

QUESTIONNAIRE FOR THE ALAI CONGRESS 2015 IN BONN

REMUNERATION FOR THE USE OF WORKS

(Exclusivity v. other approaches)

CONTRIBUTION OF THE PORTUGUESE GROUP

A. QUESTIONS IN RELATION TO SCOPE AND ENFORCEMENT OF EXCLUSIVE RIGHTS UNDER EXISTING LAW

1. Portuguese Copyright and Neighbouring Rights Code, approved by Decree-Law nr. 63/85 of 14 March, modified by Laws 45/85 of 17 September; 114/91 of 3 September; 50/2004 of 24 August, 24/2006 of 30 June; 65/2012 of 20 December 82/2013 of 6 December; 32/2015 of 24 April, consolidated by Law nr. 16/2008 of 1 April, and modified by Decrees-Law nrs. 332/97 and 334/90 of 27 November (the Code), has implemented all the EU Directives that constitute the “*acquis communautaire*” in the matter. and therefore includes all the faculties indicated in the question within a **general exclusive right**, stating that the author is free to determine the discrete forms of use of a protected work, each one independently from the others, under art 68 (1) (2), 3 and 4 of the Code, and therefore, according to recent ECJ CaseLaw, it may be assumed that:
 - i. Offering of hyperlinks to works may be a form of communication to the public of the work, under the conditions laid out by the SVENSSON Case-Law¹;
 - ii. Offering of deep links to works may be a form of communication to the public of the work, under the conditions laid out by the C MORE ENTERTAINMENT Case-Law²;
 - iii. Framing/embedding of works may be a form of communication to the public of the work, under the conditions laid out by the BESTWATER Case-Law³;
 - iv. Streaming of works may be regarded as a form of reproduction or performance of the work which may be done for private use as an exception to the exclusive right, not for profit, either directly or indirectly under art. 75(2)(a);
 - v. Download of a work is a form of reproduction or performance of the work which may be done for private use as an exception to the exclusive right, not for profit, either directly or indirectly under art. 75(2)(a);
 - vi. Upload of works is a form of making available of a work to the public in such a way that members of the public may access them from a place and at a time individually chosen by them under art 68 (2)(j);
 - vii. Supply of a platform for “user –generated content” is a form of making available of a work to the public in such a way that members of the public may access them from a place and at a time individually chosen by them under art 68(2)(j);
 - viii. Other novel forms of use on the internet may be regarded either as an exercise of the “making available” right, reproduction, performance or even of use of an original work in a different (new) work under art. 68 (2) h). Either way, it is always an exclusive right owned by the author, which has the ultimate decision concerning each permitted form of use.
2. The answer is affirmative. In fact, according to a Press Release made by the most representative Portuguese Collecting Management Society (Sociedade Portuguesa de Autores – SPA⁴), on the last 30 June 2014 there was an agreement between SPA and Youtube,

¹ C-466/12 Nils Svensson et al. v. Retriever Sverige AB of 13 .02.2014

² C-279/13 C More Entertainment AB v. Linus Sandberg, of 26.03.2015

³ C-348/13 BestWater International GmbH v. Michael Mebes, Stefan Potsch, Order of 21.10.2014

⁴ <http://www.spautores.pt/comunicacao/noticias/sociedade-portuguesa-de-autores-e-youtubechegama-acordo-para-a-musica>

according to which the uploaded videos that include works represented by SPA will be paid in Portugal, and rightholders of such works will receive a fee. Income is to be generated when the advertising is displayed on videos of YouTube partners.

Also according to the Press Release, SPA has managed to increase 120% the minimum guaranteed income in the national market, for music works, but also extended collection of rights to non-music works, ensuring that these obtain the same percentage. Such agreement is in force since last June.

