Questionnaire for the ALAI Study Days 2015 in Bonn

# Remuneration for the use of works

# Exclusivity v. other approaches

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*This is a summarized version, translated from the Spanish original version*

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## ABREVIATURAS

- **AN**: Audiencia Nacional
- **AP**: Audiencia Provincial
- **CP**: Código penal
- **CPI**: Comisión de Propiedad Intelectual. Se organiza en dos secciones, identificadas abreviadamente como **S1ª** y **S2ª**
- **Ley 21/2014:** *Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*
- **LSSICE**: Ley 34/2002, de 11 de julio, sobre servicios de la sociedad de la información y comercio electrónico
- **STJUE**: Sentencia del Tribunal de Justicia de la Unión Europea
- **TRLPI:** Texto Refundido de la Ley de Propiedad Intelectual, aprobado por *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia. Nota.- Las referencias se hacen a la versión consolidada, en la que ya se incluyen las modificaciones introducidas por la Ley 21/2014*

- **TS:** Tribunal Supremo

## *A. Questions in relation to scope and enforcement of exclusive rights under existing law*

*(Sebastián LÓPEZ MAZA [apdos. 2-4] & Rafael SÁNCHEZ ARISTI [apdo.1])*

*In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.*

1. *How are the following acts covered by the copyright law of your country (statute and case law):*

*i. Offering of hyperlinks to works*

The provision of hyperlinks, as such, is not envisioned in the Spanish Copyright Act (TRLPI), except for the specific administrative procedure set in art. 158 ter TRLPI that may be used against –providers of information society services which infringe copyright. This procedure was introduced by the Law 2/2011, on Sustainable Economy, has been recently amended by the Law 21/2014 and is conducted by the *Sección Segunda de la Comisión de Propiedad Intelectual* (S2ª CPI) However, as we see below, this administrative procedure can only be used against online infringement provided on a large scale. Beyond that, the Spanish copyright law (TRLPI) has no other reference regarding linking to copyrighted works.

> Before the 2014 amendment, Sec.2 CPI was entitled to issue injunctions (to stop the service and withdraw or block infringing content) when the ISP was –directly or indirectly- acting with a lucrative intent and causing an economic prejudice to a third party. The 2014 amendment expands (or clarifies) the infringements subject to this procedure and enhances the measures that can be issued against them. Sec.2 CPI can now act against ISP of two kinds: those who infringe copyright (the decision to start proceedings against the ISP will depend on the audience level in Spain and the amount of works infringed that can be accessed through it) and those who facilitate the location of infringing contents by means of links offered in an ordered and classified manner, regardless of whether these links may have been initially provided by the users of the service (that is, sites which offer list of links to P2P infringing contents) when they act in an "active and non-neutral" manner (beyond a merely technical intermediary activity). In these cases, Sec.2 CPI can order the infringing ISP to withdraw the infringing contents, and the Access provider to suspend service to the infringing site, order the cancellation of its domain name (when it is a ".es" URL), as well as order the suspension of any payment or advertising services provided (by third parties) on the infringing site.

In addition, if the infringer or the ISP repeatedly fail to comply with Sec.2 orders' they may be fined with 30.000 upto 300.000 € (for infringing users and sites) and 150.001 to 600.000 € (for ISP providing either access, domain name registration, payment or advertising services).

On top of that, the Spanish Criminal Code –which qualifies some copyright infringements as criminal offences- has also been recently amended by Organic Law 1/2015 introduced an express reference to linking to infringing contents: A new Art.270.2 CP now qualifies the provision of links to unauthorized works and subject matter –using the same wording of Art. 158 ter TRLPI, seen above- as a criminal offence, as long as it is done with the intent to obtain some economic profit (directly or indirectly)[1] and in prejudice of third parties.

Until now, several Criminal Provincial Audiences (appeal courts) have confirmed several lower court rulings either refusing to qualify these activities as a criminal offence -based on the fact that the provider of the link is a mere intermediary and is not engaging in an act of exploitation of copyright-[2] or simply exonerating them from any copyright liability.[3] Instead, other criminal appeal courts have concluded the opposite: either confirming the initiation of a criminal proceeding by a lower court,[4] or by confirming that the provider of links to infringing P2P files cannot be exempted as a mere intermediary because it is making an unauthorized act of communication to the public (art.20 TRLPI).[5]

On the other hand, Civil Courts have rarely had the opportunity to deal with copyright infringements regarding linking. Only a couple of rulings may be pointed out, both by the Provincial Court of Barcelona (Sec.15): of 24 Feb. 2011 ("elrincondejesus") and 7 July 2011 ("índice-web"). In the first one, the AP distinguishes between linking to a site which allows direct download of the infringing work, and linking to files on P2P platforms,

[1] Before the 2015 amendment, the crime against copyright required a "lucrative intent" (*ánimo de lucro*). Which had been interpreted by the Spanish Prosecutor General in the strict sense of obtaining a "commercial benefit," thus making the criminal prosecution of P2P infringing sites very difficult, if not, impossible. The amendments operated by LO 1/2015 are clearly aimed at overcoming these obstacles to facilitate the criminal prosecution of P2P infringement.

