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The performers' economic rights in the international treaties and the EU directives

The authors have been supported and protected by the legal system of copyright since 1709, when the Statue of Anne was incorporated in Great Britain. In these three hundred years legal researchers have focused mainly on authors' rights, while the phenomenon of neighbouring rights protection appeared much later, only at the beginning of the 20th century. However, in most cases cultural contents or products are consumed by the general public not directly, but through the interpretation of performing artists, including actors, singers, dancers, performers.

At the level of international law, the development of performers' rights started in 1961, when the first multilateral neighbouring rights treaty, the Rome Convention was adopted. The expansion of performers' rights came to a stop in 2012, when the Beijing Treaty on Audiovisual Performances was enacted, although the implementation of this treaty is still pending in the European Union. Meanwhile, the European legislator regulated performers' rights in 1992 for the first time, when the original version of Rental Directive was adopted. In the early period, the European Community enacted mainly specific rules for performers and other neighbouring right holder, but legislative texts adopted after the Millennium created a balanced situation and are mostly the same for authors and performers.

This article examines how economic rights of performers have evolved at the level of multilateral international treaties and the legislation of the European Union during this period. The main focus of the analysis is to compare the economic rights of performers with the identical rights of authors and phonograms producers, and to evaluate the identified similarities and differences.

1. The performers' economic rights in general

While moral rights protect the performer in his personal relationship with a specific performance,[2] the web of economic rights ensures that the performer's intellectual investment is financially rewarded. Similar to the authors' right, this economic return is ensured by granting a monopoly on the exploitation of performances. The purpose of economic rights is therefore to ensure that the income from the exploitation of the performances is granted exclusively to the right holder and the person, who the performer authorizes.

From a doctrinal point of view, economic rights can basically be divided into two groups: exclusive rights to authorize and prohibit the use of the performance, and remuneration rights without an exclusive right. The main distinction between the two is whether the right holder is granted by legislation the right to prevent a specific use (exclusive rights), or whether the user may use the performance even against the will of the performer, while paying him a fair remuneration (remuneration rights).

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[2] As an analogy, see Gábor Faludi's interpretation, GYERTYÁNFY Péter (ed.): *Nagykommentár a szerzői jogi törvényhez*, Wolters Kluwer, Budapest, 2023, p. 117.

The international treaties are not uniform how they describe the scope of the economic rights. The Rome Convention[3] and the TRIPS Agreement[4] grant the performer the right to 'prevent' or 'prohibit' certain uses, while the WPPT[5] and the Beijing Treaty[6] establish the right to 'authorise' the use of his performance. In other words, while the early multilateral treaties on performers' rights focused on the passive side, the later treaties focused on the active side of the economic rights. However, the two approaches differ mainly in principle, and in practice they give the performer essentially the same possibilities.

In the case of performers, the link between moral rights on the one hand, and economic rights on the other hand has not received nearly as much attention in the legal literature, as the theoretical debate on this issue regarding authors. The primary reason for this is certainly that by the time the international community adopted the first convention on neighbouring rights (the Rome Convention in 1961) and by the time the protection of performers' rights had become general in national laws by the end of the 20th century, these doctrinal debates had typically lost their relevance. However, national legislators can achieve the highest level of legal protection if they understand the moral and economic rights as tools to mutually reinforcing and supporting each other.

As Péter Gyertyánfy said regarding authors, the economic rights are comprehensive, exclusive (absolute) rights, which reserve the rights to the author for all possible uses (positively) of the work and (negatively) excludes all others from the use of the work.[7] One could apply this definition to the performing artists' economic rights, without any changes. The exclusive rights of the performer can therefore be divided into a positive and a negative layer, just as the exclusive right of authors.

Another possible approach to group economic rights is to distinguish them according to the way, in which they are managed. Similar to the authors, performers can manage some of their economic rights individually, and others through collective management organisations. The distinction between the two depends heavily on the development of national law. Although the European Union (EU) regulates the structure and activity of the collective management organisations extensively,[8] significant differences can be detected between national laws of the EU member states yet. It is not disputed that the right holder's right to authorise or prohibit the use of the performance is managed the most freely when the performer can exercise that right of authorisation individually. Collective forms of management (by i.e., an employer, ensemble, or a collecting management organisation) restrict the performer's freedom of choice in different ways and degrees. However, this limitation is insignificant in all cases, where the form of the collective management is not mandatory, and the performer can take back the right to decide into his own hands, at any time.

