

ATRESMEDIA: Rethinking Equitable Remuneration After 30 Years



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» 1. Introduction: The Atresmedia judgment

In its 2020 *Atresmedia* judgment^[1] the Court of Justice of the EU (CJEU) found that, when a phonogram is incorporated into an audiovisual work, it no longer qualifies as a “phonogram”. Consequently, the rights in the “phonogram” cease to be applicable (although the phonogram regains its quality when published later separately).

The CJEU has deduced from this finding that, as long as a phonogram is incorporated with permission in an audiovisual work, the right of performers and producers to a single equitable remuneration for such “phonogram” is not applicable.

This marked a dramatic change in the neighbouring rights landscape in the Netherlands – after 30 years, since broadcasters and other users of music in audiovisual productions, such as commercials, films, TV series and videos, now refuse to pay separately for the broadcasting of music in audiovisual productions. However, despite *Atresmedia*, Dutch performers and phonogram producers of commissioned and fixated music, demand fair market conditions.

» 2. Neighbouring Rights - Pay for Play

Since the introduction of the Neighboring Rights Act (NRA) in the Netherlands on July 1st, 1995, broadcasters and other users of audiovisual productions have been accustomed to paying to the

collective rights organization Sena, an “equitable remuneration” for the broadcast or other public disclosure of audiovisual productions containing music.

Under international, European and national legislation, performers are granted protection for their performances in the field of music, audiovisual, dance or any other category of performing arts. Those rights are generally called performers' rights or neighbouring rights (“neighbors” to the copyrights). Apart from the recognition of their creative contribution, the introduction of performers' rights has been mainly justified on economic and cultural grounds. Financial rewards give artists the necessary incentives to create new works and contribute to their income while also supporting cultural development. It also safeguards employment and encourages new job creation.

For the producers of phonograms, which were very expensive to make in 1961, the legislators wanted to grant them neighboring rights in order for these investors to be able to recoup their investments.

However, since 2024, broadcasters and other users have refused to do so, based on *Atresmedia*, which now seems to have major implications for the creators of commissioned and pre-existing music. However, it is questionable whether the CJEU intended this to be the case, and an important commentator is convinced that the CJEU got it all wrong in any case.

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» 3. International Legal Framework

3.1 No EU Harmonization

The 2019 European Copyright Directive allows (but does not require) participating

countries to provide copyright holders with a clear, statutory right to proportionate or equitable remuneration for authors and performers as required by Article 18 of the Copyright Directive. As of early 2025, only a minority of the 29 countries (27 EU member states plus Norway and Iceland) have implemented a direct, statutory right to proportionate and equitable remuneration.[2]

Most countries rely on a mix of contractual, collective or future mechanisms when it concerns the right to a proportionate equitable remuneration for the use of their performances for broadcasting and communication to the public. But not in all countries have artists and phonogram producers received the same level of protection from national legislators. Some countries, like Poland, have recently introduced explicit statutory provisions guaranteeing this right for performers, coming into force in 2025. Other countries, such as Ireland, have included the principal in national law but often rely on contractual or collective bargaining mechanisms, rather than a direct Statutory right. Several member states have transposed the Directive literally but have not established a clear enforceable right.

Artists in Spain are largely protected by national law as a result of broad implementation in that country of the 2019 Copyright Directive. But in Germany, the situation is quite different. There, neighbouring rights holders have not been given the right by national law to demand equitable remuneration from streaming platforms such as Netflix, HBO Max, etc. German artists can exercise that right against file exchange platforms such as YouTube, but practice is difficult and compensation to artists hardly takes place there either.

In sum, there is no harmonization in Europe in this area. Some countries have a right to fair compensation for streaming provided to artists, while others do not. Although this is not envisaged in the international Treaties or European Directives, certain countries have extended the right to remuneration for broadcasting and communication to the public, to audiovisual fixations. This practice appears to be at odds with *Atresmedia*.

3.2 Rome Convention

At the international level, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations from 1961 created the first basic exclusive rights for performers regarding the fixation of their live performances, broadcasting and communication to the public of these live performances, together with a reproduction right. Its main success was to introduce the guarantee of equitable remuneration for broadcasting and communication to the public of commercial phonograms.

3.3 Equitable Remuneration

The Rome Convention introduced in article 12 the principle that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, then a single equitable remuneration must be paid by the user to the performer, or to the producer of the phonogram, or to both. In the Rome Convention, a ‘phonogram’ is defined as “any exclusively aural fixation of sounds of a performance or of other sounds”.