[2] See Auto AP Madrid, Sección 2ª, 11 Sept. 2008 («sharemula»): providing a link is a means to facilitate Access to the user, by saving him from writing the URL address and it does not involve any act of exploitation. See also Autos AP Alicante, Sección 2ª, de 18 Feb. 2010 («aidadonkey»), AP Madrid, Sección 1ª, de 15 March 2011 («edonkeymania»), AP Álava, 3 Feb. 2012 («cinetube»).

[3] See Sent. AP Zaragoza, Sección 1ª, 16 Feb. 2011 («Zackyfiles»), and Sent. AP Barcelona, Sección 7ª, 22 Dec. 2005 («todocaratulas»).

[4] See, *ad exemplum*, Auto AP Barcelona, Sección 3ª, 11 Nov. 2009 («ps2rip») or Auto AP Madrid, Sección 2ª, 28 June 2010 («zonaemule»).

[5] See Sent. Juzgado Penal núm. 1 de Logroño, 25 Nov. 2008 («infopsp»); Sent. AP Vizcaya, Sección 1ª, 27 Sept. 2011 («fenixp2p, mp3-es»); Sent. AP Audiencia Provincial (Sección 4ª), 20 Jan. 2014 ("Divxonline"); Sent. Juzgado de lo Penal nº 4 de Castellón, 30 Oct. 2013 ("bajatetodo.com").

before concluding that only the former qualifies as an infringement of the right of communication to the public. In the second one, the AP refuses to qualify either kind of links as an act of communication to the public.

In addition, linking has also been considered within the Administrative jurisdiction, when examining appeals against the rulings of the Sec.2ª CPI. The National Audience (Administrative chamber) has not hesitated to qualify linking to infringing contents as an act of making available online (after the ECJ's *Svensson* doctrine).[6]

In summary, rulings on linking vary widely among jurisdictions, but one must hope it will consolidate once the CJUE doctrine on linking starts applying, and following the TRLPI as well as CP amendments.

### *ii. Offering of deep links to works*

No distinction is made in the statutes (neither TRLPI, nor CP) based on whether the link is superficial or deep. Some civil courts rulings initially distinguished –see above, "elrincondejesus"- between linking that allowed direct downloading of the unauthorized works and linking to P2P platforms; but this was subsequently "corrected" by the same court –see above "indiceweb"-.

### *iii. Framing/embedding of works*

As explained, there is no regulation of links *framed or embedded* under Spanish law.

### *iv. Streaming of works*

The Spanish TRLPI does not offer detailed treatment of the several means of communication to the public, in digital contexts. *Streaming* may be qualified as either an act of "*transmission"* (art. 20.2.e) TRLPI) or an act of "*making available to the public (online)*" (ex Art.3 DDASI, art. 20.2.i) TRLPI). It will depend on the participation (interactivy) of the user receiving it. Thus, *simulcasting* or *webcasting* could easily qualify under the former, while *webcasting* (with interactive functions, such as pausing, resuming, etc) could qualify under the later. Courts tend to apply this distinction: see Sent. AP Barcelona, Sec.15, 24 Feb. 2011 ("elrincondejesus").

[6] See AN, 17 Oct. 2014 ("elitetorrent"), which denies that the operator of a site offering links to unauthorized contents is a mere intermediary since it had an active role in the selection, ordering and indexation of the unauthorized contents that could be accessed or located through its website. See also, in the same sense, AN, 17 Nov. 2014 ("Goear") and 26 Nov. 2014.

### *v. Download of works*

Download of works implies a reproduction (art.18 TRLPI). To the extent that the user who downloads it makes a private use of it, it would be exempted as a private copy (Art.31.2 TRLPI). However, this limitation was seriously amended by Law 21/2014 and, under the current language, it does not apply to exempt copies made of works which have been commercially (in exchange of a payment) made available online under a license (regardless of any TPM being applied to prevent this copying); this means that they will not be compensated, either.

