



The Ultimate Cookbook

FOR CULTURAL MANAGERS



**COPYRIGHT CLEARING FOR LIVE EVENTS
IN AN INTERNATIONAL CONTEXT**

2017

EFA RISE

The EFA RISE project runs from 2014-2017 with activities focusing on the exchange of expertise on audiences, management models, artistic and policy making choices (working groups, think tanks, conferences), development of skills (atelier and technical workshops with Pearle), incentive to cooperation (Artistic Collaborations WG) and engagement in policy making (Round Table with Culture Commissioner, Conferences).

EFA / PEARLE* partnership

In the frame of EFA RISE, EFA teamed up with its Synergy Partner Pearle*-Live Performance Europe to improve general knowledge of the legal and managerial aspects of cross-border cultural cooperation.

The partnership on capacity building in the context of internationalisation, cross-border cooperation and mobility encompasses workshops, booklets and four video announcements (visit www.efa-aef.eu or www.pearle.ws)

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Cover photo

Michael Nyman in Emilia Romagna Festival

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This publication is part of the EFA RISE project implemented with the support of the Creative Europe Programme of the European Union. This publication reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

ISBN

9789082663112



Co-funded by the
Creative Europe Programme
of the European Union

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Let's
cheer for
a simpler
legislation for
live performance

Prologue

The European Festivals Association (EFA) and Pearle*-Live Performance Europe have teamed up to improve knowledge on legal and managerial aspects on cross-border cooperation within the EFA RISE project, funded by the Creative Europe Programme from the European Union from 2014 until 2017.

Between April 2014 and March 2017 several workshops, under the experienced guidance of legal and academic experts, were organised on a wide range of issues which either have a cross-border dimension or are of common interest to many artists and cultural managers across Europe. Participants were invited to bring their questions along, and both theoretical approaches and practical cases with suggestions for solutions are assembled now in this booklet.

Cross-border working, touring and international collaboration are found deep in the DNA of the live performance sector. Inside this cook book, you will find that we have provided you all the necessary ingredients and a number of recipes for cooking this "copyright dish". Like all cooks, you are free to add spices, flavourings or other ingredients, depending on your taste and needs.

We thank Olivier Sasserath and Herman Croux, lawyers at Marx Van Ranst Vermeersch & partners (MVVP) for the workshops they gave in Wroclaw during EFA's General Assembly in April 2016 and Pearle**'s conference in Prague in November 2016, whilst giving practical tips and detailed advice on what you need to know about handling copyright issues. Our thanks go to Olivier Sasserath for authoring this brochure.

Introduction

Activities of artists, cultural professionals and live performance organisations are rarely limited to their own country. Nowadays they are very mobile and readily accept to perform abroad.

Take for example: a dance company on tour for several weeks in different countries; a theatre company invited to a festival in another country; an orchestra, music ensemble or a musician playing concerts abroad when invited by different venues; a pop group creating its own music, releasing albums, downloads and streams, and performing in various countries; an opera house that goes online with streaming activities so that the performances can be seen at any place and at any time that you find convenient; and so on.

Copyright clearance must be tackled well in advance of a performance. This issue becomes even more complicated when a music group, theatre or dance company is invited to perform abroad. To make creative content accessible to an audience requires a separate rights clearance process in each country where the performance is due to be staged.

The frequently asked questions are: who is responsible for the rights clearance? Which entities, collecting societies or publishers need to be contacted and how can a good deal be negotiated with them?

And as if this was not complicated enough, other questions arise regarding whether or not to take into account national copyright rules or harmonised European legislation.

This guide will walk you through the basics of copyright legislation and explain the main principles. It gives an overview of the stakeholders involved in the copyright chain and provides both practical insights and tips on how to handle the clearance process and contract negotiations.

The Basics

of copyright law



Partial harmonization and the importance of National law

When dealing with matters of copyright, it is important to realise that it is not fully harmonized at international level.

As a consequence, the applicable rules may vary from country to country, although a certain degree of harmonization has been achieved through the conclusion of international treaties and via the European Union.

The main legal sources for copyright law are:

International treaties. The main international treaties are the Berne Convention¹, the WCT², and the WPPT³.

At **European level**, the matter has been partially harmonized in several Directives⁴. This is still a “work in progress”, and new directives and Regulations are on the European Commission’s agenda.

The **European Court of Justice** also plays an important role in trying to achieve unity in the copyright system.

¹ | Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (as amended several times), available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

² | WIPO Copyright Treaty of December 20, 1996, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295166

³ | WIPO Performances and Phonograms Treaty of December 20, 1996, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578.

⁴ | List available at: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>
Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive") of 22 May 2001, Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("Rental and Lending Directive") of 12 December 2006, Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ("Satellite and Cable Directive") of 27 September 1993, Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ("Term Directive") of 27 September 2011, Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ("CRM Directive") of 26 February 2014.



Exceptions

Contrary to European Regulations, European Directives are not pieces of legislation that are implemented directly in the Member States. They need to be “translated” by the national parliaments of each Member State into their own national laws (European Directives generally also allow Member States a certain level of flexibility when transposing the European rules into national law, however, when it comes to copyright, there is far less room for flexibility). This confers greater importance to national law, although the same main principles will generally apply to all European countries.



A “NOT SO SMALL” SEMANTIC PRECISION: COPYRIGHT VS. NEIGHBOURING RIGHTS

The term “copyright” is often used in everyday language to encompass two types of rights that are very similar but not quite identical: “copyrights” and “neighbouring rights”.

Copyright

Copyright covers the rights that are granted to authors of all kinds of artwork and in particular – **as far as live performance organisations are concerned** – to musical works, theatre pieces, choreographies, operas, films, etc.

Neighbouring Rights

Neighbouring rights are rights that have gradually been recognized during the second half of the 20th century to categories of people other than authors: those who are involved in different processes of the performance and distribution of works and, because of the importance of their contribution, those involved in the dissemination of these works. These rights have been recognized as applying:

- to performing artists,
- the producers of the first prints (fixations) of films and producers of phonograms, and
- to broadcasters.