Another example is the agreement that two private television broadcasters have concluded with YouTube, through the Collecting Management Society GEDIPE, which represents the rights of audiovisual producers (as a member of AGICOA) last year. According to this Agreement, the broadcasters' respective programming schedules are uploaded by them into YouTube and this legitimate uploading automatically inhibits third parties from illegally uploading any part of those programming schedules, thus preventing a major source of content piracy. This agreement is extremely positive since it allows the content to remain available to the public legitimately and, at the same time, it prevents third parties from illegally making profits out of those contents, which belong to the intellectual property of broadcasters.

SPA also presents its standard tariffs for mobile and fixed e-communication platforms, including the various forms of online use. For 2015, the tariffs are as follows⁵:

- (a) mobile rings (8,25% - 12% per download, chargeable to the consumer, for communication to the public the minimum monthly value €3,00 for up to 50 works, € 0,02 for the upload of each work file, with the minimum monthly fee of € 100,00);
- (b) digital music sales (8% after taxes, with the minimum value of € 0,07 per transfer); (c) online radio (3% of website's operative income, including advertising and sponsorship subject to minimum values, ranging from €15,00 up to €150,00 a month up to 501 simultaneous accesses;
- (d) web TV (6% of website's operative income, including advertising and sponsorship subject to minimum values of € 25 for news services and € 50 for generalist services; (e) podcast (minimum € 0,12 per downloaded file, subject to a minimum € 15,00 monthly fee);
- (f) ambience music (TBD by the author, communication to the public in accordance with streaming tariffs);
- (g) Streaming and Communication to the Public (from 15 up to 60 minutes – monthly fee from € 4,00 up to € 36,00, with an extra € 0,50 up to €2 *per* any additional of 5 minutes. Variations in accordance with the nature of the website (personal, non-for profit, for profit);
- (h) Special streaming (8% of website's operative income, including advertising and sponsorship). Minimum values are determined case by case according to minimum number of visits, € 0,0025 per pageview/hearing. This *item* includes concerts, videoclips, musical interviews.

These licenses don't include moral rights, graphic rights, adaptation rights, advertising or synchronization rights, which remain subject to individual negotiations. All the major players have agreed licensing terms that were worth more than € 1.000.000,00 (one million euro) in a total income collected of more than € 35.000.000,00 (thirty five million euro) in 2014, Certain international well-known music and video players such as Spotify, Apple, Google, etc.,

⁵ http://www.spautores.pt/assets_live/322/2015_condicoes_licenciamento_on-line.pdf

are also present in the Portuguese market and offer legal streaming services, having cleared licenses with the relevant CMOs which enter into compensation agreements between national and international CMOs and reflect in the amount of rights collected abroad by national CMOs. End-users are not targeted by these tariffs. Instead these are aimed at platform and service providers, though the latter may reflect this cost on their subscribers. Portuguese implementation of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the council of 8 June⁶ on certain legal aspects of information society services in particular electronic commerce, in the Internal Market) has been regularly carried out by Decree-Law 7/2004 of 7 January (Electronic Commerce Act) and therefore there is a standard exemption of liability for intermediary services' providers, according to the Directive's articles 12 ("mere conduit"), 13 ("caching") and 14 ("hosting"), provided certain circumstances occur, namely the prompt removal or disabling of access of manifestly illicit content upon obtaining knowledge or awareness of the illegal character of the activity or information. Such provisions are reflected by articles 14, 15 and 16 of the Portuguese Electronic Commerce Act, respectively. The Act extends the same rules which apply to intermediary services' providers, in terms of liability, to content aggregators, namely search engines or hyperlink providers according to art 17 of Decree-Law 7/2004. The Directive's art 15, determining a lack of a general monitoring or filtering obligation for the providers of network intermediary services, is also implemented by art 12 of Decree-Law 7/2004. The alternative dispute resolution procedure laid down by such statute in art. 18, states that a decision has to be adopted in 48 hours, but is rather confusing in terms of determining which sectorial entities are competent for such actions. There is, however, a provision which enables the E-Communication sector Regulator (ANACOM) as the main supervisory authority, over all sectorial authorities, though the solution is rather confusing, in practice, since it leads to negative conflicts of competence and overall inefficiency.

