Copyright licensing rules in the European Union

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Foreword

In film and audiovisual production and distribution, like in any other economic sector, there is legislation and then there are the realities of the market. The former provides a framework that protects the interests of the different stakeholders. The latter is reflected in individual negotiation (where bargaining power is key) and industry practices. The great number of participants in the creation and distribution of a cinematographic or audiovisual work brings a high degree of legal complexity to the negotiating table.

This publication focuses on the legal framework applying to the production and distribution of audiovisual works. It explains the key concepts of copyright and related rights, provides an overview of the international and European minimum standards of protection that intervene in the licensing process and presents the newly adopted provisions aimed at facilitating the rights clearance process. Moreover, it explores the different national rules on the aggregation of the various rights involved in the production and exploitation of film and audiovisual works and on the various forms of remuneration, discusses the principle of territoriality in copyright law and its implications for the exploitation of audiovisual works, and proposes a selection of examples from European and national case law on some of the key concepts involved in the various stages of the licensing process.

With regard to the realities of the market, in the course of drafting this publication, we had various exchanges with several industry stakeholders represented in the Advisory Committee of the European Audiovisual Observatory in order to help us identify and collect elements on existing licensing practices. It is worth noting that this publication was drafted at the height of the COVID-19 pandemic and that this very unique situation made the work of gathering information from external sources particularly difficult. I would therefore like to deeply thank all contributors for having provided their contribution despite the difficult circumstances: this kind of input brought great added value to our work, considering that these very practical aspects are rarely reported on.

A special thanks goes to EUROVOD, the association of European Video on Demand platforms specialised in art-house, independent and European cinema, for sharing some of their licensing practices in the form of case studies and contract templates for VOD rights, which are available in the Appendix to the publication.

Given the importance of the topic and its continuous evolution, especially in the online field, the European Audiovisual Observatory will continue following the situation and hopefully we will be able to provide more information on industry practices in future publications.

Stay safe and enjoy your read!

Strasbourg, July 2020

Maja Cappello
IRIS Coordinator
Head of the Department for Legal Information
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Executive summary

In all respects, copyright is a key factor to be considered throughout the entire value chain of films and audiovisual works, from pre-production to all forms of exploitation. First of all, unlike other works protected by copyright, such as books or paintings, films and audiovisual works have the specificity of involving several rightsholders. Thus, the production of a work implies the prior clearing of all rights concerning the rightsholders involved in the project and, in some cases, the acquisition of licences for the use of pre-existing works. After this rights-clearing exercise, the producer will be able to license the work for the different exploitation channels. **Chapter 1** sets the scene, with insights into the key concepts of copyright and related rights and the particular rights involved in the production of a film or audiovisual work along the value chain and its exploitation.

At the supranational level, minimum standards for the protection of copyright and related rights were first established by the 1886 Berne Convention and the 1961 Rome Convention. The scope of protection of these rights was later extended on a wider scale by the 1994 TRIPS Agreement and adapted to the digital era by the two 1996 WIPO Internet Treaties and the 2012 WIPO Beijing Treaty on Audiovisual Performances. A certain degree of harmonisation has also been achieved at EU level under the EU copyright "acquis", through a set of eleven Directives and two Regulations, which provide for exclusive rights for authors, performers, producers and broadcasting organisations. The recent Copyright Directive in the Digital Single Market has put the final touches to the EU acquis to make copyright and related rights fit for the digital age. As far as licensing is concerned, the directive introduces, in particular, new provisions to facilitate rights clearance processes, such as measures to ensure wider access to audiovisual works on VOD platforms or to fair remuneration in the exploitation contracts of authors and performers. **Chapter 2** gives an overview of the international and European minimum standards of protection that intervene in the licensing process and presents the newly adopted provisions to facilitate the rights clearance process.

Beyond these minimum standards of protection, national laws define more precisely the rules for the licensing of copyright for the production and exploitation of audiovisual works. As far as the authorship of such works is concerned, in addition to that of the principal director of the work under EU law, most EU member states tend to give the status of co-author to any person who has made a sufficient creative contribution to the work. As regards the transfer of rights, which is essential for the producer, who must acquire all the rights of the relevant authors and performers in order to exploit the final work, two different systems are generally used in Europe: either there are general rules on copyright contracts with some specific rules on film production and agreements, or these are issued in the form of a more detailed regime for the main types of copyright contracts, sometimes including film production contracts. The different national rules on the aggregation of the various

rights involved in the production and exploitation of film and audiovisual works and on the different forms of remuneration are explored in more detail in **Chapter 3**.

This difference in national copyright licensing systems is made possible by the principle of territoriality, according to which each country can regulate copyright in its own way, within the framework of international treaties and relevant European directives. This principle, which allows rightsholders to grant territorial licences to different licensees in different countries, has been contested by some, who argue that this territorial fragmentation leads to additional transaction costs and creates legal uncertainty. On the other hand, its supporters defend the fundamental importance of this principle, which allows the granting of territorial licences and intervenes upfront in the financing of audiovisual works, thus contributing to greater cultural diversity in Europe. **Chapter 4** focuses on the principle of territoriality in copyright law and its implications for the exploitation of audiovisual works.

Chapter 5 proposes a selection of examples from European and national case law on some of the key concepts involved in the various stages of the licensing process, from the transfer of rights from creators to producers to the licensing of the copyright-protected work to users. Such concepts range from the very notion of ownership of rights in a given audiovisual work to the presumption of transfer of rights to producers, the notion of fair remuneration and the scope of the licence.

As the audiovisual sector is reshuffling its cards, with the recent emergence of new on-demand players and services entering the market and new content walled gardens appearing, contractual arrangements are being adapted to these new circumstances and have resulted in a wider variety of licensing practices and, consequently, in greater complexity. **Chapter 6** offers some concluding thoughts on the current state of play of copyright licensing practices in Europe, while **Chapter 7**, in the Appendix, focuses on the licensing of rights to these new players by presenting case studies on three different licensing models in the market.

1. Setting the scene

1.1. Key concepts of copyright and related rights

Copyright is present throughout the entire value chain of films and audiovisual works, from pre-production to all forms of exploitation. It is a key factor when a producer decides to put together a project, which entails licensing the rights of the authors involved in it and, in some cases, licensing the rights to pre-existing works. Moreover, once production is completed, the licensing of copyright is what allows the producer to commercialise the final work through the different exploitation windows.