The rights are granted on the performances (for the performing artists), on recordings (for the producers) and on own programmes (for the broadcasters).



Note

An important rule to remember is that, in principle, neighbouring rights and copyrights have no priority one over the other: in other words, copyright and neighbouring rights are rights of equal level and the user of copyrighted works/performances must take both types of rights into account when *clearing* the rights. For example, when using a recording of a music in a festival, the organizer should in theory clear the rights with the author/publisher of the music (for the copyright on the music) and with the recording company (producer of the recording, for the neighbouring rights of the producer – most of the time, the recording company also owns the neighbouring rights of the performing artist).



Remember!

When clearing the rights on a work or a performance, you should not forget that it may be useful to clear other rights than copyright/ neighbouring rights as well: image rights of the performer (other than those taken from the performance) or of the author, and the right to use the name and biographical data of the performer or the author, and in both cases there are rights on printing images and information in programmes and for advertising purposes.



What about Moral Rights?

In several countries, the author and the performing artists are also granted so called “moral rights”, the extent of which may vary from country to country. In most countries, that right allows the copyright owner to be mentioned (paternity right) when his work/performance is used, and to oppose any modifications of his work/performance (right of integrity). The author may also be recognized as having the right to prohibit the divulcation of works which he does not want to be made public.



In case that copyrights expire, what happens with the personality rights?

Even if copyrights expire, personality rights still have to be taken into account. Heirs of a composer can, for example try to claim them when they do not agree with a performance.



What can a rights user do about it?

On the basis of the moral right the author or the heirs can stop performances that do not respect the work, even if there was a basic authorisation to use it. An example of non-respect of the work is the unauthorised modification of the work itself. There have been cases where staging a work in such a way that damages the reputation of the author has been considered a violation of moral rights, even if the text as such was not modified.

Small modifications are in practice not always contested. The contractual license terms anyhow usually stipulate what can be modified and the conditions of the performance.

TIP! Best practice to avoid problems is to negotiate beforehand and convince the rights holders.



Note!

The above question concerns personality rights, but copyright as such (including moral right) is the principal legal basis to deal with these issues.



SCOPE OF THE PROTECTION

Generally speaking, **copyright and neighbouring rights** offer a similar scope of **protection**: they entitle their titular (generally called “rights holder” or “rights owner”) to oppose two types of action:

- reproduction and
- communication to the public.

The rights of opposition to these actions are generally referred to as *reproduction right* and *right of communication to the public* (also known as *making available right*).

As often, the right to prohibit encompasses the right to authorize, and also to set the conditions and modalities for such authorization. This lies of course at the core of copyright law: to license the use of the works/performances/recordings by third parties against payment of dues.

In the artistic sector, the **royalties** to be paid for a reproduction are generally referred to as *mechanicals* or *mech*, and royalties to be paid for communication to the public are often referred to as *performance rights* or *perf*.



Attention!

It is important to note that the notion of **reproduction** is very broad and encompasses the right to prohibit/allow reproductions of works by all means and on all types of supports (including electronic supports) and the right to prohibit/allow distribution of these supports. Distribution includes all kinds of dissemination on physical supports such as sales, lending, renting, giving away for free, etc.

The **right of communication to the public** encompasses the right to make the work/performance available to the public, to bring the work to the ears/eyes of the public other than via a material support, and therefore encompasses all kinds of public performances of a work or a performance, including through live or recorded performance, by broadcasting, by the internet, etc. Streaming and video/audio on demand fall under the scope of communication to the public.



Note!

Both reproduction rights and the right of communication to the public apply as much to reproductions/communications of the whole work/performance as to reproductions/communications of parts of such works/performances.

While the notion of **reproduction** is clearly understood, there is still debate over what is to be considered as a **communication** and when any such communication is made to a public, especially when it involves broadcasting and dissemination on the internet. The numerous decisions made by the European Court of Justice (ECJ) in that respect are rather confusing.

For example

FROM THE ONLINE WORLD:

To give an example, in two decisions the ECJ ruled that hyperlinks were “communications” but not “to the public”, at least not if the hyperlinks referred to material posted on the internet with the consent of the rights owner. In another decision the ECJ ruled that, if posted without consent of the rights owner, it is to be determined whether the link has been provided without intention to pursue financial gain by a person who did not know or could not have reasonably known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are being provided for such a purpose, a situation in which that knowledge must be presumed... No need to point out that decisions of this kind are not making the life of users and rights owners any easier.

In addition, when (re-)broadcasts are involved, there must be a communication to a new public, that is to say, to a public which had not been taken into account by the authors of the protected works when they had authorized their use by the communication to the original public⁵. At least for copyright... The protection may be broader for performances/recording protected by neighbouring rights, depending on the countries.

As far as the performing arts and live music sector is concerned, the situation seems clearer: live performances will normally always be considered as communications to the public and thus will be subject to prior authorization from the owners of the copyright and the neighbouring rights⁶.

⁵ ECJ, 7 December 2006, SGAE, C306/05; ECJ, 4 October 2011, Football Association Premier League and Others, C403/08 and C429/08

⁶ For more information on the notion of “communication to the public” see the annex.



Remember!

It should not be forgotten that copyright law and protection is still a matter of national law, and that applicable rules are the rules of the country where the communication/reproduction is happening, i.e. where the performance takes place.



EXCLUSIVE RIGHTS VS. COMPULSORY/LEGAL LICENSING AND COMPULSORY COLLECTIVE MANAGEMENT

Historically, copyrights were considered as exclusive, meaning that the rights owner had the exclusive right to decide whether or not he would grant authorization for the use of his/her work.

However, this notion has evolved over time, mainly because legislators have considered that under certain circumstances the rights owner should not be entitled to prohibit a specific use, but should rather be entitled to receive payment or compensation for such use.

For instance, **retransmission by cable and satellite** as well as **public lending** is generally subject to legal/compulsory licensing. **Private copying** is also subject to **legal/compulsory licensing** in most European countries (with the notable exception of the United Kingdom, where private copying is still not possible).

