ALAI Congress 2017 in Copenhagen Copyright, to be or not to be

Questionnaire

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The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

In the Portuguese Copyright and Related Rights framework, there are no general policy justifications on the preamble of legislative acts, so normally we must search into the parliamentary debates from the time of their discussion to reach for the historical reasons for this or that legislative option.

In the case of Portuguese Copyright and Related Rights Code, (PCRRC)[1] there was a very strong debate in the Portuguese Parliament, in July 1985, in relation to the Law nr. 45/85 of 17 September 1985, which modified substantially the Decree-Law nr. 63/85 of 14 march 1985, approved by the Government, but subsequently summoned to the Parliament for wider political discussion.

In general, the Code resulted from a large consensus achieved by all political parties participating in the process, and was regarded as granting those who work in the cultural sector the possibility of exercising their creative activity in more favourable terms than before its entry into force. The Members of Parliament have stated, in the minutes of the parliamentary session, the reasons why they considered this Code to be a very well balanced exercise between the private interest of the rightholders and that of the public, namely by the conversion of many legal licenses as proposed by the Government into licensing opportunities, even for the purpose of international harmonization, incompatible with such licenses.

Certain specific aspects, such as the presumption of titularity favoring the intellectual creator, in case of work made-for-hire or within the framework of a contract of employment (article 14(2)), in the absence of a written provision stating otherwise; the possibility of modifications, introduced by the user, that do not affect the integrity of a work of architecture, to the extent required by the work's economic destination (article 63(2)); the possibility of using a posthumous work 25 years after the author's death, in case the author's successors don't exploit it or make it available - except where such delay is morally justifiable (article 70(3)) - are reported as vivid example of the achieving of such balance, also reflected on the issue of duration of the protection granted by copyright and related rights (before joining the EU).

More recently, in September 2014, there was another major parliamentary debate, on the occasion of a partial reform of the framework, where three new legislative acts were proposed: a new draft law regulating CMOs, a draft amendment to the existing law on private use and the new draft law implementing Directive 2012/28/UE of 25 October 2012, on certain permitted uses of orphan works.

[1] All the articles quoted in the text are from the PCRRC, unless otherwise specified.

During such debate, the then State Secretary of Culture (SSC) has voiced a strong defense of authors and holders of related rights, to obtain an equitable compensation for the private copy of copyright protected content, instead of being forced to waive their rights for free, namely when such payments are the basis of their life-support and professional activity and since such contents are a very substantial part of the driver for use of technological platforms and electronic equipment.

These proposals have been presented side by side with a pledge to fight Internet piracy, which led the Government to support the currently in force Memorandum of Understanding between the ISPs, the CMOs, the private television broadcasters, the Press Association, and several other relevant cultural players, which enabled a currently functioning system of Domain Name blocking whenever there is evidence of substantial infringement of third-parties' rights.

The SSC, to justify the inclusion of digital blank media in the basis for private use levy, has also mentioned the need to update the Portuguese legislative framework, in the light of comparison with other Countries, higher developed, such as Germany, France, Belgium, U.S. Canada and Japan, which have already implemented such protective and compensatory mechanisms.

One of the MPs also defended the then proposed extension of levies to digital media, on account of generating more income for rightholders and creators, in order to allow them to continue their cultural originating activities without asking for any contributions from the State Budget, that is, without impacting the general tax-payers, but charging the users of such digital blank media, instead.

To complement the justification of the predictable increase of income produced by this new private use Law, which updates the tariffs and includes digital blank media, the SSC explained that this new draft Law on CMOs is meant to enhance transparency and governance within such entities, thus responding to those who question how much money goes to copyright and related rights and how, and by whom, it is spent.

The draft laws were approved by a significant majority, and therefore we have Law 26/2015 of 14 April 2015, on the activity of CMOs, Law 49/2015 of 05 June 2015, on the regulation of private use and Law 32/2015 of 24 April 2015, on certain permitted uses of orphan works.

