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Support for structured policy dialogue, coordination of the  
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## Assessment Report

# Assessment of the current Copyright Law of the Republic of Moldova, and the draft amendments for harmonisation with EU legislation and International Treaties

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Related to project activities:

C.3.4.1. Support in legal drafting (amending the Copyright Law) and transposing the EU directive(s) on the collective management system

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## Acronyms

Term	Explanation
<b>AA</b>	Association Agreement
<b>AGEPI</b>	State Agency on Intellectual Property of the Republic of Moldova
<b>ANPFI</b>	National Association of National Producers of Phonograms and Interprets of the Republic of Moldova
<b>ATIC</b>	National Association of ICT Companies of the Republic of Moldova
<b>CJEU</b>	Court of Justice of the EU
<b>EC</b>	European Commission
<b>EU</b>	The European Union.
<b>FIA</b>	Foreign Investors Association in the Republic of Moldova
<b>GD</b>	Government Decision
<b>GDO</b>	Gross Domestic Product
<b>IFRRO</b>	International Federation of Reproduction Rights Organisations
<b>Moldova</b>	The Republic of Moldova.
<b>MS</b>	Member State (Eu)
<b>TRIPs</b>	Trade-related Aspects of Intellectual Property Rights
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>WIPO</b>	World Intellectual Property Organization
<b>WPPT</b>	WIPO Performances and Phonograms Treaty



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# 1 Introduction to the relevant international treaties and the EU acquis

This Report includes an analysis of the draft amendment to Law no. 139/2010, in relation to the provisions of the international treaties in the field to which the Republic of Moldova is a party, as well as the relevant European directives.

## 1.1 International treaties

According to the information provided on the website of the State Agency for Intellectual Property (AGEPI), as well as on the website of the World Intellectual Property Organization (WIPO), the Republic of Moldova is a party to the following international conventions and treaties in the field of copyright and related rights:

**Berne Convention** for the Protection of Literary and Artistic Works (1886), Paris Act from 1979, Accession: August 1, 1995, In Force: November 2, 1995;

**Rome Convention** for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), Accession: September 5, 1995, In Force: December 5, 1995;

**Convention** for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), Accession: April 17, 2000, In Force: July 17, 2000;

**WIPO Copyright Treaty (WCT)**, 1996), Ratification: March 13, 1998, In Force: March 6, 2002;

**WIPO Performances and Phonograms Treaty (WPPT)**, 1996), Ratification: March 13, 1998, In Force May 20, 2002;

**Beijing Treaty** on Audiovisual Performances (2012), Ratification: September 4, 2015, In Force April 28, 2020;

**Marrakesh Treaty** to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013), Ratification: February 19, 2018, In Force January 19, 2018<sup>1</sup>;

**Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)** (1994), In force July 26, 2001.

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<sup>1</sup> The date of May 19, 2018 is mentioned on the WIPO website.



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## 1.2 The European Acquis

### 1.2.1 European directives that can be fully transposed

- **DIRECTIVE 93/83/EEC** on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
- **DIRECTIVE 96/9/EC** on the legal protection of databases;
- **DIRECTIVE 2001/29/EC** on the harmonization of certain aspects of copyright and related rights in the information society;
- **DIRECTIVE 2001/84/EC** on the resale right for the benefit of the author of an original work of art;
- **DIRECTIVE 2004/48/EC** on the enforcement of intellectual property rights;
- **DIRECTIVE 2011/77/EU** amending Directive 2006/116/EC on the term of protection of copyright and certain related rights;

#### Codified versions:

- **DIRECTIVE 2006/115/EC** on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version, Directive 92/100/EEC is hereby repealed);
- **DIRECTIVE 2006/116/EC** on the term of protection of copyright and certain related rights (codified version, Directive 93/98/EEC is hereby repealed);
- **DIRECTIVE 2009/24/EC** on the legal protection of computer programs (codified version, Directive 91/250/EEC is hereby repealed).

### 1.2.2 European directives that can be partially transposed

- **DIRECTIVE 2014/26/EU** on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. This Directive is partially transposed, respectively TITLE I - General provisions, TITLE II - Collective management organizations, TITLE IV- Enforcement measures. The provisions on independent management entities and TITLE III (Multi-territorial licensing of online rights in musical works by collective management organizations will not be transposed);
- **DIRECTIVE (EU) 2017/1564** on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society may be partially transposed (Articles 4 and 6 do not need to be transposed, as imports and exports are carried out in accordance with national law adopted under the Marrakesh Treaty);
- **DIRECTIVE (EU) 2019/789** laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, and amending Council Directive 93/83/EEC - Article 9 Amendment to Directive 93/83/EEC;
- **DIRECTIVE (EU) 2019/790** on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC - Article 12 Collective licensing with an extended effect, Article 14 Works of visual art in the public domain, Article 17 Use of protected content by online content-sharing service providers.



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The authorities of the Republic of Moldova must also consider the possibility of transposing Art. 18 The principle of adequate and proportionate remuneration; art. 19 Obligation of transparency; art. 20 Contract adjustment mechanism; art. 21 Alternative dispute resolution procedure; art. 22 The right of revocation; art. 23 Common provisions.

In this respect, I mention Recital 72 *Authors and performers tend to be in the weaker contractual position when they grant a license or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonized under Union law. That need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts.*

### **1.2.3 European directives that cannot yet be transposed in the Republic of Moldova**

- **DIRECTIVE 2012/28/EU** on certain permitted uses of orphan works.



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## 2 General observations concerning the legal transposition process

In the process of legislative transposition, it is necessary to take some recitals, which clarify or complete a series of articles of the European directives, and to study the relevant practice of the Court of Justice of the European Union.

It is necessary to restore the tables of concordance for all European directives that will be transposed into national law.

Is recommended the regulation:

- of some essential notions for copyright and related rights, such as the assignment contract and the command contract;
- of the exclusive right of *rebroadcasting*, in accordance with the Rome Convention (Articles 3 g), 7 and 13). *Rebroadcasting means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization;*
- of audiovisual performances in accordance with the provisions of the Beijing Treaty on Audiovisual Interpretations and Performances, which entered into force on 28 April 2020.

The authorities of the Republic of Moldova must analyze the possibility of transposing Article 17 of Directive (EU) 2019/790, thus deleting Article 66. *Infringement of copyright and related rights through computer networks* in Law 139/2010. In this respect, please take into account the clarifications in Recitals 64 and 65 of Directive (EU) 2019/790, on the separate application of the provisions of **Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market**, as well as the provisions of EU Directive 2019/790.

*(64) It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorization, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.*

*(65) When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. That should not affect the application of Article 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive.*





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### 3 DIRECTIVE 93/83/EEC ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION

In the draft amendment and completion of Law no. 139/2010, there are provisions regarding the incomplete and incorrect transposition of the provisions of Directive 93/83/EEC

- cable retransmission, respectively Article 3, Article 11 (5) - (8) and Article 51<sup>2</sup> (9);
- communication to the public by satellite – transposition of Articles 1(2) and 3 was not insured.

#### 3.1 RECOMMENDATIONS REGARDING THE RIGHT TO CABLE RETRANSMISSION:

##### 3.1.1 TRANSPOSITION OF THE DEFINITION OF THE RIGHT OF RETRANSMISSION BY CABLE,

as provided in art. 9 of *DIRECTIVE (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs, and amending Council Directive 93/83/EEC*<sup>2</sup>.

##### 3.1.2 TRANSPOSITION OF THE PROVISIONS ART. 9 (2) OF DIRECTIVE 93/83/EEC

which lays down the following: *Where a rightsholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightsholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightsholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightsholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.*

This also ensures compliance with the provisions of Directive 2014/26/EU, in particular the provisions regarding the rightsholders choice in respect of a collective management organization (Article 5 and Recital 19 - *Where a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights, rightsholders' choice would be limited to other collective management organizations*).

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<sup>2</sup> Article 9, Amendment to Directive 93/83/EEC

For the purposes of this Directive, "cable retransmission" means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public, regardless of how the operator of a cable retransmission service obtains the programme carrying signals from the broadcasting organization for the purpose of retransmission.'



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Taking into account these provisions, it is necessary to reanalyze art. 51<sup>2</sup> (9) of Law no. 139/2010, in order to eliminate the confusion between the legal notion of authorization of a collective management organization and the notion of designation of a single collector. These issues are discussed in detail in the section on collective management organizations.

### **3.1.3 REPEAL OF GOVERNMENT DECISION NO. 641/2001 ON THE MINIMUM TARIFFS OF AUTHOR'S REMUNERATION**

In the Republic of Moldova, the remunerations due by users, including in the case of the right of cable retransmission, are established by Government Decision no. 641/2001 on the minimum tariffs of the author's remuneration, normative act issued in accordance with art. 25 of the Law on copyright and related rights no. 293-XIII of November 23, 1994

This aspect is also noted in the Information Note on the draft amendment and completion of Law no. 139/2010, more precisely „*Currently, the minimum amount of copyright for the retransmission fee is 5.6% of the amount received from subscribers (3.2% - copyright and 2.4% - related rights) or by agreement - monthly or quarterly fee for the entire volume of issues, established in the contract, according to the Government Decision no. 641/2001 on the minimum tariffs of author's remuneration. It should be noted that this is the minimum amount from which the parties can negotiate the amount of the remuneration for the retransmission right. Considering that the maximum amount is not regulated, in practice this legal provision is applied in an incorrect and unilateral manner.*”

**3.1.4 ELIMINATION OF ARTICLE 11(5<sup>1</sup>),** considering the fact that the tariffs that the collective management organizations charge to the users do not have to be established in the content of Law no. 139/2010, amended and supplemented.

Article 11(5<sup>1</sup>) of the draft amendment and completion of Law no. 139/2010 is one of the main divergent aspects between AGEPI, collective management organizations and users in the Republic of Moldova.

Both AGEPI and the collective management organizations and users in the Republic of Moldova seem to agree that remedying this situation requires the legal indication of the remuneration for the right to cable retransmission, the only problematic issue being the amount of remuneration, respectively:

- **2.8%** of the amount received from subscribers, without value added tax, but not less than 1 lei per subscriber per month (AGEPI);
- **3%** of the revenues obtained from the activity of retransmission of program services, without value added tax, but not less than 1 lei per subscriber per month (collective management organizations AN «COPYRIGHT» and ANPFI);
- the maximum limit of **0.5%**, without value added tax, calculated from the revenues obtained from the retransmission of program services, but not less than 0.5 lei per subscriber per month (ATIC, AmCham Moldova, FIA and ARAX IMPEX).

The solution chosen for amending and supplementing Law no. 139/2010 does not comply with the provisions of Directive 93/83/EEC and those of Directive 26/2014/EU, nor does it ensure the establishment of reasonable and motivated tariffs to be applied uniformly and transparently in relation to cable operators.



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Thus, by directly establishing in the content of Law no. 139/2010 of the percentage due for cable retransmission, regardless of its value (3%, 2.8% or 0.5%), the following issues arise:

- **The subsequent modification of these tariffs implies a difficult and long procedure, necessary to amend a special law,**
- **Absence of negotiation,** mandatory procedure for determining the amount of remuneration and authorization of the cable retransmission right, according to Recital 34 and Article 12 of Directive 93/83/EEC, as well as Recital 31 and Article 16 of Directive 2014/26/EU:
  - the possibility for Member States to regulate the activities of collecting societies should not prejudice the freedom of contractual negotiation of the rights provided for in this Directive, on the understanding that such negotiation takes place within the framework of general or specific national rules with regard to competition law or the prevention of abuse of monopolies (Recital 34)
  - Member States shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification (Article 12 (1) Prevention of the abuse of negotiating positions)
  - *Collective management organizations and users should therefore conduct licensing negotiations in good faith and apply tariffs which should be determined on the basis of objective and non-discriminatory criteria* (Recital 31 of Directive 2014/26/EU)
  - Member States shall ensure that collective management organizations and users conduct negotiations for the licensing of rights in good faith. Collective management organizations and users shall provide each other with all necessary information (...) Rightsholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization. Collective management organizations shall inform the user concerned of the criteria used for the setting of those tariffs (Article 16)
- **Absence of mediation.** Directive 93/83/EEC expressly regulates the procedure for mediation in the case of the right of cable retransmission, in Recital 30 and Article 11:
  - *whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task is to assist negotiations and who may submit proposals; whereas any such proposals and any opposition thereto should be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents, in particular as set out in existing international conventions* (Recital 30)
  - Article 11 Mediators
    1. *Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.*



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2. *The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.*

3. *It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.*

4. *The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt.*

### **3.1.5 ESTABLISHING A LEGAL PROCEDURE REGARDING THE TARIFFS<sup>3</sup>, a procedure that applies even in the case of cable retransmission and that requires the following steps to be completed: NEGOTIATION, MEDIATION/ARBITRATION, COURT.**

Negotiation and mediation in case of cable retransmission, respectively reference to the provisions of Article 48 (14) - (16)<sup>4</sup> of Law no. 139/2010 operates hypothetically. These two legal procedures are not intended to be used exclusively in direct relations with each user, but involve unitary application at the branch level and ensure the necessary transparency, by publishing the tariffs in the Official Gazette.

The right of cable retransmission is an exclusive patrimonial right, which belongs to the authors and holders of rights.

Cable operators must obtain, for each part of a retransmitted program, the authorization of all rightsholders, on the basis of contracts, for the proper conduct of which compulsory collective management has been imposed. In those circumstances, *the authorization right as such remains intact (the right to authorize a cable retransmission can still be assigned and the exercise of moral rights is not affected) and only the exercise of this right is regulated through the obligation to have recourse to a collecting society* (Recital 28)

The principle of contractual freedom governs the right of cable retransmission (Recital 13, 30 and Article 8), contractual arrangements regarding the authorization of cable retransmission should be promoted by additional measures; whereas a party seeking the conclusion of a general contract should, for its part, be obliged to submit collective proposals for an agreement (Recital 30)

Analyzing the Information Note on amending and supplementing Law no. 139/2010, as well as the observations of the collective management bodies and those of the users, identify the realities existing in the Republic of Moldova, the potential of the market of copyright and related

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<sup>3</sup> Remuneration due by users to collective management organizations both in the case of exclusive rights and in the case of rights to remuneration

<sup>4</sup> (14) The collective management organization shall determine the amount of remuneration, as well as other licensing conditions applicable to the methods of capitalization of the objects whose rights have been delegated to it in management, based on negotiations with the persons obliged to pay the remuneration or with the associations that represent them.

(15) If the interested parties cannot agree on the amount of remuneration and other licensing conditions, either party may appeal to the Mediation Commission or to the Intellectual Property Arbitration established by AGEPI.

(16) The amount of the remuneration that is established through negotiations or mediation may not be lower than the minimum tariffs of the author's remuneration, approved by the Government or provided by the present law.



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rights, as well as objective criteria proposed by users for negotiating tariffs in case of cable retransmission.

In the content of the Information Note to the draft law for the modification of some normative acts, AGEPI motivates the introduction of art. 11 (5<sup>1</sup>), respectively *the percentage of 2,8% of the amount received from subscribers, without value added tax, but not less than 1 lei per subscriber per month thus*

- *"the amount of 2.8% for the retransmission right without VAT is considered to be a reasonable one, respectively, based on this calculation, the annual amount collected by the collective management organization approved with this right would constitute approximately 8,360,800 lei";*
- *The basis for establishing this amount was the Report "DEVELOPMENT OF ELECTRONIC COMMUNICATIONS IN THE REPUBLIC OF MOLDOVA, 2019" prepared by the National Agency for Regulation in Electronic Communications and Information Technology (ANRCETI). According to the ANRCETI Report, in 2019 there were 335,436 subscribers to paid TV services (154.9 thousand are subscribers of cable TV networks, and 180.5 thousand - of IPTV services), and the average monthly income per user of pay-TV service providers is 39.1 lei. As a result, revenues from audiovisual broadcasting services amount to 298.6 million. lei.";*
- *Payments for technical access as well as for the maintenance and servicing of the equipment used for retransmission may not be the basis for the calculation of the author's remuneration for cable retransmission.*

The collective management organizations AN COPYRIGHT and ANPFI claim that the 3% percentage *"was negotiated with the distributors of media services in the process of collecting remunerations during the years 2015-2020, being an acceptable and applicable one"*

ARAX IMPEX points out that the current draft law *"does not bring a security in order to establish the remuneration and does not bring a plausible justification regarding the established amount, considering that today the issue of this rule is not only the amount of remuneration of 5.6%, but also the wording "minimum amount", which leaves room for abuse and the possibility to request a maximum of 100% of the revenues obtained from the provision of audiovisual services"*. In these circumstances, the cable industry calls for *"the establishment of a maximum quota within which to negotiate and subject to a number of criteria such as:*

- a) *the economically necessary proportionality between the amount of remuneration and the average income per user from the provision of publicly accessible audiovisual program services,*
- b) *the amount of remuneration applied on comparable markets, in relation to the purchasing power per capita"*

At the same time, AmCham Moldova, ATIC and FIA claim that *"the parties should be able to negotiate this amount depending on the type of network through which the retransmission is performed, the number of retransmitted channels, the format (quality) of the retransmitted channels (SD, HD, 4K), the revenues obtained from the retransmission, the number of subscribers, the income per subscriber, etc"*



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They are being discussed “*the much smaller size of GDP per capita and, respectively, the level of purchasing power of the population in Moldova (which are tens of times lower than in other European countries) and the total market value of the services for the transmission and retransmission of audiovisual programs (about 300 million lei) and also the license fee for the right to retransmit program services, .... is very high, especially for foreign stations.*

In addition to the above, it should be borne in mind that at this time in the Republic of Moldova, collective management bodies approved or in the process of approval:

- manages, according to the object of activity, both copyright and related rights;
- hold in their repertoire only musical works and their interpretations (only the authors of musical works, performers and producers of phonograms are represented);
- they do not manage written works, works of fine art, photographic works, cinematographic works, videograms.

## **3.2 RECOMMENDATIONS REGARDING PUBLIC COMMUNICATION BY SATELLITE**

### **3.2.1 DEFINITION OF BROADCASTING INCLUDES PUBLIC SATELLITE COMMUNICATION**

According to Article 4 (2) of Directive 93/83/EEC the expression '*broadcasting by wireless means*' in Directive 92/100/EEC shall be understood as including communication to the public by satellite.

**3.2.2 TRANSPOSITION OF THE PROVISIONS OF ARTICLE 1 (2) AND ARTICLE 3 OF DIRECTIVE 93/83/EEC.** Art. 3 - *The acquisition of broadcasting rights* explicitly authorizes the granting of extended collective licenses, an important provision for the collective management of rights.



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## 4 DIRECTIVE 96/9/EC ON THE LEGAL PROTECTION OF DATABASES

In the draft amendment and completion of Law no. 139/2010, there are articles regarding the incomplete transposition of Directive 96/9/EC, at Articles 40-44 and at Article 3 (database definition).

### 4.1 RECOMMENDATIONS:

#### 4.1.1 TRANSPOSITION OF CHAPTER II - COPYRIGHT, RESPECTIVELY ARTICLE 3 - OBJECT OF PROTECTION, ART. 4 – DATABASE AUTHORSHIP AND ART. 5 - RESTRICTED ACTS.

In respect to exceptions to the database author's rights (Article 6, restricted acts), *should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes* (Recital 35). Thus, **it is necessary to introduce a new article, which should provide exceptions regarding the database author's rights**, similar to Article 42 of Law no. 139/2010, article that provides exceptions regarding the rights of database producers.