[3] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome on October 26, 1961

[4] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

[5] WIPO Performances and Phonograms Treaty, adopted in Geneva, on December 20, 1996

[6] Beijing Treaty on Audiovisual Performances, adopted in Beijing, on June 24, 2012

[7] GYERTYÁNFY Péter (ed.): *Nagykommentár a szerzői jogi törvényhez*, Wolters Kluwer, Budapest, 2023, p. 153.

[8] Among these rules, Directive 2014/26/EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market has a major importance. In addition, Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission and the Directive 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC Directive also contain some rules on collective management.

The scope of economic rights exercised through collective management organisation has been extended to all mass uses, which cannot be individually controlled. These uses cover in various forms of communication to the public of fixed performances. However, even in such cases, the performer can manage his economic rights individually, if the use involves any moral right question. This is the case e.g., when the exploitation requires an intensive intervention in the fixed performance.

Furthermore, the individual management of rights does not always mean that the performer can exercise his economic rights truly individually. This is mainly because performing activities typically belong to the collective forms of arts, and performers often act as members of bands, orchestras, choirs or ensembles. In the case of collective genres, it is also not uncommon for the performer to be employed or to have other legal relationships with his ensemble, which, according to many national legislations, results an *ex lege* transfer of the economic rights. Although in such a case, the economic rights are managed not by a collective management organisation, but is still a collective form of rights management, which is exercised by the performer's employer or ensemble. In many legal systems, the employer, as an ex lege right holder, can authorise the use of the performance without a specific authorisation from the performer himself.

In theory, the collective management of rights does not affect the scope of the economic right itself. However, in practice, the borderlines of the exclusive rights managed by a collective management organisation are narrower, mainly for competition law reasons. This is because, a collecting management organisation is usually obliged to authorise all uses under the strict framework of EU collective management legislation. Consequently, in such a case, the passive element of the exclusive right (the prohibition of an unlawful use) may predominate. At the same time, in the case of individual rights management, the right holder is genuinely free to decide, which user he or she aims to authorise to exploit the performance.

Economic rights can also be grouped according to whether a given exploitation is linked to an unfixed or an already fixed performance. As of today, the mass exploitations of performances require the performance to be fixed. Although broadcasting of a live performance ensures that an unfixed performance can reach a very wide audience, the unrecorded nature of the performance means, that it will always be a one-off, single, non-repeatable exploitation. On the other hand, digital technology allows the reproduction of fixed performances without any degradation in quality, very quickly and without any other restrictions, which makes it difficult or impossible for performers to control the secondary use of their performances in practice.

2. Economic rights in the Rome Convention

Article 7 of the Rome Convention formulates the economic rights in such a way, that performers may 'prevent' certain uses of their performances. The Rome Convention thus focuses to the passive layer of the economic rights of performers. At the same time, the very same Rome Convention granted exclusive right to phonogram producers[9] and broadcasting organisations[10] in the same way as for authors, emphasising the active element of licensing, too.[11]

[9] Article 10 of the Rome Convention.
[10] Article 13 of the Rome Convention.
[11] For both of these groups of right holders, the Rome Convention uses the 'authorize or prohibit' phrase. Similarly, the Berne Convention sets the right of authorisation the same way with regard translation (Article 8), reproduction

The aim of the Rome Convention was to give member states the widest possible choice how to ensure the protection.[12] The records of the 1961 diplomatic conference show, that the delegates followed the text of the Hague Draft – the basic proposal of the conference – without any changes.[13] The records also show that during the diplomatic conference Czechoslovakia proposed[14] that – beside the phonogram producers and broadcasting organisations – the exclusive right of performers should be formulated similarly to the Berne Convention's language. On the other hand, the Mexican delegation suggested[15] – again, unsuccessfully – that the protection could be ensured not only by copyright means, but also by any other legal concept. After considering the conflicting proposals, the delegates finally decided to adopt the text of the basic proposal, without any changes. The situation in the United Kingdom certainly played an important role in this decision, since at that time, the United Kingdom applied a criminal law approach to protect performers.[16] The final text adopted by the diplomatic conference allowed this system to be maintained.

