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**QUESTIONNAIRE**

**MAIN THEME: COPYRIGHT, NEIGHBOURING AND SPECIAL RIGHTS - STATE OF AFFAIRS AND FURTHER OUTLOOK**

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**Preliminary note:** Unless otherwise indicated, all the Portuguese legislation quoted refers to the Portuguese Copyright and Related Rights Code approved by the Decree-Law nr 63/85 of the 14th of March, amended by Law nr 45/85 of the 17th of September, Law nr 114/91 of the 3rd of September Decree-Law nr 332/97 of the 27th of November, Decree-Law nr 334/97 of the 27th of November, Law nr 50/2004 of the 24th of August, Law nr 24/2006 of the 30th of June, Law nr 16/2008 of the 1st of April, Law nr 65/2012 of the 20th of November, Law nr 82/2013 of the 6th of December, Law nr 32/2015 of the 24th of April, Law nr 49/2015 of the 5th of June, Law nr 36/2017 of the 2nd of June, Decree Law nr 100/2017 of the 23rd of August and Law nr 92/2009 of the 4th of September.

## PANEL I – PERFORMER'S RIGHTS – A COMPARATIVE OVERLOOK

**1- What types of performers are there according to your legal framework?**

Featured and non-featured artists.

**2- Do all types of performers enjoy Neighbouring Rights protection?**

Yes. There is no distinction in the law.

**3- Does the law distinguish between featured/non-featured performers? How?**

No. At rights distribution level under collective management there is a single framework. In the musical market there are important distinctions according to the respective contractual practices.

**4- Which rights are awarded to each type of performer?**

**I- Live performances:**


**a) Fixation**: Article 178th, nr 1 b);

**b) Broadcasting** and **Communication to the Public:** Article 178th , nr 1 a).

**II- Fixed performances:**

**c) Reproduction:** Article 178th , nr 1, c).

**d) Distribution:** Article 7th, nr 1, a) of Decree Law nr 332/97, of the 27th of November that implemented EU Directive nr 92/100/CEE, of the 19th of November 1992.

**e) Rental:** Articles 5th and 7th of Decree-Law nr 332/97, of the 27th of November.

**f) Making Available to the public:** Article 178th, nr 1 d).

**g) Communication to the Public:** Article nr 178th, nr1 a).

**h) Public performance:** Remuneration right as foreseen in Article 184th, nr 3.

**i) Broadcasting:** Article 178th, nr1.

**j) Retransmission:** Articles 7th and 8th of Decree-Law nr 333/97 of the 27th of November.

**k) Direct Injection:** Not yet implemented in Portugal.

**III- Are moral rights attributed to performers? Which prerogatives does it comprehend?**

Article 180th, Article 182nd and Article 9th, as referenced by Article 192nd

Please confront Articles 182nd and 9th.

**5- What is the nature of those rights? – Statutory? Contractual?**

Statutory.

**6- Which of them are exclusive rights/remuneration rights?**

The so-called moral rights are all exclusive rights since these rights are irrevocable, unwaivable and imprescriptible. Articles 182nd , 9th and 56th to 62nd as referenced by Article 192nd.

**7- Which exceptions/limitations generate remuneration rights for performers?**

Private Copy, Article 82nd.

**8- Which rights are transferred to music/audiovisual producers? For how long?**

In general terms, rights granted to producers are those that are not subject to mandatory collective management or rights that may not be subject to mandatory collective management but, in practical terms, are managed collectively (such as the right to authorize the broadcasting, public communication, or simulcasting). Therefore, the most common rights transferred to the producer are the following:

- Reproduction right – Article 178th, nr 2;
- Making available right, Article 178th, nr 1, c).

Except, in the audiovisual field, the remuneration foreseen in Article 178th, nr 2, because it is an unwaivable right.

- Rental right – Article 8th of Decree-Law nr 332/97, of the 27th of November (only applicable to audiovisual performers).

**9- Are there any legal presumptions of transfer or is it voluntary/contractual?**

No. but, in the case of the transfer presumption foreseen in Article 8th of the Decree-Law nr 332/97 of the 27th November, that implemented the European directive nr 92/1000/EEC, of the 19th of November 1992, relating to the rental, lending and certain neighbouring rights in intellectual property, the transfer might be *ope legis*.

**10- Are there any unwaivable and inalienable remuneration rights?**

Yes, in all the cases of mandatory collective management, namely the remuneration right for actors in Article 178th, nr 2, as well as the right foreseen in Article 7th, nr 1 of the Decree-Law nr 333/97 of the 27th November, that implemented the European directive nr 93/83/EEC of the 27th November 1993, concerning to certain copyright and related rights applicable to satellite broadcasting and cable retransmission.

**11- What type of compensation is paid in exchange? How is it set? For how long?**

As far as individual management rights are concerned, according to the respective contract and according to the performer's negotiation power. In the case of rights subject to mandatory collective management, according to the respective negotiation or judicial decision.

**12- How is "streaming" qualified in your Country for rights awarding purposes?**

Interactive streaming is included in the so-called making available right, foreseen in Article 178th nr 1, c).

