



**The Budapest dialogue**  
**Protection and exercise of copyright and related rights in the field of music in**  
**the digital environment (exclusive rights, rights to remuneration, DRM,**  
**levies, free distribution forms)**

**Contribution of AIE and GIART**

First of all, I would like to thank the organisers, specially the Hungarian Copyright Forum (ALAI Group) for giving me the opportunity to participate in such an interesting Panel on behalf of performers and representing AIE, the Spanish Performers' Society and GIART, the International Organisation of Performing Artists.

I will try to deal with the different items proposed.

***1) Exclusive rights/rights to remuneration:***

As to the debate about the exclusive rights and the rights to remuneration regarding the protection and exercise of copyright and related rights of the concrete digital environment, we must take into consideration the particular condition of performers and overall, which could be the better way to protect their rights in such environment.

When the performers are granted exclusive rights, as in the main European countries it happens for the making available right, these rights are assigned to the producer and the performer is paid for that once, but loses the control of the right after such payment.

In our opinion the main objective must be the protection of the rights of performers, in spite of the way these rights are foreseen in the law, under the different legal formulas. Besides, the interests of performers are more protected if the rights are exercised collectively because their negotiating power is bigger than individually.

In that sense there are two possibilities that are already implemented in Europe that can ensure a better protection for performers of the making available right, because they focus on the collective exercise:



- According to the Spanish Intellectual Property Law (Consolidated Text, RLD 1/1996, as amended by the Law 23/2006), although making available right is an exclusive right for audio and audiovisual performers, it can be presumably assigned to the audio or audiovisual producer. In that case the performer is granted a non waivable remuneration right to be paid from the person who makes available the subject-matter. Such remuneration will be obtained by the performer through the performers' collective management society compulsorily.
- According to the Portuguese Intellectual Property Law, as amended to implement the Infosoc Directive 2001/29 performers are granted an exclusive making available right that must be exercised through the collecting society compulsorily.

I have mentioned these two possibilities in order to present some positive options for the management of the Internet rights, where the interests and rights of performers should be adequately protected. In that way performers would receive a payment for the use of their performances in the on-line environment without losing the making available right because of an assignment and performers would count with the structure and resources of their collecting society for that purpose.

We must not forget that the on-line rights are the future for performers because it is in such scope where their performances are going to be mainly spread. Performers should benefit of it, not to be damaged because of their individually weaker position to operate in the on-line scope which is quite uncertain especially for them.

We must refer to the Recommendation on cross-border management of copyright and related rights for legitimate on-line music services issued in 2005, as it focus on the management of the making available right. The following basic principles should be taken into account between the CMS and in any initiative of the EU institutions:

- Only not-for-profit organizations should be in charge of administration of the performers' on-line rights, excluding agents.
- The cooperation between a group of organizations will have as a main goal to make the (international) distribution more efficient.



- The aim of the one-stop-shop should be the management of the online rights limited to the repertoire of the one-stop-shop members.
- The licensing system should have to be established “on demand”: it means that the user will not be obliged to ask for a license for all the territories and the entire repertoire. The user should have the possibility to choose both concepts.
- Rightholders should be treated equally and should have the choice to entrust the management of rights to an organization of their choice. Non discrimination principle must be respected.
- Collective rights organizations should work together in a transparent and efficient way with a common main goal: full and fair distribution to all rightholders.
- Collective rights organizations must work together in order to be able to provide for multi-territorial licenses for music users but a previous impact assessment from the Commission should be welcome in order to study the results and risks of such licenses taking into account the full cultural, economic and social dimension.
- The way of establishing the administration costs has to be further studied.

## *2) DRM, levies, free distribution forms*

DRM and levies are often presented as incompatible ways of leading with Intellectual Property rights. In AIE and GIART view, both elements are compatible because they are foreseen for different purposes:

1) Firstly we must take into account that the right of reproduction is one of the fundamental and most important rights of rightholders. Reproduction rights are, at least in principle, exclusive rights to authorise or prohibit all kinds of acts of reproduction. This is based on the Berne Convention, and is also reflected in several provisions of the EU copyright framework. Exceptions to this right have been foreseen for example by the Berne Convention (art. 9.2), if the conditions of the three steps test are met. Private copying exception is firmly based in the international legislation.

The legal framework set up by the Infosoc Directive 2001/29 aims at ensuring that levy schemes and "fair compensation" take into account the application or non-application of technological measures (Article 5(2)(b), but, it does not oblige in any way the Member States to abandon levies systems when rightholders are technically able to protect their works and use DRMs.