It is essential to consider the following issues:

- *Whereas copyright remains an appropriate form of exclusive right for authors who have created databases (Recital 5);*
- *copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database (Recital 35);*
- *whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database (Recital 15);*
- *no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied (Recital 16);*
- *the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive (Recital 28);*
- *the copyright protection of databases includes making databases available by means other than the distribution of copies (Recital 31);*
- *Article 10 (1) of the Berne Convention is not affected by this Directive (Recital 37).*

#### 4.1.2 REPHRASE OF THE DEFINITION OF DATABASES, TAKING INTO ACCOUNT THE FOLLOWING:

- *the term "database" should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data*



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*or other materials which are systematically or methodically arranged and can be individually accessed (Recital 17);*

- *this Directive protects collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes (Recital 13);*
- *protection under this Directive should be extended to cover non-electronic databases (Recital 14);*
- *the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner (Recital 21);*
- *protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems (Recital 20);*
- *electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-I (Recital 22).*

Does not fall within the scope of this Directive:

- *a recording or an audiovisual, cinematographic, literary or musical work as such (Recital 17);*
- *the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right (Recital 19);*
- *computer programs used in the making or operation of a database (Recital 23).*

#### **4.1.3 ESTABLISHING SANCTIONS IN CASE OF VIOLATION OF THE PROVISIONS ON DATABASES, IN ORDER TO TRANSPOSE ARTICLE 12 - REMEDIES**

*In addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database (Recital 57).*

The existing provisions in the Contravention Code<sup>5</sup> and those in the Criminal Code<sup>6</sup> do not meet the requirements of Directive 96/9/EC on appropriate sanctions against unauthorized extraction and re-utilization of the contents of a database.

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<sup>5</sup> Art. 96 (1) Infringement of copyright or related rights, if it does not constitute a crime, committed by:

a) the reproduction of works or objects of related rights in the course of entrepreneurial activity tangential to intellectual activity in the field of copyright and related rights, especially in the field of literature, art and science, for the purpose of marketing or offering for sale, import, export, as well as the storage, transport of copies of works or phonograms for the purposes mentioned, or any other form of capitalization of the objects of copyright or related rights for the purpose of obtaining profit, without the consent of the rights holder;

<sup>6</sup> Article 185<sup>1</sup>. (1) The infringement of copyright and related rights, if it is in large proportions, committed by:

a) the reproduction of works or objects of related rights in the course of entrepreneurial activity tangential to intellectual activity in the field of copyright and related rights, especially in the field of literature, art and science, for the purpose of marketing or offering for sale, import, export, as well as the storage, transport of copies of works or phonograms for the purposes mentioned, or any other form of capitalization of the objects of copyright or related rights for the purpose of obtaining profit, without the consent of the rights holder



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**4.1.4 TRANSPOSITION OF ARTICLE 15** *Binding nature of certain provisions* (Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void).

**4.1.5 DISTINCT REGULATION OF DATABASES, IN A CHAPTER/SECTION THAT DOES NOT INCLUDE WORKS AND OBJECTS PROTECTED BY RELATED RIGHTS, IN THE PUBLIC DOMAIN.**



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## 5 DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

Directive 2001/29/CE serves to implement a number of the new international obligations, including the *WIPO Copyright Treaty* (WCT) and of the *WIPO Performances and Phonograms Treaty* (WPPT) which update the international protection for copyright and related rights significantly, not least with regard to the so-called 'digital agenda', and improve the means to fight piracy world-wide.

The Republic of Moldova is a party to those treaties, both ratified in 2002.

The main aspects covered by this European directive are:

- Rights (Article 2-4)
- Limitations and exceptions (Article 5)
  - a) One mandatory exception to the reproduction right (Article 5 (1)<sup>7</sup>
  - b) Exceptions and limitations to the reproduction right (art. 5 alin. (2));
  - c) Exceptions and limitations from the rights of reproduction, public communication and making available to the public (Article 5 (3)).

### 5.1 A. EXCEPTIONS AND LIMITATIONS

This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public (Recital 32) and safeguards A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter (Recital 31).

The only mandatory exception to the reproduction right, provided for in Directive 2001/29/EC, is correctly transposed in Article 25 of the draft amendment and completion of Law no. 139/2010 (and Article 38).

Article 5 (2) of Directive 2001/29/EC regulates, in the case of the exclusive right of reproduction, 5 optional exceptions and limitations

- **2 cases in which fair compensation can be provided** according to the cultural policy of each state, according to Recital 36 (The Member States may provide for fair compensation for rightsholders also when applying the optional provisions on exceptions or limitations which do not require such compensation)
  - (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
  - (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the

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<sup>7</sup> Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.



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preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

- **3 cases in which the condition that the rightsholders receive fair compensation is expressly provided**, respectively:
  - (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightsholders receive fair compensation;
  - (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned;
  - (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightsholders receive fair compensation.

### **The concept of fair compensation**

The Court of Justice of the European Union has ruled that *The concept of ‘fair compensation’, within the meaning of Article 5(2)(b) of Directive 2001/29/EC is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on the Member States to determine, within the limits imposed by European Union law in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation (Case C-467/08)*

*When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightsholders resulting from the act in question. In cases where rightsholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightsholder would be minimal, no obligation for payment may arise. (Recital 35)*

### **The criterion of the harm**

The Court of Justice of the European Union has ruled that (Case C-467/08):

- *as regards the role played by the criterion of the harm suffered by the author in the calculation of fair compensation, it is apparent from recitals 35 and 38 in the preamble to Directive 2001/29 that the purpose of fair compensation is to compensate authors ‘adequately’ for the use made of their protected works without their authorization. In order to determine the level of that compensation, account must be taken – as a ‘valuable criterion’ – of the ‘possible harm’ suffered by the author as a result of the act of reproduction concerned, although prejudice which is ‘minimal’ does not give rise to a payment obligation. The private copying exception must therefore include a system ‘to compensate for the prejudice to rightsholders’ (point 39)*



- *the word ‘compensate’ in recitals 35 and 38 in the preamble to Directive 2001/29 expresses the intention of the European Union legislature to establish a specific compensation scheme triggered by the existence of harm to the detriment of the rightsholders, which gives rise, in principle, to the obligation to ‘compensate’ them (point 41)*
- *fair compensation must be regarded as recompense for the harm suffered by the author (point 40)*

### **Reprography and private copying, limitations to the reproduction right**

The Court of Justice of the European Union has ruled that Cases C-457/11 C-460/11:

- *In Article 5, the European Union legislature, in the very title of that article, makes a distinction between, first, exceptions and, secondly, limitations to the exclusive right of rightsholders to authorize or prohibit the reproduction of their protected works or other subject-matter (point 33);*
- *Accordingly, that exclusive right may, depending on the circumstances, be either, as an exception, totally excluded, or merely limited. It is conceivable that such a limitation may include, depending on the particular situations that it governs, in part an exclusion, a restriction, or even the retention of that right (point 34);*
- *That distinction in the legislation should therefore be given effect (point 35);*
- *By contrast, where a Member State has decided not to exclude completely the right for the rightsholders to authorize reproduction of their protected works or other subject-matter, but merely to introduce a limitation of that right, it is necessary to establish whether, in the particular case, the national legislature intended to preserve the reproduction right from which the authors benefit. (point 38);*
- *Where, in the particular case, that reproduction right has been preserved, the provisions relating to fair compensation cannot apply, given that the limitation provided for by the national legislature does not allow a reproduction to be made without the authorization of the authors and, therefore, it does not cause the type of harm for which fair compensation would constitute recompense. Conversely, where, in the particular case, the reproduction right has not been retained, the act of authorization does not affect the harm caused to the authors and cannot therefore have any bearing on the fair compensation owed (point 39);*
- *in the context of an exception or limitation provided for by the relevant provision of Directive 2001/29, an act by which a rightsholder may have authorized the reproduction of his protected work or other subject-matter has no bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis under the relevant provision of that directive (point 40).*

### **Common issues of reprography and private copying according to CJEU practice**

- *there is some overlap between the respective ambits of the provisions setting out the reprography exception and those setting out the private copying exception (point 33 C 572/13 HP/Reprobel);*
- *the case-law of the Court concerning the criterion of harm must apply in the context of both the private copying exception and the reprography exception (point 68 C 572/13 HP/Reprobel).*



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## **SHEET MUSIC**

*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music (Case C 572/13 HP/Reprobel)*

## **UNLAWFUL SOURCES**

*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude such legislation which introduces an undifferentiated system for recovering fair compensation which also covers counterfeit reproductions made from unlawful sources. (Case C-435/12 ACI Adam/Stichting de ThuisKopie, Case C-463/12 Copydan Båndkopi/Nokia Danmark, Case C-572/13 HP/Reprobel);*

## **DEVICE WHICH BELONGS TO A THIRD PARTY**

*Directive 2001/29 does not preclude national legislation which provides for fair compensation, in accordance with the exception to the reproduction right, in respect of reproductions of protected works made by a natural person by or with the aid of a device which belongs to a third party (Case C-463/12 Copydan Båndkopi/Nokia Danmark)*

## **MIXED SYSTEM FOR ESTABLISHING FAIR COMPENSATION**

*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, which introduces a system that combines, in order to finance the fair compensation payable to rightsholders, two forms of remuneration, namely, first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, and, second, proportional remuneration paid after that reproduction operation and determined solely by means of a unit price multiplied by the number of copies produced, which is payable by the natural or legal persons making those copies, in so far as:*

- the lump-sum remuneration paid in advance is calculated solely by reference to the speed at which the device concerned is capable of producing copies;*
- the proportional remuneration recovered after the fact varies according to whether or not the person liable for payment has cooperated in the recovery of that remuneration;*
- the combined system, taken as a whole, does not include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users.*

## **ALLOCATION OF THE FAIR COMPENSATION**

*Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude national legislation, such as that at issue in the main proceedings, which authorizes the Member State in question to allocate a part of the fair compensation payable to rightsholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived. (Case C 572/13 HP/Reprobel)*



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### 5.1.1 REPROGRAPHY

Reprography is regulated in Article 27 of the draft amendment and completion of Law no. 139/2010, and at paragraphs (4) and (6) are provided the persons who have to pay this remuneration and its amount.

AGEPI, the collective management organizations and users in the Republic of Moldova propose the express indication at legal level of the fair compensation for reprography, the only problematic aspect being the amount of remuneration,

- **1.7%** calculated from:

a) *the value declared at customs of the equipment indicated in par. (5), excluding VAT for importers;*

b) *the cost of the equipment indicated in par. (5) and put up for sale in the case of producers (AGEPI);*

- *At least 3%* (the collective management bodies AN «COPYRIGHT» and ANPFI »opt for maintaining the current wording of Law no. 139/2010);
- *The amount of compensatory remuneration will not exceed 0.1% and 50 lei per unit. Compensatory remuneration in the form of a percentage quota is calculated from:*
  - the intrinsic value of the equipment, without value added tax, for importers;
  - the cost of equipment and material supports, without value added tax, for producers (ATIC, AmCham Moldova, FIA).

#### RECOMMENDATIONS:

##### 5.1.1.1 Elimination from the definition of reprography (art. 3) of the last thesis

*Reprographic reproduction does not include the fixation of the work in electronic form (including digital), optical or in any other mechanizable form. Reproduction or copying takes place in many different forms, such as: printing, photocopying, scanning, digital copying<sup>8</sup>;*

##### 5.1.1.2 Transposition of Article 5 (2) lit. c "

*(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage having regard to the mandatory exceptions and limitations provided for in TITLE II Measures to adapt exceptions and limitations to the digital and cross-border environment (Art. 3-6) of Directive (EU) 2019/790.*

##### 5.1.1.3 Establishment of:

- **tariffs for natural persons** using the reproductive equipment in public places, respectively royalties related to the use of the equipment<sup>9</sup>
- **natural and legal persons** using reproductive equipment in public places, taking into account that the potential areas of licensing are: education at all levels; public administration; trade and industry; public and research libraries; cultural institutions and other similar bodies; religious institutions; copying centers and other public places where photocopiers are available<sup>10</sup>

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<sup>8</sup> Copyright Levies and Reprography – IFRRO, 2008, p. 9-10

<sup>9</sup> See the case of Belgium, from Collective Management in Reprography, WIPO-IFRRO Study, April 2005, p. 23

<sup>10</sup> Collective Management in Reprography, WIPO-IFRRO Study, April 2005, p. 38



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In accordance with Recital 37 of Directive 2001/29/EC, *existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.*

For the correct determination of remuneration, the practice of the Court of Justice of the European Union must be taken into account, which clarifies aspects related to the main criterion for establishing the obligation to pay, the debtors of the obligation to pay remuneration.

In this regard, by its Judgment of 12 November 2015 in Case C 572/13, the Court of Justice of the European Union establishes that *Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29/EC must be interpreted as meaning that, with regard to the phrase 'fair compensation' contained in those provisions, it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.*

The reasoning of the CJEU takes into account that

- *Article 5(2)(a) of Directive 2001/29 does not specify the users for which the reprography exception provided for therein is intended, the purpose of the reproduction which it covers or the context, private or otherwise, in which such reproduction takes place, such an exception must be regarded as covering all categories of users, including natural persons, whatever the purpose of the reproductions, including those made for private use and for ends that are neither directly nor indirectly commercial (point 30)*
- *More specifically, while reproductions made by natural persons for private use and for ends that are neither directly nor indirectly commercial may come within the scope of the reprography exception and the private copying exception, reproductions carried out by users other than natural persons, as well as those carried out by natural persons for a use other than private use or for commercial purposes, come within the scope of the reprography exception alone (point 34)*
- *the harm suffered by the rightsholders in each of those situations is not, as a general rule, identical (point 41)*

By Judgment of 27 June 2013 in Cases C - 457/11-C - 460/11, the Court of Justice of the European Union established that *Applying that case-law mutatis mutandis to the reproduction on paper or similar medium exception, it is, in principle, for the person who has made such a reproduction to finance the compensation which will be paid to the rightsholders. However, Member States are free, given the practical difficulties encountered, to put in place, where appropriate, a levy chargeable to the persons in possession of the equipment on which the reproduction has been made (point 77)*

In Cases C - 457/11-C - 460/11, the Court of Justice of the European Union has ruled that *The concept of 'reproductions effected by the use of any kind of photographic technique or by some other process having similar effects' within the meaning of Article 5(2)(a) of Directive 2001/29 must be interpreted as including reproductions effected using a printer and a personal computer, where the two are linked together. In this case, it is open to the Member States to put in place a system in which the fair compensation is paid by the persons in possession of a device contributing, in a non-autonomous manner, to the single process of reproduction of the*



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*protected work or other subject-matter on the given medium, in so far as those persons have the possibility of passing on the cost of the levy to their customers, provided that the overall amount of the fair compensation owed as recompense for the harm suffered by the author at the end of that single process must not be substantially different from the amount fixed for a reproduction obtained by means of a single device.*

- *Article 5(2)(a) of Directive 2001/29, as is clear from its wording, distinguishes between the medium of reproduction, namely paper or a similar medium, and the means which are used to make that reproduction, namely any kind of photographic technique or some other process having similar effects (point 64)*
- *as regards the medium, the material element on which the given reproduction of a protected work or other subject-matter is found, the wording of Article 5(2)(a) of Directive 2001/29 explicitly refers to paper, to which it joins, in general terms, another substrate which must possess similar qualities, namely qualities comparable and equivalent qualities to those of paper (point 65)*
- *It follows that mediums which do not have comparable and equivalent qualities to those of paper do not come within the scope of the exception referred to in that provision. If it were, otherwise, the effectiveness of that exception could not be ensured, particularly in the light of the exception referred to in Article 5(2)(b) of Directive 2001/29, which concerns 'reproductions on any medium' (point 66)*
- *It follows that all non-analogue mediums of reproduction, namely, in particular, digital mediums, must be excluded from the scope of Article 5(2)(a) of Directive 2001/29, since, as the Advocate General observed in paragraph 63 of her Opinion, in order to be similar to paper as a medium for reproduction, a substrate must be capable of bearing a physical representation capable of perception by human senses (point 67)*
- *as regards the means by which a reproduction on paper or similar support may be made, the wording of Article 5(2)(a) of Directive 2001/29 refers not only to photographic technique but also to 'some other process having similar effects', namely any other means allowing for a similar result to that obtained by a photographic technique to be achieved, that is to say the analogue representation of a protected work or other subject-matter (point 68)*
- *As long as that result is ensured, the number of operations or the nature of the technique or techniques used during the reproduction process at issue does not matter, on condition, however, that the various elements or non-autonomous stages of that single process act or are carried out under the control of the same person and are all intended to reproduce the protected work or other subject-matter on paper or a similar medium (point 70)*

### **5.1.2 PRIVATE COPYING**

The private copy is regulated in Article 26 of the draft amendment to Law no. 139/2010.

AGEPI, as well as the collective management organizations and users from the Republic of Moldova propose the express indication at legal level of the compensatory remuneration for reprography, the only problematic aspect being the amount of remuneration, respectively:

- **1.3%** calculated from:
  - a) *the declared value at customs of the equipment and material supports indicated in par. (5), excluding VAT for importers;*





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b) the cost of the equipment and material supports indicated in par. (5) and put up for sale in the case of producers. (AGEPI)

- At least **3%** (the collective management bodies AN «COPYRIGHT» and ANPFI opt for maintaining the current wording of Law no. 139/2010);
- cannot exceed **0.5% for material supports, 0.3% for unfunctional equipment and 0.1% for multifunctional equipment and 100 lei per unit**. Compensatory remuneration in the form of a percentage quota is calculated from:
  - a) the intrinsic value of the imported equipment and materials, without value added tax, for importers;
  - b) the cost of equipment and material supports, without value added tax, for producers (ATIC, AmCham Moldova, FIA).

## RECOMMENDATIONS:

**5.1.2.1 ESTABLISHMENT OF SEPARATE REMUNERATIONS (PERCENTAGE OR FLAT RATE) FOR EQUIPMENT AND MEDIA. Criteria such as copying/storage capacity, type of equipment, etc. may be considered.**

**5.1.2.2 ESTABLISHMENT OF SEPARATE REMUNERATION IN THE CASE OF PRIVATE COPYING ON DIGITAL MEDIA AND IN THE CASE OF ANALOG COPYING.**

- *Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them (point 38)*
- *When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention. (point 39)*

For the separate determination of remuneration (equipment/media, analogue/digital) it is necessary to take into account the practice of the Court of Justice of the European Union, which clarifies issues related to the main criterion for establishing the obligation to pay, debtors of the obligation to pay remuneration, presumed use of equipment and media, source of financing for fair compensation, equipment and media for which fair compensation is due, technical characteristics of equipment and media, application of technical protection measures, tax issues.

**5.1.2.3 Criterion of the harm for establishing the obligation to pay fair compensation**

- fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception (point 42)
- recital 31 in the preamble to Directive 2001/29 provides for the maintenance of a 'fair balance' between the rights and interests of the rightholders, who are to receive the fair compensation, on one hand, and those of the users of protected works on the other (point 43)



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- copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned (point 44)

In the light of this reasoning, the CJEU has established that *"fair balance" to be established between the persons concerned requires fair compensation to be calculated on the basis of the criterion of the harm caused to authors as a result of the introduction of the private copying exception* (point 38, **C-467/08** Padawan SL SGAE).

#### **5.1.2.4 Debtors of the obligation to pay fair compensation**

- *the person who has caused harm to the holder of the exclusive reproduction right is the person who, for his own private use, reproduces a protected work without seeking prior authorization from the rightsholder. Therefore, in principle, it is for that person to make good the harm related to that copying by financing the compensation which will be paid to the rightsholder* (point 45)
- *given the practical difficulties in identifying private users and obliging them to compensate rightsholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment, as stated in the last sentence of recital 35 in the preamble to Directive 2001/29, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy* (point 46)
- *nothing prevents those liable to pay the compensation from passing on the private copying levy in the price charged for making the reproduction equipment, devices and media available or in the price for the copying service supplied. Thus, the burden of the levy will ultimately be born by the private user who pays that price. In those circumstances, the private user for whom the reproduction equipment, devices or media are made available or who benefit from a copying service must be regarded in fact as the person indirectly liable to pay fair compensation* (point 48)
- *Accordingly, since that system enables the persons liable to pay compensation to pass on the cost of the levy to private users and that, therefore, the latter assume the burden of the private copying levy, it must be regarded as consistent with a 'fair balance' between the interests of authors and those of the users of the protected subject-matter* (point 49)

In view of these reasoning, the CJEU has established that *It is consistent with the requirements of that 'fair balance' to provide that persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, as much as they are able to pass on to private users the actual burden of financing it.* (Case **C-467/08** - Padawan SL/Sociedad General de Autores y Editores de España SGAE).