According to the World Intellectual Property Organization (WIPO), intellectual property refers to "*the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.*"[1] Traditionally, intellectual property (IP) has been divided into two main branches: industrial property and copyright. While the former includes patents for inventions, industrial designs, trademarks, etc., the latter "*relates to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works (such as computer programs and electronic databases).*"[2] Contrary to the protection of inventions, copyright protects the original expression of ideas, not the ideas themselves, from the moment the work is created, without any kind of prior registration or formality being required. Depending on the language and the copyright system, copyright refers to author's rights and related rights. While common law countries put the accent on the actual copying of an original work (copyright), civil law jurisdictions underline the rights generated by the authors (author's rights) and other rightsholders.

Copyright protects two types of rights: economic and moral rights. Economic rights comprise the rights to authorise (or prohibit) the reproduction, communication to the public, distribution, broadcast, public performance, translation or adaptation of an original work. These rights can be transferred or licensed by rightsowners to a third party in return for payment. In turn, moral rights, which allow authors and performers to take certain actions to preserve and protect their link with their work, are usually not transferrable. Moral rights include the right of attribution (the right of authorship to be claimed and acknowledged), the right of integrity, which is the right to "*object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.*"[3] In most countries, the duration of copyright lasts until at least 50 years after the author's death (70 years in many countries, including all EU member states). In the case of collective works, the longest-living author is taken to

[1] *WIPO Intellectual Property Handbook: Policy, Law and Use*, Chapter 1, WIPO, 2004 https://www.wipo.int/about-ip/en/iprm/

[2] *Understanding Copyright and Related Rights*, WIPO, 2016, https://www.wipo.int/publications/en/details.jsp?id=4081

[3] Article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), https://wipolex.wipo.int/en/treaties/textdetails/12214.

calculate the duration of copyright. After said period, works enter the public domain and are no longer protected.

The author of a work is the initial copyright owner or, in the case of collective works, the authors share the ownership of the copyright. However, in some cases, the work may be created by an author employed for the purpose of creating that work, in which case the employer or commissioner of the work owns the economic rights, although the author generally retains the moral rights. In many countries, the initial copyright holder may transfer through assignment or licensing some economic rights in the work to a third party. In either case, this transfer of economic rights is attached to financial modalities which may take several forms (or combination of forms) depending on the labour market and the cultural and/or legal traditions of the country concerned. An assignment by which the property right is transferred to a third party, who then becomes the new rightsholder, is not always possible under some national legislations where only licensing is allowed; licensing means that the initial copyright holder authorises a third party to use and exploit the work for a specific purpose, within a given geographical area and time framework, in an exclusive or non-exclusive way, but retains the ownership of the work (or a share of it in the case of collective works). Licensing may be managed by authors themselves or by a third party on their behalf. A common practice is for authors to mandate a collective management organisation (CMO)[4] to negotiate, license and collect the fees from licensees on their behalf, in particular for some forms of secondary exploitation, such as retransmission rights.

With regard to related or neighbouring rights, these protect the legal and economic interests of certain persons and legal entities that contribute to making works available to the public or that produce subject matter which contain sufficient creativity or organisational skills to justify legal protection. Traditionally, related rights have been granted to performers, producers of the first fixation of films, producers of sound recordings (phonograms) and broadcasters. Performers have the right to "prevent fixation (recording), broadcasting and communication to the public of their live performances without their consent [...] The rights in respect of broadcasting and communication to the public may be in the form of equitable remuneration rather than a right to prevent." [5] Certain national legislations also grant moral rights to performers so they can exercise control over the misuse of their name and image. In turn, producers of sound recordings have the right to "authorize or prohibit reproduction, importation and distribution of their sound recordings and copies thereof, and the right to equitable remuneration for broadcasting and communication to the public of their sound recordings." Lastly, broadcasters have the right to authorise or prohibit the rebroadcasting, fixation and reproduction of their broadcasts.

Film and audiovisual works have certain peculiarities which are taken into account by the legislator when addressing the question of copyright, such as who qualifies as the author of an audiovisual work, how to calculate the term of protection for such a work, or how to address the issue of territoriality in the licensing of these works. These questions are explained in more detail in Chapter 2 of this publication.

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[4] Collective Management of Copyright and Related Rights, WIPO, https://www.wipo.int/copyright/en/management

[5] *Understanding Copyright and Related Rights*, WIPO, 2016, https://www.wipo.int/publications/en/details.jsp?id=4081.

1.2. The value chain and exploitation windows

Films and audiovisual works are probably some of the more complex artistic works in terms of copyright and related rights. As opposed to a book written by an individual author or a painting produced by a single artist, a film or audiovisual work usually has several authors, producers and multiple rightsholders involved in its production; moreover, the wide range of exploitation windows for the final work provides for a great diversity of licensing options, which the producer explores on behalf of all rightsholders in the collective work under the principle of 'unification of rights in the producer' either through statutory provision (for example, France) or by contract. In addition, some film and audiovisual works may rely on pre-existing copyright material (a literary text, a musical composition, footage of other films, images, etc.). For all these reasons, it is not strange that the clearance of rights is pivotal when moving to the actual production and exploitation of a film or audiovisual work.

This section will explain the rights involved in the production of a film or audiovisual work along the value chain, as well as the licensing of the rights generated by the new work throughout the different windows of exploitation. To do this, first we need to understand the concept of 'value chain' and 'windows'. The concept of the value chain comes from the field of economic and business theory and it was introduced by Michael Porter in 1985.[6] Basically, it refers to the set of activities conducted by a company, from conception to distribution, in order to add value to their product or service. When applied to the film and audiovisual industry, this framework serves to produce a step-by-step model of the production of a film, from its conception to its exploitation. The different revenue streams generated by the money paid by the final consumer through each exploitation window constitute what we could call the recoupment chain, through which the economic contributors throughout the value chain (exhibitors, distributors, physical and online video publishers, producers, financiers, etc.) recover their investment. Within this context, the term 'window' refers to the different forms of exploitation for a film or audiovisual work, which include theatrical exhibition, broadcasting (pay TV, free TV), VOD (TVOD, SVOD), physical retail and rental.[7]

The value chain of a film or audiovisual work can be broken down into three main stages: pre-production, production and commercialisation. During these stages, the producer plays a crucial role of both a business and creative nature by taking the financial and legal risk for the entire production and having the first or second opinion on any creative decision. The first stage comprises the development and financing of the work; during this stage, the script is written under the responsibility of the screenwriter, a financing plan is put in place and contracts with the talent (the authors of the pre-existing work on which the script is based – if applicable – and the authors of the script, the director, the composer, etc.), cast and crew are signed with the producer. The financing plan may include equity investment from the different co-producers or co-financiers, public support

[6] Porter, M. (1985) *Competitive Advantage: Creating and Sustaining Superior Performance*, The Free Press.
[7] For more information on windows and how the windows system is articulated, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S., *Release windows in Europe: a matter of time, IRIS Plus*, European Audiovisual Observatory, Strasbourg, October 2019, https://rm.coe.int/release-windows-in-europe-a-matter-of-time/1680986358

in its different forms (subsidies and fiscal incentives), pre-sales and advances (this is not always the case, but distributors, international distributors and broadcasters may contribute to the financing of the film at this stage in exchange for certain exclusive exploitation rights) or gap financing (to be recouped from the revenues).[8] Most contracts with the authors, cast and crew are signed at this stage – first with the heads of the main departments (for example, the director of photography) and the main actors (as these will have an impact on the potential financing of the film), then with the rest of the cast and crew. As already mentioned, depending on the country, some of them would retain copyrights (director, scriptwriter, composer, etc.) or related rights (actors, performers, etc.) to the final work.