Ultimately, the lobby power must be the reason why, unlike the phonogram producers and the broadcasting organisations, the Rome Convention did not grant economic rights to performers in their traditional exclusive form. A legally and economically independent performer would have limited the existing possibilities of authors and phonogram producers, which would have collided to the interests of these right holders. The international associations of authors (CISAC) and phonogram producers (IFPI), by exploiting their better lobby power, without the slightest sign of professional solidarity, let the community of performers down in 1961. Even Claude Masouyé, the author of the WIPO Guide,[17] has pointed out that the solution chosen by the Rome Convention is considered by many professionals to be paradoxical, regrettable and unfair.[18]

However, the Rome Convention granted three economic rights for performers, two for unfixed and one for fixed performances. The rights of communication to the public [Article 7(1)(a)] and the fixation of unfixed performances [Article 7(1)(b)] are still essentially unchanged in the international treaties and the *acquis communautaire*. The economic right of the reproduction of the fixed performances [Article 7(1)(c)] was subject to several limitations in the Rome Convention, but later these limitations were mainly lifted, which has made the reproduction right largely identical to the similar rule for authors. One may observe, that in the case of fixed performances, the Rome Convention only granted the reproduction right, and did not regulate other economic rights in respect of other forms of secondary exploitation, such as distribution, rental, lending, etc.

(Article 9), communication to the public (Article 11^{bis}), public performance of literary works (Article 11^{ter}), adaptation (Article 12), filming (Article 14).

[12] Sam RICKETSON – Jane C GINSBURG: *International copyright and neighbouring rights*, Oxford University Press, Oxford, 2005, p. 1213.

[13] Records of the Diplomatic Conference on the International Protection of performers, producers of phonograms and broadcasting organisations, ILO-UNESCO-BIRPI, 1968, p. 216.

[14] See the report by Abraham L. Kaminstein, rapporteur-general of the diplomatic conference, ILO-UNESCO-BIRPI, 1968, p. 43 and the proposal CDR/31 (ILO-UNESCO-BIRPI (1968), p. 221) For more details see Jörg REINBOTHE – Silke VON LEWINSKI: T*he WIPO Treties on Copyright, A commentary on WCT, the WPPT, and the BTAP*, Oxford, Oxford University Press, 2015, p. 315.

[15] See proposal CDR/48. ILO-UNESCO-BIRPI (1968), p. 217.

[16] See the report by Abraham L. Kaminstein. ILO-UNESCO-BIRPI (1968), p. 43.

[17] Claude MASOUYÉ: *Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Geneva, 1981, p. 34 - paragraph 7.3.

[18] Meanwhile, it is also true that the Rome Convention could not rely on pre-existing national solutions such as the Berne Convention for authors.

Another type of economic rights appeared in the Rome Convention as well. Article 12 of the Convention grants performers no exclusive right, but only a single right to an equitable remuneration for the communication to the public of phonograms released for commercial purposes. Under the equitable remuneration system, right holders cannot prevent or prohibit the use of performance, on the other hand, right holders are still entitled to a single remuneration. Since in 1961 the most common use of a commercial phonogram was already the communication to the public (mainly by broadcasting), and secondly, since the Rome Convention made it possible for member states to exclude performers from even the fair remuneration system and to grant it exclusively to phonogram producers,[19] it is not surprising that this issue caused the hottest debates during the diplomatic conference.[20]

The term of protection for economic rights – according to the Article 14 of the Rome Convention – is twenty years, which is substantially less, than the term of protection for authors according to the Article 7 of the Berne Convention. The most significant difference between the two is obviously that the term of protection of authors shall be calculated from the death of the right holder, for performers the term of protection begins to run from the year following the fixation of the performance.[21] This regulation itself is a significant disadvantage for performers compared to authors. Moreover, instead of the minimum of fifty years protection provided for author, only twenty years was granted for performers by the Rome Convention.

According to the records, the term of protection of performers didn't generate any major debate during the diplomatic conference. In this respect, the delegates followed the provisions of the Hague Draft, without making any changes.[22] (There were only two delegates, namely the delegates of Austria and the United States of America, which proposed a term of protection of more than twenty years, the former thirty years, the latter twenty-five years.[23]) Therefore it is totally unclear, why it was necessary to set a shorter term of protection for performers, compared to authors. At the same time, since the Rome Convention contains only minimum rules, member states are allowed to grant a longer protection than the twenty years set by the Convention.[24] In this respect it may also be important that the term of protection must always be determined in accordance with the law of the country, where the protection was sought by the right-holder.[25]

Finally, Article 15(1) of the Rome Convention mentioned private copying, quotation, ephemeral fixation and educational or scientific use as purposes for which member states may establish exceptions and limitations to the economic rights. However, Article 15(2) also says, that member states can regulate other exceptions to the performers' economic rights in all cases, where the similar rights of authors are also subject to an exception or limitation.