**13- Whose authorization is it required for the "streaming" of music/audiovisual content?**

From a performer's point of view, authorization concerning the referred making available right is required. As mentioned above, and in general, the performer transfers his rights to the producer (phonographic or video producer) via contract. Therefore, the authors' authorization, as well as the producer's authorization, are both needed since the performers have transferred this right to the respective producer.

**14- What is the estimated level of copyright infringement in your Country?**

The level of rights holders' protection present in the Portuguese Copyright and Related Rights Code includes three types of protection: administrative, civil, and criminal. We should stress the fact that there is such wide and diversified protection relating to the modes of exercise, that it shows well what the Portuguese legislator faced, in the 80s from the last century: it was a territory with rampant piracy levels and a general feeling of disrespect concerning intellectual property rights and the corresponding absence of any kind of consequence. Such a scenario made the Portuguese legislator, among other territories in South Europe, opt for these three different types of protection.

**15- What is the current level of disclosure on economic returns from digital platforms?**

In general terms, the disclosure level is the one present in the Transparency Reports that collecting societies are obliged to publish on their websites every year, as well as relevant news in the media.

**16- How is performer's compensation determined for each business model?**

Concerning rights subject to individual management, it is determined according to the respective negotiation power and the will of who is contracting the performer. In general terms, the values are the ones commonly used in the market at stake. Concerning rights subject to collective management, according to negotiations or court decisions.

**17- Are there minimum amounts due? Any other economic benefits?**

There are no minimal or other benefits arising from the law or collective bargaining, however, it may occur depending on the results of the negotiation held by the contractual parties.

**18- Do UGC platforms contribute to such compensation schemes? How?**

No, as far as we know.

**19- Has the Beijing Treaty been implemented in your Country, at least, in part?**

No.

**20- Which rights are collected by Collective Management Organisations (CMOs)?**

All the following rights are subject to mandatory collective management or are in practical terms managed collectively:

- Satellite broadcasting and cable retransmission, foreseen in Article 8th of Decree-Law nr 333/97, of the 27th of November.
- Equitable remuneration, foreseen in Article 184th, nr 3. This right, despite not being legally subject to mandatory collective management, is, in fact, managed collectively by GDA.
- Private Copy remuneration, foreseen in article 82nd and in Law nr 49/2015 of the 15th of June.
- The rights that are foreseen in Article 178th nr 1, broadcasting, public communication, and the reproduction right.

**21- Which CMOs represent performers in your Country?**

GDA is the only one.

**22- Do these CMOs comply with transparency principles?**

Yes. They are bound by the Law implementing directive nr 2014/26/EU, concerning copyright and related rights collective management and multi-territorial licensing of rights in musical works for online use in the internal market: Law nr 26/2015, of the 14th of April, amended by the Decree-Law

nr 100/2017, of the 23rd of August, Decree-Law nr 89/2019 of the 04th July and Law 36/2021 of the 14th of June.

**23- Is it possible to find out how much income is provided by each type of rights?**

Copyright and related rights collecting societies are bound by the transparency framework referred to in the legislation mentioned in the previous answer, namely concerning the provision of Articles 10th, 26th, and 26th-A, including the respective annex. This way and concerning the compliance of the referred legislation, GDA publishes yearly the total amounts of rights collected and distributed. Please *cfr*. https://www.gda.pt/gda/transparencia/.

**24- What is the current litigation level for performers' rights in your Country?**

The litigation level in Portugal may be considered a high one. GDA has several lawsuits, directly or via its partnerships with Audiogest (Audio producers collecting society), with GEDIPE (Video producers collecting society), and with AGECOP (Private copy association).

Like this, at present, there are lawsuits concerning the remuneration for commercially released phonograms in the so-called local radio stations, and concerning the remuneration foreseen in Article 178th, nr 2 for audiovisual performers only with other broadcasting entities.

**25- Are there any relevant Court Decisions concerning performer's rights?**

Court cases for the collection of performer neighbouring rights in Portugal existed ever since the beginning of GDA activities. This way, either via the litigation held together with the producers to collect the remunerations to be divided with the performers (especially at broadcasting and public communication levels), or directly by GDA alone, concerning situations where exclusive performers' rights, subject to collective management, are at stake.

Therefore, there is extensive case law concerning rights collected by the phonographic producers, especially after the creation of the Intellectual Property Court of Lisbon, in 2011.

The same goes for rights concerning audiovisual where there is an extensive case law as well concerning the litigation held in conjunction with GEDIPE (see below, the answer to question III, 29).

It should be noted that most of the court decisions referred to are dated after the implementation in the Portuguese legal system of the directive nr 2004/48/EC of the 29th of April 2004, operated by Law nr 16/2008, of the 1st of April.

Finally, there is an important decision from the CJEU that should be mentioned, that is the decision from the 19th of August 2018, case C-525/16 (MEO vs. Portuguese Competition Authority and GDA).

**26- Does the Principle of National Treatment apply to all foreign performers?**

GDA applies this principle to all performers at distribution level.

**27- Are there "appropriate and proportionate remuneration" provisions?**

Not yet, although its implementation is expected to occur via the implementation of the directive nr 2019/790, of the 17th of April 2019.

