OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Creativity Comes at a Price

The Role of Collecting Societies

IRIS Special

IRIS *Special:*
Creativity Comes at a Price
The Role of Collecting Societies

European Audiovisual Observatory, Strasbourg 2009
ISBN: 978-92-871-6591-6
EUR 95

Director of the Publication:
Wolfgang Closs, Executive Director of the European Audiovisual Observatory
E-mail: wolfgang.closs@coe.int

Editor and Coordinator:
Dr. Susanne Nikoltchev, LL.M. (Florence/Italy, Ann Arbor/MI)
Head of the Department for Legal Information
E-mail: susanne.nikoltchev@coe.int

Contributing Partner Institution:

Institute of European Media Law (EMR)
Franz-Mai-Straße 6
D-66121 Saarbrücken
Tel.: +49 (0) 681 99 275 11
Fax: +49 (0) 681 99 275 12
http://www.emr-sb.de

Editorial Assistant:
Michelle Ganter

Marketing:
Markus Booms
E-mail: markus.booms@coe.int

Translation/Proof-reading:
Caroline Bletterer, Véronique Campillo, France Courrèges, Paul Green, Marco Polo Traductions, Boris Müller, Nadja Ohlig, Stefan Pooth, Erwin Rohwer, Sonja Schmidt, Roland Schmid, Nathalie Sturlèse, Catherine Vacherat, Candelaria Van Strien-Reney, Anne-Lise Weidmann

Typesetting/Print:
Pointillés, Hoenheim (France)

Publisher:
European Audiovisual Observatory
76 Allée de la Robertsau
F-67000 Strasbourg
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int

Please quote this publication as:
Susanne Nikoltchev, Ed., IRIS *Special:* Creativity Comes at a Price – The Role of Collecting Societies
(Strasbourg, European Audiovisual Observatory, 2009)

Creativity Comes at a Price
The Role of Collecting Societies

Published by the European Audiovisual Observatory

> "With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:
> to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living."
> *Art. 4 para. 1 European Social Charter (revised) of 3 May 1996 (ETS 163)*

The signatories to the European Social Charter underline in its Preamble the fact that the standard of living and the social-well being of their populations are key to safeguarding human rights. In all likelihood they were similarly aware of how central this is for the prospering of their markets.

According to the European Social Charter, the goal of fair remuneration applies indiscriminately to all branches of the industry including the audiovisual sector. But is it also guaranteed for the many different professions that form that industry? For example, have states established satisfactory systems to acknowledge the value of creative intangible contributions to audiovisual works such as those of performers? And what of the input of lighting designers, whose activity consists in providing the limelight even if they themselves do not always share it? How exactly does intellectual property law honour these indispensable contributions to audiovisual works? What rights are acknowledged and who takes them? What kind of use do they cover? Do professionals whose creativity leaves its mark on audiovisual works receive adequate payment when compared to the gains made by persons leading and financing audiovisual works such as producers?

Summarised in the language of the European Social Charter: how does the law secure the fair remuneration of script writers, set designers, cameramen, sound designers, lighting designers, editors, choreographers, costume designers, make-up artists, actors, dubbing artists, dancers, musicians, vocal performers, conductors and similar professional groups? And how high does it place their claims compared with the claims of directors and producers, who admittedly play the central role in the making and exploiting of audiovisual works?

Even in an ideal world with adequate rights and crystal clear rules, the combination of the mere number of persons potentially contributing to a single audiovisual work and the many different ways of exploiting each work complicate the establishment of any remuneration system. Global services pose an additional challenge to the monitoring of uses that would necessitate the payment of rightsholders not least because national copyright systems still differ significantly.

If one looks at the way in which the different national regimes define the statute of the author, wone finds a wide array of solutions. The different approaches share the principle that an author must have contributed to the creation of a work but then diverge with regard to specific requirements and how to apply them to the professional groups concerned. As a result film directors are the only group of professionals considered unanimously to be authors. Producers are authors in Great Britain as well as in Turkey for films made until the law was changed in 1995. Authors of pre-existing works such as books adapted for a film, for example, are also authors of the resulting audiovisual works in France

and Norway but not in Germany. Actors with a particular prominent role can be authors in Austria and Germany. Certain professionals providing technical services such as sound and light design are authors in many of the countries but not at all in Hungary or Spain. Choreographers, script and dialogue writers, editors, costume designers, make-up artists, film music composer etc. may or may not be authors depending on which law applies. A professional who made a contribution that would generally qualify him as an author might still not be considered as such, if he acted, for example, as an employee in the Netherlands. It is then the employer who takes authorship.

Not being an author, however, does not necessarily leave the person who made a creative contribution without rights given that he might still qualify as holders of neighbouring rights. Concerning neighbouring rights, however, we also note different national approaches and in spite of the existence of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. For example, while most countries confer upon performers the right of reproduction and communication to the public of fixations of their performances, French and Austrian copyright law assign (unless a contract stipulates otherwise) these exploitations rights to the producer or production company if the performing artists knowingly participated in making a professionally produced film or other cinematographic work.

Nevertheless some harmonisation has been achieved thanks to certain EC Directives. This concerns specific areas of use such as cable rebroadcast and private use payments on blank carriers, where EC legislation requires uniformly fair remuneration of rightsholders.[1]

New online modes of exploiting audiovisual works raise new questions as to the scope of existing rights *versus* recognition of online rights. Attached thereto are problems of negotiating and collecting remuneration for new services. Again different states tend to draw different demarcation lines.

Rightsholders are often not equipped to know about and even less to pursue the claims to which they are entitled in return for their contributions to audiovisual works. Therefore, they unite in order to manage their rights collectively and build up a more powerful negotiating position.

This is the cue to bring on the collecting societies. They are the middlemen between rightsholders and users of audiovisual works. For many professional groups of the audiovisual sector, working through collecting societies is the main if not the only way to recoup payment for their creative contributions. Collecting societies, as traditionally conceived, act on behalf of their members. They "negotiate rates and terms of use with users, issue licenses authorizing uses, collect and distribute royalties. The individual owner of rights does not become directly involved in any of these steps."[2] Nowadays, many variations of this traditional concept exist. Collecting societies may allow different levels of members' participation in management decisions. Members may transfer all or only part of their rights to collecting societies. They may entrust them with the exploitation of their rights even on a case by case basis. Collecting societies may be established by law or founded by their members.

In contrast, some features of collecting societies seem invariable. They are organised country by country and often profession by profession, sometimes with more than one collecting society representing a certain professional group. This IRIS Special informs about the national collecting societies that are most important for the audiovisual sector in each country. This, of course, does not mean that other collecting societies do not exist.

For Poland this publication reports on the 14 collecting societies currently registered for the audiovisual sector. For Germany and Great Britain it contains information on the 12 main collecting societies, for the Netherlands on 11 and for Turkey on nine collecting societies. The Austrian and

1) See the Satellite and Cable Directive (93/83/EEC) and the Directive on Rental and Lending Rights (92/100 EEC).
2) See http://www.wipo.int/about-ip/en/about_collective_mngt.html

Spanish contributions cover eight, and the Swiss five collecting societies. The Norwegian report covers one collecting society named Norway Copyright ("NORWACO"), even though Norway has 34 rightsholders organisations which negotiate distribution plans for their respective members. Yet all of them operate through NORWACO when it comes to collecting and distributing royalties and enforcing copyrights. Likewise for France which is particularly rich in collecting societies, this IRIS Special focuses on the three collecting societies which essentially carry out collective management for audiovisual works. Finally, two relevant collecting societies are discussed for Hungary and Italy.

Normally rightsholders may choose between managing their rights individually, on the one hand, and using collective management, on the other. If they choose to place their rights in the hands of collective management societies they might have an additional choice between different organisations. However, the law might impose mandatory rights management for certain types of rights. Usually the collection of remuneration for cable rebroadcast comes under a mandatory management scheme. Often mandatory rights management is handled by collecting societies established by law. For example, the Dutch government set up five collecting societies to deal with mandatory rights management.

Collecting societies expand their territorial reach (which is restrained to their country of establishment) by cooperating with other collecting societies of other countries. To this end, they conclude bi-lateral agreements with reciprocal obligations and rights. As a result each of them can pay its members remuneration which is due and collected in a country for which one of its partners administers the rights.

In summer 2008, this well-established practice came under scrutiny. Upon request of RTL and Music Choice, the European Commission examined reciprocal representation agreements that collecting societies operating under the umbrella of the International Association of Collecting societies of Authors and Composers (CISAC) had concluded. Most of them were based on CISAC's model contract. The Commission found a violation of the European rules on restrictive business practices (Art. 81 ECT) inasmuch as the agreements contained membership clauses, which according to the Commission deprived rightsholders of a free choice between different collecting societies. Furthermore, the Commission concluded that the anti-trust law was infringed by the exclusivity clauses used in the agreements. With these clauses collecting societies empowered each other to administer their respective repertoires on an exclusive basis for the respective territories. This practice, according to the Commission, prevented collecting societies from offering licences to users outside their domestic territory and therefore cemented territorialisation of European markets.[3] The Commission also stated that the CISAC decision does not call into question the general system of bi-lateral agreements but it bans the membership and exclusivity clauses.

Territorial fragmentation of the European market along national borders as discussed in the CISAC decision is a permanent concern to the European Commission. It was also an issue at a major conference organised by the Slovenian EU Presidency. The increasing need for cross-border licensing raises a challenge for the current licensing system which is rather arranged on a country-by-country basis. Yet as was concluded during the conference, multi-territory licensing needs further reflection especially taking into consideration that a European legislative framework will not be binding in the US and might therefore be disadvantageous for the EU market.[4]

This IRIS Special analyses neither the CISAC case nor the general multi-territory licensing issue. Instead it seeks to illustrate current practices of collective rights management. It thereby necessarily sheds some light on the practical consequences which changes to the legal framework for the existing system might entail.

3) For additional information see Christina Angelopoulos, "Collecting Society Practices that Limit the Freedom of Music Authors and Users Banned" in IRIS 2008-8: 5, available at http://merlin.obs.coe.int

4) Brdo Conference 5 June 2008 on content Online for Creativity, Panel III: management of copyright online.

Another major issue for collective rights management also addressed in this IRIS Special is how to resolve situations where the rightsholders are unknown. In some countries collective management offers a solution to this problem. For example, Norway introduced the so called extended collective licences which may supplement agreements between users and authorised copyright organisations and are binding not only on the parties but also on non-organised rightsholders from within or outside Norway. This enables the user to acquire all rights for the envisaged use of an audiovisual work. At the same time it puts the rightsholders who have been bound by the extended collective licence without being a member to the collecting society and without having negotiated the agreement on the same footing as organised rightsholders. Both groups have the same rights concerning the distribution of remuneration collected and distributed by the rightsholders' organisation.

The key to successful rights management is the actual remuneration. Who receives payment and for what uses? If rights are collectively managed, how and by whom are the amounts determined and what procedures are applied? These are questions that can make their way up even to a constitutional court as was the case in Poland, where the conditions for preparing and adopting remuneration tables for the use of works or performances covered by collective management were found to violate the Constitution. The main reason was that rightsholders lacked influence on the process.

Remuneration also represents a particular challenge as far as the online exploitation of creative works are concerned. This IRIS Special describes the European mix of contractual and statutory arrangements of individual and collective management that might cause rightsholders to shy away from collecting remuneration in different countries. Reciprocal agreements between collecting societies address the problem to some extent and in addition, they facilitate clearance for the exploitation of protected words, which is essential for online services and thus for the generation of remuneration claims by rightsholders. National laws differ as to whether or not and under what conditions rightsholders can sign away their rights for unknown uses. Italy is currently in the process of modernising its law to better address online and VoD exploitation. In addition, national laws do not necessarily use the same rules for fixing remuneration in return for future rights. In France, for example, online operators and production companies have to pay to the French authors' society a percentage of the price paid by the public to access the content while in Germany the transfer of rights for unknown means of exploitation entitles to a "reasonable separate remuneration".

As this publication also reveals, collecting societies generally do not restrict their services to the pure management of rights. Often, they offer social benefits to their members and support their branch of the industry financially through special funds. Different mechanisms secure participation rights of members to collecting societies.

This IRIS Special paints the broad picture of remuneration for creative contributions to audiovisual works spanning from (I) the legal framework establishing and governing copyrights and neighbouring rights to (II) the practical management of these rights to (III) the role, organisation and functioning of relevant collecting societies to finally (IV) the very specific perspective of rightsholders to audiovisual works or performances. Country-by country reports on the rules and practices in 12 European countries, namely, Austria, France, Great Britain, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Spain, Switzerland and Turkey, make clear that remuneration for intellectual property rights is a difficult issue and one that is quite entangled with the cultural and political tradition of each country. To every possible extent, the reports follow the same structure reflected in points (I) to (IV) mentioned above.

We are very grateful to all our authors for having supplied the country reports to this publication and thus helping us to cater to the need auf the audiovisual industry for factual background to the ongoing discussions. This IRIS Special is definitely a work of co-authorship in various senses. In particular, it is a product of the cooperation between the Observatory and its partner institution, the EMR. Together we developed the concept, won the support of the authors, briefed them and edited their contributions. Translators and proof readers complete the team that made this IRIS Special possible and we extend our thanks to them.

Finally it needs to be pointed out that other recent Observatory publications are also important to the questions of remuneration of creative contributions to audiovisual works.

This is true in particular for the IRIS *plus* on "The Legal Status of the Producer of Audiovisual Works in the Russian Federation" authored by Dmitry Golovanov from the Moscow Media Law and Policy Centre" and his preceding IRIS plus on "Transformation of Author's Rights and Neighbouring Rights in Russia". Stef van Gompel of IViR wrote another important IRIS *plus* on "Audiovisual Archives and the Inability to Clear Rights in Orphan Works". All three articles are available on the Observatory's website. Furthermore, several copyright issues were already raised by the IRIS Special "Legal Aspects of Video on Demand". The forthcoming IRIS *plus* by Francisco Cabrera from the Observatory on Music & Film, soon to be available, completes the picture.

Strasbourg, February 2009

Wolfgang Closs
Executive Director

Susanne Nikoltchev
Head of Department for Legal Information

TABLE OF CONTENTS

AT

AUSTRIA

Harald Karl
Pepelnik & Karl Attorneys-at-law

I. Legal Framework

The legal provisions governing the rights of authors of films in Austria are contained in the *Österreichische Urhebergesetz* (Austrian Copyright Act – UrhG)[1] and are mainly based on the original Act of 1936, which has since undergone numerous amendments and through which EC directives have been largely implemented.[2] As far as copyright management is concerned, the *Verwertungsgesellschaftengesetz 2006* (Collecting Societies Act 2006 – VerwGesG *2006*)[3] also has significant relevance. The activities and duties of the individual collecting societies are also defined in their respective operating licences, which are granted in the form of a public law decision, and the regulations and distribution rules which each collecting society adopts. As well as these provisions, copyright rules are enshrined in the *Kollektivvertrag für Filmschaffende* (collective agreement for film professionals), the main purpose of which (similar to the German pay agreements) is to set out the employment conditions of film professionals.[4]

Articles 38ff. UrhG contain a series of special provisions for *gewerbsmäßig hergestellte Filmwerke* (professionally produced films). According to the courts, the term *gewerbsmäßig* (professionally) should be interpreted in a broad sense[5] and includes all films meant for commercial exploitation, even those produced for public service broadcasters or types of films that do not normally achieve commercial success. In practice, the difference between professionally and non-professionally produced films has little significance, because, according to the courts, the vast majority of films are categorised as "professionally produced".

1) *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte* (Federal Act on copyright in literary and artistic works and related rights - *Urhebergesetz*), Federal Gazette No. 111/1936 as amended in Federal Gazette I No. 81/2006, available at: http://www.rtr.at/de/vwg/VerwGesGesetze . All Austrian laws are available at: www.ris.bka.gv.at
2) It should be noted that, not least with regard to the *cessio legis* – see point 5.1, below – it is doubted in some quarters whether Austrian legislation is compatible with the EC legislative framework, i.e., with EC directives, see Walter, *Urheberrecht*, para. 398f.
3) *Bundesgesetz über Verwertungsgesellschaften* (Federal Act on Collecting Societies), available at: http://www.rtr.at/de/vwg/VerwGesGesetze . This was adopted in 2006 under an amending act (*Verwertungsgesellschaften-rechtsänderungsgesetz 2006*, Federal Gazette I No. 9/2006), through which the *Urhebergesetz* (Copyright Act) and KommAustria-*Gesetz* (KommAustria Act) were amended.
4) The collective agreement is available on the website of the *Fachverband der Audiovisions- und Filmindustrie* (Association for the audiovisual and film industry - FAF) at http://www.fafo.at/?category=1&actP=13 . Some experts doubt whether copyright provisions in collective agreements are admissible under employment law, see Karl, *Filmurheberrecht*, p. 159. The collective agreement does not apply to film actors.
5) Austrian Supreme Court (OGH), ruling of 9 December 1997, 4 Ob 341/97v.

1. As far as the question of film authorship is concerned, the first thing to note is that the UrhG does not contain a list of occupations by virtue of which certain film professionals (i.e., people involved in the creation of a film) are considered as authors of a film *ex lege*. Rather, Art. 10 UrhG defines an author as someone who has created a work such as a film. Under Art. 39 UrhG, someone who has contributed to the creation of a professionally produced film in such a way that, through his contribution, the film as a whole can be considered a piece of intellectual property, can demand that the film producer name him as an author in the film and in related advertising. The decisive factor is whether a film-maker's contribution to the production of the film can be defined as being of his own creation.[6] Although there are no binding rules under which members of individual occupations are recognised as authors from the outset, certain principles have emerged in practice, particularly in relation to the collective management of remuneration rights by collecting societies. According to these principles, film professionals who carry on a particular occupation are included in the distribution of royalties. It is customary for film directors, cameramen and editors to be considered as authors, along with set decorators, costume designers and set designers.[7] Actors are sometimes also considered as co-authors if they play a particularly prominent role.

The collecting society that deals particularly with the remuneration rights of film professionals ("*Filmschaffende Genossenschaft mit beschränkter Haftung*" – VDFS)[8] represents directors, cameramen, editors, set designers/decorators and costume designers, and recognises their right to a share in film royalties.

2. Screenplay writers, script writers and authors of other literary works used in the making of a film are not generally considered as authors of the film, but as authors of a pre-existing work (i.e., one used in film production).[9] Authors' rights to film royalties are managed collectively by the *Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte GesmbH*[10] (hereinafter: "Literar-Mechana"). Similarly, the creators of film music are not treated as co-authors of a film, but as authors of a pre-existing combined work[11]: Art. 11 para. 3 UrhG expressly states that the combination of music and film does not give rise to co-authorship, but rather that this is a combination of works of different kinds. Composers of film music are therefore considered to be detached from the film itself as authors of the pre-existing music. The rights to this are managed separately.[12]

3. Another occupation which does not come under the category of authors is that of performing artists. Although this term is neither used nor defined in the UrhG, it has gained acceptance in doctrine and case-law, not least due to international provisions. Art. 66ff. of the Austrian UrhG list a host of individual rights that are credited to certain people because of their artistic contribution (performance, song, reading, interpretation) to a protected work. Although no specific level of contribution to the work is required, in most cases a minimum amount of "artistic" performance is necessary – in all cases, the performance must form part of a copyright-protected work. It is undisputed that an actor's performance constitutes that of a performing artist. It is also generally accepted that individuals such as lighting technicians, sound engineers and extras should not be treated as performing artists or authors, but as technical staff.[13] Actors are the only performing artists represented by the VDFS.

4. The following can therefore be stated: although the Austrian UrhG does not clearly define which people involved in film creation should be categorised as film authors or performing artists, in practice certain professions are considered as one or the other, at least as a general principle, for the purposes of collective rights management, while others are fundamentally excluded. Directors, cameramen, editors, set decorators, set designers and costume designers are considered as authors,[14] while actors, who represent a large group numerically, are treated as performing artists. These are the only groups whose rights are managed collectively by the VDFS and Literar-Mechana. Other professions (such as lighting technicians, sound engineers, etc.) have so far failed to obtain recognition of their contributions as being protected by copyright or performance rights.

6) See Walter, *Urheberrecht*, para. 385ff.
7) See, for example, Wallentin, in: *Kucsko,* UrhG Art. 39, p. 542.
8) Full information about the VDFS is available at http://www.vdfs.at
9) For a different view, see in particular Karl, *Filmurheberrecht*, p. 179; *Walter*, *Urheberrecht*, para. 391.
10) Full information about Literar-Mechana is available at http://www.literar.at
11) A combined work exists where several authors have joined their works together for joint exploitation.
12) These rights are collectively managed by AKM (www.akm.co.at) and, where mechanical rights are concerned, by *AUSTRO MECHANA Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.* (www.aume.at).
13) See Walter, *Urheberrecht*, para. 1443ff.
14) See part 1, point 1, above.

5. Film Professionals' Rights over Films

In light of the above, the following groups of film professionals should be distinguished:

- Film authors;
- Authors of pre-existing works (particularly screenplay writers, scriptwriters, composers, etc.);
- Performing artists (actors).

5.1. For film authors, the key provision of the Austrian UrhG is the so-called *cessio legis*. Under Art. 38 para. 1 UrhG, the exploitation rights over professionally produced films belong, in principle, to the film producer. The film producer is the person on whose behalf the film is produced and who bears the economic and organisational responsibility for the production of the film. The UrhG makes no provision for (reasonable) payment to be made in return for the exploitation rights.[15]

According to the courts' interpretation, the right to exploit a film belongs originally to the film producer, which means that there is basically no actual assignment of rights.[16] The term "*cessio legis*" has therefore falsely crept into doctrine and case law and is misleading. Rather, the film producer is, *per se*, the owner of the rights to exploit the film. These rights are as follows:

- reproduction rights,
- distribution rights, including rental and lending rights,
- broadcasting rights, including retransmission rights,
- performance rights,
- the right to make the film available.

As far as exploitation rights are concerned, film authors retain the right, according to Art. 39 para. 4 UrhG, to authorise (or forbid) the adaptation or translation of the film; only people included in the list of authors enjoy this right. Unless the author has agreed otherwise with the producer, such authorisation is not required for translations and adaptations, including the completion of an unfinished film, that (in accordance with accepted practices and customs) are necessary for the normal exploitation of the film and which do not damage the author's intellectual interests in the work.

Authors also enjoy key personality rights (authorship, right to be named, protection of work), although these are restricted insofar as authors can only assert them against third parties if they are named in the film as authors. If an author fails to assert his right to be named vis-à-vis the film producer, he can neither take action against third parties for making changes to the film, nor assert his right to be named vis-à-vis third parties.

Essentially, therefore, film authors only have certain rights to remuneration, such as blank cassette fees, cable and satellite fees and lending fees. In the case of cable fees, it should be noted that, in legal terms, these are basically licence fees, since the cable network operators acquire retransmission rights from the collecting societies as part of an overall agreement – albeit at a flat rate.[17]

These film authors' royalties, which have to be collected and distributed by collecting societies, are limited in two respects: according to the second sentence of Art. 38 para. 1 UrhG, the film producer and the author are each entitled to half the copyright royalties, as long as these are not inalienable and the producer has not agreed otherwise with the author. Only lending fees (or library fees) are inalienable; incidentally, authors can waive their right to royalties (in particular blank cassette fees and cable/satellite fees).

15) The UrhG therefore does not make provision for any obligatory right to remuneration. Film professionals working under an employment contract will, in any case, receive the minimum wage set out in the collective agreement; those working under a production contract can demand reasonable remuneration in accordance with the principles of production contract law, unless it was agreed that no remuneration should be paid.

16) This also corresponds with the intentions of those who drafted the 1936 Act. The term "*cessio legis*" does not feature in either the UrhG or in the explanatory memorandum to the original Act; it did not come into use until post-war years, Karl, *Filmurheberrecht*, p. 121f.

17) The rules are summarised below; for reasons of clarity, transitional regulations have been completely omitted. An overview can be found in Walter, *Urheberrecht*, para. 406ff.

It is important to note that these royalties can only be collected by collecting societies. If an author is a member of the VDFS, he assigns to the latter his rights to remuneration, including in relation to future works, from the outset as part of his contract with the collecting society. Since he can therefore no longer claim remuneration under individual contracts, he is also protected from being cheated in negotiations with film producers. Authors are entitled to a share in the aforementioned cable fees; this is a one-third share, unless the producer has agreed otherwise with the author. This too is not, therefore, an inalienable right.

If the film producer or the person entitled to exploit a work (or the collecting society acting on his behalf) permits a cable company to show the film not only in the context of copyright, but also as the owner of other exclusion rights and if a flat-rate fee is agreed for this, the author's entitlement as mentioned in the second sentence of Art. 38 para. 1 UrhG only constitutes the proportion of the fee paid for the right to exploit the work. This rule, which was adopted as part of the 2005 amendment to the Copyright Act, was meant to clarify, in particular with regard to disagreements between the VDFS and the *VAM* ("*Verwertungsgesellschaft für audiovisuelle Medien GmbH*" – collecting society for film producers), that an author does not necessarily have the right to a share of the film producer's remuneration. The author must *ex lege* share his part of the royalties with the producer, although he only receives such a share if the right to remuneration is inalienable and if he has not agreed otherwise with the producer,[18] e.g., waived his right to it.

With regard to directors in particular, many experts doubt whether these provisions remain compatible with EC directives or can at least be interpreted as such.[19] For Art. 2 para. 2 of the Rental and Lending Directive (92/100/EEC) and Art. 2 para. 1 of the Term of Protection Directive (93/98/EEC) stipulate[20] that the principal director is considered an author of the film. Therefore, the principal director, as an author, has a number of original rights, such as the right to remuneration enshrined in the Rental and Lending Directive or the rights enshrined in the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC). Even if these rights may be lawfully altered or transferred under contract, logically speaking the *cessio legis* as the *original* assignment of rights is clearly contradictory to this idea.

5.2. The *cessio legis* does not apply to authors of so-called pre-existing works, especially screenplay writers. The author of the pre-existing work therefore owns the copyright initially without limitation.

Film producers must therefore particularly protect their filming right by means of a contract. The same applies to other neighbouring rights over the original material and other pre-existing works that are used in the creation of a film. For the granting of these rights, i.e., the right to make a film based on a screenplay or other pre-existing work and exploit the resulting film, there are no special rules under copyright contract law that – as is the case for film authors – either limit the rights of or favour the film producer.

However, Austrian copyright law is restrictive in relation to the protection of authors and contains very few provisions concerning copyright contracts. For example, contracts can be drawn up covering future, as yet uncreated works (Art. 31 UrhG); in addition, there is no binding requirement for reasonable remuneration to be paid to the author, nor any kind of right to retrospective remuneration if a film is particularly successful (like, for example, the "bestseller paragraph" contained in Art. 32a of the German UrhG). Neither is there a rule of interpretation to determine the scope of the transfer in accordance with the contract's purpose (*Zweckübertragungsgrundsatz*), as contained in Art. 31 para. 5 of the German UrhG. Exceptions include the authors' key personality rights (authorship, protection against distortion of the work) and a right of rescission, which enables an author to cancel a contract if the party entitled to exploit the work does not exercise the right to do so; a period of at least three years must be granted for the exercise of such a right.

18) Some experts also rightly doubt whether this restriction of remuneration rights, particularly the right to lending fees, is compatible with EC directives. More detailed analysis would extend beyond the scope of this article, but an overview can be found in Walter, *Urheberrecht*, para. 406ff.

19) Walter, *Urheberrecht*, para. 398f.

20) While Art. 2 para. 2 of the Rental and Lending Directive only recognises the principal director as an author "for the purposes of this Directive", Art. 2 para. 1 of the Term of Protection Directive describes the principal director of a film as an author in general terms, not just for the purposes of the Directive.

5.3. With regard to performing artists (film actors), Art 69 para. 1 UrhG stipulates, in a mirror image to the *cessio legis* of Art. 38 para. 1 UrhG, that the exploitation rights of performing artists who have participated in recitals or performances for the purpose of making a professionally produced film or other cinematographic work in the knowledge of that purpose belong to the owner of the production company (film producer or producer). Like film authors, therefore, performing artists do not own *ex lege* exploitation rights over the film.

Performing artists therefore retain the right to protection of their intellectual interests, particularly the right to be named and the ban on adaptations, which was introduced in 2003 by the new Art. 68 para. 1a UrhG. Recitals or performances of a literary or musical work may not be used in a way that makes them accessible to the public if the recital or performance contains so many changes or is so inadequate that it may damage the artistic reputation of the performing artists. The same applies to the distribution and reproduction for the purpose of distribution of video or sound recordings of such recitals or performances.[21]

Performing artists' right to remuneration, which was previously disputed, was enshrined in law following the 2005 amendment to the Copyright Act. According to the last sentence of Art. 69 para. 1 UrhG, performing artists' legal right to remuneration for their performance is shared equally between the film producer and the performing artist, provided it is not inalienable and that the film producer has not agreed otherwise with the artist concerned. As mentioned above, the so-called lending fee (library fee) is inalienable. Incidentally, an actor can waive his right to remuneration as long as he still has such a right and has not already transferred it to the VDFS as part of the collecting society contract. In a similar way to that of authors, performing artists' right to remuneration is therefore limited in two respects: firstly, it is restricted to half the total claim for remuneration on account of the split between the film producer and the artist; and secondly, the right is only valid if the film producer and the artist have not agreed otherwise and if it is not inalienable.

II. Practice in Rights Management

1. As explained above, the exploitation rights of film authors and performing artists are owned by the film producer on account of the so-called *cessio legis*. Unless the film author is also the film producer,[22] the exploitation rights for the film therefore legally belong to the film producer. Due to economic circumstances, it is very rare for such rights to be transferred back to a film author or performing artist and this only occurs in special cases; the same applies to the partial transfer of the rights. On the contrary, film producers often exercise their powers concerning the right to remuneration and, in accordance with Art. 38 para. 1, Art. 38 para. 1a and Art. 69 para. 1 (last sentence) UrhG, agree contractually that the remuneration rights should be transferred to the film producer, unless they are inalienable.[23] Only occasionally are film professionals able to negotiate a share in the royalties from secondary exploitation.[24]

In terms of employment law, the *Kollektivvertrag für Filmschaffende*[25] provides a certain legal framework for the contractual relationship between employers and employees involved in film-making. The rates it sets out are adjusted annually. The various film support mechanisms require these provisions to be adhered to by those involved in film production. However, the *Kollektivvertrag für Filmschaffende* does not contain any binding provisions in favour of authors, which would put authors in a better financial position.

2. The legal position of screenplay writers and authors of other literary material on which films are based is similar to that of film authors and performing artists, although screenplay writers are in a better starting position because the *cessio legis* does not apply to them. The so-called *buy out* principle,

21) Walter, *Urheberrecht*, para. 1493; Schuhmacher, in: *Kucsko,* UrhG, Art. 68.
22) In recent years, more young film directors have begun to set up their own film production companies in order to produce or co-produce their films.
23) However, such a transfer is only possible if the film author is not already a member of a collecting society to which he has transferred his rights as part of a collecting society contract.
24) Occasionally, television production contracts used to contain so-called repeat fees, but this has now become very rare.
25) See footnote 4, above.

i.e., the transfer of all exploitation rights via the granting of complete, unlimited exploitation rights rather than just filming rights, has become the norm for screenplay writers and other authors. Film producers often also acquire all neighbouring rights such as stage rights, merchandising rights and the right to produce a sequel/prequel in return for a one-off payment. The lack of copyright protection mechanisms[26] also has negative consequences for the authors of pre-existing works.

The different film support mechanisms also do not lay down any rules concerning the content of contracts, such as a requirement that neighbouring rights or revenue from secondary exploitation should be shared (e.g., reversion clauses, etc.). The collecting societies have no influence on the relationship between film producers and either film authors or performing artists in this area; their role is limited to exercising their members' right to remuneration.

In conclusion, it is clear from the above that the legal position of film professionals is unfavourable, not least because of legal provisions, primarily but not exclusively in terms of their share in the revenue from film exploitation. Instead, film professionals only obtain a share in the proceeds indirectly, through the royalties gathered on their behalf by collecting societies; there is no requirement and it is rare for them to receive a direct share from secondary exploitation, for example. Conversely, film producers enjoy a privileged position *ex lege* (including in comparison to the situation in other countries).

III. Institutional Framework of Collecting Societies

As already discussed, there are two main collecting societies for the aforementioned film professionals:

- the VDFS for film authors (i.e., directors, cameramen, editors, set designers/decorators, costume designers and film actors) and
- Literar-Mechana for screenplay writers.

The main activities of both these collecting societies are the collection and distribution of the aforementioned royalties.

1. The activities of collecting societies are governed by the *Verwertungsgesellschaftengesetz 2006* (2006 Collecting Societies Act – VerwGesG). According to Art. 2 para. 1 in conjunction with Art. 1 VerwGesG, collective management is the exclusive responsibility of collecting societies in accordance with the VerwGesG. Under Art. 2 para. 1 VerwGesG, collecting societies must obtain an operating licence from the supervisory authority. The first sentence of Art. 3 para. 2 VerwGesG stipulates that only *one* collecting society may be permitted to exercise any particular right. According to Art. 3 para. 1 VerwGesG, operating licences may only be granted to non-profit co-operatives or joint-stock companies domiciled in Austria, which offer a full guarantee that they will fulfil the tasks and duties assigned to them under the Act. In order to meet this requirement, collecting societies must have full-time, qualified managers. If there are two or more applicants for the same operating licence, Art. 3 para. 2, second sentence VerwGesG states that the licence should be granted to the applicant that is expected to best fulfil these tasks and duties. In cases of doubt, it should be assumed that existing collecting societies will be better equipped to do so than those that have never previously been awarded an operating licence.

Both the foundation and the operational activities of collecting societies are subject to the control of the supervisory authority. According to Art. 28 VerwGesG, *Kommunikationsbehörde Austria* (KommAustria) has been the supervisory authority since 2007. The VerwGesG requires collecting societies to have organisational rules, distribution rules and collecting society contracts in which their respective activities and distribution principles are laid down. Collecting societies are obliged to publish and make publicly accessible their operating licence, organisational rules, general terms of contracts (collecting society contracts), distribution rules, rules for contributions from social and cultural institutions and activity report for the previous calendar year.[27]

26) E.g., retrospective remuneration models, minimum remuneration, "best seller" paragraph.
27) See Art. 16 VerwGesG.

2. According to Art. 15 VerwGesG, collecting societies must ensure in their organisational rules that rightsholders are given suitable opportunities to participate in decision-making. The VDFS is organised as a co-operative, headed by a management board and a supervisory board (each comprising film professionals who are also rightsholders). It also has a managing director, who is responsible for the operational activities of the VDFS. Literar-Mechana is a limited company under civil law. It has a supervisory board (comprising rightsholders), a managing director and an accountant.

3. One of the essential tasks of collecting societies is to distribute the royalties that, according to the UrhG, may only be collected by collecting societies. These are primarily blank cassette fees, so-called cable and satellite fees and library fees (lending fees). They also collect royalties for their members from various sister societies abroad and pass these on, provided there are reciprocal agreements with the foreign societies. It should be noted that the cable and satellite fees are collected by Literar-Mechana on behalf of the VDFS (and other collecting societies); the blank cassette fees are collected by the *Austro-Mechana* collecting society. These distribute the royalties they collect in accordance with a particular distribution key among their sister societies, which pass them on to their members. However, 50% of the revenue from the blank cassette fees must be kept back for the so-called SKE Fund, which has social and cultural objectives. Any collecting society that collects blank cassette fees must, according to Art. 13 para. 2 VerwGesG, set up such a fund and keep back more than 50% of the fees collected, minus the relevant administrative costs. Collecting societies are also free to keep back a proportion of income from other royalties for their SKE Fund. Both the VDFS and Literar-Mechana have set up SKE Funds. The VDFS paid out EUR 374,000 from its SKE Fund in 2007, for example.

4. In all, there are eight collecting societies in Austria:

- the *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mit beschränkter Haftung* (State-approved society of authors, composers and music publishers – AKM),[28]
- *Austro Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.* (Austro Mechana society for mechanical musical copyright management – Austro Mechana),[29]
- *Literar-Mechana Wahrnehmungsgesellschaft für Urheberrechte, Gesellschaft m.b.H.* (*Literar-Mechana* copyright collecting society – Literar-Mechana),[30]
- *Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.H.* (performance rights collecting society – LSG),[31]
- *Verwertungsgesellschaft für audiovisuelle Medien GmbH* (audiovisual media collecting society – VAM)[32]
- *Verwertungsgesellschaft bildender Künstler, Fotografen und Choreografen* (collecting society for artists, photographers and choreographers – VBK),[33]
- *Verwertungsgesellschaft der Filmschaffenden Genossenschaft mit beschränkter Haftung* (collecting society for film professionals – VDFS),[34]
- *Verwertungsgesellschaft Rundfunk* (broadcasting collecting society – VGR).[35]

28) http://www.akm.co.at/
29) http://www.aume.at/
30) http://www.literar.at/
31) http://www.lsg.at/
32) http://www2.vam.3dhd.net/
33) http://www.vbk.at/
34) http://www.vdfs.at/
35) http://www.vg-rundfunk.at/

IV. Rightsholders' Perspective

1. As mentioned above, in Austria there can only be one collecting society for each right category,[36] which means there is no freedom of choice, apart from the option of joining a foreign collecting society (linked to the relevant Austrian society through a reciprocal agreement).

2. According to Art. 11 para. 1 first sentence VerwGesG, collecting societies must conclude a contract with rightsholders, at their request, under appropriate, standard conditions covering the management of the rights and obligations relevant to their area of activity (collecting society contract). Art. 11 para. 1 second sentence VerwGesG stipulates that the rightsholder must be an Austrian citizen or have his main residence in Austria; citizens of a European Union or European Economic Area Member State must be treated the same as Austrian citizens.

3. The collecting society contracts used by the VDFS and Literar-Mechana cover all existing and future works of the author (and, in the case of the VDFS, of the performing artist). There is no provision for individual works to be excluded from the contract. Neither can the rightsholder allow only some of the royalties within the remit of the society concerned to be collected or negotiate special conditions (which makes sense where collective management is concerned in order to prevent contracts being eroded by special one-off provisions). In principle, there are no geographical restrictions on the rights granted. The collecting societies are therefore given authority (and they are obliged by law) to co-operate with foreign sister societies which collect the corresponding royalties abroad.[37] Collecting society contracts may be terminated with six months' notice before the end of the calendar year. Remuneration rights are defined in the collecting societies' distribution rules.

Meanwhile, Art. 17 para. 1 VerwGesG requires the collecting societies to ensure that users of the works and performances of their members are able to obtain the necessary licences under reasonable conditions, particularly in return for reasonable payment.

4. It is therefore clear that rightsholders must first sign a contract with the VDFS in order to be entitled to any payments at all. These contracts are not negotiable. On the basis of work declarations, to be submitted annually (either online or on paper by 30 June for the previous year), and, if possible, broadcasting reports, a distribution key is used to calculate the sums due and pay them to the rightsholders once a year. The VDFS deals with the following types of work: cinema/TV films, series, documentaries, magazine/news programmes, sitcoms, soaps, dailies, weeklies, docu-soaps and live broadcasts. Broadcasting data is also collected separately by the VDFS in addition to the reported data.

In principle, the same applies to Literar-Mechana, although this society also uses broadcasting reports to register its members' works if they have failed to declare them themselves. If a work was broadcast in a particular distribution year, the author receives the cable and satellite fee, the blank cassette fee, the lending fee and the legal licence fee for public screenings in bars and restaurants. In addition, Literar-Mechana collects remuneration from broadcasters and distributes payments for mechanical rights.

4.1. The level of payment received by rightsholders varies from one year to the next, partly because it depends on actual income and the number of other rightsholders. The distribution and classification according to both film categories and the type of performance (e.g., camerawork, directing, etc.) are determined in accordance with a points system based on the distribution rules.

The relevant distribution rules state firstly how much money can or must be kept back each year for the SKE Fund and for reserves and expenditure.[38] The amount of remuneration due to rightsholders is then calculated, firstly according to their profession and secondly according to film categories. The

36) The following information is taken in particular from the websites of the VDFS and Literar-Mechana collecting societies, where the relevant documents (collecting society contracts, distribution principles, etc.) are available for download.
37) See Art. 12 para.2 VerwGesG.
38) The following information focuses primarily on the VDFS, since Literar-Mechana deals mainly with spoken works, which normally do not involve film professionals.

VDFS does not count films less than 10 minutes in duration. It splits the funds available for distribution between film authors and film actors in an 80:20 ratio. A further percentage weighting applies within the film authors category, according to profession (directors: 54%, cameramen: 15%, editors: 14%, costume designers: 8.5%, set designers: 8.5%). In addition, "factors" are laid down for different film categories (cinema film, TV film: factor 100, documentary: factor 100, series: factor 50, magazine/news programme: factor 40, sitcom/soap/daily/weekly/docu-soap: factor 20, live broadcast/TV recording: factor 10). A final weighting is applied with regard to the actual programme and when it was broadcast. The distribution key is calculated on the basis of these and other factors. A comprehensive description of the organisational structure and distribution rules would go beyond the scope of this article.

As this description of the distribution principles shows, the sum paid out each year varies. Even so, the collecting societies always have to adopt an average figure as they continue their activities.

In 2007, the VDFS had a total of 1,985 members. In 2007, it collected EUR 5.42 million, EUR 4.237 million of which came from within Austria. In the same year, the VDFS spent 8.4% of its income (Literar-Mechana 10.7%).[39] It should be noted that Art. 19 para. 1 VerwGesG stipulates that a report should be appended to the annual accounts, containing information about the society's business operations and financial position, the development of its membership and of the rights it manages, its income, administrative costs, contributions to social and cultural institutions and sums distributed. The activity report must be published in accordance with Art. 16 para. 1 VerwGesG.

Both the VDFS and Literar-Mechana have also concluded numerous reciprocal agreements with foreign collecting societies (see above) and pass on the royalties collected from abroad on behalf of their members.

4.2. As mentioned above, not all the sums collected are distributed to the rightsholders. Rather, the collecting societies each operate a so-called SKE Fund, which is run by a specially appointed committee of members' representatives. The VDFS, for example, distributes its funds in such a way as to support, first and foremost, the social needs of all film professionals or, in individual cases, to offer grants for film professionals facing financial difficulties.

5. As mentioned above, the collecting societies are answerable, within their particular area of activity, to the supervisory authority mentioned in Art. 7 para. 1 VerwGesG. This essentially applies to all the collecting societies' activities based on their various rules and regulations (e.g., bye-laws, distribution rules, collecting society contracts, etc.). Each collecting society is obliged under Art. 7 para. 2 VerwGesG to provide the supervisory authority with any information it requests concerning any matters relating to its management and to allow it to inspect its accounts and other documents. The supervisory authority is also authorised under Art. 7 para. 3 VerwGesG to attend and present statements and proposals to the collecting society's general assembly and the meetings of any supervisory board or advisory council. If the society is managed by a collegiate body, the supervisory authority can demand to be allowed to submit statements and proposals to meetings of that body.

In case of disputes between collecting societies and other collecting societies, user organisations or rightsholders, any party may ask the supervisory authority to mediate in accordance with Art. 7 para. 4 VerwGesG. Under this provision, the supervisory authority plays the role of mediator in order to avoid legal disputes, particularly between collecting societies and rightsholders. The authority is obliged to act as mediator; however, no specific legal consequence or decision-making power – particularly in the civil law relationship between rightsholder and collecting society – can be derived from this.

The distribution rules are particularly important for rightsholders. With reference to these rules, Art. 14 VerwGesG stipulates that collecting societies must distribute their income according to a fixed set of rules, thereby excluding arbitrary forms of distribution. Compliance with distribution rules is monitored by the supervisory authority. A rightsholder cannot therefore initiate abstract court control over distribution rules, for example by instigating court proceedings. The VerwGesG states that

39) The activity reports are available on the VDFS and Literar-Mechana websites.

rightsholders are not authorised to file claims in proceedings before the supervisory authority. There is no provision whatsoever for an arbitration board to deal with legal disputes between rightsholders and collecting societies.[40] However, rightsholders may ask the supervisory authority to mediate or to open proceedings (although they would not be directly entitled to anything as a result). The relationship between collecting societies and rightsholders is a civil law relationship which is subject to the jurisdiction of the ordinary courts. If a rightsholder believes his rights have been breached by the distribution applied by a collecting society, for example, he can assert his claims through the civil courts.

As well as the supervisory authority, the VerwGesG mentions two control bodies: the *Urheberrechtssenat* (copyright senate), which is made up of judges, and the *Schlichtungsausschuss* (arbitration commission).

According to Art. 30 para. 2 VerwGesG, the *Urheberrechtssenat* is responsible in particular for:

- deciding on appeals against decisions of the supervisory authority, except appeals in administrative proceedings,
- imposing bye-laws and resolving disputes between parties relating to a general contract or bye-laws,
- laying down mechanisms for calculating the reasonable payment that a collecting society should receive for granting a licence,
- laying down mechanisms for calculating the level of royalties owed to a collecting society,
- determining the share to which a collecting society is entitled in cases where royalties are split.

The powers entrusted to the *Urheberrechtssenat* are withdrawn from the ordinary courts according to Art. 30 para. 3 VerwGesG. Its most important function is probably that of deciding appeals against decisions of the supervisory authority. Decisions of the *Urheberrechtssenat* can be appealed before the *Verfassungsgerichtshof* (Constitutional Court).[41]

According to Art. 36 VerwGesG, the *Schlichtungsausschuss* is an arbitration body set up on an *ad hoc* basis. It is convened on request and only in cases where negotiations between user organisations and collecting societies concerning a general agreement under Art. 27 para. 1 VerwGesG have broken down. The *Schlichtungsausschuss* consists of three members. Each party appoints one member and two of them then appoint the chairman. The *Schlichtungsausschuss* has three months in which to prepare an arbitration proposal in the form of a general agreement. Once they are notified of the arbitration proposal, each party has four weeks in which to appeal to the *Urheberrechtssenat* if it does not agree with the proposal; the *Urheberrechtssenat* must then impose a bye-law.

Generally speaking, the new version of the VerwGesG has produced a higher degree of clarity. As far as legal protection bodies are concerned, the main problem is the lack of an arbitration body for rightsholders, who therefore have to appeal to the civil courts in order to assert their rights.

40) See Walter's comments on Art. 14 VerwGesG in Walter, *Urhebergesetz 2006*.
41) Dittrich/Öhlinger in *Dittrich/Hüttner* (ed.), VerwGesG (2006), p. 275.

CH SWITZERLAND

*Valentin Blank**
Suissimage

I. Legal Framework

Copyright, related rights and collective management are regulated together in Switzerland by the *Urheberrechtsgesetz* (Copyright Act - URG[1]) and the corresponding *Verordnung über das Urheberrecht und verwandte Schutzrechte* (Ordinance on copyright and related rights - *URV*[2]). The revised Berne Convention[3], the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement[4]), the WIPO Copyright Treaty (WCT[5]) and the WIPO Performances and Phonograms Treaty (WPPT[6]) are also applicable in Switzerland. The revised URG, which entered into force on 1 July 2008, incorporated all the provisions of these international treaties,[7] as a result of which they now have declaratory significance only. Therefore this article concentrates on the URG.