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

There are no specificities as far as Related Rights are concerned, regarding the justification for intellectual property protection. The policy reasons stated are precisely the same.

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

The influence of such main conceptions is clearly at a general philosophical level: either we chose to remunerate and protect creators or we chose not to, the options are quite simple. Of course, Portugal, as a part of EU, the Berne Convention, the Rome Convention and WIPO Treaties, among other international treaties, namely within the Council of Europe framework, is no longer free to decide **not** to protect copyright and related rights, but this subject is always presented as a way of remunerating the creative effort and labour of those who contribute for the production of cultural goods and services, similarly to any

other workers. Without it, many creators would find it impossible to survive, much less to go on creating and producing works and presenting performances. Nobody really questions the nature and justification of Copyright, in the Parliament, there is only a divergence

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

The main justifications given in the legal literature are related to the Constitutional protection of Copyright and Related rights in the Portuguese Constitution (1976, substantially amended ever since) where article 42(1) states that the "*intellectual, artistic and scientific creation is free*", whereas article 42(2) adds that "*this freedom encompasses the right to invent, produce and communicate the scientific, literary or artistic work, including the legal protection of copyright*".

This provision is to be interpreted in accordance with the Universal Declaration of the Human Rights (UDHR), where article 27 (2) acknowledges that "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*."

A main topic for discussion has been the compatibility between article 78 of the Portuguese Constitution (the right to fruition of cultural goods) and article 27(1) of the UDHR*("[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*."

Some Academics prefer to accentuate the freedom of access and to make use of cultural goods, which should not be hindered by the author's exclusive right to exploit the product of creation, whereas others prefer to say that there is no incompatibility, since the protection of moral and economic rights of the creators must be protected. In addition, the creative work for the development of culture consists in his/her own creative labour, which is to be remunerated as any other form of labour, while it is committed to the State the wide-spread diffusion of cultural goods, starting by fostering the necessary conditions for the exercise of literary and artistic activities.

The literature on the foundation of Copyright and Related Rights in the Portuguese Law adopts different views, alongside with the historic evolution of the legislation, but has always departed from this unavoidable reality: there is a strong component of moral or personality rights expressed by the rights to identification, genuineness and integrity of the work and also by the right to withdrawal (even after the work is marketed). So, there is a double nature of Copyright, encompassing both a set of moral as patrimonial rights, or faculties, which make it rather difficult to classify according to a monist theory.

That explains why most authors opt for a dualist theory, based upon the undeniable and essential conception of copyright as a *temporary exclusive privilege of preservation and commercial exploitation*, but also integrated by faculties of *moral, personal and patrimonial nature* which conserve their own specific characteristics, having as subject the intellectual work (where both patrimonial and moral interests from the author are reflected). Some other authors go further than this and conceptualize Copyright as a right of plural nature, *e.g.*, as a set of different and autonomous rights which are independent from each other and feature different characteristics, behaving differently across the different circumstances faced by each legal situation. This would be the easiest way to explain certain particularities of the Portuguese framework.

The main structural characteristics which are summoned to the definition of the nature and legal grounds of Copyright, according to the Portuguese Law are as follows:

- Copyright is generated by the simple fact of materialization or externalization of the intellectual creation (article 3 of the PCRRC);
- By such generational fact, the intellectual creator acquires simultaneously, some faculties of personal and patrimonial nature;
- By granting copyright to a third party, on a contractual basis, the intellectual creator doesn't waive his/her personal rights in relation to such creation, since only the patrimonial rights are transferred;
- Within the content of Copyright there is a set of rights which are lifelong, and neither transferrable nor waivable, not subject to caducity - these rights are not subject to succession after the death of the author, although the successors do acquire a new set of faculties destined to preserve the integrity and genuineness of their deceased relative's work:
- Objective and subjective circumstances endured by most patrimonial faculties or by the property right over the material media containing the work do not affect the moral aspect of the work, both faculties presenting different characteristics;