**28- Are CMO´s mandates always exclusive and encompassing all rights?**

No, the Portuguese implementation of the directive allows different possibilities concerning the extension of the mandates given to collecting societies. In concrete, Article 31st of Law nr 26/2015 as amended by the Decree-Law nr 100/2017, of the 23rd of August does not allow an all-encompassing mandate.

**29- Are there any partial/global revocation of transfer of rights agreements provisions?**

Yes, in Portugal rightsholders can grant powers concerning all or a part of the different rights. Furthermore, rightsholders may, in fact, restrict the territorial scope of the rights managed by the collecting society. On this aspect, please compare the wording of Article 31st, nr 1, b) and the nr 6 of the same article, of Law nr 26/2015, of the 14th of April as amended by Decree-Law nr 100/2017, of the 23rd of August.

**30- Are there any provisions on contractual remuneration adjustments?**

Concerning the tariffs applied by the collecting societies, please see articles 38th and following of Law nr 26/2015, of the 14thof April amended by the Decree-Law nr 100/2017, of the 23rd of August.

**PANEL II – PHONOGRAM PRODUCERS' RIGHTS**

**1- Which rights are awarded to phonogram producers?**

According to article 184º of the Portuguese Copyright and Neighbouring Rights' Code (CDADC), phonogram producers have the right to authorize:

a) Reproduction;
b) Broadcasting;
c) Communication to the public;
d) Distribution;
e) Rental;
f) Making available to the public;
g) Cable Retransmission;
h) Direct Injection;
i) Right to authorize the use of the phonogram in a different work.

**2- What is the nature of those rights? – Statutory? Contractual?**

Statutory.

**3- Which of them are exclusive/remuneration rights?**

All of the rights mentioned are exclusive.

**4- Which exceptions/limitations generate remuneration rights for phonogram producers?**

- The use of protected work, by any means, by a natural person for private use and without commercial purposes – direct or indirectly.
- The reproduction of a work that has been made available to the public by a public library, public archive, public museum, a documentation center without commercial purposes, or a scientific or educational institute, as long as those reproductions are not intended for the public and are limited to the needs of those institutions' activities and do not have a commercial purpose.
- Private copy.

**5- Are there any legal presumptions of transfer or is it voluntary/contractual?**

No. It must always be by contract.

**6- What type of compensation is paid in exchange? How is it set? For how long?**

The producer receives a unique and equitable remuneration which is then split between the producer itself and the performer.

**7- How is producer's compensation determined for each business model?**

The compensation is determined by contract, as freedom of contract prevails. When collectively managed, the remuneration is also negotiated and follows the rules of the European Union. In Portugal, the only compensation right that truly exists for phonogram producers is private copying, in which the amounts and mechanisms are those provided in the respective legislation.

**8- Are there minimum amounts due? Any other economic benefits?**

No.

**9- Is digital piracy/streamripping still a major concern for phonogram producers?**

No.

**10- Which rights are currently being collected via CMOs?**

Communication to the public, broadcast, simulcast, webcast, reproduction, public performance.

**11- Which CMOs represent phonogram producers in your Country?**

AUDIOGEST – Associação para a Gestão e Distribuição de Direitos.

**12- Do these CMOs comply with transparency principles?**

Yes.

**13- Is it possible to find out how much income is provided by each type of rights?**

Yes.

**14- What is the current litigation level for phonogram producers in your Country?**

There is a high number of Court Cases, namely in relation to hotels and public places that litigate over the need to get a license to be able to have videoclips channels or radio turned on for the customers.

**15- Are there any relevant Court Decisions concerning phonogram producer's rights?**

Yes. All Court Decisions are in favor of the claimant (Audiogest/GDA) sometimes ending by awarding a daily compensation for infringement and other times

**16- Are there any revocation of transfer of rights' agreements provisions?**

If this question is referring to the right of revocation provided by the DSM Directive, in cases of lack of exploitation, the answer is no, as the DSM Directive was not yet transposed. In Portugal, revocation means the act through which both parties agree to terminate a contract, and that is already possible since it is a general principle in Portuguese legislation.

**17- What is considered a "phonogram published for commercial purposes"?**

The definition is the same as provided in the Rome Convention. When concerning the physical media, it means the distribution of a phonogram for purposes of sales or renting. When concerning digital format it refers to the making available to the public of a phonogram on a licensed platform by download or streaming.

**18- Is there any type of phonograms that is published for non-commercial purposes?**

We do not understand the meaning of "types of phonograms", however, there are authors, performers, and producers that, being the owners of copyrights or related rights of a certain work, may make those contents available for free.

**19 - Which rights are involved in audiovisual synchronization ("production music")?**

It is an autonomous right in Portugal. Before it was always considered an act of reproduction.

**20- Which rights are involved in mood music/sound branding licensing?**

The authors and producers' right to authorize the use and the right of remuneration of authors, producers, and performers.