1. Film Professionals and Copyright

Along with production companies, Swiss copyright law divides persons involved in the creation of audiovisual works into three categories: authors, performing artists and "technical" staff. The URG defines a "work"[8] as an intellectual creation, either literary or artistic, having an individual character. Unlike that of other work categories, the description of audiovisual productions and the preliminary stages of such productions as "works" in the sense of the URG does not generally pose any problems. The combination of pictures and sound typical of a film is clear evidence of its individuality and usually (even where documentaries are concerned) displays sufficient creative freedom as a result of the countless possible combinations of acoustic and visual elements. Consequently, it does not seem necessary here to discuss in any more detail the concept and definition of a "work". The category of *authors* traditionally includes screenplay writers and directors. In addition to film music, which we are not discussing here, other works relevant to copyright include the film outline, the so-called "Production Bible", the treatment and the dialogue, as well as the original work. Swiss copyright law defines *performing artists* as natural persons who present a work or an expression of folklore, or who make an artistic contribution to such a presentation.

---

*) Valentin Blank, attorney-at-law, works for the legal department of *SUISSIMAGE*, Bern, and is director of the *Stiftung Solidaritätsfonds SUISSIMAGE*, Bern.

1) *Bundesgesetz über das Urheberrecht und verwandte Schutzrechte* (Federal Act on copyright and related rights).
2) *Verordnung über das Urheberrecht und verwandte Schutzrechte* (Ordinance on copyright and related rights).
3) Berne Convention for the Protection of Literary and Artistic Works, revised in Stockholm in 1967.
4) Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement Establishing the World Trade Organisation, Annex 1C).
5) WIPO Copyright Treaty.
6) WIPO Performances and Phonograms Treaty.
7) In some cases, the legislative body went further than simply adopting the changes that needed ratification, such as issues in regard to online rights for performing artists, producers and broadcasters.
8) Art. 2 para.1 URG.

Unlike in France, for example, Swiss copyright law does not define which film professionals enjoy author status, leaving the definition to the courts. It is not always easy to distinguish an artistic contribution from a technical or organisational one. However, the definition is crucial, since only members of the first category enjoy the rights and claims to remuneration granted by the URG. Therefore it also has consequences for the rightsholder's relationship with the collecting society (see IV.2., below). Film technicians whose contribution to an audiovisual work is protected by copyright should, as co-authors, receive a share in the proceeds from exploitation of the work. Such co-authors typically include camera operators, editors and set designers.

2. Position of Rightsholders

Under the URG, the aforementioned groups are granted various rights and powers, which are described briefly below. It is not uncommon for these groups to overlap. For example, a person who makes an artistic contribution may also qualify as an author and therefore be granted related rights as well as copyright. The personality rights of the person concerned must also be taken into account. A person's membership of one category or another also has an impact on his relationship with the collecting society (see IV.2., below).

2.1. Copyright

The URG grants to authors the exclusive right to determine whether, when and how their work is exploited. This comprehensive right of control gives rise to the following individual rights, which are listed *non-exhaustively* in Art. 10 URG:

- to make copies of the work;
- to offer, dispose of or otherwise distribute copies of the work;
- to recite, perform, present or make available the work, directly or by any means, in such a way that persons can access it at a place and time of their choosing;
- to broadcast the work via radio, television or similar means (including cable);
- to retransmit broadcast works using technical means (including cable) operated by persons other than the original broadcaster;
- to make available works that have already been made available, broadcast or retransmitted.

This right of control over the work is subject to various restrictions described in the subsequent Articles,[9] including the obligation to make certain rights subject to collective management (see II.2., below).

2.2. Related Rights

The URG also grants a series of exclusive rights to performing artists. However, in contrast with copyright, related rights do not constitute a comprehensive right of control. According to the *exhaustive* list set out in Art. 33 URG, performing artists have the following rights in their performance or recordings of it:

- to communicate it to the public elsewhere, either directly or by some other means, and to make it available to the public in such a way that persons can access it at a place and time of their choosing;
- to broadcast it via radio, television or similar means (including cable) and to retransmit the whole performance using technical means operated by persons other than the original broadcaster;
- to make recordings of it on phonograms, videograms or data carriers and to copy such recordings;
- to offer, dispose of or otherwise distribute copies of it;
- to communicate it to the public if it is broadcast, retransmitted or made available to the public.

Performance rights are also held by phonogram and videogram producers, as well as broadcasters, whose rights are regulated separately in the subsequent Articles and are not discussed in any more detail here.

9) Such restrictions of copyright include the right to private use and the right to quote.

2.3. Personality Rights

While authors and performing artists enjoy equal protection of their general personality rights, as enshrined in the *Zivilgesetzbuch* (Civil Code),[10] the URG includes additional specific provisions. Both enjoy the right to recognition of their ownership of copyright or related rights, including the right to be named. The URG also gives the author the right to first publication.

3. Standard Contracts Instead of Copyright Contract Law

Unlike in Germany or France, for example, Switzerland has no copyright contract law. Rather, Art. 16.1 of the URG simply points out that copyright may be transferred. General contract law, which is regulated by the Swiss Code of Obligations,[11] also applies. Under Swiss law, there is no "cessio legis" nor is there an assumption that the rights belong to the producer. Key processes such as copyright licensing and dealing with infringements are not regulated in law. In order to close this obvious gap, *SUISSIMAGE* (see IV.1., below) persuaded the relevant associations and interest groups to jointly negotiate standard contracts and took part in the negotiations as a neutral body. The views of the groups concerned, which differed in some respects, were balanced out in these contracts, with the result that they were widely accepted within the industry. This set of contracts[12] contains standard contracts for screenplay writers and directors, as well as film music composers. There are also standard contracts for the acquisition of rights to a pre-existing work, script consulting and financial participation. The set of contracts is currently being renegotiated and revised.

II. Practice in Rights Management

1. Individual Exercise of Rights as Starting Point

Under Swiss law, the powers resulting from copyright and related rights are held by the original rightsholder, who is responsible for exercising these rights on an individual basis.[13]

2. Collective Management

Such rights and the corresponding remuneration rights are managed on a collective basis by collecting societies only where expressly provided for by law (see III. and IV., below).

The law makes provision for collective management in cases where individual exercise of rights appears impractical. This originally concerned only music: however, the number of collectively managed rights has increased considerably as technology has progressed, i.e., over the past 30 years. The scope of collectively managed rights can vary: in some cases, it is the exclusive right itself, while in others it is simply the right to remuneration.

In addition, further types of exploitation have evolved and although the corresponding rights are meant to be managed individually according to the law, both user organisations and rightsholders need them to be managed collectively. In some such cases, the collecting societies offer collective management services on an *optional* basis.

2.1. Compulsory Collective Management

By making a right or claim subject to collective management, the law inevitably removes the rightsholder's ability to exercise that right individually. In Switzerland, this so-called "collecting

10) Art. 28 ff. of the Civil Code.
11) *Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil Obligationenrecht)* – Federal Act supplementing the Swiss Civil Code (Part 5 – Code of Obligations).
12) All the standard contracts can be downloaded free of charge from www.suissimage.ch. For further information about typical contracts for certain branches of the industry and their content, see Dieter Meier, in: Mosimann/Renold/Raschèr (ed.), *Kultur Kunst Recht*, Basel 2008, Chapter 12, pp. 783 ff.
13) Art. 9 para. 1, Art. 10 para. 1, Art. 11 para. 1 URG.

society obligation" covers remuneration for various forms of private use,[14] the right to communicate transmitted or retransmitted works to the public simultaneously and unchanged or to retransmit such works,[15,16] the rental of copies of works,[17] the use of orphan works and broadcasters' archived works,[18] the right to make certain broadcast musical works available to the public,[19] reproduction for broadcasting purposes[20] and certain uses for disabled people.[21] Some of the powers held within these rights have been further split up, as reflected in the individual tariffs. For example, the retransmission of protected works and performances via cable networks[22] and retransmission via IP-based networks on mobile devices and PC screens[23] are covered by separate tariffs. Even though they are all forms of private use, different tariffs also apply to fees for blank cassettes, reprography, educational use and the use of set-top boxes with hard disks and virtual private video recorders. The definition of these narrow categories particularly takes into account the different user groups, with whom the respective tariffs are negotiated (see also IV.4.2., below).

2.2. Optional Collective Management

A collecting society may manage other rights (assigned to it) collectively at the request of the parties concerned or if it is necessary due to the nature of the rights. In such cases, its role may be limited to simply collecting fees, or it may also issue licences. Licensing may be based on individual contracts or tariff systems, which involve fixed payments for the use of the repertoire. As far as audiovisual works are concerned, broadcasting rights are the main rights that screenplay writers and directors have tended to assign to collecting societies in this way (see IV.3., below).

III. Institutional Framework of Collecting Societies

1. Legal Basis of Swiss Collecting Societies

As far as compulsory collective management is concerned, collecting societies require a licence from the Federal Government. In order to be licensed,[24] collecting societies must be set up in accordance with Swiss law, have their headquarters in Switzerland and conduct their business from within Switzerland. They must also be open to all rightsholders, which is why all except *SWISSPERFORM* have been set up as co-operatives, a legal status that best embodies the "open door" principle.[25] In addition, their primary purpose must be the management of copyright or related rights, they must guarantee compliance with legislative provisions and they must offer the expectation of effective, economical rights management. All five collecting societies[26] are also responsible for collective rights management in the Principality of Liechtenstein.[27]

14) Art. 20 para. 4 URG.
15) Art. 22 para. 1 URG.
16) It is worth mentioning that, in contrast with the European Union (see Art. 10 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission), in Switzerland broadcasters can only exercise their retransmission rights and the right to communicate works to the public via collecting societies (ruling of the Swiss Federal Tribunal of 9 July 2007, BGE 133 III 568 E. 4).
17) Art. 13.3 URG.
18) Art. 22a and b URG.
19) Art. 22c URG.
20) Art. 24b URG.
21) Art. 24c URG.
22) Common Tariff 1 (available for download at www.suissimage.ch).
23) Common Tariff 2b (available for download at www.suissimage.ch).
24) Art. 42 URG; see Carlo Govoni, *Die Bundesaufsicht über die kollektive Verwertung von Urheberrechten*, in: Von Büren/David (ed.), *Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Band II/1 Urheberrecht und verwandte Schutzrechte*, Basel 1995, pp. 395 ff.; Denis Barrelet/Willi Egloff, *Das neue Urheberrecht*, 3rd ed., Bern 2008, N. 1 ff. concerning Art. 42.
25) Art. 42 para. 1c URG.
26) The five collecting societies are *ProLitteris*, the *Société Suisse des Auteurs* (SSA), the *SUISA*, *SUISSIMAGE* and *SWISSPERFORM*. For more details about the work categories they each represent, see IV.1., below.
27) The collecting societies have been granted licences for this purpose by the Liechtenstein Government and operate under the supervision of the Department for Trade and Transport.

2. Organisation of Collecting Societies

As co-operatives, most Swiss collecting societies have an organic structure, which comprises a general assembly, a board and an audit body. This helps to provide effective internal control and balance (see also IV.5., below).

In the context of the territoriality principle mentioned in the preceding point 1, which is also common in other countries, the collecting societies have signed reciprocal agreements with their sister societies abroad. This enables them to offer a global repertoire. Since, in principle, only one collecting society exists in Switzerland for each work category (see IV.1., below), the Swiss societies also have to work closely with each other, particularly in connection with common tariffs.

3. Overview of Societies' Responsibilities

As their name suggests, the main activity of collecting societies is the collective management of rights and royalties granted under copyright law. To this end, they keep a record of works and how they are used, regulate the payments made in return for their use in tariffs jointly negotiated with the user organisations and pass on the relevant royalties to the rightsholders (the individual responsibilities are discussed in IV.4., below).

IV. Rightsholders' Perspective

1. Limited Choice of Collecting Society

Unlike in Germany, for example, the law in Switzerland[28] stipulates that there should be only one collecting society for each work category. This is meant to prevent fragmentation, which would be equally unfavourable to users and rightsholders, and to facilitate efficient, economical collective management. The rightsholders' ability to choose a collecting society according to their own criteria is therefore limited. In principle, their membership depends on the classification of their work into one or more work categories.[29] Copyright in *audiovisual* works is managed by *SUISSIMAGE*, partly in co-operation with the *Société Suisse des Auteurs* (SSA).[30] Rightsholders whose work falls into more than one category can belong to several collecting societies. For example, someone who writes screenplays may join *SUISSIMAGE* while, at the same time, asking *ProLitteris* to manage the rights to his novels.

We will look more closely at audiovisual rights management using the example of *SUISSIMAGE*. This collecting society was founded in 1982, following two pioneering decisions by the Federal Tribunal, which smoothed the way for retransmission rights in Switzerland.[31] The founding members included not only Swiss film-makers, but also producers and distributors – a peculiarity which remains today: the members comprise both authors and copyright holders. *SUISSIMAGE* therefore brings together under the same roof two groups of people who otherwise would normally belong to different collecting societies, but who have some complementary interests.

28) Art. 42 para. 2 URG.

29) It is also conceivable and admissible for authors to join foreign collecting societies.

30) *ProLitteris* is responsible for literary, photographic and artistic rights; the *SUISA* for musical and non-theatrical rights works. An exception to the legal principle of "one society per repertoire" concerns related rights, the collective management of which is the sole responsibility of *SWISSPERFORM*. A special rule also applies to the *Société Suisse des Auteurs* (SSA), which is authorised to manage secondary usage rights for works of spoken and musical drama and, on the basis of a co-operation agreement with *SUISSIMAGE*, also manages authors' rights in audiovisual works, while the rights of producers and other holders of derivative rights are exclusively managed by *SUISSIMAGE*.

31) See also Dieter Meier, *Fernsehen: Neue Verbreitungsformen und ihre rechtliche Einordnung*, in: *Zeitschrift für Immaterialgüter- und Informationsrecht sic!*, edition 7/8/2007, pp. 557 ff.

2. Legal Relationship between Rightsholders and Collecting Societies

2.1. Membership

Since collecting societies must be open to all rightsholders in accordance with the "open door" principle, the only conditions for membership must be linked to the nature of collective management. According to para. 3.1 of its statutes, *SUISSIMAGE*, as a collecting society for audiovisual works, accepts the following as members:

- Screenplay writers or directors;
- Producers, distributors, worldwide sales agents or other rightsholders who are active in the film or audiovisual industry and have acquired copyright;
- Film professionals (technicians) other than screenplay writers and directors, with the agreement of the producer and director.[32]

In all cases, the natural or legal person concerned must have a particular connection with Switzerland (typically headquarters, residence or nationality) and own rights which can actually be exploited. Membership is free. Anyone who cannot or does not wish to become a member can agree a mandate with *SUISSIMAGE* in accordance with a system modelled on that of membership, but which does not, of course, grant membership rights to the person concerned.

2.2. Membership Agreement

Membership is based on the signing of a membership agreement (collective management agreement) under which copyright ownership is transferred to *SUISSIMAGE*.[33] The membership agreement entitles the member to receive royalties collected by *SUISSIMAGE* in accordance with the URG, the statutes and the distribution regulations (including the relevant implementation provisions). Members are also allowed to attend the annual general assembly. In return, they agree to declare all works which they have helped to create as authors or in which they have acquired rights, including remuneration rights. They also undertake to inform *SUISSIMAGE* of any changes to the rights that they own.

2.3. Work Declaration

Members must submit a work declaration to *SUISSIMAGE* for each work. The information is used to calculate the royalties due and is also forwarded to sister societies abroad. The declaration contains details of the person making the declaration, the work (length, language versions, category, alternative title, etc.), the people involved (producer, screenplay writer, director, actors and, if necessary, the film technicians), the type of production, broadcasts and the legal situation (licences, co-productions).

2.4. Management without Mandate

If collecting societies only based their activities on membership agreements, they would not be able to offer a complete repertoire. Therefore, where no membership agreement or other mandate is in place, *SUISSIMAGE* manages the rights, as far as possible, without a mandate[34] by making reasonable efforts to establish the identity of rightsholders. This rule is also in the interests of the user organisations, which are released from other claims by paying the royalties.[35]

32) In order to be granted membership, film technicians must prove that their contribution (as a co-author) to the work concerned is relevant to copyright. The written agreement of the producer and director is sufficient evidence. For all further work declarations submitted by the same member, a declaration of co-authorship signed by the producer is sufficient. *SUISSIMAGE* does not itself assess individual contributions to films. As explained below (see IV.4.), the distribution mechanism is structured in such a way that any additional payment to film technicians does not diminish the share allocated to the main authors.

33) The mandate law provisions contained in Art. 394 ff. of the Code of Obligations apply to this agreement. The membership agreement and all regulations and statutes are available on the *SUISSIMAGE* website at www.suissimage.ch

34) Art. 419 ff. of the Code of Obligations; para. 11 of the *SUISSIMAGE* distribution regulations (available for download at www.suissimage.ch).

35) Barrelet/Egloff, N. 4 concerning Art. 44.

3. Rights Management in Detail

Members assign to *SUISSIMAGE* their existing and any future rights which, according to the law, are subject to compulsory collective management (see II.2.1., above), as well as all rights that are listed in the membership agreement or work declaration and that have not been expressly removed by the member in the specific case.

The transfer of rights depends on the membership agreement, which is valid indefinitely and must have been in force for at least one year before it can be cancelled, subject to a six-month notice period prior to the end of a calendar year.

The rights transferred by the member are actively managed by *SUISSIMAGE* firstly in Switzerland and secondly – where relevant rights and royalty claims are concerned – in the Principality of Liechtenstein. In other foreign countries, the rights are managed by the relevant sister societies, provided there is a legal requirement for such royalties to be paid and a corresponding reciprocal agreement is in place. Such reciprocal agreements are based on an international standard text. Under such agreements, *SUISSIMAGE* endeavours to calculate royalties on a work-by-work basis in the interests of a user-oriented distribution model.[36] In other cases, fixed sums are agreed.

In addition, screenplay writers and directors who join *SUISSIMAGE* automatically transfer their right and claim to remuneration for the broadcast or other distribution of their work via television, cable network, satellite or other method. This right is subject to optional collective management; however, unlike other optionally managed rights, it cannot be excluded from the rights managed by *SUISSIMAGE*.

4. Responsibilities in Detail

4.1. Establishment of Uses

In order that authors and rightsholders can be remunerated for the use of their works, uses must first be established and collated. In the case of television broadcasts, *SUISSIMAGE* mainly uses the broadcast lists available from broadcasters and listings magazines, information from which is added to the database. *SUISSIMAGE* also takes into account declarations of its members and sister societies. If necessary, *SUISSIMAGE* carries out its own additional investigations. In all cases, checks and payments are made only in relation to declared works or those that are managed without a mandate (see IV.2.4.).

4.2. Collective Licensing Based on the Tariff System

The collecting societies are obliged to manage the rights assigned to them by the rightsholders.[37] To this end, *SUISSIMAGE* concludes appropriate agreements with its members (see IV.2.2., above) and negotiates tariffs with the user organisations.[38] If a particular use falls within the responsibility of several collecting societies, the latter are obliged to draw up common tariffs,[39] which is another unusual feature of the Swiss collective management system. These pre-arranged tariffs represent the level of royalty owed for specific contributions to the film-making process and are binding on all parties. Once a tariff has been legally approved, not even the courts are allowed to examine whether it is reasonable by means of a civil procedure.[40] Tariffs must be approved by the *Eidgenössische Schiedskommission für die Verwertung von Urheberrechten und verwandten Schutzrechten* (Swiss Federal Arbitration Committee for the exploitation of copyright and related rights (see IV.5.2., below).

36) Point 4.5 of the *SUISSIMAGE* distribution regulations (available for download at www.suissimage.ch).
37) Art. 44 URG.
38) Regarding tariffs, see Ernst Brem/Vincent Salvadé/Gregor Wild, in: Barbara K. Müller/Reinhard Oertli (ED.), *Urheberrechtsgesetz (*URG*)*, Bern 2006, N. 1 ff. concerning Art. 46.
39) Art. 46 f. URG.
40) Art. 59.3 URG; ruling of the Swiss Federal Tribunal of 27 October 2000, BGE 2A.245/2000 E. 2b/bb.

4.3. Royalties

The law stipulates both upper and lower limits for royalties. In principle, the maximum thresholds are 10% of the proceeds or cost of use for copyright and 3% for related rights. The gross proceeds from each use of the work are taken into account; so for cable operators, for example, this means subscription fees, including connection fees. If this information cannot be established, gross expenditure is used. Under the legally established principle of proportionality,[41] these limits cannot be reached in every case. However, the lower limits ensure that rightsholders receive appropriate remuneration.[42] Under this rule, the maximum limits may also be exceeded if, in a specific case, 10% or 3% does not represent reasonable remuneration.

The fees that are collected must then be distributed among the members and sister societies in accordance with legislative and regulatory provisions. When the proceeds are shared out between the original rightsholders and other rightsholders, care must be taken to ensure that the authors and performing artists receive a reasonable share.[43] The only exception to this arises if the cost would be unreasonable. The proportionality principle ensures that the collecting societies do not "degenerate" into mere instruments for derivative rightsholders.

As we have already seen (see IV.2.1), the main authors (screenplay writer and director), derivative rightsholders (producer, distributor, etc.) and, in some circumstances, film professionals who are not involved in the screenplay or direction of the film (co-authors) may become members of SUISSIMAGE. The fees collected for the use of works are – after the deduction of administrative costs[44], 7% and 3% for the cultural and solidarity funds respectively and a fixed payment for broadcasters' rights – distributed among the rightsholders on a work-by-work basis in accordance with the following table:[45] in principle, half (50 points) to the main authors (split equally between director and screenplay writer) and half (50 points) to derivative rightsholders. If, in individual cases, there are additional co-authors, an extra 10 points are available, to be distributed among them equally – unless otherwise stated in the work declaration.[46] Within each of these categories, the actual sums distributed are determined according to specific criteria.[47]

4.4. Cultural and Solidarity Funds

Subject to the agreement of their supreme body, collecting societies are allowed under Art. 48 para. 2 URG to use part of their income to promote social aid and cultural activities. *SUISSIMAGE* deducts 10% of its income from user organisations within Switzerland and allocates 70% of that sum to its cultural fund and 30% to its solidarity fund. Both funds are independent foundations. The cultural fund supports the Swiss film-making industry by making specific grants (e.g., residual financing or treatment promotion). The solidarity fund offers support to film professionals in needy circumstances and improves their retirement provisions by contributing to their pensions.

5. Supervision and Control of Collecting Societies

Measures to ensure that the collecting societies are run carefully, economically and in accordance with their remit include monitoring, multi-level controls and equal representation on their boards. These measures are discussed briefly below, again using the example of *SUISSIMAGE*.

41) Art. 60 para. 2 URG.
42) This lower limit was used in Common Tariff 4b, which makes provision for a fee of CHF 0.05 per 525 MB of memory or 1 hour of play-time on CD-R/RW discs.
43) Art. 49 para. 3 URG; the courts decide whether a share is reasonable considering the circumstances of the individual case.
44) As far as compulsory collective management is concerned, the administrative costs for *SUISSIMAGE* in 2006 and 2007 were each 4.4%. For optional collective management (where administrative costs are higher), they are fixed at 10%. No administrative costs are deducted for forwarding royalties collected abroad.
45) See para. 6.4.1 of the distribution regulations (available for download at www.suissimage.ch).
46) These ten additional points do not reduce the number of points allocated to the two other categories. Rather, they are funded from the *total* sum of royalty income.
47) For broadcasts, for example, the work category, coverage rate, transmission time and programme coefficient are taken into account (see para. 13.3 ff. of the distribution regulations).

5.1. Equal Representation on Board

The board of *SUISSIMAGE* comprises a President plus between five and 12 other members, who are elected for two years. The statutes[48] stipulate that authors and (derivative) rightsholders should be equally represented. Representatives of screenplay writers, directors, other co-authors (film technicians), producers and other rightsholders (distributors, etc.) are each entitled to at least one seat. Board members do not need to be members of *SUISSIMAGE*.

5.2. Reporting and Supervision

As far as their licensed activities are concerned, the collecting societies report to the Federal Government, whose supervisory role is undertaken by two equal bodies.

The *management* of the collecting societies is monitored by the *Eidgenössische Institut für Geistiges Eigentum* (Federal Institute for Intellectual Property), which is also responsible for granting licences.[49] The collecting societies submit annual activity reports to the Institute, which checks and approves them. The collecting societies are also obliged to provide the Institute with any information it requests and must offer it access to all documents necessary for monitoring purposes. In this context, the Institute is also authorised to issue directives to the collecting societies and can impose measures of varying severity, including the restriction or withdrawal of the licence.

Monitoring of *tariffs* is the responsibility of the *Eidgenössische Schiedskommission für die Verwertung von Urheberrechten und verwandten Schutzrechten* (Swiss Federal Arbitration Committee for the exploitation of copyright and related rights),[50] which comprises representatives of user organisations and rightsholders. Regardless of whether tariff negotiations lead to an agreement or the parties cannot agree, the Arbitration Committee examines whether the tariff is reasonable, in terms of both its overall structure and its individual provisions. Of course, where tariffs are not disputed, this process is usually just a formality, since it is assumed that an agreed tariff must reflect the market conditions. The purpose of checking that the tariffs are reasonable is to ensure that the proposed remuneration mechanism can be implemented in an economical and efficient way and that it does not lead to any discrimination. At the same time, the tariff must also be financially appropriate. This criterion is discussed in more detail in a separate provision of the Copyright Act.[51] This Article states that the tariff should be calculated according to the (gross) income received from use of the work or, where this information cannot be established (or only at excessive expense), according to the cost generated by its use. In addition, the type and number of works used and the relationship between protected and unprotected works must be taken into account. Although not mentioned in the Act, the principle of continuity must also be observed in order to prevent sharp rises or drops in royalty levels, while collecting societies must be able to offer rebates to associations and ask for contributions towards the cost of litigation.[52]

Effective self-monitoring is also provided by the organs that a corporation must have under Swiss law, such as its general assembly, board and audit body. Societies must have their annual accounts properly audited by an independent audit body.[53] This body particularly monitors compliance with legal provisions, statutes and regulations, as well as the existence of an internal monitoring system, and reports its findings to the board and general assembly.

In the Principality of Liechtenstein, the collecting societies are supervised by the Department for Trade and Transport, in terms of both management and tariffs.

48) Para. 8.3 of the statutes (available for download at www.suissimage.ch).
49) Art. 52 ff. URG.
50) Art. 55 ff. URG.
51) Art. 60 URG.
52) For example, *SUISSIMAGE* offers a 5% rebate to national associations of cable distributors, which collect the fees and declarations from their members on behalf of the collecting societies and forward them to *SUISSIMAGE*, and which fulfill all tariff-related and contractual obligations (para. 4.4 of Common Tariff 1).
53) Art. 906 para. 1 in conjunction with Art. 727 ff. of the Code of Obligations.

5.3. Legal Action

Two separate legal processes are available for the two areas of supervision.

Problems with the management of the collecting society can be reported to the Institute in the form of a "disciplinary complaint".[54] This does not constitute a formal right of appeal, but a legal remedy. The complainant therefore has no guarantee that his request will be dealt with through formal proceedings.[55] Nevertheless, this legal remedy is not totally ineffective, since the Institute should have officially dealt with the allegations anyway if it had known about them. If the Institute then rules against the collecting society concerned, the latter can submit a formal appeal to the *Bundesverwaltungsgericht* (Federal Administrative Court).[56] This decision can in turn be appealed to the Federal Tribunal.

The Arbitration Committee's decisions on the approval of tariffs can be appealed to the Federal Administrative Court, whose rulings can then be challenged before the Federal Tribunal.[57] These are formal rights of appeal, which the Federal Administrative Court can examine fully,[58] while the Federal Tribunal can, in principle, only examine the legal aspects of the case.[59]

54) Art. 71 para. 1 of the *Bundesgesetz über das Verwaltungsverfahren* (Federal Act on Administrative Procedure) (applied analogously, since collecting societies are not public authorities).
55) Thomas Merkli/Arthur Aeschlimann/Ruth Herzog, *Kommentar zum Gesetz über die Verwaltungsrechtspflege des Kantons Bern*, Bern 1997, N. 1 concerning Art. 101.
56) Art. 74 para. 1 URG.
57) Art. 74 para. 1 URG in conjunction with Arts. 82 ff. and 90 ff. of the *Gesetz über das Bundesgericht* (Federal Tribunal Act).
58) Art. 49 *Bundesgesetz über das Verwaltungsverfahren* (Federal Act on Administrative Procedure).
59) Art. 97 *Gesetz über das Bundesgericht* (Federal Tribunal Act).

DE

GERMANY

Nicole Spoerhase-Eisel
Institute of European Media Law (EMR)

I. Legal Framework

The *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights – UrhG) of 9 September 1965[1] forms the basis of copyright protection in Germany.[2] Recent amendments to the Act have brought it into line with the digital era and new technological advances.

As well as legislative provisions, case-law too plays an important role in Germany, particularly in the interpretation of abstract legal concepts (e.g., limitations on copyright, see I.2.b). It has a decisive influence on the practical scope of copyright and related rights.[3]

1. Different Groups of Rightsholders

Authors are protected with respect to their intellectual and personal relationship with their work, as well as with respect to the use of their work. Copyright is therefore a combination of personal rights and property rights.

The UrhG distinguishes between (co-)authors, owners of related rights and film producers. In accordance with the creator principle, which applies in Germany (see a), below), ownership of rights must always be determined on a case-by-case basis according to the actual circumstances. Each individual contribution to the overall result, i.e., the audiovisual work, must therefore be assessed on its own merits.

a) Author

An author is the creator of a work (Art. 7 UrhG).

Only personal intellectual creations constitute works in the sense of the Act (Art. 2 para. 2 UrhG). In order to be considered a creator of a work, a person must have made a discernible contribution to it. Although a certain level of creativity must have been reached, the precise requirements should not be too demanding. Since films and other audiovisual works are the result of a combination of numerous copyright-protected and other contributions, the only people considered as being authors are those who have used their individual intellectual creativity to assist with the production and subsequent editing of the film.[4]

1) BGBl. (Federal Gazette) I p. 1273.
2) The UrhG was last amended on 13 December 2007; the amendment entered into force on 1 January 2008 and is known as the "2nd basket of copyright reforms". It is based on the 2003 amendment ("1st basket"); both amendments were designed to transpose Directive 2001/29/EC (Copyright Directive) into German law.
3) For example, the German courts decide on a case-by-case basis whether a person's contribution to a work represents a personal intellectual creation, which is a requirement for authorship.
4) See Dobberstein/Schwarz, in: von Hartlieb/Schwarz, *Handbuch des Film-, Fernseh- und Videorechts*, 4th ed., chap. 37, para. 1ff.

Films are protected by copyright in accordance with Art. 2 para. 1 no. 6 UrhG. A "film" is defined as a recording of a real-life event or moving pictures created in some other way (including cartoons and computer-generated films), which are usually stored on analogue video or video and audio media or on a digital data carrier for the purposes of conservation, communication, use through copying, public performance or broadcast.[5] Works that are created in a similar way to films (e.g., multimedia productions such as computer and video games) enjoy the same protection. If a personal intellectual creation is adapted, the adapted work is treated as an independent work separate from the original work (Art. 3 UrhG).

If several persons have created a work jointly and their respective contributions cannot be exploited separately, they are deemed to be co-authors of the work (Art. 8 para. 1 UrhG). Therefore, (co-)authors may include film directors, cameramen, editors, sound mixers, make-up artists and executive producers, if they have made a personal intellectual contribution to the work.[6]

Set designers, set decorators, costume designers, choreographers, screenplay writers, film music composers and dialogue writers are, in principle, not authors of a film, but authors of *pre-existing* works, if those works can be exploited separately from the film itself. Copyright in a film does not imply copyright in pre-existing works, and vice versa.[7] Meanwhile, filming of the work is dependent on the acquisition of the film adaptation rights in the relevant pre-existing work (Art. 23 UrhG), except where free use is concerned (Art. 24 UrhG). Such free use is granted, for example, if only the traits of the protected work are extracted.

According to Art. 65 para. 2 UrhG, copyright in films and works which are produced in a similar way to films expires 70 years after the death of the longest-surviving of the following persons: the principal director, the author of the screenplay, the author of the dialogue and the composer of the music written for the film in question.

b) Owner of Related Rights (Performance Rights)

Related rights (performance rights) as referred to in the UrhG generally apply to pre-existing works.[8] Although their structure is similar to that of copyright, they are not afforded the same level of protection. For example, an author can transfer certain *Nutzungsrechte* (exploitation rights) to third parties, but not copyright itself (or to be more precise, the copyright-protected *Verwertungsrechte* (economic rights)).[9] However, due to the less rigorous protection of related rights, holders of performance rights only can assign to third parties the economic rights afforded by Arts. 77 and 78 UrhG, i.e., recording, reproduction and distribution rights, as well as public communication rights. The term of protection is also shorter for performance rights. According to Art. 76 UrhG, personality rights expire on the death of the performer. However, they expire no earlier than 50 years after the performance if the performer has died prior to the expiry of that period, and not before the expiry of the economic rights as described in Art. 82 UrhG. According to the latter provision, the performer's economic rights expire 50 years after the publication of the video or audio recording, or after the performance if it was recorded on a video or audio medium.

Performers are expressly referred to in the Act as holders of performance rights (Art. 73 UrhG). A performer is defined as any person who participates artistically in the production of a film (Art. 73 in conjunction with Art. 92 UrhG). Such persons typically include actors, musicians and dubbing artists, as well as assistant directors, cameramen, editors and sound mixers.[10] On the other hand, legal entities

5) See Dobberstein/Schwarz, *op. cit.*, chap. 35, para. 2.
6) See Dobberstein/Schwarz, *op. cit.*, chap. 37, para. 4.
7) See Dobberstein/Schwarz, *op. cit.*, chap. 38, para. 2.
8) See Schmid/Wirth, UrhG, *Handkommentar*, preface to §§ 70ff., para. 2.
9) Under German Copyright Law, economic rights cannot be assigned (that is, transferred in total as a form of property), but the rightsholder can issue a licence to use the work by way of contract. Therefore, the UrhG makes a distinction between *Verwertungsrechte*, that is, the rights of an economic nature attached to a given work (also called economic rights, as distinguished from moral rights), and *Nutzungsrechte*, rights transferred by the rightsholder to use the work in a concrete way (exploitation rights).
10) The person who gives a performance that is connected or similar to the performance of the author, i.e., which is "related" to it, is often (and in contrast to the author) interchangeable, without affecting the result of the performance. See Schmid/Wirth, *op. cit.*, § 24 para. 1. Co-authorship (rather than just ownership of performance rights) should only be considered for very famous film actors playing leading roles.

and natural persons who only make a technical, organisational or commercial contribution to the film (e.g., production managers, continuity persons, script girls, production secretaries, film accountants, production accountants, film property buyers, grips, etc.) are excluded.[11]

c) Film Producer

As well as authors and owners of related rights, film producers are protected (Art. 94 UrhG). Although there is no legal definition of "film producer", Art. 94 UrhG aims to protect persons who bear the organisational and financial risk of the production of a film. This is normally the producer. According to Art. 94 UrhG, producers have their own original rights, which they can exercise alongside those transferred to them by authors and performers. Art. 94 para. 1 UrhG gives producers the right to reproduce, distribute, broadcast, publicly present and make accessible to the public films that they have produced. Film producers also have the right to prohibit any distortion or abridgement of the video recording or audio and video recording which may jeopardise their legitimate interests.

2. Rights

a) Authors' Rights

aa) Authors' Personality Rights

Provisions for the protection of authors' personality rights cover their non-material interest in, and in relation to, their work. The following rights are protected:

- Right of publication: authors can decide whether and how their work is published (Art. 12 para. 1 UrhG).
- Right of recognition of authorship of the work: authors have the right to recognition of their authorship. They can decide whether the work should bear an author's designation and what designation is to be used (Art. 13 UrhG).
- The right to prohibit any distortion or other mutilation of the work which would jeopardise the author's legitimate intellectual or personal interests in the work (Art. 14 UrhG): however, where films are concerned, only *gross* distortions or other *gross* mutilations may be prohibited (Art. 93 UrhG).

bb) Economic and Exploitation Rights

Economic rights enable authors to control all forms of commercial use of their work. They may be inherited, but are not otherwise transferable (see above). They should be distinguished from exploitation rights, which are transferable (Art. 31 ff. UrhG).

Some economic rights are listed in Art. 15 UrhG, although the list is non-exhaustive,[12] in order that newly emerging (digital) forms of exploitation may be included. An author's economic rights over a film include in particular:

- The right of reproduction, i.e., the right to make copies on video or audio media such as film negatives, film copies, video cassettes, DVDs etc. (Art. 16 UrhG);
- The right of distribution, i.e., the right to put copies of the work into circulation, including lending and rental rights (Art. 17 para. 1 UrhG) – however, if the original or copies thereof have been put into circulation within the EU or EEA through sale thereof by or with the consent of the author, Art. 17 para. 2 UrhG stipulates that the author only retains the right of rental;[13]
- The right of presentation, i.e., the right to make a film perceivable to the public by means of technical devices – known as the film presentation right (Art. 19 para. 4 UrhG);
- The right to make the film accessible to the public by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them – this right covers exploitation via on-demand services, for example (Art. 19a UrhG);[14]

11) See Reber, in: v. Hartlieb/Schwarz, *op. cit.*, chap. 62 para. 2.
12) Art. 15.1 UrhG states that "…the right shall comprise in particular…".
13) This limitation in favour of authors is based on the Directive on Rental and Lending Rights, 92/100/EEC.
14) This rule was added to the UrhG on 13 September 2003 in order to implement the exclusive right to make works available to the public, set out in Art. 3 para. 1 of the Copyright Directive.

- The right of broadcasting, including satellite and cable retransmission (Art. 20a and 20b UrhG)[15] – this enables the author to make a work accessible to the public through broadcasting, such as radio or television transmission, satellite broadcasting, cable transmission or other similar technical devices (Art. 20 UrhG);
- The right of communication, i.e., the right to make recitations and performances of a work perceivable to the public by means of video or audio recordings and the right to make broadcasts or public presentations of such works accessible to the public (Art. 21 and 22 UrhG);
- The right to adapt and transform existing works – film adaptation rights (Art. 23 UrhG).

cc) Other Rights

Personality rights, economic rights and exploitation rights are not the only rights held by authors. In the film sector, the rights of authors to fixed remuneration for rental and lending are particularly important (Art. 27 paras. 1 and 2 UrhG). This rule gives authors a direct claim to reasonable remuneration from the hirer or lender.

b) Limitations

In the general interest, the Act makes provision for exceptional use of economic rights in some situations (Art. 44a ff. UrhG), which authors cannot prohibit. According to case-law, these limitations on copyright should be interpreted narrowly, since authors have a basic right to an appropriate share in the proceeds from exploitation of their work – this is part of the right to protection of property, enshrined in Art. 14 of the German *Grundgesetz* (Basic Law). Examples of exceptional use can be divided into limitations on copyright designed to benefit (a) individual users, (b) the cultural sector and (c) the general public.

Examples of exceptional use described in the UrhG include the following:

- temporary right of reproduction in the field of computer-based use (Art. 44a UrhG);
- reproduction for the benefit of disabled persons (Art. 45a UrhG);
- admissibility of the use of works which become perceivable in the course of the events which are being reported on for the purposes of reporting on events of the day by broadcast or other similar media mainly devoted to current events, or by film (Art. 50 UrhG);
- quotation of works or parts thereof (Art. 51 UrhG);
- public communication of a published work if the communication serves no gainful purpose on the part of the organiser (Art. 52 UrhG);
- making works accessible to the public for the purposes of education and research, i.e., for academic purposes (Art. 52a UrhG);[16]
- reproduction for private and other personal uses – so-called private copying (Art. 53 UrhG);
- reproduction by broadcasting companies for technical reasons linked to the broadcasting process (Art. 55 UrhG).

Art. 42a UrhG does not represent a limitation on copyright.[17] Under this provision, if authors have granted an exploitation right to one producer of audio recordings, they are obliged to grant an exploitation right with the same content to any producer of audio recordings, entitling the latter to record the work on an audio medium and to reproduce and distribute that recording for commercial purposes, provided the work has already been published (so-called compulsory licence for the production of audio recordings). However, compulsory licences do not apply to film producers, nor do they apply if the exploitation right is granted for the purpose of producing a film (see Art. 42a para. 1 third sentence and 42a para. 7 UrhG).

c) Related Rights

Groups of people who are granted related rights in return for their contributions are listed in the Copyright Act. The rights of performers (Art. 74 ff. UrhG) are particularly relevant to this report.

15) This transposed the Satellite and Cable Directive (93/83/EEC) into German law.
16) According to Art. 137k UrhG, Art. 52a UrhG currently only applies until 31 December 2008; following an agreement between the parliamentary groups CDU/CSU and SPD, its validity will be extended by four years until 2012.
17) See Götting in Loewenheim, *Handbuch des Urheberrechts*, Munich 2003, § 30 para. 15 ("*Zwangslizenz*").

aa) Personality Rights

The personality rights that apply to performers include the right to be named (Art. 74 para. 1 in conjunction with Art. 93 para. 2 UrhG) and the right to prohibit gross distortions or other gross mutilations of their works (Art. 75 in conjunction with Art. 93 para. 1 UrhG).

bb) Economic Rights

Performers essentially enjoy the following economic rights:

- The right of recording and the right of reproduction and distribution of video or audio recordings of the performance. This right corresponds to the authors' reproduction and distribution rights enshrined in Arts. 16 and 17 para.1 UrhG (see I.2. a) bb)). However, where performers are concerned, in cases of doubt it is assumed that these rights are assigned to the film producer (Art. 92 para.1 UrhG). Under Art. 77 para. 2 second sentence UrhG, performers are also entitled to remuneration for the lending and rental of video and audio recordings.
- The right to public communication of the performance, which includes the right to make it accessible to the public, the right of broadcasting and the right to make it perceivable to the public in a place other than that in which it takes place. Performers are also entitled to remuneration for these rights (Art. 78 para. 2 UrhG).

Performers' economic rights are also not without limitation. Here also, there is the possibility of exceptional use (Art. 83 in conjunction with Art. 44a ff. UrhG). The limitations listed in I.2.b) above, apply.

3. Establishment of Rights in Law

Although the aforementioned rights are established in law, they sometimes require interpretation through case-law.

4. Transfer of Rights by Law

German copyright law does not require the aforementioned rights to be assigned to a "rights manager"; however, under Art. 88 ff. UrhG, it can be assumed that film rights are owned by film producers. As rules of interpretation, such assumptions are secondary to expressly agreed contractual provisions.

If an author permits another person to make a film of his work, he is deemed, in cases of doubt, to have granted the exclusive right to use the work in its original or adapted form to produce a film and to exploit translations and other cinematographic adaptations of the film (Art. 88 para. 1 UrhG). However, the right to remake a film is not covered by this rule of interpretation. In addition, in cases of doubt, the author is entitled to use his work otherwise for cinematographic purposes 10 years after the conclusion of the contract with the third party.

Art. 89 para. 1 UrhG stipulates that participants in the production of a film (should they acquire a copyright, i.e., film directors or cameramen, for example) are deemed, in cases of doubt, to have granted to the film producer the right to exploit the film as well as translations and other cinematographic adaptations or transformations of the film in *any* manner. Following the removal of the limitation to all (previously) "*known*" forms of exploitation, film producers can now exploit works in ways which were still unknown at the time of their production. Film producers can therefore exploit films in any way they like.

If a performer concludes a contract with a film producer on his participation in the production of a film, in cases of doubt concerning exploitation of the film such a contract constitutes assignment of the rights to record, reproduce, distribute or publicly communicate his performance (Art. 92 para. 1 UrhG).

If the author of a film has in advance granted to another person the exploitation right referred to Art. 89 para. 1 UrhG, he nevertheless remains entitled to grant that right to the film producer, with or without limitation (Art. 89 para. 2 UrhG); the same applies to performers under Art. 92 para. 2 UrhG.

The provisions illustrate the legislative body's efforts to create a fair balance of interests between film professionals and, *in cases of doubt,* to help films achieve commercial viability by bundling exploitation rights.

Finally, in this context, the aforementioned Art. 94 UrhG should also be mentioned. This provision gives film producers the exclusive right to reproduce, distribute and use for public presentation or broadcasting the video recording or video and audio recording of the film.

II. Practice in Rights Management

1. Scope of Transfer of Rights to Other Persons

a) Individual Contract

Rightsholders can transfer their rights to third parties by concluding a contract as long as the rights concerned are transferable. Such contracts take precedence over the legal assumption that all rights are assigned to the film producer.

aa) Copyright

In Germany, copyright as a whole may be transferred by inheritance (Art. 28 para. 1 UrhG), but is not otherwise transferable (Art. 29.1 UrhG, see I.1.b)).[18] Under Art. 29 para. 2 UrhG, authors are allowed to grant exploitation rights to third parties, conclude agreements with third parties concerning economic rights and agree legal transactions concerning their personality rights, provided they hold the relevant rights (Art. 39 UrhG).

In practice, the granting of exploitation rights is very important. In principle, this does not need to be achieved through a particular form of contract, unless it concerns future works, in which case it must be in writing (Art. 40 para. 1 UrhG). The agreement may cover individual forms of exploitation, may be limited in respect of time, place or content, and may be exclusive or non-exclusive (Art. 31 para. 1 UrhG). Whereas a non-exclusive exploitation right does not prevent third parties from using the work, the owner of an exclusive exploitation right is entitled to use the work to the exclusion of all other persons.

In principle, authors must agree to any transfer of their exploitation rights or granting of non-exclusive exploitation rights; they also enjoy the right of revocation for non-exercise of the rights or if they change their conviction (Art. 41 and 42 UrhG). Under these rules, an author can revoke an exploitation right if the holder of an exclusive exploitation right does not exercise that right or exercises it insufficiently, thereby causing serious harm to the author's legitimate interests, or if the work no longer reflects his conviction and he can therefore no longer be expected to agree to its future exploitation. However, according to Art. 90 UrhG, this does not apply to film authors and performers (Art. 90 UrhG in conjunction with Art. 92 para. 3) in respect of the right of cinematographic adaptation after filming has begun and the rights to the work (Arts. 88 and 89 UrhG). The reason given for this exception is the high cost of film production and the associated economic risk borne by the producer.

In return for granting an exploitation right, the author receives the remuneration agreed in the contract or, if there is no such agreement, a reasonable level of remuneration (Art. 32 UrhG).

bb) Related Rights (Performance Rights)

Performers may assign their performance rights to third parties as full rights (Art. 79 para.1 UrhG). However, in order to protect performers, legal rights to remuneration are not transferable without limitation.

In addition, under Art. 79 para. 2 UrhG, performers may grant both exclusive and non-exclusive exploitation rights to third parties. In this respect, reference is made to the aforementioned comments relating to authors.

18) This is based on the idea that authors' personality rights are inextricably linked to the author's position as the holder of economic rights; see Schmid/Wirth, *op. cit.*, § 29 para. 1, so-called "monistic principle".

b) Tariff Agreement

In Germany, agreements on the assignment of rights in the audiovisual media sector can also take the form of collective agreements, i.e., tariff agreements. Important provisions on this subject are contained in the *Tarifvertrag für Film- und Fernsehschaffende* (tariff agreement for film and television professionals - TVFF) of 24 May 1996, which was concluded by the *Bundesverband Deutscher Fernsehproduzenten e.V.* (federal union of German television producers), the *Verband Deutscher Spielfilmproduzenten e.V.* (union of German film producers) and the *Arbeitsgemeinschaft Neuer Deutscher Spielfilmproduzenten e.V.* (association of new German film producers) with *IG Medien*[19] (printing and paper, publishing and art) and the *Deutsche Angestelltengewerkschaft (Berufsgruppe Kunst und Medien)* (German employees' union – art and media sector).[20] Since this tariff agreement was not declared generally binding, it only applies if either both parties are bound by the tariff agreement or if rules contained in the tariff agreement have been incorporated in the individual contract. Para. 3.1 of the tariff agreement, which was cancelled on 1 January 1995 and has not yet been replaced by a new rule, provides that film professionals grant to the film producer virtually all the exploitation rights for the production and use of the film on an exclusive basis and without limitation in respect of content, time or place. These rights include remakes.