Moreover, it is also at this stage that the licensing or assignment of pre-existing works would start. First and foremost, in the case of the adaptation of a pre-existing literary work (a novel, a biography, a short story, etc.) or a remake, spin-off or any other form of reuse or adaptation of pre-existing audiovisual works, the rights of the pre-existing work are cleared at the very beginning of the development phase, as the producer needs to know that the intended work can be used for the purpose of producing the new film or audiovisual work. It is common for the licensor and licensee to sign an option agreement, which would allow the producer not to disburse the entire amount due for the licensing of the rights until they are certain that the film will go into production; it also prevents the copyright of the author of the pre-existing work from being blocked for other adaptation opportunities should the producer fail to enter production within the foreseen schedule, in which case the licensed rights would return to the author. Other works such as musical works can be cleared at this stage or later on, during the production or the post-production stage.

The next stage of the value chain is the production stage, which comprises the actual shooting of the film and its post-production, from the day of principal photography to the delivery of the final print (normally a digital print copy, DPC). During the shooting, the work is recorded and then later edited during the post-production stage; this is the moment at which the music composed for the film as well as that licensed is included in the soundtrack.

The last stage involves the actual commercialisation of the work, including its marketing, distribution and exploitation. This stage includes the physical or digital distribution of the work to the end consumer through a variety of distribution channels operating under a diversity of business models, as well as the marketing and promotion activities related to it. As already mentioned, this is a multi-window process, with windows being exploited sequentially (one after the other), in parallel or a mix of both. A traditional exploitation schedule of a film would begin with the theatrical distribution in the country of production (via a national distributor) and in other countries – sometimes with an international sales agent acting as an intermediary between the producer and the domestic distributors abroad. In the case of international co-productions, it is usually the producer in each co-producing country who retains the distribution rights for their respective domestic markets.

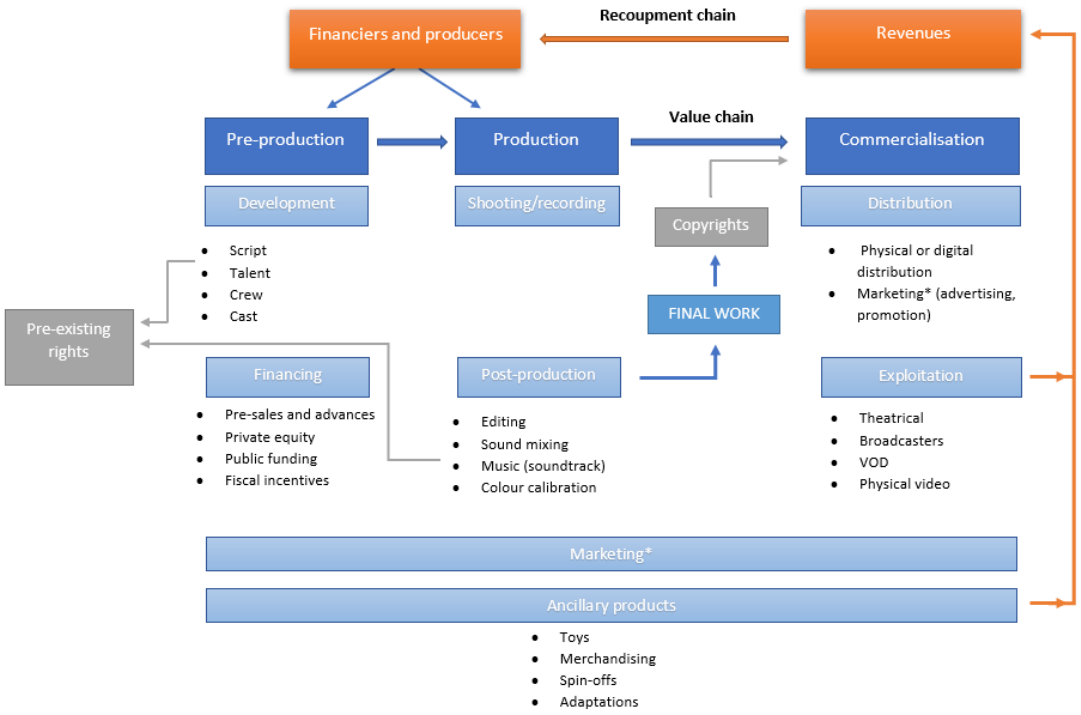
[8] For more information on financing, see Kanzler M., *Fiction film financing in Europe: A sample analysis of films released in 2017*, European Audiovisual Observatory, Strasbourg, 2019, https://rm.coe.int/fiction-film-financing-in-europe-2019/1680998479

The following windows to be licensed would be home entertainment (physical, such as DVD and BR, and online, such as TVOD, SVOD and AVOD), and then pay TV and free TV. As mentioned when discussing the financing phase in the pre-production stage, these rights could already be licensed before starting the production of the film, with the money from the advances (from the future distributor, offline or online home entertainment publisher, broadcaster and/or international sales agent) being used for the financing of the film, which implies that it will not make up part of the recoupment plan. Although the agreed advance is normally payable upon delivery of the film, the contract will usually secure the producer a bank loan. Equally, depending on the production model, the marketing and advertising of the work can already start during the pre-production stage, which is commonly the case with larger productions. Similarly, the licensing of ancillary rights (for merchandising and other products using the image or content of the film) can take place either at this stage or during the pre-production stage.

Regardless of whether the licensing takes place before the work is completed or not, the rights need to be licensed for a given territory over a given period and for one or more windows of exploitation, in exclusivity or not. The exploitation of the work triggers revenues for the different licensees throughout the value chain (exhibitors, distributors, offline and online video publishers, broadcasters and sales agents) and ultimately for the producers, but also, in certain cases, for the authors and performers involved in the production as well as the author of the pre-existing works used in it, as their copyrights and related rights may entitle them to a share of the revenues from each exploitation, depending on their contract. If they assigned their rights for a lump-sum payment (buy-out contract), they will not receive anything.[9] In other words, the stream of revenues retraces the path of the value chain, from the ultimate consumers to the producer, authors and performers along the recoupment chain.