## PANEL III- BROADCASTERS AND FILM/AUDIOVISUAL PRODUCERS RIGHTS

**1- Which rights are awarded to broadcasters in your Country?**

Under art. 187$^{th}$ of the Portuguese Copyright and Neighbouring Rights Code, broadcasters are awarded the following rights:

a) Simultaneous retransmission of broadcastings by wireless means;

b) Fixation of broadcasts by wire or wireless means;

c) Reproduction of fixation of their broadcasts if made without their consent, or ephemeral fixation if the reproduction is made for purposes different from those which justified the reproduction;

(d) Making available to the public by wire or wireless means, including by cable or satellite, in such a way that members of the public may access them from a place and at a time individually chosen by them;

e) Communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee;

Under Decree-Law no. 333/97 of 27.11.1997, which transposes Directive no. 93/83/CEE of 27.09.1993, broadcasters are awarded the right of simultaneous retransmission of their broadcasts by cable.

**2- What is the nature of those rights? – Statutory? Contractual?**

Statutory.

**3- Which of them are exclusive/remuneration rights?**

All these rights are exclusive.

**4- Which exceptions/limitations generate remuneration rights for broadcasters?**

Under article 189 of the Portuguese Copyright and Neighbouring Rights Code, the following exceptions/limitations apply to neighbouring rights:

a) private use;

b) the excerpts of a performance, a phonogram, a video or broadcasting, as long as the use of these excerpts is justified for the purpose of information or criticism or any other that authorizes the quotations or summaries referred to in point g) of paragraph 2 of Article 75 (E&L applicable to authors, see below);

c) use for exclusively scientific or teaching purposes;

d) ephemeral fixation by a broadcaster (under article 152, this is only for their own use, in case of deferred broadcasts, recordings must be destroyed within three months and broadcasts are limited to three);

e) the fixations or reproductions made by public entities or providers of public services for some exceptional documentary interest or archives;

f) other cases where the use of the work is lawful without the consent of the author.

The limitations and exceptions that fall on author's rights also apply to related rights in all that is compatible with the nature of these rights, so, in practice, the following exceptions also apply, with the necessary adaptations:

a) the reproduction of works for the exclusive purpose of private use, in paper or any similar medium, effected by any kind of photographic technique or process with similar results, except for sheet music, as well as the reproduction in any medium carried out by a natural person for private use and without any direct or indirect commercial purposes;

b) the reproduction and making available to the public, by the media, for purposes of information, of speeches, addresses, and lectures given in public that do not fall within the categories provided for in Article 7, by extract or summary form;

c) the regular selection of periodic press articles, in the form of press reviews;

d) the fixation, reproduction, and public communication by any means, of fragments of literary or artistic works, when their inclusion in current event reports is justified by the information purpose pursued;

e) reproduction, in whole or in part, of a work that has previously been made available to the public, provided that such reproduction is made by a public library, a public archive, a public museum, a non-commercial documentation centre, or scientific or educational institution, and that such reproduction and the respective number of copies are not intended for the public, are limited to the needs of the activities of these institutions and not seek to obtain any economic or commercial, direct or indirect, advantage including the acts of reproduction [which are]necessary to the preservation and archive of any work;

f) the reproduction, distribution, and public provision for the purpose of teaching and education, of parts of a published work, provided that it is intended exclusively for the purpose of teaching in these establishments and does not seek to obtain any economic or commercial advantage, direct or indirect;

g) the inclusion of quotations or summaries of other people's works, whatever their gender and nature, in support of the doctrines themselves or with the purposes of criticism, discussion, or teaching, and to the extent justified by the objective to be achieved;

h) the inclusion of short pieces or fragments of third parties' works in their own works for teaching purposes;

i) the reproduction, public communication, and making available to persons with disabilities of any work that is directly related to the extent and the strictly required extent required by those specific deficiencies and provided they do not have, directly or indirectly, a for-profit purpose.

j) the public performance and public communication of hymns or patriotic songs officially adopted as well as works with an exclusively religious character in acts of worship or religious practices;

l) the use of a work for the purpose of advertising relating to the public exhibition or sale of artworks, to the extent that this is necessary to promote the event, with the exclusion of any other commercial use;

m) the reproduction, communication to the public, or making available to the public, of topical articles, economic discussion, political or religious, matters, broadcast works, or other materials sharing the same nature, unless expressly reserved;

n) the use of works for purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary, or judicial proceedings;

o) the communication or making available to the public for the purpose of research or private study, to individuals from the public through end-user devices intended for this purpose in libraries, museums, public archives, and schools, protected works not subject to conditions of purchase or licensing, and are included in their collections or property holdings;

p) the reproduction of works carried out by social non-for-profit institutions such as hospitals and prisons when it is broadcast;

q) the use of works, such as works of architecture or sculpture, made to be permanently located in public places;

r) the incidental inclusion of a work or other subject matter in any other material;

s) the use of work related to the demonstration or repair of equipment;

t) the use of an artistic work in the form of a building or a drawing or plan of a building for the purpose of reconstruction or repair.

The distribution of copies lawfully reproduced, as justified by the objective of the act of reproduction. is also lawful.

The use of the exercise modes provided for in the preceding paragraphs must not reach the normal exploitation of the work or cause unreasonable prejudice to the legitimate interests of the author (rightsholder).