We may therefore conclude that, at least, two sets of faculties do coexist, with different characteristics, subject to different and specific sets of rules. This makes it hard to defend a pure monist conception of Copyright, but it all depends on whether we consider the patrimonial side of "*temporary exclusive of commercial exploitation*" as more important than the few moral faculties which are a tribute to the personality of the author. In fact, a general overview could lead to regarding Copyright as an increasing form of protection for the so-called Cultural industries, where the weight of the creator's personality is progressively fading as mass production and content distribution of complex and multimedia works, mostly of collective nature, take over the market of cultural goods and services.

As for related rights, some moral faculties are also granted, such as the right to identification (article 180) and to integrity of the performance (article 182). However, the holders of related rights may never hinder the exercise of author's rights (article 177).

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

In 2009, the Ministry of Culture has entrusted to a highly-reputed Consulting Company (*Augusto Mateus & Associados*) the measurement of the weight of creativity and culture in the generation of wealth and employment, using statistical data from 2006.[2]

The study adopted a broad concept of Culture & Creativity, according to UNCTAD, WIPO, UNDP, E.U. OECD and UNESCO, and proposed a three-levelled approach, encompassing i) nuclear activities; ii) cultural industries; iii) creative industries. It concluded that the sector altogether, contributed with 2,8% of all the wealth created in Portugal on the year 2006, generating an added value of approximately € 3.700 million.

[2] Available at www.gepac.gov.pt/.../04-o-sector-cultural-e-criativo-em-portugal-vint-pdf.aspx and the executive summary can be found at www.gepac.gov.pt/.../04-o-sector-cultural-e-criativo-em-portugal-sumario-pdf.aspx

- The first subsector to be considered included i) Performative Arts; ii) Visual and Literary Creation Arts; iii) Cultural Heritage – this subsector contributed an added value of € 277 million, thus, 7,5% of the whole sector, having generated 13.339 jobs, thus, 10,5% of the whole sector;

- The second subsector included i) Cinema and Video; ii) Publishing; iii) Music; iv) Radio and Television Broadcasting; v) Equipment; vi) Distribution/Trade; vii) Cultural Tourism - this sector contributed an Added value of € 2.908 million, thus, 78,8%, having generated 100.667 jobs, thus, 79,2% of the whole sector.

- The third subsector included i) architecture; ii) design; iii) advertising; iv) software services; v) creative components in other activities – this subsector contributed an added value of € 505 million, thus, 13,7%, having generated 13.023 jobs, thus, 10,2% of the whole sector.

The study further concluded that the main segments of cultural industries – publishing, radio and television broadcasting – are responsible for practically half the wealth produced by all the sector, thus reinforcing an image of substantial polarization and unbalance in the relative weight of the different structural parts.

The dynamics of wealth creation has run along the dynamics of the Portuguese economy resulting in an aggregated growth of 18,6 %, that is a yearly average medium rate (AMR) of 2,9%.

In terms of employment, 127 000 jobs were created in 2006, that is 2,6% of the whole nation, indicating a qualification and productivity level which is higher than the national average. Along the period of 2000-2006, 6500 jobs were created by the Creative and Cultural Sector. In aggregated terms, employment has grown 4,5%, as opposed to only 0,4% in the national economy as a whole. The publishing subsector featured as the larger employer, grossly one third of all the sector (32%) followed by Equipment and Distribution & Trade.

The dynamic performance of Art, Architecture and Design as well as Cultural and Historical Heritage together with Cultural Tourism stands out as highly positive, whereas conventional music and traditional media strikes us as rather on the negative side.

The wealth generated by the sector has overcome the performance of other sectors, such as textile and clothing and compares rather well with the automobile sector, for example.