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[19] Article 12 of the Rome Convention provides that 'If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.' This rule allows member states to grant a remuneration right for performers (excluding phonogram producers), but given the different economic power of the parties to claim, this was not a realistic route even in 1961.

[20] Claude MASOUYÉ: *Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Genf, 1981, p. 46 - point 12.1.

[21] Silke VON LEWINSKI: *International Copyright Law and Policy*, Oxford University Press, Oxford, 2008, p. 221.

[22] ILO-UNESCO-BIRPI (1968), p. 51.

[23] Ibid., p. 51.

[24] Claude MASOUYÉ: *Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Genf, 1981, p. 55.

[25] ILO-UNESCO-BIRPI (1968), p. 50.

3. Economic rights in the TRIPS Agreement

Performers' rights were in many ways overshadowed during the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as an annex to the General Agreement on Tariffs and Trade (GATT), in 1995. The most obvious indication is the fact that, unlike the substantive provisions of the Berne Convention, the substantive provisions of the Rome Convention were not incorporated into the body of the TRIPS Agreement.[26] The main reason for this is that the highly influential USA and China never signed to the Rome Convention, so it would have been against their interests to adopt the rules of neighbouring rights in this roundabout way.

Since the TRIPS Agreement could not apply a rule[27] referring to the provisions of the Rome Convention, the most important rules of neighbouring rights had to be repeated in the TRIPS Agreement. Although Article 14(1) of the TRIPS Agreement granted economic rights to performers in a way that went beyond the Rome Convention, it still preserved the discrimination of performers against authors and phonograms producers.

As far as performers are concerned, the TRIPS Agreement also failed to grant a general exclusive right, but instead enacted a less effective right to 'prohibit' certain uses without prior consent.[28] This right to 'prohibit' without prior consent does not go beyond the solution mentioned regarding the Rome Convention's (right to 'prevent').[29] Some commentators interpret this text as obliging member states to provide civil enforcement instruments, and that criminal law protection alone could not result in an adequate implementation of the TRIPS Agreement.[30] Although the difference between the traditional form of exclusive right on the one hand, and the right to 'prohibit' a use without consent on the other, is not very significant in practice, it highlights a major difference of power between the right holders. One should also consider Article 14(2) of the TRIPS Agreement, which granted exclusive rights to phonogram producers the very traditional way, covering the active layer of right, too.

The TRIPS Agreement has incorporated the economic right of communication to the public and the fixation of unrecorded performances similar to the Rome Convention. However, the TRIPS Agreement has significantly extended the reproduction right of a fixed performance by removing the limitations that appeared in the Rome Convention.

Unlike the Rome Convention, the TRIPS Agreement does not grant any remuneration right for the performers. The main reason for this is that the TRIPS Agreement omits the right to a single equitable remuneration for the communication to the public of a phonogram released for commercial purposes.

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[26] Carlos M CORREA: *Trade Related Aspects of Intellectual Economic, A Commentary on the TRIPS Agreement,* Oxford University Press, Oxford, 2007, p. 155.

[27] On the contrary, Article 9(1) of the TRIPS Agreement made it obligatory for its member states to apply Articles 1 to 21 of the Berne Convention, with the exception of Article 6bis on moral rights and the rights derived from it. The reason behind the different approach was that the international acceptance of the Rome Convention was much lower than that of the Berne Convention. See Silke VON LEWINSKI, *International Copyright Law and Policy*, Oxford University Press, Oxford, 2008, p. 298.

[28] Daniel GERVAIS: *The TRIPS Agreement - Drafting history and analysis*, Sweet and Maxwell, London, 1998, p. 96.

[29] Silke VON LEWINSKI: *International Copyright Law and Policy*, Oxford University Press, Oxford, 2008, p. 299.

[30] Daniel GERVAIS: *The TRIPS Agreement – Drafting history and analysis*, Sweet and Maxwell, London, 1998, p. 98.