In most cases, when a legal/compulsory licence is created, the rights owner is compensated by the allocation of royalties, also called levies when they are not collected directly from the users (e.g. in the case of private copy, in most European countries, the levies have to be paid by manufacturers or resellers of recording devices, copiers, etc.). The amount of the compensation is set by law or is the result of a bargain between the various stakeholders (in which case the rights owners are represented by their professional associations or by collecting societies), and is collected by collecting societies and then redistributed among the rights owners.



Are levies of importance for live performance organisations?

Live performance organizers could also be entitled to get a share of some of the levies collected for legal/compulsory licensing, e.g. in the event they have recorded the live performance⁷ (and therefore can themselves be awarded neighboring rights as *producers*) and the recorded performance have been reused, e.g. for cable TV broadcasts or other public performance subject to legal/compulsory licensing (e.g. music use in public places). In that case, they could consider joining the CMO representing the audiovisual producers.



Attention!

With respect to live events, one should note that in some countries, communication to the public of recorded performances (neighbouring rights) could fall under a specific legal/compulsory licensing scheme if specific criteria are met, such as the absence of a price to be paid in order to attend the performance.



Exceptions to copyright

Copyright are also subject to exceptions, i.e. special cases where reproduction/communication to the public is not subject to the authorization of the rights owners.

Exceptions to copyright are however only harmonized to a small extent.

At the European level, the InfoSoc Directive⁸ provides for an exhaustive list of exceptions that may be applied, but that list is not compulsory (with just one exception, which is rather technical and not relevant here) and whether that exhaustive list also apply to *live* communication to the public is open to question.



Check out your national rules!

Under national law, exceptions could apply for instance when live music and performances are organized for disabled persons, or as part of school activities. These are however very specific cases, and the copyright issues that may arise in that respect should be checked on a case by case basis, in the country involved.

⁷ | The organizer will need to obtain the authorization of the copyright owner and the performing artist to make such recording.

⁸ | Directive on the harmonisation of certain aspects of copyright and related rights in the information society of 22 May 2001

And now:
curtain up for
all the players
in the copyright
value chain
you need to know

Who has to

give clearance?



COLLECTING MANAGEMENT ORGANIZATIONS

Collecting Management Organizations (CMOs), commonly called **collecting societies**, or **copyright societies**, are basically unions for right owners, acting on their behalf to manage their rights.

CMOs are generally dedicated to the management of the rights of one specific type of right owner (author of a specific type of work, or all types of work; performing artists; producers). In most, if not all, EU countries, the **CMOs manage both reproduction rights and the right of communication to the public** (in exceptional cases, some CMOs may only manage one type of rights).

Also, **CMOs never administer moral rights** and therefore always reserve the moral right of their members; when changes are made to a copyrighted work⁹ (e.g. when a stage play was supposed to take place in the past according to the indication in the original work, but an adaptation takes place and the decors and the costumes are contemporary ones), or when a copyrighted work is to be used in conjunction with other works (e.g. recorded music to be used for a dance performance, or in a movie), or even when a work is used in particular circumstances (e.g. the use of music, images, etc. for political rallies), the copyright user must obtain the authorization of the author.

Moral rights are not harmonized in Europe and the extent of such a right varies from country to country. France, for instance, is very protective of the personality of the author and moral rights are extensively used as a means to prevent unauthorized uses. On the other hand, countries such as the UK do not recognize moral rights.

⁹ Moral rights are not only granted to authors, but are also recognized to performing artists in several countries. In that case, authorization of the artist (e.g. in case of use of recorded music) should be obtained as well.



What does the notion of territoriality mean?

CMOs are mainly active in one country only, and will generally deliver licences for use in their territory only. This last principle becomes diluted as the CMOs, under the pressure of the European Union (and its aversion to territorial monopolies) attempt to develop cross-border licensing systems and pan-European copyright hubs. For instance, the European Union has tried to develop a system of pan-European licensing of music for online use and made it possible for CMOs to offer pan-European licenses. For physical events, however, the system remains entirely territorial.

The fact that a CMO is only active in one country does not mean that it only manages the rights of local authors/artists. Most of the time the repertoire of a CMO is made up of repertoires of local rights owners, and also those of foreign rights owners, since the CMOs conclude **reciprocity agreements with sister-CMOs** in other countries and as such they represent a much larger repertoire. (e.g. The main collecting societies for music generally have agreements with most of other CMOs and de facto represent the worldwide repertoire.)



Relevant EU rules

Due to problems arisen with (some) of the CMOs, the European Union has passed a **Directive on Collective Management Organizations**, aiming at regulating their functioning and setting a level playing field¹⁰. The main consequence for users is that the CMOs now have a specific obligation not to discriminate between users and must offer them fair and equal financial terms and conditions.

¹⁰ | Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ("CRM Directive") of 26 February 2014



What do we have to know about tariffs?

The primary role of CMOs is to license an entire repertoire of works of a specific type (such as musical works/recordings/performances) to mass users of the type of works they manage, such as broadcasters, dancing, bars, concert organizers, etc.

When doing so, they generally use tariffs, that are – most of the time – non-negotiable (as they have a non-discrimination duty, based on the fact that CMOs are generally in dominant position in their own territory and on the obligations imposed in the Directive on CMOs).

But CMOs may also license “individual” works, for specific uses (such as theatre plays, operas). Although these types of use may have their own fixed tariffs, there is usually room for negotiation.



Special cases of clearance

When the use of the work requires a change in the type of work (e.g. a book being adapted for a stage play or a film), or when the work is to be used as part of another work (e.g. music played as part of a stage performance or in a film), CMOs' licences will generally not cover such uses where there is a change of destination or an adaptation. (In the countries where moral rights exist, such changes will also be considered as requiring the authorization of the owner of the relevant rights.)



What is the difference between small and grand rights?

The terms **small rights** (*petits droits*) and **grand rights** (*grands droits*) are sometimes used when dealing with collecting societies. These terms do not refer to legal concepts, but are generally used when issuing performance licences for musical-dramatic work (=grand rights, such as stage plays, musicals and operas), or for non-dramatic music work (=small rights, such as a concert).