Any contractual clause that aims to eliminate or prevent the normal exercise by beneficiaries of the uses set out in paragraphs 1, 2, and 3 of this Article will be null and void., without prejudice to the possibility of parties to agree freely on ways of operation, in particular, as regards the amounts of the equitable remuneration.

**5- Are there any legal presumptions of transfer or is it voluntary/contractual?**

There are no presumptions of transfer for broadcasters' rights, it is always done on a contractual basis.

**6- What is the relevance of copyright infringement in relation to broadcasters' rights?**

According to recent research by AKAMAI and MUSO[1], broadcasting is the industry that is currently being most affected by piracy, with more than 67 billion visits to pirated TV programs, followed from a large distance by book publishers, with more than 31 billion visits in 2021. Internet users have increased the rate of access to illegal content platforms by 16% in 2021 in comparison with the same period in 2020. These data from AKAMAI and MUSO seem to contradict previous information from EUIPO report in relation to 2017-2020[2] according to which the level of illicit access to television shows had declined by 41%.

Portugal is not one of the Countries where piracy reaches the highest levels, when compared with France, Russia, the US, or even Sweden. However, there were 788 million accesses between January and December 2021 to websites that make content such as TV serials, movies, music, software, books, newspapers, and magazines illegally available, representing a 12% growth rate in relation to 2020. Research data confirms that sports broadcastings and television serials are now the biggest targets for illicit access (52,1%) followed by editorial content such as books, newspapers, and magazines (24,4%) software (10,1%) whereas music and movies have sunk to 7% and 6,4%

[1] https://www.akamai.com/resources/state-of-the-internet/soti-security-pirates-in-the-outfield
[2] https://euipo.europa.eu/ohimportal/pt/web/observatory/online-copyright-infringement-in-eu_2021


respectively. This is explained by the appearance of streaming services that make these types of content available at an affordable price. 52% of the consumption is through streaming, whereas the rest is through downloading. It is during weekends that piracy rates increase for sports broadcastings, TV serials, and movies, whereas access to other types of content is more constant.

**7- Is digital piracy/streamripping still a major concern for broadcasters?**

Yes. The whole content industry (including film producers and distributors) has quantified piracy losses of € 146 million plus € 66 million lost in evaded taxes[3].

**8- Do UGC platforms contribute to broadcasters' rights? How?**

No, except in case of a decision to monetise UGC that uses copyrighted material, when filtering software such as Content ID or a similar system is used.

**9- What is the current litigation level for broadcasters' rights in your Country?**

The only ongoing case is case C-716/20, a preliminary reference to the CJEU that opposes RTL GmbH to GRUPO PESTANA SGPS and SALVOR, but only the defendants are Portuguese, whereas the plaintiff is not. Nevertheless, the case is important for the broadcasters because the issue at stake is the communication to the public in hotels and similar public establishments v. cable retransmission right.

**10- Are there any relevant Court Decisions concerning broadcasters' rights in your Country?**

The only case worth mentioning is an Arbitral Court Decision from 30.11.2000 that set up the amount of the cable retransmission right to be collected from cable retransmission operators by authors, artists, and broadcasters. Each type of rightsholder collects cable retransmission right via its own CMO, except broadcasters, that are not subject to mandatory collective licensing, but only voluntary.

**11- Are broadcasters acting as One-Stop Shop in relation to retransmission operators?**

No.

**12- Which rights are awarded to audiovisual producers in your Country?**

Article 176(3) of the Portuguese Copyright and Neighbouring Rights Code defines a video producer as the physical or moral person that records for the first time the images from any origin, with or without any sound. The same provision, indent (5), defines videos as the registration in any material media, of images, with or without any sounds, as well as the copy of films or audiovisual works.

Under article 184 of the Portuguese Copyright and Neighbouring Rights Code, video producers, as they are named (producers of the first audiovisual fixation) are awarded the following rights:

a) Direct or indirect, temporary or permanent reproduction of a video, by any means and in any form, in whole or in part;

b) Distribution to the public of copies, theatrical exhibition, as well as import and export of the video;

[3] https://observador.pt/opiniao/uma-questao-de-oportunidade/


c) Making available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

d) Any use of the video in a different work.

e) Communication to the public of the video, including the broadcast by any means and public performance direct or indirect, in a public place (a place that is explicitly or tacitly accessible to the general public, either against payment or without payment, even where admission is reserved);

Under Decree-Law nr 333/97 of the 27th of November, which transposes E.U. directive no. 93/83/CEE of the 27thof September, audiovisual producers are awarded the right of simultaneous cable retransmission of their videos.

Under Decree-Law nr 332/97 of the 27th of November, which transposes E.U. directive no. 92/100/CEE of the 19th of November, producers of the first fixation of a film are awarded the rental and lending right, concerning the original and copies of the film (cinematographic or audiovisual work with or without sound).

**13- What is the nature of those rights? – Statutory? Contractual?**

Statutory.

**14- Which of them are exclusive rights? Which of them are remuneration rights?**

All these rights are exclusive rights, although for art 184 e) the compensation is named "equitable remuneration", as a legacy from a previous formulation where the public communication right was not exclusive. Nowadays, licensing by producers is required, as for any other exclusive right, but the compensation is still named an "equitable remuneration". In practice, it is only collectively managed.