2. Precautions to Protect the Role of Collecting Societies

Under German copyright law, certain claims can only be asserted collectively. They must therefore be exercised by collecting societies. In the audiovisual media sector, these include royalties for:

- cable retransmission (Art. 20b para. 1 first sentence UrhG);
- lending and rental (Art. 27 para. 3 UrhG);
- reproduction and distribution for people with disabilities (Art. 45a para. 2 second sentence);
- reproduction, distribution and public communication of individual broadcast commentaries (Art. 49 UrhG);
- making works available to the public for education and research (Art. 52a UrhG);
- communication of works at electronic reading stations in libraries, etc. (Art. 52b UrhG);
- copies distributed to order (Art. 53a UrhG);
- reproduction by means of video and audio recordings (Art. 54 in conjunction with Art. 54h para. 1 UrhG),
- performers' remuneration claims for recording, reproduction and distribution (Art. 77 para. 2 UrhG in conjunction with Art. 27 para. 3 UrhG);
- performers' remuneration claims for public communication under Art. 78 para. 3 and 4 in conjunction with Art. 20b para.1 first sentence UrhG.

For reasons of synergy and in order to ensure equal, fair distribution of royalties and to avoid arbitrariness, the German legislative body deemed it necessary to rule that these rights should be exercised entirely by collecting societies. According to Art. 63a UrhG, legal claims to remuneration that represent compensation for limitations of copyright may, in principle, only be assigned in advance to a collecting society. The same applies to cable retransmission (Art. 20b para. 2 second sentence UrhG) and claims to remuneration for rental and lending (Art. 27 para.1 third sentence UrhG). These provisions are designed to protect the remuneration claims of authors and performers.[21]

The importance of collecting societies was boosted by the *2. Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft* (2nd act on the regulation of copyright in the information society – "2nd basket"), which entered into force on 1 January 2008. Before this amendment came into force, the fees levied on appliances and storage media, which are paid to authors via collecting societies, were

19) In 2001, *IG Medien* became part of the *Vereinte Dienstleistungsgewerkschaft e.V.* (united services union - ver.di), where it forms sector 8; in 2005, the *BundesFilmVerband* (federal film union – BFV) was created for film and cultural professionals as well as (independent) self-employed contractors and employees of film and television production companies. With around 3,500 members, the BFV is a union for film professionals. For the cinema sector, the so-called *Kino.Netzwerk* (cinema network) was created within the ver.di.

20) See http://www.nrw-film.de/a_content/fundus/tarife/tarifvertraege.pdf

21) See Government draft copyright act in *BT-Drucksache 14/7564*, available at: http://www.urheberrecht.org/UrhGE-2000/

fixed by the State (Art. 54d UrhG, old version). Under the new provisions, the collecting societies negotiate the fees with the associations of appliance and storage media manufacturers themselves. The law only now provides the participants with a framework for calculating the level of fees, which depends on the actual extent of exploitation (Art. 54a UrhG).

3. Reversion Clauses

The original rightsholder and the person acquiring exploitation rights can agree on the reversion of the rights in a contract. This usually takes the form of either a clause under which the rights revert at the end of an agreed exploitation period or a so-called turnaround clause.

In the first scenario, the clause takes effect automatically, resulting in the reversion of the rights to the original rightsholder after the expiry of the exploitation period.[22] Where films are concerned, the aforementioned rule of interpretation contained in Art. 88 para. 2 second sentence UrhG is significant in this context. It states that exclusive rights transferred by an author to a film producer should, in cases of doubt, be limited to a 10-year period. Permanent exclusivity must, on the other hand, be explicitly agreed in the contract. In the second case, continuing the legal right of revocation due to non-exercise enshrined in Art. 41 UrhG, the rights revert to the author if the film producer fails to exercise them; here, the author pays to the film producer part of the overall development costs. In return, he receives his rights back as well as all development materials and the right to continue the project himself and/or with the support of other parties. Such clauses are often included in contracts in order to protect the rightsholder.[23]

III. Institutional Framework of Collecting Societies

1. Collecting Societies and Their Legal Foundations

The *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten – Urheberrechtswahrnehmungsgesetz* (Act on the management of copyright and related rights - UrhWG) regulates the activities of collecting societies. Collecting societies require official authorisation (Art. 1 UrhWG). Under Art. 1 para. 4, they are defined as legal persons or groups of persons who collectively manage exploitation rights or remuneration claims on behalf of several authors or performance rightsholders. The rules apply to natural persons by analogy. Generally speaking, collecting societies are private law entities, either in the form of business associations[24] or limited companies (GmbH)[25].

Authorisation is officially granted following a written application to the supervisory authority, the *Patentamt* (Patent Office) (Art. 2 para. 1 in conjunction with Art. 18 para. 1 UrhWG). The collecting society's statutes should be appended to the application, along with details of its authorised representatives, the number of people who have asked it to manage their rights and the number and financial value of the rights concerned. Authorisation may be refused on certain grounds, which are listed in the Act: an unlawful provision in the statutes, insufficient reliability of the applicant or a negative economic prognosis for the collecting society.

The law also provides for the subsequent withdrawal of authorisation if one of the aforementioned grounds for refusal is subsequently discovered and the collecting society does not take remedial action before a certain deadline. Authorisation may also be withdrawn if the collecting society repeatedly infringes one of its obligations despite receiving a warning from the supervisory authority.

For reasons of public information, both the granting and withdrawal of authorisation should be announced in the *Bundesanzeiger* (the gazette published by the Federal Justice Ministry).

22) There appear to be no statistical records showing how common such clauses are in Germany.
23) See Brehm, *Filmrecht, Handbuch für die Praxis*, 2nd ed., p. 307.
24) E.g., *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (society for musical performing and mechanical reproduction rights - GEMA).
25) E.g., *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH* (society for the management of performance rights - GVL).

2. Organisation of a Collecting Society

As explained above, collecting societies in Germany are private law entities in the form of associations or limited companies. An association is a corporate amalgamation of several persons, which bears a common name, is created for a certain period of time, is independent of changes to its membership and pursues a particular purpose which is laid down in its statutes.[26] A *GmbH* is a joint-stock company, i.e., the shareholders are not liable for the company's obligations personally, but (like the members of a registered association) their liability is restricted to the company's assets. In Germany, there are many collecting societies[27] with a wide range of types of legal status.

To take an example: the *Verwertungsgesellschaft Bild-Kunst (*VG Bild-Kunst*)*[28], an important collecting society for creative contributors to the film industry is organised as follows. According to Art. 1 of its Statutes, it is an association in the sense of Art. 22 of the *Bürgerliches Gesetzbuch* (German Civil Code – BGB), founded by authors (artists, photographers and film authors), which has acquired legal personality by State charter.[29] Art. 2 of its Statutes states that the VG Bild-Kunst administers, for its members and members of foreign sister societies, the copyrights in the visual sector which, for practical or legal reasons, individual authors are unable to administer themselves. According to Art. 5 of the Statutes, the organs of the VG Bild-Kunst are the *Verwaltungsrat* (Administrative Council), the *Vorstand* (Board of Directors), the *Mitgliederversammlung* (Members' Assembly) and the *Berufsgruppen-versammlung* (Assembly of Professional Groups).

The VG Bild-Kunst is divided into three Professional Groups. Professional Group I is comprised of artists and publishers, Professional Group II is comprised of photographers, photo journalists, designers, etc., while Professional Group III is comprised of directors, cameramen, editors, set designers, costume makers and film producers.

The Administrative Council, which is made up of five members of each Professional Group, supervises the management activities of the Board of Directors and concludes and terminates employment contracts with the Managing Director and contracts with the Board members. Art. 9 of the Statutes requires the Professional Groups to meet together once a year at an Assembly of Professional Groups.

The Board of Directors is comprised of one member from each Professional Group acting in an honorary capacity as well as one full-time managing member (Art. 12 of the Statutes). According to Art. 13 No. 1 of the Statutes, the Board of Directors manages the society's business.

The members take their decisions at the Members' Assembly, which must be called by the Board of Directors in agreement with the Administrative Council at least once a year. The Members' Assembly decides, *inter alia*, on the distribution of the royalties collected on the basis of distribution plans proposed by the respective Assemblies of Professional Groups.

3. General Services Offered by Collecting Societies

According to Art. 6 para.1 UrhWG, collecting societies are obliged to assert the rights and claims within their sphere of activity at the request of the rightsholders under appropriate conditions (see IV.). Art. 7 UrhWG requires them to distribute the income from their activities in accordance with fixed rules. They also draw up tariffs in respect of the remuneration they demand (Art. 13 UrhWG).

---

26) See decision of the *Reichsgericht* (former German supreme court), RGZ 143, 212 (213).

27) The main ones are: GVL, which manages performance rights for performers, phonogram manufacturers and music producers; *Verwertungsgesellschaft Wort (*VG Wort) for publishers' and authors' rights; *Verwertungsgesellschaft Bild-Kunst*, which manages the primary and secondary exploitation rights of artists; *Verwertungsgesellschaft der Film- und Fernsehproduzenten* (collecting society for film and television producers - VFF); *Verwertungsgesellschaft Musikedition* (collecting society for music publishers - VG Musikedition*);* VG Media for copyright and performance rights of media companies; *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (society for musical performing and mechanical reproduction rights - GEMA); *Gesellschaft zur Wahrnehmung von Film und Fernsehrechten mbH* (society for the management of film and television rights - GWFF); *Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH* (collecting society for film exploitation rights - VGF); *Verwertungsgesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH* (collecting society for film presentation rights - GÜFA); *Verwertungsgesellschaft Werbung und Musik mbH* (collecting society for advertising and music - VGWM) and *Urheberrechts-Gesellschaft mbH (*AGICOA*)*.

28) http://www.bildkunst.de/

29) Art. 22 para. 1 *BGB* states that: "An association whose object is commercial business operations acquires legal personality, for lack of special provisions under *Reich* law, by State charter."

As well as this function of collecting and distributing royalties, collecting societies must fulfil social obligations, such as the promotion of important cultural works and the maintenance of welfare and assistance schemes for their members (Art. 8 UrhWG).

The VG Bild-Kunst offers the following services: collection and distribution of fixed copyright royalties (e.g., private copy royalties), licensing and implementation of individual rights and political and legal strengthening of copyright protection (e.g., statements regarding proposed legislation and conclusion of general contracts).[30]

In 1998, all the German collecting societies together set up the *Clearingstelle Multimedia für Verwertungsgesellschaften von Urheber- und Leistungsschutzrechten GmbH* (Multimedia Clearing House for Collecting Societies Responsible for Copyright and Performance Rights - CMMV). This is the central information point for multimedia producers wishing to identify the rightsholders for copyright-protected works. The CMMV cannot grant exploitation rights itself, but simply forwards via the Internet the requests it receives to the collecting societies concerned, which then process them themselves.

In 1963, in order to assert more efficiently their claims to remuneration for reproduction by means of audio and video recording (Art. 54 UrhG), the GEMA, *VG Wort* and GVL collecting societies formed the *Zentralstelle für private Überspielungsrechte* (Central Organisation for Private Copying Rights – ZPÜ). The *Verwertungsgesellschaft der Film- und Fernsehproduzenten* (collecting society for film and television producers – VFF), the *Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungs-rechten mbH* (collecting society for film presentation rights – GÜFA), the VG Bild-Kunst, the *Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten* (society for the management of film and television rights – GWFF) and the *Verwertungsgesellschaft für Nutzungsrechte an Filmwerken* (collecting society for film exploitation rights – VGF) joined the ZPÜ in 1988. The ZPÜ has the sole task of collecting royalties from appliance and blank cassette manufacturers, importers and dealers and distributing them amongst its shareholders.

The royalties owed by video libraries in accordance with Art. 27 para. 1 UrhG are collected by the *Zentralstelle für Videovermietung* (Central Organisation for Video Rental – ZVV). The members of the ZVV are GEMA, VG Wort, VG Bild-Kunst, VGF, GWFF, GÜFA and GVL.

IV. Rightsholders' Perspective

1. Rightsholders' Choice between Different Collecting Societies

In Germany, collecting societies can, in principle, be freely set up. Rightsholders can therefore, at least in theory, choose between all existing collecting societies; as a corollary there is no (legal) monopoly in the sense of only one collecting society being allowed or supposed to manage each category of economic rights.

However, in practice, there is an actual monopoly due to the nature of the market. User organisations normally sign an agreement with the collecting society which can grant them the most comprehensive rights and provide them with the best selection of works. This is usually the society that represents the most rightsholders from the same genre in respect of certain rights. Rightsholders therefore assign their rights to the society with the greatest market power.

2. Legal Relationship between Rightsholders and Collecting Societies

a) In Germany, rightsholders are not obliged to join a collecting society. However, as already explained, some rights can only be asserted by collecting societies. Holders of copyright and performance rights usually conclude a so-called *Wahrnehmungsvertrag* (collection agreement) with the relevant collecting society, such as the VG Bild-Kunst, for example. In so doing, they become members of the society and transfer to it the rights relevant to the particular professional group.

30) See http://www.bildkunst.de/

Collection agreements concluded by artists usually contain the following clause:

> "The rightsholder hereby transfers to collecting society XY *all* performance rights to which he is currently entitled or will be entitled during the term of this agreement."[31]

On the basis of this clause, the rightsholder no longer has control over his individual rights.

b) The fixed royalties owed to rightsholders by manufacturers and importers, etc., are collected by collecting societies and distributed amongst the authors (e.g., the appliance tax referred to in Art. 54 in conjunction with Art. 54h para. 1 UrhG). Since the law only requires remuneration to be "reasonable", the collecting societies are responsible for drawing up criteria for determining what is reasonable and for laying down fixed tariffs.[32]

c) Collecting societies are obliged to assert the rights of the rightsholder (Art. 6 UrhWG) and to conclude agreements with potential users (Art. 11 UrhWG).

3. Scope of Collective Rights Management

As explained above, only exploitation rights, rather than copyright itself, may be transferred under contract. In general, the rightsholder decides which rights to transfer to the collecting society concerned, although the aforementioned general transfer clause is included in most collection agreements. In addition, particularly in the film production field, rules of interpretation favouring film producers apply (Arts. 88, 89 and 92 UrhG, see I.4.), assigning all rights to the film producer in cases of doubt.

The period for which exploitation rights are transferred is defined in the agreement; the assertion of rights is usually limited to Germany.[33] In order to take into account the convergence of international markets, the German collecting societies have signed reciprocal agreements with other national collecting societies[34] in order that foreign rights can also be offered in Germany and German exploitation rights can be asserted abroad. International umbrella organisations[35] have been created to support this work by developing standard agreements and helping to coordinate and implement exploitation rights at international level.

4. Service to Rightsholders

a) As already explained, collecting societies are obliged to draw up remuneration tariffs that take authors' interests into account (Art. 13 para. 1 UrhWG). A so-called distribution plan must be established in order to avoid an arbitrary distribution process (Art. 7 para. 1 UrhWG). The distribution plan must adhere to the principle that culturally important works and performances should be promoted (Art. 7 para. 2 UrhWG).

As an example of the distribution of royalties, we shall again look at the activities of the VG Bild-Kunst, in particular its distribution plan of 7 July 2007,[36] which contains both general distribution principles and 13 individual distribution plans.[37] According to the general principles, each rightsholder

31) See Brehm, *op. cit.*, p. 318.
32) For example, the GEMA currently charges EUR 7.50 plus VAT for CD burners and EUR 9.21 plus VAT for DVD burners. See also http://www.gema.de/uploads/tx_mmsdownloads/gema_cd-brenner_tarif.pdf and http://www.gema.de/uploads/tx_mmsdownloads/gema_dvd-brenner_tarif.pdf
33) See Brehm, *op. cit.*, p. 320.
34) For example, the VG Bild-Kunst has 68 reciprocal agreements (as of October 2008); see http://www.bildkunst.de/html/pdf/Auslandsadressen.pdf
35) E.g., *Confédération Internationale des Sociétés d´Auteurs et Compositeurs (CISAC); Bureau International de l´Edition Mécanique (BIEM)*.
36) See http://www.bildkunst.de/
37) These distribution plans cover resale rights, fine art and photography reproduction rights, art broadcasting rights, the broadcast of book illustrations, library royalties, copying fees, digital reprography fees, press review royalties, reading club rental fees, retransmission rights for fine arts, design and photography, cable retransmission fees for films, rental fees for video cassette, film DVDs and other video and audio media, and appliance and blank cassette fees.

receives the share due for the (actual) use of his work, minus the society's administrative costs and the payments made to its welfare, promotion and assistance schemes. Fixed-rate distribution rules only come into play if it is impossible or disproportionately expensive to calculate the value of the individual royalty shares. These rules should take into account the extent of the exploitation and the cultural or artistic importance of each rightsholder's contribution. Upper and lower payment limits may be set. Payments are made on the basis of annual calculations.

One of the individual distribution plans concerns cable retransmission of films. It states that the administrative cost deducted must not exceed 20% of income. After deduction of additional items (e.g., up to 5% for the VG Bild-Kunst Social Fund[38] and up to 1% for the VG Bild-Kunst Cultural Fund[39]), the remaining amount is distributed among the rightsholders in accordance with a complicated distribution key, which is based on the so-called points value[40] of a film. The resulting sum is then shared among the rightsholders according to a fixed scale.[41] In 2007, the total income of the VG Bild-Kunst was EUR 60.2 million, 38.4% more than in the previous year (EUR 43.5 million).[42]

b) As mentioned above, collecting societies are obliged to set up welfare and assistance schemes for their members (Art. 7 UrhWG).

The (general) entitlement of artists to social protection in the form of pension, health insurance and nursing care insurance is regulated in the 1981 *Künstlerversicherungsgesetz*[43] (Artists' Insurance Act – KSVG).[44] Artists' insurance is part of the German social welfare system. Since 1983, self-employed artists and publishers have therefore been obliged to join the scheme if they earn a minimum amount from their activities, do not employ more than one other person and are not otherwise exempt from this obligation. "Artists" in the sense of the KSVG include performing artists. The unusual feature of artists' social insurance is the fact that only half of the contributions are made by the insured parties; the other half are paid by users in the form of fixed artists' social security contributions (see Art. 24 ff. KSVG).[45] The artists' social insurance scheme is implemented and managed by the *Künstlersozialkasse* (Artists' Social Welfare Fund).[46]

The VG Bild-Kunst contributes to the artists' social insurance scheme from two sources: firstly in the form of payments in return for resale rights (Art. 26 UrhG),[47] and secondly as compulsory payments under the KSVG.

5. Rights Relating to Transparency and Monitoring of Collecting Societies

a) The members of a collecting society are represented by the Members' Assembly. The example of the VG Bild-Kunst shows that the Members' Assembly also has an extensive influence over the activities of the society's other organs. It elects the Administrative Council, which in turn appoints and dismisses members of the Board of Directors. For non-members, Art. 6 para. 2 UrhWG states that, for the appropriate protection of their interests, common representation should be provided by collecting societies.

38) The VG Bild-Kunst Social Fund provides financial support to artists, photographers, designers and film-makers in emergency situations, occupational disability and old age; see http://www.bildkunst.de/html/sozialwerk.html

39) The VG Bild-Kunst Cultural Fund is responsible for promoting culturally important works in the fields of art, photography and film.

40) Important factors in determining this points value include the length of the broadcast, a "time factor" and a "cable factor" (2 for cinema films, 1 for other films).

41) 95% is shared between directors (66%), cameramen (19.5%) and editors (14.5%); the other 5% is split between set designers (56.7%) and costume designers (43.3%).

42) See http://www.bildkunst.de

43) See http://www.gesetze-im-internet.de/ksvg/index.html

44) Federal Gazette I p. 705, last amended by Art. 1 of the Act of 12 June 2007, Federal Gazette I p. 1034.

45) In 2008, artists' social security contributions were fixed at 4.9% of all artists' and publishers' fees, see http://www.kuenstlersozialkasse.de/wDeutsch/ksk_in_zahlen/beitraege/abgabesaetze.php

46) The *Künstlersozialkasse* is a department of the *Unfallkasse* (federal accident insurance fund) and is therefore part of the federal administration. Its headquarters are in Wilhelmshaven and it is a national body; see http://www.kuenstlersozialkasse.de/wDeutsch/kuenstlersozialkasse/index.php?navanchor=1010002

47) If the original of a work of fine art or photograph is resold and if an art dealer or auctioneer is involved as purchaser, vendor or agent, the vendor must pay to the author a share of the selling price before tax. If the vendor is a private person, the art dealer or auctioneer acting as purchaser or agent is also liable as a joint debtor; in their relation to one another, only the vendor carries an obligation. According to sentence 1, there is no obligation if the selling price is less than EUR 400.

b) The interest of different groups of people in the transparency of collecting societies is taken into account in the UrhWG. As far as rightsholders are concerned, Art. 9 UrhWG includes the obligation to draw up annual accounts and a report at the end of each financial year. The annual accounts and reports are checked by expert auditors, who draft a written report on their findings. The end-of-year report is published in the *Bundesanzeiger*.

Collecting societies may also be obliged to communicate other information to their members under their organisational rules.[48] For example, the Board of Directors of collecting societies with association status must inform members about the management of the society (Art. 27 para. 3 in conjunction with Arts. 666 and 259 of the Civil Code).

In addition, members may be entitled to certain information on the basis of individual agreements – in connection with distribution plans, for example. An example is the VG Wort rules concerning its distribution plan.[49] These stipulate that rightsholders should automatically receive a detailed, formalised statement, which indicates the amount they are owed as well as the VAT involved. According to Art. 5 of the VG Wort distribution plan, rightsholders are entitled, in return for an administration fee payable to the collecting society, to a detailed statement or tax certificate.

In practice, collecting societies usually provide members and other interested parties with the information they need via extensive Internet sites, from which statutes, collection agreements, distribution plans, etc., are often available for download. Some also inform their members by means of regular circulars (e.g., GEMA-*Brief*, *Wort* Report of the VG Wort) or annual publications (e.g., GEMA-Jahrbuch).

In addition, collecting societies are subject, under Art. 18 UrhWG, to State supervision by the Patent Office. The Patent Office also decides, in agreement with the *Bundeskartellamt* (Federal Cartels Office), on applications for and the withdrawal of authorisation (see III.1.). According to Art. 19 UrhWG, this supervision includes monitoring the fulfilment of the society's legal obligations and ensuring that it does not operate without the necessary authorisation. Amongst other things, the Patent Office can request information from the collecting society at any time and take part in its Members' Assemblies.

Under Art. 20 UrhWG, collecting societies are obliged to inform the supervisory authority (Patent Office) about changes to the list of official representatives, amendments to the statutes or tariffs, agreements with foreign collecting societies, Members' Assembly resolutions, etc.

c) According to Art. 16 UrhWG, disputes involving a collecting society must be taken to a Patent Office arbitration body before they are brought before an ordinary court if they concern any of the following issues:

- the use of works or performances protected under the Copyright Act;
- the fees payable for reproduction on video and audio media or
- the conclusion or amendment of a general agreement.

The arbitration body comprises a chairman and two other members, all appointed by the Federal Justice Ministry. It is not obliged to follow outside instructions and disputes must be submitted to it in writing. Its objective must be the amicable settlement of the dispute and to achieve this, it must submit a proposed settlement to the parties within a year of the initial request.

48) See Riesenhuber, *"Transparenz der Wahrnehmungstätigkeit – Pflicht der Verwertungsgesellschaft zur Rechnungslegung, Publizität und zur Information ihrer Berechtigten"*, ZUM 2006, 417 (419).

49) See http://www.vgwort.de/files/verteilungsplan_07.pdf

ES SPAIN

Luis Miguel Sendino Villoriego
Suárez de la Dehesa Abogados

I. Legal Framework

The legal concept of an "audiovisual work" within the range of works referred to as "audiovisual" underwent a dramatic evolution in Spain firstly during the 1980s and then more particularly in the 1990s, as a result of the massive commercialisation of technological products that had existed previously but that were only then becoming fully available to the general public.

The distinction between "cinematographic films" and what is called "audiovisual material" is defined in the Intellectual Property Act (LPI),[1] whose Article 10 para. 1 d) draws a distinction between "cinematographic works" and "any other type of audiovisual works". The former presupposes a unitary original creation, the prime purpose of which is that the work should be shown in cinema theatres, with its own stylistic features, and fixed on a physical medium that does not allow it to be recorded.[2]

A non-cinematographic audiovisual work, for which originality is also a requirement, does not presuppose that its primary purpose is that it should be shown in a cinema theatre, or that it forms a unit, thereby establishing freedom of form in the field of audiovisual creation.

Article 87 of the LPI opts for restricting the group of authors of an audiovisual work to the director, the authors of the story line, adaptation and script or dialogue, and the composer of any music created specifically for the work.

Director:

This is the professional who assumes most responsibility and artistic authority from the beginning of filming or fixing the images, or the preparatory work, up to the moment prior to establishing the final version or handing the first totally completed copy over to the producer, depending on the terms of the relevant contract. In the case of bilingual directors, this may include directing the dubbing. The director does not assume technical responsibility; he has more of a supervisory function in this area, responsibility being in the hands of the "technical" directors, mainly the photographic, artistic and editing directors.

1) *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (Royal Legislative Decree 1/1996 of 12 April, approving the reworked text of the Intellectual Property Act, regulating, clarifying and harmonising the statutory provisions in force on the subject), available at: http://noticias.juridicas.com/base_datos/Admin/rdleg1-1996.html
2) We refer here to the cinema film as a distinct medium, to differentiate it from other media such as television or home video (DVD, Blue Ray, etc.).

The Intellectual Property Act, without going to the extreme of considering the director to be the single author of the work, nevertheless gives him in Article 92 an essential, privileged position above that of the other co-authors, since the final version of the audiovisual work is decided on by the director and the producer, unless agreed otherwise in the contract. Thus the law excludes the other co-authors from the establishment of the final version, giving special consideration to one of the co-authors: i.e., the director of the work.

Authors of the Story Line, Adaptation, Script and Dialogues:

These are the authors of the written basis for the work, containing more or less technical indications, which the director-producer will transform into image form. Save in exceptional cases, the story line, also called "treatment" or "original idea", is not published prior to the start of the production process. It should therefore be understood as being an original work whose immediate purpose is to serve as the basis for the development of the script for an audiovisual work. The author of the adaptation is a professional who takes a pre-existing work and transforms it in such a way that it can be used as the basis for a script. The scriptwriter is a professional who takes an existing written element, either a story line or an adaptation, in order to create a script, i.e., a creation containing enough literary and technical elements to serve as a guide in transforming the written creation into images. Lastly, among the group of the authors of the dialogues, will be included the authors of the translations of the dialogues intended for dubbed versions where the original version is in a different language.

Composers of the Music Created Specifically for the Work:

This work is completely independent from that of the other professionals involved in the production process, and it does not alter the narrative pace determined by the director. This is a separate contribution that is superimposed upon the work.

Special consideration should be given to musicals; since these are works originally composed for other purposes (stage performance), their authors do not have the same status as the co-authors of the audiovisual work.

1. Authors

Recognition of the authorship of an audiovisual work presumes automatic access to a set of rights, some of which are common to all authors in general, and which the Act divides into moral rights, exploitation rights, and other rights. Such a set of rights has, initially and by its essence, an individual core, definitively recognised as being non-transferable, inalienable, and of unlimited duration, which the Act calls moral rights. Attached to them are those with pecuniary content, i.e., exploitation rights.

a) Moral Rights

Entitlements concerning publication:

- Deciding whether the work is to be made available to the public or not, and in what form;
- Applying for and obtaining recognition of authorship;
- Determining whether the work is to be made available to the public under the author's real name, under a pseudonym, or anonymously;
- Accessing a unique or rare copy of the work, when this is in another person's possession, in order to exercise the right of publication or any other right corresponding to it.

Possibilities concerning the integrity of the work:

- Demanding respect for the integrity of the work and preventing any modification, alteration or infringement that would be damaging to the author's legitimate interests or diminish his/her reputation;
- Altering the work, respecting the rights acquired by third parties and the protection of goods of cultural value;
- Taking the work off the market further to a change in his intellectual or moral convictions, with compensation for the damage and prejudice caused to the holders of the exploitation rights.

b) Exploitation Rights

- Right of reproduction,
- Right of distribution,
- Right of public communication,
- Right of transformation,
- Right of making the work available,
- Right of database protection.

c) The Rights to Remuneration for the Authors of Audiovisual Works

- Right to remuneration for acts of private copying,
- Right to remuneration for remunerated public performance,
- Right to remuneration for the non-remunerated public performance or broadcasting of audiovisual works.

There are two ways of remunerating authors. There is a contractual or direct way that is based on the contract transferring exploitation rights; this consists of paying a percentage of the sale price of the media concerned. The second or indirect way consists of what are called simple remuneration rights, which give their holders an economic advantage in relation to certain exploitations of the works which, according to the legal provisions, have either been excluded from the scope of exclusive rights, or the right corresponding to this exploitation has been transferred to a person other than the original rightsholder. The line of argument in defence of this right is based on the presumption of a situation of imbalance between the author and the producer at the time of concluding the contract which calls for an increase in the remuneration based on more or less objective parameters.

2. Producer

The producer decides to carry out a specific project for an audiovisual work, finds professionals to make the work, decides on the appropriate means of doing so and brings together the necessary funds – his own or sourced from elsewhere – to finance it. His contribution throughout the time taken to produce the audiovisual work is more than a merely economic contribution, since it affects decisive elements of the work; it is not limited to merely assuming the risks involved in production.

The legal concept of the producer defined in Article 120 para. 2 LPI, in conjunction with Article 88 para. 1, includes both the producers of cinematographic works and the producers of any other type of audiovisual recording.

From the legal point of view, the recognition of the rights of the audiovisual producer *in personam* and not as an assignee, whether legal or contractual of the authors, only began in the mid-1960s, when the concept of "related rights" was coined.

Thus in Articles 121 to 123 of the LPI, it is indicated that the producer shall enjoy the right to authorise the reproduction, distribution and public communication of his audiovisual recordings.

According to Article 88 para. 1 of the same text:

> "Without prejudice to the rights that are devolved on the authors by the contract for the production of the audiovisual work, the rights of reproduction, distribution and public communication, and the dubbing or subtitling of the work, are presumed to be assigned exclusively to the producer."

This presumption may be refuted by means that already exist at law, with the burden of proof being incumbent on the party seeking to refute this presumption.

Article 88 para. 2 adds the following exception:

> "Notwithstanding this, cinematographic works shall always require the specific authorisation of their authors for their exploitation, by making copies available to the public in any system or format for their use in the home, or through public communication by means of broadcasting."

The following points should be made concerning the specific rights of the producer in relation to his audiovisual recordings:

- Right of reproduction (Art. 121 LPI): This refers to the first fixation of an audiovisual recording and its copies. It covers both direct reproduction using the original fixation itself and indirect reproduction using a copy or duplicate of the original or an act of its public communication. This right is exclusive.
- Right of distribution (Art. 123 LPI): This is also an exclusive right; in point 2, it refers to the exhaustion of the right establishing two distinct systems, according to whether the distribution takes place inside or outside the European Union. Within the Union, the right is exhausted with the first distribution as this puts an end to the possibility of the producer's using his *ius prohibendi* to control the distribution of legitimately obtained copies, except in the case of rental, for which special authorisation is required. Outside the European Union, the producer may continue to exercise this right even after the work has legitimately gone on sale.
- Right of public communication (Art. 122 LPI): This gives the producer the exclusive right to authorise the public communication of his/her audiovisual recordings. Point 2 establishes a legal obligation of remuneration in favour of performing artistes and producers, according to which third parties using the audiovisual recordings for public communication purposes are under the obligation of providing such remuneration.

3. Performing Artists

Article 105 of the LPI states that:

> "The title of performing artist refers to a person who represents, sings, reads, recites, interprets or performs a work in any form."

The rights that the LPI recognises in regard to performing artists follows the scheme applied to authors, differentiating between moral rights and pecuniary rights.

a) Moral Rights:

Article 113 para. 1 of the LPI states that it is for the performer to determine whether his interpretations or performances should be circulated under his own name or under a pseudonym and demand the corresponding recognition. It also gives the performer the right to oppose any deformation, modification, mutilation or infringement of his interpretations or performances that might be damaging to his standing or reputation. Throughout the artist's entire lifetime, his specific authorisation will be required for dubbing the performance in her own language.

b) Exploitation Rights:

As is the case for authors, exploitation rights include, in addition to those set out in Articles 106 to 110 of the LPI, those included in Article 25 of the LPI on fair compensation for private copying.

The exclusive exploitation rights are:

- Right of fixation (Art. 106 LPI): The performer may authorise or prohibit the fixation, i.e., printing onto a data carrier, of his performances or interpretations.
- Right of reproduction (Art. 107 LPI): This is the exclusive right to authorise the reproduction of his performances.
- Right of distribution (Art. 109 LPI): Performers may also dispose freely of this right.
- Right of public communication (Art. 108 LPI): The reworked text of the LPI gives performing artists an exclusive right to authorise the public communication of their interpretations or performances. This right is to be determined according to what is established in Article 20 LPI. There is therefore no concept of public communication or a scope of application of the law that is specific to performing artists.

There are nevertheless certain specific features concerning the right of public communication of performing artists that are not observed in respect of authors. Firstly, there is the fact that Article 108 para. 1 of the LPI limits the legal scope of the performer's right of public communication

to the granting of mere authorisations. This is not the same as the provisions in respect of other rights recognised for performers, such as reproduction or distribution; there is nothing in Article 108 LPI about the possibility of the transfer, disposal or licensing of the right of public communication. In simple terms, it is a right that, as such, remains with its original holder who, through any contractual negotiations he may choose to undertake, may allow the exercise of the possibilities covered by the right.

Secondly, the signature of a production contract no longer generates the legal transfer of rights that was the case previously. Nor, unless norms are provided for in this respect, does it result in a presumed contractual transfer, as happens in the case of authors (Arts. 88 and 89 LPI). In those cases, however, where the artist performs in the context of a contract of employment or provision of services, this must comply with the provisions of Article 110 of the LPI. In such cases, unless other arrangements are made, the impresario or principal will acquire the exclusive right to authorise the reproduction and public communication of the work.

4. Other People Involved In the Audiovisual Work

Since audiovisual art has reached such a stage of development by the end of the twentieth century, it would be inexplicable – and unjust – to refer exclusively to those who are involved in the audiovisual work as author, producer and performer and omit those professionals whose contribution has an undisputed effect on the final result. These professionals include, but are not limited to, the director of photography, the editor, the artistic director, the decorator, and the people in charge of designing any special effects created exclusively for a given work.

A distinction can no longer be made, as was sometimes done in the past, between intellectual work and manual or technical skill. Not infrequently, the work of latter professionals has a transforming effect on the result, such that the work may be identified not only by its authors or performers, but also by reference to some of the other persons involved.

The question is whether these professionals, on the basis of their participation in the creative process, may accede in any way to the rights they held, at least presumptively, under the old 1966 Act, i.e., whether the list given in Article 87 LPI is exclusive, or if there is the possibility of extending recognition for creativity to these professionals.

Reference must be made here to the fact that, Article 4 of Act 55/2007 on the cinema[3] considers that the creative contributors to a work include not only the authors, actors and other performers involved in the work but also creative technical personnel – the senior editor, the artistic director, the head of sound, the costume designer and the make-up artist.

It should be mentioned that for the purposes of the Act, the director of photography is recognised as an author (Art. 5).

However, the fact that the professionals to whom we are referring here do not have the option of being considered as the authors of the audiovisual works does not mean that their creations remain unprotected. The Act also provides protection for a number of elements involved in the production of audiovisual works, such as designs, sets, scale models, choreographic works, and sometimes photographic work carried out for filming purposes, and special effects and musical works created independently and not specially for the audiovisual work but subsequently incorporated into its soundtrack.

The key issue is to clarify whether the fact that other protected works or other elements such as applied art works are incorporated into the audiovisual work should lead us to conclude that the audiovisual work should be considered as a composite work, or if it is rather a case of joint publication. In reaching a decision, it needs to be seen whether the inclusion of the director of photography in the Cinema Act has further consequences and is reflected in the Intellectual Property Act, and whether the concept of author should be extended further to include other creative technicians.

3) *Ley 55/2007, de 28 de diciembre, del Cine* (Act No. 55/2007 of 28 December, on the cinema), available at: http://noticias.juridicas.com/base_datos/Admin/l55-2007.html

II. Practice in Rights Management

Generally, rightsholders may undertake the administration of their rights personally or entrust such management to the relevant collecting society, except in cases of compulsory collective management. In theory, each rightsholder may negotiate individually with the relevant collecting society, although in practice this does not usually happen. The collecting societies often propose a "membership contract" drawn up in advance, which the rightsholder has no choice but to accept. As a result, and to avoid any possible abuse of the scheme, Article 153 of the LPI stipulates a series of limits on a contract for the management of rights. Its duration may not be more than five years, although the period may be renewed indefinitely, nor may it impose as compulsory the management of all the methods of exploitation or of all future work or production. Likewise, the collecting societies are supposed to ensure management that is not influenced by the users of their catalogue and to prevent the unfair preferential use of the works they contain.

According to Article 90 of the LPI, the remuneration of the authors of the audiovisual work by the transfer of the rights to the producer of the work and, where appropriate, the corresponding remuneration of the authors of the pre-existing works whether they have been transformed or not will need to be decided contractually for each one of the methods of exploitation conceded.

The following rights will be made effective through collecting societies:

- Article 90 para. 2 of the LPI establishes a presumption of transfer of the right of rental to the producer, unless agreed otherwise in the contract and except for the inalienable entitlement to fair remuneration, which will be required from those parties actually carrying out the operations of renting the audiovisual recording to the public.

- As for projection in a public place for which an entrance charge is made, the authors will be entitled to receive from those who exhibit the work publicly a percentage of the income generated by such public exhibition. The amounts paid in this respect may be deducted by the exhibitors from the amounts they are required to pay to the parties ceding rights to the audiovisual work. In the case of an audiovisual work that is exported, the authors may accept payment of a lump sum instead. Impresarios of public halls or exhibition premises will be required to pass on to authors the amounts collected for this remuneration periodically (Art. 90 para. 3 LPI).

- The projection or showing of an audiovisual work for free, and the transmission to the public by any means or process, whether wireless or otherwise, including, *inter alia,* making it available in such a form that any person may access the work from any place at any time, shall entitle the authors to receive a remuneration calculated in accordance with the rates generally established by the corresponding entity (Art. 90 para. 4 LPI).

Article 90 para. 5 of the LPI imposes an obligation on the producer to supply at least once a year at the author's request the documentation necessary to enable the author to exercise his rights arising from the exploitation of the audiovisual work.

In the case of rights to remuneration, the collecting societies are under an obligation to manage the rights, in compliance with the remit entrusted to it by law, regardless of whether the holder of the rights is a member of the society or not. In the case of exclusive rights, there is no statutory mandate for their management, so the rightsholder may manage them himself or entrust their management to another person or collecting society under a contractual agreement.

In practice, the difficulty of managing all the works, both in the country of residence and their circulation throughout the rest of the world, leads rightsholders to conclude contracts with collecting societies for the management of all their rights. For the same reason agreements for the management of rights concluded for a specific period of time are rather unusual.

III. Institutional Framework of Collecting Societies

The LPI does not require the collecting societies to adopt any specific form of organisation. Collecting societies, as regulated in Section IV of Book III of the LPI, may be established as private organisations in the form of not-for-profit associations that are dedicated in their own name or otherwise to the management of intellectual property rights of a pecuniary nature on behalf of the legitimate rightsholders.

Because of this not-for-profit aspect, part of the profits obtained from developing the association's activities will be earmarked by the collecting society itself for funds to enable it to continue developing its management.

For its part, the LPI gives a specific list of elements that must be reflected in the articles of association of each collecting society, such as object, purpose, the duties incumbent on the members of the collecting society and its disciplinary system, governance organs, and matters concerning the functioning and internal organisation of the society.

The articles of association establish the representation of the partners in the governance and administration of each collecting society. In general, we may say that each collecting society will have as its organs of governance a general assembly, a board of directors and a delegated commission.

The general assembly is the meeting place for all the members of the collective society; its meetings are called in order to reach agreements as the supreme body, the agreements being reached by a majority for the collecting society's ordinary affairs. The general assembly shall also appoint the collecting society's auditor. Generally there are two ordinary meetings each year, although an extraordinary meeting may be convened by the chairman of the board of directors whenever this is deemed to be in the collecting society's interests.

It is the board of directors that carries out the society's actual management. It comprises a variable number of members, depending on the society, and generally most of its members will be representatives of the ordinary members elected by universal or direct suffrage. However, the collecting society may lay down additional requirements for eligibility. The board approves the annual budgets, the accounts, the assessment of rates, the systems for distribution, and the application of the assistance fund which all the societies have.

Lastly, there is often a delegated commission, set up by the board of directors and having certain partial or total powers to deliberate severally or jointly. The commission is to be chaired by the collecting society's president or, in his absence, its vice-president.

There are at present eight authorised collecting societies in Spain, namely SGAE (*Sociedad General de Autores y Editores* – general society of authors and editors), CEDRO (*Centro Español de Derechos Reprográficos* – Spanish centre for reprographic rights), AGEDI (*Asociación de Gestión de Derechos Intelectuales* – association for the management of intellectual rights), AIE (*Artistas, Intérpretes o Ejecutantes: Sociedad de Gestión de España* – Spanish management society for performing artistes), VEGAP (*Visual Entidad de Gestión de Artistas Plásticos* – visual society for the management of plastic artists), EGEDA (*Entidad de Gestión de los Derechos de los Productores Audiovisuales* – society for the management of the rights of producers of audiovisual works), AISGE (*Artistas Intérpretes: Sociedad de Gestión* – management society for performing artistes), and DAMA (*Asociación de Derechos de Autor de Medios Audiovisuales* – association to protect the copyright of authors of audiovisual media).[4]

These collecting societies are subject to administrative supervision, and must be authorised by the Ministry of Culture to carry out their functions, which include the following:

- Administration of intellectual property rights, subject to the legislation in force and the collecting societies' articles of association. These collecting societies manage intellectual property rights that have been either delegated by their legitimate holders, or by statutory mandate (rights covered by compulsory collective management); they follow up violations of these rights by checking

4) For details concerning the collecting societies see below IV.

on use; they determine suitable remuneration depending on the type of exploitation, and collect this remuneration.
- In the case of large-scale use, they conclude general contracts with associations of users of their catalogues and fix general price lists for their use.
- They make effective rights to remuneration (for example, remuneration for private copying).
- They distribute the net amount collected to the rightsholders.
- They provide services of assistance and promotion for authors and performers.
- They protect and defend intellectual property rights from infringement, if necessary by having recourse to the courts.

It is important to highlight their essential role as mechanisms for the protection of intellectual property rights. With the intention of reinforcing this mechanism for the protection of the various rightsholders, the legislator has opted for giving the collecting societies their own legal status, featuring the exclusive management of rights covered by collective management and giving them special legitimisation ensuring their pre-eminent position, making up for the weakness of the situation of the rightsholders they represent. Combined with the exclusivity for management of the rights defined as being covered by collective management in the LPI, Article 150 of the LPI automatically confers legitimacy on the collecting societies, once they have been duly authorised by the Ministry of Culture, to exercise the rights entrusted to their management and to uphold them in any kind of administrative or legal procedure that may arise in relation to them, as stated in their articles of association. The *ad causam* legitimisation of the collecting societies has been one of the most debated issues in court, further accentuated by the appearance of the DAMA as a competitor to the SGAE[5], although most precedents and even the Supreme Tribunal have shown themselves in favour of recognition of specific legitimisation for the collecting societies. The collecting society must provide, at the appropriate point in court proceedings, a copy of the articles of association and the certification accrediting its administrative authorisation in order to prove that legitimisation, even if the user will always be able to base a counterclaim on a possible lack of representation.

IV. Rightsholders' Perspective

The LPI has instituted a system under which various collecting societies are able to coexist on condition that they fulfil the requirements laid down by the law. Indeed the law supposes the existence of competition among the collecting societies that manage the same type of rights, allowing the rightsholder to select which collecting society he wishes to manage his rights. In Spain this competition may arise in the case of DAMA and SGAE, and AIE and AISGE, and this has given rise to many problems deriving, *inter alia,* from the fact that on many occasions users have been obliged to make identical payments to more than one collecting society. Attempts have been made to resolve this with agreements between the competing collecting societies, setting up a mechanism called the "one-stop-shop" aimed at preventing the same payment being claimed from the user successively by the collecting societies in competition and its subsequent distribution in accordance with agreed rules.

As a result of the ministerial authorisation mentioned above and the legal status it confers upon collecting societies, collecting societies remain subject to a special scheme that gives rise to a series of obligations laid down as a foundation to guarantee protection for the intellectual property of rightsholders and also ensures fair and transparent management.

The obligations incumbent on the collecting societies are as follows: (i) they must accept the administration of authors' rights and other intellectual property rights that are entrusted to them in accordance with their object and purpose, subject to their articles of association and other applicable norms; (ii) they must distribute the royalties fairly collected in accordance with a system set out in the articles of association, excluding all arbitrary action; (iii) they must fulfil a social function based on promoting consultancy activities and services in terms of assistance, training and promotion and providing their members with appropriate accounting information; (iv) they must conclude contracts with any parties that so request, unless they are justified in declining to do so, conceding non-exclusive authorisations concerning the rights they manage, under reasonable conditions and against remuneration; (v) they are to draw up general lists of rates laying down the remuneration required for

5) *Sociedad General de Autores y Editores* – general society of authors and editors.

using their catalogues, which should make provision for reductions for not-for-profit cultural bodies; and (vi) they are to sign general contracts with associations that are representative of a certain category of users of their stock catalogue.

The collecting society is required to draw up the corresponding balance sheet and a report on its activities during the previous year. The balance sheet and the accounting documents are to be audited by experts or firms of experts. Once these have been audited, the balance sheet is to be made available for consultation by members at the collecting society's registered office and local delegations at least fifteen days prior to the holding of the General Meeting at which it has to be approved (Art. 156 LPI). Once the balance sheet has been approved, it must be sent with the audit report and the activities report to the Ministry of Culture.

The activities of collecting societies are also subject to supervision by the Ministry of Culture; the collecting societies are required to inform the Ministry of appointments and changes in their administrators and agents, their general rates and any changes made, contracts concluded with associations of users and with foreign associations of the same type, and their accounting documentation.

As for claims procedures, it should be pointed out that all the collecting societies have internal procedures for claiming the correction of wrong payments, although only in respect of material errors. These procedures are not provided for in their articles of association.

Rightsholders may be represented by one of the following collecting societies:

SGAE

The main purpose of the SGAE is to protect the author, the editor and any other rightsholders in the exercise of the following rights by managing those rights efficiently:

- the exclusive rights of reproduction, distribution and public communication – within the meaning of the Act – of literary works (verbal and written), musical works (with or without text), theatre works (covering dramatic, dramatic-musical, choreographic and pantomime works), cinematographic works and any other audiovisual or multimedia works, whether they are original works or derived from pre-existing works (such as translations, arrangements, adaptations or other transformations);
- in conjunction with any one of the previous rights, the exclusive right of transforming such works with a view to their interactive use as multimedia productions, in analog or digital mode;
- the rights of remuneration held by the authors of these works, and more particularly those provided for in Articles 25 and 90 para. 2 to para. 4 of the LPI on reproduction for the private use of the person making the copy and the rental of phonograms and audiovisual recordings and public communication of the audiovisual works.