With regard to the exemptions and limitations, the first sentence of Article 14(6) of the TRIPS Agreement refers to the rules of the Rome Convention, thus somehow lifting the independence from the Rome Convention. It is also worth noting however, that the second sentence of Article 14(6) states that the rules of the Berne Convention are also applicable to all neighbouring right holders,[31] which utterly confuses the relation between international treaties.

The TRIPS Agreement went significantly beyond the provisions of the Rome Convention regarding the terms of protection of performers' economic rights, as Article 14(5) of the TRIPS Agreement extended the term of protection from twenty years to fifty. It is true that the TRIPS Agreement left unchanged the Rome Convention's rule on the starting date of the calculation, therefore the term of protection is to be calculated from the fixation of the phonogram and not from the death of the performer. It is also worth noting that there are no known economic calculations to justify the extension of the term of protection, which may ultimately be driven by the view that a wider scope of protection is necessarily preferable for performers.[32]

4. Economic rights in the WPPT

The WPPT, adopted in 1996, was a turning point in the system of economic rights for performers, as it was the first international treaty to formulate economic rights the same way as the economic rights of authors and phonogram producers.[33] It can therefore be said that, following the 'right to prevent' of the Rome Convention and the 'right to prohibit' of the TRIPS Agreement, the traditional system of exclusive economic rights was established in 1996 at the level of international treaties. Furthermore, since the WPPT reproduced the rules of the Rome Convention in a modernised form in many respects, the adoption of the WPPT has essentially eliminated the largely unjustified differences that previously existed between the different categories of right holders.

The text of WPPT – in this regard – strictly follows the wording of the WCT[34] ('shall enjoy the exclusive right of authorizing') and can be equated with the text of the Berne Convention ('shall have the exclusive right of authorizing'). This right is in fact more than the exclusive right of authorizing a use, as it includes the right to determine the conditions of authorization and the right to prohibit certain use.[35]

The WPPT granted an exclusive right to authorise the communication to the public [Article 6(i)] and fixation [Article 6(ii)] of unfixed performances in the same way as the Rome Convention and the TRIPS Agreement, and an exclusive right to reproduce a fixed performance [Article 7] in the same way as the TRIPS Agreement, without further restriction. This is the first international treaty to include an exclusive right for distribution [Article 8] and rental

[31] Ibid. p. 100.
[32] Carlos M CORREA: *Trade Related Aspects of Intellectual Property, A Commentary on the TRIPS Agreement*, Oxford University Press, Oxford, 2007, p. 166 and Daniel GERVAIS: *The TRIPS Agreement – Drafting history and analysis*, Sweet and Maxwell, London, 1998, p. 301.It is also worth noting that the TRIPS Agreement did not change the term of protection for broadcasting organisations compared to the Rome Convention, which remained twenty years.
[33] Jörg REINBOTHE – Silke VON LEWINSKI: *The WIPO Treaties on Copyright, A commentary on WCT, the WPPT, and the BTAP*, Oxford, Oxford University Press, 2015, p. 315 and Sam RICKETSON – Jane C. GINSBURG: *International Copyright and Neighbouring Rights, Volume II.*, Oxford, Oxford University Press, 2005., p. 1259.
[34] WIPO Copyright Treaty, adopted in Geneva on December 20, 1996
[35] Jörg REINBOTHE – Silke VON LEWINSKI: *The WIPO Treaties on Copyright, A commentary on WCT, the WPPT, and the BTAP*, Oxford, Oxford University Press, 2015, p. 134.

[Article 9] of fixed performances. However, the most significant development was not these but the creation of an exclusive right for making performances available on the Internet [Article 10], which was drafted following the authors' rules in WCT.[36]

The WPPT, however, preserved the two-tier system of economic rights by reiterating in Article 15 the content of Article 12 of the Rome Convention on the communication to the public of commercial phonograms. Moreover, the introduction of a remuneration right, which provides a lower level of protection, is not obligatory for member states in this case, and they may make reservations or waive it generally. However, Article 15(2) of the WPPT has strengthened the position of performers, since member states – if a national law introduces this right – cannot exclude performers from the remuneration.