[9] For more details on remuneration issues, see Chapter 3 of this publication.

Figure 1. Flowchart of the value and the revenue chain of a theatrical production



Source: European Audiovisual Observatory

**Marketing activities may begin at any time of the value chain, although these commonly take place during the commercialisation stage, especially in the case of low and average budget productions.*

2. Statutory rights under international and EU law

An internationally recognised system of effective copyright and related rights has been established over the years to protect all the various creative, financial, technical and entrepreneurial contributions required to produce, finance and commercialise a film or audiovisual work. International and EU law have set minimum levels of protection by determining the types of rights granted to given rightsholders and the way in which those rights may be exercised. Chapter 2 gives an overview of the minimum standards of protection established at international and EU level that intervene in the licensing process of film and audiovisual works and presents the newly adopted provisions to facilitate the rights clearance process.

2.1. Minimum standards of protection under international law

2.1.1. Authors' rights

2.1.1.1. The Berne Convention, at the cornerstone of copyright

The Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention", BC) is the oldest multilateral copyright convention (concluded in 1886, last updated in 1971).[10] The Berne Convention deals with the protection of works and the rights of their authors. It aims to harmonise to a certain extent the copyright laws of all Contracting States by introducing minimum standards of protection for authors. Its provisions leave a great amount of discretion to Contracting States. The Berne Convention is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The three basic principles are the following:

- The principle of "national treatment", that is, works originating in one of the Contracting States (by nationality or place of residence of the author, or by place of first publication of the work) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals.

[10] Berne Convention for the Protection of Literary and Artistic Works, https://www.wipo.int/treaties/en/ip/berne/index.html. The Berne Convention, concluded in 1886, was revised in Paris in 1896 and in Berlin in 1908, completed in Berne in 1914, revised in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971, and was amended in 1979.

- The principle of "automatic protection", that is, protection must not be conditional upon compliance with any formality.
- The principle of "independence of protection", that is, protection is independent of the existence of protection in the country of origin of the work. If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

The minimum standards of protection established under the Berne Convention relate to the works and rights to be protected, as well as to the duration of protection. As far as works are concerned, protection must include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression" (Article 2(1) BC). Cinematographic works, which are specific due to the fact that they combine images and sound, include, in many cases, pre-existing works and involve multiple contributors, are expressly included in the scope of protection as literary and artistic works ("cinematographic works to which are assimilated works expressed by a process analogous to cinematography", Article 2 BC). In addition, the Berne Convention contains a specific provision concerning such works, by distinguishing between the copyright protection granted to the cinematographic work as an original work and the protection of any pre-existing work which is included in the cinematographic work or which has been adapted for the purposes of the cinematographic work (for instance, images or sounds, a novel..) (Article 14bis BC).[11]

Another question linked to cinematographic works relates to the ownership of rights for such work, as in most cases they include a number of contributions. To grant ownership to every one of them would not be practical, and contrary to the basic principle of the Berne Convention to grant rights to individual authors. Article 14bis 2(a) of the Convention leaves the question of ownership of copyright in a cinematogaphic work to the discretion of the Contracting States.[12] However, the Convention establishes a presumption of legitimation, which applies to countries that have chosen to give authorship to all or some contributors, as follows:

- Authors whose works have contributed to the making of a film "(…) may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work." (Article 14bis 2(b))
- The presumption is not applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof (Article 14bis 3 BC).

[11] Specifically, Article 14bis BC provides that "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work (..)."
[12] Countries usually follow three main options: (i) all contributors are granted authorship; (ii) only specific contributors are given authorship (writer, music composer, director); (iii) only the producer or maker of the film is given authorship (EU/Common law examples).

With regard to the economic rights granted to authors, the following rights must be recognised as exclusive rights of authorisation, subject to certain permitted reservations, limitations or exceptions:

- the right to translate;
- the right to make adaptations and arrangements of the work;
- the right to perform in public dramatic, dramatico-musical and musical works;
- the right to recite literary works in public;
- the right to communicate to the public the performance of such works;
- the right to broadcast (with the possibility for a Contracting State to provide for a mere right to equitable remuneration instead of a right of authorisation);
- the right to make reproductions in any manner or form (with the possibility that a Contracting State may permit, in certain special cases, reproduction without authorisation, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author);
- the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.

The Berne Convention also provides for "moral rights", that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honour or reputation. As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. As an exception to the general rule, in the case of audiovisual (cinematographic) works, countries of the Union may provide that the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work.

The Berne Convention allows for certain limitations and exceptions to economic rights, that is, cases in which protected works may be used without the authorisation of the owner of the copyright. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) BC (reproduction in certain special cases), Article 10 BC (quotations and use of works by way of illustration for teaching purposes), Article 10bis BC (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and Article 11bis(3) BC (ephemeral recordings for broadcasting purposes).

Article 9(2) of the Berne Convention has set out three conditions that, today, still govern exceptions and limitations to copyright and related rights under international and EU law, namely that:

- they be limited to special cases,
- provided that the act does not conflict with a normal exploitation of the work, and
- does not unreasonably prejudice the legitimate interests of the author.

These three conditions, known as the "three-step test", are used to determine whether or not an exception or limitation is permissible under the international norms on copyright and related rights. Although the three-step test under Article 9(2) initially applied exclusively to the right of reproduction, it was later extended to all exclusive rights under other international treaties.

The Berne Convention has been revised on many occasions in order to accommodate new technological developments. On 11 February 2020, 178 states were parties to the Berne Convention.

2.1.1.2. The TRIPS Agreement and the WIPO Copyright Treaty

More recent conventions, such as the 1994 World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement")[13] and the 1996 WIPO Copyright Treaty (WCT),[14] refer expressly to the Berne Convention.

The TRIPS Agreement placed copyright in a world trade context and expanded the principles of copyright to even more countries, whilst at the same time updating copyright in the light of events since the last Berne revisions in the 1970s. In particular, the TRIPS Agreement addresses the applicability of the basic principles of intellectual property rights and provides for effective enforcement measures for those rights, as well as for multilateral dispute settlement and transitional arrangements.

