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## *THE STATUTE OF THE PERFORMING ARTIST*

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*SUMMARY: 1) Introduction; 2) Definition of Performing Artists; 3) Rights of Performing Artists; 4) Exclusive economical rights; 5) Following remuneration rights; 6) Following duration of exclusive economical rights and remuneration rights; 7) Moral rights; 8) Following duration of moral rights.*

### **1) Introduction**

Before the development of technology that enabled performances to be recorded and broadcast, performances were accessible only to those spectators who were close to the Performing Artists, therefore making it relatively easy for them to collect payment for their performances.

In the late nineteenth century and the early twentieth century, technology was developed in order to enable performances to be recorded and recorded performances to be broadcast and communicated to the public locally, regionally, nationally and, eventually, internationally.

Furthermore, audio and audiovisual devices, reproducing Performing Artist's interpretations, have a natural vocation to circulate and this characteristic is emphasized by technological development of mass communication instruments. Performances were therefore ever more separated from the Performing

Artist who had made them, and this made it even more difficult for Performing Artists to control the exploitation of their performances.

On an international level, the protection of Performing Artists' rights passed by the 1961 Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter also referred to as the "Rome Convention"). Italy became member of Rome Convention on April 8, 1975, by law No. 866 of November 22, 1973<sup>1</sup>.

A later step came with the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter also referred to as the "TRIPS Agreement"), adopted in Marrakech on April 15, 1994, within the frame of the commercial multilateral negotiations of the World Trade Organization, concluding the so-called "Uruguay Round". Italy adopted the Agreement on January 1, 1995, by law No. 747 of December 29, 1994<sup>2</sup> and has implemented the principles thereof by Legislative Decree No. 198 of March 19, 1996<sup>3</sup>.

Finally, we should mention the World Intellectual Property Organization Performances and Phonograms Treaty (hereinafter also referred to as "WIPO Agreement") adopted by the Diplomatic Conference on December 20, 1996. As of the moment we prepared this paper (June 2003), Italy still had to ratify the WIPO Treaties, although on March 16, 2000, the Council of the European Union approved the WIPO Agreement.

## **2) Definition of Performing Artists**

Art. 80, par. 1, of the Italian Copyright Law (No. 663 of April 22, 1941, hereinafter also referred to as "Copyright Law") defines Performing Artists as "*actors, singers, musicians, dancers and other persons who play, sing, recite or perform, in any manner, intellectual works, whether protected or in the public domain*"<sup>4</sup>.

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<sup>1</sup> Published in the Italian Official Journal on January 3, 1974.

<sup>2</sup> Published in the Italian Official Journal on January 10, 1995.

<sup>3</sup> Published in the Italian Official Journal on April 15, 1996.

<sup>4</sup> Article amended by art. 13 of Legislative Decree No. 685 of November 16, 1995, implementing the European Union Directive No. 92/100 of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

The definition must be read in connection the following Art. 82 of the Copyright Law, which specifies that “*for the application of the foregoing provisions, the definition of performers shall include: (i) persons who, in the performance of any dramatic, literary or musical work or composition, play significant artistic part, even if in a supporting role; (ii) the conductors of an orchestra or choir; (iii) the orchestras or choirs as such, provided that the orchestral or choral part of performance has artistic value in itself and is not a mere accompaniment*”.

On the combined reading of those articles the Italian legal literature has taken different positions, considering also that Art. 3 (a) of the Rome Convention specifies that “*performers means actors, singers, musicians, dancers, and other persons who act, sing deliver, declaim, play in, or otherwise perform literary or artistic works*”, without any kind of limitations.

Part of these opinions considers that only the Performing Artists expressly mentioned by Art. 82 (i), (ii), and (iii) are entitled to economical rights.

On the other hand, it has been suggested that Art.3 (a) of Rome Convention should prevail on Art. 82 of The Copyright Law, with the consequence that each Performing Artists, regardless of their role, should be entitled to economical rights.

Finally, it should be noted that, according to Art. 2 of the WIPO Agreement, the category of the Performing Artists also extends to those who perform “*expression of folklore*”.

### **3) Rights of Performing Artists**

Italian law recognizes to Performing Artists two types of rights; economical rights on their performances (Artt. 80, 82, 84 and 85 of the Copyright Law) and moral rights (Artt. 81 and 83 of the Copyright Law).