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In practice, a phonogram is any fixation of sounds in a material or digital form, for example a CD or MP3. “Commercial purposes” means that a phonogram is published for financial gain. Also, the use must be “direct”, meaning that the person who takes the decision to make use of the phonogram, is the one called upon to pay[3]. And “published” means, offered to the public in reasonable quantities. In 1961 and many years thereafter, music was sold as vinyl, CD or in another material form.

Streaming, the current ‘major’ outlet for the exploitation of music, had not yet been invented. The EU is not a party to the Rome Convention. However, the EU court has ruled earlier, that the Rome Convention has indirect effects within the European Union.

3.4 WPPT

The WIPO Performance and Phonogram Treaty (WPPT) of 1996, provided for an international protection of the rights of performers that, for the first time, took into account developments in the digital environment. The EU acceded to the WPPT in 2000. The WPPT only covers the rights of performers in relation to their performances which are fixed in phonograms, and grants them in respect of such performances, the exclusive rights of reproduction, distribution, rental and making available (on demand)[4]. The WPPT updates the definition of “phonogram” as worded in the Rome Convention, by also allowing “representation of sounds” and omitting the words “exclusively aural” (see article 2(b) WPPT).

The WPPT forms an integral part of the EU legal order and is therefore applicable in the European Union. Under article 2(b) of the WPPT, “phonogram” means the *“fixation of sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”*. The WPPT provides in article 15(1) that *“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect*

use of phonograms published for commercial purposes for broadcasting or for any communication to the public.” This provision is qualified by article 15(3) which states that “Any Contracting Party may... declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.”

As a result, the equitable remuneration for the communication to the public, broadcasting through radio, broadcasting through TV Channels, webcasting, simulcasting or other ways of communication to the public, have been arranged for differently in each country of the European Union. Also, the terms for an equitable remuneration for the broadcasting and communication to the public, are established by each individual collection society in each EU country and these terms differ very much. An equitable remuneration for the broadcasting of audiovisual fixations including music, does not exist in 15 countries who are a member state of the EU. This right does exist in Belgium, Germany, Greece, Italy, Poland, Portugal, Romania, Slovakia, Spain and Switzerland. And it existed in the Netherlands, on which country the remainder of this article will now focus.

3.5 The Netherlands

In the Netherlands, as of July 2015 an unwaivable right to a proportionate equitable remuneration was implemented in the Dutch law with regard to audiovisual works for all forms of communication to the public, except for the making available right. However, solely main performers are entitled to this right. This right to remuneration arises if the rights concerned are transferred to the producer, either via the presumption of transfer of rights, or by agreement. The remuneration right is subject to mandatory collective management and the remuneration is to be paid by the end users.

3.6 Transferable Exclusive Rights

Exclusive rights are transferable. In practice, the producer (TV or Film studio, advertising agency) of a commercial, film, video or TV show will insist that performers (and phonogram producers) transfer all of their exclusive rights to them before they sign a contract with the performer or record company for the use of the music in a film or commercial. The terms of the contract then decide what kind of remuneration the artist will get for making c.q. recording the music.

Payments of a lumpsum are not rare in the Netherlands and often so the artist makes the music for free. This is because the users of the recording, including the performance, since 1995, are used to paying, and the neighbouring rightsholders are used to receiving, an equitable remuneration to or from Sena (the Dutch collection society for neighboring rights) for the broadcast of the audiovisual work in which the recording of the music is included. In the Netherlands, Sena by law is the only party which is allowed

to collect the equitable remuneration for the artists and the phonogram producers for the broadcasting or other communication to the public of phonograms. Sena is however not allowed to collect an equitable remuneration for streaming.

3.7 EU Directive 92/100 and 2006/115

Both these directives contain the following wording in Article 8(2):

Broadcasting and communication to the public
'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproductions of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

In the Netherlands, it is the collection society Sena who collects this 'equitable remuneration' and the income is divided 50/50 between performers and phonogram producers. From the start in 1995, Sena collected monies from both radio and TV broadcasters like Talpa and RTL for the broadcasting of music recordings in radio shows as well as music in audiovisual works like TV programs, films, TV series and commercials.