### *vi. Upload of works*

As with downloads, uploading Works involves an act of reproduction (art. 18 TRLPI). Courts have generally accepted that P2P file sharing (when contents included in the files are protected and have not been lawfully licensed) amounts to an act of making available as well as reproduction. For instance, Sent. AP de Madrid, Sección 28ª, 31 March 2014 ("Blubster"):

> "*(...) el intercambio entre usuarios de Internet de archivos que estén amparados por derechos de propiedad intelectual, si no se cuenta con la autorización del titular de los mismos, entraña una infracción de aquéllos. La misma se comete por inmiscuirse en la órbita de los derechos exclusivos de explotación que incumben al titular de los mismos (artículo 17 del TRLPI), en concreto, el de comunicación pública, en su modalidad de puesta a disposición del público de forma interactiva de las obras (artículo 20, párrafo 2, apartado i del TRLPI y artículo 116 del mismo cuerpo legal en lo que respecta a los productores de fonogramas), de modo que se confiere la posibilidad de acceder a ellas vía Internet a voluntad del que esté interesado, y el de reproducción (artículo 18 del TRLPI, con carácter general, y artículo 115 en lo que atañe a los productores de fonogramas), por la realización inconsentida de copias digitales de las obras protegidas, sin que ello lo ampare el límite de copia privada (artículo 31.2 del TRLPI), pues su vocación es la de la utilización colectiva de esas copias, que además, en muchos casos, se realizan precisamente a partir de un ejemplar ilegítimo*".

Some ruling had concluded that the making available online involves an act of distribution: Juzgado de lo Mercantil nº 1 de Madrid, Sent. 11 May 2010 ( "Jet Multimedia"); On appeal, this was reversed: Sent. AP de Madrid, Sección 28ª, 5 July 2013.

### *vii. Supply of a platform for 'user-generated content'*

The providers of these platforms could be liable for infringing user-generated content if they fail to comply with the conditions under the hosting safe harbor (Art.16 LSSICE): that it had "actual knowledge" of the infringement and failed to act expeditiously to block

or delete the infringing contents. On this grounds, Youtube was found liable for hosting Telecinco's unauthorized contents on its platform: Sent. AP de Madrid, Sección 28ª, de 14 de enero de 2014 (*Telecinco c. Youtube*).

*viii. Other novel forms of use on the internet.*

No other form of internet use (such as cloud storing or social networks) is envisioned in Spanish TRLPI. However, the new Art.138.II TRLPI (introduced by Law 21/2014), which incorporates the criteria used in US caselaw to assign secondary liability (under the doctrines of vicarious liability and contributory infringement, including inducement), may result in finding the providers of these services liable for third party infringements, under Spanish copyright law. See Art.138.II TRLPI.

*2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders)?*

Spanish TRLPI does not address this issue.

*3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:*

- *for content providers*
- *for host providers*
- *for access providers*
- *for others?*

Spanish TRLPI did not address these issues, until the Law 21/2014.

*b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?*

As modified by Law 21/2014, an ISP may be liable for third party (indirect, secondary) infringement of copyright under Spanish TRLPI, under Art. 138.II TRLPI): 1) who knowingly induces the infringement; 2) who cooperates with the infringement, knowingly or having reasonable grounds to know about it; 3) who has the ability to control the infringement and a direct economic interest in it.

On the other hand, Spain has implemented the safe-harbors from the Directive on e-commerce,[7] as well as a specific safe-harbor for search engines and links (Art.17 LSSICE), under the same conditions set for the hosting safe-harbor. And its Art.13 LSSICE expressly states that ISP may be subject to civil, criminal and administrative liability. Under the conditions set in the safe-harbor provisions, an ISP may be exempted from indirect liability (for the infringements committed by its users). Beyond that, the assignment of direct as well as indirect liability on the ISP will depend on each applicable law.

> An ISP which provided websites with *streaming* services as well as direct downloads cannot be exempted from indirect liability (since it had "actual knowledge") and was found directly liable for the copyright infringement; See Sent. AP de Valencia, 20 January 2014. Similarly, an ISP which provides websites with links to infringing contents (links provided by users) can not rely on Art.17 LSSICE safe harbor because it has "actual knowledge" –deriving from its active role in the selection, ordering and indexation of the access and localizing instruments which facilitate to search and download works through P2P networks (Sent. AN, 17 Oct. 2014, 17 Nov. 2014 and 26 Nov. 2014; Sent. AP de Barcelona, 18 Dec. 2013).
> Instead, in other cases, an ISP offering P2P links was not found liable because its activity was merely neutral and was not inducing or contributing to the infringement. Sent. AP Madrid, 31 March 2014.