The following exclusive rights are excluded from management by the company:

- the reproduction of the works in the form of a book or brochure; and
- public communication of literary works not included in an audiovisual work in their original or derived form, on condition that the methods of exploitation are different from those set out below:
  - public recitation or representation in a theatre or similar place,
  - wireless broadcasting or retransmission,
  - initial transmission by cable,
  - cable distribution of the initial broadcast by the same cable means as originally used, and
  - any communication to the public that may be made using phonograms or audiovisual recordings of the literary work intended for its publication.

CEDRO

CEDRO's main purpose is the protection and more particularly the collective management (direct or through agreements with other collecting societies, whether Spanish or not) of the pecuniary intellectual property rights of the authors, editors and other rightsholders of works that have been or are likely to be printed or circulated in either analog or digital format. Its effect on audiovisual works is minimal, which is why we shall not include coverage of its system of rights management here.

AGEDI

The AGEDI groups together the producers of phonograms, which include:

- the producers of phonograms or musical videos who also market them;
- the editors of phonograms or musical videos, meaning the parties exercising the rights of reproduction and distribution further to cession on the part of the phonographic producer.

The AGEDI carries out the collective management that corresponds to the producers of phonograms by the public communication of their sound recordings and musical videos, by their reproduction exclusively for directly or indirectly effecting their public communication, and by the compensatory remuneration regulated in Article 25 of the Intellectual Property Act, under the terms established in the management contract.

AIE

The main purpose of this collecting society is the management of the intellectual property rights of performing artists, for both original and derived rights.

The AIE has the following functions:

- The non-exclusive concession, in a general or individualised form, of the authorisation or licence for the exploitation or use of the performances and fixations by any method.
- The establishment of general rates in respect of rights to remuneration for which the corresponding list of rates has not been laid down by law, the granting of global non-exclusive licences for exploitation or use of the performances and exploitation or derived uses that have not been authorised or carried out in infringement of any of the rights.
- The determination, acceptance, collection and receipt of remuneration for the licences granted, or of the general lists of rates, the contracts or the statutory provisions in accordance with which the rights that are managed by the collecting society have to be enforced, and the compensation for exploitation or use that is unauthorised or has been carried out in infringement of any of the rights mentioned.
- The signing of general contracts with associations of users that are representative of the corresponding sector, concerning the rights that are managed by the collecting society.
- The administration, distribution, sharing out and payment of the corresponding rights and compensation and economic yield derived from the same, which are fairly distributed among the rightsholders in respect of the performances and fixings being exploited or used, excluding any arbitrariness, on condition that they have a proportionate part in the use of the same.
- The establishment of minimum levels of remuneration for authorisations.

The society's management covers the following intellectual property rights of performing artists:

- The rights of remuneration that may be legally recognised as referring to performing artists, particularly those concerning equitable remuneration for the private copying of phonograms, videograms and other sound, visual and audiovisual media, public communication of phonograms or reproductions of phonograms and audiovisual recordings, and distribution by the rental of phonograms and the originals or copies of audiovisual recordings. Likewise, the right of remuneration derived from making available to the public the interpretations or performances fixed on phonograms or audiovisual recordings, or reproductions of these, by either wire or wireless media in such a way that members of the public are able to access them wherever and whenever they choose.
- The right to authorise the cable broadcasting of their recorded performances (recordings) on any sound, visual or audiovisual medium.
- And any other intellectual property rights that are exercised collectively that may at any time relate to performing artists either by specific legal acknowledgement or by application by analogy and/or as a subsidiary to the rights of the author, either by the exploitation or use of his/her performances, whether or not they are fixed on any sound, visual or audiovisual medium and whose management relates to AIE either by law or by contract.
- The exclusive right to authorise the fixing of his performances on any sound, visual or audiovisual medium allowing its reproduction or its public communication.

- The exclusive right to authorise the public communication of his performances, whether or not they are fixed on any sound, visual or audiovisual medium, or parts or fragments of the same.
- The exclusive right to authorise the reproduction, either direct or indirect, of the fixations of his performances on any sound, visual or audiovisual medium.
- The exclusive right to authorise the distribution of his performances and recordings.
- The exclusive right to authorise making available to the public of his interpretations or performances fixed on phonograms or on audiovisual recordings, or representations of the same, by either wire or wireless media in such a way that members of the public are able to access them wherever and whenever they choose.
- Any other intellectual property rights exercised individually that may at any time correspond to performing artists, either by legal acknowledgement or by application by analogy and/or as a subsidiary to the rights of the author, either by the exploitation or use of his performances, whether or not they are fixed on any sound, visual or audiovisual medium, and whose management relates to the collecting society either by law or by contract.

VEGAP

The main purpose of this society is to protect the authors of works of visual creation, including the creation of images, whether these are still or in motion, regardless of the medium or process used for their creation, and the protection of their rightsholders in the exercise of their rights of a pecuniary nature.

VEGAP also has the following purposes and functions:

- Concession of the authorisation for the economic use of the works whose exclusive rights are being managed, either directly or through reciprocal or unilateral representation contracts concluded with companies or organisations of the same type.
- The drawing up of general lists of rates laying down the remuneration due for the various types of use of the catalogue administered either currently or in the future.
- The conclusion of contracts or standards with associations of users that are representative in each sector.
- The collection of the rights derived from the licences granted or the contracts or legal provisions in accordance with which the pecuniary rights being managed should be made effective.
- The distribution of the rights collected.

Management by the collecting society, as far as audiovisual works are concerned, covers principally the exclusive right of public communication of the works, in any of the ways described in Article 20 of the LPI.

EGEDA

The object of EGEDA is the collective management and administration, subject to the conditions provided for by law, of the intellectual property rights that the legal text attributes to performers and other rightsholders in respect of the audiovisual work and other rightsholders in the performances fixed on a medium or sound, visual or audiovisual system that permits its reproduction, including storage of the said performances in digital form on an electronic medium, and their communication or availability to the public using any analog or digital system.

This exercise, management and administration of rights shall cover the following functions:

- Collection of the compensation or economic yield arising as a result of licences or the exploitation, in any form whatsoever, of the artistic performances fixed on a medium. This function covers:
  - negotiation with users/debtors in order to concede to them the authorisation for use where there is statutory provision for this, or to establish the extent of the corresponding remuneration by means of a sector or individual agreement;
  - determining and establishing general rates; and
  - claiming payment and taking any legal or other action to recover the corresponding royalties.

- Distribution of the sums collected among the rightsholders, in accordance with the arrangements set out in the articles of association and in the appropriate legislation in force on the subject.

EGEDA's management covers the following rights:

- the right of remuneration for the private copying of phonograms, videograms and other media, or sound, visual or audiovisual appliances or systems, whether analog or digital;
- the right of remuneration for public communication, in any of its forms, of the artistic performances fixed on a phonogram or audiovisual work or recording;

- the right of remuneration for distribution by means of the rental of phonograms and of originals and copies of audiovisual recordings onto which the performances have been incorporated;

- the exclusive right to authorise the cable broadcasting of artistic performances within the territory of the European Union.

The society is also to manage and administer any intellectual property rights (both voluntary and compulsory) exercised collectively that may in future relate to performers either by specific legal recognition, by analogy or subsidiary application of copyright, or because they have been entrusted to it by contract.

Finally, EGEDA is responsible far the exercise, management and administration of those intellectual property rights granted by law or the corresponding norms to the performer exclusively or for individual exercise, when the rightsholder specifically places its management in the collecting society's hands.

AISGE

The stated object of AISGE is the exercise, management and collective administration of the intellectual property rights of performers and other rightsholders in respect of performances fixed on a medium or sound, visual or audiovisual system that permits its reproduction, including the storage of the performances in digital form on an electronic medium, and its communication or making available to the public using any analog or digital system.

The AISGE carries out the collective management of the collection of the compensation or economic yield arising as a result of licences for the artistic performances recorded on the medium, including negotiation with the users in order to grant authorisations for use, when this is provided for by law, or to establish the amount of the corresponding remuneration by means of a specific or sector agreement; determining and establishing the general rates of fees; the requirement of payment and the exercise of any legal or other action in claiming the relevant rights; the distribution of the sums collected among the rightsholders, in compliance with the provisions of the present Articles of Association and the legislation in force on the subject.

Similarly, the AISGE manages the pecuniary rights of an intellectual property nature originally assigned to performers, and more particularly the right of remuneration for the private copying of phonograms, videograms and other media, arrangements of sound, visual or audiovisual systems, whether analog or digital; the right of remuneration for public communication in any of its forms of the artistic performances fixed on a phonogram or audiovisual work or recording; the right of remuneration for the distribution by means of rental of phonograms and of originals and copies of audiovisual recordings onto which the performances have been incorporated, and the exclusive right to authorise cable re-broadcasting of artistic performances within the territory of the European Union.

The AISGE also deals with the exercise, management and administration of the intellectual property rights conferred by law or corresponding norms on the performer exclusively or individually, when the rightsholder specifically entrusts its management to the collecting society.

DAMA

The DAMA is a collecting society that specialises in the collection, management and distribution of royalties in the audiovisual field; it is a not-for-profit society created for an indefinite period of time, and its members are cinema and television scriptwriters and directors.

The DAMA basically administers two types of intellectual property rights:

- Exclusive rights: these are the exploitation rights for the author's work (reproduction, distribution, public communication and transformation) which are reserved for the author, as is the case for the rights for the mechanical reproduction of the audiovisual work. If the author specifically so entrusts it in advance, the DAMA collects the amounts corresponding to the sale of the work in video, CD or DVD format.
- Rights that must be managed collectively: these are the rights that the Intellectual Property Act establishes as being non-renouncable by the author or his legitimate rightsholder and which must be administered through a collecting society:
  – Right to remuneration for private copying of an audiovisual work;
  – Right to remuneration for any form of public communication;
  – Right to remuneration for rental.

The DAMA concerns itself, *inter alia,* with establishing contracts for conceding authorisations in respect of the rights being managed, establishing general rates determining the remuneration demanded for the use of their catalogues, including provision for reductions for not-for-profit cultural bodies, concluding general contracts with associations of users of their catalogues, collecting the royalties derived from the authorisations of use, and distributing the collected royalties fairly among the rightsholders of the works used.

FR FRANCE

Pascal Kamina
Cabinet Kamina

This report considers the role of collecting societies in the remuneration of authors and performers of audiovisual works in France. Since there are some major differences in the way these two categories of "creative contributors" are treated, we shall deal with authors (I) and performers (II) separately.

I. Authors

As far as authors are concerned, the situation in France is unusual for two reasons: firstly because French law includes specific rules on the remuneration of authors of audiovisual works, offering authors a high level of protection; and secondly because collective management in the audiovisual sector is particularly well developed in France.

We shall begin by considering the copyright rules relating to the remuneration of authors of audiovisual works (A), an explanation of which is essential to an understanding of collective management practices in this field (B).

A) Legal Framework

1. Definition of Audiovisual Works

French law uses a broad definition of audiovisual works. Article L.112-2 of the Intellectual Property Code mentions "cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audiovisual works".

This broad definition covers all productions that are generally considered to be audiovisual, particularly, in addition to fictional works and documentaries, recordings of shows or events, television programmes (including studio-based programmes), advertisements, video clips, trailers, private recordings, etc.

2. Authors of Audiovisual Works

Article L.113-7 of the Intellectual Property Code stipulates that "authorship of an audiovisual work shall belong to the natural person or persons who have carried out the intellectual creation of the work". The Article continues as follows:

"Unless proved otherwise, the following are presumed to be the joint authors of an audiovisual work made in collaboration:

1° the author of the script;
2° the author of the adaptation;

3° the author of the dialogue;
4° the author of the musical compositions, with or without words, specially composed for the work;
5° the director."

This Article also includes an unusual provision which gives authorship of a film to the author of an adapted pre-existing work:

"If an audiovisual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work."

An important aspect of Article L.113-7 is that it specifically describes audiovisual works as "works made in collaboration". This label applies even if the conditions in which the work was created do not correspond with those of a work made in collaboration. This rule is fundamental because it forms an obstacle to the application of doctrines such as those of "collective works", which would result in bringing the French system closer to Anglo-American systems in terms of initial ownership and remuneration.[1]

The list set out in Article L.113-7 has two main characteristics:

Firstly, it mentions a simple presumption of authorship, from which it can be inferred that, in some cases, it is possible to prove that the creative contribution of one of the persons mentioned is insufficient for him to be considered a joint author. Such a judgment has been made in the television sector regarding certain directors whose contribution was limited to technical assistance.[2] However, the presumption cannot be rebutted where the author of a pre-existing work is concerned.

Secondly, the list in Article L.113-7 is open-ended and other contributors (natural persons) could claim to be joint authors of an audiovisual work if their contribution meets the criteria of a collaborative work. With this in mind, it would be reasonable to expect that certain contributors, such as editors, directors of photography and artistic directors would, for certain productions, try to claim a share in the authorship of the work. However, this has proved not to be the case, probably because it has not been common practice in the past, but also due to the organisation of the sector (particularly of collecting societies, which only grant membership to the categories of author listed in Article L.113-7), leaving little room for other players to enter the rights chain. Furthermore, in the few cases that have been referred to them, mainly relating to television, the French courts have been reluctant to extend the legal list to include other types of authors.

3. Initial Ownership of Rights

Under French law, authors are the initial owners of the copyright in an audiovisual work.[3] However, this rule does not stand in the way of the contractual assignment of rights nor of the "presumption of assignment" of ownership, such as that described in Article L.132-24 of the Intellectual Property Code.

4. Presumption of Assignment of Rights to the Producer

Article L.132-24 of the Intellectual Property Code stipulates the following:

"Contracts binding the producer and the authors of an audiovisual work, other than the author of a musical composition with or without words, shall imply, unless otherwise stipulated and

1) In French law, a "collective work" is a fairly narrow category defined in Article L.113-2 of the Intellectual Property Code as a "work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created". The rights to a collective work belong *ab initio* to the legal person who initiated and directed its creation.
2) For example: Paris Appeal Court, 4 March 1987, RIDA, April 1987, p. 71; *Revue Dalloz*, 1988, Sommaire, p. 204, note Colombet; Court of Cassation, 29 March 1989, RIDA, July 1989, p. 262; Poitiers Appeal Court, 7 December 1999, *La Semaine Juridique* (e), 2000, p. 1375, note Brochard.
3) Article L.111-1 of the Intellectual Property Code. In the audiovisual field, this principle is also expressly enshrined in the aforementioned Article L.113-7.

> notwithstanding the rights afforded to the author by Articles L111-3, L121-4, L121-5, L122-1 to L122-7, L123-7, L131-2 to L131-7, L132-4 and L132-7, assignment to the producer of the exclusive exploitation rights in the audiovisual work.
> Audiovisual production contracts shall not imply assignment to the producer of the graphic rights and theatrical rights in the work (...)."[4]

This presumption of assignment covers all exclusive exploitation rights in the audiovisual work, except graphic and theatrical rights.[5] Case law has clearly confirmed that the presumption implies assignment for the duration of the rights themselves.

However, the legal presumption does not apply if there is no written contract as required under Article L.131-2 of the Code.[6] This reduces the usefulness of the presumption for producers, at least in their dealings with authors. Indeed, the existence of a written contract inevitably implies express assignment, which will replace the presumption of assignment. And if this is the case, it is clear that express assignment contradicts the presumption of assignment and cannot, for example, cover other unassigned rights.

5. Rules of Remuneration

One of the peculiarities of French copyright law is the development of fairly detailed rules on "audiovisual production contracts", i.e., contracts binding the authors and the producer of an audiovisual work, which lay down the rights and obligations of the parties.[7]

These rules define the system governing the value of the rights in Article L.132-25 of the Intellectual Property Code, which, along with the aforementioned presumption of assignment, represents a central element of the audiovisual production contract system. This system is largely based on the common authorship contract system, clarifying or changing the emphasis of certain points. Article L.132-25 states the following:

> Remuneration shall be due to the authors for each exploitation mode.
> Subject to Article L131-4, where the public pays a price to receive communication of a given, individually identifiable audiovisual work, remuneration shall be proportional to such price, subject to any decreasing tariffs afforded by the distributor to the operator; the remuneration shall be paid to the authors by the producer.

This rule contains two principles: firstly, that of remuneration for each exploitation mode, and secondly, that of specific proportional remuneration for certain exploitation modes. Failure to respect these principles results in either the clause or the contract being rendered invalid, depending on the case.

6. The Principle of Remuneration for Each Exploitation Mode

This principle is laid down in the first paragraph of Article L. 132-25, which means firstly that all forms of exploitation should be remunerated and, secondly, that separate remuneration should be provided for each exploitation mode.

The purpose of this rule is to enable authors to identify and negotiate remuneration for the different exploitation modes and thus to achieve fairer overall remuneration.

---

4) This presumption was introduced into French law by Article 17, para. 3 of the Act of 11 March 1957.
5) The wording seems sufficiently broad to cover so-called "remake rights". However, there is some doubt over whether it also covers so-called "sequel rights" (right to produce a sequel to the work).
6) For example: *Paris Appeal Court, 4th chamber, 17 January 1995: RIDA 1995, no. 165, p. 332.*
7) These rules comprise three sets of provisions, inspired by the publishing contract system: Articles L.132-24 and 132-25 of the Code, which form the heart of the provisions, are devoted to the presumption of assignment to the producer and the remuneration of authors; Articles L.132-26 to 132-29 lay down certain obligations for authors and producers; and Article L.132-30 deals with the consequences of a producer ceasing its activities or entering judicial rehabilitation or liquidation. These rules are supplemented by general provisions applicable to all authorship contracts and by certain rules intended to govern publishing contracts, which have been extended to cover all authorship contracts. Subject to these specific rules, common contract law applies.

There is no equivalent rule in such a precise form in other areas of copyright law. For example, the general principle of proportional remuneration enshrined in Article L. 131-4 of the Intellectual Property Code does not require a distinction to be made between different exploitation modes. Similarly, the obligation to specify the nature and scope of the assigned rights, described in Article L. 131-3 of the Code, another general principle, does not imply that remuneration is necessary for each exploitation mode (proportional remuneration covering several modes is acceptable if the basis of calculation meets legal requirements).[8]

7. The principle of Proportional Remuneration

This principle is mainly enshrined in Article L. 131-4 of the Intellectual Property Code, which is applicable to all copyright contracts and which states that assignment by the author of the rights in his work "shall comprise a proportional participation by the author in the revenue from sale or exploitation of the work."

However, it is clarified in the audiovisual field by the aforementioned Article L.132-25 para. 2. Even so, the Article does not appear to be an exact transposition of Article L. 131-4, since the reference to decreasing tariffs is a concession in relation to the latter text.

8. Determination of Remuneration Rates: the Principle of Freedom of Contract

While the text offers some clues regarding the basis on which remuneration should be calculated, it does not mention the rate of such remuneration. The rate is therefore freely determined by the parties.

It should be noted that the courts sometimes claim the right not to revise remuneration rates, but to consider them illegal because they are too low, by applying the notion of cause or the requirement for a price to be determined under Article 1591 of the Civil Code. Common practices within the profession will often be decisive in analysing whether the rate is too low: for films, for example, a rate of 0.5% of net revenue has been deemed acceptable.[9] The percentages may vary according to the situation, particularly the number of authors involved. The Paris Appeal Court, for example, decided that a rate of 0.1% was lawful for a scriptwriter who had collaborated with five other scriptwriters, noting that "a total fee of 0.5% for a sole scriptwriter is common practice within the profession".[10]

9. Determining the Assessment Basis

The law is much stricter with regard to the basis on which remuneration is calculated. A distinction should be made between whether or not the public pays a price to receive communication of a given, individually identifiable audiovisual work.

If the public pays a price to receive communication of a given, individually identifiable audiovisual work (cinematographic exploitation in the form of a videogram, video-on-demand, pay per view, etc.), the rate is calculated on the price paid by the public (before tax). Since no deductions are mentioned in the law, none are permitted.

It should be noted that the application of this principle to remuneration for video exploitation has caused numerous problems. Producers have claimed that it is very difficult to monitor income from video sales, since the system is less effective than that for cinema revenue (despite the obligation for video producers to notify sales to the *Centre national de la cinématographie* (national film centre). However, their argument has been expressly rejected by the courts, which remain very strict in this matter.[11]

8) On the contrary, a more precise reference in relation to the neighbouring rights of performers is found in Article L. 212-4 para. 2, under which a contract concluded between a performer and a producer for the making of an audiovisual work "shall lay down separate remuneration for each mode of exploitation of the work".

9) Paris 1st ch., 23 Nov. 1970, RIDA July 1971, p. 74 : "there is nothing to suggest that such a rate is exceptionally low".

10) Paris 20 February 1990, unpublished, quoted in V. Chardin, *La rémunération des auteurs de l'œuvre audiovisuelle, Légicom n°12*, p. 139, annulling Paris Regional Court, 16 November 1988, RIDA p. 275.

11) For example, Paris 4ème, 13 October 1995, D. 1996, somm.76, obs. T. Hassler, confirmed by 1st Civ., 16 July 1998, D. 1998, I.R 220, JCP 1998, N, 3114).

However, professional negotiations and collective management systems have developed alternative solutions that are described below.[12]

For other exploitation modes, i.e., mainly television broadcasting (apart from pay per view) and derived forms of exploitation or merchandising, Article L. 131-4 of the Intellectual Property Code applies, requiring remuneration that is proportional to revenue. It should be noted that the exceptions to proportional remuneration permitted under the Intellectual Property Code do not apply to most forms of exploitation of audiovisual works or derivatives of those works.[13] Proportional remuneration is therefore a matter of principle.

Since remuneration from television broadcasting in France and some other countries is managed by collecting societies, the corresponding remuneration clause usually just refers to this form of distribution. Audiovisual production contracts, for example, state that the collecting company will receive fees directly from the exploiting party, calculated according to the applicable schedules.

For other forms of exploitation, the rates and basis of remuneration are defined in the contract. According to Article L. 131-4, the basis of remuneration should be "revenue from sale or exploitation", with no further explanation. This notion requires a little clarification.

The expression "revenue from sale or exploitation" in Article L.131-4 is sufficiently broad to cover what are commonly known as "presales" (sale of distribution rights before a film is completed in order to finance the production) and "minimum guarantees" (minimum sums paid by the distributor as advances on distribution revenue, which are also designed to finance the production). On the other hand, the expression probably does not cover investments made by coproducers, even if, in return, the coproducers concerned are granted a share of the rights in the film comprising exploitation rights for a certain territory or a percentage of the revenue generated by the film.

It should be noted that Article L.131-4 does not mention the origin of the revenue. According to common practice and case law, it means revenue received by the producer (or rather the coproducers). This is known as the "producer's net revenues" or "producer's share of net revenues". We should point out that, if the producer who signed the audiovisual production contract is the only party that remunerates the author, the latter can take direct action against the sub-assignees.[14]

It should also be noted that contracts make provision for corrective measures in cases where lump sum payments are made to certain coproducers, particularly foreign ones, instead of proportional remuneration. Usually, their share in the coproduction is artificially labelled "lump-sum net revenues", to which the author's percentage is applied.

Article L.131-4 also does not define how revenue should be calculated. It can therefore be inferred first of all that remuneration should be calculated on the full amount of income and that a payment threshold (amortisation costs of the film, for example) is not admissible.[15] Of course, payment of a minimum guarantee as an advance on the revenue is perfectly legal. Similarly, the rule that remuneration should be calculated on the whole amount of revenue is not compulsory with regard to any additional remuneration that may be granted to authors (additional remuneration after amortisation or beyond a certain number of cinema entries is a common feature of production contracts for cinematographic works).

---

12) See footnote 21.

13) These exceptions are listed in Article L.131-4, which states that "the author's remuneration may be calculated as a lump sum in the following cases:
1°. the basis for calculating the proportional participation cannot be practically determined;
2°. the means of supervising the participation are lacking;
3°. the cost of the calculation and supervising operations would be out of proportion with the expected results;
4°. the nature or conditions of exploitation make application of the rule of proportional remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work or because the use of the work is only of an accessory nature in relation to the subject matter exploited;
5°. assignment of rights in software;
6°. in the other cases laid down in this Code.
The Article adds that "Conversion, at the author's request, between the parties of the rights under existing contracts to lump sum annuities for periods to be determined between the parties shall also be lawful."

14) 1st Civ., 16 July 1998, see above; RIDA 4/1998 p. 241 ; D. 1999 p. 306 note Dreyer ; JCP E 2000 p. 77 obs. Laporte-Legeais.

15) See Paris, 1st ch, 13 October 1998: JCP 2001, ed. E, p. 78, obs. Cormier ; RIDA 1999, n. 180, p. 358.

What about deductions carried out when determining the "producer's share of net revenues"? The text of Article L.131-4 actually appears not to permit them. In practice, however, they are included in all contracts. For example, a standard contract used by the SACD, a collecting society discussed below, allows, where television broadcasting is concerned, the deduction of sales commissions, the price of copies and items required by the broadcasters, and contributions to the *Centre national de la cinématographie* (but only of "costs proven and paid by the producer" for "other forms of exploitation"). In contrast, contracts proposed by producers allow a large number of deductions. Some consist of allowable expenses, while others involve fixed deductions.

Therefore, despite the wording of Article L.131-4, it appears that the parties enjoy a degree of freedom to define their revenue, as well as the possibility of deducting certain costs. However, it is clear that the courts retain a certain power to control definitions of net revenue. A definition that included excessive fixed deductions (general expenses, contributions) which resulted in delays in the payment of proportional remuneration by a producer who had made a profit would undoubtedly violate the principle enshrined in Article L.131-4.

B) Collective Management

1. General Context: Forms of Royalty Management

Under French law, the main form of royalty management is known as "individual" management, which is carried out by authors themselves, their representatives or assignees. In contrast, so-called "collective" management is carried out by collecting societies on behalf of their members and concerns rights relating to certain types of exploitation.

In France, a royalty collection and distribution society must be established in the form of a civil law company, governed by Articles L.321-1 to L.321-13 of the Intellectual Property Code, which make particular provision for various control mechanisms.[16] It may carry out collective management at the request of authors or their representatives and/or collective management which is compulsory by law.

It is therefore necessary to distinguish three forms of royalty management: individual management, which remains the norm; voluntary collective management; and compulsory collective management, established under law in very restrictive cases and for a very small number of exploitation modes (right of reprography and cable transmission only).[17]

2. Collective Management Bodies

In the audiovisual sector, collective management is essentially carried out by two collecting societies, the *Société des auteurs et compositeurs dramatiques* (society of dramatic authors and composers – SACD) and the *Société civile des auteurs multimedia* (civil society of multimedia authors – SCAM). The *Société des auteurs, compositeurs et éditeurs de musique* (society of authors, composers and music publishers – SACEM) also plays an important role with regard to musical works incorporated into audiovisual works. Other societies, either set up or commissioned by these bodies, are involved with certain exploitation modes (private copying, certain Internet-based exploitation modes, etc.).

The SACD is the oldest collecting society and is made up of authors of stage and audiovisual works. The audiovisual works in its repertoire are "drama-based" (documentaries and fiction). The SACD has around 30,000 members (authors or their successors).

The SCAM is the other collecting society for the audiovisual sector. In this sector, it particularly represents the authors of documentaries, reports and series.

The SACD and SCAM only represent authors, rather than publishers (producers).

As its name suggests, the SACEM manages the rights of authors, composers and producers of music. In doing so, it manages the rights of authors (and producers) of film soundtracks and music written

16) The accounts and management of these societies are in particular overseen by a standing committee for the monitoring of royalty collection and distribution societies.

17) Articles L.122-10 and L.132-20-10 of the Intellectual Property Code.

for other audiovisual works. It therefore manages the rights of authors of audiovisual works, where the author of music specially composed for a film is considered an author of the work. It should be noted that, in spite of their dual status as authors of both musical and audiovisual works, composers who are considered as joint authors of audiovisual works do not belong to the SACD, but are represented only by the SACEM. The SACEM also manages the rights of authors (directors) of video clips.

To complete the picture, we should also mention the *Société pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs* (society for the administration of mechanical reproduction rights of authors, composers and publishers - SDRM), which collects mechanical reproduction royalties on behalf of these societies.

3. Transfer of Rights

Authors of audiovisual works who belong to the SACD "transfer" to the latter, for all countries and for the lifetime of the society:

> "the right to authorise or prohibit public release by any process, other than dramatic performance, as well as reproduction by all processes and use for publicity or marketing purposes of [their] works." (Article 1 of the Statutes, to which the SACD membership application form refers)

Members of the SCAM transfer similar rights, although they are defined in greater detail.

According to these definitions, the rights transferred appear very broad and extend beyond simple televisual exploitation. They particularly seem to cover, for example, reproduction in the form of videograms and video-on-demand. However, the collecting societies have only recently begun to deal with these exploitation modes and their involvement remains limited for the time being.

It is important to note that members of collecting societies transfer the rights to their future works. This is an exception to the principle of the ban on total transfer of future works described in Article L.131-1 of the Intellectual Property Code. This exemption is specially established under Article 132-18 of the Code for performance contracts concluded by these societies ("general performance contracts").

Does the transfer of rights to these societies constitute a transfer of ownership? The answer has to be yes, although such transfer of ownership is sometimes deemed to have a particular character. Some courts draw important conclusions from this. For example, a recent judgment by the Versailles Appeal Court stated that an author "who transferred to the SCAM the ownership, and not just the administration, of his rights, cannot act alone with regard to an infringement of his proprietary rights as an author" which he believed had been committed by a producer.[18] This ruling contradicted that of the Court of Cassation, which had previously decided that authors, even if they were members of the SACEM, "were still entitled to exercise their rights over the work and could go to court directly if their copyright were infringed".[19]

This "transfer" enables the SACD to negotiate so-called "general performance contracts" with entertainment promoters, giving rise to the collective management of the rights concerned.

Logically speaking, this "short-circuits" transfers made by authors to producers, as well as the presumption of transfer, at least insofar as membership of the societies predates the signature of the audiovisual production contract.

4. Amendment of the Scope of Transfer

Rights that are transferred to collecting societies are traditionally assigned "en bloc". Following a dispute referred to the Competition Council, the SACD amended its rules and now permits the separation of theatre rights from audiovisual rights (allowing authors to manage theatre rights individually). However, audiovisual rights continue, in principle, to be transferred "en bloc". To the best

18) 1st ch., 1st sect., 15 February 2007, F. C. v. SA System TV: unpublished.
19) Cass. 1st civ., 24 February 1998, TF1 v. Sony music.

of our knowledge, there have been no legal disputes concerning this total transfer. Nevertheless, according to the reasons given by the Competition Council in its Decision no. 05-D-16 of 26 April 2005, requiring the assignment of all categories of rights attached to audiovisual works could be disputed before the competition authorities.

5. Foreign Authors

As far as we know, there are no admission restrictions for SACD or SCAM members linked to the author's nationality or indeed the nationality of an audiovisual work. However, the repertoires of collecting societies only contain works regarding which a copyright contract conforming to French law has been concluded, requiring the proportional remuneration of the author as well as a SACD or SCAM "reserve" clause under which the society concerned would collect that remuneration for relevant forms of exploitation.

6. Disputes with Collecting Societies and Members' Right to Information

Such disputes may be submitted to the ordinary courts. Some have been submitted to the competition authorities.

A right to information for members of royalty collection and distribution societies is enshrined in the Intellectual Property Code.[20]

7. The Traditional Field of Collective Management of Audiovisual Works: Television Broadcasting

Traditionally, the SACD and SCAM only collectively manage audiovisual rights within the framework of general performance contracts concluded with broadcasters (television channels) covering their own collection territories (i.e., France and countries with which French societies have concluded a reciprocal agreement – mainly French-speaking countries where the SACD and SCAM are concerned).

Therefore, in return for the right to show the works in their repertoires, the SACD and SCAM receive from the broadcasters with which they conclude a contract a fee based on their turnover, which they then redistribute to each author concerned, depending on the length of the broadcast, after deducting various administration costs.

In practice, in order to receive television royalties, the authors of audiovisual works have no choice but to join these societies, since they are unable to deal directly with the broadcasters to obtain a fee for the transmission of their works.

In contrast, other types of exploitation of audiovisual works have always been managed on an individual basis. Authors have therefore traditionally negotiated with producers, either directly or through their agents, appointed for this purpose, concerning rights over the following exploitation modes:

- television exploitation outside the collection territories of the SACD / SCAM;
- cinema exploitation;
- video exploitation;
- other neighbouring forms of exploitation (video-on-demand, Internet)
- secondary and derived forms of exploitation (multimedia, adaptation rights, merchandising, etc.).

These individual negotiations deal particularly with remuneration paid to authors in return for the assignment of these rights, the system for which we have described.

8. Broadening of Collective Management

In recent years, the collective management of audiovisual works in France has been broadened significantly to include exploitation modes other than television broadcasting, outside the boundaries of general performance contracts.

20) This is described in Articles R.321-2 and R.321-6 to R.321-6-4 of the Intellectual Property Code.

This broadening has been based on so-called "collective" agreements negotiated with certain producers' organisations and aimed, on the one hand, at setting out a minimum or fixed level of remuneration for certain exploitation modes and, on the other, at ensuring that these "fixed" sums are channelled through collecting societies. At present, they deal with certain types of video-on-demand and videograms for public use (video exploitation).

9. Video-on-demand

In 1999, the SACD concluded a "draft agreement" with various professional producers' organisations (CSPEFF, UPF and SPI) concerning the exploitation of cinematographic works through "video-on-demand".

This 1999 agreement was supplemented by draft agreements of 5 February 2002, 12 April 2002 and 17 February 2004, which are identical to the original, but extend its scope to other producers' organisations.

These agreements stipulate that a minimum level of remuneration for authors from exploitation of their works via video-on-demand should be paid directly to the SACD by the audiovisual communication services (i.e., VoD providers) concerned. This remuneration is fixed for all authors at 1.75% of the price (before tax) paid by the public to the audiovisual communication service to receive the cinematographic works concerned.

In order to guarantee uniform application of this system, Article 3 of the 1999 agreement requires the inclusion of the following clause in audiovisual production contracts concluded after its adoption:

> "The assignment by the author to the producer of the right to exploit the work by any form of telecommunication enabling the public to access it by paying a one-off fee, particularly pay per view and video-on-demand, is permitted subject to the conditions laid down in the agreement of 12 October 1999, signed between the SACD and the professional producers' organisations."

This clause therefore enables the author to assign VoD rights to the producer at the same time as opting for the collective management mechanism provided for in the agreement.

In order to strengthen the scope of the agreement even further, the same Article 3 stipulates that this clause "shall be considered to form an integral part of audiovisual production contracts concluded prior to the adoption of the present agreement, except those that make specific reference to the exploitation mode that enables the public to access a cinematographic work through television by paying a set fee and that make provision for specific remuneration on this basis."

These agreements are valid for a renewable 10-year period.

10. Video Exploitation

The collecting societies became heavily involved in questions linked to video exploitation following the aforementioned difficulties linked to the calculation of the basis for proportional remuneration. In order to break this deadlock, the producers' representatives and the SACD signed an agreement on 12 October 1999 (last amended on 12 September 2002) on the evaluation of the basis of authors' remuneration from the sale of videograms for private use on the national territory. Under this agreement, retail prices can take into account a coefficient of 1.5 of the gross turnover before tax generated by the video producer and declared to the *Centre national de la cinématographie*. Audiovisual production contracts often refer to this.

In contrast to the SACD mechanism, standard SCAM contracts state that video remuneration should be collected directly by the SDRM. This second formula is much rarer in practice. At first glance, it appears more favourable to authors: the remuneration paid by the collecting society is not based on the guaranteed minimum paid to the author by the producer and the rate applied by the SDRM seems to result in higher remuneration levels. However, it is more difficult to negotiate because the payments are made to the video producer rather than to the collecting society.

On 18 December 2006, however, the SACD took things a stage further by concluding with the USPA (professional producers' association), the SDRM and the SCELF (which represents literary publishers),

each "acting on behalf of its members", an agreement on "the management of the remuneration of authors who are members of the SACD or represented by the SCELF from the videographic publication of their works under the terms of contracts concluded with producers".

This agreement, which is currently limited to televisual works, sets out, in principle, the conditions applicable to the collective management of remuneration from video exploitation of the works concerned, although its scope is actually much broader.

For the members of the organisations concerned, the agreement uses a basis different from the legal basis of proportional remuneration of the author, depending not on the retail price, but on the wholesale price before tax (Article 3.1), for both individual and collective management situations.

The agreement also states that producers may choose, within the framework of an audiovisual production contract, to remunerate authors for the video publication of their works either through the SACD (collective remuneration management) or directly (individual remuneration management) (Article 2).

However, it provides that, if the audiovisual production contract does not mention this issue, the remuneration due to the author for video exploitation of the work in question shall be distributed by the SACD in accordance with the collective management system (Article 2.1). Collective management is therefore no longer optional if the contract does not address the subject.

The agreement also states that collective management applies to "contracts that do not conform to the rules" that were concluded before 1 January 2006, when the agreement entered into force.

Finally, according to Article 2.4 of the agreement:

> "Where a work has more than one author, the audiovisual production contract of each author shall require the same form of management (individual or collective) where video exploitation of the work is concerned."

Therefore, the freedom of joint authors to negotiate an individual management clause will be limited if another author negotiates a collective management clause.

Finally, the agreement sets out the collective payment rates, specifying that they may be raised or lowered, depending on calculations made in accordance with agreements concluded between the *Syndicat des Editeurs Vidéo* (union of video producers) and the SDRM (Article 3.2.3).

11. Extension of Agreements: the Act of 1 August 2006 and Article L.132-25 of the Intellectual Property Code

Article 38 of the Copyright Act of 1 August 2006 added the following as a second paragraph to Article L.132-25 of the Intellectual Property Code:

> "Agreements relating to the remuneration of authors concluded between professional authors' associations or royalty collection and distribution societies mentioned in section II of book III and organisations representing a particular sector of activity may be made obligatory for all parties in the sector concerned by decree of the Minister for Culture".

Under this text, agreements concluded by collecting societies such as the SACD may be extended "to all parties in the sector of activity concerned", along the same lines as the extension of collective work agreements (but without any of the guarantees, particularly the extension procedures established under labour legislation).

In order to apply this text, the French Minister for Culture and Communication adopted a decree extending the aforementioned video-on-demand agreements on 15 February 2007.[21]

21) OJ no. 64 of 16 March 2007, page 4934.

Article 1 of this decree stipulates that:

> "The provisions of the draft agreement of 12 April 1999, supplemented by the draft agreements of 5 February 2002, 12 April 2002 and 17 February 2004, concerning the remuneration of authors of cinematographic and audiovisual works exploited through any electronic communication process enabling the public to access them for a one-off fee, particularly pay per view and video-on-demand, shall be obligatory for any company in the cinematographic or audiovisual production sector".

Article 2 adds that the provisions of the agreements mentioned are obligatory from the date of publication of the decree for the period of time covered by the relevant agreements.

This is therefore a very important development in French law, which thus makes provision for the first time for the extension of collective agreements in the copyright field. It remains to be seen how successful this formula will be, since in our view it comes up against certain obstacles. It is worth noting that this text is currently the subject of an appeal filed with the State Council by a professional organisation of artistic agents. This appeal contests several aspects of the extension, particularly the general obligation for VoD rights to be managed collectively, the need to amend existing contracts and certain competition issues (linked to the ban on individual management by authors and their agents).

II. Performers

The situation of performers is very different from that of authors, due to a less favourable system governing their rights and remuneration (A), resulting in more limited scope for collective management (B).

A) Legal Framework

1. Performers' Rights

Under French law, performers enjoy neighbouring rights enshrined in Articles L.212-1ff. of the Intellectual Property Code. However, not all performers are protected in this way.

2. Definitions of Performer

Article L. 212-1 of the Intellectual Property Code states the following:

> "Save for ancillary performers, considered as such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts."

The legal definition of "performer" therefore excludes "ancillary performers" from the scope of neighbouring rights, referring to "professional practice" for a definition of such performers. In the audiovisual sector, case law tends to consider "extras" to be in this category.[22]

3. Legal Presumption of Salary

Performers are also presumed to be salaried employees, which favours the conclusion of collective agreements, particularly with regard to their remuneration, whether minimum or supplementary. Article L.7121-3 of the Labour Code states the following:

> "Any contract under which a natural or legal person secures, via remuneration, the help of a performer in its production, is presumed to be an employment contract, since the performer does not carry out the activity covered by the contract under conditions that require them to be listed in the commercial register."

22) For a court's definition of ancillary performer, see Paris Appeal Court, 18 February 1993, D. 1993, jurispr. p. 397, note I. Wekstein; RIDA 4/1993, p. 214 s. It should be noted that voice dubbing artists have been given performer status, particularly in an "agreement on the rights of voice dubbing artists" concluded on 11 May 1998 between representatives of producers, distributors, video producers, broadcasters and unions representing voice dubbing artists.

This presumption that an employment contract exists remains "whatever the mode and level of remuneration, and whatever name the parties give the contract" and "even if it is proven that the performer retains the freedom to perform, that he owns all or part of the equipment used or that he himself employs one or more persons to assist him, insofar as he participates personally in the show."[23]

The presumption can only therefore be rebutted in exceptional cases.

4. Ownership of Neighbouring Rights and Remuneration

In the audiovisual sector, Article L.212-4 of the Intellectual Property Code establishes the presumption that a performer's rights are assigned to the producer of an audiovisual work in the following terms:

> "The signature of a contract between a performer and a producer for the making of an audiovisual work shall imply the authorisation to fix, reproduce and communicate to the public the performance of the performer."

Unlike the aforementioned presumption of authorisation for authors, this presumption is indisputable: it is therefore a form of *cessio legis*.

The same Article immediately adds:

> "Such contract shall lay down separate remuneration for each mode of exploitation of the work."

Therefore, the Code does not lay down the principle of proportional remuneration that applies to authors, but only the principle of separate remuneration for each exploitation mode. Consequently, most contracts, in return for their authorisation, offer performers a fixed level of remuneration, a proportion of which is allocated to each exploitation mode.

It should be noted that the Intellectual Property Code also contains provisions on remuneration, but they only apply where the remuneration concerned is not mentioned in a contract or collective agreement. For example, Article L.212-5 of the Intellectual Property Code states that:

> "Where neither a contract nor a collective agreement mentions the remuneration for one or more modes of exploitation, the amount of such remuneration shall be determined by reference to the schedules established under specific agreements concluded, in each sector of activity, between the employees' and employers' organisations representing the profession."

This mechanism has already been used in situations where the professional film-making organisations were unable to conclude specific agreements. However, it currently has no practical application in the audiovisual sector because of the collective agreements that have been concluded.

B) Collective Management

1. The Place of Collective Management

The combination of the *cessio legis* and the absence of proportional remuneration is an obstacle to the development, for performers, of collective management systems like those that apply to authors.

The main collecting society involved in the management of the rights of performers of audiovisual works is the civil association for *l'Administration des Droits des Artistes et Musiciens Interprètes* (administration of the rights of performing artists and musicians – ADAMI), created in 1955. The ADAMI collects and distributes royalties for 70,000 actors, singers, musicians, conductors and dancers from the exploitation of their recorded performances. Membership of the ADAMI is not compulsory in order to receive royalties.

23) Article L.7121-4 of the Labour Code.

The ADAMI's involvement in the audiovisual sector is limited: it collects and distributes the royalties of performers who are listed in the credits of (European) audiovisual programmes and manages two types of remuneration: remuneration for private audiovisual copies on the one hand and some types of supplementary remuneration described in certain audiovisual collective agreements on the other.

These collective agreements include one cinema agreement, several collective agreements for the television sector and a so-called "DAD-R" agreement concerning dubbing. An important agreement concerning "*the remuneration of performers for the use of their performance via VoD"* was also concluded on 11 September 2007 between the unions representing television producers and actors. Under this agreement, supplementary remuneration is to be paid to performers (6% of net income generated by the producer for all performers), distributed by the ADAMI.

GB UNITED KINGDOM

Phillip Johnson
New Square

I. Legal Framework

The relevant legislation governing copyright and related rights in the United Kingdom is the Copyright, Designs and Patents Act 1988 (the 1988 Act); any reference to a section is to a section of that Act. The rights held by the different groups involved in the making of audiovisual works (as described below) are granted by national law (although many of these rights are required by European Directives).

1. Script Writers

A script for an audiovisual work is a literary work within the meaning of section 3(1) of the 1988 Act.[1] The script writer will be the first owner of the copyright in the script (sections 9 and 11). That writer will have the following rights in relation to the work: the right of reproduction (section 17), the right to issue copies of the work to the public (distribution) (section 18), the right to control the rental and lending of the work (section 18A), the right to control the performance of the work (section 19) and the right to prevent the work being communicated to the public (including broadcasting and making available) (section 20).

These rights are conferred on script writers (as authors) and they may assign or licence the rights as they choose.

2. Set Designers

The work of set designers may be protected as an artistic work, in particular as a work of artistic craftsmanship (see section 4(1)). The placing of various items around the stage, where they were not made by the set designer, are unlikely to attract protection (see for comparison, *Creation Records v. Newsgroup Newspapers* (2000) where the photographing of an arrangement of items was not protected as a copyright work). If a set design is protected as a copyright work then the designer has a reproduction right, a right to control the issuing to the public of copies of the work, a rental and lending right and a right to restrict the communication of the work to the public.

These rights are conferred on set designers and they may assign or licence them as they choose. The Society of British Theatre Designers is the trade body for theatre set designers (some of whom also work

1) Art. 3 (1) of the Act says: "In this Part—"literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—(a) a table or compilation, and (b) a computer program;"

on film sets). Similarly, some designers are members of the union Equity (hereinafter "Equity"), which provides some standard terms and conditions of engagement. There is no collecting society for set designers as such, although some belong to collecting societies on other grounds.

3. Directors

The principal director is the joint owner of the copyright in the film (along with the producer). The film copyright includes the reproduction right, the right to issue copies to the public, the rental and lending right, the right to control the film being shown in public (section 19) and the right to control the communication of the work to the public.

These rights are conferred on directors, who may assign or licence the rights as they choose. Their trade body is the Directors' Guild of Great Britain; although some directors are also members of Equity. The relevant collecting society covering these rights is Directors UK (which was, until 2008, called the Directors and Producers Rights Society (DPRS)).

4. Camera Operators

Unless a camera operator is also the principal director of the film, no rights attach to his or her work.

The interests of camera operators (and other camera technicians) are represented by the Guild of British Film Technicians, although some are also members of Equity.

5. Performing Artists

A performing artist is granted rights in his or her performance under Chapter 2 of Part 2 of the 1988 Act. The rights are divided up into performers' property rights, which include the reproduction right (section 182A), distribution right (section 182B), rental and lending right (section 182C) and making available right (section 182CA). The performers' non-property rights are the right to stop the unauthorised recording of a live performance (section 182) and a right to stop the subsequent use or importation of such a recording (sections 183 and 184).

As the performer's property rights were only introduced in 1996 there is also a long history of contractual agreements between performers and producers that provide additional remuneration in relation to their performances. Many of these agreements continue to have effect.

The rights belong to the performer and can be assigned or licensed as the performer wishes except that there is a (rebuttable) presumption that the rental right is transferred to the producer of the performance (section 191F).