In 2013, the same Consulting Company was commissioned another study, this time on the role of Culture & Creativity on the internationalization of the Portuguese Economy[3], and the main conclusions were as follows:

The evolution of the "creative balance of trade" in the decade from 2002 to 2011 according to the CNUCED shows that the exporting of the creative industries (including design, handcraft, visual art, publishing, new media and audiovisual and advertising, architecture , R&D audiovisuals and other recreational and cultural services as the exporting of related industries (raw materials and supporting equipment that ensure creation, production, distribution and consumption of creative products) have been highly dynamic and

[3] Available at www.gepac.gov.pt/gepac-seminarios/cultura2020/estudo-augusto-mateus-pdf.aspx and the executive summary can be found at www.gepac.gov.pt/gepac-seminarios/cultura2020/sintese-amateus-pdf.aspx

resilient with a higher degree in relation to the national average. They are recovering from the collapse of international trade since 2009, at a pace which is equal or superior to the highest exporting sectors such as chemistry, automobile, food or electric equipment. An important contribution is given by the Portuguese Speaking Markets projecting the language as an extraordinary powerful platform for achieving cultural identity.

A more recent report, commissioned by the Portuguese Government, namely the GEPAC [4] has attempted to understand the main conceptual and methodological differences between the various Cultural Satellite Accounts (CSA) [5], gather statistical information and harmonize it, given the restrictions discovered, analyze the cultural sector through descriptive statistical tools and identify the main irregularities and differences between countries, then formulating explanatory hypothesis based on economic and social factors and identifying any clues which may serve as basis for future policy measures.

The report concludes that:

- Portugal is the Country, among those encompassed by the CSA project, with the minor weight of the cultural sector in the creation of wealth, even *per capita*, and the one which accounts for less productivity in the cultural sector;
- Cultural sector doesn't appear as the most resilient sector to [eventual] product shocks. The post-2008 economic crisis has had larger effects on the cultural sector than on the rest of the economy in all the compared Countries;
- The domain of books and publishing represents the cultural domain which has the largest weight in the Economy, followed by Audiovisual and Multimedia. Heritage, Archives and Libraries as well as Performing Arts represent the smallest pieces of the cultural sector, for most Countries compared.
- Culture is not the minor or even a niche sector among the economies in comparison, as it may be compared to Agriculture, Food Industry or Automobile Sector, in most of the studied Countries;
- Culture is positively related to the level of life-satisfaction, with the educational level and the recreational use of new Communication and Information Technologies (CIT);
- Portuguese expertise is centered on more traditional economic sectors (Textile, Automobile, etc.) and not so much in the cultural and creative sector.
- CSA are a useful tool to ascertain the economic dimension of the cultural sector; however, they present serious limitations in terms of international comparability.

[4] Heitor, F. (coord), (May, 2016), *A dimensão do setor cultural segundo as Contas Satélite da Cultura euopeias: Uma comparação metodológica e setorial das experiências de Portugal, Espanha, Finlândia, Polónia e República Checa na criação de Contas Satélite da Cultura,* Gabinete de Estratégia, Planeamento e Avaliação Culturais available at https://www.igac.pt/documents/20178/557437/A+dimens%C3%A3o+do+setor+cultural+segundo+as+Contas+Sat%C3%A9lite+da+Cultura+europeias.pdf/55a86760-f16c-4c57-a01c-0de22e9e01fa

[5] According to Regulation (EU) 2013/549, paragraph 22.04 "*Satellite accounts can meet specific data needs by providing more detail, by rearranging concepts from the central framework or by providing supplementary information, such as non-monetary flows and stocks. They may deviate from the central concepts. Changing those concepts can improve the link with economic theory concepts such as welfare or transactions costs, administrative concepts such as taxable income or profits in the business accounts, and policy concepts such as strategic industries, the knowledge economy and business investments used in national or European economic policy. In such cases, the satellite system will contain a table showing the link between its major aggregates and those in the central framework*". Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0549&from=en

Last, but not least, the Regulatory Authority (IGAC) also provides statistical data, updated on a yearly basis, on its own activities, namely the number of works and performances which are registered by its services (for the purpose of evidence providing, rather than as a constitutive formality) and the number of preventive and protective interventions in case of Copyright infringement[6].