However, there is not always a clear line; for instance, the use of a part of a dramatic-musical work can be considered as a small right; the same applies to an aria from an opera performed at a concert.

Generally, small rights are managed by CMO, whereas grand rights are mostly licensed directly by publishers or the authors.

In case of doubt, it is always advisable to contact the author/rights owner to obtain confirmation about who is entitled to license the rights.

For example

A few years ago, a Swedish Theatre invited a play from a theatre in Riga, "The Sound of Silence". The play included already existing music written by Paul Simon. "The Sound of Silence" had been on tour throughout many European countries before coming to Sweden. The different theatres had paid for the music within the system of collecting societies. In Sweden however, the play fell outside the scope of the collecting society according to Universal, claiming "grand rights". Due to these copyright issues, the theatre cancelled the tour to Sweden.



THE RIGHTS OWNERS

Who owns copyright and neighbouring rights? Copyright is owned by the author or his/her publisher.

Although it is of utmost importance to obtain the authorization of (all) the author(s), in most cases, the identification of the author is not an issue.



The Author

Even if the national laws may not contain a clear definition of who is the author of a copyrighted work, the author is generally the **physical person who has created** the copyrighted work (the composer of the music, the author of the texts, the libretto, the playwright for theatre play, etc.) or has had **some creative input** in the creation of the work.



Some tips about Copyright Ownership

- For identification of rights owners of music works and audiovisual works, CMOs have publicly accessible databases (usually online) containing all works in their repertoire, with indications of the rights owners (including the publishers, if any);
- For specific types of works, such as audiovisual works, national law may contain provisions regarding who is to be considered as the author of the work (e.g., under EU law, the director of a film will always be considered as one of the authors, while Member States are free to add other persons as co-authors);
- National law may also provide for the aggregation of rights in one person, to be deemed authorized to grant licences for use of their works (e.g., in some countries, the producer of a film will be entitled to grant licences for the use of the film);
- Under some national laws, the person whose name is displayed on reproductions of the work is deemed to be its author;
- National laws may also have specific rules regarding co-authorship of works and regarding who is empowered to grant authorization for the use of a jointly created work;
- For music, as well as for opera, and books, the copyrights may be managed by a publisher to whom the author has transferred his/her rights.

The same question arises with respect to neighbouring rights, and similar answers apply.

B

The Producer

With regards to the neighbouring rights of the producers, it is important to note that the neighbouring rights only cover **recordings of phonograms and the first prints (fixation) of films** (films being defined under EU law as “a cinematographic or audiovisual work or moving images, whether or not accompanied by sound”). Not all national law defines what a producer is: under the WPPT, it is defined as “the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds”. It is generally agreed that the owner of the neighbouring rights is **the person who takes the economic risk for the production**, not the artistic producer in charge of the artistic part of the project. Typically, for music, it will be the recording company; for films, it will be the main producer (but the producer may have transferred the right to administrate sales in a given territory to a distributor or to a sales agent).

C

The Performing Artists

With regards to neighbouring rights of performing artists, some additional remarks need to be made:

- **What a performing artist is, may vary from country to country.** Under the WPPT, the performing artist is defined as: “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore”;
- When a recording of performances is used, the producer of the recording will also own the neighbouring rights of the performing artists;
- When a live performance is made, by a group (dance company, theatre company, orchestra etc), the national law may have provisions enabling the director of the company, or the conductor of the orchestra (or the main solo musician) to speak for the members of the group. This point has to be checked under national law.



Other Copyright Owners

That last category (“*some creative input*”) can sometimes lead to complications: for instance, it is not only writers of a theatre play who can claim copyright on a performance of a theatre play, but also the creator of the decors, or even the set designer. For ballet, the choreographer will generally be considered as co-author with the composer of the music, but the stage director may also be included (for music concerts one could also argue that the artistic producer is also a co-author of the musical work).

In order to avoid problems as much as possible, when a licensee concludes a license, it is standard form to include a guarantee clause providing for a guarantee of the co-contractors should a third party make a claim for copyright.



Attention!

When a performance has been produced by a third party and is licensed from that third party, **the producer generally has taken care of clearing of all rights** (this is the case for most productions of theatre or dance companies touring in several countries, operas produced by an opera house, etc.); in that case, the production house has usually cleared all neighbouring rights and it will guarantee the organizer of the performance against claims from third parties. Attention should however be paid to possible claims from collecting societies (especially for performance rights on the copyright side).

For example

A German curiosity: the concert promoter

In Germany, specific neighbouring rights are granted to the “concert promoter” that organizes a live performance of a performing artist (the concert promoter can be the performing artist if he has a commercial purpose).

These rights are similar to most other neighbouring rights. For example, the concert promoter may either prohibit or allow the concert to be recorded as well as the communication to the public of the concert but may oppose any public broadcasting of this concert, even if the producer of a phonogram or a performing artist does not oppose this broadcast. In such a case, if the recording had been made legally, the promoter could only claim for compensation via the legal licensing scheme. The promoter is also entitled to get a share in some of the levies that derive from legal/compulsory licensing (such as copying for private purposes), if they are members of the German CMO for performance rights of producers/performing artist, called GVL.

The neighbouring right is not reserved to promoters based in Germany, but also granted to foreign promoters for concerts taking place in Germany.

This was a
first insight!

Now,
take a deep breath
and dive into
the essence of
copyright clearance
for live events

The Basic Rules

for clearing rights

RULE N°1

Rights have to be cleared: if nobody clears the rights, the venue/festival will be liable towards the rights owners

As a general copyright rule, it is important to note that the organizer/venue is very likely to be held liable toward any third party that can make a copyright claim, therefore the organizer must pay particular attention to the clearing of rights: remember that he is most likely to be held liable for the **communication to the public** of the copyright protected work or performance (see page 11 of this booklet).

Not only could the organizer/venue face a formal demand for payment of damages, but he could also face court proceedings, generally under the form of fast track proceedings, aimed at either prohibiting the use of the work or preventing the performance from taking place.