**15- Which exceptions/limitations generate remuneration rights for audiovisual producers?**

Currently, only private copy. However, public lending will also generate some form of compensation, the amount of which is in the course of being set up within a long-lasting ongoing Court procedure.

**16- Which rights are transferred to audiovisual producers? For how long?**

Normally, producers tend to acquire all the rights that are necessary for commercial exploitation. This includes contracting the authors (director, scriptwriter or/and dialogue writer, composer of the soundtrack), as well as the artists (actors, performers, dancers), authors of the adaptation, if applicable, and all technical contributors who are not qualified as rightsholders, as providers of creative input. In general, rights are transferred to producers in perpetuity, against such payment.

**17- Are there any legal presumptions of transfer towards audiovisual producers?**

a) Authors' rights are presumed to be transferred to audiovisual producers in order to enable exclusive economic exploitation of the film/audiovisual work for 25 years (by default of contractual provision) under art. 125-128 of the Portuguese Code of Copyright and Neighbouring Rights;

b) Performers' rights are presumed to be transferred to audiovisual producers or broadcasters, in accordance with the authorization granted for fixation. There is no time limit in the law.

**18- What type of compensation is paid in exchange? How is it set? For how long?**

Under art. 131 of the Portuguese Code of Copyright and Neighbouring Rights, as regards the authors, compensation may consist of a fixed amount, a percentage of income from the theatrical exhibition, a fixed amount per theatrical exhibition, or any other form of retribution agreed with the producer.

As regards the performers, the law (article 178(2)) requires the payment of a single equitable remuneration. This remuneration includes the right of broadcasting and communication to the public, but also rebroadcasting, new broadcastings, and commercial exploitation of fixations made for broadcasting purposes.

**19 - How is audiovisual producer's compensation determined for each business model?**

In the case of theatrical exhibition, the producer splits the tickets income with the theatre owner;

For broadcasting, the producer agrees with the broadcaster on the license fee per title or season, depending on the number of reruns, territories, number or type of platforms, and novelty of the content. For VoD, SVoD, AVoD, Pay per View the producer agrees to pay a fee to the platform and keeps the rest of the income For OTT operators, the producer charges the OTT player a license fee, which may be fixed or variable according to the viewing rates, the novelty of the content, etc. For retransmission rights, it is the CMO that sets up the license fee, normally a fixed amount per subscriber, subject to a tiered structure, where the unitary amount decreases as subscribers' base grows. For communication of the work in public places, the license fee is set up by the audiovisual producers' CMO, normally a tiered structure where fixed values increase along with square meters.

**20- Are there minimum amounts due? Any other economic benefits?**

In general, there are no minimum amounts due, but general tariffs set up by CMOs may include that.

**21- Do UGC platforms contribute to such compensation schemes? How?**

No, except in case of a decision to monetise UGC that uses copyrighted material, when filtering software such as Content ID or a similar system is used.

**22- Is digital piracy/streamripping still a major concern for audiovisual producers?**

Yes. Please refer to the answer provided to Question no.6 for Panel III.

**23- What is the most recent estimation of rights' loss on account of digital piracy in your Country?**

Please refer to the answer provided to Question no.7 for Panel III.

**24- What is the current rule in terms of audiovisual exploitation windows in your Country?**

There are no restrictions, currently. The freedom of contract principle prevails.

**25- Which CMOs represent audiovisual producers in your Country?**

Gedipe- Associação Para A Gestão Coletiva De Direitos De Autor E De Produtores Cinematográficos E Audiovisuais.

**26- Do these CMOs comply with transparency principles?**

Yes, under Law 26/2015 of 14 April, modified and republished by Decree-Law 100/2017 of the 23rd of August, modified by Decree-Law 89/2019 of the 04th of July, and Law 36/2021 of the 14th of June (CMO Law) which transposed Directive (EU) 2014/26 of the 26th of February.

**27- Is it possible to find out how much income is provided by each type of rights?**

Yes, by analysing yearly reports that are publicly available on the website of the CMO, namely at https://www.gedipe.org/site_gedipe/main/relatorios_gestao

**28- What is the current litigation level for audiovisual producers' rights in your Country?**

Neglectable. There are currently several claims pending against Hotels that don't comply with licensing. So far, the CMO has won or reached an agreement on 100%. The case law is now very firm.

**29- Are there any relevant Court Decisions concerning audiovisual producer's rights?**

There are several decisions related to Hotels and licensing of communication to the public right and a recent one upholding a claim from a national producer against the claim of the foreign format licensor. The latter was not acknowledged copyright since it didn't produce the work, despite having become the owner of the local rights stemming from the output.

All the relevant cases (not just for audiovisual producers) can be found at https://www.gedipe.org/site_gedipe/main/juris_nacional

**30- Are audiovisual producers acting as One-Stop Shop in relation to retransmission operators?**

No. Each type of rightsholder collects its own cable retransmission rights directly from the cable operator.

