

**ALAI CONGRESS 2022 – ESTORIL, Portugal**  
**CENTRO DE CONGRESSOS DO ESTORIL**  
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**QUESTIONNAIRE**

**PANEL II – SOUND RECORDING PRODUCERS' RIGHTS - SPAIN**

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**PANEL II – PHONOGRAM PRODUCERS' RIGHTS**

- 1- Which rights are awarded to phonogram producers?
- 2- What is the nature of those rights? – Statutory? Contractual?
- 3- Which of them are exclusive/remuneration rights?
- 4- Which exceptions/limitations generate remuneration rights for phonogram producers?
- 5- Are there any legal presumptions of transfer or is it voluntary/contractual?
- 6- What type of compensation is paid in exchange? How is it set? For how long?
- 7- How is producer's compensation determined for each business model?
- 8- Are there minimum amounts due? Any other economic benefits?
- 9- Is digital piracy/streamripping still a major concern for phonogram producers?
- 10- Which rights are currently being collected via CMOs?
- 11- Which CMOs represent phonogram producers in your Country?
- 12- Do these CMOs comply with transparency principles?
- 13- Is it possible to find out how much income is provided by each type of rights?
- 14- What is the current litigation level for phonogram producers in your Country?
- 15- Are there any relevant Court Decisions concerning phonogram producer's rights?
- 16- Are there any revocation of transfer of rights' agreements provisions?
- 17- What is considered a "phonogram published for commercial purposes"?
- 18- Is there any type of phonograms that is published for non-commercial purposes?
- 19 - Which rights are involved in audiovisual synchronization ("production music")?
- 20- Which rights are involved in mood music/sound branding licensing?

1. Article 114 of the Spanish Copyright Act ("SCA") defines "phonogram" as any exclusively sonorous fixation of the performance of a work or of other sounds, and "phonogram producer" as the natural or legal person under whose initiative and responsibility the abovementioned fixation is made for the first time.

There is no express definition in the law of "phonogram published for commercial purposes", which has generated some conflict in this respect. Spanish courts have understood, based on Article 15.4 WPPT, that sound recordings made available to the public (i.e. interactive communication to the public) are published for commercial purposes. They have also declared that sound recordings published for direct or indirect economic or commercial benefit have a commercial purpose, and that nothing prevents phonograms made available to the public under free use licenses (such as Creative Commons licenses) to be considered as published for commercial purposes.

2. Sound recording producers own related rights recognized by the SCA, all of them of an economic nature. These rights are the following:

a) Exclusive rights:

i. Right of reproduction (art. 115 SCA)

ii. Right of non-interactive communication to the public, including broadcasting, communication to the public via satellite, transmission and retransmission by cable... (art. 109.1 SCA/1987) .

iii. Right of making available to the public (art. 116.1 SCA).

iv. Right of distribution, including rental and public lending (art. 117 SCA).

b) Statutory remuneration rights, which are compulsorily managed through the producers CMO (AGEDI).

i. Right to receive equitable remuneration, to be shared with performers, for the non-interactive public communication of sound recordings published for commercial purposes (art. 116.2 SCA).

ii. Right to receive fair compensation for private copying (art. 25 SCA).

3. The duration of these rights is seventy years from January 1st of the year following that of the first publication of the phonogram or, failing that, from its first lawful communication to the public. If the sound recording has not been published or communicated to the public, the producer's rights shall expire after fifty years from January 1st of the year following that of the recording of the phonogram (article 119 SCA).

4. Producers may assign or license the rights over their sound recordings to third parties under the terms freely agreed with them. Assignments and licenses have contractual nature. Spanish law does not provide for presumptions of assignment or license to third parties. Nor does it provide for specific mechanisms for revocation of assignments, beyond the generic right that every contractual party has to terminate an assignment or license agreement when it has been breached by the other party (art. 1124 of the Civil Code).

The parties are free to negotiate the term of the assignment/license. In some cases the assignment or license may be for the entire term of protection of the assigned/licensed rights (this is often the case in non-exclusive licenses for synchronization of sound recordings published for commercial purposes in audiovisual works).

Normally, assignment or license agreements entered into by sound recording producers and third parties are onerous. In return, producers receive either a lump sum (for example, when they license the synchronization of the phonogram in an audiovisual work) or a share of the revenues obtained by the assignee/licensee (for instance, when they assign to a streaming platform the right to make their phonograms available to the public). Although it is not so usual, assignments/licenses may also be free of charge.

