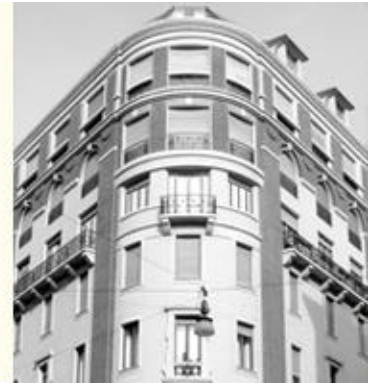




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EU: request of clarifications to Italy on the measure and distribution of the compensation due to phonograms producers and performers for the broadcasting of recordings

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Art. 12 of the Rome Convention of October 26, 1961, on the protection of performers, producers of phonograms and broadcasting organizations, established the obligation, at the charge of the user of the recording, to pay a “rémunération équitable et unique” (single equitable remuneration) for its broadcasting and communication to the public. With Law n. 866 of November 22, 1973, Italy has ratified the said Convention, delegating the Government to issues rules of implementation thereof.

With Presidential Decree n. 490 of May 14, 1974, articles 73 and 79 of the Italian Copyright Law n. 633 of April 22, 1941, and art. 23 of the relevant Regulation of execution have been modified; by putting at the charge of the phonographic producer the obligation to share in equitable manner with the performing artists the amount of compensation collected for the utilization of the recording in public or by radio or television broadcast (art. 73), and by establishing that the amount of such compensation and the distribution shares be determined by Prime Minister Decree, upon proposal of the Consulting Committee for Copyright, established by articles 190 and following of the Copyright Law, in general meeting.

With Prime Minister Decrees of September 1, 1975, and July 15, 1976, it was established that, save different agreement between the parties, the amount of compensation for the utilization of the recording, for purpose of gain, be related to 2% of the gross incomes referring to the recording; while the compensation due by the (public) entity exercising the broadcasting service be limited to 1,5%.

With Council Directive n. 92/100/EEC of November 19, 1992, the European Union has reestablished at art. 8.2 the principle set forth by the Rome Convention; and with Legislative Decree n. 685 of November 16, 1994, implementing the Directive, in addition to the modification of art. 73 of the Copyright Law a new art. 73bis was introduced, extending the compensation due to the utilization for purpose not of gain (still to be determined according to the Regulation, save different agreement between the parties). The mentioned art. 23 of the Regulation does not, however, seem to have been extended to art. 73bis, nor there is any relevant ministerial disposition for the determination of the compensation thereof.

Now the European Commission – internal market Directorate General, issued a statement on July 27, 2006, asking the Italian State for clarifications concerning the provision of the mentioned Prime Minister Decree of September 1, 1975, noting that, according to the Commission, art. 1 of the Decree, when fixing the measure and the distribution shares of the compensation due to performing artists and phonographic producers for the broadcasting and communication to the public, could conflict with art. 8.2 of the Directive 92/100/EEC - concerning rental and lending right and certain rights related to copyright in the field of intellectual property - and with the Court of Justice law cases (decision of February 2, 2003, case C-245/00, SENA, searchable in www.curia.europa.eu). In fact, according to the Commission, the mentioned provision (introducing a legal presumption according to which, lacking an agreement between the right-owners and phonograms broadcasters, the measure of the compensation is fixed in 2% of the invoiced amount, proportioned to the total broadcasting time) does not seem to intend to encourage the negotiation of a higher level of remuneration and would set a factual legal

maximum that does not exist in other Member States. This could create a distortion in the internal market, depriving right-owners of the right to the equitable remuneration set forth by art. 8.2 of the Directive n. 92/100/EEC.

The Italian Consulting Committee for Copyright, established according to articles 190 and following of the Copyright Law, in the General Meeting of September 25, 2006, addressed the mentioned remarks of the Commission and noted that “It is only in the absence of a different agreement between the parties that the Prime Minister Decree fixes the 2% share. Such share has, in fact, been set, according to the Committee, to the safeguard of the weakest party that in such manner sees the fixation of a threshold under which it is not possible to derogate. This derives from the expression used at art. 1, establishing that the compensation is related to 2%, meaning that that is in fact a minimum guaranteed amount and not a legal maximum”, nonetheless convening on the opportunity to revise the said Prime Minister Decree. Such interpretation has innovative effect towards the motivation expressed by the same Committee in the works that led to the issuing of the Decree, where the evaluation simply assessed the measure of the percentage, then held as equitable in consideration of the start up thereof.

The Committee now adds that the need to fix a compensation, in the absence of an agreement between the parties, is due to the peculiarity of this being a mere remuneration right, and not an exclusive right, therefore not assisted by any measure of inhibition of uses, so that the party interested to the compensation is considered “weak” as deprived of any effective measure to protect its right.

It should be noted that both the Commission and the Committee offer their opposite remarks with the common purpose of ensuring the rights of the categories protected by the Rome Convention and the Directive, meaning that, according to the Commission, the mentioned categories might be prejudiced by the Italian provisions while, according to the Committee, such provisions would aim at providing them with a “minimum guaranteed” remuneration, and that should be underlined as coming from the

EU Directorate General protecting competition. It will have to be seen now what stance the Italian State will take towards the remarks of the Commission, although it seems that the Minister for Community Matters does not intend to contrast the Community intervention and risk sanctionatory measures.