In addition, let's not forget the administrative procedure available under art. 158 ter TRLPI, in front of the Sec.2ª of the Comisión de Propiedad Intelectual (see above).

*4. In these cases of infringement, who has standing to sue:*

- *the author*

Yes. The author has standing to sue against infringements, as long as he owns the rights and has not transferred then to a third party, on an exclusive basis (Art. 138 TRLPI).

- *the exclusive licensee*

[7] Arts.14-17 Ley 34/2002, de 11 de julio, *sobre servicios de la sociedad de la información y comercio electrónico* (LSSICE).

The exclusive licensee has standing to sue against infringements (Art. 48.1 TRLPI).

- *the non-exclusive licensee*

The non-exclusive license does not have (automatic or independent) standing to sue (Art.50 TRLPI).

- *the employer of the author*

The employer has standing to sue against the infringement of works created by its employees, accruing from the exclusive rights being transferred to him by law (unless otherwise agreed). Art. 51.2 TRLPI

- *the CMO that manages the exclusive right?*

Once they have been authorized by the Ministry of Culture, the CMO has standing to sue against infringements of copyright –to defend the rights it has been mandated- according to their Statutes.

## *B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees*

*(Patricia RIERA)*

*If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.*

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

The Spanish TRLPI allows for the transfer (assignment and license) of exclusive rights of exploitation (only), both *inter vivos* and *mortis causa.* Contractual transfers of rights may be done in written form or orally (as long as both parties agree and no problem of evidence arises). A transfer on an exclusive basis must be expressly identified as such – and, accordingly, transfers in exclusive are usually in writing.

The transfer may be in exchange of remuneration or for free. When a remuneration is agreed, it should be a proportional participation on the revenues/income from the

exploitation of the work (the amount will be agreed by parties). A flat amount may apply in specific cases (Art.46.2 TRLPI): when a proportional remuneration would be too difficult to manage, contributions to periodical publications, when the work is accessory or not essential to a larger work, contributions to dictionaries, prologues, etc.

In addition Art.43 TRLPI establishes a general rule of restrictive interpretation of transfers and licenses, and some specific interpretative clauses:

- To the right or rights transferred or licensed and the means of exploitation transferred/licensed (only those which are indispensible to fulfill the contract).
- In any event, a transfer/license will never cover any means of exploitation unknown at the time of the contract;
- To the territory granted for or, when silent, to the country where the contract was entered in;
- To the time set in the contract or, when silent, to 5 years.

The transfer/license of rights on future works, as a whole, of an author is null and void, and so is any provision forcing the author not to create in the future.

When the transfer of rights is done in exclusive, the transferee is in the only one who can exploit the work (in the terms granted in the contract) and can sublicense and even assign the rights to a third party (the assignment needs the express consent of the author). The transferee in exclusive has an obligation to exploit the rights transferred – obligation to do so (not to be successful!).

The TRLPI regulates two specific contracts: A) The publishing contract (granting rights of reproduction and distribution, in exchange of a remuneration) and B) The contract of theatrical representation and musical performance.

- *as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);*

When a flat amount has been agreed as the remuneration for a transfer/license of rights, this amount can be revised when a "manifest disproportion exists between this remuneration and the profits obtained by the transferee/licensee" . The author must request its revision (it is not automatic); if no agreement is reached he can ask the courts to set an "equitable remuneration". See, for instance, Sent. AP de Santa Cruz de Tenerife, n.337/2008, de 27 June 2008, FD 3º.

- *in the case of oppressive contracts;*

No regulation exists in the TRLPI, but the general norms in the Civil Code –as well as the norms on the protection of consumers- could apply against oppressive contracts. See Sent. AP de Madrid, sec. 14, de 3 May 2007.

- *in other cases;*
  *and if so, under what conditions?*

Spanish law grants some remuneration rights to the authors and performers of audiovisual works/recordings and musical works/phonograms.

A) Co-authors of audiovisual works transfer their exploitation rights to the producer through the production contract; a presumption of transfer –set by law- applies, unless parties agree otherwise. Remuneration shall be set for each right and means of exploitation transferred. On top of that, the TRLPI grants some remunerations to the co-authors of an audiovisual work:

1) Remuneration in exchange for the rental right transferred to the producer; this also applies to authors of musical works in phonograms;
2) Remunerations for public showing of audiovisual works (box office as well as a fee for events without an entrance fee)

B) Performers (of phonograms and audiovisual recordings);