Attention!

The mere fact that the organizer has concluded an agreement with the production house (or another co-contractor) where the clearing of the rights is for the account of the production house/co-contractor, or even that the production house or the co-contractor guarantees that all rights have been cleared (so called All Rights Included (ARI) agreements¹¹), will generally not help: under most legal systems in Europe, that argument will not be considered relevant as the rights owner will have a direct justification for legal action against the infringer and can enforce his/her rights directly against him.

¹¹ ARI-agreements are not always relevant, especially when CMOs are claiming rights: when right owners adhere to a CMO, they generally transfer their rights to that CMO and cannot subsequently license their rights to third parties (production houses, festival organizers), since they no longer own these rights.

The only recourse against the co-contractor will be to ask for payment of the damages to which the organizer had been liable from the copyright claim.

This leads to some remarks regarding **guarantee clauses**:

1. Guarantee clauses should normally allow the organizer to settle any claim to satisfy the mutual interests of the parties, where the interest of safeguarding the live event will prevail and without any possibility for the co-contractor to block the settlement completely or waive the guarantee; the co-contractor may also be granted a short period of time to settle the case directly with the plaintiff (unless time constraints prevent that);
2. Guarantee clauses should be formulated broadly enough to cover all damages suffered, including indirect or consequential damages such as loss of profits and loss of image, sponsors, etc., and also the reimbursement of legal fees;
3. The licence agreement with a production house/licensor should contain a choice for the organizer of which laws and which courts should be competent to hear any disputes, a choice between those of the place where the performance/live event takes place and those of the place where the organizer is established;
4. Guarantee clauses are necessary, but activating these clauses may turn out less than satisfactory: it can be cumbersome to conduct legal proceedings against a production house established abroad, and the same would be true for enforcing the resulting court decision, and it can also happen that the production house may not be able to pay all the damages claimed.

RULE N° 2

Get **all** the rights cleared

As indicated above, performances may involve multiple rights owners and multiple clearings.

In order to avoid loopholes, it is advisable to:

1. List all creative input that is used in a production;
2. Ask for a chain of title (clearances obtained by the producer – to go back to the original right owner, or CMO) and
3. Check the presence of guarantee clauses in agreements with production houses.

Remember that, under many national laws, agreements with rights owners, especially with authors and performing artists, may be subject to specific rules, including the following:

1. Restrictive interpretation of transfer of rights/licenses, which means that the specific use which is licensed needs to be clearly stated or included in the rights transferred/licensed by the author/performing artist;
2. Formal requirements regarding the scope of the transfer/licence, such as the indication of the territory, the duration, and the type of rights at stake;
3. Formal requirements regarding the indication of the royalties to be paid (possibly for each type of exploitation).

Agreements may also include provisions regarding the fact that the license to use works/performances will only be granted after the payment of fees by the production house (this is typically the case for synchronization of music in a performance/work). In absence of payment, the license will not be valid.

When concluding any agreement with production houses or co-contractors, the venue/organizer should also already bear in mind any possible claims from local CMOs that might not be overruled by contracts with production houses or co-contractors.



Think ahead!

The venue/organizer should also consider the different types of exploitation that will take place in the course of the performance (live, recording, broadcasting) and they should all be addressed in the agreement with the production house/co-contractor.

Finally, in case of doubt, the venue/organizer can consult the databases of CMOs to find out who are the rights owners, and should pro-actively discuss these issues with the production house or co-contractor.



Be proactive rather than reactive!
This protects you better when a claim arrives.



Checklist for music:

When recorded music is involved, do not forget to:

- ✓ Clear (a) the copyright (publisher/CMO) and (b) the neighbouring rights (master owner – record company);
- ✓ Check whether synchronization rights need to be cleared in addition to performing rights (or even reproduction rights: DVDs, etc).



Checklist and tips for touring companies when dealing with copyrights:

- ✓ Communicate with the venue(s) in the host countries and agree on who is dealing with copyright clearance;
- ✓ The production company should take as much as possible in its hands to avoid double work, double standards, or uncertainty;
- ✓ Plan ahead and get your copyright licenses at the beginning of the production;

- ✓ Look at the territory and where you plan to go, do not get worldwide rights when touring only to a few countries;
- ✓ Publishers can push an agreement through in other countries;
- ✓ It can make sense to negotiate directly with authors/composers of high profile as they can force a deal with collecting societies if you haven't got a suitable agreement;
- ✓ It can be a good idea to pay a lump sum to avoid burdensome administration;

RULE N° 3

Get the rights cleared **in advance**

Remember that, under copyright law, the clearing of the rights must take place prior to the use of the works/performance, preferably long enough in advance.

Two reasons for this:

1. Most CMOs will impose penalties if the clearing takes place after the work/performance has been used or made. If there is no publicly known tariff and individual negotiations are to be made, rights owners may also ask for higher royalties, as they know that the festival will have no other choice than to pay for the use that has taken place and they are basically the ones who fix the fees.
2. When rights have to be cleared with rights owners (not with CMOs), there is usually room for negotiation; if these negotiations are difficult, alternatives to the work/performance can be considered, if the timing allows that.

Royalty calculation

in Copyright clearances

There are many different ways of calculating royalties. festivals and live performance organisations a lump sum or a share of the income are the two main forms of royalty calculation. Typically, the occasional use of works/performances in a production will be subject to the payment of a lump sum, while the use of works/performances which are of material importance for the production will more likely be remunerated by a share of the income (or a fixed amount per representation).

CMOs generally ask for a share in the income, e.g. for the performance of music in music festivals, or for authors of theatre plays.



FIRST SCENARIO: a share in the income

When the royalties are calculated as a share in the income, the following points are common practice:

- A minimum guarantee is foreseen (e.g. for music performing rights);
- The share is usually calculated on the “**gross**” income generated by the sale of tickets (“box office”); additional factors may be taken into consideration, such as the price of drinks at the bar;
- Reductions or lower shares are available for specific types of live performances (e.g. classical music festivals, non-professional events, etc.);
- The level of share may vary in function of the size of the event: curiously, in some countries, you will have to pay a higher share if the event generates more income or if the number of visitors exceeds a threshold (e.g. music festivals in Germany), whereas in other countries, the tariff is digressive (e.g. in Belgium);
- An audit clause, if foreseen, allows the rights owner (mainly the CMO) to control whether the amounts declared by the organizers are correct (typically, if differences exceeding 5% are found, the costs of the audit have to be reimbursed by the organizer).