Earlier injunctions aimed at the removal of illicit content or blocking of access failed on account of the legal requirement that the illegal nature of the content be evident, but there have been recent successful injunctions against websites which illegally share copyright protected content, like Pirate Bay and the well-known Btuga website, where the Court has ascertained an illegal profit of more than € 166.000,00 by illegally sharing 3.000 to 4.000 files with more than 120,000 users. The Lisbon Intellectual Property Court acknowledged that the music and video industry has lost, in Portugal, between 2005 and 2006, more than € 9.000.000,00 (nine million euro) and BTuga was responsible for 2% of such losses. BTuga's appeal against the findings of the Lisbon IP Court has been rejected and its defense, based on the provider's liability exemption, didn't succeed, since the Court has also acknowledged that the owner of the website knew the contents that were shared, made several changes in the software that enabled users to share contents illegally and was responsible for a first check of all torrent contents in the quality of website administrator. As a consequence, his personal bank accounts were seized, and he is currently living abroad.

Decree-Law 7/2004 also imposes on intermediary services' providers the obligation to inform rightholders on the illicit character of activities carried out by means of the services rendered, identify the subscribers of hosting agreements, and provide lists of website holders that they serve if and when requested (in practice, only when requested by the Court, due to the need

⁶ OJ L 178, 17.07.2000, p. 1-16

to respect privacy and personal data secrecy). On the other hand, art 8(3) of Directive 2201/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and neighbouring Rights in the information society, which determines that Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third Party to infringe a copyright and related right, and art 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, stating that judicial decisions finding an infringement of an intellectual property right may be enforced through injunctions have been implemented by art 227 (2) of the Code. Therefore, this mechanism has been successfully used on various occasions by the Intellectual Property Court, which has established a very consistent line of Case-law granting rightholders with the means to prevent and terminate infringement.

3. When exercising their rights under the Code, authors may act personally or be represented, according to art. 72 of the Code. Representation is normally ensured by publishers or CRM, which are legally granted with standing to appear in court or arbitration, on behalf of all the rightholders which they represent, according to art 73 (2) of the Code. Such representation is subject to registration with the Inspectorate-General of Cultural Activities (IGAC) which is the supervisory governmental authority, as per art 74 and the newly published Law 26/2015 of April 14 (The CMO Act).

Several Code provisions, namely those enforcement measures implementing Directive 2004/48/EC, are more encompassing than those which explicitly award faculties to the rightholders themselves, or those that extend rightholders' rights to their duly authorized representatives, by simply stating "the interested Party". However, the case-law is generally about the rightholders themselves or CMO which are expressly or legally mandated to represent them.

Opposite to the general solution in the field of trademarks and patents, licensees are not usually awarded with standing to sue, unless special provisions are included in the contract. In general, licensors act as guarantor of the licensed rights, and any potential challenge to the rights is to be settled by rightholders' intervention. Legitimacy of SPA to represent the interests of its members and beneficiaries has been stated, *v.g.* by Tribunal da Relação do Porto (Oporto Appeals Court) of 13.03.1996, STJ (Supreme Court) Decision of 26.03.1998 *in* www.dgsi.pt and after that, acknowledged without any difficulty, namely by STJ Decisions dated from 27.05.1998, and, more recently, 14.12.2006, 18.12.2008 and Tribunal da Relação de Lisboa (Lisbon Appeals Court) of 17.02.2005, 07.02.2009 and 13.11.2012. On another Decision, dated 02.03.2009, the Tribunal da Relação de Guimarães (Guimarães Court of Appeal) stated that SPA doesn't have legitimacy to intervene as victim of a fraud perpetrated by another authors' society which allegedly collected rights on behalf of a few right holders claiming that such payments replaced SPA's collection. Legitimacy of CMOs is restricted to their members and doesn't cover all the rightholders of the same category as stated, *v.g.* in the Decisions of Tribunal da Relação de Évora 14.07.2011, Tribunal da Relação de Lisboa 27.05.1998 and 07.02.2009, Tribunal da Relação do Porto, 13.03.1996. All these Decisions are available at www.dgsi.pt (in Portuguese).