On the other hand, the WCT takes these efforts further and updates authors' rights in the Internet digital era by granting them three new exclusive rights, as follows:

- The right to authorise or prohibit the distribution to the public of original works or copies thereof by sale or otherwise (right of distribution);
- The right to authorise or prohibit the commercial rental of cinematographic works or works embodied in phonograms (right of rental);
- The right to authorise or prohibit the communication to the public of their original works or copies thereof, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (right of communication to the public).[15]

As to limitations and exceptions, Article 10 WCT incorporates the so-called "three-step test" to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights. According to this test, as first enacted in the Berne Convention in 1967, three conditions must be fulfilled in order to create an exception or limitation to the reproduction of a work without the authorisation of its rightsholder(s): "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain special cases, provided that [b] such

[13] The TRIPS Agreement, https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm.
[14] The WIPO Copyright Treaty, https://www.wipo.int/treaties/en/ip/wct/.
[15] The quoted expression covers, in particular, on-demand, interactive communication through the Internet.

reproduction does not conflict with a normal exploitation of the work and [c] does not unreasonably prejudice the legitimate interests of the author."

The Agreed Statement accompanying the WCT provides that such limitations and exceptions, as established in national law in compliance with the Berne Convention, may be extended to the digital environment. Contracting States may devise new exceptions and limitations appropriate to the digital environment. The extension of the existing limitations and exceptions or the creation of new ones is allowed if the conditions of the "three-step" test are met.

2.1.2. Related rights

Related rights (also referred to as "neighbouring rights") are related to copyright but exist in their own right. Their purpose is to protect the legal and economic interests of certain persons and legal entities who have a different involvement with works and who contribute to making them available to the public. The overall purpose of these related rights is therefore to protect those people or organisations that add substantial creative, investment or organisational skills to the exploitation of the work.

2.1.2.1. The Rome Convention

The main problem with related rights is that, originally, hardly any national copyright law dealt with them. To remedy this absence of protection under traditional copyright rules, a separate system of related rights was created at international level, through the signing in Rome in 1961 of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the "Rome Convention").[16] The Rome Convention was the first attempt to establish international rules and standards in this area, and it is still the basis for most legislation in this field (although the laws of many states have exceeded its minimum levels of protection). Three basic categories of rightsholders were seen as deserving protection in addition to what copyright was already offering:

- Performers (actors, dancers, etc.): because their creative intervention gives life to the works they are performing;
- Producers of phonograms: in order to ensure that they can protect their efforts and investment, including by taking action against unauthorised uses;
- Broadcasting organisations: as they play a similar role to that played by producers of phonograms and they should have the right to control the transmission and retransmission of their broadcasts and recoup their investment.

Whatever right is granted is a separate right that leaves the existing copyright in works untouched (Article 1 Rome Convention). Neighbouring rights, like copyright, are granted on the basis of national treatment, that is to say, the treatment accorded by the domestic law

[16] The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, https://www.wipo.int/treaties/en/ip/rome/index.html.

of the Contracting State in which protection is claimed. This means the treatment that is given to performers who are nationals of that Contracting State for performances that are taking place, that are broadcast or that are first fixed on the territory of that Contracting State. For broadcasting organisations, the treatment concerned is that given to broadcasting organisations which have their headquarters on the territory of the Contracting State concerned in relation to broadcasts that are transmitted from transmitters that are situated in that territory (Article 2 Rome Convention). As to the rights granted, the Rome Convention secures the following rights as far as performers and broadcasting organisations are concerned:[17]

- Performers (for example, actors) are protected against certain acts to which they have not consented, such as the broadcasting and communication to the public of a live performance; the fixation of the live performance; and the reproduction of the fixation if the original fixation was made without the performer's consent or if the reproduction was made for purposes different from those for which consent was given. As regards audiovisual recording, the protection granted is weaker than for audio recordings, because it is considered that once a performer has consented to the incorporation of his or her performance in an audiovisual fixation, the rights shall have no further application (Article 19 Rome Convention). In other words, in the audiovisual area, performers only have a right of fixation under the Rome Convention.
- Broadcasting organisations have the right to authorise or prohibit certain acts, namely the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; and the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention allows for limitations and exceptions to the above-mentioned rights in national laws as regards private use, the use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases where national law provides exceptions to copyright in literary and artistic works. As to the term of protection, protection must last at least until the end of a 20-year period computed from the end of the year in which the performance took place (for performances not incorporated in phonograms) or the broadcast was made. However, national laws increasingly provide for a 50-year term of protection (often as far as performances are concerned).

2.1.2.2. TRIPS Agreement and WIPO Beijing Treaty on audiovisual performances

The WTO TRIPS Agreement also dealt, in 1994, with neighbouring rights. The TRIPS Agreement sets out minimum standards of protection in Article 14; these standards, which Contracting States need to implement, show strong similarities with the provisions of the Rome Convention. The fact that all WTO member states are obliged to implement all the

[17] The rights granted to phonogram producers fall outside of the scope of this publication.

agreements that resulted from the General Agreement on Tariffs and Trade (GATT) negotiations guaranteed an almost global coverage for the provisions on the related rights contained in the TRIPS Agreement. This was a significant step forward in the protection of these rights.

Later, in December 1996, the WIPO Performances and Phonograms Treaty (WPPT)[18] updated the core of the related rights of performers and phonogram producers in view of the increasing use of online means to exploit and deliver works, based on digital technologies and the Internet. However, the WPPT granted performers economic rights in respect of their performances fixed in phonograms, but not in audiovisual fixations, such as motion pictures.[19] In order to remedy this situation, activity continued at WIPO level in the audiovisual field and led to the adoption, in 2012, of the Beijing Treaty on Audiovisual Performances (the "Beijing Treaty").[20] The Beijing Treaty specifically provides for a presumption of transfer that once a performer has consented to the fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of the Treaty shall be owned or exercised by or transferred to the producer of such an audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law. (Article 12).

It also deals with the related rights of performers in audiovisual performances and grants them four kinds of economic rights, as follows:

- the right of reproduction, that is, to authorise the direct or indirect reproduction of the performance fixed in an audiovisual fixation in any manner or form;
- the right of distribution, that is, to authorise the making available to the public of the original and copies of the performance fixed in an audiovisual fixation through sale or other transfer of ownership;
- the right of rental, that is, to authorise the commercial rental to the public of the original and copies of the performance fixed in an audiovisual fixation; and
- the right of making available, that is, to authorise the making available to the public, by wire or wireless means, of any performance fixed in an audiovisual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them (for example, for on-demand exploitation).[21]

The Beijing Treaty also grants audiovisual performers moral rights, that is, the right to claim, to be identified as the performer, and to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation. The Beijing Treaty provides that performers shall enjoy the right to authorise the broadcasting and communication to the public of their performances fixed in audiovisual fixations. However, Contracting States may, instead of an exclusive right of authorisation, grant a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual

[18] WIPO Performance and Phonograms Treaty, https://www.wipo.int/treaties/en/ip/wppt/.
[19] For more information on the WPPT, please consult: https://www.wipo.int/treaties/en/ip/wppt/.
[20] The Beijing Treaty on Audiovisual Performances (2012), https://www.wipo.int/treaties/en/ip/beijing/.
[21] The Beijing Treaty also grants performers rights in relation to their unfixed (live) performances. For further details, please consult: https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html.

fixations for broadcasting or communication to the public.[22] In addition, the Beijing Treaty allows Contracting States to provide for a rebuttable legal presumption of the transfer of performers' rights to the audiovisual producer (that is, unless a contract between the performer and the producer states otherwise). Irrespective of such a transfer of rights, national legislation or individual, collective or other agreements may provide that the performer is entitled to receive royalties or equitable remuneration for any use of the performance. As to limitations and exceptions, the Beijing Treaty also incorporates the "three-step" test to determine limitations and exceptions (Article 13 Beijing Treaty), and extends its application to all rights.[23] The term of protection must be at least 50 years. Furthermore, the enjoyment and exercise of the rights provided for in the Treaty cannot be subject to any formality. In addition, the Beijing Treaty obliges Contracting States to provide for legal remedies against the circumvention of technological measures (for instance, encryption) used by performers in connection with the exercise of their rights, and against the removal or altering of information – such as the indication of certain data that identify the performer, the performance and the audiovisual fixation itself – necessary for the management (for example, the licensing and the collecting and distribution of royalties) of the said rights ("rights management information").

The Beijing Treaty is open to states who are members of WIPO and to the European Union. It shall enter into force three months after 30 eligible parties have deposited their instruments of ratification or accession. The Beijing Treaty on Audiovisual Performances gained a key 30th member on January 28, 2020, allowing its entry into force for its 30 contracting parties on April 28, 2020.[24]

2.2. Economic rights under the EU copyright "acquis"

Each of the 27 EU member states has its own copyright law and policy at national level. Nevertheless, the European Union has adopted several legal instruments in the field of copyright and related rights and has achieved some degree of harmonisation. By setting harmonised standards, the European Union aims at reducing national discrepancies; ensuring the level of protection required to foster creativity and investment in creativity; promoting cultural diversity; and ensuring better access for consumers and businesses to digital content and services across Europe.

[22] In addition, any Contracting State may restrict or – provided that it makes a reservation to the Treaty – deny this right. In the case and to the extent of a reservation by a Contracting State, the other Contracting States are permitted to deny, vis-à-vis the reserving Contracting State, national treatment ("reciprocity").
[23] The accompanying Agreed Statement provides that the Agreed Statement of Article 10 of the WCT applies similarly to the Beijing Treaty, that is, that such limitations and exceptions as established in national law in compliance with the Berne Convention may be extended to the digital environment. Contracting States may devise new exceptions and limitations appropriate to the digital environment. The extension of the existing limitations and exceptions or the creation of new ones is allowed if the conditions of the "three-step" test are met.
[24] See "WIPO's Beijing Treaty on Audiovisual Performances Set to Enter into Force with Indonesia's Ratification; Aims to Improve Livelihoods of Actors and other Audiovisual Performers", WIPO press release of 28 January 2020, https://www.wipo.int/pressroom/en/articles/2020/article_0002.html.

The so-called EU "acquis" in the field of copyright is composed of a set of eleven directives and two regulations.[25] The European Commission monitors its timely and correct implementation in the member states. In addition, the Court of Justice of the European Union (CJEU) has significantly contributed to the consistent application of copyright rules across the European Union by developing a substantive body of case law interpreting the provisions of the directives. Most of the EU copyright acquis reflects the member states' obligations under the Berne and the Rome conventions, as well as the obligations of the European Union and its member states under the WTO TRIPS Agreement and the 1996 WIPO Internet Treaties (the above-mentioned WCT and WPPT). In addition, in the last few years, the European Union has signed the Beijing Treaty and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled.[26] Moreover, free trade agreements, which the European Union concluded with a large number of third countries, reflect some provisions of EU law. The economic rights granted to rightsholders in the audiovisual sector are provided for and their exercise is mainly regulated through the directives presented below.[27]

2.2.1. Overview

2.2.1.1. The "InfoSoc" and "Copyright" Directives

Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive")[28] was designed to update copyright rules to the (then nascent) digital networks and to implement the two 1996 WIPO Internet Treaties (WCT and WPPT). It harmonises several exclusive rights that are essential to the online dissemination of works and other protected subject matter. The InfoSoc Directive grants the following transferable rights to authors and neighbouring rightsholders (including performers, producers and broadcasting organisations): the reproduction right, the right to communication to the public and the distribution right. It also harmonises, to a lesser degree, the exceptions and limitations to these rights. Lastly, it harmonises the protection of technological measures and of rights management information, sanctions and remedies.

The InfoSoc Directive was amended by Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and

[25] For further details, please consult: https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation. See also, Guibault, L., Salamanca, O., van Gompel, S. *Remuneration of authors and performers for the use of their works and the fixations of their performances*, Europe Economics and IViR, Final Report, A study prepared for the European Commission, https://www.ivir.nl/publicaties/download/1593.pdf.

[26] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, WIPO, 27 June 2013, https://www.wipo.int/treaties/en/ip/marrakesh/.

[27] Contrary to economic rights, moral rights are not fully harmonised, so their scope of protection may vary from one country to another at EU level.

[28] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580808310147&uri=CELEX:32001L0029.

2001/29/EC ("Copyright Directive") of 17 April 2019.[29] The Copyright Directive updates but does not replace the 11 directives that form part of the acquis. As far as audiovisual works are concerned, the Copyright Directive mainly adapts key exceptions to copyright to the digital and the cross-border environment;[30] it sets some specific rules to facilitate the licensing of content, such as for the making available of audiovisual works on VOD platforms; it establishes the principle of appropriate and proportionate remuneration for authors and performers; and it creates some transparency obligations in relation to the exploitation of works and performances.[31]

2.2.1.2. The "Rental and Lending" Directive

Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[32] ("Rental and Lending Directive") provides for a codified version of its ancestor, Directive 92/100, which has been substantially amended several times. The Directive harmonises the legal situation regarding rental and lending rights and certain related rights (fixation, broadcasting or communication to the public, and the rebroadcasting rights of performers, phonogram producers and broadcasters).

The Directive provides that the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member states may provide for others to be considered as its co-authors (Article 2.2).[33] The Directive also establishes special rules for the transfer of the rights of performers appearing in films. It provides that when performers, individually or collectively, conclude a contract concerning film production with a film producer, they shall be presumed to have transferred their rental right, subject to contractual clauses to the contrary (Article 3(4)). Member states may provide for a similar presumption with respect to authors (Article 3(5)). In such a case, authors and/or performers retain an unwaivable right of remuneration for the rental of the audiovisual work (Article 5).