SECOND SCENARIO: Lumo Sums

Lump sums (or a fixed amount per representation) save the transactional costs of calculation and reporting (and also auditing), and allow accurate provisional budgets to be drawn up.



Negotiating grand rights

When making this calculation, take into account that for dramatic productions grand rights are generally negotiable (even if you negotiate with a CMO and there is a tariff). In that case, virtually all combinations of the following elements are acceptable:

- Lump sum;
- Flat sum share of revenue;
- Higher share after costs recovered;
- Minimum guarantee;
- Maximum cap (this is rare).

Also, it is a good idea to make provisional calculations with a cap (total amount and/or percentage not to be exceeded) and negotiate upfront.



A few general tips regarding royalty calculations:

1. Include lump sums in production budgets;
2. Set a total share of income that you can spend on royalties for each production and negotiate the share of each right owner ("the split") that will be claiming their rights on that production. For example, make a split between music/text/choreography, depending on the importance of each and/or the duration of each element in the production;
3. Very important: insist that every party involved uses the same calculation basis.

Recommended provisions

for inclusion in clearance contracts with rights owners

Clauses most commonly found in licence agreements

TRANSFER OF RIGHT CLAUSE



Licence, assignment or transfer?

The main object of the clearing of rights is to obtain the right to use a work/performance.

Organisations or venues in the performing arts will not be “assigned” rights, nor will the ownership of the right be “transferred” to them; they will merely be granted a “licence”, i.e. an authorization to use the work/performance without actual transfer of ownership of the rights.



Mandatory rules

Depending on the law applicable to the licence agreement, that agreement may have to comply with specific rules.



Purpose of the licence

Any licence agreement should contain a clear definition of:

- The performance or the works for which the rights are licensed;
- The nature of the rights that are licensed:
 - A Copyright ;
 - B Neighbouring rights;
 - C Other types of rights:
 - image rights,
 - right to use the name;
 - right to use other personal data (voice, biographical details), etc.

It should be noted that the same person can own several types of rights: e.g. a singer can be (A) the owner of the neighbouring rights of performing artists and also (B) the author of the song and therefore the copyright owner on the song; a film producer may be (A) the owner of the neighbouring rights on the film and also (B) the owner of the copyright on the film.

- The type of the rights that are licensed:
 1. Adaptation rights
 2. Translation rights
 3. Synchronization rights (synchronization rights are the right to incorporate a work/performance into another work/performance. For example, a pre-existing recorded piece of music may be used in a film, or in a choreography – both copyrights and neighbouring rights need to be cleared; copyright will be cleared with the publisher, not with CMOs)
 4. Performance rights
 5. Reproduction rights / Recording rights (audiovisual and audio)
 6. Distribution rights
 7. Publicity rights
 8. Merchandising rights
 9. Further exploitation rights



Attention!

In some countries, the main rule for the interpretation of copyright/neighbouring rights licence agreements is that such agreements should be interpreted narrowly and that all rights that have not been licensed remain with the right owner. Depending on the applicable law and on how the festival intends to use the works/performances, it may therefore be necessary to describe these rights in a very detailed manner, to cover all intended uses.

When drafting a licence agreement, it is also important to consider the existence (or not) of moral rights, and of the possible legal limitations to transfers of moral rights.

WARRANTY CLAUSE

The Licensor must guarantee that he is entitled to grant the license.

Guarantee clauses should be formulated broadly enough to cover all damages (including indirect or consequential damages such as loss of profits and loss of image, sponsors, etc., and reimbursement of legal fees).

In addition, the Licensor should also commit to provide the licensee with the written documentation including an evidence of the complete chain of title, i.e. not only the underlying agreement between him and his own co-contractor, but also the agreements between other people involved at an earlier stage in the licensing of rights, all way back to the original author(s).

As already mentioned, a warranty clause should allow the organizer/licensee to settle the case in the best mutual interest of the parties; the interest of safeguarding the live performance shall prevail and the co-contractor shall not be authorized to completely block the settlement or waive the guarantee; the licensor may also be granted a short period of time to settle the case directly with the plaintiff, at his own costs (unless time constraints prevent that).



Remuneration/price

The drafting of the **remuneration clause** will depend mostly on the type of remuneration (lump sum/share in the income).

One should take into consideration that in several countries, formal requirements exist regarding the drafting of remuneration clauses. Therefore, depending on the countries (e.g. France and Belgium), it may be important to list precisely the type of remuneration per form of exploitation if different types of use are intended.

Tax considerations specific to some Member States (such as Belgium) can also lead to a split in the remuneration between the remuneration for a licence on copyright/neighbouring rights and the remuneration for the performance of work/services to be provided (different tax rates may apply to copyright transfer on the one hand and to services provided by the rights owner on the other hand).

For example, part of the remuneration of an actor will be for his performance on stage and part will be for the transfer of rights for the recording of his performance.

The remuneration clause will also generally contain a provision to prevent that additional remuneration has to be paid to the co-contractor, by stating that the remuneration contained in the clause “covers all and any remuneration due” to the co-contractor for the licence granted. Whether or not the agent’s fee comes on top of the negotiated remuneration should also be mentioned.

Similarly, in order to avoid double payment, licence agreements generally state that if the co-contractor is entitled to receive payment for a specific use of his/her work or performance, through a CMO in a country, the licensee (here: the festival) shall make no direct payment for that use of the work/performance in that country.

If the remuneration consists in a share of income, the licence agreement will in all cases contain reporting and audit clauses: the licensee will have to send to the licensor the figures necessary for calculation of the royalties, and the licensor has the right to audit the accounts of the licensee to check whether the reported figures are correct. Generally, if a difference exceeding 5% is found, the costs of the audit have to be reimbursed by the licensee.