B. QUESTIONS REGARDING MECHANISMS TO ENSURE ADEQUATE REMUNERATION FOR CREATORS AND PERFORMERS IN THEIR RELATIONSHIP WITH LICENSEES

1. The Code includes general provisions concerning remuneration or compensation for the use of copyright works and performances protected by neighbouring rights, aiming at the protection of rightholders which are presumably the weakest Parties in the relationship:
 - (i) Art.14 (4) of the Code, on works for hire, states that even when copyright is awarded to the Party commissioning the work (which has to result explicitly from the written contract) the intellectual creator is allowed to demand a *special remuneration* – meaning a higher sum than that which the Parties agreed upon, independently from the publishing or wide diffusion of the work, in case the result of intellectual labor significantly exceeds the expected level of performance or when the effective use of the work exceeds that which the Parties expected and considered when negotiating and adjusting the agreed remuneration.
 - (ii) Art. 49 of the Code applies to the cases where rightholders have alienated or burdened their exploitation rights, thus suffering a serious patrimonial injury due to manifest disproportion between income received and the profits earned by the beneficiary of such acts. They may claim a supplementary compensation, which will be calculated over the results of the work's commercial exploitation. In the absence of agreement, such compensation is to be determined in regard of the normal results of the whole set of similar works made by the same author. In case the price of such alienation was a percentage of the income to be earned by the commercial exploitation of the work, the right to supplementary compensation only remains if such percentage is manifestly lower than the usual standard for that kind of transaction. The right to supplementary compensation must be claimed two years after the knowledge of the serious patrimonial injury suffered by the rightholder.
 - (iii) Art 105(3) of the Code, on publishing contract and art 170 on translation, contain similar provisions, establishing the right to supplementary compensation.
2. There is no provision determining the percentage or the amount of remuneration in the circumstances above referred, leaving the matter for negotiation and Court litigation or arbitration, if necessary. However, in the standard rules on publishing contracts, art 91 (3) states that in the absence of agreement between the Parties, the author is entitled to 25% over the coverage price on each sample to be sold. Specific amounts are also established by the Private Copy Act, according to a variation depending on the type of equipment or media. But these are standard provisions, which apply in general, and not only when there is a serious disproportion affecting the rightholder.
3. It's still too soon to evaluate effectiveness of the new tariff establishing mechanisms. So far, there have been long standing procedures, sometimes even lack of agreements and sometimes Civil Courts have failed to address those matters. The Lisbon Intellectual Property Court, however, seems to be better prepared to solve any litigation that may arise in the course of licensing. Arbitrations have also occurred in the field of Cable retransmission and Television Distribution Platforms. The existing Case-Law concerns only the amount of damages awarded in case of infringement. The Case-law is overwhelmingly in favour of determining that the value of compensation for infringement should equal the damage

suffered, *i.e.* the exact amount of license fee the defendant failed to ask (and pay⁷), so, in practice, the Court acts as a replacement of the agreement which Parties should have made. Other decisions, namely after implementation of Directive 2004/48/CE acknowledge the right to claim besides the missed license fee, also the costs with IP protection⁸ and illegal profits made by defendant⁹.