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

As regards methodology, Augusto Mateus & Associados has stated clearly that the first difficulty in this kind of work is to determine the concept of Cultural Sector, given the fact that the reality is always changing very fast, according to a vast and complex set of social, economic, institutional, behavioural and technological changes that started to question the previously established and commonly accepted dimensions of "culture" and "cultural policies". The second large difficulty lies with the inadequacy of statistical categories to "measure up" Culture, since the existing ones are too encompassing and sliding, joining creative and non-creative activities together. Much of the data available is neither directly nor indirectly comparable or aggregable internationally due to the different statistical methodologies applied. In fact, the existing national statistical systems don't capture a significant part of artistic and cultural work, namely voluntary or informal, temporary, whether integrated or as a form of "outsourcing" collaborative work.

Several studies and reports issued by OECD, UNCTAD, DCMS (UK), European Cultural Foundation and KEA (EC), have been compared in order for Augusto Mateus & Associados to come up with a final concept of Cultural sector, and the conclusion was that the sector should be structured along with the CAE (Classification of Economic Activities) that resulted more adapted to the national reality and allowed an international comparison, namely regarding the European reality. As far as research methodology is concerned, the 2016 report, issued by GEPAC, has followed four essential and sequential steps:

1. Analysis of the documents structuring the creation of the CSA: i) EU methodological recommendations (ESSnet-Culture, 2012) and other important previously issued documents; ii) previous studies produced for GEPAC, such as the one by Augusto Mateus & Associados (2010)[7]; iii) CSA reports for each Country participating in the CSA project.
2. Comparison between CSA with particular focus on economic activities accounted as cultural and its aggregation in domains and functions;
3. Economic analysis of the main results for the CSA;
4. Drawing of Conclusions and Recommendations.

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

After some extensive search, there seems to be no such research, other than the empirical verification of periodical announcement by CMOs of the benefits awarded to their members, on account of rights collected.

[6] The most recent report is available at https://www.igac.pt/documents/20178/48338/BE+2015/825b26a7-5081-4d19-998e-242ec0c071ea.
[7] See above, pages 4-5

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

In Portugal, collective management is not the general rule, and it is only mandatory in certain specific situations, as far as author's rights are concerned, such as the exception of reprography and private use, where the remuneration is a levy charged upon blank media and reproduction equipment, collected by an overarching CMO structure named AGECOP, of which all the CMOs representing the different categories of rights are members, and in cable retransmission, except when the rights are transferred to broadcasting organisations.

There are other cases where the law grants authors a right to an equitable remuneration, such as in the case of secondary fixation of the same phonograms (article 144); broadcasting or communication to the public of a work previously fixated with author's permission encompassing such forms of communication (article 150) and commercial use of copyright protected photographs (article 165). Usually, in practice, such equitable remuneration rights are only made effective through CMOs, but it is not a legal rule.

SPA is the older CMO and it represents all kinds of authors, participating in most negotiations and litigation on their behalf, and collecting rights for all major forms of use, mostly private copy and cable retransmission, where collective management is compulsory, pursuant to arbitration decisions, and also blanket licensing deals with broadcasters, encompassing the "small rights". For "large rights" such as transformation and adaptation of songs as well as audiovisual material, SPA ensures the communication and negotiation with rightholders, in order to reach agreements and provides support to all licensing deals.