Term

The licence agreement will obviously also contain the indication of the period of time for which the licence is granted.

Indication of a term is a condition for a valid copyright licence in some countries.



Territory

As for this term, indication of the territory in which the licence is granted may be a condition for validity of a copyright license in some countries.

If radio- or TV-broadcasting rights are licensed to the live performance organiser, the territory clause should contain a "spill-over" clause, allowing broadcasting outside the boundaries of the contractual territory, for broadcasts aimed primarily at the audience of the territory concerned but nevertheless also accessible outside that territory.

When internet broadcasting is involved, licence agreements often contain provisions regarding geo-blocking. (In the future, geo-blocking provisions are likely to be considered invalid, as far as the European Union is concerned: the European Commission intends to prohibit geo-blocking and is already allowing subscribers to internet services to access content in other territories than their actual territory or residence, for a limited period of time – so called "content portability"). There may also be limitations of the websites on which the broadcast is permitted to take place.

TERMINATION CLAUSE

Like in most agreements, the grounds for termination of the licence agreement by the licensor should be listed and a period of remedy should in any case be granted.

The Agreement should also state that termination will have no effect on licences that have already been granted by the licensee to third parties.

Specific agreements

AGREEMENTS WITH PERFORMERS

Point of attention for agreements with performers include:

- The exclusivity clause;
- The provisions on moral rights;
- The use of biographical data of the performer;
- The use of his/her image for advertising purposes;
- Provisions regarding rehearsals;
- Provisions regarding the regime of social security that is applicable, as well as the tax regime;
- Provisions regarding the rights to collect compulsory licences/legal licences, if transferable (for example, will that right remain with the performing artist?).



Remember!

When dealing with groups/ensemble/orchestras, the licensee should verify whether the signatory can validly represent the various members of the group under the law applicable: in several countries, the agreement can be signed with conductor/stage director/or a company director.

AGREEMENTS FOR THE ADAPTATION OF AN EXISTING WORK

Points of attention for that type of contract are as follows:

- Adaptation rights, if not cleared via CMOs: the licensee should contact the publishing house/ the agent / or the author (or his/her estate if the author is deceased);
- Option right: the licensee pays a fee for a reservation of the rights, on an exclusive basis (the author of the work to be adapted cannot sell the adaptation rights to another person for a specific period of time);
- Exclusivity (for a territory – and/or for a type of adaptation and for a specific term);
- Moral right issues: does the right owner have to grant approval for the final version of the adaptation? To what extent?
- Right to use title or to change it;
- The licensed rights must entitle the licensee to make translations in other (all) languages;
- The licensed rights must include advertising rights;
- Credits to be given to the author of the adapted work;
- In some countries:
 - The adaptation agreement must be separate from a general license agreement for the exploitation of the existing work;
 - The author of the adapted work may be considered as the co-author of the adaptation in some countries.

COMMISSION OF A WORK (“WORK MADE FOR HIRE”)

When commissioning a work, the commissioner (live event organiser) may legitimately ask for more than a license, and request an assignment of copyright/neighbouring rights, in full ownership, i.e. for the complete duration of the protection by the copyright/neighbouring rights, for the whole world, in exclusivity and for all types of exploitation.

In many countries, such an assignment, benefiting the commissioner, is easier than a normal copyright transfer.

Points of attention in a commissioning contract include:

- The schedule for delivery of the work;
- Clauses of compulsory changes and approval by the commissioner;
- Possibility of replacement of the author (or addition of co-authors).

Summary

This booklet should have guided you through the most important copyright rules to be remembered when organising or staging a live performance – up to you to translate into action!

Activities of artists, cultural professionals and live performance organisations are rarely limited to their own country. Nowadays they are very mobile and engagements to perform abroad are readily accepted.

One of the managerial issues that must be tackled are the copyrights. Remember to start **WELL IN ADVANCE** to gather information about all the copyrights and to update it, especially if the performance has to do with a creation or a première, and start your negotiations in good time.

Making creative content accessible for an audience requires **A SEPARATE RIGHTS CLEARANCE PROCESS IN EACH COUNTRY** where the performance is staged. The applicable rules may vary from country to country, even though a certain degree of harmonization has been achieved through the conclusion of international treaties and via the European Union.

Notice the **DIFFERENCE BETWEEN COPYRIGHTS and NEIGHBOURING RIGHTS**.

COPYRIGHTS are the rights that are granted to authors of all kinds of artwork, e.g. the composer, the choreographer, the author of a theatrical work etc.

NEIGHBOURING RIGHTS are rights that are recognized to persons other than authors and who are involved in the processes of performance and distribution of works and, because of the importance of this contribution, in the dissemination of these works. These rights have been recognized to performing artists, to the producers of the first prints (fixations) of films, to producers of phonograms and to broadcasters.

It can be useful to clear not just copyright/neighbouring rights but also **OTHER RIGHTS**: image rights of the performer (other than those taken from the performance) or the author, and the right to use the name and biographical data of the performer or the author, in both cases for printing images and information in programmes and for advertising purposes.

For what purpose do rights need to be cleared? Generally speaking, the aim is to reproduce and/or make available or communicate art works to the public. In several countries authors and artists are also granted **MORAL RIGHTS**, i.e. the right to be mentioned and to oppose any modifications or divulgation.

Who is **RESPONSIBLE** for rights clearance? If nobody clears the rights, in the end the venue/organizer will be liable towards the rights owner as the responsible party for communicating the work to the public. However, clauses in contracts with either the production house or the performer may be worded such that the performer is obliged to clear the rights, and if this is not done, the performer will be required to compensate the damage.