1) A remuneration for the rental rights transferred to the producer (of phonograms and audiovisual recordings) (art. 109.3, ap. 2º TRLPI)
2) An equitable remuneration for performers (shared with producers) for the public communication of phonograms (art. 108.4 TRLPI)
3) An equitable remuneration for performers, for the public communication of audiovisual recordings (art. 108.5 TRLPI)
4) In exchange for a presumption of transfer of the right of making available to the phonogram producer, the phonogram performers are granted an inalienable and unwaiveable right to receive an equitable remuneration –which is managed by the CMO (art. 108.3 TRLPI)

*2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?*

Only for phonogram performers (Art. 110 bis, 2 TRLPI) as amended by Law 21/2014, in transposition of the Directive 2011/77/EU: when performer agreed to a flat fee, the producer will pay him a minimum of 20% of his annual income, during the extended term of protection of phonograms. This remuneration is unwaiveable and managed exclusively by CMO.

*3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.*

No mechanisms are set in the law. It all depends on bargaining position of authors and performers.

## *C. Questions in relation to statutory remuneration rights*

*(Ramón CASAS)*

*The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.*

*1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?*

In Spanish law, remuneration rights (usually called “simple” remuneration rights) are distinguished from the exclusive rights of exploitation, since they do not confer any power to authorize or prohibit (only a right to be paid). These remuneration rights are:

1) Resale right (*droit de suite)*, for authors of works of art: Art.24 TRLPI, as amended by Law 3/2008 implementing Directive 2001/84/CE; it is not subject to mandatory collective management.
2) Equitable compensation for the private copy exception (arts. 25 y 31 TRLPI). The amount is calculated annually by the Government and paid on the General State Budget. It is mandatorily managed by CMOs.
3) Equitable remuneration for authors of press articles, used in commercial press-clipping services (art. 32.1,II TRLPI). It is mandatorily managed by CMOs “unless reserved” by copyright owners.
4) Equitable compensation for press-publishers, in exchange for the authorization of news aggregation (art. 32.2 TRLPI). It is mandatorily managed by CMOs. This is a new “limitation” set by Law 21/2014, very criticized.
5) Equitable remuneration for authors and publishers of printed works partially used (up to a 10%) for teaching purposes in universities and for research purposes in public research centers (art. 32.4 TRLPI); the remuneration yields to any “previous specific agreement”, its management is done mandatorily by CMO.
6) Agreed remuneration (failing an equitable one) for authors of works (articles) on current events disseminated by media, when used by other media (Art. 33.1 TRLPI)

7) Equitable remuneration for public lending (Art.37.2 TRLPI) of works; the remuneration is subject to collective management and calculated as regulated in RD 624/2014, of 18 July 2014.
8) Equitable remuneration for making available through specialized terminals in library premises (Art. 37.3 TRLPI).
9) Equitable compensation for the use of an orphan work (Art.37.7 TRLPI)
10) Equitable remuneration, as a revision of the flat fee agreed by parties, when a "manifest disproportion exists between this remuneration and the profits" obtained by the transferee/licensee (Art. 47 TRLPI).
11) Equitable remuneration of authors for rentals of audiovisual recordings and phonograms (Art. 90.2 TRLPI) *ex* Art. 5 Directive 2006/115/CE; it is unwaiveable and subject to mandatory collective management. SGAE & DAMA
12) Remunerations of co-authors of an audiovisual work for its public showing (participation in the box office Art.90.3 TRLPI, as well as a fee for events without an entrance fee – including making available online); (Art.90.4 TRLPI) these remunerations are unwaiveable, inalienable and subject to collective management.
13) The same remuneration also applies to the authors of pre-existing work adapted for the audiovisual work (art.90.6 TRLPI)
14) Equitable remuneration for performers, in exchange for a presumption of transfer of the right of making available to the producers (of phonograms or audiovisual recordings); it is inalienable and unwaiveable, and managed by the CMO (art. 108.3 TRLPI)
15) Equitable remuneration for performers (shared with producers) for the public communication of phonograms (art. 108.4 TRLPI) and of audiovisual recordings (art. 108.5 TRLPI); these remunerations are unwaiveable, inalienable and subject to mandatory collective management. For performers: AIE and AISGE; For producers: AGEDI and EGEDA
16) An equitable remuneration of performers for the rental rights of phonograms and of audiovisual recordings (art. 109.3, ap.2º TRLPI); it is unwaiveable and subject to collective management.
17) Only for phonogram performers (Art. 110 bis, 2 TRLPI) as amended by Law 21/2014, in transposition of the Directive 2011/77/EU: when performer agreed to a flat fee, the producer will pay him a minimum of 20% of his annual revenues/income, during the extended term of protection of phonograms. This remuneration is unwaiveable and managed exclusively by CMO.
18) Equitable remuneration for the producers of phonograms for the communication to the public of phonograms (Art. 116.2 TRLPI), subject to mandatory collective management. This remuneration is shared with performers (Art.108.4 TRLPI).
19) Remuneration for the producers of audiovisual recordings for the communication to the public of audiovisual recordings (Art. 122.2 TRLPI), subject to collective management. This remuneration is shared with performers (Art.108.5 TRLPI).