3.8 Beijing Treaty

The WIPO Treaty on Audiovisual Performances was adopted in Beijing on 24 June 2012 (the 'Beijing Treaty') and it establishes a set of new international rules which aim at ensuring the adequate protection and remuneration of audiovisual performers. The majority of issues covered by the Treaty are already harmonised at EU level. Until now, 48 states are a member of the Beijing Treaty and the Treaty came into force on April 28, 2020. The European Union is still studying on the ratification of the Treaty.

» 4. Atresmedia Judgment

4.1 Facts and Court Case

The Spanish collecting societies AGEDI and AIE brought an action before the Madrid court against TV broadcaster Atresmedia seeking payment of compensation in respect of acts of communication to the public of phonograms, published for commercial purposes, carried out between June 1st, 2003 and December 31st, 2009 via the TV channels operated by Atresmedia. A lower court judged against such a claim, but in appeal this judgement was set aside. The case then went to the CJEU. The question

addressed to the CJEU was, whether the communication to the public of audiovisual works carried out by Atresmedia via its television channels gives rise to the right to the single equitable remuneration mentioned in the Spanish law and in article 8(2) of the EU Directives 92/100 and 2006/115. The EU Court had to determine whether – from the moment when a phonogram published for commercial purposes, or a reproduction of that phonogram, has been incorporated or “synchronized” with permission in an audiovisual recording containing the fixation of an audiovisual work - the performers and the phonogram producers concerned may demand that single equitable remuneration.

The EU Court made it clear, that the question to address, did not concern the incorporation of the music (synch) as such in an audiovisual recording, since the synch was carried out with the permission of the rightholders concerned, for which authorisation the rightholders had received a remuneration in accordance with the applicable contractual arrangements.

The CJEU had to determine, whether an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or reproduction thereof has been incorporated, must be classified as ‘phonogram’ or ‘reproduction of such a phonogram’ within the meaning of the Directives mentioned earlier. The CJEU ruled that – since

phonogram means ‘*any exclusively aural fixation of sounds of a performance or of other sounds*’ in the Rome Convention – that it follows that the fixation of images and sounds cannot come within that concept, since such a fixation cannot be described as “exclusively aural”.

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Does this mean – in the Netherlands – that broadcasting companies do no longer have to pay Sena for the broadcasting of the music, which is incorporated in an audiovisual production? And does this mean – in the Netherlands – that the total remuneration for

the related rights in the phonograms – at the time of incorporation – is paid by means of such contractual arrangements?

According to the CJEU, the WPPT updated the definition of “phonogram” in the Rome Convention, with ‘*the effect... that , in a case where an audiovisual fixation does not qualify as a work, a fixation of the sounds of a performance or other sounds, or of a representation of sounds, incorporated in such an audiovisual fixation, is to be regarded*

as a ‘phonogram’. It must, therefore, be held, that both the wording of the WPPT and the “Wipo Guide to the copyright and related rights treaties administered by Wipo” preclude a fixation of sounds incorporated in an audiovisual work from being covered by the concept of “phonogram” within the meaning of that provision.

4.2 Unpractical Outcome

This outcome of the Atresmedia court case is however very unpractical. Usually, the contracting parties do not know beforehand (at the time of giving permission for the synch) the exact use of the audiovisual work and thus of the recorded music in it. Remunerations by Sena were always realized afterwards and based on the actual use of the audiovisual work with the recordings. These facts can often not be known beforehand. So where should a to be negotiated remuneration upfront, be based on? The CJEU was obviously not aware of the fact that negotiations between users and makers regarding a synch are often very difficult and the result of these negotiations do very often not mean that the artists involved receives an adequate remuneration. The balance of power between the parties is often too unbalanced for that, since there are many artists and few broadcasters. Ask too much, you get cancelled or blacklisted and the broadcasting company will never give you a job again.

» 5. Agreed Statement

According to an “Agreed Statement” adopted at the Diplomatic Conference regarding the WPPT in 1996 *‘phonograms may only be used in a (cinematographic or other audiovisual work) on the basis of appropriate contractual arrangements, duly taking into account the rights of producers of phonograms provided for in the WPPT. If they are used again independently from the audiovisual work, they are to be regarded as ‘phonograms’.*

According to the CJEU, this Agreed Statement means that a phonogram incorporated in a cinematographic or other audiovisual work loses its status as a “phonogram” in so far as it forms part of such a work, without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue.