For related rights, namely performers' rights, collective management is the general rule, since Law 50/2004 of 24 August 2004, because there is a legal presumption of transfer encompassing all their exclusive rights (broadcasting and communication to the public; primary fixation; direct or indirect, temporary or permanent reproduction; making available) to the broadcasting organisations or to audiovisual producers, except for the right to make available, which is expressly excluded from the legal presumption. In case of such transfer, the unwaivable right to an equitable remuneration is preserved, but it must be managed by a CMO. The right to make available may be entrusted to a CMO, but this is no longer mandatory, since the modification carried on by Law 32/2015 of 24 April 2015. Performers are also granted an equal share of the equitable remuneration collected by phonographic and audiovisual producers for public performance of commercial phonograms or videos, generally applied as referring to communication to the public of broadcastings (article 184(3)) charged to hotels, restaurants, pubs, and any other public establishments.

Phonogram and Audiovisual producers collect their broadcasting rights (article 184 (2) and (3)), cable retransmission rights (article 7 of Decree-Law 333/97 of 27 November 1997 and communication to the public rights (article 184 (2) and (3)) through their respective representative CMOs (AUDIOGEST and GEDIPE). In the latter case, both CMOs share with the performers' CMO, GDA, on a 50/50 basis, the income collected in hotels, restaurants, pubs and all the public establishments where there is communication to the public of phonograms/videos/broadcasting. AUDIOGEST and GDA use the common brand PASSMUSICA in view of licensing establishments. GEDIPE has implemented an internet tool which makes it very easy and

practically automatic for users to pay according to the effective number of vacancies occupied per year. Broadcasting organisations are not legally required to collect cable retransmission or any other rights via CMOs, they are not represented by CMOs and they do not participate from the income collected for private use (which, in fact, would make sense, given the fact that most people record broadcastings for private use, and that they also own exclusive reproduction rights) but they participate in the sharing of retransmission rights on behalf of their own in-house productions, e.g. in the category of audiovisual producers.

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

The subject matter of Collective Management Organisations (CMOs) has been dealt with by Law 26/2015 of 14 April 2015, which has substantially implemented Directive 2014/26/EU of 26 February 2014, (although in a rather incomplete manner, leading to the need of a thorough revision and inclusion of many new provisions, now in preparation).

There were, however, some traces of innovation which was very warmly welcome by the cultural industry:

One of them was the introduction of provisions on the issue of One-Stop Shop Licensing for Related Rights, according to article 37 of Law 26/2015 of 14 April 2015. The following text is a quote from such article 37:

"1- *Collective Management Organisations representative of the different categories of Rightholders, together with the entities representative of users shall make publicly available the so-called «joint licensing one-stop shops» which encompass: i) Licensing procedures for public performance of works, phonograms and videos; ii) A single procedure; iii) Licenses which are issued in representation of the respective Rightholders."*

"3-The Licensing one-stop shops must ensure:

a) the effective application of the general tariff applied by the various Collective Management Organisations and the distribution of the amounts collected;

b) the autonomous determination of their respective tariffs, through the mechanisms provided for in this law;

c) the allocation of respective operating costs depending on the amount of compensation awarded to each of the collective management entities;

d) efficient and transparent management of the licensing service;

e) effective control of licenses issued on behalf of the various Collective Management Organisations, in equitable and parity terms;

f) speed and ease of access to licensing by the interested users;

g) autonomy of its organization and functioning in relation to Collective Management Organisations.

4- In the absence of agreement between Collective Management Organisations, or between these and the entities representing users, for the implementation of the joint licensing One-Stop Shops, IGAC, which is the

Regulatory Authority, within the Ministry of Culture, must hear from the entities involved and mediate with a view to seeking its entry into operation.

5- Should the absence of an agreement continue to exist, IGAC [shall] propose to the Member of Government responsible for the area of culture, [the adoption of] appropriate measures for the effective implementation of licensing mechanisms.

6- The provisions of this article shall be without prejudice to the possibility of Collective Management Organisations to promote and issue, simultaneously, autonomous licensing and to exercise, separately, the rights entrusted to its management, in relation to all users who have neither requested nor obtained licensing or permission through the joint One-stop shops pursuant to the preceding paragraphs."