The interests of music performers are protected by a range of unions and collecting societies. Named artists are generally represented by Equity, whereas session musicians are represented by the Musicians' Union. The collecting society for both types of artist is the Phonographic Performance Limited (PPL).

In relation to actors, rather than musicians, most are members of Equity. The rights they own can be managed by Equity's own collecting society called British Equity Collecting Society (BECS).

6. Producers

The producer is a joint author of a film (along with the principal director, see above) and is the sole author of a sound recording (which might be incorporated into an audiovisual work) (section 9(2)). Producers have the same exclusive rights as directors in relation to both films and sound recordings. In addition, protection is granted in relation to exclusive recording contracts (section 185). These relate to contracts between a performer and another person (such as a record company) under which that person is entitled, to the exclusion of all other persons (including the performer), to make recordings of one or more of his performances with a view to their commercial exploitation. Where such a contract exists, the owner of the rights (e.g., the record company) has a right, in addition to the performer, to prevent a third person making a recording of a performance by the relevant performer.

In practice, many of the rights outlined above are assigned to the producer of the audiovisual work who then has all the rights of the creator. Indeed, in relation to film producers, section 93A presumes a transfer of the creator's rental rights to the producer unless the parties agree otherwise. This presumption does not, however, apply to any dialogue or music specifically created for and used in the film. In such a circumstance the creator remains entitled to equitable remuneration (section 93B). A similar presumption applies in relation to performers' rights (sections 191F and 191G). Where these statutory presumptions do not apply and a work is voluntarily assigned to a producer then there is no requirement that the creator will receive any financial remuneration. Furthermore, where an assignment occurs – either presumed or otherwise – there is no statutory obligation on the producer to exploit the film. The collecting society for producers of sound recordings (including those incorporated in an audiovisual work) is Phonographic Performances Limited (PPL); in relation to films some collections are undertaken for producers by Directors (UK).

II. Practice in Rights Management

1. The Transfer of Rights to Those Who Manage Rights

The author or performer is normally the first owner of the work (section 11) – only in relation to rental rights for performers is there a presumption of transfer – this means that the effective exploitation of audiovisual works requires those rights to be arranged by contract. A transfer may be presumed, as an implied term, under contract law but this depends on the circumstances of the case. Such presumptions are not regulated by copyright law.

Collecting societies manage rights on three different bases. Most collecting societies act as an agent (or more commonly, exclusive agent) of a rightsholder (e.g., Mechanical-Copyright Protection Society (MCPS), see below). In such cases, no rights are transferred at all. Other collecting societies require a member to grant them an exclusive licence in relation to that member's work (e.g., Design and Artists Copyright Society Ltd (DACS), see below). In UK law, an exclusive licensee has all the same rights as the copyright owner (section 101). Other collecting societies require members to assign them the relevant rights (or parts of rights) so that the collecting society becomes the rights owner (e.g., Performing Rights Society (PRS), see below).

2. Specific Contractual Provisions to Ensure that Collecting Societies Play a Certain Role in this Regard

Save in relation to cable rebroadcasting and the artist's resale right, there are no statutory provisions requiring the involvement of collecting societies. In practice, however, many collective agreements do include a role for these societies.

An example of such an agreement is the agreement between the BBC, ITV, Channel 4, Channel 5, BSkyB, the Producers' Alliance for Cinema and Television (PACT), Sianel Pedwar Cymru (S4C, the Welsh Fourth Channel) and Teledwyr Annibynnol Cymru (TAC, the Welsh Independent producers) in relation to the secondary use of television programmes. This agreement required a payment to be made to Directors (UK) (or DPRS as it then was) for such uses, which was subsequently distributed to the relevant directors and producers. The distribution uses a simple calculation which primarily assigns points on three bases: (a) the type of work, (b) the length of the work and (c) the type of secondary exploitation. These points are first multiplied together and then by the value (i.e., cash value) per point.[2]

3. Fall-back Clause for Exploitation Rights after a Given Period of Time

There is nothing preventing "fall-back" clauses being included in the contractual arrangements for the exploitation of works. In practice, however, this is uncommon unless the creator is established and so has significant bargaining power.

2) For a full explanation of the scheme see: www.dprs.org/distribution.htm

III. Institutional Framework of Collecting Societies

1. The Legal Basis for the Foundation of Collecting Societies

Most collecting societies are companies limited by guarantee (without share capital). This is the usual corporate form for not-for-profit organisations. Such companies are registered in the normal way at Companies House[3] (under the Companies Acts 1985 and 2006). In outline, this involves filing out four documents at Companies House: (i) the memorandum of association; (ii) the articles of association; (iii) a form setting out the registered address of the proposed company; (iv) a declaration of compliance with the relevant rules of the Companies Acts. There are no additional requirements, however, for registering a company that will act as a collecting society beyond those required of any other commercial company. Accordingly, there is no governmental or other approval required to operate as a collecting society in the United Kingdom.

The regulation of collecting societies once they have been established is the same as for other companies. In other words, it is minimal and relates simply to the annual filing of accounts and other returns to Companies House.

The Copyright Tribunal which was set up under Chapter 7 of the 1988 Act is able, upon an application being made, to set (or modify) licensing fees. The Tribunal's jurisdiction is restricted to disputes between licensors and licensees, in particular licensing bodies (collecting societies). It should also be noted that the UK competition authorities have taken an active interest in the activities of collecting societies in that complaints have been made, and upheld, that certain activities by collecting societies are anti-competitive.

2. Organisation of Collecting Societies

Most collecting societies have a management team or board of directors. The role of these varies, but in relation to Authors´ Licensing & Collecting Society Ltd (ALCS), for example, the governing board is responsible for: (a) establishing the overall strategic direction of the company; (b) ensuring that the necessary financial and human resources are in place; (c) reviewing management performance; (d) setting the company's values and standards and ensuring that its obligations to its stakeholders are met; (e) ensuring that ALCS operates within the limit of its articles of association and in accordance with any other condition(s) relating to the use of members' funds; (f) promoting equality of opportunity and cultural diversity in ALCS' work; (g) ensuring that the highest standards of corporate governance are observed at all times and that ALCS runs its affairs properly; and (h) that employees administer and enforce the members' rights.

The relationship between the members and the collecting society is regulated by the mandate and by normal company law.

3. Services Offered by Collecting Societies

The services offered vary between collecting societies. Almost all require the registration of the works in respect of which a member is claiming rights. The society usually then takes steps to confirm what, if any, rights a person has in relation to a particular work before registering it (an administration and auditing role).

The main service is, of course, collecting royalties and distributing them to rightsholders. Most collecting societies also have some form of enforcement mechanism (e.g., enforcement officers undertaking investigations), but the extent of the enforcement action taken varies greatly between collecting societies (e.g., PPL sends enforcement officers to unlicensed venues where music might be played; if music is being played then usually a civil action for infringement is started, such proceedings ending in summary or default judgment). The mandates for collecting societies usually give the society power to take enforcement action, but do not impose an obligation on them to take such action.

3) Companies House is an Executive Agency of the United Kingdom Government in the Department for Business, Enterprise and Regulatory Reform, and is charged with keeping the register of companies; see www.companieshouse.gov.uk/

4. Collecting Societies in the United Kingdom

The following collecting societies exist in the United Kingdom:

- Authors' Licensing and Collecting Society Ltd (ALCS), which administers rights in literary and dramatic works on behalf of authors;
- British Equity Collecting Society Ltd (BECS) which administers performers' remuneration;
- Compact Collections Limited manages royalties arising from secondary television uses for film and television content owners;
- Copyright Licensing Agency Ltd (CLA) licenses the reprographic rights of authors and publishers in published literary and artistic works;
- Design and Artists Copyright Society Ltd (DACS) manages rights in artistic works;
- Directors (UK) collects royalties arising from certain rights on behalf of film and television directors and producers;
- Educational Recording Agency Ltd (ERA) collects royalties, effectively on behalf of other collecting societies, for the recording by educational establishments of broadcasts;
- Newspaper Licensing Agency Ltd (NLA) administers the reprographic rights of newspaper publishers;
- Mechanical-Copyright Protection Society (MCPS) collects royalties relating to the inclusion of music on CDs, DVDs and their subsequent broadcast on television and radio (it has now formed the MCPS-PRS Alliance);
- Performing Rights Society (PRS) collects money for any public performance of music, whether live or recorded, that takes place outside the home and from radio and television broadcasts and online (as mentioned above, it has now formed the MCPS-PRS Alliance);
- Phonographic Performances Limited (PPL) administers rights on behalf of phonogram producers and performers in relation to the playing of sound recordings;
- Video Performance Ltd (VPL) (which is effectively part of PPL) administers the rights of producers of music videos.

IV. Rightsholders' Perspective

1. Rightsholders' Right to Choose between Different Collecting Societies

There is no legal requirement for a rightsholder to use a particular collecting society. Indeed, in the past there has been more than one collecting society for a particular right (e.g., Performing Artists' Media Rights Association (PAMARA) and the Association of United Recording Artists (AURA) for performers), but these smaller societies have in general merged with other societies (in their case PPL). This means that choice in fact is very limited and, in relation to some rights, non-existent.

2. The Legal Relationship with Collecting Societies

Membership of a collecting society is entirely voluntary and on an opt-in (rather than opt-out) basis. There are, as mentioned already, certain rights which can only be exercised through a collecting society, in particular the right to grant or refuse permission in relation to cable retransmission (section 144A) and the artists' resale right. These comprise remuneration arising from cable-retransmission (section 144A) and any remuneration whatsoever arising from the artist's resale right (see Artist's Resale Right Regulations 2006, regulation 14. The Artist´s Resale Right Regulations 2006[4] create a right for artists to receive a royalty on their works when these are resold.) These rights *must* be administered by a collecting society. However, the equitable remuneration for rental right, if assigned, can only be assigned to a collecting society (sections 93B(2) and 191G(2)). There are no private copies levies and so there is no role here for the collecting society.

In addition, some of the exceptions to copyright relating to the recording of educational broadcasts are "turned off" where the royalties are collected by a certified collecting society (e.g., ERA). Accordingly, where no authorisation has been given to collect the royalties such recordings are not an infringement of copyright (section 35(2)).

4) The text is available at: http://www.opsi.gov.uk/si/si2006/draft/20063820.htm

The relationship between the rightsholder and the collecting society is almost entirely regulated by the law of contract in accordance with the mandate. The obligations on collecting societies vary but they are generally related to the collection, administration and distribution of royalties. In addition, some collecting societies undertake lobbying activities.

3. Collectively Administered Rights/ Period of Time/ Territory

The rights that are collectively administered depend on the particular collecting society. The following indicates what rights are administered by the main societies:

Authors' Licensing and Collecting Society (ACLS) administers the following rights for authors of literary works: (i) the lending right; (ii) the reprographic right in each published work; (iii) the private recording right; (iv) the right to communicate the work to the public by means of cable diffusion; (v) the off-air recording right; (vi) the right to perform the work in public; (viii) the rights of exploitation by all or any electronic means or in electronic form; (ix) the rental right; (x) the performing right; (xi) the right to reproduce the work for the benefit of visually impaired persons (the list has been simplified: for a detailed list see Art. 7 of the Mandate)[5].

British Equity Collecting Society (BECS) administers the following rights for performers: (i) rental rights and equitable remuneration; (ii) any blank tape levy or other levies on copying media or devices (from other countries); and (iii) the cable retransmission of programmes incorporating their performances.

Compact Collections Ltd administers the following rights in relation to film and television content owners: (i) cable retransmission right; (ii) private copying right (outside the UK); (iii) the educational off-air recording right; (iv) public showing of television rights (v) and some rental rights (outside the UK).

Directors (UK) administers rights on behalf of directors under the Directors' Rights Agreement that was agreed with broadcasters and independent producers in 2001, which relates to annual payment to compensate freelance television directors for the secondary use of their work.

The MCPS-PRS Alliance administers the following rights in relation to musical works: (i) the general performing right; (ii) the broadcasting right; (iii) the right of cinematographic exhibition; (iv) the right of mechanical reproduction and diffusion; (v) the cinematographic production right; (vi) the exploitation rights resulting from technical developments or future change in the law.

Phonographic Performances Limited (PPL) administers the public performance and broadcasting rights of phonogram producers and performers.

Video Performances Limited (VPL) administers the rights in relation to music videos; in particular it relates to the public performance of these videos as well as the "dubbing" right.

There is no fixed period of time for which rights are administered by collecting societies; usually it lasts until it is revoked by a rightsholder.

Traditionally, collecting societies operated only domestically (in the United Kingdom), but there are an increasing number of agreements between domestic societies and foreign societies. This means that many of the societies collect royalties from the exploitation of works abroad either directly in relation to online sources (e.g., MCPS-PRS Alliance licence can collect from a number of European countries) or through co-operation with local collecting societies (e.g., the ALCS Agreement with Société Française des Intérêts des Auteurs de l'Ecrit (SOFIA) relating to French Public Lending Right).

5) See: http://www.alcs.co.uk/Join/The%20Mandate/The_Full_Mandate.aspx

4. The Return for Rightsholders

The basic role of collecting societies is to provide royalties to their members. Each collecting society has a distribution plan (the plans, and bases of assessment, vary between the various collecting societies; there is no legal requirement for a particular basis of assessment) to determine how funds are divided among members and when payments are made. For example, the PRS plan works on the basis of blanket licences which allow the licensee to play any music in its repertoire. The money is then distributed based on the music actually played (where a complete play list is provided) or based on the sample or projection of the music played or to be played. This sample is then used to assess what music will actually be played. The money is collected from a number of sources, such as television and radio broadcasting, live events, DJs playing music, background music, theatres and cinemas and online sales as well as some overseas uses. An administration charge is then levied against the royalties; the money raised is then paid to members at four points over the course of the year.

In addition to collecting and distributing royalties, the collecting societies undertake strategic planning and lobbying in relation to copyright policy development. For example, PPL has been very active in lobbying for the extension of copyright terms for sound recordings and performers.

Some collecting societies (such as PRS) also provide career guidance for members and lists of lawyers who have agreed to give limited free legal advice to members. There are no unemployment benefits provided by collecting societies, but they often provide training and other events for members.

5. Transparency and Accountability

All collecting societies in the United Kingdom have a clear management structure. This usually includes a Management Committee or Board of Governors which is there to ensure it complies with its articles of association and company law. Some collecting societies such as PPL go further and try to ensure that corporate social responsibility is taken into account at all levels. This is simply part of the collecting societies' own corporate governance, rather than having any external mechanism existing to ensure compliance.

As companies limited by guarantee, the members (i.e., the rightsholders) are able to attend the annual general meeting (AGM). At this meeting the directors of the company (which may be called the Board of Governors or something similar) present the annual report of the company. In addition, the directors retire on a rotating basis and have to stand for re-election if they so wish. The members of the collecting society elect the directors of the company, which means ultimately they have control over who manages their society.

In practice, however, very few members will attend the AGM. To counter this problem, some collecting societies, for example PPL, appoint "Guardian" members to speak up in the interest of those groups who rarely choose to attend the meeting.

As already mentioned, collecting societies are limited companies. This means that they must comply with the accounting rules for companies, which include filing accounts at Companies House on an annual basis. In addition, all the other rules of corporate governance apply in the same way that they would apply to any other company.

There is usually a mechanism for resolving complaints relating to distribution. For example, in ACLS the procedure is as follows: in first instance the matter is referred to the Company Secretary for determination. If the matter remains unresolved, it shall firstly be referred to the relevant subcommittee of the Board of Directors and then to the Board of Directors for decision. If the complainant remains aggrieved, the matter shall be referred to an independent arbitrator appointed by the Chairperson or Vice-Chairperson of the Board of Directors, whose decision will be final and binding upon the complainant and the Society.

HU HUNGARY

Márk Lengyel
Körmendy-Ékes & Lengyel Consulting

I. Legal Framework

The Hungarian copyright system is governed by Act LXXVI of 1999 on Copyright (Copyright Act). In accordance with European practice the Copyright Act distinguishes between two categories of rightsholders i.e., between authors[1] and owners of neighbouring rights[2].

1. Authors

The author is the person who created the work.[3] This implies that he contributed to the creation of the work in a creative manner. As regards audiovisual works, the Copyright Act defines the list of authors in a non-exhaustive way:

"[T]he authors of the literary and musical[4] works prepared for a motion picture, the director of the motion picture, and all other persons having made creative contributions to the production of the whole of the motion picture shall be taken to be the authors of the cinematographic creation."[5]

Beyond those explicitly named in the above provision, a number of other contributors can be classified as authors — such as directors of photography, drawers of cartoons or editors. Naturally, the list of such authors not explicitly named in the Copyright Act in relation to audiovisual works, in general depends on the nature of the actual film. However, the main rule clearly appplies to such contributors too: only those who contributed in a creative manner to the production of a given audiovisual work can be classified as its authors. In this regard it is also clear that providers of technical services (e.g., logistics, lighting, etc.) cannot qualify as authors, however vital their work may be.

Under the Copyright Act authors have two kinds of rights:

- moral rights, and
- economic rights.

1) *Szerző*.
2) *Szerzői joghoz kapcsolódó jogok* or *szomszédos jogok*.
3) Copyright Act 4. § (1). This contribution refers to the rules as of the end of 2008. The Copyright Act is available in English at: http://www.artisjus.hu/english/act.html
4) Given that the scope of this paper does not extend to the examination of the position of authors of musical works the special provisions regulating this category of rightsholders are not taken into account in the analysis.
5) Copyright Act 64. § (2).

The moral rights are:

- the exclusive right to decide whether the given work may be published,[6]
- the right to be designated as the author of the given work,[7] and
- the protection of the unity and integrity of the work.[8]

Moral rights are unlimited in time and, in general, cannot be transferred to others. However, under certain conditions there are also persons other than the authors who are in a position to act with the aim of protecting the moral rights of the authors. In the case of films there are provisions in the Copyright Act governing the final acceptance of films. In addition to these rules the Copyright Act also provides a special shift of certain aspects of authors' moral rights:

„(1) A cinematographic creation shall be considered as completed if its final version is accepted as such by the authors and the producer. The final version may not thereafter be unilaterally altered by either party.
(2) The alteration of a completed film by addition, omission or replacement or in any other form shall be subject to the authorization of the authors and the producer.
(3) Unless otherwise agreed between the authors, the director shall represent the other authors in the exercise of the rights provided in Paragraphs (1) and (2).
(4) Except for the rights provided in Paragraphs (1) and (2), the producer may take action towards the protection of the moral rights of the authors."[9]

Under the economic rights the author also has the exclusive right "to use his entire work or an identifiable part thereof in any tangible or intangible form and to authorise each and every such use"[10]. This exclusive right also extends to the use of the particular title of the work or any typical and original character thereof ("merchandizing").[11]

The Copyright Act provides, by means of a list of examples, a definition of the term "use". According to this
"as uses of the work shall be rated in particular:

a) its reproduction,
b) its distribution,
c) its public performance,
d) its communication to the public by broadcasting or in any other manner,
e) retransmission of the broadcast work to the public with the involvement of an organization other than the original one,
f) its alteration,
g) its exhibition."[12]

Given that the list contains only examples and that these categories also comprise almost all the aspects of use, authors are in a position to exclusively authorise any kind of use of their works.

2. Neighbouring Rightsholders

The Copyright Act defines the following categories of neighbouring rightsholders, other than producers:

- performers (e.g., actors, musical performers);
- producers of phonograms;
- radio and television organisations.

6) Copyright Act 10. §.
7) Copyright Act 12. §.
8) Copyright Act 13. §.
9) Copyright Act 65. §.
10) Copyright Act 16. § (1).
11) Copyright Act 16. § (2) – (3).
12) Copyright Act 17. §.

Contrary to the approach taken in the case of authors, neighbouring rights are defined by the Copyright Act in an exhaustive manner. As a consequence, the extent of these rights is limited to the content that has been explicitly defined by the Act.

For the purpose of this study the rights of primarily the performers and the producers of motion picture works are worth considering in detail.

2.1. Performers

The Copyright Act defines the economic rights of the performers as follows:

"[T]he performer's consent shall be sought for:
a) the fixation of his unfixed performance;
b) the broadcasting or the communication in another manner to the public of his unfixed performance, unless the performance broadcast or communicated in another manner to the public is itself a broadcast performance;
c) the reproduction of his fixed performance;
d) the distribution of his fixed performance;
e) making his performance available to the public by cable or any other device or in any other manner so that the members of the public can choose the place and time of availability individually."[13]

The performer is entitled to remuneration in return for his consent.

In these cases the performer also has the moral right "to have his name indicated, depending on the nature of the use and in a manner consistent with it".[14] In addition to this, it is also stipulated that "the distortion, mutilation or any other alteration of a performance which prejudices the honour or reputation of the performer shall be taken to infringe his moral right."[15]

2.2. Producers of Motion Picture Works

The producers of films form another category of neighbouring rightsholders. The producer of the film is defined by the Copyright Act as "the natural or legal person or the unincorporated economic organisation who or which on their own behalf initiates and organizes the creation of the film and provides for the necessary financial and other conditions."[16]

The rights of the producer are defined by the Copyright Act as follows:

„(1) The consent of the film producer [Article 64, Paragraph (3)] shall be required for the film to be:
a) reproduced;
b) distributed, including by lending to the public;
c) made available to the public by cable or any other means or in any other manner so that the members of the public can choose the place and time of availability individually.

(2) Unless otherwise provided by statute, the uses referred to in Paragraph (1) shall be subject to the payment of remuneration."[17]

13) Copyright Act 73. § (1).
14) Copyright Act 75. § (1).
15) Copyright Act 75. § (2).
16) Copyright Act 64. § (3).
17) Copyright Act 82. §.

II. Practice in Rights Management

The extent to which the producer and other subsequent licensees will be able to exploit a given audiovisual work is defined first of all by the permission for use contracts they conclude with authors and other contributors. While keeping the wishes of the parties paramount, the Copyright Act also provides a set of ancillary rules in case the parties omit the explicit arrangement of certain aspects of their contractual relationship. These ancillary rules are based on the assumption that, in the relationship between the user and the author (rightsholder), it is the latter who is in the weaker position. As a consequence, the rules of the Copyright Act governing the conclusion and interpretation of permission for use contracts grant a far more favourable legal position to the rightsholders than to users. In this regard the following rules should be mentioned:

- "if the contents of the licence agreement cannot be interpreted unambiguously, the interpretation most favourable for the author shall be accepted;"[18]
- "the licence agreement shall provide an exclusive right to use only by express stipulation to that end";[19]
- "unless otherwise provided by statute or agreement, the authorization for use shall cover the territory of the Republic of Hungary and its term shall be in compliance with the period customary in agreements concluded on the use of works similar to the subject-matter of the agreement".[20] [As regards the term "period customary" it shall be noted that neither the practice of the courts nor any opinion of the Body of Experts in Copyright, the official forum for interpreting the provisions of the Copyright Act as established by the Act and maintained by the Hungarian Patent Office, gives further indication as to its duration].
- "if the agreement does not provide for the manners of use to which the authorization is intended to apply or does not provide for the authorized extent of use, the authorization shall be limited to the manner and extent of use indispensably necessary for the implementation of the objectives of the agreement";[21]
- "no authorization for a manner of use still unknown at the conclusion of the agreement may be granted";[22]
- "the user may confer the authorization or may grant a sub-licence to a third person for the use of the work only subject to the author's express consent thereto";[23]
- "according to the general provisions of civil law the court may alter the licence agreement in the event that such an agreement infringes upon the author's substantive lawful interest in having an equitable share in the income from use for the reason that because of a considerable increase in the demand for the use of the work following the conclusion of the agreement the difference in value between the services respectively provided by the parties becomes strikingly great".[24]

In addition to these general rules applicable to all kinds of use contracts there are also specific provisions for audiovisual works. According to the Copyright Act:

> "unless otherwise stipulated, pursuant to the contract concluded on the production of a cinematographic creation the author - except the composer of a musical work with or without text - shall assign to the producer the right of the use of the cinematographic creation and of the authorization for its use."[25]

The Act also contains a similar provision for the contractual relationships between performers and producers.[26]

As a consequence, users of films and other audiovisual works will generally be in a position to obtain a licence to use the work in question from a single rightsholder, the producer. However, performers and authors remain entitled to remuneration within the framework of collective rights management.

18) Copyright Act 42. § (3).
19) Copyright Act 43. § (1).
20) Copyright Act 43. § (4).
21) Copyright Act 43. § (5).
22) Copyright Act 44. § (2).
23) Copyright Act 46. § (1).
24) Copyright Act 48. §.
25) Copyright Act 66. § (1).
26) Copyright Act 73. § (3).

III. Institutional Framework of Collecting Societies

The work of collective rights management organisations is highly relevant within the audiovisual sector. The role of collecting societies is to represent the different kinds of rightsholders in their relationships with users where the nature of the exploitation makes individual licensing impracticable. Accordingly, the Copyright Act defines collective rights management as:

> "the exercise of authors' rights and neighbouring rights as well as database creators' rights relating respectively to authorial works, productions of performers, sound recordings, and programmes broadcast or transmitted by cable as well as the creation of films and databases, which are individually non-exercisable due to the character or circumstances of utilization and therefore exercised through organisations of rightsholders established to this end whether legally prescribed or based on the resolution of rightsholders."[27]

1. Collecting Societies – Their Legal Status

The legal status of collective rights management organisations[28] (collecting societies) is defined by the Copyright Act. According to the relevant provisions, the collecting societies operate as associations of different kinds of rightsholders. These associations are recognized as collecting societies by the act of registration. The registry of collecting societies is kept by the Ministry of Education and Culture.[29] The criteria for registration are outlined in the Copyright Act as follows:

"The records of societies for the collective administration of rights are open to the registration of a society

a) which may be joined by all those concerned who so wish and authorize the society to perform the collective administration of their rights and who prove eligible for admission according to the criteria laid down in the statutes,

b) which includes as members, or is intended to be joined as members, a substantial part of the resident rightsholders who are affected by the collective administration of rights the type of which is specified by the society,

c) which has a staff in reliance on which it has the appropriate expertise and experience necessary for the collective administration of rights and the maintenance of international contacts,

d) which is equipped for data processing related to the collective administration of rights,

e) which has entered into reciprocal representation agreements with organisations concerned with the collective administration of the rights of foreign rightholders and are of importance from the aspect of domestic and international utilizations, or which possesses a mutual letter of intent on the conclusion of such agreements,

f) the statutes of which include that the society:
   1. shall endeavour to collectively administer the rights and protect the interests of the affected rightsholders, in particular in exercising and enforcing economic rights relating to the collective administration of rights in its own name before the courts and other authorities,
   2. shall keep databases of the Hungarian and foreign works, and subject-matters protected by neighbouring rights subject to collective administration, as well as the respective rightsholders,
   3. shall perform the collective administration of rights not as a business activity and shall use revenues from complementary activities, if any, only for the defrayal of its expenditures,
   4. shall cover the expenses of its operation from the administration costs deducted by this title from the collected royalties and – if so provided by the statutes – from the membership fees it collects,

27) Copyright Act 85. § (1).
28) *Közös jogkezelő szervezet*.
29) http://www.okm.gov.hu/

5. shall distribute its revenues from collective administration, less the administration costs, among the rightsholders according to its rules of distribution, irrespective of whether they are or are not members of the organisation."[30]

According to the Copyright Act only one association can be registered for the administration of the same right of the same group of rightsholders.[31] As a consequence collecting societies are present in the content market as legal monopolies and, as such, enjoy powerful positions.

The activities of the collecting societies are supervised by the Ministry of Education and Culture.

2. Organisation of the Collecting Societies

The organisation of the collecting societies follows the pattern of associations. This also implies that their structure and organisation shall comply with Act II of 1989 on associations (Associations Act).

In general, the main decision-making body of the collecting society is the general assembly. This includes the entire membership of the organisation. Each of the collecting societies has a separate office with full-time employees responsible for the daily management of the operation. These offices are generally not large. For example, in the case of the Association of Arts Unions – Bureau for the Protection of Performers' Rights (*Művészeti Szakszervezetek* Szövetsége [MSzSz]-EJI) the total number of employees (including the top executives) was 22 in 2007.[32]

The top executive staff of collecting societies is generally divided according to two functions:

- the president of the collecting society is generally an author or performer himself. His duties extend to representing the collecting society in public.
- the head of the operative unit of the collecting society (director general, director) is, in contrast, a professional lawyer, in general. His main role is to manage the operation of the institution on a day-to-day basis.

It should also be noted that MSzSz-EJI, the collective rights management society acting on behalf of performers, follows a special organisational pattern, since the EJI itself acts as an office of the *Művészeti Szakszervezetek* (MSzSz), and not as an individual association.

3. General Activities of the Collecting Societies

The activities of collecting societies generally cover the following operations:

- licensing uses within their remit, collecting royalties on behalf of the rightsholders, initiating and pursuing legal actions in relation to these tasks, if necessary;
- administering data relating to the exploitation of works within their remit;
- administering data relating to the rightsholders represented and their works;
- distributing the licence fee income among the rightsholders.

4. The Relevant Collecting Societies

The Hungarian collecting societies relevant for the purpose of this paper, are:

- Filmjus - Hungarian Society for the Protection of Audiovisual Authors' and Producers' Rights;[33]
- MSzSz-EJI - Association of the Arts Unions – Bureau for the Protection of Performers' Rights.[34]

30) Copyright Act 88. § (1).
31) Copyright Act 86. § (2) – (3).
32) Report of MSzSz-EJI on its activities in 2006-2007, p. 24.
33) http://www.filmjus.hu/angolul/statut_2.htm
34) http://www.eji.hu/english/english.html

While Filmjus represents the authors (directors, scriptwriters, cinematographers, etc., see above) of audiovisual works, MSzSz-EJI provides collective rights management on behalf of performers.

The activities of Filmjus comprise the following forms of exploitation:

- as regards collective rights management prescribed by law:
  - collecting remuneration due, with regard to the copying of films for private purpose, to the authors and producers of films;[35]
  - lending to the public of individual copies of the work;[36]
  - retransmission to the public of works broadcast or transmitted in the programme offering of a radio or television organisation or of an entity communicating its own programme offering by cable or by any other means to the public, simultaneously and in an unaltered manner via an organisation other than the original one;[37]

- as regards voluntary collective rights management:
  - copying and distributing films;[38]
  - public performance of films;[39]
  - broadcasting films;[40]
  - communication to the public of films in an own programme offering by cable or any like device or in any like manner;[41]
  - communication of films to the public in a manner other than broadcasting or the means referred to in the previous indent;[42]
  - making films available to the public by cable or any other means or in any other manner so that the members of the public can choose the place and time of the availability individually.[43]

In regard to these types of exploitation, Filmjus represents the authors of films, grants licences on their behalf and collects licence fees. It should be noted that the scope of the activity of Filmjus is limited to audiovisual works produced by Hungarian producers.

As regards MSzSz-EJI, its activity comprises collective rights management prescribed entirely by law. The types of exploitation relevant to MSzSz-EJI are as follows:

- collecting remuneration due to performers of films with regard to the private purpose copying of their films;[44]
- retransmission to the public of works broadcast or transmitted in the programme offering of a radio or television organisation or of an entity communicating its own programme offering by cable or by any other means to the public, simultaneously and in an unaltered manner via an organization other than the original one;[45]
- fixation of a performance made for the purposes of broadcasting or communication to the public;[46]
- making performances available to the public by any means or in any manner so that the members of the public can choose the place and time of the availability individually;[47]
- broadcasting of a sound recording released for commercial purposes or of its copy;[48]
- communication to the public, in any other manner, of a sound recording released for commercial purposes or of its copy;[49]

35) Copyright Act 20. § (1) – (2), (4) – (6).
36) Copyright Act 23. § (3).
37) Copyright Act 28. § (2) – (5).
38) Copyright Act 18. §, 23. § (1) – (3), (5).
39) Copyright Act 24. §.
40) Copyright Act 26. § (1) – (6).
41) Copyright Act 26. § (7).
42) Copyright Act 26. § (8), first sentence.
43) Copyright Act 26. § (8), second sentence.
44) Copyright Act 20. § (1) – (2), (4) – (6).
45) Copyright Act 28. § (2) – (5).
46) Copyright Act 74. § (2).
47) Copyright Act 74. § (2).
48) Copyright Act 77. §.
49) Copyright Act 77. §.

– public lending and rental of the released copies of a sound recording;[50]
– distribution of the performance through rental in the case where the performer has consented to his performance being fixed in a cinematographic creation.[51]

The licence of the relevant collecting societies – if this is also needed in addition to the payment of a licence fee[52] – can be obtained in a permission for use contract. Under the terms of these contracts the users generally have two obligations: the payment of the licence fee and the provision of detailed data on the extent of use. The licence fees for the various kinds of use are defined in yearly communications to the public published by collecting societies in the official journal *"Magyar Közlöny"*. These communications are subject to approval by the Minister of Education and Culture.

Authors of audiovisual works and performers are also entitled to a portion of the royalties collected by Artisjus,[53] the collecting society representing authors of musical works and literary compositions, with regard to the retransmission of their works (for example by cable companies). According to the Copyright Act, 19 % of this royalty shall be paid to Filmjus and a further 26.5 % to MSzSz-EJI, however the respective collecting societies are free to make a different arrangement if they wish.[54]

IV. Rightsholders' Perspective

The legal monopoly of the collective societies in their respective sector means that collecting societies represent the entire list of a given category of authors or neighbouring rightsholders. As a consequence, no formal membership is needed for individual rightsholders in order to claim their share of the royalties, and a collecting society is entitled to represent the entire segment of rightsholders.

1. Membership, Possibility to "Opt-out"

However, the Copyright Act also makes it possible for rightsholders to withdraw their works from the scope of collective rights management. This option is subject to an objection submitted "beforehand in a written declaration to the authorization of the use of his works or performances of neighbouring rights within the framework of the collective administration of rights."[55] Should a rightsholder make such an objection, "the organisation performing collective administration of rights shall proceed according to such a declaration, if it is made more than three months before the end of the calendar year, to take effect not earlier than the first day of the following year."[56]

It has to be noted that this possibility of withdrawal is not provided in cases where collective rights management is prescribed by law. It also has to be noted that such withdrawal is possible only if it is done for all the works of the rightsholder. In other words, an author or performer cannot withdraw only certain of his works from the collective management of rights.

50) Copyright Act 78. §.
51) Copyright Act 73. §, 23. § (6).
52) It is worth noting that under the rules of the Copyright Act, in the cases of:
– collecting remuneration due to performers of films with regard to the private purpose copying of their films and
– retransmission to the public of works broadcast or transmitted in the programme of a radio or television organisation or of an entity communicating its own programme by cable or by any other means to the public, simultaneously and in an unaltered manner via an organisation other than the original one,
no licence is required from the performers for such use. However, this is without prejudice to their right to receive a licence fee for such uses. As a consequence, in these cases the collecting society (MSzSz-EJI) does not conclude contracts with users; its role is limited to receiving the proper portion of the licence fee as collected by Artisjus (the collecting society of authors of musical works, responsible for administering the licence fee income on behalf of other collecting societies in these cases as well).
53) http://www.artisjus.hu/
54) Copyright Act 28. § (4).
55) Copyright Act 91. § (2).
56) Copyright Act 91. § (2).

2. "Services" Provided by Collecting Societies

2.1. Distribution of Royalties

In the absence of withdrawal the rightsholder is entitled to his share of the royalties collected by the collective rights management association. The calculation of this remuneration is based on a set of distribution rules. These rules define the percentage of the revenue to be paid to rightsholders according to manner of exploitation and categories of rightsholders. The distribution rules are adopted by the main decision-making body of the collecting societies (the general assembly), and are subject to scrutiny by the Ministry of Education and Culture.

The other basis for the distribution of royalties among individual rightsholders is the data provided by users on the exploitation of the works under the licence granted by the collecting society in the permission for use contract concluded with the user. The final amounts to be distributed among the rightsholders are calculated on the basis of such data.

2.2. Other Activities

In addition to the collection and distribution of royalties, collecting societies are also engaged in other activities for the good of their members. Some collecting societies also provide them with social and professional benefits.

In regard to Filmjus, the operation of the Filmjus Foundation may be described briefly here. This foundation – established by the collecting society – has a double purpose. In pursuing its cultural aims it grants scholarships to scriptwriters. In its social role it provides social benefits for indigent authors of films. Filmjus also supports the *Irodalmi Filmszerzők Egyesülete* (the Association of Literary Film Authors – IRKA).[57] This association has purposes similar to those of the Filmjus Foundation. In 2007 Filmjus dedicated 11% of its total income for the year to social and cultural support purposes.[58]

MSzSz-EJI also spends a significant share of its income on social and cultural purposes in the interests of performers. Corresponding activities of EJI include:
- giving loans for the purpose of promoting housing or buying equipment;
- granting aid for social purposes, education, or for Christmas;
- granting individual direct subsidies for professional purposes: contributing to the costs of participation in national or international contests, festivals, courses, training schemes, etc.;
- granting collective direct subsidies for cultural, educational or social events, contributing to operational costs of related organisations.[59]

3. Control and Transparency

There are various means by which rightsholders can control collecting societies:
- Rightsholders control their respective collecting societies primarily via the election of their officials. According to the Copyright Act collecting societies operate as associations,[60] therefore their internal rules and procedures shall be in compliance with the Associations Act. According to this Act the members have the right to apply to court in the case of any decision of the association or any of its organs that is contrary to the law.[61]
- Collecting societies – as associations – operate under the general supervision of the Prosecution Service of Hungary. In the case of any unlawful decision or act of the association the prosecutor shall apply to court.[62]
- The compliance of the operation of collecting societies with copyright rules is also subject to control exercised by the Ministry of Education and Culture as outlined above.

In addition to these forms of control, collecting societies also publish reports on their operation drafted by their respective management on a regular basis.

57) http://www.irkae.hu/index.php
58) Decision of the board of the Filmjus No. 4/2007.
59) Report of MSzSz-EJI on its activities in 2006-2007, p. 16.
60) Copyright Act 86. § (1).
61) Associations Act 10. § (1).
62) Associations Act 14. § (1).

IT ITALY

Valeria Capuano
Universita Degli Studi di Napoli

I. Legal Framework

In Italy there are different provisions aimed at the regulation of the rights of authors and holders of neighbouring rights:[1]

Although copyright is not the subject of specific provisions in the Italian Constitution, a number of its provisions can be read as implying that copyright is protected. At the outset, Article 2 of the Constitution recognizes certain fundamental human rights which are specified in the following articles: Article 4 states the right for each citizen to work and to carry out activities able to promote both spiritual and material progress for society, Article 9 promotes research and cultural development, Article 21 guarantees freedom of expression, Article 33 states the freedom of arts and sciences, Article 35 is the constitutional basis for the protection of each kind of labour and Article 41 recognizes individual economic initiative. Most importantly, according to Article 42 of the Constitution, private as well as public property is protected.

With reference to legislation adopted by the Parliament, Articles 2575 to 2583 of the Italian Civil Code lay down the general rules on copyright protection for artistic and literary works. The main principles set forth there concern, in particular, the subject of copyright, modes of acquisition, rights of interpreters and performers and moral rights. These principles are general stipulations, which the Copyright Act describes in more detail.

1. The Copyright Act (Law no. 633 of 22 April 1941) constitutes the main legal source as regards authors' rights and neighbouring rights.

According to Part I of the Copyright Act, all creative and intellectual efforts which fall within the categories of literature, music, visual arts, architecture, theatre and cinematographic works (Article 1) are protected. The copyright-holder is the creator of the original work (Article 6) or the person indicated as the author (Article 8). In the case of collective works, the "copyright holder" is the person who manages or directs the setting-up of the work (Art. 7). Chapter III Section I of Part I governs the economic exploitation of rights, while its Section II regulates the moral rights of authors.

Part II of the Copyright Law contains provisions concerning neighbouring rights. Neighbouring rights are rights other than author's rights that are recognized by law and connected with the work.

1) On copyright protection in Italy see: Ubertazzi L.C., *I diritti d'autore e connessi*. Scritti, Milano, 2003; Nivarra L., *Itinerari del diritto d'autore*, Milano, 2001; Chimenti L., *Lineamenti del nuovo diritto d'autore,* Milano, 2004; Ercolani S., *Il diritto d'autore e i diritti connessi*, Torino, 2004.

The underlying idea is that not only authors but also other professional groups have to be considered with regard to copyright issues. The provisions distinguish between producers, interpreters and performers of phonograms (2. a) below), producers of cinematographic or other audiovisual works (2. b), managers of sport events, broadcasting organisations (2. c), general interpreters and performers (2. d).

With specific reference to audiovisual works, the Copyright Law protects not only the authors of the script or the screenplay, directors and adapters, but also the producers, broadcasting companies, artists and performers.

Italian legislation lacks express and comprehensive rules concerning online and VoD exploitation of audiovisual works, but instead contains a few scattered provisions dealing with these issues. Article 70-bis para. 1 of the Copyright Act stipulates that the diffusion of music and images via the Internet is permitted if these contents are provided in low resolution and only for scientific, teaching and non-profit purposes. Article 71-sexies of the Copyright Act allows the reproduction of phonograms or videograms on "every support" if this is done exclusively for personal use, without any commercial or profit-making purpose. These provisions might also be used to regulate new ways of exploiting audiovisual works such as audiovisual services offered over the Internet or mobile phones. However, in practice it is not always easy to ascertain whether the use is non-profit-making.[2] Moreover, legal protection for these new ways of exploiting copyright protected works could also be guaranteed by interpreting the expression "communication to the public" broadly.[3] According to Art. 16 of the Copyright Act "communication to the public" covers the use of long distance communication means such as telegraph, telephone, radio, television and other similar means (e.g., Internet), it includes communication to the public by satellite, cable retransmission and all encoded communication to the public with particular access conditions, and all systems that transmit specific contents to a place and at a time requested (e.g., VoD).

On the basis of Article 190 of the Copyright Act, a Permanent Advisory Committee for copyright law has been established within the Ministry of Cultural Heritage and Activities. The President of this Committee is appointed for four years by the Minister of Cultural Heritage and Activities. This Committee may set up special subcommittees for the study of specific questions related to copyright. As for online copyright issues,[4] a special subcommittee for the modernization of copyright law in Italy has been set up.[5] This subcommittee has not yet submitted definitive proposals, but has started its work and is expected to adopt a first draft on the modernization of certain aspects of Copyright Law (such as online and VoD exploitation) by December 2008.[6]

Finally, regarding the EC Term of Protection Directive,[7] it is worth noting that the Italian Copyright Act stipulates that the protection of neighbouring rights in the audiovisual sector lasts for 50 years:

- as from the fixation of the work for the producer of cinematographic or audiovisual work (Art. 78-ter para. 2 of Law no.633/41);

2) See Ercolani S., *Il Diritto d'autore e i diritti connessi*, *op. cit*. p. 238.

3) See Art. 8 Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission. See also the Court of Justice of the European Communities' decision of 7 December 2006, Case C-306/05, SGAE, Rec. I-11519, where the Court ruled that "While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive. The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29."

4) Recently, Mediaset sued Google for approximately EUR 500 mio. in damages for alleged "illegal commercial use" of copyright-protected video clips on YouTube (company owned by Google Inc.). For further details see Financial Times website available at: http://www.ft.com/cms/s/0/3bb7f55a-5e75-11dd-b354-000077b07658.html

5) Law of 28 November 2005 n.246, Art. 14 para. 14.

6) For further details see http://www.spettacolo.beniculturali.it/dipart/autore/comitato.htm#

7) Directive 2006/116/EC of 12 December 2006 on the term protection of copyright and certain related rights, OJ L 372, 27 October 2006.

- as from the first transmission for the broadcasters of the work (Art. 79 para. 5 of Law no.633/41);
- as from the performance or playing activity of the artists and performers (Art. 85 of Law no.633/41).

2. Each category of rightsholder has its own particular rights:

a) *producers of phonograms, artists and interpreters, in respect of the phonograms on which their performances are fixed*, are entitled to remuneration for the use of those phonograms through cinematographic, radio and television means (Article 73 of Law no.633/41 as amended following the implementation of the EC Directive on rental and lending rights[8]);

b) *producers of cinematographic and other audiovisual works* have the right to authorize the reproduction, distribution, renting, and communication to the public of their works according to the conditions they deem appropriate (Article 78-ter of Law no.633/41, as introduced by the implementation of the EC Directive on rental and lending rights[9]). However, according to Art. 78-quarter of the Copyright Act (introduced by Decree-law no. 9/2008),[10] in the case of sports events, these rights are transferred to *sports event managers*;[11]

c) *broadcasting organisations*[12] have the right to authorize the fixation of their broadcast, to authorize reproduction and retransmission of their fixed broadcast, and to license communication to the public of the fixation of their broadcasts (Art. 79 of Law no.633/41);

d) *interpreters and performers* have the exclusive right to authorize the fixation of their artistic performances and their reproduction, and communication to the public. Furthermore, they can grant rental rights for the fixation of their performances. In the case of assignment of rental rights to the producer, they retain the right to adequate remuneration: Art. 80 to Art. 85-bis of the Copyright Law regulate performing artists' rights concerning cinematographic works. According to these articles, performers who take part in the realization of a theatrical film or television film are entitled to claim "adequate remuneration"[13] relative to the rental or broadcasting (by cable, terrestrial means and satellite) of the work. Moreover, they are entitled to adequate remuneration for the distribution of their works on home video and for private copying of videos.

Furthermore, if the use of the fixations endangers the honour or reputation of interpreters and performers, they can oppose the communication to the public or reproduction of their performances (Art. 80 of Law no.633/41).

3. As stated above, all these rights are granted by national legislation, i.e., Law no.633/1941.

4. According to this Law most of these rights can be managed individually (except the exploitation by cable retransmission). Art. 84 of Law no.633/1941 contains the presumption of a *cessio legis* according to which artists and performers confer the rights to fixation, reproduction and broadcasting of their performances to the producer the moment they enter into the production contract for cinematographic, audiovisual or other works with sequences of moving images. For this reason, the producer is viewed as the "rights manager". By virtue of paragraphs 2 and 3 interpreters and performers retain a right to adequate remuneration and they do not have the possibility of renouncing their right to adequate remuneration (Art. 84 para. 4 of Law no.633/1941).

8) See Art. 8 Directive 92/100/EEC on rental and lending rights (codified version).
9) See Art. 8 Directive 92/100/EEC on rental and lending rights.
10) O.J. of the Italian Republic of 1 February 2008, n. 27.
11) Loffredo E., *L'impresa di spettacoli, anche sportivi*, AIDA 2007, p. 313.
12) Carter E. J., *Market definition in Broadcasting Sector*, in World Competition, 2001, p. 93; Cian M., *Lo statuto dell'impresa televisiva nell'era delle comunicazioni elettroniche*, AIDA, 2007, p. 340.
13) See Ercolani S., *L'equo compenso degli autori delle opere audiovisive*, Il diritto d'autore, 1/2007, p.65.

II. Practice in Rights Management

Chapter II of Part III[14] of the Copyright Law no.633/1941 is entitled "transfer of exploitation rights". According to Art. 107, not only authors' rights but also neighbouring rights can be purchased by, assigned to or conferred upon others in all the ways allowed by law. The transfer must always be agreed upon in writing. Two Sections of Chapter II, namely the "general provisions" of Section I and the articles contained in Section IV entitled "representation and performance agreements", are both devoid of any limit or exception to the scope of neighbouring rights and do not regulate the manner of exploiting neighbouring rights.