Following the Judgment of 21 October 2010 in Case C 467/08, the CJEU ruled in Case C 572/13 (Hewlett Packard Belgium SPRL/Reprobel SCRL) that



- *given the practical difficulties in identifying users and obliging them to compensate rightsholders for the harm caused to them, it is open to the Member States to establish a levy chargeable not to the users concerned but to the persons who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to those users or who provide copying services for them and who are able to pass on the cost of the levy to the users (see, to that effect, judgment in Padawan, C-467/08, EU:C:2010:620, paragraphs 46 and 48) (point 70)*
- *It is understood that the amount of a levy of that kind which is fixed in advance cannot be fixed on the basis of the criterion of actual harm suffered, as the extent of that harm remains unknown at the moment at which the devices concerned are put into circulation on national territory. Accordingly, that levy must necessarily be set as a lump sum (point 71)*
- *In that regard, the persons to whom such devices are made available are rightly presumed to benefit fully from the making available of those devices, that is to say, that they are deemed to take full advantage of the functions associated therewith, including copying. It follows that the fact that those devices are capable of producing copies is sufficient in itself to justify the application of the levy to the persons concerned (see, to that effect, judgment in Padawan, C-467/08, EU:C:2010:620, paragraphs 55 and 56) (point 72).*

#### **5.1.2.5 Suspected use of equipment and supports**

In Case C - 467/08 (Padawan SL v Sociedad General de Autores y Editores de España SGAE) it was established that *a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29.*

The Court of Justice of the European Union has given the following reasons:

- *the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users (point 56)*
- *where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work (point 54)*
- *Those natural persons are rightly presumed to benefit fully from the making available of that equipment, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying (point 55)*
- *Such an interpretation is supported by the wording of recital 35 in the preamble to Directive 2001/29. That recital mentions, as a valuable criterion for the determination of the level of fair compensation, not only the ‘harm’ as such but also the ‘possible’ harm. The ‘possibility’ of causing harm to the author of the protected work depends on the fulfilment of the necessary pre-condition that equipment or devices which allow copying have been made available to natural persons, which need not necessarily be followed by the actual production of private copies (point 57)*



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### 5.1.2.6 Source of financing of the payment obligation

In Case C-470/14 it was established that Article 5(2)(b) of Directive 2001/29/EC must be interpreted as precluding a scheme for fair compensation for private copying which, like the one at issue in the main proceedings, is financed from the General State Budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

The Court of Justice of the European Union has held that:

- unlike natural persons who fall within the private copying exception under the conditions specified by Directive 2001/29, legal persons are in any case excluded from benefiting from that exception and thus they are not entitled to make private copies without receiving prior authorisation from the rightholders of the protected works or subject matter concerned (point 30)
- In that regard the Court has already ruled that it is inconsistent with Article 5(2) of Directive 2001/29 to apply a private copying levy, in particular with regard to digital reproduction equipment, devices and media which are acquired by persons other than natural persons for purposes clearly unrelated to such private copying (see, to that effect, judgments of 21 October 2010 in *Padawan*, C-467/08, EU:C:2010:620, paragraph 53, and 11 July 2013 in *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paragraph 28) (point 31).

### 5.1.2.7 Equipment, devices and media for which fair compensation is due

The Court of Justice of the European Union has held in Case C 463/12 (*Copydan Båndkopi v Nokia Danmark A/S*) that Article 5(2)(b) of Directive 2001/29/EC

- does not preclude national legislation which provides that fair compensation is to be paid, in accordance with the exception to the reproduction right for copies made for private use, in respect of **multifunctional media such as mobile telephone memory cards**, irrespective of whether the main function of such media is to make such copies, provided that one of the functions of the media, be it merely an ancillary function, enables the operator to use them for that purpose. However, the question whether the function is a main or an ancillary one and the relative importance of the medium's capacity to make copies are liable to affect the amount of fair compensation payable.
- does not make the supply of components whose main purpose is to store copies for private use, such as the internal memories of MP3 players, subject to that levy, provided that those different categories of media and components are not comparable or the different treatment they receive is justified, which is a matter for the national court to determine. In this case, it is necessary:
  - to make a distinction between media that are detachable from devices with a digital reproduction function and components that cannot be detached from such devices. Indeed, while the supply of such media is subject to the private copying levy, the supply of such components is not (point 34)
  - the difference between **components** that are inseparable from the devices in which they are integrated (eg internal memories of MP3 players) and **media** used for identical reproduction purposes such as memory cards, which are removable from them, a feature that could be nature to facilitate additional reproductions of the same works on other media (points 35, 36, 38, 40)



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- *does not preclude national legislation which requires payment of the levy intended to finance fair compensation, in accordance with the exception to the reproduction right for copies for private use, by producers and importers who sell mobile telephone memory cards to business customers and are aware that those cards will be sold on by those customers but do not know whether the final purchasers of the cards will be individuals or business customers, on condition that:*
    - *the introduction of such a system is justified by practical difficulties;*
    - *the persons responsible for payment are exempt from the levy if they can establish that they have supplied the mobile telephone memory cards to persons other than natural persons for purposes clearly unrelated to copying for private use, it being understood that the exemption cannot be restricted to the supply of business customers registered with the organization responsible for administering the levy;*
    - *the system provides for a right to reimbursement of that levy which is effective and does not make it excessively difficult to repay the levy and only the final purchaser of such a memory card may obtain reimbursement by submitting an appropriate application to that organization.*

The Court of Justice of the European Union has upheld in case C 265/16 (VCAST Limited/RTI SpA)<sup>11</sup> that ***Directive 2001/29/EC, in particular Article 5(2)(b) thereof, must be interpreted as precluding national legislation which permits a commercial undertaking to provide private individuals with a cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording, without the rightsholder's consent.***

#### **5.1.2.8 Characteristics of equipment for which fair compensation is due**

The Court of Justice of the European Union has upheld in Case C 572/13 (Hewlett Packard Belgium SPRL v Reprobel SCRL) that *Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude lump-sum remuneration, such as that at issue in the main proceedings, paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer at the time at which a device is put into circulation on national territory, in a situation in which the amount of that remuneration is fixed solely by reference to the speed at which that device is technically capable of producing copies (point 77).*

The motivation:

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<sup>11</sup> Significantly, this solution was given as a result of the question referred by the District Court of Turin for a preliminary ruling, which was necessary for the resolution of the dispute between VCAST and RTI SPA. VCAST is a company incorporated under UK law which makes available to its customers via the Internet a video recording system, in storage space within the cloud, for terrestrial programmes of Italian television organizations, among which are those of RTI.

VCAST brought proceedings against RTI, concerning the lawfulness of the making available to VCAST's customers of a cloud video recording system for television programmes broadcast, inter alia, by RTI. In practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service provided by that company. The user can specify either a certain programme or a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space is purchased by the user from another provider.



- *it cannot be inferred that all persons to whom those devices are made available are to be deemed to take full advantage of the technical copying capacity of those devices, that capacity corresponding to the maximum number of copies which can technically be produced within a given period (Recital 73);*
- *It is common ground that, as the different categories of acquirers or users do not have the same needs and are not subject to the same limits as those set out in Article 5(2)(b) of Directive 2001/29, they will use the technical capacity of a given device only so far as those needs or limits require (Recital 74);*
- *the use of the technical capacity of reproduction devices differs depending on whether the person concerned is making copies for public or private use, and whether such copies are made for commercial or other ends (Recital 75);*
- *remuneration the amount of which is set as a lump sum and which must be paid by persons who make devices available to natural and legal persons for the purpose of making copies must, in principle, take that difference into account, given that the assessment of the harm suffered is likely to lead to significantly different results for each of the situations mentioned in the preceding paragraph (Recital 76)*

#### **5.1.2.9 Application of technical protection measures**

The Court of Justice of the European Union has upheld that *the possibility of applying technological measures under Article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of that directive*. However, this implementation may have an impact on the actual level of that compensation (See Cases C-457/11- C-460/11, Case C - 463/12).

#### **5.1.2.10 Tax issues**

The Court of Justice of the European Union has decided that the *Directive 2006/112/EC on the common system of value added tax, as amended by Council Directive 2010/45/EU, must be interpreted as meaning that holders of reproduction rights do not make a supply of services, within the meaning of that directive, to producers and importers of blank media and of recording and reproduction devices on whom organizations collectively managing copyright and related rights levy on behalf of those rightsholders, but in their own name, fees in respect of the sale of those devices and media (Case C – 37/16)*.

The judgment of 18 January 2017 contains the following reasoning:

- *it does not appear that there is a legal relationship pursuant to which there is reciprocal performance by, on the one hand, holders of reproduction rights or, as the case may be, the organization collectively managing such rights and, on the other, producers and importers of blank media and of recording and reproduction devices (point 27)*
- *the obligation to pay fees, such as those at issue in the main proceedings, is owed by those producers and importers by virtue of the national legislation which also determines their amount (point 28)*
- *the obligation on producers and importers of blank media and of recording and reproduction devices to pay fees cannot be regarded as resulting from the supply of a service for which it constitutes the direct consideration (point 29)*
- *the fair compensation does not constitute the direct consideration for any supply of services, because it is linked to the harm resulting for those rightsholders from the reproduction of their protected works without their authorization (see, to that effect,*



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judgment of 21 October 2010, Padawan, C-467/08, EU:C:2010:620, paragraph 40) (point 30)

- Consequently, a transaction such as that at issue in the main proceedings cannot be regarded as being carried out for consideration, for the purposes of Article 2(1)(c) of the VAT Directive (point 31)
- holders of reproduction rights do not make a supply of services, within the meaning of that directive, to producers and importers of blank media and of recording and reproduction devices on whom organisations collectively managing copyright and related rights levy on behalf of those rightholders, but in their own name, fees in respect of the sale of those devices and media. (point 33)

European practice is not uniform. In order to have a correct and complete regulation of reprography and private copying, I recommend going through the following reports and studies, as well as the practice of the Court of Justice of the European Union:

- „Recommendations resulting from mediation on private copying and reprography levies”<sup>12</sup>, Vitorino, A. Bruxelles, **2013**;
- International Survey on Text and Image Copyright Levies, WIPO and IFRRO, **2015**;
- International Survey on Private Copying, Law & Practice 2015, WIPO and de Thuiskopie (only data for EU MS Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden)
- International Survey on Private Copying, Law & Practice 2016, WIPO and de Thuiskopie (only data for EU MS Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden)
- the practice of the Court of Justice of the European Union, respectively:
  - **Case C-467/08** - Padawan SL vs Sociedad General de Autores y Editores de España (SGAE) – **Judgment of 21 October 2010**;
  - **Case C-462/09** - Stichting de Thuiskopie vs Opus Supplies Deutschland GmbH, Mijndert van der Lee, Hananja van der Lee – **Judgment of 16 June 2011**;
  - **Case C 277/10** - Martin Luksan vs. Petrus van der Let - **Judgment of 9 February 2012**;
  - **Cases C-457/11-C-460/11** - Verwertungsgesellschaft Wort (VG Wort) vs. Kyocera, Kyocera Mita Deutschland GmbH, Epson Deutschland GmbH, Xerox GmbH (C-457/11), Canon Deutschland GmbH (C-458/11) and Fujitsu Technology Solutions GmbH (C-459/11), Hewlett-Packard GmbH (C-460/11) vs. Verwertungsgesellschaft Wort (VG Wort) – **Judgment of 27 June 2013**;
  - **Case C-521/11** - Amazon.com International Sales Inc., Amazon EU Sàrl, Amazon.de GmbH, Amazon Logistik GmbH vs Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH - **Judgment of 11 July 2013**;

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<sup>12</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino\\_recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino_recommendations_en.pdf)



- **Case C-435/12** – ACI Adam BV and others vs Stichting de ThuisKopie, Stichting Onderhandeligen ThuisKopie vergoeding – **Judgment of 10 April 2014**;
- **Case C-463/12** - Copydan Båndkopi vs Nokia Danmark A/S – **Judgment of 5 March 2015**;
- **Case C-572/13** - Hewlett-Packard Belgium SPRL vs. Reprobel SCRL, Epson Europe BV – **Judgment of 12 November 2015**;
- **Case C-470/14** - Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA), Visual Entidad de Gestión de Artistas Plásticos (VEGAP) vs Administración del Estado Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic), Artistas Intérpretes, Sociedad de Gestión (AISGE), Centro Español de Derechos Reprográficos (CEDRO), Asociación de Gestión de Derechos Intelectuales (AGEDI), Entidad de Gestión, Artistas, Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE), Sociedad General de Autores y Editores (SGAE) - **Judgment of 9 June 2016**;
- **Case C 110/15** - Nokia Italia vs. SIAE - **Judgment of 22 September 2016**;
- **Case C – 37/16** - Minister Finansów vs. Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych SAWP (SAWP) - **Judgment of 18 January 2017**;
- **Case C-265/16** - VCAST Limited vs RTI SpA - **Judgment of 29 November 2017**.

### 5.1.3 Exceptions and limitations on the rights of reproduction, public communication and making available to the public (Article 5 (3))

The list of exceptions and limitations provided in Article 5 (3) is optional and it refers to intended uses such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

#### RECOMMENDATIONS:

In view of the amendments made by Directive (EU) 2017/1564 and Directive 2019/790, the following are necessary for the transposition of optional limitations and exceptions:

- 5.1.3.1 ***Taking over the text as amended by Directive (EU) 2017/1564 in the case of Article 5 (3) (b):*** *uses, for the benefit of people with a disability, which are directly related to the disability and of a noncommercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council. I mention the fact that the transposition of the exception provided in Article 3 of Directive (EU) no. 2017/1564 does not remove the transposition of the exception from Article 5 (3) b) of Directive 2001/29/EC. The two exceptions concern different situations, so that their coexistence within the law is necessary;*





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5.1.3.2 **Transposition of Article 5 (3) (k)** use for the purpose of caricature, parody or pastiche **and Article 5 (3) d)** quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose. The recommendation takes into account the provisions of Article 17 (7) of Directive (EU) 2019/790 - Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.

5.1.3.3 **Transposition of Article 5 (3) a)** use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved having in mind the exceptions and limitations provided for in TITLE II Measures to adapt exceptions and limitations to the digital and cross-border environment of Directive (UE) 2019/790.

## 5.2 PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS MANAGEMENT INFORMATION

In the draft amendment and completion of Law no. 139/2010, Articles 6 and 7 of Directive 2001/29/EC are incompletely transposed in Articles 3, 52, 53 and 67<sup>13</sup>.

### 5.2.1 RECOMMENDATIONS:

5.2.1.1 **Revision and correction of the transposition of Articles 6 and 7 of Directive 2001/29/EC, as well as the correlation with the articles ensuring the transposition of the limitations and exceptions provided by Article 5 of the same Directive, as well as with the articles transposing Directives 2009/24/EC and 96/9/EC.**

For the correct regulation of technical protection measures, the practice of the Court of Justice of the European Union unanimously rules, that the application of these measures does not make inapplicable the condition of fair compensation in the case of private copying:

- Cases **C-457/11-C-460/11** - The possibility of applying technological measures under Article 6 of Directive 2001/29 cannot render inapplicable the condition relating to fair compensation provided for by Article 5(2)(b) of that directive.
- Case **C 463/12** - The implementation of technological measures under Article 6 of Directive 2001/29 for devices used to reproduce protected works, such as DVDs, CDs, MP3 players and computers, can have no effect on the requirement to pay fair compensation in accordance with the exception to the reproduction right in respect of reproductions made for private use by means of such devices. However, the

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<sup>13</sup> Article 67. Infringement of the provisions regarding technological protection measures and rights management information



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*implementation of such measures may have an effect on the actual level of such compensation.*

The Communication *The Management of Copyright and Related Rights in the Internal* **COM 2004/0261** shows that *rightholders, commercial users and governments have begun, and should continue, to inform and educate the public about whether the medium of delivery should affect the price and to foster a culture of licensing protected digital content that counteracts the perception that if protected content is available on the Internet it is necessarily for free*

The COM document contains an analysis of Digital Rights Management (DRM) Systems, which:

- are relevant for both individual and collective management;
- can be used to clear rights, to secure payment, to trace behaviour and to enforce rights;
- are, therefore, crucial for the development of new business models,

With regard to new business models, Recital 53 of Directive 2001/29/EC states that *the protection of technological measures should ensure a **secure environment for the provision of interactive on-demand services**, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them.*

At the same time, the Commission Communication COM 2004/0261 notes that *a wider availability of DRM systems and services can only bring additional value to both rightholders and consumers if it contributes to the availability of protected content and facilitates the access of end-users to protected content.*

The CEN/ISSS report on *DRM standardization and interoperability* lists forms of DRM-based content offerings:

- **Pay per Download**, the most common form. Consumers pay for downloading a track or a movie, and the DRM system attaches particular usage rights to the content object (ex. iTunes music store). For consumers, this model regularly implies that usage rights are limited as specified in the licensing terms. For example, a user might expect to be able to play a song he paid for on various devices he owns. This, however, can be technically restricted by the DRM system;
- **Pay per Use** - the usage right is restricted to just one single use of the content. The content object is often streamed rather than downloaded to the user's device, e.g. over a wireless network or the Internet. (ex. MSN Music Club). One factor that will determine the success of pay per use models is the availability and pricing structure (flat fees) of high bandwidth connections;
- **Subscription** - consumers acquire a usage license with clearly defined start and end dates. If the subscription is not renewed, the license expires and the content cannot be accessed further. Subscription models can include either downloading or streaming of content (ex. Napster);
- **Rental** - content can be used for a limited time period after purchase or after first use. Such services are often called "...on demand". Repeated streaming of large content files only makes sense for customers with broadband connections and flatrate fee contracts. It also requires that the consumer does not wish to own and store the content;



- **Bundling Digital content** (ex.the German pay-TV channel Premiere offers various bundles consisting of packages such as “Premiere Film” or “Premiere Sport”);
- **Price and Product Differentiation DRM systems** allow content providers to offer alternative market offerings at different prices. In this case, DRM technologies allow providers to price access to a recently released song or movie differently than access to the same piece of content when it is several months old. A problem that arises, though, is that pricing and licenses can become highly intransparent to the user;
- **Superdistribution and Viral marketing** is a business model enabled by DRM, which allows users to forward digital content to others. The recipient is limited in the use of the content until he obtains the full license to use it. However, the content object contains some metadata, including a URL where the rights to use the content can be acquired;
- **Preview and Sampling DRM systems** can also be used to enforce special promotional licenses, in order to promote physical or digital goods via digital channels. Restricted licences are timed to coincide with release schedules. On the day of release the license ends and customers are automatically redirected to e-retailers where they can buy the physical product;
- **“forensic DRM”** models aim at preventing copyright infringements on a large scale. To prevent this, digital content files are watermarked or fingerprinted so that illegal copies on the Internet can be traced back. A digital user certificate is attached to content, which can easily trace back the origin of the copied content.

In other words, the degree of use of technological measures and thus the development of new DRM-based business models must be taken into account when determining fair compensation in the context of private uses, allowed in accordance with Article 5 (2) (b) of Directive 2001/29/CE.

The success of DRM systems depends on the large scale acceptance by all stakeholders, including consumers, as well as the interoperability of these systems and services. *The widespread deployment of DRMs as a mode of fair compensation may eventually render existing remuneration schemes (such as levies to compensate for private copies) redundant, thereby justifying their phasing down or even out (COM 2004/0261).*

The legal protection of technological measures is without prejudice to

- *the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures (Recital 49)*
- *the protection of technological measures used in connection with computer programs, which is exclusively addressed in Directive 91/250/EEC (Recital 50)*

The protection of technical measures is extremely important. In the Republic of Moldova, the violation of these measures is sanctioned as a contravention (Article 96 (1) letter f) of the Contraventional Code) or criminal (art. 185<sup>1</sup> (1) letter f) Criminal Code).

### 5.3 SANCTIONS AND REMEDIES

In the draft amendment to Law no. 139/2010, art. Article 8 of Directive 2001/29/EC has been incorrectly and incompletely transposed in Article 55. *Initiation of infringement proceedings* - paragraphs (1) and (3) and Article 59. *Provisional and insurance measures* - paragraph (1).