In summary, remuneration rights are :
- in exchange for a limitation;
- simple remuneration rights *strictu sensu* (strict statutory policy)
- in exchange for the transfer of exclusive rights.

*2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?*

Spanish law does not provide for compulsory licenses, other than the remunerated limitations set by law.

*3.*

*i. For which statutory remuneration rights does your law provide for obligatory collective management?*

See answer to question 1

*ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?*

See answer to question 1

*iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?*

As a general rule, the person who makes the act of exploitation is obliged to pay for the remuneration/compensation, as applicable in each case. Perhaps the only exception to this rule is the compensation for private copy which is now (since 2011) paid on the State General budget, rather than through the levy on equipment and supports (which had been the traditional system since 1987). The Law 21/2014 has consolidated this regime.

*iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?*

Unless expressly set by law (very rare –i.e., equitable remuneration for public lending and equitable compensation for private copying), the amounts of remuneration are set by the CMO which are in charge of its management.

The equitable remuneration fee is set by the CMO. Traditionally, the fee has been set unilaterally by the CMO, but the Law 21/2014 requires negotiation with users. If parties fail to reach an agreement, the fee will be set by the Sec.2º of the Comisión de Propiedad Intelectual (art. 158 bis TRLPI).

*v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?*

Yes. This is another of the novelties introduced by Law 21/2014. The Ministry of culture may establish the "methodology" that CMO will use to negotiate and set these fees; the Sec.2ª CPI has the power to supervise the fees set by CMOs, and make sure that they are equitable, non-discriminatory and reasonable (taking into account the economic value of the use in the user activity, and finding a balance between both parties according to several criteria describe in Art.157.1.b) TRLPI), and that they have been correctly negotiated and based on good faith and (Art. 158 bis.4 TRLPI)

*vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?*

As with any other debt, it will not be met in case of bankruptcy and it must face same general problems (and procedural challenges) as any other reclamation for payments due.

*vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?*

No specific solution.

## D. ***Mechanisms to ensure adequate remuneration for creators and performers*** *(Raquel EVANGELIO)*

*The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.*

*1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by*

*particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?*

As a general rule, Spanish TRLPI does not determine the percentage of the remuneration. Only in some cases:

1) Equitable Compensation for private copying (art. 25 TRLPI, as amended by Law 21/2014).- Compensation only applies to private copies done of some works: works disseminated in the form of books and assimilated publications, works disseminated in the form of phonograms, videograms and other sound, visual or audiovisual supports. Beneficiaries are the authors of such works, as well as the publishers, producers and performers. RD 1657/2012, regulates how the amount will be calculated and distributed among the several beneficiaries, through the respective CMOs (subject to compulsory collective management). According to these parameters, each year, the Government calculates the general amount of equitable compensation and establishes the % that will apply for each category of works/authors.
For 2013, the compensation (by Orden ECD/2166/2014) was set in 5.000.000 euros, which were distributed as follows:

Phonograms and alike: 33,65%
Videograms and alike: 37,36%
Books and assimilated: 28,99%

The resulting amounts are later distributed within each category as follows:[8]

Phonograms and alike: 50% authors, 25% performers, 25% producers
Videograms and alike: 33,3% authors, 33,3% performers, 33,3% producers
Books and assimilated: 55% authors, 45% publishers

2) Remuneration for any communication to the public of a phonogram -except for making available online- (arts. 108.4 and 116.2 TRLPI).- It is a single equitable remuneration, which is to be shared by performers and producers of phonograms and subject to mandatory collective management. Art.116.2 TRLPI expressly states that failing an agreement among the corresponding CMOs regarding how to share the remuneration collected, it will be shared in equal parts.

*2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?*

See supra

[8] This distribution set by Art. 5 RD 1657/2012, is the same that applied under Art. 36 RD 1434/1992, as amended by Law 20/1992.

*3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?*

When no statutory or regulated distribution applies, CMOs are obliged to establish the rules and % for remuneration. These rules must be equitable and non-arbitrary and must be proportional (arts. 151.10 y 154.1 y 2 TRLPI). In practice, the % is set directly by the CMO (see art. 55 Estatutos CEDRO[9], art. 59 Estatutos VEGAP[10], art. 55 AIE[11], art. 96 Estatutos AISGE) or as agreed by their members (art. 87.5 Estatutos SGAE[12], art. 50.4 Estatutos DAMA[13] y art. 52.4 Estatutos EGEDA[14]).