Article 17(1) of the WPPT set the term of protection of the fixed performance – following the TRIPS Agreement[37] – to fifty years, calculating from the year of fixation. The fact that the rules of the TRIPS Agreement, adopted only a few years earlier, had already been transposed into more than 100 national laws by the time the diplomatic conference negotiating the WPPT began, proved to be of great importance in this question.[38] Although, by principle, the WPPT steps backwards by not providing a term of protection for unfixed performances, this is understandable, since a performance cannot be re-used without it being recorded.[39] What is less understandable is why the diplomatic conference has set a shorter term of protection for performers than for producers of sound recordings. Indeed, according to Article 17(2) of the WPPT, the term of protection for phonogram producers is only calculated from the year of fixation if it is not released within the fifty-year term of protection. However, if the phonogram is published within that period, the starting point of the term of protection is the year of publication. This means, in the extreme case, that if the publisher releases the sound recording only in the fiftieth year after its fixation, the term of protection expires only fifty years after that date, i.e. in the hundredth year after the fixation of the recording.[40] Meanwhile, the performers' rights in the same phonogram will expire fifty years after the year of fixation, even if the producer does not start exploiting the recording until that year. It should also be noted that the concept of publication is limited to physical copies in Article 2(e) of the WPPT and in the 'Agreed statement' to that Article,[41] so a publisher could exploit the phonogram exclusively online for the first fifty years after the fixation and then start distributing physical copies in the fiftieth year, thus extending the term of protection.

Regarding limitations and exemptions on economic rights, WPPT follows the method of the TRIPS Agreement. As a first step, Article 16(1) says that in all cases where the rights of authors have been limited by national law, the same scope of limitation may be imposed on related right holders. The second step of the WPPT, going beyond the TRIPS Agreement, obliges the

[36] Last sentence of Article 8 of the WIPO Copyright Treaty.
[37] Mihály FICSOR: *Guide to the copyright and related rights treaties administered by WIPO*, WIPO, Genf, 2003, p. 255.
[38] Jörg REINBOTHE – Silke VON LEWINSKI: *The WIPO Treaties on Copyright, A commentary on WCT, the WPPT, and the BTAP*, Oxford, Oxford University Press, 2015, p. 419.
[39] The text submitted to the diplomatic conference even included a fifty-year term for the protection of unrecorded performances, but this was ultimately deemed unnecessary by delegates. See Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, WIPO, Genf, p. 62.
[40] FICSOR MIHÁLY: *The law of Internet*, Oxford University Press, Oxford, 2002, p. 643.Interestingly, the participants in the diplomatic conference - with the exception of the representative of Austria - did not feel bound by the TRIPS Agreement as regards the starting date of the term of protection for phonogram producers. See Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, WIPO, Genf p. 682.
[41] Silke VON LEWINSKI: *International Copyright Law and Policy*, Oxford University Press, Oxford, 2008, p. 480.

member states to apply the three-step-test of the Berne Convention for the related rights, too, making that rule generally applicable to all limitations and exemptions.[42]

5. Economic rights in the Beijing Treaty

The Beijing Treaty on audiovisual performances enacted the economic rights as traditional exclusive rights the same way as the WPPT did. As the Beijing Treaty only regulates the rights of audiovisual performers, this solution cannot be compared with the solution applied to other rightholders.

The Beijing Treaty establishes a system that, while formulating exclusive rights at a high level of abstraction, in many cases it is the Treaty itself, which undermines the high level of legal protection. This can be seen, for example, in the case of rental [Article 9] and communication to the public [Article 11], where for both rights member states have been given a wide discretion to create a weaker right for performers, or not to grant such a right at all, instead of an exclusive right.

The Beijing Treaty basically follows the provisions of the WPPT and grants, with practically identical wording, the rights of communication to the public and fixation of unfixed performances [Article 6], rights of reproduction [Article 7], distribution [Article 8], rental [Article 9] and making available [Article 10].

A new element of the economic rights is the introduction of an exclusive right to broadcast fixed audiovisual performances [Article 11]. Nevertheless, it has only limited importance, since member states are not obliged to introduce this exclusive right at all. Finally, it should be noted that Article 12 of the Beijing Treaty makes it possible for the member states to set an assumption on the transfer of performer's economic rights to the producer. That practically means that the international community has extended the rights of the producers, rather than the performers.[43]

Article 14 of the Beijing Treaty also follows the provisions of Article 17(1) of the WPPT with regard to the term of protection, which is fifty years, calculated from the date of the fixation.

The Beijing Treaty also followed the rules of the WPPT regarding the limitation on economic rights. Accordingly, Article 13(1) authorises member states to limit economic rights in all cases where they do so in the case of authors, and Article 13(2) again incorporates the three-step-test for all limitations and exemptions.