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### 5.3.1 RECOMMENDATIONS:

A series of confusions are identified regarding the transposition of Article 8 of Directive 2001/29/EC and the transposition of the provisions of Directive 2004/48/EC on ensuring the enforcement of intellectual property rights.

#### **Observations regarding Article 55 (1) and (3) of Law no. 139/2010**

*(1) Any natural or legal person who **has claims regarding the capitalization of an object of copyright, related rights or other rights protected** by this law has the right to initiate actions in the competent court or to notify another authority for the application of measures , procedures and remedies provided for in this Chapter.*

*(3) Courts and other competent authorities shall apply the measures, procedures and remedies provided for in this Chapter in a fair and equitable manner so as not to be unduly difficult or costly and not to impose undue time limits or unforeseen delays. The application of these measures, procedures and remedies will be effective and proportionate, will not create obstacles to legal trade and will provide protection against their misuse.*

The text of Law no. 139/2010 contains an incorrect translation of the term 'remedies', with the medical meaning, not the legal one.

Article 8 of Directive 2001/29/EC regulates sanctions and remedies *in respect of infringements of the rights and obligations set out in this Directive*. Paragraph 1 of Article 55 regulates *the claims regarding the capitalization of an object of copyright, related rights or other rights protected by this law*.

In these conditions it is necessary the correct and complete transposition of art. 8 of Directive 2001/29/EC.

*The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material (Recital 58)*

*In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightsholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States. (Recital 59)*



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## 6 DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE RESALE RIGHT FOR THE BENEFIT OF THE AUTHOR OF AN ORIGINAL WORK OF ART

In the draft amendment and completion of Law no. 139/2010, there are provisions regarding the incomplete and incorrect transposition of the provisions of Directive 2001/84/EC, at Articles 20, 48 (9) letter f) and 51<sup>2</sup> (9).

Moreover, the provisions of Article 20 are based on the system provided in the **Government Decision no. 641/2001 on the minimum tariffs for author's remuneration**, Annex no. 4 - Regulation on the remuneration of authors for the industrial capitalization (multiplication) of works of plastic, decorative and applied art, point 4.

In accordance with Recital 9 of Directive 2001/84/EC, when transposing the provisions of this Directive, the following mandatory elements must be taken into account:

- the works covered (Articles 2 and 10 and Recitals 17<sup>14</sup>, 19<sup>15</sup> și 21<sup>16</sup>);
- persons entitled to receive royalties (Article 6 and Recital 27);
- the rate applied (Article 4 and Recitals 20, 22, 23, 24);
- the transactions (Article 1 and Recital 18);
- subject to payment of a royalty (Article 1 and Recital 18);
- the basis on which these are calculated (Articles 3 and 5).

### 6.1 RECOMMENDATIONS:

#### 6.1.1 OBSERVATIONS REGARDING ARTICLE 20 (1) OF LAW NO. 139/2010

Article 20 (1) *In the case of each resale of the original work of art, subsequent to **the first assignment** by the author of the property right, the seller is obliged to pay the author or his successors a remuneration **in the amount of 5% of the resale price**, if this price constitutes at least 20 minimum wages (suite fee). The resale right is **inalienable for the life of the author** and passes exclusively to the legal or testamentary successors of the author for the duration of copyright protection.*

- a) The phrase "*first assignment*" must be replaced by "*the first transfer*". Sale and assignment are two different legal notions. The scope of the resale right includes *any resale of the work, subsequent to the first transfer of the work by the author*;
- b) It is not mentioned that the prices are *net of tax*, so that the transposition of art. 5 of Directive 2001/84/EC is not ensured;
- c) It is necessary to establish a system consisting of a tapering scale of rates for several price bands (Recital 24), being allowed to establish national thresholds lower than the Community threshold (EUR 3000) following Recital 22 - *The non-application of royalties below the minimum threshold may help to avoid disproportionately high collection and*

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<sup>14</sup>. Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (2), the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right. **Consequently, only the originals of works of modern and contemporary art may fall within the scope of the resale right.**

<sup>15</sup> It should be made clear that the harmonization brought about by this Directive does not apply to original manuscripts of writers and composers.

<sup>16</sup> The categories of works of art subject to the resale right should be harmonized.



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*administration costs compared with the profit for the artist. However, in accordance with the principle of subsidiarity, the Member States should be allowed to establish national thresholds lower than the Community threshold, so as to promote the interests of new artists. Given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market;*

- d) In the draft amendment to Law no. 139/2010, the threshold set for the minimum selling price is *at least 20 minimum wages*. The proposed threshold is questionable, given that the minimum wage changes, in principle annually, so it must be regularly checked whether this minimum price exceeds EUR 3000, given that *This minimum sale price may not under any circumstances exceed EUR 3 000* (Article 3 (2)). If the price exceeds this ceiling, it will be necessary to amend the law;
- e) It is necessary to reformulate the phrase “*inalienable for the life of the author*”. The resale right is inalienable<sup>17</sup>, both for the author and for the heirs (rightsholders). *The persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity. It is not appropriate to take action through this Directive in relation to Member States' laws of succession. However, those entitled under the author must be able to benefit fully from the resale right after his death, at least following the expiry of the transitional period referred to above* (Recital 27).

*Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (2), the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right* (Recital 17)

*The term of protection of the resale right shall correspond to that laid down in Article 1 of Directive 93/98/EEC* (Article 8 (1)).

### **6.1.2 REPEAL OF GOVERNMENT DECISION NO. 641/2001 ON THE MINIMUM TARIFFS OF AUTHOR'S REMUNERATION**, normative act issued in accordance with art. 25 of the Law on copyright and related rights no. 293-XIII of November 23, 1994

Taking into account these provisions, it is necessary to reanalyze art. 51<sup>2</sup> (9) of Law no. 139/2010<sup>18</sup>, in order to eliminate the confusion between *endorsing the status of a collective management organisation* and the *designation of a sole collector*. These issues are discussed in detail in the section on collective management organizations.

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<sup>17</sup> Recital 1 - The resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.

Recital 2 – The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work.

Recital 3 - The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

Recital 4 - The resale right forms an integral part of copyright and is an essential prerogative for authors.

<sup>18</sup> Article 51<sup>2</sup>. Authorization of collective management organizations

(9) For the compulsory collective management, in accordance with the provisions of the present law, a collective management organization will be approved with reference to the following rights:

c) the resale right, according to Article 48 para. (9) lit. f);



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## 7 DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

In the draft amendment and completion of Law no. 139/2010, there are provisions regarding the incomplete and incorrect transposition of the provisions of Directive 2001/84/EC, at Articles 54-66. A series of confusions are identified between the transposition of Article 8 of Directive 2001/29/EC and the transposition of the provisions of Directive 2004/48/EC on the enforcement of intellectual property rights.

Directive 2004/48/EC, applicable both in the case of industrial property and in the case of copyright and related rights has been transposed in the Republic of Moldova in the following 6 special laws:

- Law on the Protection of Industrial Designs no. 161-XVI of July 12, 2007;
- Law on the Protection of Trademarks no. 38-XVI of February 29, 2008;
- Law on the Protection of Plant Varieties no. 39-XVI of 29.02.2008;
- Law on the Protection of Inventions no. 50-XVI of March,7, 2008;
- Law on the Protection of Geographical Indications, Appellations of origin and Traditional specialties guaranteed no. 66-XVI of 27.03.2008;
- Law on Copyright and Related Rights no. 139 of 02.07.2010.

### 7.1 RECOMMENDATIONS:

The following measures are required:

#### 7.1.1 Revision and correction of the transposition of Directive 2004/48/EC

and correlation with the provisions of Laws no. 161/2007, no. 38/2008, no. 39/2008, 50/2008, no. 66/2008, as well as with those of the Civil Procedure Code regarding the provisional measures in the matter of intellectual property rights, in order to ensure the terminological unity<sup>19</sup>;

*Necessary clarifications can be found in COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE A balanced IP enforcement system responding to today's societal challenges COM(2017) 707 final;*

#### 7.1.2 Transposition within the Article 3 - Main concepts, of the definition set out in Recital 14 of Directive 2004/48/EC for the concept of commercial scale

Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith;

Transposition is also required to ensure compliance with **Annex 1C - Agreement on trade-related aspects of intellectual property rights**;

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<sup>19</sup> relevant clarifications can be found in COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE A balanced IP enforcement system responding to today's societal challenges COM(2017) 707 final;



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### **7.1.3 The introduction of some provisions in the law to ensure the transposition of Article 17 - Codes of conduct**

and to encourage the development of codes of conduct, in consultation with stakeholders, in accordance with the realities of the market in the Republic of Moldova;

*Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced in the Community, helps to limit infringements of intellectual property rights in this sector, which suffers from piracy on a large scale. However, these technical protection measures should not be misused to protect markets and prevent parallel imports (Recital 29).*

### **7.1.4 Correction of the transposition of Article 13 – Damages, and the elimination of compensation from 500 to 500,000 lei for each infringed right.**

The court is the only one able to decide a lump sum value, in accordance with the provisions of this article, as well as with those provided in the Civil Procedure Code (*order damages appropriate to the actual prejudice suffered by him as a result of the infringement*);

*With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightsholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightsholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightsholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightsholder, such as the costs of identification and research (Recital 26);*

In support of this recommendation, I would point out that Article 13 of Directive 2004/48/EC has been correctly transposed into the laws on industrial property (Laws No 161/2007, No 38/2008, No 39/2008, 50/2008, No 66/2008), as follows:

#### **a) Law on the Protection of Industrial Designs no. 161-XVI of July 12, 2007**

Article 68. Compensation for harm

*(1) At the victim's request, a party that has infringed the rights in an industrial design, either knowingly or with reasonable grounds to know, shall compensate the right holder for the material harm caused to that right holder by the infringement of its rights. In determining the amount of the compensation:*

*a) the calculation shall take account of all relevant circumstances, such as the negative economic impact – including income lost by the victim and income obtained unlawfully by the respondent – and, in appropriate cases, other elements such as the emotional distress caused to the right holder by the infringement; or*





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**b) as an alternative, a single sum may be set, calculated to equal the minimum level of royalty or compensation that would have been paid to the right holder if the respondent had requested permission to use the industrial design in question.**

(2) If the infringer committed the infringement unknowingly or without reasonable grounds to know, it shall compensate the right holder for lost income and harm caused, as established in accordance with legislation in force.

**b) Law on the Protection of Trademarks no. 38-XVI of February 29, 2008**

Article 72. Compensation for damage

(1) At the request of the injured party, a person who consciously or with reasonable grounds to be aware of the fact infringed the rights in a trademark, shall compensate the rights owner for actual damage caused to it as a result of the infringement of its rights. When determining the level of damages:

a) in the calculation all substantive circumstances shall be taken into consideration such as negative economic consequences, including lost profit of the injured party, income unlawfully obtained by the defendant, and in appropriate cases also other aspects such as moral harm caused to the rights owner as a result of the infringement; or

**b) as an alternative a single sum may be determined, calculated as the minimum sum of the royalty or remuneration which would accrue to the rights owner, if the claimant requested authorization to use the corresponding trademark.**

(2) In this case, where an infringer has unconsciously committed an infringement or does not have reasonable grounds to be aware of that, he shall be obliged to compensate the rights owner for lost profit or damage caused, as established in accordance with this Law.

**c) Law on the Protection of Plant Varieties no. 39-XVI of 29.02.2008**

Article 82. Damages

(1) Upon request of the affected party, the infringer who knowingly, or with reasonable grounds to know, infringed a patent shall be ordered to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of the infringement of his rights. In evaluating the damage:

a) due account shall be taken of the respective circumstances, such as the negative economic effect, including the lost profits suffered by the affected party, the benefits received unfairly by the infringer, and other aspects, such as moral damage the affected party has suffered because of the infringement of his rights;

**b) alternatively, a lump amount may be fixed on the basis of certain components, such as, at least, the amount of the royalty or fees which would have been payable, had the infringer applied for the authorization to use the respective variety.**

(2) When the infringer commits the infringement not knowingly, or with reasonable grounds to know about it, he shall be obliged to repay the lost profits or the damages suffered by the right holder, established by the applicable law.

**d) Law on the Protection of Inventions no. 50-XVI of March,7, 2008**

Article 84. Damages

(1) Upon request of the affected party, the infringer who knowingly, or with reasonable grounds to know, engaged in an activity infringing the rights conferred by a patent application or a patent shall be ordered to pay the right holder damages adequate to



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*compensate for the injury the right holder has suffered because of the infringement of his rights. In evaluating the damage:*

*a) due account shall be taken of the respective circumstances, such as the negative economic effect, including the lost profits suffered by the affected party, the benefits received unfairly by the infringer and, as the case may be, other aspects, such as moral damage the affected party has suffered because of the infringement of his rights; or*

*b) alternatively, a lump amount may be fixed on the basis of certain components, such as, at least, the amount of the royalty or fees which would have been payable, had the infringer applied for the authorization to use the respective patent application or patent.*

*(2) When the infringer commits the infringement not knowingly, or with reasonable grounds to know about it, he shall be obliged to repay the lost profits or the damages suffered by the right holder, established by the applicable law.*

**e) Law on the Protection of Geographical Indications, Appellations of origin and Traditional specialties guaranteed no. 66-XVI of 27.03.2008**

**Article 58. Damages**

*(1) Upon request of the injured party, the defender who knowingly, or with reasonable grounds to know, infringed the rights on a protected geographical indication, or a protected appellation of origin, or a traditional specialty guaranteed shall be ordered to pay the rightsholder damages appropriate to the actual prejudice suffered by him as a result of the infringement of his rights. When evaluating the damage, due account shall be taken of the respective circumstances, such as negative economic consequences, including lost profits suffered by the injured party, any unfair profits made by the defendant and, in appropriate cases, other elements, such as the moral prejudice caused to the rightsholder as a result of infringing his rights.*

*(2) Where the defendant has committed the infringement unknowingly or is reasonably believed to be unaware of the infringement, he shall be obliged to reimburse the lost profits or the damage suffered by the rightsholder, evaluated according to the applicable Law.*

In view of the above, it is necessary that all the chapters on Enforcement of rights, existing in the 6 laws, be correlated, including terminology, in order to ensure the uniform, correct and complete transposition of the provisions of Directive 2004/48/EC.

See Table no. 1



LAW on the Protection of Industrial Designs no. 161-XVI of July 12, 2007	L A W on the Protection of Trademarks no. 38-XVI of February 29, 2008	LAW on the Protection of Plant Varieties no. 39-XVI of 29.02.2008	LAW on the protection of inventions no. 50-XVI of March, 7, 2008	LAW on the protection of geographical indications, appellations of origin and traditional specialties guaranteed no. 66-XVI of 27.03.2008	L A W on Copyright and Related Rights no. 139 of 02.07.2010
Art. 57. Suit for infringement of rights	Art. 61. Protection of rights	Art. 70. Proceedings for Infringement of Rights	Art. 73. Proceedings for Infringement of Rights	Art. 47. An action in connection with the infringement of the rights	Art. 54. Infringement of Copyright, Related Rights, and Other Rights
Art. 58. Suit to establish non-infringement of rights	Art. 62. Suit concerning announcement of non-infringement of rights	Art. 71. Proceedings Preceding the Grant of a Patent	Art. 74. Proceedings for a Declaration of Non-Infringement of Rights	Art. 48. An action seeking a statement regarding non-infringement of the rights	Art. 55. Instituting Infringement Proceedings
Art. 59. Measures to secure evidence before filing a suit	Art. 63. Measures for provision of proof prior to bringing a suit	Art. 72. Right to Bring Proceedings for Infringement of Rights	Art. 75. Measures to Preserve Evidence up to Institution of Proceedings	Art. 49. Measures for preserving evidence prior to court actions	Art. 56. Evidence
Art. 60. Securing evidence in urgent cases	Art. 64. Provision of evidence in urgent cases	Art. 73. Measures to Preserve Evidence up to Institution of Proceedings	Art.76. Preservation of Evidence in Urgent Cases	Art. 50. Urgent measures for preserving evidence	Art. 57. Measures for Preserving Evidence
Art. 61. Invalidity of measures to secure evidence	Art. 65. Invalidity of measures for provision of evidence	Art.74. Preservation of Evidence in Urgent Cases	Art. 77. Revocation of Measures to Preserve Evidence	Art. 51. Cancellation of the measures for preserving evidence	Art. 58. Right of Information in Connection with Infringement of Rights
Art. 62. Producing and securing evidence in the context of a suit for the infringement of rights	Art. 66. Presentation and provision of evidence within the framework of a suit for the infringement of rights	Art. 75. Nullity of Measures to Preserve Evidence	Art. 78. Presentation and Preservation of Evidence in the Proceedings for Infringement of Rights	Art.52. Presentation and preservation of evidence in the proceedings regarding the infringement of rights	Art. 59. Provisional and Precautionary Measures
Art. 63. Right to information	Art. 67. Right to information	Art.76. Presentation and Preservation of Evidence in Proceedings for Infringement of Rights	Art. 79. Right to Information	Art. 53. The right to information	Art. 60. Corrective Measures
Art. 64. Measures to secure a suit for the infringement of rights	Art. 68. Measures for filing a suit for infringement of rights	Art. 77. Right to Information	Art. 80. Measures to Ensure the Proceedings for Infringement of Rights	Art. 54. Measures providing for injunction order on infringement of the right	Art. 61. Injunctions



Art. 65. Corrective measures	Art. 69. Corrective measures	Art. 78. Measures to Ensure the Proceedings for Infringement of Rights	Art. 81. Corrective Measures	Art. 55. Corrective measures	Art. 62. Alternative Measures
Art. 66. Ensuring enforcement of a court ruling	Art. 70. Implementation of court decisions	Art. 79. Corrective Measures	Art. 82. Enforcement of a Court Decision	Art. 56. Enforcement of the court decision	Art. 63. Damages
Art. 67. Alternative measures	Art. 71. Alternative measures	Art. 80. Enforcement of a Court Decision	Art. 83. Alternative Measures	Art. 57. Alternative measures	Art. 64. Legal Costs
Art. 68. Compensation for harm	Art. 72. Compensation for damage	Art. 81. Alternative Measures	Art. 84. Damages	Art. 58. Damages	Art. 65. Publication of Judicial Decisions
Art. 69. Publication of court rulings	Art. 73. Advertising measures	Art. 82. Damages	Art. 85. Publication of Court Decisions	Art. 59. Publication of the court decisions	
		Art. 83. Publication of Court Decisions			



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## 8 DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON RENTAL RIGHT AND LENDING RIGHT AND ON CERTAIN RIGHTS RELATED TO COPYRIGHT IN THE FIELD OF INTELLECTUAL PROPERTY (CODIFIED VERSION)

In the draft amendment and completion of Law no. 139/2010, there are provisions regarding the incomplete and incorrect transposition of the provisions of Directive 2006/115/EC, as follows

- The lending - Articles 3,12, 54 (2);
- The rental - Article 3, Article 11 (1) c) and (4), Article 18 (3) and (5), Article 33 (2) lit. d) and (8), Article 34 (1) c), Article 35 (1) c), Article 48 (9) c), Article 51<sup>2</sup> (9) a), Article 52, Article 54 (2).

### 8.1 RECOMMENDATIONS REGARDING THE LENDING RIGHT

#### 8.1.1 THE DEFINITION OF THE LENDING RIGHT DOES NOT COMPLY WITH THE DEFINITION OF ART. 2 (1) B) OF THE DIRECTIVE,

in the sense that it is limited to *publications in any format*

With a view to clarity, Recital 10 and Article 3 (2) of Directive 2006/115/CE exclude from rental and lending:

- making available phonograms or films for the purpose of public performance or broadcasting;
- making available for the purpose of exhibition;
- making available for on-the-spot reference use;
- buildings and to works of applied art.

**Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public. (Recital 10)**

Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive (Recital 11)

It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them. (Recital 12).