Another important innovation brought by Law 26/2015 of 14 April 2015 is the substantial amount of provisions dedicated to negotiation and establishing of tariffs: 10 (ten) long and extremely detailed articles provide for specific forms of procedures for CMOs to negotiate and to enter in agreement with entities representative of users. General tariffs are to be set by CMOs and duly advertised on all the websites, taking in consideration the economic value of the use of the rights in question, also in accordance with the real functioning of the market and the effective amount of such use.

However, the Law determines that such general tariffs are to be the result of negotiations between the CMOs and the entities which are representative of users, a quality that must be demonstrated in relation to a significant number of undertakings, entrepreneurs and business people which are typic or current users. In case of doubt as to whether any entity is representative, the IGAC must notify such entity to provide evidence on how many associates it represents. Otherwise, CMOs are not legally bound to enter negotiations with such entities or, in case they receive any proposal, they are allowed to refuse them, subsequently applying their own unilaterally fixed tariffs. Even after the conclusion of any agreement, the possibility of annulment remains, if made on behalf of another entity who demonstrates a higher level of representativeness, within a thirty-day term.

The law determines the precise terms for the parties to enter an exchange of proposals and counterproposals, aiming at reaching a final agreement on general tariffs which is to become legally binding for all users who fulfil the objective requirements for its implementation, independently of their membership.

During the course of negotiations, the previously set tariffs shall apply or interim licenses are to be issued, so that the use of CMO's repertoire is never effected without a proper licensing, to be replaced by the terms finally agreed between the Parties. In case of disagreement there is also a provision for arbitration.

There is also the possibility that, after a failure in the negotiating procedure, a collective negotiating procedure takes place, provided the entities are in fact, representative of users. In case of failure of the first negotiating procedure, there may still be an individual negotiating procedure, which applies only to one user, in case there is no previous agreement or tariff in force which applies to that specific type of use.

In case of agreement, or unilaterally establishing of tariffs, the result is to be deposited with the IGAC and made available to everyone in its website, namely https://www.igac.pt/atos-de-deposito.

Resorting to any of the above referred forms of negotiation is not exclusive of the possibility for any of the users to file a Court complaint in order to obtain the necessary license or for the CMOs to react against the unlawful use of their repertoire. This provision applies whenever the remuneration or compensation to be determined is not in exchange of a free use or a legal license expressly provided for by the law.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

According to articles 75 and 189 of the PCRRC, as consolidated by Law 16/2008 of 1 April 2008, which are the main provisions on statutory exceptions and limitations to Copyright (art 75) and to Related Rights (art 189), the following exceptions and limitations have been implemented, from the general list provided for by the InfoSoc Directive:

A) In relation to authors' rights:

"Article 75

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Article 76

1 - The free use referred to in the previous article must be accompanied by:

a) the indication, where possible, of the name of the author and the publisher, the title of the work and other circumstances that identify him/her;

b) in the case of paragraphs a) and e) of paragraph 2 of the previous article, of an equitable remuneration payable to the author and the analog scope, the editor for the entity that carried out the reproduction;

c) in the case of paragraph h) of paragraph 2 of Article, equitable remuneration payable to the author and publisher;

d) in the case of paragraph p) of paragraph 2 of the previous article, of an equitable remuneration to be paid to rights holders.

2 - The works reproduced or quoted, in the case of subparagraphs b), d), e), f), g) and h) of paragraph 2 of the previous article, are not be confused with the work of those who use them, nor the reproduction or quotation can be so extensive as to prejudice interest in such works.

3 - Only the author has the right to meet in volume the works referred to in point b) of Article previous paragraph 2. "

B) In relation to Related Rights (in general):

"Article 189

Free use

1 - The protection granted under this Title shall not cover:

a) private use;

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

c) use for exclusively scientific or teaching purposes;

d) ephemeral fixation by a broadcaster;

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

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

2 - The protection granted to the artist in this chapter does not cover the performances arising from the exercise of functional duties or employment contract.