C. QUESTIONS IN RELATION TO STATUTORY REMUNERATION RIGHTS

1. Art 75 of the Code is the legal source of exceptions and limitations, presented as “free uses”. Some of those exceptions or limitations are subject to statutory remuneration rights, under art. 76 (1) (b) (c) (d). However, only in the case of private copying (art. 75 (2) (a), 76 (1) (b) and 81 (b) does the legislator establish the precise amount of compensation, namely through a specific Law which has recently been changed to encompass digital storage equipment. Other cases where compensation is due for “free uses” are the following:
 - a. Reproduction of works previously published or made accessible to the public by public libraries, archives, museums, non-for-profit documentation centres, scientific or teaching institutions, provided such reproduction is not aimed at public diffusion, remains limited to the needs of those institutions and does not envisage any economic or commercial advantage direct or indirect, including the acts of reproduction necessary to the preservation or archive of any works. This use is subject to compensation owed to the authors and to the publishers of the original works;
 - b. The inclusion of short extracts or fragments of third Party works in new works for teaching purposes, which is subject to compensation owed to the authors and to the publishers of the original works;
 - c. The reproduction of works performed by non for profit institutions such as hospitals and prisons, when such reproduction is based on the broadcasting of works, subject to equitable remuneration to be awarded to the rightholders.
2. The Portuguese legislator is not very favorable to compulsory licenses, and there are only a few minor examples, :
 - a. Art. 52 of the Code allows any interested person to claim for a license for the republishing of any work that has been previously published but becomes out of sale, even against the will of the holder of the republishing right (normally, the first publisher). The license is to be issued by the Court, provided there is public interest and the refusal is not morally or materially grounded, but for economic reasons;
 - b. Art 71 of the Code implies a faculty of translation or transformation in every case of “free use”, to the necessary extent for each form of “free use”, representing a case of legal license rather than a compulsory license;
 - c. Art 144 of the Code allows a new fixation of works previously fixated without the author’s opposition, without prejudice to equitable remuneration and subject to minimum quality standards – may also be considered a legal license;

⁷ Évora Appeals Court Decisions of 17.03.2010 and 29.03.2012, among others.

⁸ Évora Appeals Court Decision of 13.02.2014, among others.

⁹ Oporto Appeals Court Decision of 27.01.2009 among others.

- d. Art 150 of the Code waves the need of rightholder's authorization for each act of rebroadcasting of a work previously fixated with the purpose of broadcasting.
- e. Art. 191 of the Code presumes an agreement on behalf of the holder of neighbouring rights when the interested person has unsuccessfully tried to reach him/her, once such diligence is certified by the Ministry of Culture, provided he is willing to make a cautionary payment in view of the remuneration that will be finally determined;
- f. Orphan works: the most recent change in the Portuguese Code of Copyright and neighbouring Rights was done by Law nr. 32/2015 of April, 24, which implemented Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

This Act introduced the reproduction and the making available to the public of orphan works, as a new type of *free use*, for purposes of digitization, indexation, catalogue, preservation or repair, when carried out by libraries, teaching institutions, museums, archives, entities responsible for cinematographic or phonographic heritage and public service broadcasters, aiming at ensuring public interest objectives such as access to information, education and culture, including the right to enjoy intellectual property goods. Orphan works are defined by new art 26A in accordance with the above referred Directive, pointing out a number of possible reliable sources for a good-faith and diligent search for the rightholder, which is a requirement for any work to be awarded the status of "orphan". Rightholders are entitled to put an end to the "orphan work" status by coming forward to claim their rights in the work or other protected subject-matter, thus being entitled to receive fair compensation for the use that has been made of their works or other protected subject-matter. This may be seen as a case of legal license, rather than compulsory, even because, by definition, there is no previous knowledge on rightholder's identity until the moment (s)he comes forward and reveals her/himself, so the license to use the works is actually given by the Law.

- 3. i. The Portuguese Copyright and Neighbouring Rights Code and the complementary legislation determine a few minor cases where collective management is obligatory:
 - a) Compensation due for cable retransmission rights, according to Directive 93/83/EEC of the European Parliament and of the Council, of 27 November 1993, implemented by Decree-Law nr 333/97 of 27 November;
 - b) Compensation due for reproduction on any medium made by a natural person for private use for ends that are neither directly nor indirectly commercial, according to art 5(2) (b) of Directive 2001/29/EC, implemented by art 75 (2) (a) and 81-82 of the Portuguese Copyright and Neighbouring Rights Code, recently developed by a new Private Copy Act which has extended levies to digital storage equipment; The new draft of Private Copy Act has been recently approved by the Parliament and has provoked a huge debate in the Portuguese society, which led to a presidential veto, on the grounds that such levies had not been negotiated and consensual between the stakeholders, namely consumers and equipment manufacturers. Actually, this updating of Private Copy Act had been in preparation and discussion for more than three years and the higher applicable levy is € 20,00.