2.2.1.3. The "Satellite and Cable" Directives

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

[29] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0790

[30] Text- and data-mining, illustration for teaching, the preservation of cultural heritage.

[31] See this section, paragraph 2.2.4.

[32] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115.

[33] This provision can also be found in the Term Directive at Article 2.2. on cinematographic or audiovisual works, and in the Satellite and Cable Directive.

retransmission ("Satellite and Cable Directive")[34] introduced an exclusive right for authors to authorise the communication to the public by satellite of their works. It also introduced the principle of "country of origin" according to which copyright authorisations for satellite broadcasting only need to be obtained for the EU country of origin of the satellite broadcast and not for the EU countries where the signals are received. It also established the mandatory collective management of rights for cable retransmission.

It was amended and complemented by Directive (EU) 2019/789, which lay down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Directive on Online Transmissions of Broadcasting Organisations) of 17 April 2019.[35] The Directive on Online Transmissions of Broadcasting Organisations aims to improve the cross-border availability of television and radio programmes in the EU single market by making it easier to clear copyright and related rights for certain online services provided by broadcasters[36] and for the retransmission of television and radio programmes by means other than cable. It also contains rules for programmes transmitted via direct injection.[37]

2.2.1.4. The "Term" Directive

While in many countries moral rights have no time limit, economic rights are usually limited in time. The term of protection is longer in the European Union than the minimum period required under the Berne Convention (that is, 50 years from the death of the author), since it is set at 70 years from the death of the author, according to Directive 2011/77/EU of 27 September 2011 on the term of protection of copyright and certain related rights amending the previous 2006 Directive ("Term Directive").[38] For films or audiovisual works, the Term Directive sets the term of protection at 70 years after the death of the last survivor among the following:

- the principal director;
- the author of the screenplay;
- the author of the dialogue; and

[34] 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31993L0083.
[35] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1581063536063&uri=CELEX:32019L0789.
[36] For simultaneous transmissions over the Internet (simulcasting) and the catch-up services (possibility to view or listen to a programme online after a defined period of time).
[37] Direct injection is a technical process by which a broadcaster transmits programme-carrying signals to a distributor in such a way that the signals are not accessible to the public during the transmission.
[38] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:265:0001:0005:EN:PDF.

- the composer of music specifically created for use in the cinematographic or audiovisual works.

2.2.1.5. Other relevant directives

Copyright systems also provide for procedures and remedies against infringement of copyright (enforcement). These have been partly harmonised at EU level through Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (the "IPRED Directive").[39] The IPRED Directive provides a minimum set of measures, procedures and remedies allowing the effective civil enforcement of intellectual property rights across the European Union, thus ensuring a standardised level of protection throughout the internal market (for example, providing judicial authorities with evidence-gathering powers, powers to force parties commercially involved in an infringement to provide information on the origin of the infringing goods and provisions on the payment of damages).[40]

In addition, in February 2014, the European Union adopted the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market ("Collective Rights Management Directive").[41] The Directive is an essential part of Europe's copyright legislation, as it aims at ensuring that rightsholders have a say in the management of their rights, and at improving the functioning and accountability of Collective Management Organisations (CMOs). The Directive also intends to facilitate the multi-territorial licensing by collective management organisations of authors' rights in musical works for online use who are subject to several requirements.

2.2.2. Which right for which holder under the EU copyright acquis

Four main categories of rightsholders intervene in the audiovisual licensing process: authors, performers, producers and broadcasting organisations. This section focuses primarily on the exclusive rights that may intervene in the licensing process of a film or audiovisual work.

[39] Directive 2004/48/EC on the enforcement of intellectual property rights of 29 April 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0048.
[40] For further details, please consult: https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32004L0048.
[41] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026.

2.2.2.1. Authors

According to the EU copyright acquis, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. All authors enjoy the following exclusive (and transferable) rights:

- **Reproduction:** The right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of the original and copies of their works (Article 2a InfoSoc Directive);
- **Communication to the public, including making available to the public:** The right of communication to the public by wire and wireless means, including the making available to the public of their works (Article 3.1 InfoSoc Directive). The right of making available refers to the right to authorise or prohibit the making available to the public of their works "in such a way that members of the public may access them from a place and at a time individually chosen by them." This exclusive right encompasses all forms of interactive Internet distribution, VOD, webcasting, streaming, etc;
- **Distribution:** The right to authorise or prohibit any form of distribution to the public by sale or otherwise of the original of their works or of copies thereof (Article 4.1 InfoSoc Directive);
- **Rental and lending:** The right to authorise or prohibit the rental and lending of the original and copies of their works (Article 3.1a Rental and Lending Directive). Where an author has transferred or assigned his rental right concerning an original or copy of a film to a film producer, that author shall retain the right to obtain an equitable remuneration for the rental (Article 5.1 Rental and Lending Directive). Concerning the lending right, member states can choose to implement this right as an exclusive public lending right or as a right of remuneration (Article 6).

2.2.2.2. Performers

According to the EU copyright acquis, all performers enjoy the following exclusive (and transferable) rights:

- **Fixation:**[42] The exclusive right to authorise or prohibit the fixation of their performance (Article 7.1 Rental and Lending Directive);
- **Reproduction:** The exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of the fixations of their performances (Article 2b InfoSoc Directive);
- **Broadcasting and communication to the public:** The right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation (in other words, live performances), (Article 8 Rental and Lending Directive);

[42] According to the WIPO, the fixation is the process by which a live performance is captured for the first time on a medium from which it can be further enjoyed or reproduced. An "audiovisual fixation" means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;

- **Making available to the public:** The right of making available to the public of fixations of their performances (Article 3.2a InfoSoc Directive);
- **Distribution:** The right of distribution of fixations of their performances or copies thereof (Article 9.1a Rental and Lending Directive);
- **Rental and lending:** The right to authorise or prohibit rental and lending in respect of fixations of their performance (Article 3.1b Rental and Lending Directive). Where a performer has transferred or assigned his or her rental right concerning an original or copy of a film to a film producer, that performer shall retain the right to obtain an equitable remuneration for the rental (Article 5.1 Rental and Lending Directive). Concerning the lending right, member states can choose to implement this right as an exclusive public lending right or as a right of remuneration (Article 6). For performers, the right of remuneration is only optional for member states (Article 6(2)).

