalienable right to equitable remuneration, which can be transferred in advance only to a collective management

organization. The international provision is Art. 12 Rome Convention and Art. 15 WPPT. The basis in the European Acquis is Art. 3 para. 2 No. 1 EU-InfoSoc-Directive 2001/29/EG.

Because of that provision the transfer in advance to the broadcasters was invalid and they were unable to entrust their Collective management organization with these performers' rights. The Collective management organization quickly confirmed to GVL, the German Performers' rights management organisation, that their claim for payments from public venues was only based on the transferred copyrights from contracted authors, but not on performers. They were unable to keep these rights, since no limitation of the transfer of rights applies in case of these exclusive rights.

This is a good example of the strength of remuneration rights towards exclusive rights – at least when creators – be it authors or performers – are in a weak bargaining position.

3. Strengthening of bargaining power by the DSM-Directive? German Experience

One could argue that this deficiency has now been removed by the new provisions on fairness of contracts, especially the contract adjustment provisions provided by Art. 20 EU-DSM-Directive 2019/790. Based on the right to transparency on income generated by the artistic contribution in Art. 19 EU-DSM-Directive 2019/790, performers and authors can claim additional payments if the original payment was unfair and out of proportion to the income generated. This is intended to correct the imbalance caused by the weak bargaining position of performers when they close the contract. But does it lead to fairness as intended? In Germany we have a similar provision for more than 20 years now in Art. 32 lit. a German Copyright Act. Based on this provision some performers sued their producers and claimed additional payments – and even succeeded. But did it work?

One compelling example is the case of the dubbing actor Marcus Off, who dubbed Johnny Depp alias Jack Sparrow in the first episodes of "Pirates of the Caribbean". For the first three episodes, which were extremely successful in Germany, he received 9.308 € in total. Based on the right to additional payments he sued Disney and asked for additional payment due to the success of the movies. The German District Court in Berlin

adjudicated him 67.315 € additionally as an appropriate payment.[1] He got the money but then was replaced for the fourth episode by another dubbing actor and lost his job. This shows the limits of contractual payments based on an exclusive right.

This example shows the advantages of remuneration rights quite clearly. But can they be extended to performers in audiovisual works? The traditional area where remuneration rights apply is the broadcasting or communication to the public of commercial phonograms. Here the system is well established and contributes to the most income generated by performers' rights management organisations. But couldn't it also be applied to audiovisual? A chance to do so is the implementation of the Beijing Treaty[2] into European law, what we are still waiting for.

4. Remuneration right for communication to the public of audiovisual works?

One example for equitable remuneration for broadcasting of videograms is the Swiss legislation: In Swiss law equitable remuneration has to be paid for the broadcasting of commercial videograms according to Art. 35 Swiss Copyright Act. The Swiss Collecting Society for Performers Swissperform sued the Broadcasters to pay equitable remuneration for the broadcasting of commercial videograms, available as DVD, videotape or on Online-platforms. The broadcaster claimed that the technical format they use for broadcasting is different from those for home entertainment. The Swiss Federal Tribunal Bundesgericht decided, that this is irrelevant, since it is the same film covered by the remuneration right.[3] Based on this decision, Swissperform collects for broadcasting of phonograms as well as for videograms. This additional collection had no negative impact on the salaries paid to the actors, who could increase their income.

A similar provision exists in Germany for broadcasting and for communication to the public – as mentioned below. They guarantee the permanent income for performers – also those in a weak bargaining position.

1 Judgement Kammergericht Berlin from 29.11.2010, 24 U2/10, https://openjur.de/u/172606.html.

2 Beijing Treaty on Audiovisual Performances, June 24, 2012.

3 Judgement Bundesgericht from 20.08.2012, 2C_146/2012.

5. Impact for the ratification of Beijing Treaty

In order to keep this protection in future, The EU would have to express a declaration to Art. 11 Beijing Treaty – at least as a 'Grandfather clause' to allow member states to continue with remuneration rights instead of introducing exclusive rights. By default, Art. 11 para 1 Beijing Treaty provides an exclusive right for performances fixed in audiovisual fixations for broadcasting and communication to the public. However, according to para 3 any party can declare, not to provide any protection at all. According to para. 2 contracting parties can also establish a right to equitable remuneration, similar to Art. 15 WPPT. This right to equitable remuneration should be kept by a respective declaration – to the benefit of performers in audiovisual works, who are unable to negotiate a fair payment for their rights due to their weak bargaining power. This remuneration right can only be introduced for Art. 11, but not for the making available right in Art. 10 Beijing Treaty, Art. 3 para. 2 lit. a EU-InfoSoc-Directive 2001/29/EG. Here only an exclusive right can be introduced. But a fair payment might be achieved based on an additional direct remuneration right to be administered by the Performers' rights management organisation similar to the rental right in Art. 5 EU Rental-Directive 2006/115/EG. This right to provide a fair remuneration as stated in Art. 18 EU-DSM-Directive 2019/790 could also be introduced in those member states, where Art. 11 para. 1 Beijing Treaty is an exclusive right. The introduction of an additional direct remuneration right does not require an explicit declaration of the Beijing Treaty, but can be added during the implementation in those member states lacking a remuneration right and implementing the exclusive right for broadcasting and communication to the public of audiovisual recordings. Based on this, all performers in audiovisual works could receive a fair payment – without the risk to be blacklisted afterwards.