- c) Equitable remuneration due for performer's rights in relation to broadcasters or audiovisual producers, whenever fixation is permitted for the purpose of broadcasting (covers all communication to the public with the exception of the making available right) under art 178, which has recently been the subject of an amendment waving the need for obligatory collective management (only for the making available right, a solution that had been introduced in 2004, but which never really worked out well for the Parties). Communication to the public, including broadcasting and rebroadcasting remains subject to obligatory collective management and is to be compensated through an equitable remuneration TBD.
- ii. Equitable compensation due for the public performance of commercial phonograms and videos, as stated by art 187 (3) of the Portuguese Copyright and Neighbouring Rights Code, is, in practice, managed collectively, given the fact that there is a legal obligation to divide it between phonogram producers (represented by AUDIOGEST) and performers (represented by GDA). The sharing must be done in equal parts, unless agreed otherwise;
- iii. The payment is generally due by the user, with the exception of levies applicable to reproduction media and equipment, which are to be paid by the first acquirer of such media and equipment on the Portuguese territory, provided they are not for exporting purposes. There is also a specific levy to be paid by the reprography shops and establishments open to the public, which is charged to the end-user for each copy made.
- iv. With the exception of private copying purposes, the Portuguese Law doesn't establish any concrete tariffs, although there is one case (art 144 of the Code)¹⁰ where equitable remuneration is to be determined by the Ministry of Culture, absent agreement between the interested Parties. So far, I don't have information that such determination has taken place.
- v. The Law 26/2015 of 15 April (CMO Act) has retained the principle of "inspective supervision" by the IGAC, which is a Department of the Government specially awarded competence in Copyright and Entertainment matters.

The main criteria concerning tariffs are those determined by articles 10, 36 and 38¹¹, namely non-discrimination; fairness; reasonability; proportionality (and transparency, above all).

- vi. Outside the scope of compulsory or legal licenses¹², there is now a comprehensive set of provisions that are worth mentioning in relation to licensing, introduced by the recently approved Law 26/2015 of 14 April (CMO Act), which has replaced Law 83/2001 of 3 August on the subject of collecting management organisations (CMOs).

This Law, mainly aimed at the implementation of Directives 2006/123/EU and 2014/26/EU, also introduces several forms of streamline procedures designed to the establishment of tariffs via collective licensing, regulating with much detail the discrete ways of obtaining licenses and the framework that applies while negotiations are pending:

- a) Art 36 on the issue of "**relationship with users**" establishes several principles, namely good faith (*bona fides*), transparency, mutual and timely information,

¹⁰ See above answer nr. 2 c).

¹¹ See below answer nr. 3 vi) a) and c).

¹² The application of the new CMO Act procedures to compulsory or legal licenses is explicitly excluded by its own art 47(6).

communication via electronic means; general licensing terms must reflect objective and non-discriminatory criteria, namely concerning tariffs;