Rules on economical rights have been modified by the Legislative Decree No. 685 of November 16, 1994, implementing the European Union Directive n° 92/100 of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property, introducing the exclusive right of the Performing Artist to exploit his or her performance, as well as by the later Legislative Decree No. 581 of October 23, 1996, implementing the European Union Directive

n° 93/83 of September 27, 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

The statute of Performing Artist has also been amended by the European Union Directive n° 93/98 of October 29, 1993, harmonizing the term of protection of copyright and certain related rights, implemented in Italy by Legislative Decree No. 154 of May 26, 1997, and by the European Union Directive n° 2001/29 of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society, implemented in Italy by the Legislative Decree n° 68 of April 9, 2003.

Let us now examine each disposition of the Copyright Law concerning the rights of the Performing Artists, as resulting in their present configuration after the above-mentioned amendments.

#### **4) Following, exclusive rights**

Art. 80, par. 2, establishes that the Performing Artist has the following exclusive rights for his live performances<sup>5</sup>:

##### a) the right to authorize the fixation of his or her live performances<sup>6</sup>

According to Art. 80, par. 2, lett. a, of The Copyright Law, Performing Artists shall have the exclusive right, “[regardless of any remuneration to which they may be entitled for they live performances,] a) to authorize the fixation of their performances”.

“Fixation” means the making of a performance’s first recording on a mechanical device, which is its typical primary form of exploitation.

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<sup>5</sup> In line with Art. 7, par. 1, of the Rome Convention establishing that: “*The protection provided for performers by this Convention shall include the possibility of preventing:*

- (a) *the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from fixation;*
- (b) *the fixation, without their consent, of their unfixed performance;*
- (c) *the reproduction, without their consent, of a fixation of their performance:*
  - (i) *if the original fixation itself was made without their consent;*
  - (ii) *if the reproduction is made for purposes different from those for which the performers gave their consent;*
  - (iii) *if the original fixation was made in accordance with the provision of Art. 15, and the reproduction is made for purposes different from those referred to in those provisions”.*

<sup>6</sup> In the same way, Art. 6 par. (ii) of WIPO Agreement provides that: “*Performers shall enjoy the exclusive right of authorizing, as regards their performance:*

[.....]

- (ii) *the fixation of their unfixed performances”.*

b) the right to authorize the reproduction of (the fixation of) of his or her live performances<sup>7</sup>

According to Art. 80, par. 2, lett. b, of The Copyright Law, Performing Artists shall have the exclusive right, “*[regardless of any remuneration to which they may be entitled for they live performances,] b) to authorize the direct or indirect reproduction, temporary or permanent, in any manner or form, in whole or in part, of the fixation of their performances*”.

“Reproduction” means the making of a copy or copies of a fixation.

c) the right to authorize the communication to the public<sup>8</sup>

According to Art. 80, par. 2, lett. c, of The Copyright Law, Performing Artists shall have the exclusive right, “*[regardless of any remuneration to which they may be entitled for they live performances,] c) to authorize the communication to the public, in any form or manner, including the making available to the public so that everyone may access them from a place and at a time individually chosen, of their live performances, as well as the broadcasting over the air and the communication by satellite of the live performances, unless the latter were rendered for broadcasting purposes or they were already fixed for broadcasting. If the recording consists of a phonographic device, utilized with gainful intent, the performers shall be entitled to the remuneration referred to in Art. 73; however, if the recording is not utilized with gainful intent, the performers shall be entitled to the remuneration referred to in Art. 73 bis*”.

Art. 80, par. 2, lett. c, emphasizes that the right of communication to the public and of broadcasting over the air are not applicable to the performances intended for broadcasting by radio or television or are already the subject of a recording for broadcasting purposes.

d) the right to authorize the making available to the public<sup>9</sup>

According to Art. 80, par. 2, lett. d, of The Copyright Law, Performing Artists shall have the exclusive right, “*[regardless of any remuneration to which they may be entitled for they live performances,], d) to authorize the*

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<sup>7</sup> Art. 7 of WIPO Agreement provides that: “*Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form*”.

<sup>8</sup> Art 6, par (i) of WIPO Agreement provides that: “*Performers shall enjoy the exclusive right of authorizing, as regards their performance: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance*”.