## PANEL IV – DATABASE PRODUCERS' AND PUBLISHERS RIGHTS

**1 - Are Databases legally protected in your Country? How?**

Databases are protected in Portugal under the Database IP Act approved by Decree-Law no. 122/2000 of the 4th of July. This Act transposes into the internal legal order Directive no. 96/9/EC, of the European Parliament and of the Council, of the 11th of March, on the legal protection of databases.

For purposes of this Act, a database means "a collection of works, data or other independent elements, arranged in a systematic or methodical manner and susceptible of individual access by electronic or other means" (Article 1(2)).

Databases are given dual protection, either by copyright, under the terms set out in chapter II, and/or by the producer's rights set out in chapter III (Article 1(3)). The protection granted to databases does not extend to computer programs used in the manufacture or operation of databases accessible by electronic means (Article 1(4)), which are given special protection under the Software Copyright Act, approved by Decree-Law no. 252/94 of the 20th of October (in force with amendments). The Software Copyright Act transposed into the domestic legal order Directive no. 91/250/EEC, of the Council, of the 14th of May, on the legal protection regime for computer programs, which has been repealed and replaced by Directive no. 2009/24/EC of the European Parliament and of the Council, of the 23rd of April 2009, on the legal protection of computer programs.

**2- Is there a *Sui Generis* Database producers' right or equivalent protection in your Country?**

Yes. Article 12(1) of the Portuguese Database IP Act provides for a special or *sui generis* database producer's right, in accordance with Directive 96/9/EC. It is the right of the manufacturer of the database to authorize or to prohibit the extraction and/or reuse of all or a substantial part, qualitatively or quantitatively assessed, of its content; this special right requires that the manufacturer does a substantial investment, from a qualitative or quantitative point of view, in obtaining, verifying or presenting the content of a database.

The database producer's right does not require the protection of the database or its content by copyright or other rights (Article 12(5)), and it is divided into two specific rights: the right of extraction and the right of reuse. According to the definitions provided in Article 12(2), extraction means "the permanent or temporary transfer of all or a substantial part of the content of a database to another medium, by whatever means or in whatever form", while reuse means "any form of distribution to the public of all or a substantial part of the content of the database, namely through the distribution of copies, rental, online transmission or other modality", excluding public lending (Article 12(4)). The first sale of a copy of the database exhausts the right of distribution (reuse) in the European Community (Article 12(3)).

Legitimate users of a published database are mandatorily entitled to perform all the acts inherent to its license, namely those of extracting and reusing the insubstantial parts of the respective content, to the extent of their right (Article 14(1)(3)). However, the database sui generis right applies also to the systematic extraction and/or reuse of non-substantial parts of the content of the database that conflict with the normal exploitation of that database or that may cause unjustified damage to the manufacturer's legitimate interests (Article 12(6) and Article 14(2)).

The *sui generis* right is subject to exceptions and limitations, notably a) private use concerning non-electronic databases, b) extractions for didactic or scientific purposes, provided that the source is indicated and to the extent that the non-commercial purpose justifies it, c) for purposes of public security or an administrative or judicial process; d) or for the benefit of blind, visually impaired people or those with other difficulties in accessing printed texts, as provided for in article 82-B of the Code of Copyright and Related Rights, as introduced by Law no. 92/2019, of 4 September, which

establishes the permitted uses of works for the benefit of blind people, according to Directive (EU) 2017/1564, of the European Parliament and of the Council, of 13 September.

The *sui generis* or special database right expires after 15 years from the 1st of January of the year following the date conclusion of the manufacture of the database or the making available to the public of the database (Article 16). However, in case of substantial changes, evaluated quantitatively or qualitatively, of the content of a database, including substantial changes resulting from the accumulation of additions, deletions, or successive changes that lead to the conclusion that it is a substantial new investment, a period of protection of its own is given to the database resulting of that investment (Article 17).

**3- Is it possible to evaluate its efficiency and level of enforcement?**

No relevant data found.

**4- Is there any different form of protection for Database producers or for ownership of data?**

Yes. Article 20(1) of the Database IP Act safeguards the continued application of other legal provisions, in particular copyright, rights related to copyright, or any other rights or obligations subsisting in the data, works, or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

In particular, trade secrets are protected under Article 313 to 315 of the Code of Industrial Property, enacted by Decree-Law no. 110/2018, of 10 December, which transposes notably Directive (EU) 2016/943, of the European Parliament and of the Council, of 8 June 2016, on the protection of know-how and confidential business information (trade secrets) against their illegal acquisition, use, and disclosure.

**5- How does it work? Is it effective?**

Trade secrets mean information that (1) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, (2) has commercial value because it is secret, and (3) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret (Article 313(1) CPI).

Trade secrets are protected against their unlawful acquisition, use, and disclosure. First, the acquisition of a trade secret is unlawful where it has been carried out (a) by unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances, or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced; or (b) by any other conduct which, under the circumstances, is considered contrary to honest commercial practices (Article 14(1)).

Second, the use or disclosure of a trade secret is unlawful whenever carried out by a person who is found to have acquired the trade secret unlawfully or to be in breach of a confidentiality agreement


or any other duty not to disclose the trade secret, or a contractual or any other duty to limit the use of the trade secret (Article 14(2)). Other forms of unlawful use include the production, offering, or placing on the market of infringing goods, or the importation, export, or storage of infringing goods for those purposes, where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully (Article 14(4)).