- b) Art 37 on **One–Stop Shop licensing** establishes the implementation schedule for a unique point of entry for licensing by the various CMOs; in the absence of voluntary mechanisms (which is most unlikely to happen, given the suspiciousness currently existing between the discrete CMOs). Therefore, the IGAC will have cause to intervene in case of lack of implementation;
- c) Art 38 establishes that tariffs for the licensing of exclusive rights and equitable remuneration must be published on the CMO’s websites, as well as **general tariffs** to be charged in exchange for **general licensing** which may be granted; they should reflect the economic value of the use of rights and consider the real functioning of the market; general tariffs must consider, namely the economic value that the rights have for each category of licensees and correspond to the fair compensation of rightholders for the use of their works, performances, phonograms, videos or broadcastings and, whenever possible, take into consideration the effective use of such protected subject;
- d) Articles 39 to 43 determine a first set of detailed procedures named **“Negotiation”**, to be followed by CMOs and entities representative of users. This type of procedures aims at the establishment of general tariffs which must be precise in terms of applicability and terms for use of CMO’s repertoire. CMO’s are legally obliged to negotiate general tariffs with entities representative of a significant number of users, in case there is no previous agreement or the existing agreement doesn’t apply to some of the users now represented; pending negotiations for the establishing of general tariffs, interim licenses should be issued according to existing tariffs or, at least, after the users issue a declaration of acceptance in relation to the outcome of the procedure, whereas unilaterally established tariffs existing are to be withheld and shall only be applied in case of refusal to negotiate on behalf of the entity representing the users.
- e) Art 44 sets an ADR procedure to be applied in case of failure of the “negotiation” procedure, namely a **committee of three experts** nominated each one by the Parties and the third by the experts themselves, aimed at the establishing of general tariffs (applicable to a whole objectively defined category of users) or individual tariffs (applicable to a concrete individual user or number of users; the Expert Committee must decide in six-months after taking charge. The Parties may appeal of such decision to the Appeals Court (Tribunal da Relação).
- f) Art. 45 determines a second set of procedures, named **“collective procedure”** to be held in case of failure of the previous negotiation procedure, between the same Parties which have participated assuming they are effectively representative of stakeholders they claim to represent;
- g) Art. 46 lays down a third set of procedures, named **“individual procedure”** to be held as an alternative to **“collective procedure”**, provided the users have participated in the **“negotiation”** procedure, in the absence of applicable general tariffs or Experts’ Committee decision or **“collective procedure”** in case such users

are not members or represented by entities which are part of any agreements existing and in force, even if these may be unregistered with IGAC;

vii. Art 47 establishes that pending “**collective**” or “**individual**” procedures, the general or individual tariffs previously in force or previously determined according to those procedures will apply on an interim basis, provisional licenses shall be issued and there is also the possibility of court procedures. So, regular payments have to be made, on the basis of those agreements, even if formally terminated by the course of time or the will of the Parties.

The same provision states that once the Expert Committee issues a decision on tariffs, the amounts in excess or in default must apply from the start of negotiation, in case of the “**collective procedure**”, from the start of the use, in case of “**individual procedure**”.

D. MECHANISMS TO ENSURE ADEQUATE REMUNERATION FOR CREATORS AND PERFORMERS

1. In some cases, the Law determines the percentage of amount to be allocated to each category of rightholders.
2. For instance the change to Private Copy Act, which is currently waiting to be published, sets the precise value in euro of the equitable remuneration (levies) that each type of media/equipment is charged with and also determines the percentage of share that each rightholder’s category is entitled to. Therefore, is not subject to any change by the members of AGE COP, the civil association created to manage the income generated by such levies. The same Act sets the value of the levy to be paid by reprography shops and public copying establishments in 3% of the final price, which is to be applied before taxes.

According to art 7 of the soon to be published change to Private Copy Act (but maintaining the solution of the “old” Private Copy Act):

- a) 20% of the total amount of equitable remuneration received is to be applied on cultural activities, research and diffusion of Copyright and Neighbouring Rights;
- b) Equitable remuneration collected from reprography must be shared equally between those CMOs representing authors and those representing publishers, after deduction of the amount referred in a) and before taxes;
- c) Equitable remuneration collected from every other media and/or equipment is to be divided in two subcategories:
 - a. Phonograms/audiovisual: authors-40%; performers-30%; phonogram/video producers - 30%; after deduction of the amount referred in a) and before taxes;
 - b. Literary works (books and regular/non regular publications): authors-50%; publishers- 50%, after deduction of the amount referred in a) and before taxes.