*making available to the public, so that everyone may access them from a place and at a time individually chosen , of the fixations of their live performances and of their reproductions”.*

e) the right to authorize the distribution of the fixations of his or her performances<sup>10</sup>

According to Art. 80, par. 2, lett. e, of The Copyright Law, Performing Artists shall have the exclusive right, “[regardless of any remuneration to which they may be entitled for they live performances,], e) to authorize the distribution of the fixations of their performances. The right shall not be exhausted on the territory of the European Union, unless the first marketing was made in a Member State by the right-holder or with his authorization”.

f) the right to authorize the rental or lending of the fixations of his or her performances and of the reproductions thereof<sup>11</sup>

According to Art. 80, par. 2 lett. f, of The Copyright Law, Performing Artists shall have the exclusive right, “[regardless of any remuneration to which they may be entitled for they live performances,], f) to authorize the rental or lending of the fixations of their performances and of the reproductions thereof: the performers shall retain, even when assigning the rental right to a producer of phonograms or cinematographic or audiovisual works or of sequences of moving images, the right to equitable remuneration in the event of rental agreed by the producer with third parties. Any contrary stipulation shall be null and void. In the absence of agreement between the mutual interest body of performers<sup>12</sup> and the competent union associations of the confederation of industries, the said remuneration shall be set according to the procedure provided for by Article 4 of the Legislative Decree n° 440 of July 20, 1945<sup>13</sup>”.

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<sup>9</sup> Art. 10 of WIPO Agreement establishes: “Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them”.

<sup>10</sup> Art. 8, par. 1 of WIPO Agreement establishes: “Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership”.

<sup>11</sup> Art. 9 of WIPO Agreement provides that: “Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

*Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers”.*

<sup>12</sup> IMAIE

<sup>13</sup> Art. 4 of the Legislative Decree no. 440 of July 20, 1945, establishes that in the absence of agreement between the parties, the amount of the remuneration will be determined by an arbitration board composed by three members of which two appointed by each party and one by the two arbitrators already appointed or, in absence of agreement, by a Governmental Agency (UPLAS). Arbitrators will award by equity.

5) *Following remuneration rights*

a) secondary uses of the recordings

Art. 73<sup>14</sup> of The Copyright Law establishes that:

*“1. [...] the producer of phonograms, as well as the Performing Artists who executed the performance recorded or fixed on phonograms, shall be entitled, independently of the right of distribution, rental and lending belonging to them, to remuneration for the utilization with gainful intent of phonograms by cinematography, radio and television broadcast, including the communication to the public by satellite, in public dances, on public premises and on the occasion of any other public utilization of the phonograms. This right shall be exercised by the producer, who shall share the remuneration with the performers concerned.*

*2. The amount of such remuneration and the scale of distribution, together with the corresponding conditions, shall be determined in accordance with the provisions of the regulations.*

*3. No remuneration shall be due for utilization for educative or informative purposes by the State administration or by institutions authorized by the State for such purposes”.*

Art. 73 bis of the Copyright Law establishes that:

*“1. The performers and the producers of the phonogram utilized shall be entitled to equitable remuneration also when the utilization referred to in Art. 73 is effected with non-gainful intent.*

*2. Unless otherwise agreed on by the parties, the remuneration shall be calculated, collected and distributed in accordance with the regulations.”*

According with Art. 23 of the Copyright Regulations,<sup>15</sup> the amount of the remuneration and the scale of distribution due for the such uses<sup>16</sup> are determined by the President of the Council of Ministers,

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<sup>14</sup> As amended by the Legislative Decree n° 685 of November 16, 1994, which implemented the European Union Directive n° 100 of November 19, 1992, and by the Legislative Decree n° 581 of October 23, 1996, which implemented the European Union Directive No. 83 of September 27, 1993.

<sup>15</sup> Royal Decree n° 1369 of May 18, 1942.

Art. 23 of this Decree provides: *“The amount of remuneration due, according with Art. 73 of Law, by whom who utilizes with gainful intent a disk or any other similar devices which reproduce sound or voices, is determined by Council of Minister President Decree, on motion of Permanent Copyright Advisory Committee, in general meeting.*

*Quotas and modalities of division of the same remuneration with performing Performing Artists are determined by the same procedure.*

which on September 1, 1975, issued a Decree that established that (in the absence of different agreement between the parties) the amount of the remuneration due to producers (and Performing Artists) for the secondary uses of their phonograms is equal to 2% (1,5% for the national Radio and TV broadcaster<sup>17</sup>) of the gross incomes of the users, whether necessary apportioned to the amount of incomes generated by the recorded music.