Besides there are some provisions in the Directive, as Recital (35) that try to balance the fair compensation for the private copying exception and the use of technological measures. We can deduce consequently that both elements are compatible and as far as the copying cannot be avoided by technological measures, which is the current situation, fair compensation for private copying has to be maintained.

The current systems of remuneration for the private copying must compensate rightholders for the economic losses inflicted by all and every consumer's private copying act. This is the only way to ensure the future of the European creativity.

The levies are not taxes: they are a copyright and related rights royalty. Their conditions and, in many cases anyway, their amount are defined by national laws.

Private copying is not against the development of the Information Society. Let us quote the case of France and Finland, two countries with a high level of protection in the Intellectual Property scope, private copying included and also a high level of development of the Information Society.

The advent of the DRMs which are systems enabling the licensing of the rights and administration of the payments of royalties on an individual scale has not changed the legal framework. Also, even copy-protected digital sources can be recorded in analogue form, and that analogue content is in turn easily redigitized, making it available for copying and distribution completely unprotected over digital networks. Furthermore even copy protected works can easily be copied through popular legal devices such as the iPods. Performers are certainly not asking for double payment, levy schemes are not an obstacle to and do not prevent the development of DRMs. They may co-exist as far as there is some place for private copying in the definition of article 5/2 (b) of Directive.

2) Secondly, we must enhance that DRMs fundamental role is to ensure that illegal private copying acts cannot be made. However we have to admit that DRMs are still not able to ensure that all copies made are legal even if we think that we are going in the right direction. We esteem that on the other hand, the objective of the existing levies systems is to remunerate rightholders for each and every copy made. Confusion should not be made



between the current discussions on the levies systems and the further development and improvement of the DRMs as effective tools to fight piracy.

Private copying levies do not compensate in any case rightholders for the acts of piracy but, according to the Directive, private copy levies have to be paid in all the cases independently from the source. We have to make a clear distinction in order to avoid confusions: on the one side piracy is a crime and accordingly is regulated in the criminal code; on the other side private copying is regulated under civil law as an exception to an exclusive right (the distribution right) that in order to comply with the three steps test and not to harm the rightholders involves a remuneration. Both legal regulations are compatible as they pursue different aims. Industry attempts to lower the current tariffs because according to them the majority of the acts of copy are from illegal source have to be rejected.

We cannot forget that it is the industry that provides the consumers with the most sophisticated machines to copy protected works at ridicule prices. It is the industry who makes profit from the piracy, why should not it compensate rightholders for the economic harm such machines provoke to them? Furthermore it is really impossible to determine when the carriers and the machines are used to do a legal copy or an illegal one.

AIE and GIART position is based on the principle to protect what can be technically protected and pay levies on what cannot be protected.

However, DRMs, as for now, are not yet sufficiently secure, interoperable, and flexible to function correctly. So, no intervention is needed to modify the current levies schemes.

Furthermore, all DRMs are afflicted with the problem that they no longer offer any protection once the copy-protection device has been “cracked” and the hardware industry is bringing more and more advanced equipment onto the market in bigger and bigger quantities, the primary purpose of which is massive private copying. In fact, recent studies and surveys confirm that digital storage media are privately used for the copying of works protected by copyright. This means that what happened for years and years in the analogue environment, is being continued into the digital world as well. We must admit that the current levies schemes are the only remuneration systems capable of guaranteeing full and appropriate remuneration for digital copies made for private use.



We must accept that DRM's are not infallible by the time being. Even the industry (Steve Jobbs, Apple) is admitting that such TPM's are not effective because they not avoid the illegal copy. In that sense the music recording companies as SONY and EMI are following a DRM-free policy with certain catalogues, as The Beatles catalogue in EMI case.

Finally, we esteem that consumer acceptance of DRMs is also an important factor for the creative community; for this reason we think that DRMs should allow a limited number of private copies (respecting Art.5.2b), subject to remuneration,as private copying is foreseen by most EU legislations.”

For these reasons the current remuneration schemes are technically and legally the best option to ensure that rightholders get a remuneration for the use of their works in the case of the private copy exception.

3) Thirdly, we must insist on the fact that debtors of this remuneration are not the consumers but the manufacturers and importers of the equipments and back-ups that allow massive copies. In the European legislations, the manufacturers and importers are the ones obliged to pay the compensation and not the consumers and users of those equipments and apparatus. Consumers are in an ungraceful manner, presumably used to end with the compensation. It must be clear that the compensation must be paid by those receiving huge economical benefits resulting from the manufacture and import of the equipments and back-ups allowing massive copies, taking advantage of performances and creations whose rights correspond to third parties external to that commercial distribution process. Such manufacturers and importers and not the artists and authors, are those to affect in the final product the compensation to the consumer they claim to be defending.