Distribution is not uniform across CMOs; usually it is set by Assembly General upon proposal of the executive board: (arts. 33 y 44 Estatutos CEDRO, arts. 31 y 41 Estatutos VEGAP, arts. 30 y 35 Estatutos DAMA, arts. 31 y 42 Estatutos AIE; art. 51.9 Estatutos AISGE, art. 52.3 Estatutos EGEDA); or directly set by executive board (art. 67 d) SGAE, art. 43.13 AGEDI[15]).

Some rules for the distribution of revenues set by CMOs:
1) Remuneration for public lending: CEDRO[16] provides for 50% split between authors and translators.
2) Unless agreement to the contrary, SGAE provides for a 50% split between authors of musical work and authors of lyrics (art. 128 Reglamento SGAE[17]).
3) Video-clips: upon registration, a % (not higher than 25%) must be assigned to the director (art. 128 Reglamento SGAE).
4) Audiovisual works: Both DAMA and SGAE distribute revenues according to the percentages agreed among the authors. Failing such an agreement, DAMA[18] assigns 25% to director, 50% to writer/s and 25% music composer, while SGAE (art.147 Reglamento) applies the following:

[9] http://www.cedro.org/docs/socios/estatutos.pdf?sfvrsn=24
[10] http://www.vegap.es/Info/Documentos/ESTATUTOS/estatutos-vegap.pdf
[11] http://aie.es/component/remository/2.-DOCUMENTOS-GEN%C3%89RICOS/
[12] http://www.sgae.es/acerca-de/estatutos-sgae/
[13] https://www.damautor.es/estatutos.html
[14] http://www.egeda.es/estatutos/Capitulo_11.pdf
[15] http://www.agedi.es/
[16] http://www.cedro.org/docs/reglamentos/reglamento-de-reparto-de-pr%C3%A9stamo.pdf?sfvrsn=2
[17] http://www.sgae.es/acerca-de/reglamento-de-sgae/
[18] http://www.damautor.es/pdf/DAMA_Normas_de_Reparto.pdf

| | Director | Writer | Music composer | |
|---|---|---|---|---|
| Works before 1.Jan.1967 | 0 | 50% | 50% | |
| Movies between 1.Jan.1967 and 31.Dec.1987 | 25% | 50% | 25% | |
| Short films between 1.Jan.1967 and 31.Dec.1987 | 25% | 37,5% | 37,5% | |
| TV movies, documentaries and animated TV movies between 1.Jan.1967 and 31.Dec.1987 | 0 | 50% | 50% | |
| Movies and Short films after 7 Dec.1987 (contracted before 18 May 1988) | 25% | 50% | 25% | |
| Any other works after 7 Dec.1987 (contracted before 18 May 1988) | 20% | 60% | 20% | |
| Movies, short films documentaries, between 1 Jan. 1988 and 30 June 1989 | 33,3% | 33,3% | 33,3% | |
| Dramatical works adapted for TV, between 1 Jan. 1988 and 30 June 1989 | 30% | 40% | 30% | |
| Dramatic-Musical works adapted for TV, between 1 Jan. 1988 and 30 June 1989 | 25% | 70% | | |
| Works after 1 July 1989 | 25% | 50% | 25% | |
| Dramatical-musical works adapted for TV, after 1 July 1989 | 25% | 75% | | |

5) AISGE[19] applies a complex distribution system among performers of audiovisual works (including dubbing performances).
6) AIE ( arts. 16 a 18) applies 60% for solo singer or director (orchestra or play) and 40% for executants (musicians).

*4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?*

*5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?*

Control of CMOs is done by different means; Law 21/2014 added some more.

- Accountability and Auditing of CMOs by the Ministry of Culture (art. 156 TRLPI)
- CMOs are authorized by the Ministry of Culture (art. 148.1 a LPI); Approval of CMOs Statutes and subsequent amendments also by the Ministry of Culture (arts. 151.10 y 154.1 LPI).
- Inspection and control of CMOs activities by the Ministry of Culture and by Autonomic Governments (art. 159 TRLPI)

[19] http://www.aisge.es/media/multimedia/ficheros/218.pdf

- Sanctions applicable for failure to meet obligations (art. 162 *ter* TRLPI), including economical sanctions as well as closing down CMO.
- Control by the Comisión de Propiedad Intelectual (Sec.1) that the fees and licensing done by CMOs are equitable, non-abusive and have been fairly negotiated.

