Kluwer Copyright Blog

CDSM: French transposition on the remuneration of performers

Brad Spitz (REALEX) · Friday, April 21st, 2023

Order no. 2021-580 of 12 May 2021 ('transposition Order') of the French Government implements articles 2(6) and 17 to 23 of the EU Directive 2019/790 on copyright and related rights in the Digital Single Market ('CDSM').

Image by Pexels from Pixabay

In a ruling of 15 November 2022, the French administrative Supreme Court annulled the transposition Order to the extent that it does not provide that authors who assign their exclusive rights are entitled to receive 'appropriate' remuneration. The other transposition provisions of the transposition Order were not annulled; these include those relating to the remuneration of performers.

This post is a follow-up to the one published in the Kluwer Copyright Blog on that ruling, and more generally on the remuneration of authors pursuant to the implementation of the CDSM into French law (see here).

The remuneration of performers

Prior to the implementation of the CDSM, article L213-3 of the French intellectual property code ('IPC') simply provided that the performer's authorisation and the remuneration resulting therefrom are subject to the Labour Code, but not the portion of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective bargaining agreement or by specific agreement. In other terms, the agreement is a mix of two contracts:

- a labour contract, whereby the remuneration is in the form of a salary when the presence of the performer is needed (for example to record or perform live); and
- a neighbouring rights assignment agreement, whereby the performer is paid intellectual property royalties on exploitation of the recordings or other objects (the social charges relating to royalties are much lower than those that apply to wages).

Collective bargaining agreements have been negotiated not only to fix minimum wages, but also, in certain situations, to fix the royalties payable to performers by the producers and/or the broadcasters. In the music business, contracts between performers and producers, as well as the collective bargaining agreements, usually provide for a lump sum remuneration for secondary performers (for example accompanying musicians) and proportionate royalties for the main performers (for example the singer).

The transposition Order implemented article 18 of the CDSM into article L212-3 IPC, which, in addition to the provisions presented hereabove (that have been kept), now states that in a contract between a performer and a producer:

- the performer's remuneration shall '*be appropriate and proportionate to the actual or potential economic value of the rights assigned, taking into account the performer's contribution to the work as a whole and all other circumstances of the specific situation, such as market practices or the actual operation of the service*',
- however, the performer's remuneration may be in the form of a lump sum (and therefore not strictly speaking proportionate royalties based on exploitation; this is an exception that already exists for the author's remuneration under article L131-4 IPC). The situations in which the performer's remuneration may be in the form of a lump sum include the following cases:
    - the basis for calculating proportional remuneration cannot be determined in a practical manner,
    - there is an absence of means for calculating proportional remuneration, or it is too difficult to put such means into place,
    - the nature or the conditions of the exploitation make it impossible to apply proportional remuneration, either because the contribution of the performer does not constitute one of the essential elements of the performance, or because the use of the performance is not significant in relation to the object exploited.

As explained above, in practice in the music business there is already a distinction between the remuneration paid to the main/lead performers – who are usually paid a proportionate remuneration – and the remuneration paid to the accompanying musicians – who are usually paid a lump sum (or lump sum**s**, since there can be various payments to cover different forms of exploitation). The wording used by article L212-3 IPC means that main/lead performers should henceforth always receive proportionate remuneration; and secondary performers will usually continue to receive a lump sum remuneration (in both cases a mix between wages and intellectual property royalties, as explained above).

Article L212-3 IPC adds that '*collective conventions and agreements may determine, taking into account the specificities of each industry* [music, TV, cinema, etc.], *the conditions for implementing the provisions of this article.*' It remains to be seen how future agreements will be negotiated.

Other provisions

In order to implement article 19 of the CDSM (transparency obligation), article L212-3-1 IPC now organises the conditions in which the assignee must remit the information on the exploitation of their performances to the performers at least once a year. Article L212-3-1 IPC states that these conditions can be fixed by professional collective agreements, which can then be imposed on an industry by an order of the Minister of Culture. It is not certain that such collective agreements will ensure that the performers receive adequate comprehensive information.

Article L212-3-2 IPC implements the contract adjustment mechanism of article 20 of the CDSM, stating that the performer is entitled to additional remuneration when the remuneration initially provided for in the exploitation contract proves to be disproportionately low in relation to all the income subsequently derived from exploitation by the transferee. Article L212-3-2 IPC adds that '*In order to assess the situation of the performer, his or her contribution may be taken into account*', which means that it is not certain that secondary performers (i.e. those who are not main or lead performers) will be entitled to any adjustment.

Finally, article L212-3-3 IPC implements the right of revocation of article 22 of the CDSM, stating that the performer is entitled to terminate the assignment of rights where there is a '*lack of exploitation of his or her performance'*. The conditions in which the termination may be carried out can be set out in professional collective agreements, which can then be imposed on an industry by an order of the Minister of Culture. In the case of several performers, they must exercise their revocation right together, and if they fail to reach an agreement the court will settle the case. Neither article L212-3-3 IPC nor article 22 of the CDSM answer this difficult question: when the performers exercise their right of revocation, what happens to the neighbouring rights of the producer of the phonogram (sound recording) or of the videogram that embodies the performances? It seems difficult to take the eggs out of the cake after it has been baked…

This entry was posted on Friday, April 21st, 2023 at 1:42 pm and is filed under CDSM Directive, Digital Single Market, France, Performers' Rights, Remuneration (equitable)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.