Another example already referred¹³, but one which can hardly be considered statutory remuneration, because its actual amount is left to negotiation and agreement, is art 184 (3) of the Code where the equitable remuneration compensating for public performance of phonograms and videos is to be shared equally between producers and performers, unless agreed otherwise.

¹³ See above, answer nr. 3 ii.

3. The concrete distribution rules are to be determined by decision of the relevant social body, normally the General Meeting of each CMO, where all members are allowed to participate. All CMOs have a Distribution Regulation which is approved by the General Meeting under proposal by the Executive Body. Some of the Portuguese CMOs already have their Distribution Regulations publicly accessible on their website¹⁴. It is expected that, in the near future, the distribution rules will be publicly available on account of art 28 of the CMO Act.
4. Transfer of patrimonial rights between rightholders or acquirers of derived rights such as publishers or CMOs is free and will be subject to the concrete allocation rules agreed between the Parties. However, CMOs and publishers are normally entitled to a standard administration fee which varies. They do not acquire any right to the collected amounts. CMOs and publishers will always represent rightholders and collect rights for them, deducting their own administration fees. Furthermore, CMOs are subject to a principle of moderation in administrative costs, according to art 10 of the CMO Act.
5. All the CMOs are under the supervision of IGAC – Inspectorate General of Cultural Activities, a Department which belongs to the Ministry of Culture (currently a Secretary of State).

IGAC is responsible for registry of all acts related with the activity of CMOs, namely rightholder's mandates reciprocal representation agreements, statutory changes, social bodies, yearly management reports and accounts, business and activities plans, budgets, tariffs in force, licensing agreements signed with entities representing users. This registry must be kept duly updated by IGAC based on communication obligations by the CMOs.

IGAC has jurisdiction to conduct any enquiries, audits and inspections whenever there are any signs of illegal or irregular procedures or activities, and it is also required to issue regular reports to the Government, the courts of law or any competent entities.

IGAC has the power to call for dissolution of any CMOs that seriously or repeatedly break the law, or do not proceed statutory purposes, or use illicit means for the prosecution of their purpose, or illegitimately withhold the remuneration due to rightholders.

IGAC is also competent to issue punitive procedures and the President is competent to apply fines ranging from €125,00 up to €25.000,00 and complementary sanctions, namely temporary suspension or registry cancellation that may last up to two consecutive years.

E. QUESTIONS ON NEW BUSINESS MODELS AND THEIR LEGAL ASSESSMENT

1. In Portugal, some of the major providers of work via the internet are already established and doing business.

There are different forms of making money through the Internet, but, so far, the only one that seem to be working out some results is participating of the advertising income of search engines or content aggregators, based on a value *per click.*, following the insertion of an

¹⁴ <http://www.spautores.pt/spa/estatutos-regulamentos;>
<http://www.gda.pt/?p=346>
<http://visapress.pt/uploads/files/regulamento-interno.pdf>

advertising message as an *overlay ad, display, pop-up, interstitial or ad link* on a webpage, side by side with editorial content, or the mere sale of *pre-roll, mid-roll or post-roll* advertising messages to be placed together with videoclips or other online subject matter likely to attract the attention of prospective viewers.

2. The Courts, in Portugal, and particularly the Lisbon Intellectual Property, have granted a number of injunctions aimed at blocking websites offering access to illegal content and injunctions have worked rather well, both as a means to prevent and to stop infringement.
3. The most frequent business model is the one which is based on a *pay-per-click*. In terms of Copyright, however, it seems that the preferred model is the *flat rate*, agreed between CMOs and the platforms, although some of SPA's tariffs, as we have seen above¹⁵ are per download or per pageview/hearing, which implies a need to engage monitoring services such as GFK.
4. Authors and performers are still looking for the best practical way of getting paid, in a stage where business operators constantly claim they can't make money yet. In fact, only search engines, social networks and content aggregators seem to be doing well on the Internet, so rightholders are lobbying for direct payment of a proportional compensation to creators.

¹⁵ See answer nr. A2