## *E. Questions on new business models and their legal assessment*

*(Nerea SANJUAN)*

1. *Which new business models do you know in your country in respect of the supply of works via the internet?*

   *Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.*

Business models are mostly for music online (Spotify, Deezer operate in Spain; also Google Play Music and Xbox Music) and audiovisual works (Netflix is not operating in Spain yet, but Filmin and Waki.tv are operating; also iTunes (Apple TV) and Xbox). These business models are similar: contents is offered either for free or in exchange of a price (pay per view or monthly or annual payment) for viewing on demand (VOD). Movies are also offered on an (EST) *Electronic sale through* basis (i.e., Waki.tv offers it for three years and a limited number of views, on authorized devices –including portable ones such as smartphones, Chromecast, etc. based on *over-the-top* technology).

In addition, several websites offer downloads of music and movies online, by means of indexed and organized links to infringing files (in some cases, the platform also provides summaries and posters), but they are mostly infringing websites. These are free services, which are mostly financed by means of advertising and commercializing the personal data of users.

Broadcast TV channels are offering online services (such as Yomvi, Imagenio and ONO TV) that allows their subscribers to access the same contents VOD (on demand) and OTT (on any portable device), at no additional cost.

In addition, some exclusively online TV services are being developed, using IPTV y OTT technologies. For instance, Total Channel (www.totalchannel.com) offers three services, in exchange for a monthly fee: live TV, online recording (a copy of the TV

program is hosted in the cloud) and Catch-up service (no copy is saved but program may be seen at a later time); No VOD service is offered.

Similarly, Zattoo (http://zattoo.com/es/) is also operating in Spain, in exchange for a monthly or annual fee or for free (in this case, with less contents available); they also offer an online recording service.

Other offers include Nubeox (Antena 3 / Planeta).

In the book publishing sector, Casa del Libro offers an online sale service for e-books www.casadellibro.com/ebooks, at a price per unit. Web www.24symbols.com allows their clients (subscribers) to read (no download) from its repertoire (stored in the cloud), in exchange for a monthly fee.

In social networks, www.filmtosee.com offers a platform to offer and access information on movies, and to locate contents available in other websites, for free or under payment.

*2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found*

As explained previously, several websites offering indexing and links to infringing files available on line have been the object of several rulings, both in civil, criminal and administrative jurisdictions.

Two of the most recent rulings involve bajatetodo.com[20] and goear.com[21], as well as mejortorrent/multiestrenos.com[22] and elitetorrent.com.[23] Instead, in the criminal jurisdiction, eDonkeymania[24] and Cuádruple,[25] these websites were found not liable for copyright infringement, on the basis that providing a link (to infringing contents) does not amount to an act of making available online the infringing contents) and they can enjoy the protection of the safe-harbors for hosting services.

However, under the amendment of Art.158 ter (by Law 21/2014), these services will be most likely liable for indirect infringement.

[20] Sent. AP Castellón (sec.1) nº 426/2014, 12 Nov. 2014.
[21] Sent. AN (cont.-adm.) 17 Nov. 2014, Rec. 54/2013.
[22] Sent. AN (cont.-adm.) 26 Nov. 2014, Rec. 345/2013.
[23] Sent. AN (cont.-adm.) 17 Oct. 2014, Rec. 302/2013.
[24] Auto AP Madrid (sec.1) 15 March 2011.
[25] Auto AP Leon (sec.3) 13 Jan. 2014.

An example of a “legalized” service is Seriesl.ly: it initially linked to infringing files and it now links to lawful contents on Waki.tv.

As for Total TV, copies saved in the cloud could not be exempted as a private copy since, after the amendment of Art.31.2 TRLPI operated by Law 21/2014, the private copy can only be done by the user (not by an intermediary). However, this issue has not been decided by courts in Spain.

*3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.*

See supra.
For instance, Filmin offers individual pay per view (to view within 72 hours), while Waki.tv o iTunes offer an EST system.

*4. Within these business models, how do authors and performers get paid?*

In all explained models, the rights of reproduction and making available online are involved … Accordingly, authors as well as performers (actors and musicians) are being remunerated through their respective CMOs, in addition to any remuneration deals agreed with the producers. Vid supra: Art.90.4 TRLPI and art.108 TRLPI (simple remuneration in favor of authors and performers of phonograms and audiovisual rights).

Authors of musical works in phonograms will be receiving remuneration for these models, when they have mandated their exclusive rights to the CMO (SGAE) or when they individually license them.