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## **8.1.2 Regarding Article 12 (2)<sup>20</sup> and (4), I recommend that THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION BE TAKEN INTO ACCOUNT.**

### **8.1.2.1 For THE CATEGORIES OF INSTITUTIONS that may be exempted from paying the public lending right, the following must be taken into account:**

- Judgment of the Court of 16 October 2003 in Case **C-433/02**;
- Judgment of the Court of 6 July 2006 in Case **C-53/05**;
- Judgment of the Court of 26 October 2006 in Case **C-198/05**;
- Judgment of the Court of 26 October 2006 in Case **C-36/05**;
- Judgment of the Court of 11 January 2007 in case **C-175/05**

The Judgment of the Court of 16 October 2003 in Case C-433/02 says that:

*Finally, Article 5(3) of the Directive does not specify what is to be understood by 'certain categories of establishments'. Similarly, the Directive does not mention any criterion which the Member States should apply in order to determine the 'categories of establishments' which may benefit from an exemption from payment (point 16)*

*It must be observed, first, that in the absence of sufficiently precise Community criteria in a directive to delimit the obligations under the directive, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law and in particular by the directive, compliance with that directive (point 19)*

*Moreover, as the Commission observed, Article 5(3) of the Directive authorizes but does not oblige a Member State to exempt certain categories of establishments. Consequently, if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned (point 20)*

However, Article 5(3) of the directive cannot be interpreted as allowing for total derogation from the obligation of remuneration laid down in Article 5(1) pct. 36 (Case C-53/05)

### **8.1.2.2 FOR DETERMINING THE AMOUNT OF REMUNERATION DUE FOR THE PUBLIC LENDING,**

respectively Art. 12 (4) of the draft amendment and completion of Law no. 139/2010, the Judgment of the Court of Justice of 30 June 2011 in Case C-271/10, establishes the following *Article 5(1) of 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 precludes legislation, such as that at issue in the main proceedings, which establishes a system under which the remuneration payable to authors in the event of public lending is calculated exclusively according to the number of borrowers registered with public establishments, on the basis of a flat-rate amount fixed per borrower and per year.*

The motivation is based on the following main aspects:

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<sup>20</sup> Art. 12 (2) - *Libraries and other similar institutions that do not seek to obtain an economic or commercial advantage, directly or indirectly, are exempted from the obligation to pay the remuneration provided in para. (1).*

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**THE LEGAL REGIME** - *Consequently, the arrangements for public lending are deemed to be distinguishable from the other arrangements described in that directive. The same must be true as regards the various elements of those arrangements, including those relating to the compensation of authors (point 31);*

*Although intervenes in a comparable situation in which the fact that the works are being used in the context of public lending without the authorization of the authors result in harm to the latter (...) the Community legislature used the word 'remuneration' instead of 'compensation' provided for in Directive 2001/29 (point 29);*

*That difference in drafting already implies that the two concepts mentioned must not be interpreted in the same way (point 30), having in mind that Article 4(1), relating to rental, and Article 8(2) of Directive 92/100, relating to broadcasting and communication to the public refer systematically to 'equitable remuneration' (point 30).*

**THE QUANTUM** - *lending does not have a direct or indirect economic or commercial character. In those circumstances, the use of a protected work in the event of public lending cannot be assessed in the light of its value in trade. Consequently, the amount of the remuneration will necessarily be less than that which corresponds to equitable remuneration or may even be fixed on a flat-rate basis in order to compensate for the act of making available all the protected works concerned (point 33);*

- *Its amount cannot therefore be purely symbolic (point 34);*
- *consideration for the harm caused to authors by reason of the use of their works without their authorization, the determination of the amount of that remuneration cannot be completely dissociated from the elements which constitute that harm. As that harm is the result of public lending, that is to say, the making available of protected works by establishments accessible to the public, the amount of the remuneration due should take account of the extent to which those works are made available (point 37);*
- *It follows that the amount of remuneration to be paid by such an establishment should take account of the number of works made available to the public and, consequently, that large public lending establishments should pay a greater level of remuneration than smaller establishments (point 38);*
- *It follows that the amount of remuneration to be paid to authors should be determined by also taking into account the number of borrowers registered with that establishment (point 39).*

**CRITERIA** - *Member States are not bound by any particular criteria under Directive 92/100. It is thus for the Member States alone to determine, within their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law, and in particular by Directive 92/100, compliance with that Community concept (see, by analogy, SENA, paragraph 34) (point 35);*

- *Member States may determine the amount of the remuneration due to authors in the event of public lending in accordance with their own cultural promotion objectives (point 36).*

At the same time, it is necessary to take into account the Judgment of the Court of 10 November 2016 in Case C 174/15, which establishes that the concept of "lending" **must be interpreted, within the meaning of those provisions, covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public**



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**library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.**

In those circumstances:

- *it follows from recital 7 of Directive 2006/115 that, it is necessary to interpret the concepts of 'objects' and 'copies', for the purposes of Directive 2006/115, in the light of the equivalent concepts in the WIPO Treaty (see, by analogy, judgment of 15 March 2012, SCF, C-135/10, EU:C:2012:140, paragraph 55) (point 31, 33);*
- *According to the agreed statement annexed to the WIPO Treaty, the concepts of 'original' and 'copies', in Article 7 of that treaty, in relation to the right of rental, refer 'exclusively to fixed copies that can be put into circulation as tangible objects'. It follows that intangible objects and non-fixed copies, such as digital copies, are excluded from the right of rental (point 34);*
- *It is therefore necessary to interpret the concept of 'rental', in Article 2(1)(a) of Directive 2006/115, as referring exclusively to tangible objects, and to interpret the concept of 'copies', in Article 1(1) of that directive, as referring, as regards rental, exclusively to copies fixed in a physical medium (point 35);*
- *as can be seen from Article 2(1)(a) and (b) of Directive 2006/115, the EU legislature sought to define the concepts of 'rental' and 'lending' separately. Thus, the subject matter of 'rental' is not necessarily identical to that of 'lending' (point 38);*
- *intangible objects and non-fixed copies, such as digital copies, must be excluded from the rental right, governed by Directive 2006/115, so as not to be in breach of the agreed statement annexed to the WIPO Treaty, neither that treaty nor that agreed statement preclude the concept of 'lending', within the meaning of that directive, from being interpreted, where appropriate, as also including certain lending carried out digitally (point 39);*
- *forms of exploitation of a protected work, such as public lending, are different in nature from a sale or any other lawful form of distribution, since the lending right remains one of the prerogatives of the author notwithstanding the sale of the physical medium containing the work. Consequently, the lending right is not exhausted by the sale or any other act of distribution, whereas the distribution right may be exhausted, but only and specifically upon the first sale in the European Union by the rightsholder or with his consent (see, to that effect, judgment of 6 July 2006, Commission v Portugal, C-53/05, EU:C:2006:448, paragraph 34 and the case-law cited) (point 59);*
- *Article 6 of Directive 2006/115, must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive 2001/29. (point 65);*
- *Article 6(1) of Directive 2006/115 must be interpreted as meaning that it precludes the public lending exception laid down therein from applying to the making available by a public library of a **digital copy of a book in the case where that copy was obtained from an unlawful source** (point 72).*





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## 8.2 RECOMMENDATIONS ON THE SINGLE EQUITABLE REMUNERATION

The Judgment of the Court of 18 November 2020 in **Case C-147/19** says that: **Article 8(2) of Council Directive 92/100/EEC and Article 8(2) of Directive 2006/115/EC must be interpreted as meaning that the single equitable remuneration referred to in those provisions must not be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.**

The motivation is based on the following main aspects:

- *neither Directives 92/100 and 2006/115 nor the other EU directives in the area of copyright law define the concept of ‘phonogram’ or contain an express reference to the law of the Member States for the purpose of determining the scope of that concept (point 32)*
- *According to the wording of Article 3(b) of the Rome Convention, the concept of ‘phonogram’ is defined as any ‘exclusively aural’ fixation of sounds of a performance or of other sounds. It follows that the fixation of images and sounds cannot come within that concept, since such a fixation cannot be described as ‘exclusively aural’ (point 37)*
- *the concept of ‘phonogram’ in Article 8(2) of Directive 2006/115, which replaced without amendment Article 8(2) of Directive 92/100, must be interpreted in accordance with the equivalent concept contained in the WPPT (see, to that effect, judgments of 15 March 2012, Phonographic Performance (Ireland), C-162/10, EU:C:2012:141, paragraph 58, and of 8 September 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677, paragraph 62) (point 38)*
- *Under Article 2(b) of the WPPT, ‘phonogram’ means the ‘fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work’ (point 39)*
- *It must, therefore, be held that both the wording of Article 2(b) of the WPPT and the document referred to in the previous paragraph preclude a fixation of sounds incorporated in a cinematographic or other audiovisual work from being covered by the concept of ‘phonogram’ within the meaning of that provision (point 41)*
- *It may be inferred from that agreed statement that a phonogram incorporated in a cinematographic or other audiovisual work loses its status as a ‘phonogram’ in so far as it forms part of such a work, without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue (point 44)*
- *an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a ‘phonogram’ or ‘reproduction of that phonogram’ within the meaning of Article 8(2) of Directive 92/100 or Article 8(2) of Directive 2006/115 (point 52)*
- *the communication to the public of such a recording does not give rise to the right to remuneration provided for in those provisions (point 53), so a broadcasting organization is not obliged to pay the single and fair remuneration provided in art. 8 (2) of Directive 2006/115.*

From the moment when a phonogram published for commercial purposes, or a reproduction of that phonogram, has been incorporated or ‘synchronized’ in an audiovisual recording containing the fixation of an audiovisual work, the performers and phonogram producers



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concerned can no longer claim this single equitable remuneration through a collective management organization.

*In circumstances such as those at issue in the main proceedings, those objectives must be achieved by the conclusion, when the phonograms or reproductions of those phonograms are incorporated into the audiovisual works concerned, of appropriate contractual arrangements between the holders of the rights in phonograms and the producers of such works, so that remuneration for the related rights in the phonograms at the time of such incorporation is paid by means of such contractual arrangements (point 55).*



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## 9 DIRECTIVE 2006/116/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE TERM OF PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS AND DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 2006/116/EC ON THE TERM OF PROTECTION OF COPYRIGHT AND CERTAIN RELATED RIGHTS

In the draft amendment and completion of Law no. 139/2010 was not ensured the transposition of the provisions of Directive 2011/77/EU on the right to obtain an annual supplementary remuneration, which cannot be waived by the performer.

### 9.1 RECOMMENDATIONS:

#### 9.1.1 TRANSPOSITION OF ARTICLE 1 OF DIRECTIVE 2011/77/EU.

Under Article 3 from Directive 2006/116/EC, the term of protection of related rights is 50 years, calculated from:

- the date of the performance/the date of the first publication or the first communication to the public, whichever is the earlier, in the performer's case;
- the date of the fixation/the date of the first lawful publication/the date of the first lawful communication to the public, in the case of producers of phonograms;
- the date of the first fixation/the date of the first lawful publication/the date of the first lawful communication to the public, in the case of producers of films;
- the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite, for broadcasting organizations.

In the case of performers, the term of protection was extended from 50 to 70 years, under the conditions of the amendments from Article 1 (2) of Directive 2011/77/EU.

According to Recital 6 of Directive 2011/77/EC, performers should receive, **at least their lifetime**, revenues derived from:

- the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC, as well as the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC;
- fair compensation for reproductions for private use within the meaning of Directive 2001/29/EC.

*Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. (Recital 9)*

In practice, the following situations occur:

- a) either performers are paid an advance on royalties and enjoy payments only once the phonogram producer has recouped the initial advance and made any contractually defined deductions*
- b) or performers transfer or assign their exclusive rights in return for a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in*



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*the background and do not appear in the credits (non-featured performers) but sometimes also for performers who appear in the credits (featured performers).*

Pursuant to Recital 10, in order to ensure that performers who have transferred or assigned their exclusive rights of reproduction, distribution, rental and making available benefit from the term extension, it is necessary to introduce two accompanying measures, established on the basis of the contractual relationship with phonogram producer.

**1) A “clean slate” option (Recital 14) Article 1 (2) lit. c) (2a)**

If the performer received a *royalty or remuneration rate unencumbered by advance payments or contractually defined deductions*, he may terminate the contract on transfer or assignment, if the producer, within a year from the notification by the performer, fails to carry out both of the acts of exploitation (offer copies of the phonogram for sale in sufficient quantity or make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them

If the contract on transfer or assignment is terminated, the rights of the phonogram producer in the phonogram shall expire and the performer receives a *royalty or remuneration rate unencumbered by advance payments or contractually defined deductions* during the extended period.

For the sake of legal certainty, certain terms in those contracts which provide for recurring payments can be renegotiated for the benefit of performers, having procedures in place to cover the eventuality that the renegotiation fails (Recital 15, 16)

**2) In the case of one-off payment (non-recurring remuneration) –**

*should be the imposition on phonogram producers of an obligation to set aside, at least once a year, a sum corresponding to 20 % of the revenue from the exclusive rights of distribution, reproduction and making available of phonograms. ‘Revenue’ means the revenue derived by the phonogram producer before deducting costs (Recitals 9 and 11);*

*Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments of the supplementary remuneration, no account should be taken of revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying (Recital 13);*

*The sums set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenue may be applied. In order to avoid the imposition of a disproportionate burden in the collection and administration of that revenue, Member States should be able to regulate the extent to which micro-enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenue (Recital 12).*

In accordance with the provisions of Article 1 letter 2d) of Directive 2011/77/EU - Amendments to Directive 2006/116/EC, the right to obtain an annual supplementary remuneration is administered by collective management organizations. In these circumstances, it is necessary to amend and supplement the article governing compulsory collective management.



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## 10 DIRECTIVE 2009/24/EC ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

In the draft amendment to Law no. 139/2010, there are provisions regarding the incomplete transposition of Directive 2001/84/EC, at Articles 3 (definition of computer programs) and 29. In accordance with Recital no. 6 of Directive 2009/24/EC, when transposing the provisions of this Directive, the following mandatory elements must be taken into account:

- accord protection to computer programs under copyright law as literary works;
- the object of protection (Article 1, Recitals 7,8,10 and 11)
- beneficiaries of protection (Articles 2 and 3)
- the exclusive rights that the protected persons may invoke (Article 4 and Recital 11)
- exceptions (Article 5 and Recitals 13 and 14)
- decompilation (Article 6)
- the term of protection
- special measures of protection (Article 7)

### 10.1 RECOMMENDATIONS:

#### 10.1.1 Computer programs are regulated in Law no. 139/2010 in Article 29 entitled

*Using computer programs and databases. Decompiling computer programs*

**THE REGULATION OF COMPUTER PROGRAMS MUST BE DIFFERENT FROM THAT OF DATABASES**, taking into account Recital 23, Article 1 (3) and Article 2 of Directive 96/9/EC, respectively:

(23) *Whereas the term 'database should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC on the legal protection of computer programs;*

Article 1 (3) - *Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.*

Article 2 Limitations on the scope

*This Directive shall apply without prejudice to Community provisions relating to:*

(a) *the legal protection of computer programs;*

#### 10.1.2 IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 7 (2) b) OF LAW NO. 139/2010, COMPUTER PROGRAMS ARE PROTECTED AS LITERARY WORKS. IN ADDITION TO THIS PROVISION, THE FOLLOWING AMENDMENTS AND ADDITIONS CONCERNING THE OBJECT OF PROTECTION ARE REQUIRED:

- **COMPLETING THE DEFINITION OF COMPUTER PROGRAMS**, by taking over the provisions of Article 1 (2) of Directive 2009/24/EC, respectively *Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.*

- **TRANSPPOSITION OF THE DEFINITIONS FROM RECITAL 10**, namely:

- "INTERFACES" - *the parts of the program which provide for such interconnection and interaction between elements of software and hardware;*



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- 'INTEROPERABILITY'- *the ability to exchange information and mutually to use the information which has been exchanged, to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;*

- **COMPLETING /REFORMULATING THE DEFINITION OF COMPUTER PROGRAMS**, by taking over Article 1 (2) of Directive 2009/24/EC - *Protection under this Directive applies to any form of expression of a computer program.*

In this respect, Case **C - 406/10** (SAS Institute Inc. vs World Programming Ltd) is relevant, the CJEU establishing that:

- 1. *Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive.*
- 2. *Article 5(3) of Directive 91/250 must be interpreted as meaning that a person who has obtained a copy of a computer program under a license is entitled, without the authorisation of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that license and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program.*
- 3. *Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if - this being a matter for the national court to ascertain - that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright.*

**10.1.3 In the case of beneficiaries of protection, I recommend that the provisions of Articles 2 and 3 of Directive 2009/24/EEC are to be taken into a separate article, as follows:**

(1) *The author of a computer program shall be the natural person, the group of natural persons or the legal person who has created the program.*

(2) *When the computer programs meet the conditions of a collective work, the author is established according to the provisions of art. ....*

(3) *In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.*

(4) *Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.*



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#### 10.1.4 Regarding the exclusive rights belonging to the author of a computer program, I recommend writing a separate article,

in which the exclusive rights of reproduction and derivative works are circumscribed in direct connection with computer programs. At the same time, I recommend that, in this case, the definition of the *rental right*, as defined in Recital 12, be taken over, as the for-profit purpose is essential.

(1) *The author of a computer program shall enjoy the rights provided for in this Law, and especially the exclusive right to do and authorize the following:*

*a) temporary or permanent reproduction of a program in its entirety or in part, by any means and in any form, including where the reproduction is necessitated by the loading, display, transmission or storage of the program;*

*b) translation, adaptation, arrangement and any other transformation of a computer program, including the reproduction of the result of those operations, without prejudice to the rights of the person who transforms the program;*

*c) distribution and rental of the original or copies of a computer program in any form.*

(2) *The first sale of a computer program copy, on the domestic market, by the owner of the rights or the one made with his consent, shall exhaust the exclusive right for the authorization of the distribution of such copy on the domestic market.*

(3) *The term ‘rental’ means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof. This term does not include public lending, which, accordingly, remains outside the scope of this Directive.*

**10.1.5 In accordance with Recital 13, the exceptions provided in Article 5 of Directive 2009/24/EEC are limited in order** *to allow the reproduction technically necessary for the use of that program by the lawful acquirer. This means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract. In the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy*

In these conditions, it is necessary to eliminate any references to existing computer programs in Articles 26, 27 of Law no. 139/2010, given that the limitations and exceptions in Directive 2001/29/EC are without prejudice to the exceptions from Directive on the legal protection of computer programs (Directive 2009/24/EC, the codified version of Directive 91/250/EC), as set out in Recitals 20<sup>21</sup> and 50<sup>22</sup>, and in Article 1 (2) of Directive 2001/29/EC.

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<sup>21</sup> This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC (2), 92/ 100/EEC (3), 93/83/EEC (4), 93/98/EEC (5) and 96/9/ EC (6), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

<sup>22</sup> Such a harmonized legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive



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**10.1.6 In the content of Article 29 (1) of Law no. 139/2010, it is necessary to delete the term “legal purchaser” and replace it with the term “legal user”.**

At the same time, it is necessary to correct the transposition of Article 5 (1) of Directive 2009/24/EC, in the sense that, in the absence of specific contractual provisions, the following acts shall not require authorization by the rightsholder:

- the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightsholder;
- the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program.

I recommend completing the article from point D, with paragraph (4), having the following content

*(4) In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of paragraph (1) shall not require authorization by the rightsholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.*

**10.1.7 In addition to the transposition of Directive 2009/24/EC, the following regulations are needed**

*(1) Unless otherwise agreed, a contract for the use of a computer program shall assume that:*

- a) the user has been granted the non-exclusive right to use the program;
- b) the user may not transfer the right to use the program to another person.

*(2) Transfer of the right to use a computer program shall not imply transfer also of the copyright in it.*

*(3) The provisions of Article 10 (1) letter (e) of this Law do not apply to computer programs.*





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## 11 DIRECTIVE 2014/26/EU ON COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AND MULTI-TERRITORIAL LICENSING OF RIGHTS IN MUSICAL WORKS FOR ONLINE USE IN THE INTERNAL MARKET

Recommendations on the transposition of the provisions of Directive 2014/26/EU were also made during the Project *Support to Enforcement of Intellectual Property Rights – Moldova EuropeAid/137467/DH/SER/MD*.