5. Producers have entrusted their CMO AGEDI with the administration of their exclusive right to authorize the non-interactive communication to the public of sound recordings, as well as the right of reproduction exclusively to the extent necessary for the non-interactive public communication of their sound recordings. AGEDI manages the exclusive right of public communication together with the concurrent right to equitable remuneration, through a joint body with AIE, the phonographic performers' CMO. The tariff amount for the use of these rights is set by the CMOs in accordance with the criteria established by the SCA (art. 164).

AGEDI complies with the transparency obligations established by the SCA. The annual transparency report for 2021 is published on AGEDI's website <https://www.agedi.es/wp-content/uploads/AGEDI-Informe-IAT-31.12.2021.pdf>.

Producers reserve for their individual management the remaining forms of reproduction (including synchronization), the right of distribution in all media and the right of making the sound recordings available to the public (i.e interactive communication to the public).

6. There are numerous legal proceedings pending at the request of AGEDI (and AIE, the phonographic performers' collecting society) against users who carry out acts of public communication of phonograms published for commercial purposes without paying the corresponding equitable remuneration. AGEDI also maintains some litigation against defaulting debtors of the compensation for private copying.

There are also some legal proceedings brought by PROMUSICAE (Spanish IFPI national group) in defense of the rights of associated producers in the digital field.

Although digital piracy in the music sector has been decreasing in recent years, it continues to be a concern for phonogram producers. According to data from the Observatorio de la Piratería, piracy consumers of music in digital format accounted for 25% of all music consumers in 2020, with more than 2 billion illegal accesses to protected music content, worth more than 8 billion euros. The damage caused to the music industry can be calculated at 482 million euros.

7. At national level, the most noteworthy judgments relating to the neighboring rights of phonogram producers issued in the last two years are the following:

- Madrid Court of Appeal (28th Section) Judgment 241/2022, dated April 4 2022 (AERC v. AGEDI/AIE): Declares subsisting the exclusive right of non-interactive public communication recognized to phonogram producers by art. 109.1 of the LPI/1987, which is considered to be compatible with EU Law.
- Supreme Court Judgment 67/2021, dated February 9 2021 (AGEDI/AIE v. Atresmedia): Following the doctrine of the EUCJ Judgment dated November 19, 2020, case C-147/19 (Atresmedia), this Supreme Court decision declares that users who broadcast audiovisual works in which sound recordings published for commercial purposes have been synchronized do not have to pay equitable remuneration to producers and performers (through their CMOs) for the communication to the public of phonograms published for commercial purposes or reproductions thereof.

8. Regarding the synchronization of sound recordings published for commercial purposes in audiovisual works and other films which are not audiovisual works:

- Synchronization in audiovisual works: Before the EUCJ Judgment in the Atresmedia case, it was considered that, in addition to a reproduction license to synchronize a sound recording in an audiovisual work, it was necessary that the authorization from the phonogram producer also extended to the different media of exploitation of the audiovisual work required by the licensee (i.e distribution or public communication in the agreed media) so that the audiovisual work incorporating the sound recording could be lawfully exploited. It was understood that the exploitation of the audiovisual work entailed the exploitation of a reproduction of the synchronized phonogram. Therefore, it was considered that non-interactive public communication of the audiovisual work implied the public communication of the synchronized phonogram, and that users carrying out such communication to the public had to pay to their producers and performers the corresponding equitable remuneration. This had a logical impact on the price of the license granted by the producer.

Following the EUCJ decision the Atresmedia case, it is understood that the synchronization license authorizes the reproduction of the sound recording in the audiovisual work and that, when synchronized, the sound recording is diluted within the audiovisual work, so that the non-interactive public communication of the audiovisual work does not entail the public communication of the synchronized phonogram, with the consequence that the user who carries out the act of public communication of the audiovisual work does not have to pay the equitable remuneration for the public communication of the synchronized phonograms.

- Synchronization in films which are not audiovisual works: On the contrary, the sound recording published for commercial purposes that is synchronized in a film which does not meet the requirements for its qualification as an audiovisual work does not lose its consideration as a phonogram published for commercial purposes. Therefore, the exploitation of this film always entails the exploitation of a reproduction of the sound recording. Consequently, the reproduction license granted by the phonogram producer would not be sufficient to exploit the film, and its authorization would also be required in order to exploit the film (and the reproduction of the sound recording) by means of public communication or distribution in any form or media. For the same reason, the non-interactive public communication of the film entails that of the phonograms published for commercial purposes that have been synchronized in it and accrues the corresponding equitable remuneration.

9. The use of sound recordings as mood music or sound branding requires the relevant licenses from the phonogram producers in order to attach their phonograms to the products or services provided by the licensee and to exploit them. Audio branding licenses are subject to individual management.