There is no unlawful acquisition of a trade secret when the trade secret is obtained by independent discovery or creation, or by observation, study, disassembly, or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret. The same is valid where the trade secret is acquired by the exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices, or by any other practice which, under the circumstances, is in conformity with honest commercial practices (Article 315)

**6- How do the courts of your Country balance the sui generis right with freedom of information and freedom of competition?**

The research found no relevant caselaw on how domestic courts balance the *sui generis* right with freedom of information and freedom of competition.

The Portuguese Supreme Court of Justice has issued several decisions balancing the right of good image and reputation with the freedom of expression and freedom of the press. In a recent decision, the Court held that '*the conflictual relationship between fundamental rights does not postulate a preferential or hierarchically abstract position (principle of primacy), but rather demands the principle of practical balance (concordância prática), through a criterion of concrete proportionality'*, meaning that a fair balance must be found between the legal protection of one's honor and the right of expression and freedom of the press, as well as the 'limitations which are indispensable to safeguard the essential core of the right to information when its exercise falls within the public function" of the press, and specifically demands a weighted judgment in the face of the individual case (Ac. STJ 20-04-2022, proc. 28126/17.4T8LSB.L1.S1, in www.dgsi.pt)

On the other hand, domestic courts are expected to interpret and apply national law in accordance with EU Directive and relevant case law from the Court of Justice of the European Union. Concerning the balance between the sui generis right and freedom of information and freedom of competition, it is worth noting that the CJEU considers that, for purposes of copyright and/or *sui generis* protection, the notion of 'investment in … the obtaining … of the contents of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials that make up the contents of a database. In the context of drawing up a fixture list to organise football league fixtures, therefore, it does not cover the resources used to establish the dates, times and team pairings for the various matches in the league' (C-444/02, Fixtures Marketing, of 9 November 2004 (ECLI:EU:C:2004:697). As a consequence, the less the scope of the *sui generis* protection the more room is left for freedom of information and freedom of competition. In the decision of 3 June 2021, CV-Online Latvia v Melons (ECLI:EU:C:2021:434), the ECJ found that "an Internet search engine specialising in searching the contents of databases, which copies and indexes the whole or a substantial part of a database freely accessible on the Internet and then allows its

users to search that database on its own website according to criteria relevant to its content, is 'extracting' and 're-utilising' that content within the meaning of that provision, which may be prohibited by the maker of such a database where those acts adversely affect its investment in the obtaining, verification or presentation of that content, namely that they constitute a risk to the possibility of redeeming that investment through the normal operation of the database in question, which it is for the referring court to verify". In Portuguese literature it is argued that the *sui generis* right is a threat to freedom of information and freedom of competition. See with more references Alexandre L. Dias Pereira, Direitos de autor e liberdade de informação, Almedina, 2008.

**7- Is the sui generis right protected against circumvention of TPM designed for controlling access?**

Yes. The Code of Copyright and Related Rights, enacted by Decree-Law no. 63/85 of the 14th of March, has been amended inter alia by Law no. 50/2004 of 24 August, which has transposed Directive No. 2001/29/EC, of the European Parliament and of the Council, of the 22nd of May, on the harmonization of certain aspects of copyright and related rights in the information society. This includes provisions on the protection of technological measures, which apply also to the *sui generis* database right.

According to Article 217(1) of the Code of Copyright and Related Rights, "*legal protection is guaranteed, under the terms provided for in this Code, to the holders of copyright and related rights, as well as to the holder of the sui generis right provided for in Decree-Law n.º 122/200, of 4 July, with the exception of computer programs, against the neutralization of any effective measure of a technological nature*". Technological measures are effective when the use of the work or other protected material is controlled by the rightsholders through the use of access control or a protection process (Article 217(3)).

**8- Is there a special protection against online uses of press publications in your Country?**

So far, there is no special protection against online uses of press publications in Portugal. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, provides a publisher's right to prohibit the commercial use of extracts of its publications adequately, in particular against online media aggregators. So far, despite the expiry of the term for its implementation, the directive has not been implemented yet.

**9- Does it apply to scientific journals and hyperlinks? How does it work?**

Article 15 of Directive (EU) 2019/790 protects press publications concerning online uses by information society service providers (no. 1). This protection does not apply to private or non-commercial uses of press publications by individual users (1), acts of hyperlinking (2), and the use of individual words or very short extracts of a press publication (3). Moreover, it does not apply to periodicals that are published for scientific or academic purposes because they are not press publications for purposes of this Directive (Art. 2(4)), as well as to works or other subject matter for which protection has expired (Art. 2(3) *in fine*). Moreover, the special publisher's right does not interfere with any authors' rights and other rightsholders, in respect of the works and other subject matter incorporated in a press publication (Art. 15(3) *in fine*).


This new publishers' right has a term of two years, counting from the 1st of January of the year following the date on which that press publication is published, and is limited to press publications first published as of 6 June 2019 (Art. 15(4)).

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