6. Economic rights in the directives of the European Union

[42] The so-called three-step-test was first introduced in Article 9 of the Berne Convention as a general rule on the possible limitation on reproductions. For details on the three-step-test of the Berne Convention, see GYENGE Anikó: *Szerzői jogi korlátozások és a szerzői jog emberi jogi háttere*, HVG-ORAC, Budapest, 2010, pp. 38-47.

[43] This approach is not new, as Endre Nizsalovszky already points out in his 1963 study that the producers of sound recordings tried to obtain as many rights as possible for performers in the first half of the 20th century in order to strengthen their own position by obtaining these rights later. NIZSALOVSZKY Endre: *Az előadóművész jogállása*, In MÁDL Ferenc – PESCHKA Vilmos (ed.): *Tanulmányok a jogról*, Akadémiai Kiadó, Budapest, 1984, p. 149.

The first copyright directive of the European Union, the 1991 Software Directive[44], did not cover the rights of performers. However, the Rental Directive[45], adopted only a year later, already covered related right holders and is therefore relevant to our topic.

Article 2(1) of the Rental Directive[46] regulated the exclusive rights for all right holders regarding rental and lending in a uniformed way. This solution also included the possibility to authorise or prohibit the use, therefore it is identical to the approach of the Berne Convention. This was a huge step in the favour of the performers, since, as I mentioned, at the time of the adoption of the Rental Directive, the Rome Convention (which was the only international treaty on related rights in force), limited its wording to the passive elements of the economic rights. Therefore, the Rental Directive granted performers a *de facto* exclusive right. Moreover, the Rental Directive granted an exclusive right for performers to uses, where the economic right in question was not even regulated at all for authors. Examples of this can be seen in the case of fixation [Article 6[47]], reproduction [Article 7[48]] and communication to the public of unfixed performance [Article 8].

The European legislator has therefore taken the same approach to granting exclusive rights to performers and authors from the first step of copyright harmonisation, well before the adoption of the WPPT, which was a turning point in this respect. While the exclusive rights of the two groups of right holders differ significantly in scope, it is nevertheless important to recognise in principle that authors and performers are in many respects closer to each other than to other related right holders. This approach has been detectable throughout the thirty-year history of copyright harmonisation, including its most recent element in time, the CDSM Directive adopted in 2019.[49]

However, European law – applying the approach of the Rome Convention and the WPPT – also grants a remuneration right, without the active layer of the authorisation. In this context, one should mention the right to a single equitable remuneration according to the Article 8(2) of the Rental Directive.

The European Union regulates the rules on term of protection in the Term Directive. This directive not only sets the term of protection, but harmonises the method and starting date for calculation too.[50] The Directive adopted in 1993, in its original form, provided a term of protection of fifty years for all neighbouring rights, including performers.[51] This provision went beyond the twenty-year term of protection of the Rome Convention (although the TRIPS Agreement, the WPPT and the Beijing Treaty, which provided a fifty-year term of protection, had not yet been adopted by the international community at that time). The directive also takes

[44] Directive 91/250/EEC on the legal protection of computer programs
[45] Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
[46] Identical in wording to Article 3(1) of the codified version of the Rental Directive.
[47] Article 7 of the codified version of the Rental Directive.
[48] This provision is no longer in force, see Article 2 of Infosoc Directive.
[49] See, for example, the chapter on fair remuneration in the CDSM Directive (Title IV, Chapter 3), which only covers authors and performers.
[50] Michel M. WALTER – Silke VON LEWINSKI: *European Copyright Law*, Oxford University Press, Oxford, 2010., p. 507.
[51] GYENGE Anikó: „*Érted haragszom, nem ellened" – néhány gondolat a védelmi idő meghosszabbításához*, In Iparjogvédelmi és Szerzői Jogi Szemle. 4. (114) évfolyam 1. szám, 2009. február, p. 6.

into account the fact that at that time none of the member states had granted a term of protection of more than fifty years to neighbouring rightholders.[52]

However, the *acquis communautaire* goes beyond the Rome Convention not only in the length of the term of protection, but also in its horizontal nature, as the term of protection directive covered all fixed performances, including audiovisual performances. The EU changed the one-size-fits-all approach for all performers in 2011, when Directive 2011/77/EU changed the term of protection for phonograms from fifty years to seventy, while leaving the term of protection for audiovisual performances unchanged.