1. The Role of SIAE

Article 110-bis of the Copyright Act stipulates that the authorisation for cable retransmission of radio broadcasts is to be granted under a contract between copyright holders, neighbouring rights holders and cable distributors. Copyright and neighbouring rights holders, however, are represented by the *Società Italiana degli Autori e degli Editori* (SIAE) (see below). If no consensus is reached among the parties, they can request a third party, chosen by common agreement, to submit a draft contract (as envisaged by Art. 11 Dir. 93/83/EEC). If the parties do not agree on the choice of the third party, the President of the Court where one of the parties has its residence or place of business will appoint the third party. The proposal is to be regarded as accepted if none of the interested parties object to it within 90 days from its notification. Pursuant to Art. 180-bis of Law n.633/41, copyright or neighbouring rightsholders can exercise their right to authorise cable retransmission exclusively by recourse to SIAE (as envisaged by Art. 9(1) of the Directive on cable retransmission). In particular, as regards neighbouring rightsholders, SIAE acts on the basis of specific contractual arrangements entered into with the *Istituto Mutualistico Artisti Interpreti ed Esecutori* (Mutual Institute for Interpreters and Performers, IMAIE) or other collecting societies established exclusively for the management of other neighbouring rights.[15] These societies act for non-members in the same way as they act for their members. Non-members may exercise their rights within three years from the moment their work has been transmitted by cable (cf. Art. 9(2) Dir. 93/83/EEC).

Pursuant to Art. 180-bis of Law no.633/41, the right to authorise cable retransmission on behalf of copyright or neighbouring rightsholders is entrusted exclusively to SIAE.[16] According to this provision, in Italy SIAE has the exclusive "right to act as intermediary" for the exercise of copyrights in whatever form.[17] To this end SIAE may grant authorisations and licences for the economic exploitation of the protected works, and it shall collect and distribute royalties. According to Art. 180 para. 4, the exclusive management power conferred upon SIAE does not prevent the author or his successor from exercising the rights personally. In other words, the exclusive management power is conditioned on the fact that the rightsholder decides not to manage his rights himself. In practice, however, this provision does not find any concrete application as individual rightsholders rarely have the negotiating power to exploit their rights autonomously with beneficial results. Hence SIAE has a *de facto* legal monopoly on the management of authors' and publishers' economic rights.

14) Part III of the Copyright Law is entitled "common provisions".

15) In Italy as one example of "other collecting societies" there is the *Società Consorzio Fonografici* (SCF), an Italian society representing producers of phonograms. SCF does not seem relevant to the current research to the extent that it manages the rights of producers of phonograms. However, a connection with the audiovisual sector could be found every time a song for a broader work is required such as, for example, a theme song for a TV program. In this case, according to Italian law, the broadcaster should recognize the obligation to remunerate not only the author for his rights (through SIAE), but also performers (through IMAIE) and producers of phonograms (through SCF). On the rights of producers of phonograms, the Italian Supreme Court (*Corte di Cassazione*, judgment n. 27074/2007), has recently stated that the rights belonging to producers and artists are autonomous from the rights of music composers, hence they deserve specific criminal law protection and their management is not conferred by law on the SIAE. For this reason the rightsholders are free to confer the management on SCF.

16) Marabini F., *Monopolio della SIAE, normativa antitrust, compensi per diritti d'autore e criteri di ripartizione*, Il diritto d'autore, 1, 1997, p.49; Nivarra L., *Esclusiva SIAE e obbligo a contrarre: una disciplina in cerca d'autore?,* in Foro it.,1990, I, p.2401. Tommaselli, A., Amendola, A., *Le funzioni della SIAE e la natura delle deliberazioni relative al sistema di ripartizione dei proventi del diritto d'autore*, Il Diritto d'Autore, 1998, p. 203.

17) The Italian Copyright Law is quite vague in defining the kind of contracts generally entered into by rightsholders. It refers generally to "licence", "mandate", "representation". The only exception is Art. 180 that expressly uses the term "licence". On the argument see Fabiani M., *I contratti di diritto d'autore*, Milano, 2000.

As far as the exploitation of neighbouring rights is concerned, however, SIAE is not entitled to collective management except in the case of authorisation for cable retransmission, as provided by Art. 180-bis (see above).

2. The Role of IMAIE

Neighbouring rights are regulated by Law no.93 of 5 February 1992 (hereinafter "Law no.93/92").[18] This Law grants the phonographic industry a right to remuneration for private and non-profit reproductions. Article 1 para. 1 governs the underlying framework of phonographic activity. This provision stipulates that phonograms are "heritage of national relevance" insofar as they are a means of spreading culture and that record companies are industrial undertakings which are thus entitled to the benefits granted to large, medium and small industrial undertakings. While Article 1 para. 2 states that phonographic businesses are to be considered and treated as small or medium undertakings, Art. 4 establishes IMAIE, defines its remit (the protection of the interests of interpreters and performers) and its general composition (see Section III below for further details).

IMAIE is vested, at least as regards the audiovisual sector, with an institutional role in the management of neighbouring rights.[19] Law no.93/92 in conjunction with Art. 84 of the Copyright Law confers upon IMAIE the right to administer on behalf of performers and artists their right of communication to the public and to remuneration for private copying of videos. IMAIE manages these rights on the basis of Art. 4 paragraph 1 of Law no.93/92. IMAIE has exclusive rights to fix remuneration on the basis of private agreements entered into with the phonographic industry and all the associations representing artists and performers.

The amount of the remuneration due to interpreters and performers is determined either by the parties[20] or, failing that, pursuant to an agreement entered into between IMAIE and the relevant representatives of the phonographic industry[21] or, if that solution too proves unfeasible, by way of arbitration.[22] IMAIE thus plays a key role in this matter, as individual agreements are seldom reached between the parties. Article 5 of Law no.93/92, in this connection, provides that phonogram manufacturers or their representatives transfer the sums due as remuneration to IMAIE which, on a quarterly basis, informs rightsholders of the individual amounts to which they are entitled. Interpreters and performers have 1095 days to collect those sums. After this deadline, any sums not collected by the rightsholders will be devolved to finance activities in the collective interest of artists, interpreters and performers (on this point see below Section III, paragraph 3).

III. Institutional Framework of Collecting Societies

1. According to academic literature, the legal nature of IMAIE is a highly controversial issue.[23] Even if it is a private association, it is recognized by law that entrusts IMAIE with tasks of general interest. Moreover, the State exercises a certain control over IMAIE's activities, i.e., by appointing members to its Board of Auditors. Different practical consequences may derive from defining IMAIE as a private rather than a public law body (e.g., if it were a private association, competition law issues might be relevant if another organisation should want to enter the Italian market in order to provide similar services).[24]

Defining IMAIE as a public undertaking or, better still, as a private institution which is *also* entrusted with activities of public economic interest, would allow for the application of the exceptions

18) O. J. of Italian Republic 15 February 1992, n.38.
19) Marasà A, *Natura e funzioni di IMAIE*, AIDA, 1992, p. 16.
20) Article 4 of Legislative Decree (*decreto legislativo*) of Lieutenant 20 July 1945, no. 440.
21) Article 84 paragraph 4 of the Copyright Act.
22) *Ibid.*, last sentence. The arbitration is regulated by Article 4 of Legislative Decree of the Lieutenant 20 July 1945, no. 440.
23) Marasà A, *Natura e funzioni di IMAIE*, *op. cit.*; Zaccaria A., *Profili civilistici dei diritti patrimoniali degli artisti*, AIDA, 1992, p. 27; Ubertazzi L.C., *I diritti d'autore e connessi*, *op. cit.*, p. 241.
24) Sanfilippo P.M., *La gestione collettiva dei diritti d'autore e connessi tra regolazione e concorrenza*, AIDA, 2007, p. 443; Kretshmer M., *The failure of property rules in collective administration: rethinking copyright societies as regulatory instrument*, European Intellectual Property Review, 2002, 24(3), p. 126.

provided for by Art. 86 para. 2 of the Treaty on the European Community (ECT) and by Art. 8 of the Italian Antitrust Law.[25] According to these provisions competition rules also apply to public undertakings and to undertakings entrusted with services of public economic interest or undertakings which act in a monopolistic regime "insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". In certain circumstances both SIAE[26] and IMAIE have *de iure* monopolies (see respectively Art. 180 Law no.633/41 and Art. 4 Law no.93/92). Given that this contribution focuses on collecting societies offering to manage neighbouring rights, it concentrates in particular on IMAIE.[27]

IMAIE's exclusive right to determine artists' and performers' remuneration has raised questions of constitutional and EC law. In particular, it has been questioned whether IMAIE's exclusive position in managing rights is compatible with the principles of equality (Art. 3 of the Italian Constitution), the freedom of association (Art. 18 of the Italian Constitution), the State's duty to promote and to support private economic activities (Art. 41 of the Italian Constitution). Furthermore, from an EC law perspective, this exclusivity in rights management has also been scrutinized under Art. 82 ECT, which prohibits undertakings from abusing their dominant market position. The Tribunal of Milan[28] stated that both questions did not pose actual problems because, given the facts of the case, there was no evidence for the existence of other persons potentially interested in competing with IMAIE in the provision of the services the latter was offering. Furthermore, artists were not looking for an alternative service provider. Moreover, the Tribunal did not find the legal monopoly of IMAIE to be unlawful. The Court argued on the basis of the exception provided for in Art. 86 ECT and invoked Art. 35 of the Italian Constitution, which protects all kind of labour. According to the Italian judge, artists have a strong interest in acting as a group rather than *uti singuli* and in concentrating their collective activity in a single body that should better guarantee the effective exploitation of their rights.[29]

2. IMAIE was established on 26 September 1977 by the Italian trade unions the *Confederazione Generale Italiana del Lavoro* (Italian General Confederation for Labour, CGIL), the *Confederazione Italiana Sindacati del Lavoratori* (Italian Confederation of Workers' Trade Unions, CISL) and the *Unione Italiana del Lavoro* (Italian Labour Union, UIL) as a private body by a notary act.[30] However, as seen above, subsequently it has been the subject of Law n.93/92, which now regulates certain aspects of its organisation and functions. In particular, Art. 4 para. 2 of Law no.93/92 required IMAIE to apply for recognition of its non-profit status, which took place by way of Decree Law of 25 October 1994, no. 299.[31] Finally, it has been enrolled in the Legal Entity Register of the Prefettura of Rome, according to Law decree no.361/2000.

According to Art. 1 of IMAIE's Statute, IMAIE's founding members are the Trade Union Federations of Public Entertainment and Communication.[32] "Ordinary" members comprise artists, interpreters and performers who make audiovisual recordings of their performances, or have such recordings made. The ordinary members, who hold rights in these recordings in conformity with Italian legislation, international conventions or trade union agreements, seek protection for these rights in regard to widespread use. In addition to the founding and the ordinary members, Art. 8 of the Statute stipulates honorary members, namely legal or natural persons promoting IMAIE's goals, to be designated by IMAIE's Board of Directors.

According to Art. 2 of the Statute of IMAIE, IMAIE has its seat in Rome, however, delegations and secondary branches can be established throughout the country. Art. 3 of the Statute sets out that IMAIE's duration is indefinite; however, it may be dissolved as provided for by Art. 33 of the Statute (in accordance with the procedures laid down in Art. 16 para. 2 of the Statute).

25) Law of 10 October 1990, n.287.
26) For further information on SIAE's legal basis, internal organisations and activities visit the official website http://www.siae.it
27) Ubertazzi L.C., *Illegittimità del monopolio di IMAIE*, I diritti d'autore e connessi, Milano, 2000, p. 241.
28) Order no.708/1-2 of 6 November 1999, AIDA 2000.
29) Mastroianni R., *Le società di autori ed il diritto comunitario della concorrenza*, Riv. It. Dir. Pub. Com., 1- 1991, p. 67; *id*, *I diritti esclusivi delle collecting societies*, AIDA, 2001, vol. X, p. 2023.
30) Registry n.128402, deposit n.29823, Notary Giuseppe Intersimone.
31) OJ of Italian Republic of 23 December 1994, n.299.
32) Art. 1 OF IMAIE's Statute, cited in Tursi A., *Le associazioni di categoria e gli accordi collettivi,* AIDA, 2001, p. 48.

Art. 10 of the Statute lists the Institute's bodies, which are: the Members Delegates' Assembly, the Board of Directors, the President, the Presidency Committee, the Board of Auditors, and the Board of Arbitrators.

All the members of these bodies are appointed for a period of three years following their election or appointment. According to Art. 11 of the Statute, representatives from the audiovisual sector are to be elected to form the Members Delegates' Assembly.[33] The Assembly is comprised of 66 members, 30 of whom are delegates from the music sector, 30 are delegates from the audiovisual sector and six are delegates of the Board of Directors.

According to Art. 18 of the Statute, the Board of Directors has 14 members: the Members Delegates' Assembly elects eight of its members (four from the music sector and four from the audiovisual sector) to join the Board, and the Founding Members appoint six members (i.e., two each). According to Art. 7 of the Statute, the Board of Directors may pass a resolution in order to establish audiovisual (and musical) Committees charged with improving the handling of tasks managed by IMAIE. In particular, each Committee may express its opinion on matters concerning their interests. They can express their views, for example, on draft agreements to be sent to users as referred to in Arts. 73, 80, 84 and 180-bis of the Copyright Law, criteria for the distribution of remuneration among performing artists, to which they are entitled under law, on any cooperation with comparable foreign collecting societies and on any agreements that the IMAIE might need to reach with phonographic or cinematographic producers.

Furthermore, the Board of Directors appoints the General Manager (Art. 28 of the Statute). The latter is accountable to the Board of Directors for the implementation of the Board's resolutions. Among his tasks feature the administration of the Institute, the management of its personnel and the supervision and coordination of all technical and administrative sections of IMAIE.

According to Art. 22 of the Statute, the Board of Directors elects the President from among the eight representatives of the music and audiovisual sectors. He is chosen from the two sectors alternately. He acts as the legal representative and the approved signatory of the Institute. The President convenes and presides over the meetings of the Board of Directors. He reports to the Board of Directors on all the measures taken, ensures compliance with the Statute, and convenes the Members Delegates' Assembly.

Another important organ of IMAIE is the Presidency Committee. According to Art. 23 of the Statute it is composed of the President and three members of the Board of Directors. It has to implement those resolutions of the Board of Directors aimed at attaining IMAIE's institutional goals. It also represents IMAIE before all national and international institutions and is responsible for organising informative meetings with ordinary members. The Presidency Committee has negotiating powers.

In the absence of the President, a Vice-President (the most senior member on the Board of Directors or, in case of parity, the eldest member) replaces the President on the Board of Directors; he will delegate his tasks concerning the Presidency Committee to one of its members.

A peculiar feature of IMAIE's structure lies in the composition of the Board of Auditors, as stipulated by Art. 25 of the Statute: it is composed of three acting members and two substitutes. The Ministry of Cultural Heritage and Activities appoints the Board's president, the Ministry of Labour and Welfare appoints the second member and the Members Delegates' Assembly elects the third member as well as the two substitutes. The Board's task is to oversee the Institute according to Art. 2403 of the Italian Civil Code. This article – inserted into Title V of the Italian Civil Code entitled "societies" – states that the Board of Auditors has the duty to supervise the accounts and ensure compliance with the reporting rules of the society. To guarantee further transparency, IAMIE's budget and other accounting reports are published on IMAIE's website.

33) For further details on the election system see Electoral Regulation for the Election of Members Delegates' Assembly available at: http://www.imaie.it/imaie_statuto.html

Finally, according to Art. 26 of the Statute a Board of Arbitrators is established. This is composed of three persons elected by the Members Delegates' Assembly from among its members who do not belong to any other of IMAIE's bodies. The mandate of members of the Board of Arbitrators lasts for three years. They may be re-elected and they elect one of the members as president. Basing themselves on the principles of equity, they decide according to the law of arbitration, on all the disputes arising among members or between members and IMAIE. A prior attempt at reconciling the dispute between parties is always required. The Board is also competent to decide on the appeal against a decree by which a member has been excluded from IMAIE; the interested parties have to file the request for recourse within 30 days from the date of receipt of the letter of exclusion.

3. According to Art. 4 para. 1 of IMAIE's Statute, IMAIE is a non-profit organisation established to protect, administer and manage performing artists' rights. These rights cover the recording, duplication, circulation or, more generally, the utilization of recordings, tapes, soundtracks and any other support utilized for the reproduction of sounds, voices and images, or from the exploitation through television and any other system utilized for the circulation, reproduction, or casting of sounds and images of their artistic performances.

Within this general scope, IMAIE carries out promotional and protective activities in the collective interest of artists, interpreters and performers (as referred to in Art. 4 para. 1 of Law Act n.93/1992); it also offers to defend their rights before the competent tribunals (Art. 4 para. 2 of the Statute).

To these ends, on the basis of Art. 5 of the Statute, IMAIE

- collects on behalf of performing artists the remuneration to which artists are entitled as a result of the reproduction of their performances on "any broadcasting system". The remuneration is distributed among the rightsholders periodically, at least once a year, except if it is not possible to locate the rightsholders or in the case of a dispute over the entitlement or on the amount of the sums;
- negotiates agreements with broadcasting companies and with all others societies and bodies that use, "by any means", performances that are not already a source of remuneration for performing artists (i.e., mobile communications companies, discotheques, etc.).

As a result, potentially all forms of reproduction by which audiovisual works may be exploited, including Internet and VoD, fall within the responsibilities of IMAIE as described in its Statute, even though it may remain problematic to guarantee actual control in some of these cases (as highlighted by the *Mediaset v. Google* case quoted above (see note 5)).

Furthermore, IMAIE protects neighbouring rights by representing the respective rightsholders on all national and international boards and committees and in their respective litigation and alternative dispute resolution systems.

Besides these economic – though non-profit – aims IMAIE carries out activities of general social interest. As required by Article 7 of Law 93/92, Art. 4 para. 5 of the Statute stipulates that IMAIE uses the royalties which belong to unidentified rightsholders, for activities of study and research as well as for promotional purposes, formation, and professional support of performing artists. Moreover, Art. 5 letters h) and i) of the Statute state that IMAIE disseminates information about Italian cinematographic culture and also promotes research and studies on the audiovisual market relating to performing artists.

IV. Rightsholders' Perspective

1. In light of the reasoning of the Italian judge, as described above (at Section III, point 1), the fact that in Italy individual rightsholders currently do not have any actual choice between different collecting societies does not violate the law.

However, there is still the (theoretical) possibility that competition issues may arise for another reason: according to Art. 5, paragraph 1, of Law no.93/92 the remuneration for artists is paid by the producers of phonograms or their associations directly to IMAIE which then – under paragraph 2 of Article 5 of Law no. 93/92 – fixes the amount that it has to distribute to the rightsholders, according to parameters defined by agreements stipulated between associations representing producers and trade unions representing artists and performers.[34] Indeed, according to Law no.93/92, IMAIE has the exclusive right to fix the amount of remuneration due to rightsholders – this provision can give rise to competition concerns – while rightsholders have no obligation to use IMAIE for their collection and distribution activities. Moreover, IMAIE protects rightsholders who are not members, guaranteeing to all of them a right to adequate remuneration.

This potential competition problem, however, does not concern users because in any event they will have to pay for the use they make of the audiovisual work. The fact that IMAIE establishes the amount of remuneration on the basis of clear conditions gives users a certain guarantee of transparency that will usually outweigh the (possible) disadvantages of having to deal with a monopolistic institution (i.e., IMAIE).

In contrast it is rightsholders that may be affected by such a kind of legal monopoly. In 1994 the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority – AGCM) in a recommendation[35] took the view that IMAIE's monopoly was illegal, holding that the exclusive position of IMAIE with regard to managing rights based on the mandatory representation requirement was not proportionate to the goals pursued because it deprived rightsholders of individual bargaining power. AGCM, although it recognized the public interest goals pursued by IMAIE (see above at Section III, point 3), held that this was not sufficient justification to make it completely impossible for rightsholders to exercise their rights autonomously (i.e., to negotiate their own tariffs with their respective counterparts). For these reasons, the AGCM proposed a revision of the Italian Law n.93/92. However on the crucial point, namely that in the audiovisual sector IMAIE has the exclusive right to set due remuneration for rightsholders – in other words that the legal relationship between IMAIE and the rightsholders in this case is based on a compulsory system of representation –[36], no reform has yet been implemented.

2. Usually the rights collectively administered are the right of communication to the public and the right to adequate remuneration for the distribution of home video and for private video copying. Generally, these rights are administered for the whole period of protection of the work, but the rightsholder may revoke the mandate and exercise his rights by way of individual management. The collective management applies to the whole country, but can be extended also to other countries if the rightsholder gives IMAIE a specific mandate to represent him abroad as well. Moreover, in the event that he is a member of IMAIE his rights are protected automatically in all the countries where IMAIE has concluded reciprocal representation agreements with other collecting societies.

3. With regard to private video copying, IMAIE collects a percentage on the sale of blank cassettes and reproduction devices. The Law Decree no.68 of 9 April 2003, entitled "Enforcement of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society", sets out norms concerning the remuneration for private reproduction for personal use of video

34) See to this effect Ubertazzi, L.C., *Diritto d'autore e connessi, op. cit., p. 254*.

35) AS280 of 27 May 2004, AGCM Bulletin 22/24, also available at: http://www.agcm.it/AGCM_ITA/DSAP/SEGNALA.NSF/296ab9dddcf3ddfdc1256e28005b7428/92a2e21490be4927c1256eac00475c52?OpenDocument.

36) On the type of contracts commonly used in Italian copyright management in general, see Chimenti, L., *Il diritto d'autore nella prassi contrattuale*, Milano, 2003.

("private video copying"). This legislation follows the same principles as the Law no. 93 of 5 February 1992 concerning the collection of remuneration by IMAIE. Therefore, holders of copyrights and related rights, that is authors, producers of phonograms and videograms, performing artists and producers of audiovisual works are entitled to request, as remuneration for the non-profit private reproduction of videograms, a share of the selling price of video tapes and similar audio and video recording carriers. Persons who, for commercial purposes, produce video recording carriers, or video recording devices or import these into Italy are also obliged to pay adequate remuneration. The money is paid to the SIAE,[37] which, after having deducted its administrative costs distributes a share of 30 % to authors, and of the remaining 70 % three equal parts to the original producers of audiovisual works, videogram producers and performing artists. According to the criteria stated in Art. 3 of Law n.93/92, SIAE has to transfer a part of the copy levies received in remuneration for private copying to IMAIE, which will distribute it to the rightsholders.

With regard to the right to communicate audiovisual works to the public, the amount of remuneration depends on the categories of audiovisual works shown on television for which it is possible to identify an actor (movies, television films, serials, short series, soap operas, sitcoms, and film magazine programmes. IMAIE collects the sums paid by broadcasters and distributes them to rightsholders such as performing artists. The relevant rightsholders have conferred upon IMAIE the power to negotiate agreements independently with broadcasters (mainly, at present, RAI, MEDIASET, and LA 7 and, subsequently, pay-TV operators and others) concerning their remuneration.

Art. 84 para. 2 of Law no.633/41 requires the identification of the amount of remuneration to which primary artists, on the one hand, and secondary artists, on the other, should be entitled. Both groups shall receive adequate remuneration if they play a role of considerable artistic importance to the work. Whereas Art. 84 introduces the concept of "considerable artistic importance" it neither determines who shall decide on the fulfilment of the criterion, nor what elements constitute "considerable".

However, according to an IMAIE resolution,[38] the remuneration of a primary artist has to be twice the amount of that for a secondary artist. IMAIE has established a Commission with the specific tasks to monitor the source data (provided by the public cinematographic register of the Ministry of Cultural Heritage and Activities, different Internet databases, and ANICA) and to draw up a list of artists. Furthermore, the Commission shall determine who can be considered as a primary or secondary artist and, if necessary, strike names from the source data or add to the original lists. Artists who wish to contest a decision can present appropriate documents as proof that a different determination would be justified. The documents need to be accompanied by a "protest form", enabling the Commission to review its decision and to possibly confirm the artist's position. If the Commission agrees with the complaint, IMAIE examines the respective artist's role again, and redefines the sum due to the artist.

In order to set the correct amount of remuneration for all rightsholders, IMAIE takes into account additional parameters:

Broadcasters provide IMAIE with "audiovisual utilizations tables" (these tables will usually be accepted by IMAIE as correct) that allow it to determine – on the basis of audience share – specific sums per minute. The so-called "basic remuneration" is the aggregate obtained by multiplying the value time of the individual broadcast (which depends on the peak viewing hours for audience) with the length of the relevant passage. However, this aggregate value does not correspond with the money

37) Under the terms of Art. 181-bis of Law n.633/41, for the exploitation of audiovisual works by video/DVD SIAE has to provide all the material supports, such as video tapes, CD-ROM, DVD etc., with a sticker. This provision aims to better ensure that the reproduction systems by video/DVD adhere to their obligations under copyright legislation. It has been recently (indirectly) reviewed by the Court of Justice of the European Communities (judgment of 8 November 2007, Case C-20/05, *Schwibbert*). The Court decided that the sticker constitutes a technical measure within the meaning of Directive 83/189/EEC of 28 March, 1983 as amended (OJ 1983 L 109, p. 8. a Directive in fact consolidated by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, itself amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998), because it lays down a procedure for the provision of information in the field of technical standards and regulations. The requirement to provide the sticker is contrary to EC law because it had not been previously notified to the European Commission. On the argument see Pike E./Lavagnini S., *Italian SIAE Stickers: A barrier to trade,* European Intellectual Property Review, 2001, 23(9), p.4.

38) Internal act of IMAIE, not available to the public.

actually distributed to rightsholders. That amount needs still to be calculated on the basis of different "percentage coefficients" to be applied to the "basic remuneration" in order to obtain the real value. These percentages are linked to the broadcasting network and are fixed according to different criteria, such as sale parameters of advertising space, the time at which a specific programme was broadcast, the category of the work broadcast, the type of production, etc.[39] In order to calculate the value of each utilization, it is necessary to reassess each time the whole set of conditions (e.g., broadcasting network, time, advertising revenue generated, etc.) under which the performance took place. The sum relative to each utilization is then distributed among the artists, divided into primary and secondary, as identified according to the criteria described above.[40]

4. According to Art. 4 para. 5 of IMAIE's Statute, social benefits that rightsholders may enjoy, are funded from the royalties which are due to unknown rightsholders. According to Art. 7 of Law no. 93 of February 1992, social benefits may consist in IMAIE's financing of research activities as well as promotional purposes, formation, and professional support of performing artists. On the basis of this provision, performing artists and other rightsholders, whether individually or collectively, can submit an application to IMAIE for the annual assignment of funds for activities of training and artistic professional support. The applications are evaluated by IMAIE, with the aid of its audiovisual and music committees; IMAIE will choose the applications that correspond best to its institutional goals. The decisions are not subject to appeal.

5. When examining IMAIE's structure (see Section III, point 2), it has been established that when rightsholders become members of the Institute, they may either themselves obtain a seat in the Members Delegates' Assembly or decide on persons representing them. Thus, adequate control and representation of rightsholders appears to be guaranteed. Through the Members Delegates' Assembly they can express their opinions on matters of importance to their interests. Furthermore, they elect their representatives to the Board of Directors every three years.

In relation to transparency issues it has been noted that two members of the Board of Auditors are appointed, pursuant to Art. 25 of the Statute, by the Ministry of Labour and Welfare, while the other members are elected by the Members Delegates' Assembly. In this sense the presence of State oversight appears to be an important guarantee of transparency in IMAIE's activities. In any case, as members of the Members Delegates' Assembly, rightsholders have to approve every year both the provisional budget and the final budget. Moreover, in order to guarantee further transparency also for rights holders who are non-members the budget and other accounts reports are published on IMAIE's website.

Finally, concerning complaints procedures, the rightsholders have different courses of action. As stated above (Section III, point 2), a Board of Arbitrators is established and vested with the right to decide on all disputes arising among members or between members and IMAIE. If the Board takes on a case, it is also competent to decide on the appeal of a decree by which a member could be excluded from the Institute provided that the interested parties sought recourse within 30 days of the date of receipt of the letter of exclusion. Even rightsholders who are not members of IMAIE may appeal to the Board.

Complaints may also be brought against the decision of the Commission (established by IMAIE) that controls the source data that is used to establish a list of artists for each work and to determine who can be considered as a primary or secondary artist (see above). Rightsholders who disagree with the Commission's evaluations may call on the Commission to review their evaluation concerning the artist's position in regard to the work in question (see above).

39) As an example of how to calculate the amount due to an actor playing in a sitcom broadcast on RAI DUE at 9 p.m. for a performance of 20 minutes in 2001: the "basic remuneration" for RAI was EUR 53.49 per min.; the "percentage coefficient" applied for RAI DUE was 80 %; the "percentage coefficient" for the time from 8.30 p.m. to 10.30 p.m. was 100 %; sitcom operas were in category II with a "percentage coefficient" of 55 %.

40) For further details see the IMAIE official website and, especially, *Regulations for calculating and paying remuneration to artists right holders*, modified on 4 November 1998, available at: www.imaie.it/en/area_artisti_incasso_av.html

THE NETHERLANDS

Cyril Bastiaan van der Net
Solv Attorneys-at-Law
F. Zuiderveen Borgesius
IViR & Solv Attorneys-at-Law

I. Legal Framework[1]

1. The *Auteurswet* (hereinafter: Dutch Copyright Act) regulates the protection of a literary, scientific or artistic work and provides the author of such a work or his successor(s) in title with the exclusive rights to multiply that work and to make it public. The right to multiply a work is interpreted broadly and covers not only reproductions but also translations and other adaptations. The right to make a work public is also interpreted in a very broad manner. It encompasses immaterial forms of communicating a work to the public where the source and the public are located elsewhere, such as broadcasting and communication to the public. The latter includes the making available to the public of the works in such a way that members of the public may access them from a place and at a time individually chosen by them. It also covers immaterial forms of communicating a work to the public where the source and the public are present in the same location. Examples are recitation, performance and presentation in public. Furthermore, communicating a work to the public relates to material forms of exploitation such as rental, lending, sale or otherwise bringing into circulation a work or copies thereof.

The *Wet op de Naburige Rechten* (hereinafter: Dutch Neighbouring Rights Act) regulates the protection of a performance, the production of a phonogram, broadcasts and the production of a cinematographic work. The Dutch Neighbouring Rights Act provides the performing artist, phonogram producer, broadcasting organisation or producer of a cinematographic work or their successors in title respectively with exclusive rights that, *cum grano salis*, correspond with the aforementioned exclusive rights of authors.

2. Article 10, first paragraph, subparagraph 10, of the Copyright Act explicitly states that cinematographic works fall within the scope of protection of the Act. According to Article 45a of the Copyright Act a cinematographic work means a work – in fixed form – consisting of a sequence of images, with or without sound, irrespective of the manner of fixation. Cinematographic works are products of the common efforts of various professional groups.

Generally speaking, natural persons who have made a contribution of a creative nature to the making of a cinematographic work shall be considered the authors thereof. That includes, depending of course on the particular circumstances, scriptwriters, set designers, costume designers, cameramen and so on. It should be noted that the director is considered to be an author under the Term of

1) Unofficial English translations of relevant copyright legislation are available at: http://www.ivir.nl/legislation/intellectual-property/netherlands.html

Protection Directive.[2] This was not laid down in the Dutch Copyright Act explicitly since it was already generally understood that directors are considered to be authors for the purposes of the said Act.

It is important to note that according to Article 7 of the Copyright Act, if the labour of authors has been carried out as employees, the employer (i.e., producer of the cinematographic work) shall be deemed the author of the work, unless otherwise agreed between the parties.

Under the Neighbouring Rights Act, actors who make a recognizable artistic contribution to the realization of a cinematographic work are considered performers for the purposes of the Neighbouring Rights Act. It should be noted, however, that Article 7 of the Copyright Act is applicable *mutatis mutandis* under the Neighbouring Rights Act (Article 4 of the Neighbouring Rights Act juncto Article 45a of the Copyright Act). Thus, unless agreed otherwise, where labour carried out by an employee consists in the making of a cinematographic work, the employer (producer) shall be deemed the rightsholder thereof.

Article 45g of the Copyright Act states that each author shall, unless otherwise agreed in writing, retain copyright in his contribution if his contribution constitutes a work that can be separated from the cinematographic work. The same holds true for the performances of performers. As soon as the cinematographic work is ready to be shown to the public each author and performer may, unless otherwise agreed in writing, communicate his contribution to the public and reproduce it separately, provided that he does not thereby damage the exploitation of the cinematographic work.

Unlike writers, composers and visual artists – who already receive remuneration for repeats on cable television — actors often only get paid a lump sum when working in an audiovisual production. Recently, at the Dutch Film Festival, Dutch actors signed a covenant to collectively demand remuneration for reruns, cable television rights and digital television rights.[3] They are planning to demand this remuneration from companies such as cable exploitation companies, broadcasting companies and producers. The current practice is that these companies often pay a lump sum to an actor and are free to show reruns as they see fit, without having to negotiate and pay new fees to the actors involved. Another disadvantage of unlimited reruns (of, for example, commercials or television productions) is that actors risk becoming typecast.

The Minister of Justice announced legislation that will improve the legal position of authors and performers vis à vis producers in general. This legislation has not yet been made public. It therefore remains unclear whether or not this proposal will have positive consequences for creative forces in the audiovisual field. The legislation will be presented to Parliament at the end of 2009 at the earliest.

3. As stated above, the Dutch Copyright Act grants the author two broad exclusive rights: the right to multiply original works and to make them public. Both rights, granted by law, are interpreted broadly.

4. If the labour has been carried out by authors on a freelance basis, Article 45d of the Copyright Act provides a specific set of rules. Article 45d of the Copyright Act states that, unless agreed otherwise in writing by the authors on the one hand and the producer on the other hand, the authors shall be deemed to have assigned to the producer the right of making the work public, to reproduce it, to add subtitles to it and to dub the dialogue. The roots of the presumption of assignment can be found in Article 14bis of the Bern Convention. The right to reproduce the cinematographic work relates to the fixation in whole or in part of the work on an object that is intended to show the work. Even though the presumption of assignment is very broad, it does not cover all forms of exploitation. It does not relate to the adaptation of a book into film. Nor does it cover the use of a cinematographic work that is not ready to be shown to the public. Furthermore, it does not cover merchandising rights. The same set of rules applies to performers according to Article 4 of the Neighbouring Rights Act.

2) Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

3) The actors were organized into *Federatie Nederlandse Vakbeweging Vakbond voor kunsten, informatie en media* (FNV KIEM, an artists union), *Nederlandse Toonkunstenaarsbond* (Ntb, an artists union), NORMA, and *Gilde voor film- en televisieacteurs* (ACT, Guild for movie and television actors).

The producer or the natural or legal person responsible for the making of a cinematographic work with a view to its exploitation is obliged to pay an equitable remuneration to the authors and performers or their successors in title for all forms of exploitation of the cinematographic work (according to Article 45b of the Copyright Act). The producer is also obliged to pay an equitable remuneration to the authors and performers (or their successors in title) if he effects exploitation in a form that did not exist or was not reasonably foreseeable at the time the work was ready for showing according to the producer. The producer is also obliged to pay authors and performers equitable remuneration if he licenses a third party to exploit the rights in the cinematographic work.

The remuneration referred to above ought to be agreed upon in writing. Equitable remuneration for rental cannot be waived by the author or performer according to Article 45d of the Copyright Act as a consequence of the European Lending and Rental Rights Directive. Unfortunately, the legislative history does not provide clear guidance as to how to determine what exactly constitutes equitable remuneration. It is not clear whether the remuneration can be waived in regard to exploitation rights other than the rental right. Furthermore it is not clear whether or not the remuneration only relates to the presumption of assignment ex (Article 4 Neighbouring Rights Act juncto) Article 45d of the Copyright Act or also covers written contracts between authors and performers on the one hand and producers on the other hand. The Dutch Supreme Court has yet to rule on these issues.

In the case "*Holierhoek v. Houwers*", probably the most important case to date, it was determined that a buy-out by payment of a lump sum is possible under Article 45d of the Copyright Act.[4] The parties included a provision in the agreement that contained an overall licence of copyrights. The agreement explicitly mentioned the assignment of rights, including rights that might exist in the *future*. *Holierhoek* – the licensor – already received his remuneration in 1975. Therefore, he was not entitled to further remuneration.

II. Practice in Rights Management

1. In practice the presumption of assignment of rights based on Article 45d of the Copyright Act does not play a very important role. Most authors and performers are hired on a temporary basis as employees for the making of a cinematographic work. In those circumstances, the producer as employer is considered to be the author pursuant to Article 7 of the Copyright Act. If authors and performers work on a freelance basis, Article 45d of the Copyright Act is not usually applicable either, since in practice they tend to agree otherwise with the producer. In written contracts, the assignment of rights from the authors and performers to the producer is dealt with in great detail. Apart from a few well-known authors and performers, the bargaining position of authors and performers vis à vis producer is relatively weak.

2. As regards the transfer of rights from the author and producer (based on a contract or based on Article 45d of the Copyright Act), there is only one specific provision in place to ensure that collecting societies play a particular role. The presumption of assignment of rights (based on Article 45d of the Copyright Act) is not applicable with regard to those who have composed music for use in a cinematographic work or those who have written lyrics for the music (Article 45d para. 2 of the Copyright Act). In practice, the collecting rights society *Bureau voor Muziekauteursrecht* (Office for Music Author's Rights – BUMA) manages the rights relating to musical works. Article 30a of the Copyright Act states that acting as a commercial agent, for profit or otherwise, in matters of copyright in musical works shall be subject to the permission of the Minister of Justice. BUMA is the sole collecting rights society (i.e., "commercial agent") that received this permission from the Minister of Justice. BUMA has been appointed by the Minister of Justice (Article 30a of the Copyright Act) to exclusively and collectively represent the rights of the authors of musical works, concerning the public performance or the broadcasting in a radio or television program of such works or reproductions thereof, wholly or in part.

The legislation does not ensure that collecting societies, such as *Stichting Naburige Rechtenorganisatie voor Musici en Acteurs* (Foundation for Neighbouring Rights for Musicians and Actors – NORMA), *Vereniging tot Exploitatie van Vertoningsrechten op Audiovisueel Materiaal* (Association for the Exploitation of Exhibition Rights regarding Audiovisual Material – VEVAM) and

4) *Hof Den Haag*, 31 January 2008, rolnummer 06/971, available at : http://www.boek9.nl/getobject.php?id=4352

Stichting Literaire Rechten Auteurs (Foundation Literary Rights Authors – LIRA) who represent creative forces in the field of cinematographic works, play a role. The rightsholders who are being represented by the aforementioned collecting societies are becoming increasingly aware of their relatively weak bargaining position. They organize themselves very well nowadays and transfer their rights to the aforementioned collecting societies in advance. Generally speaking, it seems as if it is becoming increasingly difficult for producers as well as for those who communicate cinematographic works to the public afterwards, such as cable companies, not to deal with these collecting societies.

3. It is not common to include a fallback clause in contractual arrangements for exploitation rights after a given period. However, as stated above, according to article 4 Neighbouring Rights Act juncto article 45g of the Copyright Act, works and performances that can be separated from the cinematographic work may under certain conditions fall back to the original rightsholders unless agreed otherwise in writing.

III. Institutional Framework of Collecting Societies

1. The Dutch legislator has regulated collecting societies in five cases: BUMA, *Stichting ter Exploitatie van Naburige Rechten* (Foundation for the Exploitation of Neighbouring Rights – SENA), *Stichting de Thuiskopie* (Foundation Private Copy), *Stichting Leenrecht* (Foundation Lending Right) and *Stichting Reprorecht* (Foundation Reprographic Right). BUMA has been appointed by the Minister of Justice (Article 30a of the Copyright Act). The same is true for SENA (Article 7 juncto Article 15 of the Neighbouring Rights Act), Stichting de Thuiskopie (Article 16d of the Copyright Act and Article 10 of the Neighbouring Rights Act), Stichting Leenrecht (Article 16f of the Copyright Act and Article 15a of the Neighbouring Rights Act) and Stichting Reprorecht (Article 16l of the Copyright Act). All other collecting societies in The Netherlands are examples of voluntary collective management. They are established under the common rules of the Civil Code. They do not have any foundation in the Copyright Act or the Neighbouring Rights Act.

2. Organization of the different collecting societies

2.1. SENA is a foundation, established in 1993, which collects remuneration and pays it to performing artists and record producers for the making public of commercial phonograms (with the exception of making available). The Board of Directors of SENA is made up of four representatives from the Section Board Performers and four representatives from the Section Board Producers. The members of the two Section Boards are elected for a period of three years at a meeting of affiliates.

2.2. BUMA is organized as an association. If authors (of musical works) enter into a contract with BUMA they become a *deelnemer* (participant). When participants meet certain criteria (e.g., there are minimum standards regarding received income) they can become a member of BUMA. Members can attend the annual membership meeting. At this meeting the board accounts for the policies implemented. The board consists of twelve people and includes members who have been nominated and elected by the other members. BUMA grants licences for making public musical works. BUMA is in a position to license the world repertoire.

2.3. LIRA

Stichting LIRA (a foundation) was founded in 1986 by the Dutch Writers guild with the aim of managing copyrights in an area where individual copyright management is difficult, but collective management can be effective. LIRA is a foundation for writers and scriptwriters. The board of Stichting LIRA includes representatives of the various associations for writers in Holland (e.g., screenwriters, translators, literary writers, etc.) as well as a representatives of the members of Stichting LIRA.

2.4. VEVAM and SEKAM

VEVAM was founded in 1983 and is a copyright distribution organisation, organised as a *vereniging* (association). The board of VEVAM consists of nine persons who are appointed by the members. Three of the persons on the board are writers, three are directors and three are producers. VEVAM works for natural persons – i.e., directors, writers, authors and producers of movies and television programmes – while *Stichting tot Exploitatie van Kabeltelevisierechten op Audiovisueel Materiaal* (Foundation for the Exploitation of Cable Rights regarding Audiovisual Material, SEKAM) and SEKAM VIDEO mainly work for production companies (legal persons).

2.5. NORMA

Stichting NORMA was founded in 1995. It is a foundation for performers (musicians and actors). The board consists of seven members, four of whom are appointed by the performers unions (two by the Ntb – Dutch Musicians Union – and two by FNV KIEM), while two members are elected at NORMA's annual Congress. The other six members of the board appoint the Chairman. The Board therefore consists mostly of performers and other professionals from the creative industry. Joining NORMA is voluntary; rightsholders are not obliged by law to join the foundation.

2.6. IRDA

Stichting International Rights-Collecting and Distribution Agency (Foundation International Rights-Collecting and Distribution Agency – IRDA) is also a performers' collecting society with voluntary membership, founded in 2000. IRDA only plays a marginal role. Unlike NORMA, IRDA is appointed neither by *Stichting de Thuiskopie* nor by *Stichting Leenrecht* (the role of these two foundations will be explained below). Consequently, IRDA is not allowed to distribute remuneration for private copying and public lending under the authority of Stichting de Thuiskopie and Stichting Leenrecht respectively.

3. The Copyright Act contains rules on the collection and distribution of equitable remuneration for private copying by *Stichting de Thuiskopie*. The rules are applicable *mutatis mutandis* under the Neighbouring Rights Act. Stichting de Thuiskopie was appointed by the Minister of Justice as the organisation in charge of the collection and distribution of all private copying levies in the Netherlands. According to the Copyright Act and the Neighbouring Rights Act, consumers have the right to make reproductions of protected material for private use under certain conditions. The two laws state that the rightsholders should be compensated fairly for the losses they suffer as a result of this private copying. Remunerations are collected from the importers and manufacturers of blank media products on a quarterly basis. In practice, the costs are passed on to consumers of these media products. Stichting de Thuiskopie distributes collected remuneration through organizations of rightsholders. Distribution to organizations of rightsholders is carried out on a quarterly basis with a deduction for administration costs of 5%. Stichting de Thuiskopie does not distribute levies directly to individual rightsholders. Organizations such as NORMA, LIRA and VEVAM are appointed for that purpose.

The Copyright Act and the Neighbouring Rights Act also contain rules on the collection and distribution of equitable remuneration for public lending by *Stichting Leenrecht*. The systems provided for under the law as regards private copying and public lending more or less correspond with one another. The same holds true for the collection and distribution of remuneration for reprographic reproductions by *Stichting Reprorecht*. Stichting Reprorecht collects fees levied on reprographic reproductions (photocopies). Therefore this foundation is – by its nature – less important for creative forces in the field of audiovisual performances, with the exception of scriptwriters. LIRA distributes equitable remuneration for reprographic reproductions.

Neither the Copyright Act nor the Neighbouring Rights Act regulate collection societies such as NORMA, LIRA and VEVAM that offer to manage some or all of the rights of those who contribute in a creative manner to the making of cinematographic works. As mentioned above, these organizations play an important role with regard to the distribution of the levies for private copying and public lending. The collecting societies are mandated by the individual rightsholders to manage their intellectual property rights and have specific knowledge of use of repertoire to distribute the levies to rightsholders. Therefore Stichting de Thuiskopie, Stichting Leenrecht and Stichting Reprorecht use these collecting societies. Stichting de Thuiskopie, Stichting Leenrecht and Stichting Reprorecht, however, remain responsible for the distribution carried out by NORMA, LIRA and VEVAM. Therefore, the distribution has to be monitored and audited closely.

According to Article 26a of the Copyright Act, authors have the right to authorize the unaltered and unabridged re-broadcasting of a work by a cable broadcasting installation. These rights may only be exercised *collectively* by organisations whose aim (in accordance with their rules) it is to protect the interests of rightsholders through the exercise of the rights belonging to them. Article 14a of the Neighbouring Rights Act contains a similar regime, which is also based on the European Cable and Satellite Directive. The law does not appoint one or more specific collecting societies for this purpose. Recently, a new Cable Contract between the five major companies and a combination of collecting societies entered into force.

Remarkably enough, neither VEVAM nor NORMA is a formal party to this contract. However, VEVAM receives money through SEKAM, another collecting society representing — amongst other rightsholders — production companies (legal persons). SEKAM is a party to the contract. NORMA does not receive any money. NORMA has begun legal proceedings against the cable companies; the outcome is as yet unclear. The cable companies are of the opinion that the relevant intellectual property rights are transferred to the producer (Article 4 of the Neighbouring Rights Act juncto Article 45d of the Copyright Act). Amongst other legal reasoning, NORMA is of the opinion that this is not possible since the rights have already been transferred to it.

IV. Rightsholders' Perspective

In this Chapter we will mainly focus on NORMA, LIRA and VEVAM. These collecting societies play the most important role as far as the interests of creative forces in the field of cinematographic works are concerned. NORMA, LIRA and VEVAM all offer to manage some or all of the rights of those who contribute in a creative manner to the making of cinematographic works. These collecting societies are mandated by the individual rightsholders to manage their intellectual property rights. Individual rightsholders transfer their rights in whole or in part to the above mentioned organisations. This transfer also relates to future works and performances.

1. Rightsholders cannot choose between different collecting societies in the Netherlands. There is one exception to this rule: rightsholders can choose between NORMA and IRDA. However, unlike NORMA, IRDA may neither distribute remuneration for private copy nor public lending. It is therefore a small player.

2. In the Netherlands, there is no general obligation for rightsholders to enter into a contract with any of the collecting societies mentioned above. To put it in other words, NORMA, IRDA, LIRA and VEVAM are examples of voluntary collective management. If rightsholders choose to join NORMA, LIRA or VEVAM, they have to transfer their rights to the respective collecting society. With the exception of IRDA, the collecting societies did not opt for an (exclusive) licence.