Annex

Chapter I: The basics of copyright

Additional information on the live performance sector & the notion of communication to the public (see page 11)

There is no doubt that a performance of works at a live event is a communication. Whether the live audience is a “public” will in general be assessed on the basis of interdependent criteria that can be found in several decisions of the European Court of Justice, which are applicable to both copyright and neighbouring rights:

- The number of potential recipients is indeterminate and implies, moreover, a fairly large number of persons (ECJ, 7 December 2006, SGAE, C306/05).
- As regards the ‘indeterminate’ nature of the public, it means making a work perceptible in any appropriate manner to ‘persons in general’, that is, not restricted to specific individuals belonging to a private group (ECJ, 15 March 2012, SCF, C135/10).
- As regards, the criterion of ‘a fairly large number of people’, this is intended to indicate that the concept of ‘public’ encompasses a ‘certain de minimis threshold’, which excludes from the concept groups of persons which are too small, or insignificant (ECJ, 15 March 2012, SCF, C135/10).
- In order to determine the size of that audience, account must be taken of the cumulative effects of making works available to potential audiences (ECJ, 7 December 2006 SGAE, C306/05). It is relevant, inter alia, to know how many persons have access to the same work at the same time and how many of them have access to it in succession (ECJ, 15 March 2012, Phonographic Performance (Ireland), C162/10).
- The public which is the subject of the communication is not merely ‘caught’ by chance, but is targeted by the user (ECJ, 15 March 2012 SCF, C135/10);
- The profit-making nature of the broadcast is not irrelevant.

On the basis of these criteria, not having a communication to the public would probably mean that the performance has been a complete failure...

Usefull addresses and links

EU - European Union's copyright legislation

<https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>

WIPO - World Intellectual Property Organisation

<http://www.wipo.int>

GESAC the European Authors' Societies

<http://www.authorsocieties.eu/about-gesac/gesac-s-members-in-europe>

AEPOARTIS - Association of European Performers' Organisations

http://www.aepo-artis.org/pages/14_1.html

ECSA European Composer and Songwriter Alliance

http://composersdirectory.eu/article,en,6,members_&_links.html

Glossary

CMO – Collective management organisation

CRM – Collective rights management

ECJ – European Court of Justice

GVL – Gesellschaft zur Verwertung von Leistungsschutzrechten (German collective management organization)

SGAE – Sociedad General de Autores y Editores (Spanish general society for authors and publishers)

WCT – World Copyright Treaty

WIPO –World Intellectual Property Organization

WPPT – The WIPO Performances and Phonograms Treaty

European Festivals Association

The European Festivals Association (EFA) has been uniting distinguished music, dance, theatre and multidisciplinary arts festivals from Europe and beyond for more than 60 years since its foundation in Geneva, Switzerland, in 1952 as a joint initiative of the eminent conductor Igor Markevitch and the great philosopher Denis de Rougemont.

As the umbrella organisation for arts festivals across Europe and beyond EFA has grown from 15 festivals into a dynamic network representing about 100 music, dance, theatre and multidisciplinary festivals, national festival associations and cultural organisations from 40 countries. EFA's members are the core element that make the Association an open, influential, international place for any festival that wants to be part of a bigger festival community.

Festivals have been working across borders and cultures since the dawn of festivals, before Europe was a project of unity, before Europe was a space that aimed to facilitate cross-border exchanges.

EFA brings festivals together to inspire one another, fosters an exchange of knowledge, helps festivals to speak with one strong voice to shape policy developments, increases networking opportunities, and keeps festivals informed about issues at stake in the festival and cultural world, all under the flag of artistic excellence and internationalisation.

EFA and its members are connected by common beliefs that guide and strengthen the work of festivals in their local contexts. EFA joined PEARLE* in 2005.

www.efa-aef.eu

Pearle* Live Performance Europe

Pearle*-Live Performance Europe is the European federation representing through its members and associations some 10 000 theatres, theatre production companies, orchestras and music ensembles, opera houses, ballet and dance companies, festivals, concert halls, venues and other organisations within the performing arts and music sector across Europe.

Pearle*-Live Performance Europe acts as a forum for exchanging information of relevance to members, for sharing experiences in cultural management and technical skills, for supporting and assisting the formation of employers' associations, in addition to serving as the body to make representations to the European Commission and any other authorities whose deliberations may affect the work of the Performing Arts in Europe.

The Performing Arts Employers Associations League Europe, or Pearle* is an international not-for-profit organisation in compliance with Belgian law.

The aim of this non-profit making international non-governmental organisation is the establishing of a stable environment by supporting sustainability and promotion of the Performing Arts across Europe.

Its objects are as follows:

- the exchange of information, experiences and ideas of common interest to members working in the Performing Arts sector
- the obtaining of information concerning all European issues relating to members' interests
- facilitating collective decisions in areas of common interest
- expressing Pearle*'s views in discussions with bodies whose activities are relevant to Pearle*
- lobbying in accordance with collective decisions reached by the members' representatives to EU and other authorities
- carrying out all activities connected with the above mentioned activities.

www.pearle.ws

A substantial part of the activity of contemporary artists, festivals, venues, touring and production companies, in the live music and performing arts encompasses cross-border cultural cooperation.

Too often when working together on an international artistic programme, unexpected problems arise based on misunderstandings or wrong assumptions about European legislation and procedures ruling bureaucratic aspects needed for this international cooperation to be the best collaboration it can be. This happens for different reasons: a lack of knowledge of the situation in or from another country, differences in administrative practices, forms which are missing, unclear and hermetic language in official texts, etc. For everyone working on the managerial side in the sector, these situations are recognizable and known. What is more regretful is that they may result in performances not being able to take place, financial losses (which might have been avoided) or missed opportunities to save costs or have additional income.

Under the auspices of legal experts with an in-depth understanding and knowledge of the sector, a series of booklets are designed to help you navigate these important procedures on the following topics:

- Social security
- Taxation
- Value added tax
- Copyright

Calling it ourselves as an inside joke, What you didn't know about Europe - **The Ultimate Cookbook for Cultural Managers**, the booklets aim to explain in an easy to read and understandable way what one should know and remember of each specific theme, in other words, what are the ingredients and how to cook the recipe by providing some tips and tricks.

EFA /PEARLE* partnership in the context of the EFA RISE project
EFA - European Festivals Association
PEARLE* - Live Performance Europe



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