In the draft amendment to Law no. 139/2010, there are provisions regarding the incorrect takeover of the provisions of Directive 2014/26/EU, at art. 3 - Main notions, at art. 4 and 4<sup>1</sup>, as well as to art. 48-51<sup>11</sup>.

### 11.1 GENERAL RECOMMENDATIONS:

#### 11.1.1 Collective management organizations are associations within the meaning of the provisions of Law no. 86/2020 on non-commercial organizations,

so that the establishment, organization, development and cessation of their activity complies with both the general principles imposed by this normative act and the special conditions imposed by the law on copyright and related rights. In this sense, it is necessary to correlate the legal texts. For example, with regard to the management, control and supervisory bodies of collective management organizations, the name of the *Board of Directors* must be identical to the name used in Articles 17 and 18 of Law no. 86/2020 on non-commercial organizations, respectively *the Council*;

#### 11.1.2 CORRECT AND COMPLETE TRANSPOSITION OF THE FOLLOWING ARTICLES OF DIRECTIVE 2014/26/EU:

- *Article 5 (2) - Rightsholders shall have the right to authorize a collective management organization of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organization or the rightsholder. (does not condition the conclusion of a mandate contract)*
- *Article 8 (5) h) - the approval of mergers and alliances, the setting-up of subsidiaries, and the acquisition of other entities or shares or rights in other entities;*
- *Article 13 (2) - Where the amounts due to rightsholders cannot be distributed within the deadline set in paragraph 1 because the relevant rightsholders cannot be identified or located and the exception to that deadline does not apply, those amounts shall be kept separate in the accounts of the collective management organization.*
- *Article 13 (4) - Where the amounts due to rightsholders cannot be distributed after three years from the end of the financial year in which the collection of the rights revenue occurred, and provided that the collective management organization has taken all necessary measures to identify and locate the rightsholders referred to in paragraph 3, those amounts shall be deemed non-distributable.*
- *Article 15 (2) - The collective management organisation shall regularly, diligently and accurately distribute and pay amounts due to other collective management organisations*



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- *Article 16 (1) - Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.*

### **11.1.3 TRANSPOSITION OF COMPLETE DEFINITIONS IN THE CASE OF DEFINITIONS FOR ‘USER’ AND ‘MANAGEMENT FEES’;**

**11.1.4 The payment terms proposed by collective management organizations and users (90 days, 120 days) do not comply with the provisions of Directive 2014/26/EU.** In accordance with Recital 29, *the distribution and payment of amounts due to individual rightsholders or, as the case may be, to categories of rightsholders, should be carried out in a timely manner and in accordance with the general policy on distribution of the collective management organisation concerned (...). Only objective reasons beyond the control of a collective management organisation can justify delay in the distribution and payment of amounts due to rightsholders. Therefore, circumstances such as the rights revenue having been invested subject to a maturity date should not qualify as valid reasons for such a delay;*

**11.1.5 Article 13 (1) of Directive 2014/26/EU regulates the deadline for making allocations** *collective management organizations distribute and pay those amounts to rightholders as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected.* To this end, the necessary changes must be made by **REPLACING THE PHRASE AT THE END OF THE CALENDAR YEAR WITH THE END OF THE FINANCIAL YEAR.** The financial year represents the period for which the annual financial statements must be prepared, its duration being 12 months. The financial year is different from the calendar year for collective management organizations (for example, the amounts owed by users for December are collected in January of the following year);

**11.1.6 REPHRASE OF ART. 519 (3)** *The audit of the financial statements is carried out every two years, and the audit report is reproduced in full in the annual transparency report.* The transparency report shall be drafted annually and submitted to the General Assembly for approval. Article 51<sup>7</sup> (2) of the draft amendment to Law no. 139/2010, correctly regulates the following: *Ordinary meetings of the General Assembly are convened when requested by the interests of the collective management organization, but not less than once a year, only after the submission of the financial statements of the collective management organization, related to the previous calendar year, according to legal provisions.* Under these conditions, the discharge is made for the previous year, so that the audit report cannot be reproduced in full in the annual transparency report, as long as the financial audit is performed every two years !!!



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### **11.1.7 ELIMINATION FROM THE CONTENT OF THE DRAFT AMENDMENT TO LAW NO. 139/2010 OF THE PHRASE TO TERMINATE THE MANAGEMENT CONTRACT,**

having in mind the fact that the authors and rightsholders become members of the collective management organization on the basis of a mandate contract. The mandate contract is revoked, so it is necessary to correlate the text of Law no. 139/2010 with the provisions of Directive 2014/26/EU and the Civil Code. Only the mandate contract is mentioned in the European directives. For example, in the content of Directive 93/83/EEC, the mandate contract is mentioned in Article 9 (2), and in the content of Directive 2014/26/EU the mandate contract is mentioned in Article 3 (j), Article 26 (2) and (3), Article 28 (3), Article 29;

### **11.1.8 THE ANNUAL INDIVIDUAL STATEMENTS OF THE MEMBERS OF THE SUPERVISORY FUNCTION MUST INCLUDE COMPLETE FINANCIAL INFORMATION FOR THE PREVIOUS YEAR, SO THAT THEY CANNOT BE COMPLETED IN THE FIRST 10 WORKING DAYS OF THE CURRENT YEAR,**

as provided in Article 51<sup>6</sup> (6) of the draft amendment to Law no. 139/2010. These statements must be submitted before the Annual (Ordinary) General Meeting. At the same time, in accordance with the Recital 25, collective management organizations may be required to make such statements public or to submit them to public authorities, having in mind that *the management of a collective management organisation must be independent. Managers, whether elected as directors or hired or employed by the organisation on the basis of a contract, should be required to declare, prior to taking up their position and thereafter on a yearly basis, whether there are conflicts between their interests and those of the rightholders that are represented by the collective management organisation. Such annual statements should be also made by persons exercising the supervisory function.*

## **11.2 RECOMMENDATIONS REGARDING THE AUTHORIZATION OF COLLECTIVE MANAGEMENT ORGANIZATIONS**

The draft amendment and completion of Law no. 139/2010 proposes a complicated, inefficient and incorrect procedure for approving the functioning of collective management organizations, which is caused by the confusion between

- AUTHORIZATION of the functioning of a collective management organization
- DESIGNATION of the collective management organization which may issue extended collective licenses, or which may hold the status of sole collector, in the case of compulsory collectively managed rights.

Related articles:

- Article 4<sup>1</sup> - Commission for the approval of collective management organizations of copyright and/or related patrimonies and its competence;
- Article 49 (2) - Collective management organizations;
- Article 51<sup>1</sup> - List of collective management organizations in the Republic of Moldova;
- Article 51<sup>2</sup> - Authorization of collective management organizations.

Comparing and analyzing the provisions of articles 51<sup>1</sup> and 51<sup>2</sup>, it appears that Art. 51<sup>1</sup> regulates the procedure for approving the functioning of collective management organizations in the Republic of Moldova, listing, at paragraphs (3) and (4), the cumulative conditions that



the association must meet and the documents necessary to be submitted, in order to acquire this quality.

Article 51 <sup>1</sup> (3)	Article 51 <sup>1</sup> (4)
a) is registered as a association, with the status of legal person in the manner provided by law and has headquarters based in the Republic of Moldova	b) copy of the extract from the State Register of legal persons;
b) is a non-profit association	
c) the members of the association are exclusively rightsholders of copyright or related rights;	e) list of members of the association, copyright holders and/or related rights, with an indication of the rights entrusted to collective management
d) the field of activity of the association is collective management of copyright or related rights	
e) the status of the public association corresponds to the requirements of this law	a) copy of the statute of the association
f) has a current account at a banking institution	c) copy of the opened bank account
g) has staff and technical means for carrying out the activity	g) copies of documents or other confirming information regarding the possession of the technical means necessary for the activity (computer, printer, copier, internet access, telephone, fax, offices, system of distribution of remuneration) and of the employed personnel;
h) h) has headquarters	h) copies of the documents confirming the right of use on the places necessary for carrying out the activity
i) i) has a web page containing the information mentioned according to art. 514 (3) of this law	f) information on the name, structure and content the web page of the association
	d) information about the governing bodies of the association, which include the list of governing bodies of the association, the name and position held within the bodies of the association;

Compared to the cumulative conditions that associations have to meet in order to obtain the authorization, Directive 2014/26/EU remains “*neutral as regards the prior authorization and supervision regimes in the Member States, including a requirement for the representativeness of the collective management organization, in so far as those regimes are compatible with Union law and do not create an obstacle to the full application of this Directive.* (Recital 50)



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The Communication from The Commission to The Council, The European Parliament and The European Economic and Social Committee - *The Management of Copyright and Related Rights in the Internal Market* **COM/2004/0261** states that *in their role as rightholders' trustees, collective management organizations have particular responsibilities due to the economic, cultural and social functions they fulfil, the establishment of a collecting society should be subject to similar conditions in all Member States. In order to promote good governance, common ground appears to be required at Community level in relation to the persons that may establish a society, the status of the latter, the necessary proof of efficiency, operability, accounting obligations, and a sufficient number of represented rightholders* (3.5.1. The Establishment and Status of Collecting Societies)

Taking into account those mentioned above, as well as the role and main object of activity of collective management organizations, it is necessary that Article 51<sup>1</sup> (3) to be amended and supplemented with existing provisions of Article 51<sup>2</sup> (2), so that the authorization is granted to public associations that meet the following cumulative conditions:

- a) is registered as a non-profit association, with the status of legal person;
- b) the headquarters of the association is located in the Republic of Moldova;
- c) the members of the association are exclusively rightholders of copyright or related rights, who have entrusted management of the rights on the basis of a mandate
- d) submits the repertoire of works, interpretations, phonograms or videograms belonging to its own members, according to the model approved by AGEPI;
- e) the sole or main purpose/field of activity of the association is the collective management of copyright or related rights, as defined in Article 48 (1);
- f) the statute of the association corresponds to the provisions of Article 51<sup>3</sup> and allows access as members of any right holders in its field of activity;
- g) has staff and technical means to carry out the activity, including the system of distribution of remuneration;
- h) has a current account at a banking institution;
- i) has a web page containing the information mentioned in Article 51<sup>4</sup> (3).

The list of members, the repertoire managed and the system for the distribution of remuneration are mandatory elements, which each collective management organization must hold and submit for approval, regardless of whether or not it will issue extended collective licenses, or will hold or not the quality of collector, in the case of compulsory collectively managed rights.

Definitions of collective management organizations can be found in:

- Article 1 (4) of Directive 93/83/CEE - 'collecting society means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes;
- Article 3 a) of Directive 2014/26/UE - 'collective management organization' means any organization which is authorized by law or by way of assignment, license or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:
  - (i) *it is owned or controlled by its members;*



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(ii) *it is organized on a not-for-profit basis;*

In both cases, the sole or main purpose of these organizations is the collective management of copyright and related rights, which includes *granting of licenses to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightsholders* (Recital 2 of Directive 2014/26/UE).

It is necessary to rephrase Article 51<sup>1</sup> (8), by deleting the final sentence “*except for the right to issue a license to a user and the right to collect remuneration for the use of works or objects of related rights*”, having in mind that:

- Article 49 (1)<sup>23</sup> complies with the European definitions of collective management organizations;
- Article 48 (1) contains, for the most part,<sup>24</sup> the definition of collective management - *Management of copyright and related rights includes granting of licenses to users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightsholders.*
- Article 48 (11) provides for voluntary collective management<sup>25</sup>, in which case the management organizations shall collect and distribute the remuneration due to their members and their repertoire, without the need to complete a special formality, such as those proposed in Article 51<sup>2</sup>.

By obtaining the authorization, the association becomes a collective management organization (registered in the List of collective management organizations in the Republic of Moldova) and can carry out collection and distribution activities for collectively managed rights, without the need for special designation by the Authorization Commission.

Article 51<sup>1</sup> (8), with the following new content (after it has been rephrased) *The association registered in the List of collective management organizations of the Republic of Moldova has all the rights, obligations and attributions of a collective management organization must be interpreted in correlation with:*

- Article 49 (2) - Collective management organizations are set up separately to manage rights, categories of rights or types of works and other protected objects of distinct categories of holder
- Article 51<sup>2</sup> paragraphs (6) and (7) - (6) The authorization of the association registered in the List of collective management organizations in the Republic of Moldova is made separately for the field of copyright and related rights, for the collective management of one or more rights mentioned in Article 48 paragraphs (9) and (10) of this law.

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<sup>23</sup> Article 49. Collective management organizations

1. Collective management organizations shall have the status of public association and shall be established by the free association of rightholders, having as their main purpose the management of copyright or related rights on behalf of rightholders and their collective benefit, being owned or controlled by its members.

<sup>24</sup> *auditing of users* is missing

<sup>25</sup> Voluntary collective management may be exercised in any area of rights management, except in those where extensive and mandatory collective management is exercised. Rights other than those mentioned above may be managed collectively on an optional basis only with the express consent of the rights holder.



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(7) *The authorization of several collective management organizations for the management of the same rights belonging to the same categories of holders is not permitted.*

The need to improve the functioning of collective management organizations has already been identified in Commission Recommendation 2005/737/EC **on collective cross-border management of copyright and related rights for legitimate online music services** (Recital 6 of Directive 2014/26/UE). Having in mind that the Commission Recommendation was a ‘soft law’ approach which clearly goes further than merely interpreting or supplementing existing rules, by its **resolution of 13 March 2007**, the European Parliament invites the European Commission:

- to make it clear that the 2005 Recommendation applies exclusively to online sales of music recordings;
- to present a proposal for a flexible framework directive to be adopted by Parliament and the Council in co-decision with a view to regulating the collective management of copyright and related rights.

In this legislative resolution, the European Parliament emphasized that the proposed directive:

- avoid the over-centralization of market powers and repertoires by ensuring that exclusive mandates may not be granted to a single or a very few CRMs by major right-holders, thereby guaranteeing that the global repertoire remains available to all CRMs for the granting of licenses to users;
- introduce competition on the basis of the efficiency and quality of services that CRMs can offer and not on the basis of the level of remuneration provided to right-holders;

**By introducing a fair and transparent competitive system in the field of collective management:**

- *the potential risk of favouring a concentration of rights in the bigger CRMs is avoided.* Those CRMs are attracting the most profitable right-holders against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs (point L)
- *the competition must be introduced on the basis of the efficiency and quality of the services that CRMs can offer and the percentage share represented by administrative costs* (point N)
- *regardless of which CRM manages the copyright (..) every repertoire, regardless of whether or not it is widely known, should be treated equally* (point V)
- **the pressures on the authors' incomes are avoided;**
- *the system of reciprocal representation agreements stimulates fair competition and „it enables all commercial and individual users without discrimination to have equal access to the world repertoire”* (point O)
- *safeguard the position of authors in Europe (including local authors and minority repertoire) and underpin cultural diversity in Europe* (point X)
- *national CRMs should continue to play an important role in providing support for the promotion of new and minority right-holders, cultural diversity, creativity and local repertoires* (point I)

In the Republic of Moldova, the freedom of artistic and scientific creation is guaranteed by the Constitution (Article 33), and the freedom of association is respected, protected and ensured



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in accordance with the provisions of Law no. 86/2020 on non-commercial organizations (Article 5).

In this respect, the text of the law must allow the coexistence of collective management organizations, which manage the same rights belonging to the same categories of holders, stating that it is mandatory to delimit the management of copyright from that of related rights (collective management organizations set up for the management of distinct categories of rights, corresponding to different fields of creation, as well as for the management of rights belonging to different categories of holders).

For example, I attach the list of collective management organizations drawn up by the European Commission pursuant to art. 39 of Directive 2014/26/EU, list available at <https://ec.europa.eu/digital-single-market/en/news/publication-collective-management-organisations-competent%20authorities-collective-rights-management-directive>.<sup>26</sup>

Taking into account the above, it is necessary to eliminate Article 51<sup>2</sup> (7) - *The authorization of several collective management organizations for the management of the same rights belonging to the same categories of holders is not permitted.*

According to art. 5 of Directive 2014/26/EU *Rightsholders shall have the right to authorize a collective management organization of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organization or the rightsholder.*

### 11.3 RECOMMENDATIONS REGARDING THE DESIGNATION OF COLLECTORS

Comparing and analyzing the provisions of Articles 51<sup>1</sup> and 51<sup>2</sup>, Article 51<sup>2</sup> actually regulates the legal procedure for designating the collective management organization that can issue extended collective licenses or that can hold the status of sole collector, in the case of compulsory collectively managed rights.

Given that the procedure for endorsing collective management organizations is clearly and completely regulated, listing the minimum and mandatory requirements that an association must meet, it is not necessary to repeat the conditions regarding the list of members, the staff and technical means for carrying out the activity, etc. in order to designate organizations which may issue extended collective licenses or which may hold the status of sole collector, in the case of compulsory collectively managed rights.

According to the Resolution of 13 March 2007, by avoiding *forum-shopping* (users seeking out the CRM that provides the cheapest licences), the collective management organizations should be at the centre of the close cooperation *for the existence of one-stop shops where commercial users may obtain a licence concerning the world repertoire for the territories they need, in combination with a high degree of protection for rightholders* (point Q)

*Directive 2014/26/UE does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organization and a user, i.e.*

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<sup>26</sup> According to the data updated on 31 January 2020, the situation of collective management organizations is as follows: Austria - 8 CMOs; Belgium - 26 CMOs; Croatia - 8 CMOs; Czech Republic - 6 CMOs; Denmark – 16 CMOs; Finland - 7 CMOs; Germany - 13 CMOs; Greece - 17 CMOs; Ireland -10 CMOs; Latvia - 6 CMOs; Lithuania - 6 CMOs; Netherlands - 22 CMOs; Romania - 16 CMOs; Slovakia - 5 CMOs; Slovenia - 5 CMOs; Spain - 8 CMOs and Hungary - 9 CMOs.





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*extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organizations.* (Recital 12)

Taking this into account, the following steps must be taken in the correct and complete regulation of the collective management system:

1. identification of the rights and categories of works and other protected objects, which are managed through collective management organizations;
2. identification of the appropriate type of management for each right;
3. regulation of the conditions for the designation of organizations which may issue extended collective licenses or which may hold the status of sole collector, in the case of compulsory collectively managed rights.

The granting of extended collective licenses is explicitly authorized in Article 3 of Directive 93/83/EEC – *The acquisition of broadcasting rights*. This mechanism is enshrined and regulated in detail in Directive (EU) 2019/790 *on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC* (Recitals 33, 44, 45, 46, 47, 48, 49, 50 and Article 12).

The conditions regarding the designation of the collective management organization that issues the extended collective licenses must take into account the conditions provided in Article 12 of Directive (EU) 2019/790, respectively:

- the organization has a **legal mandate or is presumed to represent rightsholders who have not authorized the organization accordingly;**
- the collective management organization is, **on the basis of its mandates, sufficiently representative of rightsholders in the relevant type of works** or other subject matter and of the rights which are the subject of the license;
- all rightsholders are guaranteed **equal treatment**, including in relation to the terms of the license;
- **rightsholders who have not authorized the organization granting the license may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism;**
- appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the license. Publicity measures shall be effective without the need to inform each rightsholder individually.

Article 7 of Directive 2014/26/EU shall apply to this licensing mechanism, so collective management organizations comply with the rules set out in:

- Article 6 (4) - *A collective management organisation shall allow its members to communicate with it by electronic means, including for the purposes of exercising members' rights;*
- Article 20 - *Without prejudice to Article 25, Member States shall ensure that, in response to a duly justified request, a collective management organisation makes at least the following information available by electronic means and without undue delay to any collective management organisation on whose behalf it manages rights under a representation agreement or to any rightholder or to any user:*
  - (a) the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered; or*



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*(b) where, due to the scope of activity of the collective management organisation, such works or other subjectmatter cannot be determined, the types of works or of other subject-matter it represents, the rights it manages and the territories covered.*

- Article 33 – (1) Member States shall ensure that collective management organizations make available to their members, and to collective management organizations on whose behalf they manage rights under a representation agreement, effective and timely procedures for dealing with complaints, particularly in relation to authorization to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to rightsholders, deductions and distributions.