As far as NORMA, LIRA and VEVAM are concerned, there is no presumption of membership of individual rightsholders. There exists one exception to this rule that might be applicable. This exception has its foundation in the aforementioned Cable and Satellite Directive. According to Article 26a of the Copyright Act and Article 14a of the Neighbouring Rights Act the management of rights for secondary publication of cinematographic works by cable companies ought to be carried out collectively. Article 26a para. 2 of the Copyright Act states that collecting societies are authorized to bind copyright holders, even if they did not enter into an agreement with these collecting societies. Article 14a of the Neighbouring Right Act contains a similar provision.

Tariffs between the collecting societies and the users of cinematographic works are set by negotiation. Rightsholders receive remuneration pro rata for the use of the works featuring their contributions.

3. The collecting societies mentioned in this chapter, which deal with cinematographic works specifically, all entered into reciprocal agreements with collecting societies abroad. Therefore, the collecting societies are capable of licensing more than just the repertoire of the rightsholders who actually joined the respective societies. The licences granted are limited to the Dutch territory.

4. Services to Rightsholders

4.1. LIRA

Part of the distribution activities of LIRA finds its basis in the legal system. For private home copying, lending right and reprographic reproduction, LIRA is appointed by Stichting de Thuiskopie, Stichting Leenrecht en Stichting Reprorecht respectively to distribute the money that is collected by the aforementioned foundations. For the other rights that LIRA handles and monitors (for instance distribution through cable infrastructures and Internet, mechanical reproduction, etc.) rightsholders

give a mandate to LIRA to manage these rights on their behalf. The author can choose which rights he wants to have handled by LIRA. LIRA collectively manages these rights until the author terminates the contract. Distribution to the rightsholders is executed on a yearly basis, with a deduction for administration costs (varying from 5% to 10%). Furthermore, LIRA offers other services to its members. LIRA manages a pension fund and a cultural and social fund. LIRA also assists its members with legal advice. As LIRA handles the author's rights, in principle rightsholders transfer their rights to LIRA for the duration of the author's rights term of protection: 70 years post mortem auctoris.

4.2. VEVAM

For VEVAM the main sources of income are funds received from Stichting de Thuiskopie (equitable remuneration for private copying) and from Stichting Leenrecht (lending rights). VEVAM also distributes fees received from SEKAM. SEKAM receives these fees from cable companies for the use of copyright-protected audiovisual content they retransmit from the broadcasters. VEVAM distributes these funds among the copyright owners, after deducting 5% for administration costs. VEVAM also manages a cultural and social fund and engages in activities in the interests of its members. As scriptwriters could in parallel be a member of LIRA, LIRA and VEVAM are in close contact and coordinate their activities in this respect.

4.3. NORMA

NORMA offers several services, including auditing and monitoring of rights, the enforcement of related rights and the collection and distribution of royalties for rightsholders. NORMA is also devoted to improving the legal position of performing artists. NORMA exploits and enforces in a collective manner the neighbouring rights and the claims to remuneration concerning the performing artist's repertoire arising from the aforementioned neighbouring rights. NORMA administers private copy rights (including but not limited to audiovisual), public lending rights (audiovisual and audio), Internet, satellite, cable and digital television rights and archive rights (for educational and other purposes). In other words, NORMA manages all performers' rights except for the broadcasting and public performing rights (Article 12 of the Rome Convention) which are managed by SENA. The private copy audio payments (nationally as well as internationally) are also being dealt with by SENA at the moment.

NORMA has a special fund (NORMA-Fonds) which encourages, supports, undertakes and participates in new and existing initiatives, projects and activities which are aimed at the cultural, social and professional interests of performing artists committed to the Dutch forum of the arts. Furthermore, NORMA operates worldwide as a content provider of iTunes for musicians and artists who have not signed away their exploitation rights. NORMA has created (and financially supports) a training programme "Actor and Entrepreneurship". NORMA also tries to strengthen the rights position of performing artists in contractual agreements by developing a concept agreement for actors and other performing artists regarding the exploitation and further use of their performances.

As NORMA handles neighbouring rights, in principle rightsholders transfer their rights to NORMA for the duration of the neighbouring rights, which is 50 years from 1 January of the year following that in which the performance took place, or 50 years from 1 January of the year a recording (or movie) was first lawfully put into circulation or, if earlier, communicated to the public.[5] Rightsholders can terminate the contracts they entered into with the aforementioned collecting societies.

5. Rightsholders' Rights to Control and Transparency

5.1. LIRA

Every year LIRA holds a public meeting for all its members. At this meeting the board is accountable to its members in matters of policy and results. LIRA publishes an annual report with information about its activities and financial policy.

5) For a full overview of the rules regarding duration of neighbouring rights in The Netherlands see article 12 of the Neighbouring Rights Act.

5.2. VEVAM

Every year VEVAM organises a public meeting for all its members. At this meeting, the board explains the results achieved and presents its plans for the future. VEVAM also publishes an annual report with information about its activities and financial policy.

5.3. NORMA

After every accounting year, which closes at the end of the year, on 31 December, NORMA publishes an annual report. The exploitation agreement of NORMA specifies that when disputes arise between NORMA and its members about the execution of the distribution regulations, settlement can be proposed by the member(s) concerned to the Distribution Appeals Committee, which will rule by way of binding advice (unless one of the parties would rather opt for submitting the dispute to a Dutch court).

6. Accountability and Reporting Rules

BUMA, SENA, Stichting de Thuiskopie, Stichting Leenrecht en Stichting Reprorecht are supervised by the Copyright Supervisory Board. There is a legislative proposal in preparation that will strengthen the powers of this Board. Moreover, the legislative proposal shall broaden the scope of the Board's powers. The Board will also supervise NORMA, LIRA and VEVAM in the foreseeable future. The proposal will be presented to Parliament at the beginning of 2009. Therefore, the proposal is not yet public and its exact content is still unclear. For the time being, the proposal is still pending before the Council of State which will give advice on its merits — presumably before the end of 2008. As soon as the proposal enters into force all collecting societies, including those whose activities are based on voluntary membership and not on statutory rules, will be obliged to provide for complaints procedures.

As mentioned already, Stichting de Thuiskopie and Stichting Leenrecht do not distribute the collected remunerations directly. Stichting de Thuiskopie and Stichting Leenrecht have appointed organisations such as NORMA, LIRA and VEVAM to distribute the money to the individual rightsholders (or collecting societies abroad with which they have entered into reciprocal agreements). However, Stichting de Thuiskopie and Stichting Leenrecht remain responsible for the correct distribution. Therefore, the distribution has to be monitored and audited closely. Stichting de Thuiskopie and Stichting Leenrecht are accountable to the Copyright Supervisory Board appointed by the Minister of Justice. LIRA also receives remuneration from Stichting de Thuiskopie, Stichting Leenrecht and Stichting Reprorecht. Again, it is not LIRA that is accountable to the Copyright Supervisory Board, but the organisations providing the collected fees to LIRA (Stichting de Thuiskopie, Stichting Leenrecht en Stichting Reprorecht). If NORMA, LIRA and VEVAM do not carry out their tasks correctly the responsible foundations may terminate the contract with them.

7. Complaints Procedures

Various collecting societies, including LIRA and NORMA, have a complaints procedure for users and the rightsholders the societies represent. The legislative proposal in which the supervision of collecting societies will be strengthened will presumably also cover the introduction of a Copyright Tribunal that will deal with disputes relating to tariffs. As far as accountability and reporting rules as such are concerned, Title 9 of Book 2 of the Dutch Civil Code provides for a general set of rules that relate to all foundations and associations, amongst other legal persons.

NO NORWAY

Tom G. Eilertsen
Bull & Co Advokatfirma

I. Legal Framework

The Norwegian Copyright Act (Act no. 2 of 12 May 1961 Relating to Copyright in literary, scientific and artistic works etc., with subsequent amendments) covers the way in which a work is expressed, rather than the idea behind it. Thus the work has to be formed/made/fixed in a certain way, meaning created, and given an individual originality by its creator. Ideas are not protected under the Norwegian Copyright Act.

Copyright protects original expression, and covers a wide range of creative or artistic forms of different works, including poems, plays and other literary works, films, choreographic works, musical compositions, audio recordings, paintings, drawings, sculptures, software, radio and television broadcasts, etc.

1. According to section 2 of the Norwegian Copyright Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work by producing permanent or temporary copies thereof and by making it available to the public, be it in the original or an altered form, in translation or adaptation, in another literary or artistic form, or by other technical means. The work is made available to the public when:

- copies of the work are offered for sale, rental or lending, or otherwise distributed to the public,
- copies of the work are displayed publicly without the use of technical aids, or
- the work is performed publicly.
  Public performance also includes broadcasting or other transmission by wire or wireless means to the public, when the work is made available in such a way that the individual can choose the time and place of access to the work, and is therefore also covered.

According to Norwegian law, for a film work (audiovisual work) several professional groups ("rightsholders") need to be distinguished with regard to copyright. The most relevant groups in this context (other than producers and composers) are:

a) Authors (meaning holders of copyright)**:**

- script writers (including the author of existing works if adaptations are made thereof)
- directors
- set designers
- DOPs (cameramen)
- sound designers
- light designers
- editors
- choreographers
- costume designers
- make-up artists.

There may be other groups as well, depending on whether their contribution is considered to be copyright protected, or not.

b) Performing Artists:
- actors
- dancers
- musicians, including vocal performers
- conductors

Regarding script writers and directors, these two groups are acknowledged as holders of copyright, without any further question or examination. The remaining groups listed above under item a) are also considered as rightsholders according to Norwegian law. For these groups, however, the contribution that each of them makes to the audiovisual work is subject to review. In other words, they are not always considered as individual rightsholders when it comes to remuneration and royalty payments, but rather dealt with as a group. Payment is made collectively to their union.

2.1. In principle, the law grants the rights mentioned above to the authors (section 2 of the Norwegian Copyright Act). These rights include the right of reproduction, distribution, rental right, the right of communication to the public, broadcast as well as the right of making available to the public in a way that members of the public may access the works from a place and at a time individually chosen by them.

2.2. Section 42 of the Norwegian Copyright Act states that a performing artist has the exclusive right to dispose of her performance of a work by:

- making temporary or permanent fixations of the performance,
- producing permanent or temporary copies of a fixation of the performance, and
- making the performance or a fixation of the performance available to the public.

The provisions of section 2 (described above) shall apply correspondingly to performing artists.

3. As mentioned above, these rights are granted by national law.

4. Regarding agreements relating to the production of cinematographic works, section 39f of the Norwegian Copyright Act states that if an author has assigned the right to use a work for a film, the assignee shall, unless otherwise agreed, be obliged to produce the cinematographic work within a reasonable period of time and to ensure that it is communicated to the public. According to the agreement between the Norwegian script writers and producers for film productions, this period is stipulated to be five years. In the case of serious default by the assignee in regard to his/her obligations, the author may rescind the agreement, retain the fee received and claim compensation for damages not covered by the fee.

Unless otherwise agreed, the assignment of a right to produce a cinematographic work comprises the right to:

a) make copies of the cinematographic work,
b) make the cinematographic work available to the public by distributing copies and by showing the work, and
c) furnish the cinematographic work with subtitles or translated speech.

The provision mentioned above (a-c), shall not apply to rights concerning already existing works, screenplays and musical works specifically created for use in the cinematographic work, or to the rights of the film director of the cinematographic work.

The provisions mentioned above (a-c) reflect the statutory presumption that certain rights are automatically transferred to the producer (the "assignee") where a contract has been concluded. For such a contract to be valid, it is mandatory that the producer and the rightsholder agree on her role as an employee in the production (whether she will be a DOP, editor, sound designer, etc.), including

the number of shooting days, salary, the rights she transfers to the producer, etc. Should these rights not be mentioned in the contract, they are automatically conferred upon the producer by law. However, no statutory transfer of rights applies to script writers (including authors of an already existing work) or film directors. For these rightsholders, each right that shall be assigned to the producer must be named and specified in individual agreements (section 39f, para. 3).

The Norwegian Copyright Act contains no presumption as to the transfer of rights from performing artists to producers, except the right to rent out copies of the film according to section 42. However, section 42 para. 5 does not refer to section 39f of the Norwegian Copyright Act. There has never been a reference between these two sections of the Act. As a consequence, the producer must obtain the relevant rights by way of contract from the performers in order for her to be entitled to exploit the film.

Regarding producers, section 45 of the Norwegian Copyright Act stipulates that subject to the limitations laid down in this Act, a producer of sound fixations and films has the right to dispose of the fixation or film by making permanent or temporary copies and by making the sound fixation or film available to the public.

In the industry, all of these agreements are negotiated by individual contracts and collective bargaining agreements. Collective bargaining agreements have been concluded between the Norwegian Film- and TV-Producers Association, on the one hand, and the Scriptwriters Association, on the other hand; between producers and actors, represented by the Actors Guild; as well as between producers and the Film Workers Union representing editors, cameramen, set designers, sound and light designers, make-up artists, etc. There are no collective agreements between the Directors Guild and the producers in Norway, so film direction is negotiated individually, but the negotiations always take into consideration certain terms and conditions common in the industry, for instance the producer's right to exploit the film in cinemas, the right to DVD distribution and all types of TV broadcasts, the right to dubbing and subtitling, etc. By means of these different agreements, the relevant rights are transferred to the producer, who is thereby given the mandate to act as the "rights manager" for the exploitation of the work in all fields, except exploitations subject to extended collective licences, such as cable retransmission, private copying and others (for further detail, see below).

For DVD and for video rental, section 39m of the Norwegian Copyright Act states that if an author has assigned to a film producer the right to make a film available to the public by way of rental, the author shall retain the right to obtain an equitable remuneration from the producer. The amount of this equitable remuneration is not defined in the Norwegian Copyright Act. It has therefore been negotiated between the producers and the authors and performers. According to section 42 para. 4 of the Copyright Act, section 39m applies to performing artists as well. The Norwegian Film- and TV-Producers Association has entered into an agreement with several Norwegian Guilds, Associations and Unions in the film sector, for payment of remuneration for DVD distribution to the relevant rightsholders. Script writers, directors and actors receive an individual payment for DVD distribution from producers; remuneration for musicians and dancers is paid collectively to their collective societies, and the same applies to the large group of authors mentioned in the introduction (editors, cameramen, set designers, sound designers, light designers, etc.). For all of these the producer pays a lump sum collectively to the Film Workers Union.

II. Practice in Rights Management

1. Section 39 of the Norwegian Copyright Act, Chapter 3 on "Transfer of copyright" states that, subject to the limitations arising from section 3 (the "moral rights"), the author may, wholly or partly, assign her right to dispose of a literary, scientific or artistic work. Assignment of copyright does not include transfer of ownership of the manuscript or any other copy that is delivered in connection with the assignment.

According to section 39a, if the author has assigned the right to use the work in a specific manner or by specific means, the assignee shall not have the right to use it in another manner or by other means. In Norway, this rule is generally referred to as the "speciality principle" in copyright law. Assignment of the right to perform a work publicly shall not give the assignee an exclusive right unless this has been agreed. This is stated in section 39d. In addition, even if an exclusive right of performance has been assigned, the author may, unless otherwise agreed, herself perform the work or assign the right

to performance to another person. In accordance with section 39d para. 3, the provisions of this section shall not apply to a cinematographic work.

As a general rule, one can say that for a film work in Norway, rightsholders transfer nearly all their rights to the producers, with the exception of exploitation rights that are subject to extended collective licences (see below). In practice, this means that the producer can exploit the film in all areas without limits as to formats, territories and time, as long as she observes the following obligations:

For script writers:
Script writers receive a fee from the producer for the development and writing of the script. On top of this, the producer pays a substantial amount for the right to film the script. In addition, script writers receive a royalty of 10 % from the film's total net revenue – including any revenue from online services. Unless agreed otherwise, this royalty is also owed for other forms of exploiting the film, e.g., from spin-offs, merchandise etc. For a remake sale, script writers receive about 40 % of the total amount paid to the producer. For DVD distribution, script writers are paid a minimum of NOK 30,000 (approx. EUR 3,500).

For directors:
Directors are paid a fee for their work, and in addition receive a 10 % royalty from the film's total net income, including income from online services. For remake sales, it varies, but commonly 10 % of the total amount paid to the producer goes to the director. In addition, for DVD distribution, directors are paid a minimum of NOK 30,000.

For Actors:
Actors are paid a salary for their performance. In addition producers pay a royalty of 5 % of their total net income from the film to the Actors Guild. The Guild then splits this amount per film, per actor in proportion to the size of the actor's role. Remuneration for DVD distribution is paid as a specific part of the salary.

For editors, set designers, etc.:
These groups receive a salary for their work during production. The producer pays a collective amount to their union as remuneration for DVD distribution.

For musicians:
Musicians are paid directly by the film composer. The film producer pays remuneration for DVD distribution to their union.

In light of these arrangements, it is clear that producers have to fulfil certain obligations towards the rightsholders. Any breach of contract, e.g., failure to provide royalty statements or payment, will mean that the producer loses her right to exploit the film.

2. Any exploitation of audiovisual works subject to extended collective licences (see below) is handled by collecting societies. According to section 38a of the Norwegian Copyright Act, an organisation that in the relevant field represents a substantial number of the authors of works used in Norway and which is approved by the Ministry of Cultural and Church Affairs, shall enter into respective agreements. Concerning the use in certain specified fields, the King may decide that the organisation that is approved shall be a joint organisation for the rightsholders concerned, that is, a kind of parent organisation where several individual organisations are members. In Norway, this has resulted in several rightsholders' organisations becoming what we usually refer to as collecting societies. The relevant rights that are subject to extended collective licences, are those generally not included in the contracts by which individual rightsholders assign their rights to producers. By doing so, the individual rightsholder can control and manage these rights herself, and this, as a general rule, is done through collecting societies.

3. In Norway, it is not common to include a fall-back clause for (some) form(s) of exploitation after a given period of time.

III. Institutional Framework of Collecting Societies

1. In Norway, Norway Copyright ("NORWACO") is the collecting society that offers to manage the rights of creative forces relating to audiovisual works. NORWACO looks after rightsholders´ interests in audiovisual works, in particular their interest in secondary uses of audiovisual works, such as retransmission of television and radio channels (extended collective licence), recording of television and radio programmes for use in teaching (educational copying – extended collective licence) and lawful private copying of copyright-protected material, including films and television programmes. NORWACO is approved by the Ministry of Cultural and Church Affairs as the organisation with the mandate to operate in these fields. Its legal basis is the Norwegian Copyright Act, section 38a. In theory, it would be possible to establish another collecting society in the audiovisual sector, but such a society, in order to be allowed to operate in this field, would have to represent a substantial number of the authors of the works used in this field, and be approved by the Ministry. Due to the size of the Norwegian industry, and the population of Norway, this seems unlikely to happen.

2. NORWACO represents 34 Norwegian rightsholders' organisations for creators/authors, performing artists and producers. Altogether, these organisations represent approximately 37,000 individual rightsholders. "Affiliation" with NORWACO is done in two steps. 1) The individual rightsholders mandate their respective organisations to manage the rights of each of their members in their fields of competence. 2) These rightsholders' organisations then give NORWACO the mandate to operate on their behalf in areas where a united front of several organisations is expedient. There are no direct points of contact between the individual rightsholders and NORWACO; everything is managed through the rightsholders' organisations, such as The Actors Guild, The Norwegian Film Workers Union, The Association of Norwegian Film Directors, etc.

NORWACO is organised as a non-profit organisation and has 13 employees. The governing/management bodies of NORWARCO are: the General Assembly, which consists of representatives of the 34 rightsholders' organisations, and the Board of Directors, elected from among NORWACO members and comprising ten members and ten deputy members from authors/creators, performing artists and producers. NORWACO has the following relevant administrative sections:

- The retransmission section (TV and radio distribution)
- The section for teaching and other internal use (recordings of TV and radio programmes for use in teaching and media monitoring)
- The private copying section (the individual distribution of compensation for lawful private copying).

3. NORWACO offers auditing and monitoring of rights and enforcement of copyright (the performers' rights) and negotiation, collection and payment of royalties/remuneration through distribution to rightsholders. In other words, the distribution plans for the different groups of rightsholders are negotiated and agreed between the 34 member organisations. The money is then paid from NORWACO to its members. The different rightsholders' organisations calculate the further individual split between their members. The payment rules in the different organisations are approved by their own general assemblies.

IV. Rightsholders' Perspective

1. Since there is only one organisation (NORWACO) operating in the audiovisual sector in Norway, it is not possible for rightsholders to choose between different collecting societies.

2. As mentioned above, 34 different Norwegian rightsholders' organisations are members of NORWACO. They have a mandate from each individual rightsholder to operate in the field of their competence according to the rules of each organisation. NORWACO has underlined the importance for its members to incorporate very secure and substantial clauses in their rules regarding the scope of their mandates. Therefore, the different rules mention precisely in what field a certain organisation can act on behalf of its members, and also whether the management tasks can be transferred to another body.

Bilateral agreements with other collecting societies ensure that remuneration can be exchanged between different countries.

A NORWACO member organisation determines in its rules that each individual member (rightsholder) of the organisation is obliged to abide by all industry agreements entered into by the organisation itself, or by a collecting society of which the organisation is a member. In addition, the organisation may also stipulate in its rules the objective to enter into different industry collective bargaining agreements, and into other, non–exclusive, agreements, that clear the way for retransmission and other transmission of broadcasts containing its members' audiovisual work. The members of NORWACO are all Norwegian organisations entitled to represent individual rightsholders in this respect.

Agreements with foreign collecting societies and organisations allow the payment of remuneration across borders. The agreements must stipulate the right of the foreign collecting society or organisation in question to represent the foreign rightsholders. Before NORWACO can pay any remuneration to the competent foreign organisation, NORWACO must ensure that the relevant organisation is representative in its field, and that it has the necessary mandates from its members. These mandates must be laid out in the rules of the respective foreign organisation. Foreign organisations may also give a Norwegian organisation a mandate to receive payment on their behalf.

3. Currently, NORWACO has agreements and responsibilities for the distribution of remuneration funds in the following areas:

- TV distribution (retransmission of TV and radio channels)
- Recordings of TV and radio channels for use in teaching and media monitoring
- The individual distribution of compensation for lawful private copying.

Extended collective licence provisions contained in the Norwegian Copyright Act are *ex lege* applicable to these agreements.

Extended collective licences are used when users encounter particular difficulties in entering into agreements with all the relevant rightsholders. This is, for example, the case for retransmissions of TV and radio channels or the recording of TV and radio programmes for educational purposes, or the photocopying of protected material in schools. The rules relating to extended collective licences supplement agreements that are entered into between users and copyright organisations and are therefore binding on the parties to the agreements and also on non-organised rightsholders, including foreign rightsholders. As an example, for retransmission of TV and radio channels, section 34 of the Norwegian Copyright Act sets out that works which are lawfully included in a broadcast may be communicated to the public, by simultaneous and unaltered retransmission, if the person effecting the retransmission fulfils the condition for an extended collective licence pursuant to section 36 para. 1, or if the person retransmits with the permission of a commission pursuant to the provisions of section 36 para. 2. Because the rule contained in section 34 Norwegian Copyright Act limits the exclusive retransmission right of the author, retransmission may only be authorised by an organisation approved in accordance with the terms of section 38a (see above). According to section 36, if retransmission is allowed by an agreement between such an organisation and other holders of transmission rights for similar works, a user who is covered by the agreement shall, in respect of rightsholders who do not come within the scope of the agreement, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies. The provision shall only apply to uses that comply with the terms of the agreement.

For the users this means in particular that the agreement entered into with the relevant rightsholders' organisation covers all rights within the relevant field. For the rightsholders the arrangement entails that both organised and non-organised rightsholders are bound by the terms and conditions of the agreement. This means that the agreements also apply to and bind non-members of the organisations. As a further consequence, non-members have the same rights as organised rightsholders concerning the distribution of remuneration collected and distributed by rightsholders organisations. NORWACO contracts with organisations in other countries, and thus ensures that the remuneration funds also reach foreign rightsholders. NORWACO has entered into bilateral agreements, for instance with Copyswede in Sweden and Copydan in Denmark.

The agreements NORWACO enters into are usually valid for one to two years, per field/area, and limited to Norwegian territory. In return, rightsholders receive remuneration/royalties from fields and geographic areas where they would probably not have gained anything if they had tried to operate on their own, since it would be nearly impossible for users to negotiate individually with all the different groups of rightsholders.

4. The distribution plan of NORWACO is very detailed, and based on copyright principles. For example, the complexity and variety of copyright-protected works contained in the different categories of programmes is reflected in the fact that a feature film is treated differently from a studio programme with one artist playing the guitar. The feature film will receive higher remuneration than the studio program. The amount to be paid for the feature film is then split between the film's rightsholders, i.e., between the script writer, director, actors, etc. The amounts are collected for each programme category and each group of rightsholders, and paid to the rightsholders' organisations. The internal split within these organisations differs, but as mentioned above, the distribution plans are approved by the individual rightsholders at the General Assembly. The organisations are guilds and unions, and as such negotiate employment benefits for their members through industry agreements.

5. NORWACO provides for transparency of its operations because its members are well represented in its governing and management bodies, and meeting and reporting frequency is high. Each individual rightsholder is entitled to receive relevant information, payment statements, explanation on distribution rules, agreements, etc. There are no formal requirements for such requests.

The Board of NORWACO is elected by the General Assembly, and is composed of representatives of authors and performing artists as well as producers. The General Assembly also elects the auditor. NORWACO reports annually to the Ministry of Cultural and Church Affairs. At the General Assembly, the accounts and annual report are presented, discussed and approved. The annual report contains a precise overview of the different operating areas and agreements, including the related remunerations that have been collected and paid. The organisations of rightsholders will be informed about the relevant distribution plan and the remuneration that they received.

Rightsholders may then complain to the respective organisation. If the complaint is from a non-organised rightsholder, he or she will receive remuneration from NORWACO, based and calculated on the same terms and conditions set out in the distribution plan, as his/her fellow, organised colleagues. According to NORWACO's rules, disagreements shall be solved by arbitration. NORWACO has its own arbitration tribunal consisting of three members. These three members are elected by the General Assembly.

PL POLAND

Małgorzata Pęk
National Broadcasting Council

The national legal framework regulating issues connected with the remuneration of authors and performers of audiovisual works includes, *inter alia,* the Act of 4 February 1994 on Copyright and Related Rights (as amended), the Act of 7 April 1989 – Associations Law (as amended), the Act of 16 February 2007 on the protection of competition and consumers (as amended), the Act of 19 November 1999 – Law on Commercial Activity (as amended), and the Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997. Of relevance in this regard are also the judgments of the Constitutional Tribunal of 24 May 2006 on Article 70 para. 2 of the Act on Copyright and Related Rights, and of 24 January 2006 on Article 108 para. 3 of the Act on Copyright and Related Rights.[1]

I. Legal Framework

1. Authors of Audiovisual Works

1.1. The Author/Co-author of an Audiovisual Work

According to the Copyright and Related Rights Act (CRRA), copyright deals with any manifestation of creative activity of an individual nature, established in any form, irrespective of its value, designation or manner of expression (work), *inter alia,* audiovisual (including cinematographic) works.

As a general rule the author is the owner of the copyright. The legal framework establishes a presumption of authorship according to which the author is the person whose name has been indicated as the author on copies of the work or whose authorship has been announced to the public in any other manner in connection with the dissemination of the work.

The national legal framework also regulates the situation of co-authors. Co-authors enjoy ownership of copyright jointly. There is a general legal presumption that the amount of shares is equal. However, each of the co-authors may claim that the amount of shares should be determined by the court on the

1) *Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (tekst jednolity) Dz.U.06.90.631 j.t., zm. Dz.U.07.181.1293,* available at: http://www.mk.gov.pl
Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach (tekst jednolity) Dz.U.01.79.855 j.t., zm. Dz.U.07.112.766
Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów Dz.U.07.50.331, zm. Dz.U.08.157.976
Ustawa z dnia 19 listopada 1999 r. Prawo działalności gospodarczej, Dz.U.99.101.1178, zm. Dz.U.08.141.888
Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U.97.78.483), zm. Dz.U.06.200.1471, available at: http://www.trybunal.gov.pl/index2.htm
Constitutional Tribunal judgment of 24 May 2006 59/5/A/2006 (document no. K 5/05), available at: http://www.trybunal.gov.pl/index2.htm
Constitutional Tribunal judgment of 24 January 2006 5/1/A/2006 (document no. SK 40/04), available at: http://www.trybunal.gov.pl/index2.htm

basis of his creative contribution to the work. Similarly, each of the co-authors may exercise his or her copyright with respect to his or her autonomous part of the work but not to the detriment of the other co-authors. The consent of all co-authors is required in order to exercise copyright with respect to the whole work. In the absence of consent, each of the co-authors may request a decision by the court which shall take into account the interests of all the co-authors. Each of the co-authors may lodge claims for infringement of copyright with respect to the whole work. All co-authors have the right to compensation in proportion to their shares.

Art. 69 CRRA defines the notion of co-authors of audiovisual works:

> "Co-authors of an audiovisual work shall be persons who have made a creative contribution to its production, including, in particular: the director, the cameraman, the author of the adaptation of a literary work, the author of musical or textual and musical works created for the audiovisual work and the author of the screenplay."

This definition of co-authors of audiovisual works is rather flexible. The catalogue of co-authors mentioned above is not exhaustive but is open to other professional groups contributing to a work. Consequently, the list of co-authors has to be established on a case by case basis, and it may vary in different situations, depending also on the character of the audiovisual work in question. Certain categories of audiovisual works may have a different or broader list of co- authors (e.g., computer animation or cartoons). The central element of this definition, which needs to be determined in a given case, is who has made a creative contribution to the production of an audiovisual work.

1.2. Economic Rights of Co-authors of Audiovisual Work

As a general rule, the author has an exclusive right to use the work and to dispose of its use in all the fields of exploitation and to receive remuneration for the use of the work, unless CRRA states otherwise.

Art. 50 CRRA provides a non-exhaustive, open-ended list of exploitation modes:

> "Separate modes of exploitation shall, in particular, comprise:
> 1) concerning the fixation and reproduction of the work – the production of copies of a work using specific techniques, such as printing, reprographic, magnetic storage and digital technique,
> 2) concerning the trade in the original work or copies thereof - the distribution, gratuitous lending or rental of the original or the copies,
> 3) concerning the dissemination of the work in a manner different from that specified in subparagraph 2 - public performance, exhibition, presentation, communication, broadcasting and rebroadcasting, as well as making the work available to the public in a manner allowing every person to have access to the work from a place and at a time of his own choice."

While this exemplary list of modes of exploitation points out usages that are regarded as separate modes of exploitation, it can also accommodate potential new modes of exploitation of audiovisual works that once they emerge might require separate treatment because of their economic, technical or market characteristics. Consequently, it is presumed that such new modes of exploitation will be the subject of exclusive rights, unless some specific legal provisions state otherwise.

The rights can be managed on either an individual or a collective basis. Unless the CRRA expressly establishes compulsory collective management for certain situations in which the lawmaker has found individual management to be impossible, too burdensome or inefficient, management of rights may be handled either individually or on a collective basis.

While individual management should be the point of departure, collective management certainly plays an important role within the national legal framework and also in practice for the relevant markets.

The CRRA provides for strong protection of authors' economic rights in many aspects: *inter alia,* authors' economic rights cannot be subject to bailiff's execution proceedings (in the sense of the Code of Civil Procedure) as long as they serve the author (so this does not include rightsholders who succeeded the author in law). This rule does not apply to due and payable receivables. Moreover,

certain additional forms of remuneration provided for authors by the CRRA (e.g., for the exploitation of audiovisual works; see below Art. 70 CRRA) cannot be waived, alienated or be subject to bailiff's execution proceedings (again, this does not apply to due and payable receivables).

Special provisions on audiovisual works in the CRRA ensure that co-authors (in the language of the CRRA literally "co-creators") of the audiovisual work are entitled to additional remuneration for the following modes of exploitation:

- the screening of the audiovisual work in cinemas – an amount of remuneration proportional to the revenues obtained;
- the rental of copies of audiovisual works and public playing thereof – an appropriate amount of remuneration;
- the broadcasting of the work on television or other mass media – an appropriate amount of remuneration;
- the reproduction of the audiovisual work on a copy intended for own personal use – an appropriate amount of remuneration (see Art. 70 para. 2bis CRRA).

Legal scholars indicate that an "appropriate" amount of remuneration shall be interpreted to mean that the remuneration may be a lump sum and does not need to be proportional to the revenues obtained.

Again, Art. 70 para. 2*bis* uses only the general term "co-authors of audiovisual work". This wording does not limit the type of co-authors entitled to additional remuneration to a certain category of creators.

Art. 70 used to be worded differently. The previous wording granted the right to additional remuneration for the use of audiovisual works only to a closed group of co-authors – namely: the principal director, the cameraman, the authors of the screenplay, and the authors of other literary or musical works that were created for the audiovisual work or used therein. This wording did not take into account the broader definition of co-authors set out in Art. 69 CRRA. On 24 May 2006 the Constitutional Tribunal[2] held that the former wording of Art. 70 para. 2 CRRA was not in conformity with the Constitution, and therefore invalid. Following the guidelines that the Constitutional Tribunal provided in its judgment, a new wording was proposed and adopted in 2007.

Accordingly, in order to establish the list of co-authors entitled to additional remuneration one has not only to look at Art. 69, but also to take into account that the exemplary list of co-authors is not exhaustive. In addition to those groups expressly listed in Art. 69, other persons may claim that they have a right to additional remuneration for the use of the audiovisual work.

The additional remuneration for co-authors and performers of audiovisual works mentioned in Art. 70 para. 2*bis* is to be paid by users through the competent organisation for collective management of copyright or related rights (see Art. 70 para. 3),[3] insofar as the CRRA makes collective management compulsory in the aforementioned situation.

2) See reference in footnote 1.

3) The competent organisation is the one to which the entitled rightsholder belongs or to which he has entrusted the management of his rights for a particular mode of exploitation. In addition, Art. 105 para. 1 CRRA stipulates:
"It is presumed that the collective management organisation shall be authorized to manage and protect the rights for the modes of exploitation covered by its collective management activity and that it shall be authorized within this scope to participate in court proceedings. The presumption may not be invoked if more than one collective management organisation claims to have a title to the same work or performance."
Which organisations are competent can be deduced from the decisions in which the Minister of Culture and National Heritage authorized different organisations to manage copyrights and related rights collectively for different modes of exploitation of protected works or performances.
Should more than one organization be authorised for collective management in a given field of exploitation (and the rightsholder did not entrust his rights to just one of them) Art 107 CRRA stipulates that the Copyright Commission shall indicate the CMO competent in this case:
"If more than one collective management organisation carries on its activity in a given field of exploitation, the competent organisation within the meaning of this Act shall be the one to which the author or the performer belongs, and if the author or performer does not belong to any organisation or has not disclosed his authorship – it will be the organisation indicated by the Copyright Commission referred to in Article 108, paragraph 1."

Additionally, the appropriate amount of remuneration for the use of a Polish audiovisual work abroad or for the use of a foreign audiovisual work in Poland may be calculated as a lump sum (Art. 70 para. 4 CRRA).

1.3. Presumption for the Acquisition of Economic Rights. Transfer of Rights

Art. 70 para. 1 of the CRRA establishes:

> "It shall be presumed that the producer of an audiovisual work acquires, under a contract for the creation of the work or for the use of the existing work, the exclusive economic rights to exploit those works within the framework of the audiovisual work as a whole."

The CRRA provides detailed rules for the transfer of rights, which protect the interests of authors. As a general rule, the economic rights of an author may devolve upon another person through inheritance or by contract, and the person who acquires these rights may transfer them to other persons, unless the contract provides otherwise.

The CRRA contains also detailed provisions aimed at protecting the author's interests with regard to contractual relations. It stipulates, *inter alia,* that:

- any provisions of the agreement concerning all works or all works of a specific type to be produced by the same author in the future are invalid;
- the contract may only refer to fields of exploitation which are known at the time of concluding that contract;
- if the contract does not indicate whether the transfer of the author's economic rights or the granting of license was free of charge, the author has a right to remuneration.
- if the contract does not specify the amount of the author's remuneration, such amount shall be set taking into account the scope of the right granted and the benefits arising from the use of the work;
- in case of a gross discrepancy between the remuneration paid to the author and the benefits received by the licensee or by the person who acquired economic rights from the author, the author may request that the judiciary duly increase his remuneration;
- unless the contract provides otherwise, the author has the right to separate remuneration for the use of his work for each separate mode of exploitation;
- if the remuneration of the author depends on the revenues derived from the use of his work, the author may request information and - to the extent necessary - access to the documentation that enables him to determine the amount of his remuneration;
- if the remuneration of the author is fixed as a percentage of the sales price for a copy of his work and the price has been increased, the author shall be entitled to receive the agreed percentage of the higher price for the copies sold at the higher price. (A unilateral reduction of the sales price before the lapse of one year after the dissemination of the work began shall not affect the amount of remuneration);
- if the contract does not specify how a work may be used, the use shall respect the character and purpose of the work and accepted market practice;
- despite the fact that a legal successor of an author acquires all the economic rights, the legal successor may not alter the work in any way, unless the author consents or alteration is obviously necessary and the author has no justifiable reason to object to it. This general prohibition applies also to works whose term of protection has expired;
- if the person who acquired the economic rights of an author, or the licensee who has agreed to disseminate the work, fail to begin dissemination within the agreed time limit or, if no time limit was agreed upon, within two years after the acceptance of the work (that is basically; after the work has been delivered and accepted as fulfilling the conditions set out in the contract) the author may renounce or terminate the contract and may claim damage for losses that he might incur, after the expiry of an additional time limit, not shorter than six months.
- if the work has not been made available to the public as a result of circumstances for which the person who acquired the economic rights or, as the case may be, the licensee are responsible, the author may instead of asking for damages claim double the amount specified in the contract as remuneration for the dissemination of the work. This does not apply if the licence granted was non-exclusive.
- if it is not clear in a contract concluded between the author and another person whether the rights have been transferred or whether only the right to use the given subject-matter has been granted (licence agreement), it is deemed that the author has granted only a licence to use.

2. Audiovisual Performers

2.1. The Performer

Any performance of a work or product of folk art is protected irrespective of its value, purpose or means of expression. Covered by this protection of performances are in particular the actions of: actors, recitation artists, conductors, instrumentalists, singers, dancers, mime artists and other persons making a creative contribution to the creation of a performance.

2.2. Economic Rights Granted to Performers

Performers hold exclusive economic rights only for modes of exploitation specifically enumerated in the law. Therefore, the scope of exclusive rights of performers is narrower than that of authors. According to Art. 86 para. 1 point 2 CRRA:

"1. The performer shall enjoy, to the extent specified in the provisions of the Act, an exclusive right to:
(…)
2) use the performance and exercise the rights attached thereto for the following modes of exploitation:
a) within the scope of fixation and reproduction – the right to produce the copies of the performance by means of a specific technique, including magnetic storage and digital technique,
b) within the scope of trade in copies on which the performance was fixed – the right to distribute, lend gratuitously or rent the copies,
c) within the scope of dissemination of the performance in a manner other than those specified in subparagraph b) – the right to broadcast, rebroadcast and communicate the performance, unless a copy already distributed is used, and the right to make the artistic performance available to the public so that every person can have access to the performance from a place and at a time of his own choice."

Where exclusive rights have been granted for uses covered by Art. 86 para. 1 point 2 CCRA, performers have a right to remuneration for the use of their performance or the exercise of the rights attached to their performance. The remuneration must be specified in the agreement or will be granted pursuant to statutory provisions.

For some modes of exploitation, which are based on the use of a copy which has already been distributed, Art. 86 para. 3 CRRA stipulates a weaker level of protection in the form of a right to receive appropriate remuneration. The provision reads:

> "In the event of broadcasting, rebroadcasting or communicating a performance using a copy already distributed, the performer shall have the right to receive appropriate remuneration."

Similarly to the situation of authors, unless the CRRA mandates expressly for collective management in specific cases, the rights of performers can be managed on either an individual or a collective basis. Whereas individual management of rights is therefore the legal default rule, collective management is in fact widely practiced.

Audiovisual performers also have a right to additional remuneration under the CRRA as do the co-authors of an audiovisual work Art. 70 para. 2*bis* grants them:

- an amount of remuneration proportional to the revenues obtained from the screening of the audiovisual work in cinemas;
- an appropriate amount of remuneration for the rental of copies of audiovisual works and public playing thereof;
- an appropriate amount of remuneration for the broadcasting of the work on television or other mass media;
- an appropriate amount of remuneration for the reproduction of the audiovisual work on a private copy.

The above-mentioned additional remuneration is to be paid by the users through the competent organisation for collective management[4] of copyright or related rights (see Art. 70 para. 3), insofar as the CRRA introduces a system of compulsory collective management.

The appropriate amount of remuneration for the use of a Polish audiovisual work abroad or the use of a foreign audiovisual work in Poland may be determined as a lump sum.

2.3. Presumption for the Acquisition of Rights. Transfer of Rights

Art. 87 CRRA establishes the presumption that the producer of an audiovisual work also acquires the rights for exploiting the audiovisual performances:

> "The contract concluded between a performer and the producer of an audiovisual work for their joint participation in the production of an audiovisual work shall, unless stated otherwise in the contract, transfer to the producer the rights to dispose of and to use the performance, within the framework of the audiovisual work, for all modes of exploitation known at the date of concluding the contract."

In conclusion, many rules benefiting authors are also relevant for the protection of performers' rights. This applies, for example, to provisions on the transfer of rights and the protection of interests in contractual relations.

II. Collective Management in the Audiovisual Sector

1. General Remarks on Collective Management

In the Polish legal system, and in practice, collective management organisations (CMOs) play an important role in the management of economic rights.

While the default rule is that rights are individually managed except in some situations where collective management is compulsory, in the audiovisual sector it is quite common practice that rightsholders entrust CMOs with the management of their rights. Rightsholders can exercise their freedom to entrust to CMOs the management of only those modes of exploitation individually chosen by the rightsholders themselves.

CMOs are associations representing groups of authors, performers, producers or radio and television broadcasting organisations whose statutory objective is the collective management and protection of copyright or related rights entrusted to them, and the exercise of the powers resulting from the CRRA on behalf of rightsholders.

A CMO may only take the legal form of an association *(stowarzyszenie)*, whose aim it is to enable the exercise of the right to freedom of association, reflected also in Art. 58 of the Polish Constitution. The Law regulating associations (hereinafter "Associations Law") provides that an association is a voluntary, self-governed, stable union of persons acting for non-profit purposes.

CMOs are governed by the provisions of the Associations Law unless the rules of the CRRA as *lex specialis* apply. Unlike the situation under the Associations Law, the CRRA stipulates that:

- a CMO may also have legal persons as members;
- in order to undertake the activities in accordance with and as specified in the CRRA the organisation must receive a permit from the Minister of Culture and National Heritage,
- the Minister of Culture and National Heritage supervises the CMO.

4) See footnote 3.

In the past the functioning of CMOs has been examined by the President of the Office for the Protection of Competition and Consumers (UOKiK). He found[5] that certain practices of CMOs restricted competition and infringed upon provisions of the Act on the protection of competition and consumers.

Recently, the legal nature of CMOs has been subject to interpretation by the Supreme Court. In its judgment of 6 December 2007 (III SK 16/07)[6] the Supreme Court found that CMOs provide their services to creators and users of protected subject-matter of copyrights. For their services CMOs charge administrative fees in the form of a portion of the royalties paid by the users of copyrighted works. Because the CMOs provide their services against payment and constantly conduct commercial activities within the meaning of the Law on Commercial Activity, they have the status of entrepreneurs also within in the meaning of the Act on Protection of Competition and Consumers.

The Supreme Court found that neither the provisions of the CRRA nor the provisions of the Associations Law impose on the CMOs a specific model of collective management. The Supreme Court indicated that the CMOs might infringe competition law not only in relation to users of the protected subject-matter (copyrighted works or protected performances), but also in relation to creators who use services provided by the CMOs. Therefore CMOs fall under the supervision of the President of the Office for the Protection of Competition and Consumers (*Prezes Urzeędu Ochrony Konkurencji I Konsumentów*).

The Minister of Culture and National Heritage is authorized to grant a permit to organisations capable of guaranteeing the proper management of the entrusted rights. A list of the permits granted to CMOs is published in the Official Journal – *Monitor Polski*.[7]

The Minister of Culture and National Heritage exercises control over the activities of CMOs. The CRRA does not specify the scope of this control, but academic scholars stress that its functional interpretation makes it relatively broad.

Should a CMO exceed the scope of its permit, the Minister of Culture and National Heritage can order the organisation to discontinue the infringement within a fixed time limit, under threat of revoking the permit.

The permit of a CMO may be revoked if the organisation:

- fails to duly perform its duties within the scope of the management of copyright or related rights entrusted to it, and the protection of these rights,
  (These might be extremely rare situations; due to the organisational structure of CMOs and their detailed examination by the Minister prior to granting the permit.)
- infringes upon legal provisions within the scope of the granted permit.
  (Such infringement has to have permanent character. It might be exceeding the scope of collective management for which the permit has been granted, or infringing provisions of the CRRA relevant to collective management; such as the obligation to treat all CMO members equally, refusal to accept certain works for collective management, etc.).

The decisions of the Minister of Culture and National Heritage to grant or to revoke a permit for the exercise of collective management of rights by a CMO shall be announced in the official journal *Dziennik Urzędowy Rzeczypospolitej Polskiej Monitor Polski*.

5) See, *inter alia,* decision Nr RWE-21.24 of 16 July 2004 referring to abuse by one of the CMOs of its dominant position on the national market of collective management of copyright in musical works. In this case the President of the UOKiK found examples of abuse of a dominant position in practices such as: the CMO forcing authors (both members and non-members of that CMO), who sought protection of their works through the CMO, to entrust the CMO with the collective management of the rights to their works for certain modes of exploitation on an exclusive basis; the CMO requiring non-members to entitle the CMO to manage three important modes of exploitation cumulatively even though the non-members might wish to entrust the CMO with the collective management for only one or two of modes of exploitation), see http://www.uokik.gov.pl

6) www.sn.pl/orzecznictwo/index.html

7) *Obwieszczenie Ministra Kultury z dnia 13 kwietnia 2004 r. w sprawie ogłoszenia decyzji Ministra Kultury o udzieleniu i o cofnięciu zezwoleń na podjęcie działalności organizacji zbiorowego zarządzania prawami autorskimi lub prawami pokrewnymi, Monitor Polski* of 29 April 2004, Nr 18, item 322.

Poland currently has 14 registered CMOs. The interests of (co-)authors of audiovisual works and performers are represented mainly by the following CMOs:

- *Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Słowno-Muzycznych* – SAWP (representing a broad category of performers of musical works)[8]
- *Związek Artystów Scen Polskich* – ZASP *(*representing a broad category of artists; *inter alia,* theatre directors, theatre scene writers, actors, singers, dancers)[9]
- *Stowarzyszenie Autorów* – ZAIKS (representing authors)[10]
- *Związek Producentów Audio-Video* – ZPAV (representing audio and video producers)[11]
- *Stowarzyszenie Filmowców Polskich* (association of Polish filmmakers, which represents, *inter alia,* directors, cinematographers, screenwriters, sound operators and sound directors, sound and image editors, animators, costume designers, set designers, producers, production managers, and deals with collective management of copyright in audiovisual works, as well as neighbouring rights of producers of audiovisual works in respect to videograms)[12]
- *Związek Stowarzyszeń Artystów Wykonawców* – STOART (representing performing artists).[13]

Some of the Polish CMOs have been granted permits by the Minister to manage rights for the same mode of exploitation and in relation to the same category of rightsholders, but this is not generally the case. If more than one CMO carries out activities for a given mode of exploitation, the competent organisation is the one to which the author or the performer belongs; if the author or performer does not belong to any CMO or has not disclosed his authorship, the CMO assigned by the Copyright Commission is competent.