3 –The limitations and exceptions that fall on author's rights also apply to related rights in all that is compatible with the nature of these rights."

Differently from author's rights, Article 191 of the Portuguese Code of Copyright and Related Rights contains a special provision, only applicable to related rights, establishing that "*When, despite the diligence of the interested person, certified by the Ministry of Culture, it is not possible to contact the right holder or he/she does not state its position within a reasonable period granted for that purpose, his/her agreement is assumed, but the person interested may only make the intended use by securing the payment of the due remuneration*."

Some academics are very critical of the expressions "legal licenses" or "compulsory licenses", since they regard licensing as a voluntary act, in every circumstance, so if the use is allowed by legislative act, it follows that the right holder's will has nothing to do with it.

However, there are some specificities in the PCRRC where the right holder's authorisation is not necessary, since the law itself provides users with the necessary legitimacy:

Besides the exceptions and limitations provided for by articles 75 and 189, some of them are subject to compensatory remuneration, according to art 76, there are the specific cases of articles:

a) 52(2), providing the publisher with right to obtain a Court authorization for the new edition of a work when the published copies have all been sold and the author or his heirs refuse to authorize it - the Court will grant the necessary permission where there is public interest except in case of moral justification preventing the new edition – this case may qualify as a compulsory license;
b) 70(3), providing that a posthumous work may be used 25 years after the author's death in case of lack of any action on behalf of the heirs – any moral objections by the latter may be claimed in Court;
c) 129(2), granting permission for translating a cinematographic work spoken in a foreign language;
d) 144(1), granting permission for new fixations of music previously fixated, subject to the payment of an equitable remuneration, and to the minimum technical quality required by the author;
e) 150, granting permission to rebroadcast a work which has been fixated to allow market uses, including broadcasting and communication;

However, in terms of exceptions and limitations, and despite the provision set up by article 76 (1) sections b), c) and d) only the remuneration for private copy (subsection a)) is, in fact, duly regulated, by the Law 49/2015 of 05 June 2015, that modifies and updates Law 62/98 of 1 September 1998 on private use.

This new law on private use was enacted on 05 July 2015, except for the limitation to 20% of the maximum cost of management of the entity appointed to manage the private copy remuneration (AGECOP), that only applies from the 1st January 2016 onwards. The original Law 62/98 of 1 September 1998, created this CMO, called AGECOP, which was legally determined to be formed by CMOs representing Authors, Artists, Publishers as well as Phonographic and Video Producers. The law disciplined what subjects should be included in the Statutes, and stated in considerable detail the main governance and functioning principles of such entity.

So, as far as compensation for private copy is concerned, the model instituted by the legislator was compulsory collective management, where all the income corresponding to both analogue and digital media, as well as reproduction equipment is collected by this all-encompassing structure, in fact an aggregatory CMO. Then, AGECOP distributes such income, after deducting its own management fee (not

higher than 20% of collections), as well as 20% for its cultural fund, by the associate CMOs according to a distribution key provided by the legislator himself:

a) In case of income provided by levies on reprographic copies: 50% for authors/50% for publishers;
b) In case of income provided by audiovisual media and equipment: 40% for authors/30% for artists; 30% to be split among phonographic and video producers.

So, the compensation for private copy is always of compulsory collective management, imposed by the law.

The law of 2015 significantly broadened the effectiveness of the levy charged on blank tapes, reproduction equipment and storage media, by encompassing digital storage equipment, which were not considered, until that moment, for the purposes of levy collection, due to aggressive lobbying by the digital equipment's' manufacturers and the policy to foster access to Knowledge in the Age of Information Society. The rate to apply to each different type of media or equipment is also determined by the law, as legal tariff, appending to the Law on private use.