*(2) Collective management organisations shall respond in writing to complaints by members or by collective management organisations on whose behalf they manage rights under a representation agreement. Where the collective management organisation rejects a complaint, it shall give reasons.*

Under the European acquis, there are several cases in which compulsory collective management is explicitly authorized, namely:

- 1) Article 9 of Directive 93/83/CEE – *Exercise of the cable retransmission right*;
- 2) Article 6 (2) of Directive 2001/84/CE - *Persons entitled to receive royalties*;
- 3) Article 5 of Directive 2006/115/CE - *Unwaivable right to equitable remuneration*;
- 4) Article 1 letter 2d) of Directive 2011/77/UE - *Amendments to Directive 2006/116/EC*;
- 5) Article 4 of Directive (UE) 2019/789 - *Exercise of the rights in retransmission by rightsholders other than broadcasting organizations.*

Given that Article 12 of Directive (EU) 2019/790 shall not apply to mandatory collective management of rights, the designation of the collector in the case of a compulsory collectively managed right may be the responsibility of the Advisory Commission or may revert to collective management bodies, which choose with the vote of the majority, the collecting organization.

In both cases, may be considered elements such as:

- the representativeness of the organization (analyzed from the perspective of the number of members and the managed repertoire);
- collection and distribution capacity;
- the amount of the management fee charged;
- the collective management organization should not be in the process of dissolution or liquidation;
- fulfilling the fiscal obligations to the state budget;
- transparency of the collective management activity;
- the criminal liability of the association for crimes in the field of intellectual property, corruption or against property was not engaged;
- persons elected, appointed or employed in the management, control and supervisory bodies of collective management organizations have not been definitively convicted of intellectual property offenses, corruption offenses or against property;
- the existence of representation agreements with similar organizations from abroad;
- lack of sanctions applied by Authorization Commission following the controls performed, etc.



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The listed elements can be included in the content of Law no. 139/2010, in a separate article on the legal criteria applicable in the case of designating collectors for mandatory collectively managed rights.

#### 11.4 RECOMMENDATIONS ON THE CONTROL OF COLLECTIVE MANAGEMENT ORGANIZATIONS

Directive 2014/26/EU does not establish the "*ex ante or ex post nature of control over collective management organizations*" and does not require the establishment of new competent authorities. Instead, it is necessary that the competent authorities provided in Article 36, to be "*capable of addressing in an effective and timely manner any concern that may arise in the application of this Directive*". (Recital 50)

In this regard, I attach the list of competent authorities, drawn up by the European Commission pursuant to Article 36 of Directive 2014/26/EU, list available at <https://ec.europa.eu/digital-single-market/en/news/publication-collective-management-organisations-competent%20authorities-collective-rights-management-directive>.

In the content of the draft amendment and completion of Law no. 139/2010, the control of collective management organizations is regulated in Article 51<sup>10</sup> *Control of the functioning of collective management organizations*.

Paragraphs (2), (3), (5) and (6) include some elements of the control procedure regarding the activity of collective management organizations, elements that should not be found in a normative act such as Law no. 139/2010 (special law), but in a Government Decision, similar to Government Decision no. 184/2015 or Government Decision no. 987/2017.

In view of this, as well as taking into account the recommendations regarding the authorization of collective management organizations and the designation of collectors, the following measures are required:

- drafting a procedure of the control activity (self-standing) carried out by AGEPI experts and an analysis of the possibility for this activity to be certified in the Quality Management System.

According to the information on its website<sup>27</sup> *AGEPI is the first public institution in the Republic of Moldova certified in the new version of the ISO 9001: 2015 standard. In 2019, AGEPI received the certificates confirming the recertification of the Quality Management System implemented within the institution in accordance with the ISO 9001: 2015 standard. The first ISO 9001:2008 certificate for AGEPI, accompanied by the IQNet International Certificate, was issued in 2013, and in 2017 during the external audit of the degree of implementation of the requirements of the Quality Management System, the audit on transition to the ISO 9001: 2015 standard took place.*

The two certificates were issued for *Legal protection granting services for intellectual property objects*.

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<sup>27</sup> <http://agepi.gov.md/ro/news/agepi-fost-recertificat%C4%83-%C3%AEn-conformitate-cu-standardul-iso-90012015>



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AGEPI has a process procedure regarding the provision of services in the field of copyright and related rights, in which the activities of monitoring, supervision and control of the activity of collective management bodies are briefly regulated.

The new government decision, as well as the new process procedure would replace the Instructions approved by the Order of the General Director of AGEPI no. 169/2016, amended by the Orders of the General Director of AGEPI no. 204/2017, 77/2018 and 71/2020;

- *Amendment and completion of Law no. 114/2014 on the State Agency for Intellectual Property, in the sense of eliminating the first sentence from Article 7 (2) letter t) “performs the control of the functioning of associations registered in the List of collective management organizations in the Republic of Moldova”. Thus, the responsibility of AGEPI is **to control the functioning of collective management organizations of copyright and/or related rights in the Republic of Moldova.***

In relation to the request of the collective management organisation ANPFI regarding the analysis of the legislation in force in the Republic of Moldova, more precisely of the way in which the provisions of *Law no. 131/2012 on state control over entrepreneurial activity* can be applied by AGEPI, I mention the following:

Law 131/2012 applies only to:

- a) The persons subject to control, respectively *the natural and/or legal persons who practice entrepreneurial activity and are subject to control. A subdivision of the person can be considered a separate person if it is identified as a full object of control in a control area and is located in a separate location from the headquarters of the legal person to which it belongs* (Article 2);
- b) The control bodies that have the right to initiate this state control, respectively *only to the public authorities/institutions established in the annex to the present law, within the corresponding limits* (Article 4 (2<sup>1</sup>)).

Given that the collective management organizations are associations, which operate according to Law no. 86/2020 on non-commercial organizations and Law no. 139/2010 on copyright and related rights, and AGEPI is not included in the annex of Law no. 131/2012, which contains the *List of control bodies and their related fields*, I underline that this normative act is not applicable to the control of collective management organizations.

Compared to the sanctions that can be applied in case of non-compliance with the legal provisions regarding the organization and functioning of collective management organizations, Directive 2014/26/EU “*does not provide for specific types of sanctions or measures, provided that they are effective, proportionate and dissuasive. Such sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a collective management organization or, in cases where an authorization is issued for an organization to operate, the withdrawal of such authorization*” (Recital 50)

In relation to the recommendations regarding the authorization of collective management organizations and the designation of collectors, it is necessary to revise art. 51<sup>11</sup>. *Violation by the collective management organization of the provisions of this law.* Thus, in addition to the replacement of the general manager and the members of the board of directors, by the General



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Assembly of the collective management organization, the Authorization Commission may order, depending on the legal provisions that have been violated and the gravity of the facts, measures such as:

- withdrawal of the quality of designated collector;
- suspension of activity for a period between 6 months and 1 year;
- withdrawal of the authorization.

The measures ordered by the Authorization Commission must be clear, precise and with an indication of the legal basis and do not preclude the incurrance of contravention or criminal liability.

I mention the fact that the Regulation on the organization and functioning of the Authorization Commission can be regulated in a government decision, such as Government Decision no. 184/2015 or Government Decision no. 987/2017.

### **11.5 RECOMMENDATIONS REGARDING THE LEGAL PROCEDURE FOR SETTING THE TARIFFS, THROUGH THE FOLLOWING STEPS: NEGOTIATION, MEDIATION/ ARBITRATION, COURT.**

Authors create works that they make available to the public, in exchange for remuneration, paid by users who use content protected by copyright or related rights, depending on the purpose and object of the main activity (radio, TV, cable operators) or secondary (hotels, restaurants, shops).

The legal offer of copyrighted/related rights content should be easily accessible and affordable, so that the number of paying users increases. This implies the increase of the level of the amounts collected by the collective management organizations, implicitly of the amounts due to the authors and rights holders, but also of the revenues of the collective management organizations (management fees).

Therefore, the relationship between collective management organizations, mandated by authors and rightholders, and users is one on long-term, based on good faith, respect and mutual provision of the necessary information. The level of remuneration must not be purely symbolic, nor burdensome, so as not to lead to a decrease in the use of copyrighted/related rights content or to the cessation of the activity of certain categories of users.

In accordance with the Resolution of 13 March 2007, it is necessary to:

- *provide users with a high degree of legal certainty and preserve the availability of the global repertoire through licenses available from any CRM within the EU and through interoperable technological platforms;*
- *take into account the interests of users and of the market, and in particular ensure that small and medium-sized users have adequate legal protection and, in the event of disputes, that effective and inexpensive dispute-settlement mechanisms are in place which do not burden users with unreasonable legal costs.*

The draft amendment and completion of Law no. 139/2010 stipulates that the remunerations due by users are established by Government Decision, as follows:

- The amount of remuneration that is established through negotiations or mediation may not be lower than the minimum tariffs for author's remuneration, approved by the Government or provided by this law (Article 48 (16));



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- Users have the following obligations: c) to pay to the collective management organization, as the case may be, the corresponding remunerations for the use of works and/or other protected objects. Payment shall be made in accordance with the tariffs approved by the Government (art. 51<sup>5</sup> (2).

*(1) This law enters into force at the expiration of 6 months from the date of publication in the Official Gazette of the Republic of Moldova.*

*(2) The Government, until the date of entry into force of this code:*

*a) will elaborate and present to the Parliament proposals regarding the bringing of the legislation in force in accordance with the present law;*

*b) will bring its normative acts in accordance with the present law and will ensure the elaboration of the normative acts necessary for its implementation;*

*c) will ensure the revision and abrogation of the departmental normative acts that contravene this law (Article III. Final and transitional provisions).*

The Information Note shows that *the provisions related to the establishment of remuneration tariffs by the Government and the settlement of disputes between the parties involved in the collective management of copyright and related rights according to Article 50 have been revised. As a result of the amendments thus proposed, some structural elements have been renumbered from the text of Law no. 139/2010. Thus, in accordance with the provisions of Article 48 (17) and (18) of the draft, if the interested parties cannot agree on the licensing conditions applicable to the methods of capitalization of the objects whose rights have been entrusted to them in management, either party may appeal to the Mediation Commission or to the Arbitration specialized in the field of intellectual property, established by AGEPI. The methodologies by which the amount of the remuneration to be paid by the users for the capitalization of the works and/or objects of the related rights, as well as other licensing conditions is established, are approved by the Government*

As I mentioned in the Recommendations on the correct and complete transposition of Directive 93/83/EEC, currently in the Republic of Moldova, the remuneration due by users is established by Government Decision no. 641/2001 on the minimum tariffs of the author's remuneration, normative act issued in accordance with Article 25 of the Law on copyright and related rights no. 293-XIII of November 23, 1994.

Practice shows that the establishment of the level of remuneration/tariffs in a Government Decision was not beneficial for the Republic of Moldova, not ensuring equal and non-discriminatory treatment of different categories of users. There have been abuses by imposing tariffs that are not updated according to the needs of the Moldovan market, that are not based on objective and non-discriminatory criteria, with considerable margins between the maximum ceiling and the minimum remuneration.

Taking these aspects into account, the following measures are required:

- Establishing a legal procedure (negotiation, mediation or arbitration, Court) for establishing the remuneration due by users to collective management organizations;
- Regulation of the composition of the negotiation commission (collective management organizations, on the one hand, and user's representative associations, major users at national level and/or local users, on the other hand);
- Imposing legal criteria on the basis of which to negotiate tariffs, such as:



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- the category of rightsholders, types of works or subject-matter and the domain for which the negotiation is carried out;
  - the category of users represented at negotiations by associative structures or the other users appointed to negotiate;
  - the repertoire managed by the collective management organization, for its own members, as well as for members of other similar foreign organizations, on the basis of reciprocity contracts;
  - the proportion of use of the repertoire managed by a collective management organization;
  - the proportion of uses for which the user has complied with the payment obligations by direct contracts with rightsholders;
  - the incomes attained by users from the activity that uses the repertoire subject to negotiation;
  - the European practice regarding the results of negotiations between users and collective management organizations.
- Enumeration of the obligatory elements that the methodologies must include (payment terms, remuneration/tariffs, expressed either as a percentage or as a flat rate, calculation basis, communication of information on the use of works/performances/phonograms, delay penalties, discounts);
  - The possibility for AGEPI to give a specialized opinion on the draft methodology to be negotiated. The proposed tariffs must not be the subject of that opinion. This approval procedure verifies whether:
    - the provisions of the draft methodology comply with the legal provisions;
    - the granting of licenses is not conditioned by the acceptance by users of additional services which, by their nature or in accordance with the legal provisions, are not related to the object of the licenses;
    - unfair remuneration or any other unfair non-exclusive licensing conditions are not imposed on users.
  - The tariffs established according to this legal procedure are opposable to all users in the field for which it was negotiated, being established individualized tariffs for categories of users (for example, accommodation units classified according to the number of stars and the place in which they are located - town, tourist resort, village; restaurants according to the surface and the place in which they are located);
  - Publication of methodologies in the Official Gazette;
  - Possibility to index flat-rate remuneration based on the inflation index, established at national level
  - Establishing a minimum period of validity of the methodologies (for example, a new request to initiate the procedures for negotiating the methodologies can be formulated only after 3 years from the date of the publication of their final version in the Official Gazette).



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By eliminating the provisions that propose the establishment of remuneration by Government Decision, the transposition of the provisions of Article 34 (1) and Article 35 of Directive 2014/26/EU shall be ensured<sup>28</sup>.

*This Directive neither prescribes a specific manner in which such alternative dispute resolution should be organized, nor determines which body should carry it out, provided that its independence, impartiality and efficiency are guaranteed. Finally, it is also appropriate to require that Member States have independent, impartial and effective dispute resolution procedures, via bodies possessing expertise in intellectual property law or via courts, suitable for settling commercial disputes between collective management organizations and users on existing or proposed licensing conditions or on a breach of contract (Recital 49)*

In the Republic of Moldova, the alternative disputes resolution is regulated, in general, according to the Law on Arbitration no. 23/2008 and the Law on mediation no. 137/2015.

In the field of intellectual property, are applicable the provisions of **Government Decision no. 184/2015 for the approval of the Regulation on the organization and functioning of the Mediation Commission in the field of intellectual property and the mediation procedure**, as well as those of the **Government Decision no. 987/2017 on the organization and functioning of the Arbitration specialized in the field of intellectual property and the arbitration procedure**, the arbitration tariffs being established according to the **Government Decision no. 774/1997**.

Law no. 114/2014 on the State Agency for Intellectual Property regulates both mediation (Article 27. *Mediation Commission in the field of intellectual property and its competence* and Article 28. *The mediator within the Mediation Commission*) and arbitration (Article 29. *Arbitration specialized in the field of intellectual property and its competence*).

Although there is a well-regulated normative framework, the practice shows that in the field of collective management no alternative dispute resolution was used, the users' trust being low regarding the application of art. 51<sup>5</sup> (1) d) of the draft amendment and completion of Law no. 139/2010. This article stipulates that users have the right to appeal to the Mediation Commission or to the Intellectual Property Arbitration, established by AGEPI, if they cannot agree with the collective management organization on the negotiation conditions. ARAX IMPEX shows that the wording of Article 48 (14) - (16) *only gives the impression that this remuneration can be negotiated*.

Under the European Acquis, the alternative dispute resolution procedure is expressly regulated in:

- Article 11 of Directive 93/83/CEE – *Mediators*;
- Article 34 of Directive 2014/26/UE - *Alternative dispute resolution procedures*;
- Article 35 of Directive 2014/26/UE - *Dispute resolution*;

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<sup>28</sup> Article 35 Dispute resolution 1. Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law

2. Articles 33 and 34 and paragraph 1 of this Article shall be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.





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- Article 6 of Directive (UE) 2019/789 – *Mediation*;
  - Article 17 (9) of Directive (UE) 2019/790 - *Use of protected content by online content-sharing service providers*;
  - Article 21 of Directive (UE) 2019/790 - *Alternative dispute resolution procedure*.

I draw attention to the fact that *the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements.* (Recital 81)

The Republic of Moldova is a party to *the Convention for the Establishment of the World Intellectual Property Organization*, and the Government Decision no. 110/2013 approved the Memorandum of Understanding between the Government of the Republic of Moldova and WIPO on cooperation in the field of intellectual property.

In these circumstances, I draw attention to the possibility of concluding a Memorandum of Understanding (MoU) on the alternative dispute resolution procedure, between WIPO and AGEPI.

Established in 1994 in Geneva, Switzerland, the Center for Arbitration and Mediation is an independent, non-profit and impartial body that is part of WIPO. The Center is currently recognized as the leading provider of dispute resolution services for the registration and misuse of Internet domain names.

According to the existing data on the WIPO website, in the period 2010 - 2019<sup>29</sup>, the cases submitted to the mediation and arbitration procedures concerned:

- **13%** - copyright (broadcasting organizations, collective management, entertainment, TV, film and media formats, copyright infringements);
- **20%** - commercial litigation (sports rights, marketing, distribution);
- **20%** - trademarks (agreements, disputes, infringement of trademark rights, licenses, oppositions, revocations);
- **25%** - ICT (telecommunications, IT development, outsourcing, software licensing);
- **30%** - patents (infringement of patent law, research and development agreements, ownership, payment of remuneration).

Detailed information on the services provided by the WIPO Arbitration and Mediation Center can be found in the brochures *WIPO Guide on Alternative Dispute Resolution Options for Intellectual Property Offices and Courts* (2018)<sup>30</sup> and *WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and Clauses* (2016)<sup>31</sup>.

At the level of the European Union, WIPO concluded the MOU with the Lithuanian Ministry of Culture, the Patent Office of the Republic of Poland, the Spanish Patent and Trademark Office and the Romanian Copyright Office.

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<sup>29</sup> <https://www.wipo.int/amc/en/center/caseload.html>

<sup>30</sup> [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_guide\\_adr.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_adr.pdf)

<sup>31</sup> <https://www.wipo.int/publications/en/details.jsp?id=3399>



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Regarding the procedure, costs and list of mediators, information can be found on the ORDA's website<sup>32</sup>.

Among the advantages offered by signing the MOU, I mention confidentiality (the procedure is not public), impartiality, extended scope, increased autonomy (unlike disputes brought before the courts, the parties may choose the most appropriate decision-makers for their dispute, as well as the applicable law, place and language of the proceedings. The procedure is fast, as the parties are free to develop the most efficient procedures for their dispute, in conditions of financial efficiency)

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<sup>32</sup> <https://orda.ro/wp-content/uploads/2020/07/WIPO-ORDA-Arbitration-Center.pdf>



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## 12 DIRECTIVE (EU) 2017/1564 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CERTAIN PERMITTED USES OF CERTAIN WORKS AND OTHER SUBJECT MATTER PROTECTED BY COPYRIGHT AND RELATED RIGHTS FOR THE BENEFIT OF PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINTDISABLED AND AMENDING DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was adopted at the Diplomatic Conference in Marrakesh, on June 27, 2013 and entered into force on September 30, 2016.

On April 30, 2014, the European Union signed the Marrakesh Treaty, but the ratification process was delayed due to the resolution of legal issues concerning the exclusive or shared competence of the European Union and its Member States.

The European Commission sought the opinion of the European Court of Justice in August 2015.

By its Opinion no. 2/14.02.2017, the Court confirmed the exclusive competence of the European Union, clarifying also that the Marrakesh Treaty does not fall within the scope of the common commercial policy.

On September 13, 2017, they were adopted:

- Regulation (EU) 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled;
- Directive (EU) 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise printdisabled and amending directive 2001/29/ec on the harmonisation of certain aspects of copyright and related rights in the information society.

By Decision no. 254/2018, the Council of the European Union authorized ratification, stating that the deposit of the instrument of ratification by the European Union should take place three months before the date by which Member States are to transpose Directive (EU) 2017/1564 and from which Regulation (EU) 2017/1563 becomes applicable<sup>33</sup>.