The modification of the term of protection for sound recording was formally based on an impact assessment by the European Commission. That document stressed that the regulatory framework at that time did not adequately recognise the contribution of performers to the creative process. The impact assessment also highlighted that the level of protection of performers' moral and economic rights was significantly below that of authors.[53] The Commission identified, among other things, the fact that the term of protection for performers was much shorter than that for composers as a sign of an unfair distinction between authors and performers.[54]

The Commission has also identified a problem to be addressed in the fact that performers face a loss of income in the second half of their career, due to the short duration of protection,[55] while their income typically remains low even at the peak of their career. It is not surprising that according to the recitals (5) and (6), the aim of the Directive was to provide a lifelong income for performers, who are no longer active.

In addition to the legal arguments, the mentioned modification was of course driven by intensive and effective lobbying by phonogram producers. It was probably motivated by the fact that from the end of the 1950s, more and more music recordings were made, which, even at the turn of the millennium, still had considerable commercial value.[56] As a consequence of the 50-year term of protection granted by the original text of the Term Directive, these recordings would have been in the public domain if the EU legislator had not intervened. It was not unreasonable for producers to expect that if the legislator extended the term of protection for performers, it would also extend the protection of phonogram producers, too.

The result of this process is that the term of protection for unfixed performances and audiovisual performances[57] is still fifty years, and for performances recorded on sound recordings is seventy years. The term of protection is calculated, according to Article 3(1) of the Term Directive, from the first lawful publication, or if earlier, the first lawful communication to the public, for both audio and audiovisual fixed performances.

The making available right of performers was regulated by the Infosoc Directive of 2001, parallel to the authors and other right holder. The aim of the European legislator was to

[52] Ibid., p. 562.
[53] COM(2008) 464 final, SEC(2008) 2288), p. 21 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008SC2287&from=FR, 12 February 2022).
[54] Ibid., p. 13.
[55] Ibid., p. 15.
[56] For example, Elvis Presley's Jailhouse Rock was recorded in 1957, Chuck Berry's Johnny B. Good in 1958, and Fats Domino's Blueberry Hill in 1959.
[57] Directive 2011/77/EU uses the phrase "fixation other than a phonogram", which is theoretically broader than the concept of audiovisual performance.

implement the rules of WCT (for author) and WPPT (for performers and phonogram producers) in a verbatim way. Consequently, regarding the making available rights all right holder has equal rights within the European Union. This approach continued with the adaptation of the legal instruments of the copyright reform, namely the Copyright in digital single market directive[58] and the modification of the cable and satellite directive.[59] Both mentioned directives granted the very same rights to performers than authors.

EU law also contains a detailed set of rules on the limitation of economic rights, mainly in the Infosoc Directive,[60] but there are also important rules in other EU legislative text,[61] which ultimately grant the same rules in all respects on authors and performers. It is symbolic that the limitation and exceptions to the economic rights of authors and performers are uniformly regulated by the EU legislator.

7. Conclusion

This article provides an overview of the development of structure of the performers' economic rights. The first stage ended in 1961, with the adoption of the Rome Convention, which was the first multilateral international neighbouring right treaty. During this period, no economic rights were granted to performers at international or regional level.

The second phase of the development of economic rights in international law lasted until 1994 and in EU law until 2001. At the level of international law, it was the TRIPS Agreement, while in EU law, it was the Infosoc Directive, which provided performers and authors at least partly the same level of protection. In this context, the Infosoc Directive is noteworthy because it applied the very same wording for authors and performers in respect of making available rights. It was therefore a transitional period which, on one hand, confirmed the need of economic rights for performers, but also showed why it was unfair approach to give performers a lower level of protection than authors.

In terms of economic rights, the full emancipation of performers has been most completed in EU law since the turn of the Millennium. Starting with the adoption of the Infosoc Directive, there was a series of directives that provided the same protection for authors and performers. It is true, that until 2019, this legislative process was markedly dominated by provisions extending the limitations and exemptions, but the SatCab II and CDSM Directives treated the two categories of rightholders in the same way in all respects.

At the same time, the protection of performers' economic rights could not be equivalent to authors, even if performers had been granted the same scope of rights for all uses, because of the significantly different term of protection. A legal emancipation of performers cannot be

[58] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

[59] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC

[60] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[61] Directive 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society,

considered complete, as long as the international community review all previously granted economic rights. So far neither the WIPO nor GATT seems open to this.

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