» 6. Reproduction of a Phonogram

But how about a ‘reproduction of a phonogram’, can that concept be of any help to the artists and phonogram producers involved? According to the CJEU, it cannot. The CJEU has also rejected the idea that the incorporation of a phonogram in an audiovisual work might be regarded as a reproduction of the phonogram. The act of making a reproduction of the fixation in question, is not the subject of article 8(2) of the Directives, but subject to the right - preventive in nature - referred to in article 2 of Directive 2001/29. The triggering element of the compensatory right of article 8(2), is the communication to the public of the performance of a work fixed on a phonogram or on a

reproduction of such phonogram, such reproduction having to be understood, *‘as a copy of the phonogram resulting from such an act of reproduction.’*

According to article 2 (entitled ‘reproduction right’) of Directive 2001/29, Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part:

- For authors, of their works;
- For performers, of fixations of their performances;
- For phonogram producers, of their phonograms.

As a result of the authorized synchronization of music with visuals, the ‘phonogram’ ceases to exist and the result is an audiovisual work.

The result of all of this is, that authors can prohibit the reproduction of their works. Performers can prohibit the fixation of their performances, but the phonogram producer can no longer prohibit the reproduction of the audiovisual work in which the phonogram was incorporated with its permission. It follows, that the communication to the public of an audiovisual recording does not give rise to the right to remuneration provided for in article 8(2).

» 7. Is There Any Hope Left?

Perhaps there still is hope for the Dutch artists and phonogram producers though.

First of all, the author[5] of the Agreed Statement and Comment in the WIPO Guide, on which the CJEU based its judgement[6], made it clear in a paper that what the CJEU has deducted from this quote, does not follow from his Comment. He says that the CJEU misinterpreted this comment, *‘since it only relates to the rights of producers of phonograms and only to the authorization of the incorporation of phonograms into audiovisual works – that is, to the act of synchronization. It does not address the question of what kind of impact such incorporation may have on the right of performers and producers of phonograms to a single equitable remuneration under article 12 of the Rome Convention, Article 15 of the WPPT and Article 8(2) of Directive 2006/115/EC’*. He makes a distinction between the situation whereby an existing phonogram is incorporated in an audiovisual work, which is not the same as where the first fixation of the sounds is made by the producer of the audiovisual work in parallel with the fixation of the images (for example: making a film of an opera).

In the latter case, the producer of the audiovisual work becomes the producer of the phonogram when the sounds first fixed by them are published independently. This is not the case when a pre-existing phonogram is incorporated in the soundtrack. In this

case, the producer is and remains the producer of the originally recorded phonogram whenever it is published separately. Mr Ficsor emphasizes in his paper, that the CJEU got it wrong, since the synching as such is an act of reproduction. So when an audiovisual work is broadcasted or communicated to the public with a pre-existing phonogram incorporated in it, also the *'reproduction of the phonogram'* (as reproduced in the soundtrack) is broadcasted or communicated.

The authorization to make a synch of pre-existing phonograms is not more than that, and in his opinion, unless there is an un-rebuttable presumption of transfer of other rights, no other rights are transferred. He writes that the agreed statement regarding Article 2(b) of the WPPT clarifies, that the rights in performances embodied in the phonogram 'are in no way affected by the incorporation of a phonogram into an audiovisual work. In his opinion, the right to a single equitable remuneration of the performers and producers of phonograms is *'beyond any imaginable doubt such a right, and since it is in no way affected, it is applicable.'*

This is the reason that in practice, for many years, users pay "front-end fees" (the synch fee, which authorizes this act of synching) and "back-end fees" (performance royalties). These "back-end fees" sometimes are an issue of separate regulation in a country of the EU (as it is in the Netherlands) or they are based on contractual agreements (mainly in countries following the common-law tradition).

» 8. Dutch Ziggo Case

Secondly, the Dutch (lower) court ruled on the 24th of July, 2024 in a case between Sena and Ziggo (a Dutch cable broadcaster) that the articles 2 and 6 WNR, which contain exclusive rights for performing artists and phonogram producers, are not directly affected by the Atresmedia-ruling of the EU court, since both articles fall within the Dutch legal sphere. The intent of the Dutch legislature with these articles remains therefore relevant.