The CRRA provisions aim at making collective management more efficient. For example, the legal presumption of legitimisation of a CMO[14] has an important role, as it would be very troublesome for the CMO to prove that it is indeed authorised to exercise the copyright or related rights in each and every given work or other subject-matter.

The CMOs also have the right to demand (under Art. 105 para. 2 CRRA), within the scope of their activities, information and access to documents needed for determining the amount of remuneration and fees. In other words, the CMOs may obtain information needed to determine the actual amount of 1) copyright and neighbouring rights remuneration – which the CMO is entitled to collect, and 2) fees that producers and importers of electronic equipment and blank carriers are obliged to pay according to Art. 20 CRRA (see further remarks).

A CMO is engaged in activities connected with the protection of rights of its members and additionally of those non-members who have entrusted the CMO with the management of their rights without becoming members of it. The CMOs license the use of the protected subject-matter, collect remuneration for that use and deal with the distribution of the remunerations collected to entitled rightsholders. Distribution is made according to specific rules of the distribution regulations that each CMO adopts. Each CMO may have different rules in this respect. Timetables for distribution, even within one CMO, may look different for the different modes of exploitation of protected works – distribution may be once a month, quarterly or once a year.

The CMOs also collect fees paid by producers and importers of electronic equipment used for fixing protected subject-matter and "blank carriers". According to Art. 20 para. 1 CRRA the obligation to pay these fees applies to producers and importers of, *inter alia*:

- tape recorders, video recorders and other similar equipment;
- photocopying machines, scanners, and other similar reprographic equipment
- blank carriers used for fixing, within the scope of permitted use, works or subjects of related rights with the use of above-mentioned equipment.

8) See www.sawp.pl
9) See www.zasp.pl
10) See www.zaiks.org.pl
11) See www.zpav.pl
12) See www.sfp.org.pl
13) See www.stoart.org.pl
14) See footnote 3.

The fees may not exceed 3% of the price for the sale of the equipment and carriers, and they are paid to the CMOs acting on behalf of authors, performers, producers of phonograms and videograms, and publishers.[15] The actual amount of these fees (varying from 3% to 0.001% for different blank carriers) as well as the respective CMOs entitled to collect these fees has been determined by regulation of the Ministry of Culture and National Heritage.[16]

The CMOs also engage in other activities connected with the protection of copyright and related rights, notably in the fight against piracy, where they co-operate with relevant services and administrative bodies, police and prosecutors. Furthermore, their activities include organizing public awareness campaigns and engaging in educational programs aimed at the education of children and minors on the value of copyright in modern society.

The CMOs organize various types of training for employees of customs offices. They also provide social help for members in need and are engaged in charitable activities.

2. Adoption of Remuneration (Royalties) Tables for the Use of Works or Performances Covered by Collective Management

2.1. Constitutionality

Traditionally CMOs used to have a very strong position in the process leading to the adoption of remuneration tables. While their role is still very important, nowadays it has to be balanced with the role of other market stakeholders and individual users.

The conditions for preparing and adopting remuneration tables were changed following the judgment of the Constitutional Tribunal of 24 January 2006. The Constitutional Tribunal held that the provision of Art. 108 para. 3 CRRA – referring to the procedure for establishing the scope of remuneration tables for the use of works or performances covered by collective management – was not in conformity with the Constitution. While this resulted in Art. 108 para. 3 CRRA being declared invalid, new provisions regulating the adoption of the remuneration tables have not yet been adopted. A new draft Amendment to CRRA[17] has been prepared by the Ministry of Culture and National Heritage.

The old, now invalid, Art. 108 para. 3 CRRA provided that the Copyright Commission shall consist of six arbiters and a chairman as the supreme arbiter who is appointed by the Minister of Culture and National Heritage from among the group of arbiters. The Copyright Commission shall indicate the competent organisations within the meaning of Art. 107 CRRA and shall approve or refuse the approval of the remuneration tables presented by the collective management organisations for the use of works or performances covered by collective management.

Remuneration tables of different CMOs representing different rightsholders establish the minimum level of remuneration in a given mode of exploitation of protected subject-matter. Contractual provisions which are less beneficial to the authors than would be the case under the application of the respective remuneration tables are invalid and shall be replaced by the latter.

15) The amount obtained from these fees paid in respect of the sale of tape recorders and other similar equipment as well as blank carriers related thereto is distributed accordingly: 50% to authors; 25% to performers; and 25% to producers of phonograms.
The amount obtained from the fees paid in respect of the sale of video recorders and other similar equipment as well as blank carriers related thereto shall be distributed as follows: 35% to authors; 25% to performers; and 40% to producers of videograms.
The amount obtained from the fees paid in respect of the sale of reprographic equipment as well as blank carriers related thereto shall be distributed as follows: 50% to authors; and 50% to publishers.

16) Rozporządzenie Ministra Kultury z dnia 2 czerwca 2003 r. w sprawie określenia kategorii urządzeń i nośników służących do utrwalania utworów oraz opłat od tych urządzeń i nośników z tytułu ich sprzedaży przez producentów i importerów, Official Journal – Dziennik Ustaw of 17 czerwca 2003 r., No 105, item 991.

17) *Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw*: this has been sent for the review of the Council of Ministers on 22 December 2008 http://bip.mkidn.gov.pl/bip/document/?docId=1196 , http://bip.mkidn.gov.pl/bip/index.jsp?catId=222

The procedure for establishing the remuneration tables had long been criticized when the Constitutional Tribunal finally rendered its judgment. The bone of contention was that even though the approval of remuneration tables by the Copyright Commission impacted directly on civil law relations between users and CMOs, the only party to the approval proceedings was the CMO that submitted its remuneration tables for approval. As a consequence, only CMOs could appeal against the decision of the Copyright Commission.

In order to reach its conclusion, the Constitutional Tribunal examined the different stages of the process aimed at providing minimum rates for the use of works or performances: the first phase included the preparation of draft remuneration tables by the collective management organizations, while the second phase included the examination of draft remuneration tables for approval by the Copyright Commission.

Draft remuneration tables were prepared entirely by the CMOs, while the role of the Copyright Commission was limited to expressing approval or refusal of what was presented to it.

In its judgment, the Constitutional Tribunal found that for properly drafting remuneration tables it is essential to acknowledge the contradictory standpoints (counter-drafts) of representatives of rightsholders and representatives of users such as broadcasters and cable operators. It is only on that basis that the subsequent decision made by the Copyright Commission can be objective and correct, as well as open and transparent, and therefore may be fully subject to judicial review.

The Tribunal stated that, in the light of Art. 108 para. 3 second part of the sentence, in conjunction with Art. 109 CRRA, approved remuneration rates constitute a specific "correction" which eliminates the advantages of broadcasters (namely a lower amount of remunerations owed to rightsholders).

Furthermore, the Tribunal recognized that users (broadcasters and entities retransmitting programme services) should also have the right to present their own, separate standpoints in the form of a counter-proposal for remuneration tables.

The Tribunal also stressed that the criteria for approval or refusal of the remuneration tables should be clear.

Therefore, the Constitutional Tribunal held that Art. 108 para. 3 CRRA was not in conformity with the Constitution. Thus it has not been in force since 1 September 2006.

The new draft Amendment to the CRRA, which was presented after the decision of the Constitutional Tribunal, was aimed at reflecting the guidelines that the Tribunal had given in its judgment. It contains new provisions on the functioning of the Copyright Commission and the process for drafting and adopting the remuneration tables. Moreover it provides additional rules for the CMOs, such as an obligation for CMOs to provide yearly reports to the Minister of Culture and National Heritage, including a financial report on their activities.

2.2. Status Quo

As was mentioned above, generally CMOs have separate remuneration tables for different kinds of exploitation of protected subject-matter. They establish minimum levels for remuneration that are to be adopted by the Copyright Commission. Different CMOs representing the same category of rightsholders for the same modes of exploitation may have different fees; sometimes these differences are indeed considerable.

Because currently the Copyright Commission cannot adopt new tables due to the lack of a valid legal mandate, the tables adopted at the period when the adequate legal basis (Art. 108 para. 3 CRRA) was still in force continue to be generally applied (some tables of importance to the audiovisual sector stem from the period 2000-2001). More recently, CMOs have also prepared their own remuneration tables, benefiting from the fact that remuneration tables adopted by the Copyright Commission establish only the minimum level of remuneration, and not fixed remunerations. The tables adopted by the Management Board of the CMO do not provide, however, the minimum remuneration level, which, by law, must be respected in the licensing agreements with the users. The tables may provide the possibility of reductions, under certain conditions, if so requested in writing by the user. The CMOs' remuneration tables are seen as a means to implement the statutory obligation of equal treatment of all rightsholders represented by the CMO.

Usually tables adopted by the Copyright Commission provide either an actual amount of remuneration or a given percentage of the gross income (excluding VAT). These fees vary according to the character of the subject-matter and the specific character of a given mode of exploitation as well as according to the kind of users. For example, for the use of the same subject-matter amounts of remuneration may differ for national, cross-regional, regional and local broadcasters and among broadcasters for radio or television uses.

2.3. Recent Example: Remuneration for Webcasting

It might be of some interest to illustrate the characteristics of remuneration tables for the use of protected subject-matter with an example from a particular mode of exploitation – webcasting. The concrete example is based on one of the 16 tables adopted by a CMO with a great tradition, namely ZAIKS.

With regard to a very special and topical type of use ZAIKS adopted in 2008 a remuneration table[18] for the use of copyright protected works by means of radio or television transmission on interactive networks (webcasting). This concerns the use of literary works (including film screenplays), musical works, choreographic works, musical–choreographic works and pantomime works, from the so-called "minor rights" category,[19] *inter alia,* in the audiovisual works.

The remuneration for webcasting transmission of works in radio programme services is subject to different amounts depending on the amount of transmission time devoted to copyrighted works in the given programme service:

Up to 10% the payment amounts to 1% of all incomes (excluding VAT) connected with the transmission activity, including incomes from advertising, announcements, sponsored programmes, sale of transmission time, barter contracts, text services, grants, subventions, other incomes connected with direct or indirect promotion of services, goods or enterprises.

From 10% to 25%	- 2% (as above)
From 25% to 40%	- 3% (as above)
From 40% to 50%	- 4% (as above)
From 50% to 60%	- 5% (as above)
From 60% to 70%	- 6% (as above)
Above 70%	- 7% (as above).

The remuneration for webcasting transmission of works in television programme services is subject to different levels depending on the character of a given programme service:

- news programme service – 1% of all incomes (excluding VAT) connected with transmission activity, including incomes from advertising, announcements, sponsored programmes, sale of transmission time, barter contracts, text services, grants, subventions, other incomes connected with direct or indirect promotion of services, goods or enterprises
- film programme service – 2.5% (as above)
- program service of general nature – 3.15% (as above)
- musical programme service – 4.75% (as above).

However, the monthly amount of copyright remuneration established according to these rules cannot be lower than a certain minimum: for radio programme services, the minimum amount of copyright remuneration varies depending on the amount of users simultaneously following a given

18) *Tabela stawek wynagrodzeń autorskich Stowarzyszenia autorów ZAIKS za nadawanie utworów w sieciach interaktywnych (webcasting) (zatwierdzona uchwałą zarządu stowarzyszenia autorów ZAIKS w dniu 28.02.2008 r.)*
http://www.zaiks.org.pl/portalzaiks/zax_JakDzialaFirst.jsp?sysparameters=packed=(true);&parameters=IndexPath=(INDEX$1657/INDEX$1658/INDEX$1665;ID=INDEX$1665);whereClause=(ZAX_STATUS=!039!4!039!!032!AND!032!ZAX_MIEJSCE=`JAK_DZIALA.PODSTAWY_PRAWNE.ZATWIERDZONE_TABELE`);wstep=(n);

19) The "minor rights" category comprises short literary works, songs, short musical works, short choreographic and pantomime works, as well as screenplays of audiovisual works (such as fiction films, television films, documentary films and serials). In contrast, "major rights" embrace, *inter alia,* longer literary works, drama works, musicals, ballets, etc.

radio programme service on the web from PLN 100 to PLN 40,000 per month. For television programme services the minimum amount of copyright remuneration is PLN 2,500 for 24 hour programme service, the remuneration, however, has to be at least PLN 250 per month.

Theses amounts do not include VAT, they are not to be applied to other than interactive network (webcasting) modes of radio or television broadcasting. Other ways of distributing broadcasts (e.g., terrestrial, cable) are subject to different remuneration tables. The licensee may apply to ZAIKS in writing for a reduction of these amounts for the first and second year of his broadcasting activity (15% and 10% reductions are possible). The amounts are subject to review each year.

TR TURKEY

Eda Çataklar
Istanbul Bilgi University

I. Legal Framework

The basic legal instrument that sets out the rules regarding intellectual and artistic works is The Law on Intellectual and Artistic Works No. 5846 (hereinafter referred as "LIA"). This Law, which was based on the principles of the Bern Convention, entered into force in 1952 and has been amended several times, especially since the establishment of the Turkey-EU Customs Union. Efforts towards harmonization with EU Law and international conventions are still in progress. Furthermore, Turkey is a party to the basic international conventions such as the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Rome and the Bern Agreements and the TRIPS.

As a result of technological developments, the number of means by which audiovisual works are exploited has rapidly increased. However, market conditions and regulations regarding these works have not developed at the same pace in every field in Turkey. Therefore, in introducing the issue, the special conditions and problems in Turkey shall be taken into consideration.

The LIA does not regulate the concept of audiovisual works. However, these kinds of works are protected as cinematographic works, provided that they fulfil the conditions laid down in Art. 5 LIA. The LIA establishes four categories of works: literary and scientific works, musical works, works of fine arts and cinematographic works. The categories are *numerus clausus*, therefore any work which is created must be categorized under one of these categories of work and be characteristic of its author in order to be protected under the law. The requirement that a work be characteristic of its author may be compared to the concept of "*l'originalité*" in French law and it means that a work is copyrightable as long as it differs from other works because of its original character.

Art. 5 LIA determines under what conditions a work may be considered as a cinematographic work. It states that:

> "Cinematographic works are works such as films of an artistic, scientific, educational or technical nature or films recording daily events or movies, which consist of a series of related moving images with or without sound and which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices."

According to this Article, the types of series of related moving images are not limited to feature films. Audiovisual works which meet these criteria can be protected as cinematographic works. As a result, the concept of cinematographic works shall be used in this report, instead of audiovisual works.

1. Authors

Art. 8 LIA regulates the concept of authorship. The Article states that the author of a work is the person who created it. However the third paragraph of the Article is more specific as to how to determine the authors of a cinematographic work. It contains an exclusive list of persons who are the joint authors of cinematographic works, namely:

a) the director
b) the composer of original music
c) the scriptwriter
d) the writer of the dialogue
e) the animator (if the cinematographic work is animated).

It is important to note that the concept of authorship of cinematographic works was amended in 1995. Prior to this amendment, producers were considered as the sole authors and they remain sole authors for cinematographic works produced before 1995.[1] However, according to the amendment of 2001, film producers are now regarded as one group of "related rightsholders" (see below at I.2.).

Turkish Law groups the rights of authors into moral and economic rights. Moral rights are inalienable rights attached to the author's personality. Economic rights are based on the purpose of deriving benefit from the works and they may be licensed or fully transferred. The infringement of any rights is subject to criminal and civil sanctions. The authors of cinematographic works hold the following rights:

a. Moral Rights

Moral rights are inalienable. However, the author may authorize third parties such as the publisher or producer to exercise certain moral rights, e.g., disclosing the work to the public or making approved changes to the work. If the author has not authorized another person during the term of copyright protection, then following the author's death, the authority to exercise these rights belongs to the executor, in the order listed in LIA or rightsholders provided that they prove a legitimate interest. If there are no authorized persons or they do not exercise their rights or if the term of protection has expired, the Ministry of Culture and Tourism may exercise in its own name the rights granted to the author under the third paragraphs of Articles 14, 15 and 16, on condition that the work is deemed to be important for national culture. The moral rights related to the cinematographic works, which are regulated Art. 14 to 16 LIA, are as follows:

i. The Authority to Disclose the Work to the Public (Art.14 LIA)

This provision gives the author the absolute right to determine whether or not his work shall be disclosed to the public and at what time and in which manner. Furthermore, the right to share information about the contents of a work, which as a whole or in a substantial part has not yet been made public, belongs exclusively to the author. The author also has the power to prohibit (even if he has given others his prior written approval) the introduction of the work to the public or the publishing of the work, if the manner in which the work is disclosed to the public is of such a nature as to damage the author's honour and reputation. It is not possible to waive this power of prohibition by contract.

ii. The Authority to Designate the Name (Art.15 LIA)

The author has the right to be identified as the author of the work and may also choose to publish his work under a pseudonym or anonymously.

iii. The Authority to Prohibit Modifications (Art.16 LIA)

Unless the author gives permission, the name of the author or the work may not be modified. Even if the author has given written and unconditional permission for such changes, he may prohibit all

1) See Gül Okutan Nilsson and Yalçın Tosun, *Protection of Films Made Before 1995*, in IRIS 2008-5: 19, available at: http://merlin.obs.coe.int/iris/2008/5/article30.en.html

modifications that prejudice his honour and reputation or damage the nature and characteristics of the work. The author may not waive the power of prohibition by contract. Any person who obtained permission from the author to exercise economic rights has the authority to make any modifications that are deemed indispensable due to the technical requirements of adaptation, reproduction, performance or publication without special permission.

b. Economic Rights

The author's right to obtain economic benefit from his work is limited by the scope of the economic rights. Economic rights are limited to those that are enumerated in the LIA. However, these economic rights are described in a rather broad manner so as to enable a flexible interpretation. Economic rights are independent of one another. The disposal and exercise of one does not affect the others. Economic rights may be fully transferred, licensed and inherited. All contracts must be in writing and the rights that constitute their subject matter must be specified individually. Economic rights are protected for a limited period of time. The protection period for the rights of authors is their lifetime plus 70 years for natural persons and 70 years from disclosure of the work to the public for legal persons. The economic rights that authors of cinematographic works have are described below:

i. The Right of Adaptation (Art.21 LIA)

The right of adaptation entitles the author to exploit his work by adapting it. For example, turning a book into a movie requires the permission of the author of the book. Art. 6 LIA gives examples of what kinds of works shall be considered as adaptations and states that any intellectual and artistic products created by benefiting from another work, but without being independent of that work, are adaptations. Furthermore, in order to protect a work as an adaptation the adaptor has to give to the newly created work its own characteristics. In any transaction relating to the assignment of the right of adaptation, it is important to specify which rights are covered by the assignment.

ii. The Right of Reproduction (Art.22 LIA)

Reproduction means reproducing the original or copies of a work by fixing on any material in any form or by any method, in whole or in part, directly or indirectly, temporarily or permanently. In addition to all types of devices now known or to be developed in the future enabling the transmission or repetition of signs, sounds and images, Internet and other digital storing and transmitting techniques, every kind of means of reproduction comes within the scope of the reproduction right[2]. Due to this right, recording cinematographic works on carriers such as DVD and VCD, and also their downloading from the Internet are subject to the permission of the author.

iii. The Right of Distribution (Art.23 LIA)

The right of distribution relates to exploiting the original and copies of a work by allowing commercial use. This right covers all kinds of means of distribution such as renting, lending and offering for sale. When a rightsholder transfers the right of reproduction, it is assumed that he also transfers the right of distribution suitable for the envisaged type of reproduction; provided that the contrary may not be deduced from a special contract between the assignor and the assignee of the rights or from the nature of the work.

iv. The Right of Performance (Art.24 LIA)

This right covers the acts of performing, reciting, playing, acting or displaying the work in public premises either directly or by means of devices enabling the transmission of signs, sounds or images. According to this provision, the written permission of the author must be obtained in order to display the work in places open to the public such as hotels and bars. If the author is a member of a collecting society, the written permission is given by the collecting society in accordance with the types of authority set out in the authorization certificate.

2) Tekinalp, *Fikri Mülkiyet Hukuku*, 4th Edition, Arıkan P, İstanbul, 2005, p.173.

v. The Right to Communicate a Work to the Public by Devices Enabling the Transmission of Signs, Sounds and/or Images (Art.25 LIA)

Pursuant to this provision, the written permission of the author is required for the acts of communicating the original or copies of a work to the public by way of broadcasting. This concerns organisations that broadcast by wire or wireless means such as radio and television, by satellite or cable, or by other devices enabling the transmission of signs, sounds and/or images including digital transmission. It also concerns organisations that rebroadcast these works or copies thereof. This right also covers the communication of the work to the public by providing access to it at a time and in a place chosen by natural persons (the making available right).

2. Holders of "Related Rights"

Art. 80 LIA regulates "the rights related to the rights of the author", which are composed of two groups; neighbouring rights and rights of film producers. As mentioned above (see I.1.) film producers are related rightsholders as a result of the 2001 amendment to LIA. Performing artists, phonogram producers and TV and radio broadcasters are holders of neighbouring rights. The protection period for related rightsholders is 70 years, starting from the date of performance, production or broadcast. Any person who wishes to use the work for non-personal purposes must obtain the written permission of the related rights holders.

For the topic of this IRIS Special, the remuneration for creative contributions, it is especially important to focus on performers and their rights. Performers are the persons who interpret, introduce, recite, sing, play or perform a work in various ways and in an original manner. In the context of cinematographic works, actors belong to the same group of related rightsholders as performers.

Performers have the following rights with regard to their performances:

i. The right to be identified as the performer of their performances and the right to prevent any distortion or mutilation of their performances that would be prejudicial to their reputation, and
ii. The right to authorize or prohibit it:
   - the fixation of such a performance,
   - the reproduction, sale, distribution, rental or lending of such a fixation,
   - the communication of such a fixation to the public by devices permitting transmission of signs, sounds and/or images as well as the re-transmission and performance of the fixation,
   - the distribution of the original or the copies of fixed performances by sale or in any other way,
   - the making available of the performances on digital platforms.

In regard to cinematographic works Art. 80 also contains the following important provision:

> "In the case where performances fixed on phonograms and films are communicated to the public in any manner, persons using them shall be obliged to pay an equitable remuneration to the authors as well as to the performers and producers or the collecting societies of the related field."

In addition to this right to equitable remuneration performers, as well as other related rightsholders and authors also have the right of authorizing and prohibiting such public communication (see above at I.1.b.v.).

With regard to dubbing and subtitles, Art. 80 LIA states that;

> "After transferring their economic rights to the producer making the first fixation of films, joint authors of cinematographic works may not object to the dubbing or subtitling of the film, provided that nothing to the contrary or no special provision is stipulated in the contract."

3. Exceptions and Limitations

The Law provides exceptions and limitations to copyright and related rights, which in some cases allow the use of the work of the author and performances as well as of broadcasts and phonograms of related rightsholders without permission and without payment. The following limitations are important as regards cinematographic works:

a. Free Performance in Educational Institutions (Art.33 LIA)

Published works may be freely performed in all educational institutions only for face-to-face education and in pursuance of non-profit purposes, on condition that the name of the author and the title of the work are clearly indicated.

b. Private Use Exception (Art. 38 LIA)

The reproduction of the work for personal non-profit use is permitted. However, such reproduction may not prejudice the legitimate interests of rightsholders without good reason or conflict with the normal exploitation of the work.

In order to compensate for the pecuniary loss that the authors incur because of this exception, Art. 44 LIA introduces a private copy levy to be collected every month by natural and legal persons who manufacture or import for commercial purposes any kind of materials carrying copyright protected works. These materials include blank video cassettes, audio cassettes, computer discs, CDs, DVDs and all kinds of technical equipment that enable the reproduction of intellectual and artistic works. The money thus collected is deposited in a special account held in the name of the Ministry of Culture and Tourism. Before the 2001 amendment, it was stated that three-quarters of the collected amount had to be shared among the collecting societies. This is currently no longer the case. The collected amounts are not being distributed to collecting societies. Art. 44 LIA as amended in 2001 determines that while a quarter of the amounts collected in the special account shall be transferred to the account of the Ministry of Culture Central Accounting Office and shall be recorded as revenue in the budget, the remaining amount shall be used by the Ministry of Culture for the purposes of strengthening the intellectual property system and the execution of cultural and artistic activities. However, there are planned changes regarding this issue (see below at IV.).

II. Practice in Rights Management

1. In General

Art. 48 LIA grants the author the right to transfer ownership in his economic rights to others. The assignment may be unrestricted or restricted as regards duration, place or scope, with or without consideration. Furthermore, it is possible to authorize others only to exercise economic rights without transferring the ownership. According to Art. 52 LIA, contracts regarding assignment of the economic rights must be in writing and each right assigned must be identified separately. Every act of disposal must relate to a work which has been completed, otherwise it shall be null and void.

Art. 80 LIA states that performers may transfer their rights, as mentioned above, to a producer by contract in return for equitable remuneration. As a flip side to this rule, film producers who make the first fixation of films shall have the related rights only if they acquire the authority to exercise economic rights from the author and the performer.

2. Present Situation in The Film Industry

Because the law allows the full, unrestricted transfer of rights, once a cinematographic work has been created authors/rightsholders usually agree to transfer to producers all the economic rights as well as the authority to exercise the moral rights necessary to financially exploit the works. In other words, such contracts between the parties normally give the assignees the necessary rights to exploit the works in all geographic areas, for unlimited duration and all kinds of uses.

It is not possible to say that there are uniform rules or model agreements. For example, the financial provisions of one agreement may differ from another due to special conditions introduced with regard

to the parties. Commonly the agreements provide that no payment shall be made except for a royalty to be paid upon the signing of the agreement. However, in special circumstances, the parties may agree that a share of the profits obtained from certain exploitation modes (such as cinema release of the film, selling to television channels, etc.) shall be paid to the author.

Although the law requires a written contract for film productions, it is not uncommon in practice to encounter film projects where no written contracts are made. This situation causes serious problems for proving authorship and securing payment of remuneration. In order to overcome these problems, collecting societies and NGOs are attempting to create model agreements or contracting principles by considering the specific benefits and requirements of each group of rightsholders.

In addition to determining the principles concerning the use of works, performances, phonograms, productions and broadcasts and/or their communication in public premises, Art. 41 LIA states that rightsholders may demand payments for communication at public premises only through collecting societies that they have authorized. Due to a reference in Art. 43 to Art. 41, this restriction also covers the payments that broadcasting organizations have to pay. As a result of this provision, the rightsholders may neither demand such payments personally nor transfer their right to collect remuneration to other persons except collecting societies. However, the application of this provision is not obligatory for cinematographic works. Therefore owners of cinematographic works are free to pursue all of their rights personally.

This exception for cinematographic works is one of the reasons why the collecting societies in the field of cinematographic works are rather passive while the collecting societies in the field of music have made remarkable progress in managing rights. As explained above, the authors transfer all the rights including the above-mentioned authority to the producers by means of contracts. These contracts, however, prevent the collecting societies from taking a role in the collection of the payments.

III. Institutional Framework of Collecting Societies

1. Legal Basis for the Establishment of Collecting Societies

Collecting societies are established in order to protect the mutual interests of their members, the management and pursuit of the rights granted by law and the collection and distribution of fees to the rightsholders. Authors and related rightsholders may pursue their rights personally or assign this authority to the collecting societies. Anyone who wants to exploit the work must obtain the written permission of the author and the related rightsholders or the authorized collecting society.

The basic regulations regarding collecting societies in Turkey are Art. 42 LIA, The Regulation Regarding Intellectual and Artistic Works Owners and Related Rightsholders (hereinafter "the Regulation") and The Uniform Statute of Intellectual and Artistic Works Owners and Related Rightsholders (hereinafter "the Uniform Statute"). The organs, members, supervision and the general obligations of the collecting societies, and procedures for their foundation under these regulations are explained below.

2. Foundation, Organisation and General Obligations

a. Foundation of Collecting Societies

Authors and related rightsholders may found collecting societies provided that they prepare a statute in accordance with the Uniform Statute and apply to the Ministry in order to obtain permission. The Ministry may not reject such applications provided that they meet the legal conditions[3] regarding the number of members and the necessary documents, etc. The conditions are further detailed in the Regulation discussed below.

3) The Ministry only checks whether the application is consistent with the mandatory requirements of the law. Any other reasons may not constitute grounds for rejecting any application, see Tekinalp, *op. cit.*, p.280.

In Turkey it is possible to found more than one collecting society in the same area. The areas are listed in Art. 7 of the Regulation. According to this rule, in the field of cinematographic works, authors, performers, radio and TV organizations and film producers represent separate areas and they may set up one or more separate collecting societies in their areas.

In order to found a collecting society, the number of founding members must be, for authors or performers, four times the number of full members of compulsory organs, and for producers or radio-television organisations, twice the number of full members of the compulsory organs. To found another collecting society in the same field, one third of the total number of members of the collecting society with the largest number of members set up for that field have to apply, provided that such number is not less than the number of founding members given above. If there are two or more collecting societies founded in the same field, they may set up a federation according to principles and procedures laid down by law. No more than one federation may be established in the same field.

b. Members

Collecting Societies may have three types of members: Full members, benefiting members and candidate members. According to Art. 12 of the Regulation, the following are the requirements for being a full member:

i. Turkish citizenship or being established according to the Turkish Laws on legal persons,
ii. Authorship or being a related rightsholder,
iii. Legal capacity,
iv. For producers and broadcasting organisations, being registered at the Trade Registry at least for six months as being active in the related field,
v. Compliance with the conditions stated in the Regulation.

Benefiting members are the economic rightsholders who obtain their rights through inheritance or contract as well as the legal representatives of minors and legal guardians of persons deprived of their legal capacity.

Candidate members are producers or broadcasting organisations which have not yet completed the obligatory period of six months. (The difference between full and other members is explained below.)

Membership status may end with the member's death or with the termination of legal personality. Membership may also be withdrawn or dismissed. The mutual responsibilities between (ex)members whose membership status has expired and the collecting societies continue for a year from the expiration of the term of the last authorization certificate.

c. Organs

The compulsory organs of the collecting societies are the general assembly, the board of directors, the board of auditors, the technical-scientific board and the disciplinary committee. All compulsory organs must be composed of full members who are selected by secret ballot. The collecting societies may establish discretionary organs provided that this is stated in their statutes.

The general assembly, composed of all the full members, has the authority to select the original and alternate members of the other organs. It adjudicates on conflicts regarding the various types of membership, discusses and settles the draft budgets, investigates and releases the accounts of the board of directors, decides to open or close branches, makes decisions on participating in international cooperation and organisations and determines the measures to be taken regarding any violations of the copyrights of its members.

The principal duties of the board of directors are to protect the mutual interests of the members, conduct the operations necessary for managing and pursuing the members' rights, apply to the competent public authorities in case of infringement of the rights of the members, prepare the budget and present it to the general assembly, determine the tariffs and present them to the general assembly, prepare the necessary agreements and approve the membership applications. Furthermore, the board of directors is authorized to represent the collecting society.

The board of auditors is obliged to audit the accounts and transactions of the board of directors, and to present periodically the audit reports to the board of directors, general assembly and the Ministry. The duties of the board of auditors are important with regard to providing transparency.

The technical-scientific board conducts research on issues relating to the area of specialization of the collecting society and prepares reports requested by the organs.

Finally, the disciplinary committee is responsible for imposing the disciplinary fines. It may also sanction members of a collecting society by excluding them from membership.

d. Obligations

The societies' founding purpose to protect the mutual interests of the members and to manage and pursue their rights, defines the obligations of the collecting societies. According to para. A of Art. 42 LIA, which is the basic provision regarding collecting societies, the collecting societies have the following obligations:

i. To notify the Ministry of all information concerning their members and the works, performances, phonograms and productions they represent and to update, every three months, this information which shall be accessible for the parties concerned;
ii. To undertake, in an equitable way, the management of the rights resulting from the activities of their members;
iii. To distribute the remuneration obtained as a result of the management of their members' rights to the rightsholders in accordance with a distribution plan;
iv. To give information concerning the works, performances, phonograms and productions they represent, to persons who make written requests;
v. To act in an equitable manner when concluding contracts regarding the rights they manage;
vi. To provide the discounts and facilitated payment methods that they deem necessary for their economic and/or moral interests;
vii. To establish in due time the tariffs for rights they manage so that the tariffs can be applied to contracts concluded between collecting societies and users and to announce these tariffs and any changes of these tariffs in due time;
viii. To have their accounts approved by sworn financial consultants.

3. Existing Collecting Societies in Turkey

When the LIA was adopted in 1951, it stated that authors should found the collecting societies within six months after the law entered into force and, in case of not being founded, that the government would be obliged to facilitate the establishment of collecting societies. However, collecting societies in Turkey were founded after the LIA had been amended in 1986, which led to a change of Art. 42. SESAM (Cinematographic Work Owners' Society of Turkey) whose goal is to protect, manage and pursue the rights of the authors of the cinematographic works is one of the collecting societies which were founded in 1986 by considering the four categories of works.

From 1983 to 1995, the LIA permitted the establishment of only one collecting society per work category, however, with the 1995 amendment it became possible to found more than one collecting society in the same category. The argument put forward in order to justify the amendment was that it was not democratic to limit the freedom to select the professional union which should protect the rights of the author. Moreover, it was argued that the existing collecting societies were not able to function at the expected level, that securing different benefits under the work categories required particular expertise and that the creation of a competitive environment would increase. The 1995 amendment was criticized, however, for potentially causing chaos and weakening the position of collecting societies in the pursuit of the authors' rights.[4]

4) Cahit Suluk, *Uygulamalı Fikri Mülkiyet Hukuku*, Arıkan P., Volume II, İstanbul, 2005, p.736.

The fields for which collecting societies may be established were determined by the Regulation dated 1999 and the legislation process was completed with the Uniform Statute. A study for a comprehensive amendment of the Regulation is still in process.

In addition to the 1995 amendment allowing for the establishment of more than one collecting society in the same category, it should be noted that the situation regarding authorship of cinematographic works – the producers were considered as authors before 1995 – resulted in all the members of SESAM being producers. Therefore, when discussing the activities of the collecting societies in the field of cinematographic works, it is difficult to separate the creative contributors from producers. Furthermore, it should be noted that a high number of producers also work as directors and/or scriptwriters while creating a work.

New collecting societies were founded in the field of cinematographic works after the 1995 amendment. The collecting societies which have been founded in this field are listed below:

a) The collecting societies for authors are:

- BSB – Associations of Documentary Film Makers
- SESAM – Cinematographic Work Owners' Society of Turkey
- SETEM – Cinema and Television Works Owners' Society
- SİNEBİR – Cinematographic Work Owners' Society

b) The collecting societies for neighbouring rightsholders are:

- RATEM – Society of Radio and Television Broadcasters
- SESBİR – The Collecting Society of Voice Artists

c) The collecting societies for cinema producers are:

- FİYAB – Society of Film Producers
- SEYAP – Movie Producers Professional Association
- TESİYAP – Society of Television and Cinematographic Work Producers

SESBİR, the society mainly for dubbing artists, does not have any activity. As already noted, there are no collecting societies to represent actors even though they form one of the most important groups in the field of cinematographic works. In previous years, a collecting society named OYUNCUBİR (the collecting society of actors) was established; but it closed due to lack of activities related to its establishing purposes and related legislative obligations. The establishment of a new collecting society in this field is currently being considered.

A project called the National Platform of Cinema has been founded by the associations, foundations and a labour organisation in the film sector and also festival organisations in addition to all the collecting societies established in the field of cinematographic works in Turkey. It is aimed at establishing a financially and administratively autonomous structure called the "Turkish Cinema Institution" which will be active in different platforms for the development of the cinema sector and constitute a wide-based but centralized decision-making authority. A draft law determining the structure, aims, duties and obligations of the Institution has been prepared.

In 2008, the collecting societies of cinematographic work owners convened in order to establish a federation. This attempt, which is being undertaken by SESAM, SİNEBİR, SETEM and BSB is the first effort to found a federation of this kind in Turkey. The collecting societies that announced to the public their decision as regards establishing The Federation of the Authors of Cinematographic Works (SEF) declared that the purpose of this attempt was to bring together the creators of cinematographic works to make their voice heard, to protect their rights against producers and publishers, and also to fight against piracy, etc. It is also believed that the Federation will fulfil a disciplinary function in the sector and facilitate communication with users and public authorities. The regulation for the Federation has been prepared but has not yet been presented to the Ministry.

IV. Rightsholders' Perspective

As regards membership of collecting societies, it should be mentioned that any person who applies for membership and who complies with the conditions listed above must be admitted by the collecting societies. Nobody may be obliged to become or to remain a member.

The rules governing the relationship between the collecting societies and their members are determined by the authorization certificate. According to the last paragraph of Art. 42/A LIA, the collecting societies manage the rights in regard to all works, performances, phonograms, productions and broadcasts that are made public or published, of authors or holders of related rights who are members of a collecting society according to the authorization certificate. Art. 40 of the Regulation also deals with the authorization certificate. According to this provision, the collecting societies have only restricted authority for the management of rights concerning the works, performances, phonograms, productions and broadcasts determined in the authorization certificate. The authorization certificates must authorize the collecting society to pursue economic rights before judicial and enforcement authorities. Both of these provisions require that the Ministry issue a by-law containing the rules and procedures for the authorization certificate.

The by-law on the authorization certificate entered into force in 1986. However, due to certain amendments later made to the related provisions of the LIA, some argue that the by-law is no longer valid and a new by-law must be issued by the Ministry. According to the by-law of 1986, the important points that every authorization certificate has to include are as follows:

The rightsholder agrees;

- to transfer his economic rights to the collecting society for at least five years,
- that if he does not cancel the authorization certificate, the term of authorization shall be considered as extended for only one more five-year period,
- to provide a copy of the agreements that he signed with third parties, for the works covered by the authorization certificate,
- to authorize the collecting society to manage the rights which shall arise after authorization,
- that the collecting society also has the authority to allow other persons the exploitation of the rights mentioned in the authorization certificate without the permission of the author.

Under the authorization certificate, the collecting society;

- has the authority to exercise the transferred rights in its name, collect the royalties and transfer the rights to other persons or prohibit the exploitation of these rights, and to apply administrative, judicial and executive measures in order to pursue and collect the rights,
- in case of the death of the author, does not have to make payment to the heirs unless inheritance is proved by legal means.

Once the relationship ends, the rights revert to the rightsholder automatically. Each collecting society is responsible for preparing a "uniform authorization certificate" and other necessary documents in accordance with the law. The existing collecting societies are abiding by this rule. According to the authorization certificates in current use, the reproduction, public performance, public communication rights and the right to make the work available to the public are assigned or licensed to the collecting societies in order to be managed and protected by them.

As stated above, one collecting society has been active in the field of cinematographic works since 1986 and currently the number of the collecting societies in this field has increased to eight in Turkey. Even if the main responsibilities of the collecting societies are managing and pursuing the rights, beside collecting and distributing the remunerations, they are currently not active in carrying out these duties. The following are the main reasons for this situation:

- The difficulties that collecting societies encounter in attempting to find funds to carry our their activities,
- The problems arising from the unsettled internal structures of collecting societies,
- The obstacles caused by the legal framework,
- The problems arising from the common attitude in the sector to disregard the interests of the rightsholders.

Currently, the existing collecting societies make an effort to pursue and manage rights by overcoming those obstacles. Their priority goal is to obtain a share of the private copy levies collected by the Ministry of Culture and Tourism. As mentioned above, before the 2001 amendment the LIA stipulated that three-quarters of the amount collected from the private copy levy had to be shared among the collecting societies (see 1.3.b). In recent years, the collecting societies are striving to get the collected amount in order to distribute it to their members. The collecting societies are still negotiating with the Ministry to reformulate the relevant article of the LIA. The number of collecting societies and the differences among the members and works they represent, however, slow down the process of determining the distribution criteria. Furthermore, the collecting societies are trying to acquire the authority to distribute banderols[5] that are obligatory for cinematographic works and achieving collective rights management for certain types of uses.

For instance, SE-YAP, in collaboration with AGICOA, an international not-for-profit organisation that tracks down and distributes royalties on retransmission of the products of independent producers,[6] is negotiating with the association of hotelkeepers to collect royalties for the exploitation of cinematographic works in hotels. SETEM which is a member of CISAC (The International Confederation of Authors and Composers Societies) is also engaging in the pursuit of their members' rights in Turkey and abroad.

Point A of Art. 42 LIA, which is the basic provision regarding collecting societies (see above) lays down the terms for determining tariffs. According to these terms, tariffs should be set at a reasonable level while considering the suitability of international practices to the economic and social conditions in the country. In addition, any impact should be avoided that would damage the structures of the sectors creating or using works, performances, phonograms, productions and broadcasts and/or prejudice generally accepted practices. This provision aims at balancing the interests of all parties. Another term for determining tariffs is that creating anti-competitive conditions should be avoided. For this reason, tariff classifications should be based on product prices in the relevant sectors and the shares of these sectors in the gross domestic product, bearing in mind the frequency with which works, performances, phonograms, productions and broadcasts are used and/or communicated.

Furthermore, Art. 42 LIA allows the societies that operate in the same field and/or sector to act jointly in the determination of tariffs, conclusion of contracts and other actions and transactions regarding the application of the LIA. They may also agree on joint tariffs. Another provision relating to joint tariffs is Art. 41 LIA. It determines principles for the use and/or communication in public premises of works, performances, phonograms, productions and broadcasts. According to that Article joint tariffs are binding upon the participating collecting societies.

By preparing uniform agreements the collecting societies are trying to provide the sector with a structure that protects the benefits of the rightsholders. It is proposed to make these agreements compulsory for all members of the sector, so that collecting societies can be active in all the contractual relations, and the interests of the rightholders can be protected against current practices which negatively affect them.

The collecting societies participate actively in meetings and projects of the relevant public institutions, especially the Ministry of Culture and Tourism, in order to protect the common interests of their members. They also maintain a continuous and intensive relationship with public institutions in order to solve problems regarding their members and the sector. For instance, the collecting societies were active participants in an EU-funded twinning project that was implemented by the Copyright and Cinema Directorate of the Turkish Ministry of Culture and Tourism. Currently they are among the members of a coordination committee on fighting piracy, teaming up with public institutions and universities.

Other activities of collecting societies in the field of cinematographic works include representing Turkey abroad and organising festivals in the country. They also work to create awareness of their members and the society about the rights of authors.

5) According to Art. 3 (f) of the Law of Cinema Video and Musik Works of Art a "banderole" is "the label which is stuck on the band, cassette and outer package of the works that makes the stuck material lose its special feature when removed and which the special sign of the person with the enterprise certificate and serial number is on."

6) http://www.agicoa.org/agicoa/about/about.html

As mentioned above, collecting societies and NGOs try to establish model agreements or contracting principles in order to overcome problems concerning the negotiation of contracts. A framework agreement and a model agreement were drafted by The Association of Script Writers (SENDER). It was hoped that the use of such documents would create an atmosphere for the benefit of the authors. However, neither the framework agreement nor the model agreement has attracted considerable attention. These documents reflect the problems of the sector and targeted principles.

The framework agreement entitled "the protocol for working principles of the sector" aims at providing constructive sectoral cooperation. The parties to this agreement should be the producer and SENDER. The framework agreement formulates some principles such as: all negotiations between scriptwriters and producers must be in writing, they must enter into a prior contract and the producers should make an advance payment, the amount of this advance payment is to be determined by a tariff fixed by agreement between the producers and SENDER. An additional fee should be paid to the scriptwriter if the characters created by him are used in advertisements; and at the scriptwriter's request, collecting societies may become parties to the agreements.

The subject of the model agreement, which has been recommended by SENDER to its members for their contracts with producers, is the assignment of economic rights and the authority to exploit moral rights in exchange for a copyright royalty. Some of the most notable provisions in the agreement are as follows:

- The producer has the preferential right for any eventual adaptations of the script into a television serial; however the scriptwriter should receive in return a copyright royalty in the amount of 5% of the net sale price paid by the TV channel per episode.
- If the producer does not begin to make the film within, at the latest, one year following the signing of the agreement, the scriptwriter has the right to sign agreements with other producers.
- The producer may not change the manner and/or timing of payment by invoking excuses such as amendments in tax laws or other legal regulations.
- The producer shall report to the scriptwriter as regards the costs and profits, etc.

According to Article 42/B LIA, collecting societies are under the supervision of the Ministry with regard to administrative and financial issues. If the Ministry establishes that a collecting society is not fulfilling its duties and obligations as laid down by this Article and Art. 42 and 42/A LIA or is not making collections and distributions in compliance with contracts or is making wrong or unfair distributions or is not setting tariffs in compliance with the principles laid down by the third paragraph of Art. 42/A, the Ministry shall warn the collecting society in writing; and if the fault is not remedied the collecting society shall be warned for a second time. If the collecting society does nothing in spite of the second warning, the Ministry shall invite the members to hold an extraordinary general assembly within three months. Until the extraordinary general assembly is held, those persons who are found to have misused their authority regarding the actions and transactions of the society shall be dismissed from service as a precautionary measure by the Ministry. The Ministry shall make a new appointment in their place, or the substitute member next in line shall be called upon to assume their duties.

Concerning rightsholders' representation on governing/management bodies of the collecting societies, only full members may be members of the compulsory organs and may vote in the general assembly. As members of the board of auditors, which is one of the compulsory organs of the collecting societies, they audit the accounts and transactions of the board of directors. Likewise, the board of directors is composed of rightsholders (full members) and conducts activities necessary to ensure transparency. Furthermore, the rightsholders may make complaints to the Ministry regarding the transactions of the governing/management bodies and thus trigger active supervision.

IRIS *Special*

Creativity Comes at a Price
The Role of Collecting Societies

This latest IRIS *Special* report focuses on the rights and remuneration of creative forces other than producers and composers, namely script writers, set designers, cameramen, sound designers, lighting designers, editors, choreographers, costume designers, make-up artists, actors, dubbing artists, dancers, musicians, vocal performers and others.

IRIS *Special* examines the mechanisms that enable these professional groups to share in the profits resulting from the exploitation of works to which they contributed. All the means by which audiovisual works may be exploited (e.g. cinema, television broadcasting, video/DVD, VoD and all other forms of online distribution) are considered.

Austria
France
Germany
Hungary
Italy
Netherlands
Norway
Poland
Spain
Switzerland
Turkey
United Kingdom

The main features of IRIS *Special*:

- The complexity of national copyright rules for intellectual property rights
- The determination and indication of the level of remuneration
- The 86 most important collecting societies in 12 European countries
- The rightsholders' choice or obligation to collective rights management
- Current practices of collective rights management
- The cases of unknown rightholders
- Social benefits and industry support by collecting societies
- Collective rights management on a cross-border level

Individual country chapters for 12 European countries covering the four main aspects of collective rights management:

- **The Legal Framework**
  The provisions that form the legal basis for the attribution of rights (the distinction of professional groups, their respective rights, etc.)
- **The Practice in Rights Management**
  Who manages these rights in practice (transfer of rights to third parties, fall-back clause for some rights, etc.)
- **The Institutional Framework of Collecting Societies**
  General information on the various collecting societies that manage some or all of the rights (their legal bases, organisation, services offered, collection and distribution of royalties, etc.)
- **The Rightsholders' Perspective**
  The practice of rights management for the individual rightsholders (their choice of collecting societies and relations with them, their financial return, control, etc.)

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

EUR 95 – ISBN 978-92-871-6591-6