#### b) private copying

As a result of the implementation into the Italian Legislation of the Directive n° 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, the whole Chapter V of the same Section I (now called “*Exceptions and limitations*”, as opposed to the former “*Free uses*”) has been amended to implement the provisions contained in art. 5 of the Copyright Directive,<sup>18</sup> with the division of its content into 3 new Sections: 1) Reprography and other exceptions and limitations, II) Private reproduction for personal use and 3) Common provisions.

In particular, article 71sexies (opening the second sub-section dedicated to private copying) has been inserted to fully incorporate in the Italian Copyright Act the exception for reproduction made by a natural person, for private use (only),<sup>19</sup> without purpose of gain, for no commercial ends and with respect of the technological measures; while granting (in addition to authors, producers of phonogram and audiovisual works and videogram producers) Performing Artists the compensation set forth in the following article 71septies, levied at source by the Italian Collecting Society (SIAE) on the sale price of recording or recordable, audio and audiovisual devices, and shared among all right-owners (and therefore also Performing Artists, through the phonographic producers).

#### c) IMAIE

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*Rules above mentioned are applicable, in absence of different agreement between the parties”.*

<sup>16</sup> Actually, it is questionable whether the system also apply to uses with non-gainful intent, as the Decree only refers to Art. 73, and not Art. 73 bis, that was inserted later, of the Copyright Law

<sup>17</sup> Decree of July 15, 1976.

<sup>18</sup> Parallel, with a greater degree of detail, to article 10 of the WIPO Copyright Treaty and article 16 of the WIPO Performances and Phonograms Treaty

<sup>19</sup> Article 5, 2., (b) of the Directive

Finally, it should be noted that the collection and distributions among Performing Artists of all remuneration for secondary uses of the recordings or private copying is reserved by law<sup>20</sup> to a State institution (Mutual Institution of Performing Artists<sup>21</sup>), to which payments are made by the various collecting societies of the phonographic industry (for the secondary uses) or SIAE (for private copying) with the charge of distributing such money to each right-owning Performing Artist.

## **6) Following, duration of exclusive economical rights and remuneration rights**

Art. 85 of the Copyright Law establishes that “*The duration of the rights provided for in this Chapter shall be 50 years from the time of performance. If a fixation of the performance is published or communicated to the public during that time, the duration of the right shall be 50 years as from the first such publication or, if earlier, from the first such communication to the public of the fixation*”<sup>22</sup>.

## **7) Moral rights and case law**

The Italian Copyright Law provides protection for other not strictly economical rights of the performing artists (in the definition given by articles 80 and 82, as mentioned above), with special regulations: article 81 on the right of objection which, as also contemplated by article 2579 of the Civil Code, gives to the artist the right to “*object the communication to the public or reproduction of his or her performance that could be of prejudice to his or her honor and reputation*” and article 83 of the Copyright Law on the right of paternity, which gives the artist the right to “*have his or her name mentioned in the communication to the public of his or her performance, and steadily affixed to any device embodying the fixation thereof, such as phonograms, videograms or cinematographic films*”<sup>23</sup>.

## **8) Following, duration of moral rights**

According to Art. 85 of the Copyright Law, the protection term of 50 years is applicable to “*the rights of the present Chapter*”, therefore including the provisions (artt. 81 and 83) on moral rights.

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<sup>20</sup> Law n° 93 of February 5, 1992

<sup>21</sup> Istituto Mutualistico Artisti Interpreti Esecutori

<sup>22</sup> In its original formulation, Art. 85 of law provided an shorter terms of protection, equal to 20 years from the (year of) the performance.

<sup>23</sup> Art. 5, par. 1 of WIPO Agreement provides that: “*Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as*

However, we should note that moral rights are not mentioned by the European Union Council Directive n° 100 of November 19, 1992, nor by the Legislative Decree No. 684 of December 15, 1994, implementing the said Directive.

The Rome Convention does not include moral rights, either, and Art. 9 of the European Union Council Directive n° 98 of October 29, 1993, expressly excludes moral rights from its scope.

Finally, Art. 5, par. 2, of the WIPO Agreement provides that: “ *The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economical rights, and shall be exercisable by the person or institution authorized by the legislation of the Contracting Party where protection is claimed.*”

For that reason, some Italian authors<sup>24</sup> have argued that moral rights, as personality rights, should not be subjected to limits of duration.

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*the performers of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.*

<sup>24</sup> Greco Vercellone, II, pag. 402.