According to the court, when the Dutch Neighbouring Rights Act (WNR) was adapted to the Copyright Directive in

2004, the legislature wanted a much broader definition of 'reproduction' then was incorporated in the Rome Convention of 1961. Sena argued successfully that the Dutch legislature wanted the act of synchronization to be part of the definition of "reproduction". However, the Dutch court ruled that this argument cannot be of any

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use for the phonogram producers, since clause 6 (and 7 WNR) grants to these producers exclusive rights regarding the use of 'phonograms' only. Therefore, after Atresmedia, phonogram producers can not prohibit the broadcasting of audiovisual works in which their recordings are incorporated with their permission. However, the situation for the performers is different since article 2 WNR grants a more general right to performers to prohibit the broadcasting of television programs in which their music is incorporated. The exclusive rights of the performers are not limited to 'phonograms' (audio-only recordings of their performances). Article 2 WNR is broader and concerns the 'recording of a performance or a reproduction of such a recording.'

» 9. What's Next?

So now the result is, that phonogram producers and performers in the Netherlands no longer are entitled to an equitable remuneration, which remuneration has been paid to Sena by broadcasters in the last 30 years and was divided on a 50/50 basis between the phonogram producers and the performers.

However, performers can still prohibit the broadcasting of their recorded performances, fixated in an audiovisual work, based on their exclusive rights. Sena is still acting as the collective rights organization who collects money from the users/broadcasters. However, this is no longer an equitable remuneration, but a fee based on each performers' exclusive rights.

Sena has changed her contracts with the performers as a result of Atresmedia and each performer has now granted separate permission to Sena to act on their behalf with respect to the broadcasting of audiovisual works in which their recorded performances are included.

» 10. To Regulate or Not to Regulate?

However, the world of "synchs" is very diverse. Sometimes, music is specially made to order, for example in films. Videoclips mainly promote the underlying musical pop song or rap and sometimes existing hits or commissioned music are used in commercials, national or foreign television shows or movies. Each situation is different. Sena and the broadcasters have discussed the outcome of Atresmedia, and they have come up – against the wishes of the relevant performers and phonogram producers - with a new fictitious system, called '*regulated or not regulated*'.

As a result, broadcasting companies can claim - for example - music in commercials as 'regulated', as a result of which, Sena will not claim a remuneration for the broadcasting of these commercials. The performers and phonogram producers involved protested

and have now formed a Collective. This Collective aim is, to restore the collective collection of monies from users of audiovisual recordings in which their audio recordings and performances have been synched. As an alternative, they will have to negotiate much higher initial fees and remunerations from the users for granting them the initial permission to synch, which shall have to include the broadcasting of the programs with their music. This is not realistic and goes against the goal of the European union to .

From a proper interpretation of the concept of “*reproduction*” as set forth in Article 2 of Directive 2001/29/EC and Article 7 of the WPPT, it follows that the inclusion (incorporation, embedding, or “synchronization”) of a commercially published phonogram into an audiovisual recording is an act of reproduction of the phonogram. The argument that the concept of “reproduction” has a different meaning in Directive 2001/29/EC than in Directives 92/100/EEC and 2006/115/EC is not admissible from the standpoint of a correct interpretation of that concept.[6] The CJEU misinterpreted the ‘authentic interpretation’ of the WPPT in the Wipo Guide, says the author of this Guide, Dr. Ficsor himself.

Currently, the result is that the Judgement deprives artists and phonogram producers in the audiovisual field of the possibility to receive proper compensation for the use of the recorded performances in audiovisual works. This is very harmful for the artists and phonogram producers involved. An annulment, reconsideration or revision of the Judgement is necessary.

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- [1] *CJEU 18 November 2020, Case C-147/19, ECLI:EU:C:2020:935 (Atresmedia)*
 - [2] *PDF 'Fair remuneration for audiovisual authors and performers in licensing', December 2023, a publication of the European Audiovisual Observatory*
 - [3] *AEPO ARTIS report 'Performers Rights in International and European Legislation, October 2018, page*
 - [4] *WPPT articles 7 – 10*
 - [5] *Dr. Mihály J. Fiscor, former Assistant Director General of WIPO: 'Comments on Atresmedia – what rights of performers are, or are not, applicable in case of embodiment of phonograms in audiovisual works'*
 - [6] *This is also the conclusion of Mr Antonio Lopez Sánchez in his paper 'The Ruling of 18-11-2020 by the Court of Justice of the European Union in Case C-147/19 (Atresmedia / AGEDI-AIE)*