The ratification of the Treaty by the European Union took place in September 2018, on the occasion of the WIPO General Assemblies. This date has been chosen to ensure alignment with the date by which the EU MS had to transpose Directive (EU) 2017/1564 (11 October 2018) and the date from which Regulation (EU) 2017/1563 applies (12 October 2018).

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<sup>33</sup> Pursuant to Article 19 (b) of the Marrakesh Treaty, in the case of the European Union, the effective date on which it becomes a party to the Marrakesh Treaty is three months from the date of deposit of the instrument of ratification or accession with the Director General of WIPO.



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The Informative Note to the draft law for the amendment of some normative acts specifies that the Treaty was ratified by the Republic of Moldova by Law no. 240/2017, (...) therefore, the proposal to amend art. 28 lit. h) of the Law supposes its adjustment to the provisions of the Treaty.

The legislative solution chosen was the insertion of the following text:

h) *the use of works, including through reproduction, distribution and making available, for the benefit of the visually impaired or those with a visual or reading disability or who are unable, due to a physical disability, to hold or handle a book or to focus their gaze, directly related to that deficiency and being of a non-commercial nature, to the extent justified by such use, in order to facilitate the availability of works in the form of copies in a format accessible to such persons*

## **12.1 RECOMMENDATIONS:**

The proposed text does not provide the necessary regulation, so these measures are needed:

**12.1.1 THE TRANSPOSITION OF ARTICLE 2 – DEFINITIONS** ('work or other subject matter', 'beneficiary person', 'accessible format copy', 'authorized entity'), Article 3 - Permitted uses, Article 5 - Obligations of authorized entities, Article 7 - Protection of personal data;

**12.1.2 The exchange of accessible format copies between the European Union and third countries** that have ratified the Marrakesh Treaty is governed by Regulation (EU) 2017/1563 (Article 3 - Export of accessible format copies to third countries and Article 4 - Import of accessible format copies from third countries). So there is no need to transpose Articles 4 and 6, because the import and the export are in accordance with the national legislation adopted pursuant to Marrakesh Treaty;

**12.1.3 Taking over the amended text of Article 5 (3) of Directive 2001/29 /EC**, point (b) *uses, for the benefit of people with a disability, which are directly related to the disability and of a noncommercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council.* I mention the fact that the transposition of the exception provided in Article 3 of Directive (EU) NO. 2017/1564 does not remove the transposition of the exception from Article 5 (3) b) of Directive 2001/29/EC. **THOSE TWO EXCEPTIONS CONCERN DIFFERENT SITUATIONS, SO THEIR COEXISTENCE WITHIN THE LAW IS NECESSARY;**

**12.1.4 IDENTIFICATION OF ASSOCIATIONS OF THE BLIND PEOPLE IN THE REPUBLIC OF MOLDOVA, IN ORDER TO REGISTER THEM IN THE ABC CONSORTIUM OF WIPO<sup>34</sup>;**

**12.1.5 COMPLETION OF THE INFORMATION NOTE WITH STATISTICAL DATA ON THE NUMBER OF BLIND**

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<sup>34</sup> Accessible Books Consortium (ABC) is a public-private partnership led by the World Intellectual Property Organization (WIPO). Includes organizations representing people with visual impairments, such as the World Blind Union (WBU); libraries for the blind; standardization bodies and organizations representing authors, publishers and collective management organizations.



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## 13 OBSERVATIONS OF LEGISLATIVE TECHNIQUE

The draft amendment and completion of Law no. 139/2010 should be drafted in such a way that the text is systematized, rearranged and correlated, in accordance with the rules of legislative technique.

For example, the following are required:

- Fragmentation of too long articles, which regulate distinct concepts (for example, Article 48, which transposes Article 5 of Directive 2014/26/EU, but also regulates compulsory collective management, extended collective management and optional collective management);
- Grouping the definitions of all terms and expressions in one article;



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## 14 FINAL CONCLUSIONS

Taking into account the fact that the present report contains wide recommendations, both regarding the proposals for modification and completion of the legislative project, and for the provisions of Law no. 139/2010 as a whole, I appreciate that it is necessary to draft a new draft law, in which to ensure the correlation of the entire text.

Practice shows that successive amendments and completions create considerable difficulties in implementation.

The draft law must have a homogeneous structure, which facilitates the knowledge and application of legal rules both by the target groups and by common people, as it is known that the field is of particular interest.



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## 15 ANNEX TO CHAPTER 11 - DIRECTIVE 2014/26/EU

### 15.1 LIST<sup>35</sup> OF COMPETENT AUTHORITIES

under Article 36(3) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Member State	Competent Authority
<b>Austria</b>	Supervisory Authority for Collective Management Organisations (Aufsichtsbehörde für Verwertungsgesellschaften)
<b>Belgium</b>	Service de contrôle des sociétés de gestion du droit d'auteur et des droits voisins (SPF Economie)
<b>Bulgaria</b>	
<b>Cyprus</b>	Copyright and Related Rights Authority
<b>Czech Republic</b>	Ministry of Culture
<b>Germany</b>	Deutsches Patent- und Markenamt (German Patent and Trademark Office)
<b>Denmark</b>	Ministry of Culture
<b>Estonia</b>	Ministry of Justice
<b>Greece</b>	Hellenic Copyright Organisation
<b>Spain</b>	Deputy General Directorate for Intellectual Property (Ministry of Education, Culture and Sports)
<b>Finland</b>	Patent and Registration Office
<b>France</b>	
<b>Croatia</b>	State Intellectual Property Office
<b>Hungary</b>	Hungarian Intellectual Property Office (Szellemi Tulajdon Nemzeti Hivatala)
<b>Ireland</b>	Controller of Patents, Trademarks and Industrial Designs
<b>Italy</b>	AGCOM
<b>Lithuania</b>	Ministry of Culture
<b>Luxembourg</b>	
<b>Latvia</b>	Ministry of Culture
<b>Malta</b>	Copyright Board
<b>Netherlands</b>	College van Toezicht Auteurs – en naburige rechten (CvTA)
<b>Poland</b>	Ministry of Culture (Ministerstwo Kultury i Dziedzictwa Narodowego, Departament Własności Intelektualnej i Mediów)
<b>Portugal</b>	
<b>Romania</b>	Romanian Copyright Office (ORDA)
<b>Sweden</b>	Swedish Patent and Registration Office (Patent- och registreringsverket)
<b>Slovenia</b>	Slovenian Intellectual Property Office (Urad Republike Slovenije za intelektualno lastnino)
<b>Slovakia</b>	Ministry of Culture

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<sup>35</sup> Last update 31 January 2020



## 15.2 LIST<sup>36</sup> OF COLLECTIVE MANAGEMENT ORGANISATIONS

under Article 39 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Member State	Collective Management Organisations
<b>Austria</b>	<ol style="list-style-type: none"> <li>1. AUSTRO-MECHANA Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H</li> <li>2. Bildrecht GmbH Gesellschaft zur Wahrnehmung visueller Rechte</li> <li>3. Literar - Mechana Wahrnehmungsgesellschaft für Urheberrechte, Gesellschaft m.b.H</li> <li>4. LSG - Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.H</li> <li>5. Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.) registrierte Genossenschaft mit beschränkter Haftung</li> <li>6. VAM Verwertungsgesellschaft für audiovisuelle Medien GmbH</li> <li>7. VDFS - Verwertungsgesellschaft der Filmschaffenden registrierte Genossenschaft mit beschränkter Haftung</li> <li>8. Verwertungsgesellschaft Rundfunk GmbH</li> </ol>
<b>Belgium</b>	<ol style="list-style-type: none"> <li>1. AGICOA Europe Brussels</li> <li>2. Auteursbureau ALMO</li> <li>3. ASSUCOPIE</li> <li>4. AUVIBEL</li> <li>5. BAVP</li> <li>6. COPIEBEL</li> <li>7. COPIEPRESSE</li> <li>8. deAUTEURS</li> <li>9. GÜFA</li> <li>10. IMAGIA</li> <li>11. LIBRIUS</li> <li>12. LICENSE2PUBLISH</li> <li>13. PLAYRIGHT</li> <li>14. PROCIBEL</li> <li>15. REPRO PP</li> <li>16. REPROBEL</li> <li>17. REPROPRESS</li> <li>18. SABAM</li> <li>19. SACD</li> <li>20. SAJ-JAM</li> <li>21. SCAM</li> <li>22. SEMU</li> <li>23. SIMIM</li> <li>24. SOFAM</li> <li>25. TONEELFONDS J. JANSSENS</li> <li>26. VEWA</li> </ol>
<b>Czech Republic</b>	<ol style="list-style-type: none"> <li>1. DILIA, divadelní, literární, audiovizuální agentura, o.s. (<a href="http://www.dilia.cz">www.dilia.cz</a>)</li> <li>2. OSA – Ochranný svaz autorský pro práva k dílům hudebním, o.s. (<a href="http://www.osa.cz">www.osa.cz</a>)</li> <li>3. INTERGRAM – Nezávislá společnost výkonných umělců a výrobců zvukových a zvukově obrazových záznamů, o.s. (<a href="http://www.intergram.cz">www.intergram.cz</a>)</li> <li>4. OOA-S, Ochranná organizace autorská – Sdružení autorů děl výtvarného umění, architektury a obrazové složky audiovizuálních děl, o.s. (<a href="http://www.ooas.cz">www.ooas.cz</a>)</li> <li>5. GESTOR – ochranný svaz autorský (<a href="http://www.gestor.cz">www.gestor.cz</a>)</li> <li>6. OAZA, Ochranná asociace zvukařů - autorů, o.s. (<a href="http://www.oaza.eu">www.oaza.eu</a>)</li> </ol>
<b>Germany</b>	<ol style="list-style-type: none"> <li>1. AGICOA – Urheberrechtsschutz GmbH</li> <li>2. GEMA – Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte</li> </ol>

<sup>36</sup> Last update 31 January 2020





Member State	Collective Management Organisations
	3. GÜFA – Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH 4. GVL – Gesellschaft zur Verwertung von Leistungsschutzrechten 5. GWFF – Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten mbH 6. GWVR – Gesellschaft zur Wahrnehmung von Veranstalterrechten mbH – 7. VG TWF – Treuhandgesellschaft Werbefilm mbH 8. VFF – Verwertungsgesellschaft der Film- und Fernsehproduzenten – 9. VG Bild-Kunst – Verwertungsgesellschaft Bild-Kunst 10. VGF – Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH – 11. VG Media – Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH 12. VG Musikedition – Verwertungsgesellschaft Musikedition 13. VG Wort – Verwertungsgesellschaft Wort
Denmark	1. CAB 2. COPYDAN TEKST & NODE (COPYDAN WRITING) 3. COPYDAN BILLEDER (COPYDAN VISUAL) 4. COPYDAN VERDENS TV 5. COPYDAN ARKIV 6. COPYDAN AVU-MEDIER 7. COPYDAN KULTURPLUS 8. FILMEX 9. FILMKOPI 10. FILMRET 11. FORFATTERNES FORVALTNINGSSELSKAB 12. GRAMEX 13. KODA 14. Musikproducenternes Forvaltningsorganisation (MPO) 15. NORDIC COPYRIGHT BUREAU (NCB) 16. PERFORMEX 14. IRIDANOS 15. PROMEDIA 16. TILEOPTIKA Dikaiomata SA 17. GEA
Greece	1. ATHINA 2. AUTODIAXEIRISI 3. THESPIS 4. ISOCRATIS 5. O.S.D.E.E.T.E 6. O.S.D.E.L. 7. PHOEBUS 8. APOLLON 9. DIAS 10. DIONYSOS 11. ERATO 12. HERMIAS 13. GRAMMO
Spain	1. Sociedad General de Autores y Editores (SGAE) 2. Centro Español de Derechos Reprográficos (CEDRO) 3. Visual, Entidad de Gestión de Artistas Plásticos (VEGAP) 4. Derechos de Autor de Medios Audiovisuales (DAMA) 5. Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) 6. Artistas Intérpretes, Sociedad de Gestión (AISGE) 7. Asociación de Gestión de Derechos Intelectuales (AGEDI) 8. Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA)
Finland	1. Kopiosto 2. Teosto 3. Gramex 4. Tuotos



Member State	Collective Management Organisations
	<ul style="list-style-type: none"> <li>5. Kuvasto</li> <li>6. Sanasto</li> <li>7. Filmex</li> </ul>
<b>Croatia</b>	<ul style="list-style-type: none"> <li>1. HDS ZAMP (Hrvatsko društvo skladatelja/ Croatian Composers' Society)</li> <li>2. HUZIP (Hrvatska udruga za zaštitu izvođačkih prava/ Croatian Performers' Rights Collecting Society),</li> <li>3. ZAPRAF (Udruga za zaštitu, prikupljanje i raspodjelu naknada fonogramskih prava/ Association for the Protection, Collection and Distribution of Phonogram Producers' Rights)</li> <li>4. DHFR (Društvo hrvatskih filmskih redatelja/ Croatian Film Directors Guild)</li> <li>5. ZANA (Udruga za zaštitu prava nakladnika/ Association for Protection of Publishers' Rights)</li> <li>6. DHK (Društvo hrvatskih književnika/ Society of Croatian Writers)</li> <li>7. DZNAP (Društvo za zaštitu novinarskih autorskih prava/Society for the Protection of Journalists' Rights)</li> <li>8. ARS CROATICA (Hrvatska udruga za zaštitu prava likovnih umjetnika/Croatian Society for Protection of Visual Artists)</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>1. ARTISJUS Magyar Szerzői Jogvédő Iroda Egyesület</li> <li>2. Előadóművészi Jogvédő Iroda Egyesület</li> <li>3. FILMJUS Filmszerzők és Előállítók Szerzői Jogvédő Egyesülete</li> <li>4. HUNGART Vizuális Művészek Közös Jogkezelő Társasága Egyesület</li> <li>5. Magyar Hangfelvétel-kiadók Szövetsége Közös Jogkezelő Egyesület</li> <li>6. Magyar Irodalmi Szerzői Jogvédő és Jogkezelő Egyesület</li> <li>7. Magyar Reprográfiai Szövetség</li> <li>8. Magyar Szak- és Szépirodalmi Szerzők és Kiadók Reprográfiai Egyesülete</li> <li>9. Repropress Magyar Lapkiadók Reprográfiai Egyesülete</li> </ul>
<b>Ireland</b>	<ul style="list-style-type: none"> <li>1. GFD Communications Limited</li> <li>2. The Irish Copyright Licensing Agency Ltd</li> <li>3. Irish Music Rights Organisation</li> <li>4. Irish Visual Artists Rights Organisation</li> <li>5. Mechanical Copyright Protection Society (Irl) Ltd</li> <li>6. Motion Picture Licensing Co. Int. Ltd</li> <li>7. Newspaper Licensing Irl Ltd</li> <li>8. Phonographic Performance (Irl) Ltd</li> <li>9. Recorded Artists Actors Performers Limited</li> <li>10. The Screen Directors Collecting Society of Ireland</li> </ul>
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>1. Asociacija LATGA</li> <li>2. Lietuvos gretutinių teisių asociacija AGATA [Lithuanian association of related rights]</li> <li>3. Audiovizualinių kūrinių autorių teisių asociacija AVAKA [Association for the rights of authors and producers of audiovisual works]</li> <li>4. AGICOA Europe (Baltic), association</li> <li>5. Muzikos kūrinių autorių teisių asociacija NATA [Association for the rights of creators of musical works]</li> <li>6. Gretutinių teisių asociacija GRETA [Association of related rights]</li> </ul>
<b>Latvia</b>	<ul style="list-style-type: none"> <li>1. Copyright and Communication Consulting Agency/Latvian Authors Association (AKKA/LAA)</li> <li>2. Latvian Performers and Producers Association (LaIPA)</li> <li>3. Latvian Union of Professional Actors (LaPAA)</li> <li>4. Latvian Film Producers Association (LKPA)</li> <li>5. LATREPRO</li> <li>6. Atbalss</li> </ul>
<b>Netherlands</b>	<ul style="list-style-type: none"> <li>1. Vereniging Het Bureau voor Muziekauteursrecht (Buma)</li> <li>2. The International Publishers Right Organization (IPRO)</li> <li>3. Stichting Collectieve Gelden Omroepen (SCGO)</li> <li>4. Stichting Leenrecht</li> <li>5. Stichting Literaire Rechten Auteurs (Lira)</li> <li>6. Stichting Naburige Rechtenorganisatie voor Musici en Acteurs (Norma)</li> <li>7. Stichting Pictoright</li> <li>8. Stichting Platform Multimediaproductenten (PM)</li> <li>9. Stichting Publicatie – en Reproductierechten Organisatie (PRO)</li> </ul>



Member State	Collective Management Organisations
	<ul style="list-style-type: none"> <li>10. Stichting Reprorecht</li> <li>11. Stichting tot Exploitatie van Kabeltelevisierechten op Audiovisueel Materiaal (SEKAM)</li> <li>12. Stichting SEKAM VIDEO</li> <li>13. Stichting ter Exploitatie van Naburige rechten (SENA)</li> <li>14. Stichting Thuiskopievergoeding Audio Producenten (STAP)</li> <li>15. Stichting Onafhankelijke Producenten Nederland (StOPnl)</li> <li>16. Stichting Exploitatie Mechanische Reproductierechten der Auteurs (STEMRA)</li> <li>17. Stichting de Thuiskopie</li> <li>18. Vereniging voor regisseurs van filmwerken (VEVAM)</li> <li>19. Stichting Verdeling Videoproducten (SVVP)</li> <li>20. Stichting VIDEMA together with Stichting Groepstelevisie (STG) and Stichting Gesloten Netwerken (SGN)</li> <li>21. Güfa Nederland (a subsidiary of Güfa GmbH in Germany)</li> <li>22. FEMU (Federatie Muziek Auteurs en Uitgevers)</li> </ul>
Romania	<ul style="list-style-type: none"> <li>1. AOTO – the Orthodox Theological Works Association</li> <li>2. COPYRO</li> <li>3. OPERA SCRISĂ.RO</li> <li>4. PERGAM – the Society of Romanian Authors and Publishers of Scientific Works</li> <li>5. UCMR-ADA- the Association for Copyright of Composers</li> <li>6. ARDAA – the Romanian Association for Audiovisual Copyright</li> <li>7. DACIN-SARA – the Society of Romanian Audiovisual authors</li> <li>8. VISARTA – the Society for Collective Management of Copyright in the field of visual arts</li> <li>9. ADPFR – the Association for the Rights of Phonogram Producers</li> <li>10. UPFR – the Union of Phonogram Producers</li> <li>11. UPVR – the Union of Videograms Producers</li> <li>12. ARAIEX</li> <li>13. CREDIDAM</li> <li>14. UNART</li> <li>15. UPFAR-ARGOA</li> <li>16. SOPFIA – the Society for Film and Audiovisual Producers</li> </ul>
Slovenia	<ul style="list-style-type: none"> <li>1. ZDRUŽENJE AVTORJEV IN NOSILCEV MALIH IN DRUGIH AVTORSKIH PRAVIC SLOVENIJE ("ZAMP - ZDRUŽENJE AVTORJEV SLOVENIJE")</li> <li>2. ZDRUŽENJE SAZAS</li> <li>3. ZAVOD ZA UVELJAVLJANJE PRAVIC IZVAJALCEV IN PROIZVAJALCEV FONOGRAMOV SLOVENIJE ("IPF")</li> <li>4. SAZOR - Slovenska avtorska in založniška organizacija za pravice reproduciranja GIZ k.o. ("SAZOR GIZ k.o.")</li> <li>5. Zavod za uveljavljanje pravic avtorjev, izvajalcev in producentov avdiovizualnih del Slovenije, k.o. ("AIPA, k.o.")</li> </ul>
Slovakia	<ul style="list-style-type: none"> <li>1. Slovak Performing and Mechanical Rights Society (SOZA)</li> <li>2. Slovak Producers Association (SAPA)</li> <li>3. LITA (Society of authors)</li> <li>4. SLOVGRAM (joint collecting society for performers and audio &amp; video producers)</li> <li>5. Protective Association of Performers in Slovakia (OZI)</li> </ul>