2.2.2.3. Producers

According to the EU copyright acquis, all producers enjoy the following exclusive (and transferable) rights:

- **Reproduction:** The exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of the first fixation of films in respect of the original performances and copies thereof (Article 2d InfoSoc Directive);
- **Making available to the public:** The right of making available to the public of the first fixations of films, of both the original and copies of their films (Article 3.2c InfoSoc Directive);
- **Distribution:** The right of distribution of the first fixation of films in respect of the original and copies of their films (Article 9.1.c Rental and Lending Directive);
- **Rental and lending:** The right to authorise or prohibit the rental and lending of the first fixation of a film in respect of the original and copies of their films (Article 3.1d Rental and Lending Directive);

2.2.2.4. Broadcasting organisations

According to the EU copyright acquis, all broadcasting organisations enjoy the following exclusive (and transferable) rights:

- **Fixation:** The right to authorise or prohibit the fixation of their broadcast, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite (Article 7.2 Rental and Lending Directive);[43]
- **Reproduction:** The right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of the fixation of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable and satellite (Article 2e InfoSoc Directive);

[43] A cable distributor shall not have the right of fixation where it merely retransmits by cable the broadcasts of broadcasting organisations (Article 7.3 Rental and Lending Directive).

- **Making available to the public:** The right of making available to the public of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable and satellite (Article 3.2d InfoSoc Directive);
- **Broadcasting and communication to the public:** The right to authorise or prohibit the rebroadcasting of their broadcast by wireless means, as well as the communication to the public of their broadcast, if such communication is made in places accessible to the public against payment of an entrance fee (Article 8.3, Rental and Lending Directive);
- **Distribution:** The right of distribution in respect of fixations of their broadcast (Article 9.1d Rental and Lending Directive).

2.2.3. New provisions to facilitate right clearance processes

On 17 April 2019, the EU Directive on copyright and related rights in the Digital Single Market (hereafter, the "Copyright Directive")[44] was adopted following intense negotiations in the Council and the European Parliament. The Directive, whose aim is to modernise EU copyright rules and make them fit for the digital age, regulates a number of areas where digital technologies have radically changed the way creative content is produced, distributed and accessed.

With regard to the licensing of rights in the digital environment, the Copyright Directive introduces new innovative provisions to facilitate the rights clearance process for the exploitation of works on VOD platforms, as well as measures to ensure fair remuneration for rightsholders in a context marked by the increasing complexity and opacity of new online distribution models.

The Copyright Directive must be implemented in the legislation of the member states by 7 June 2021 at the latest. The European Commission shall carry out its review of the directive no sooner than 7 June 2026.

2.2.3.1. Measures to ensure wider access to and availability of audiovisual works on VOD platforms

In its preparatory work for the Copyright Directive,[45] the European Commission identified a series of problems raised during the rights clearance process for VOD platforms which would have the effect of limiting the online availability of audiovisual works on such platforms. In particular, the Commission refers to some "contractual blockages generally linked to licensing practices based on exclusivity of exploitation rights and on the release windows system." As an example, the Commission refers to a situation "(…) where all the rights (including VOD rights) to a specific work have been granted on an exclusive basis to

[44] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, https://eur-lex.europa.eu/eli/dir/2019/790/oj.

[45] See Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules, Part I, p. 53 and following, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211.

an entity who is not interested in the online exploitation of the work (for example, a broadcaster to whom exclusivity was granted as a counterpart for the financing of the work)."

Another example given by the Commission refers to the case whereby a rightsholder decides to withhold the online rights until the rights for a theatrical release have been licensed, "in order to keep open its chances to get the highest revenues." According to the Commission, "[S]ome rightsholders want to keep maximum flexibility as regards exploitation rights, even if this leads to no exploitation on VOD platforms. In those cases, the online exploitation of the work remains blocked for an indefinite time." As another example, the Commission cites the case of broadcasters, who often "(…) insist upon full or partial holdbacks against TVOD or SVOD exploitation during the period covered by their licence." In those cases, the online exploitation of a work occurs at the very end of the release windows and this may, according to the Commission, negatively impact the attractiveness of VOD offers.

Another type of difficulty pointed out by the Commission relates to the complexity of rights clearance processes for VOD exploitation. In fact, the Commission highlights that it is not always easy to determine who owns the digital rights (for example, due to a lack of any licence from the initial author or succession issues) or whether all the rights for VOD exploitation have been cleared. The Commission cites the example of music rights included in a film that had not been cleared for SVOD exploitation, leading to the impossibility for a VOD platform to include this work in its SVOD catalogue.

Other potential obstacles relate to the lack of an efficient licensing model for online exploitation rights, which, in the Commission's view, mainly derives from the poor return on investment linked to making the works available on VOD plaforms. In particular, the costs in preparing content technically (encoding) for different platforms, each of them having their own technological specifications, have a direct impact on the return on investment. It is also true that at the beginning of any new business model, income is modest and the first examples of licensing income from VOD was – and in some cases remain – very modest. In this overall context, and in view of the still too low revenues for rightsholders and distributors, the Commission considers it necessary to have a very efficient licensing model (that is, easy contacts, negotiations kept to a minimum and standard contracts) that would limit transactions and technical costs.[46] All these obstacles explain, in the Commission's view, why some European audiovisual works, in particular small productions, are not available on VOD platforms.

In order to address these challenges, the Commission has excluded certain options, such as the imposition of obligations that would limit the contractual freedom of stakeholders. Instead, the Copyright Directive proposes a new voluntary negotiation mechanism for parties, who retain their contractual freedom, with the aim of facilitating the conclusion of agreements for the purpose of making available audiovisual works, in particular European works, on VOD platforms (Article 13, Recital 52). According to this provision, member states shall establish or designate an "impartial body" or mediators to

[46] The Commission highlights that aggregators, acting as intermediaries, face similar issues: a burdensome licensing process and title-by-title negotiation.

assist parties facing difficulties in negotiating the necessary licences by providing "professional, impartial and external advice."

The Commission considers that under this option, the rightholders' business model, based on exclusivity deals and release windows, would not be affected. Furthermore, this negotiation body could benefit rightsholders by unblocking situations (for instance, a broadcaster that insists on obtaining VOD rights even if it does not exploit them, in order to remain competitive with VOD platforms, or systematic refusals from VOD platforms or aggregators to include a work in the VOD catalogue). It is expected that the intervention of an impartial instance/moderator in such cases could facilitate discussions and help to find solutions.[47] However, the role of the moderator in such situations is at best uncertain, as it is part of the business environment and the balance of power between the different market operators.[48]

2.2.3.2. Fair remuneration in the exploitation contracts of authors and perfomers

The Copyright Directive acknowledges that contracts are rarely signed between persons with equal bargaining power and that measures to prevent the stronger party from taking advantage of this situation are necessary for the development of a healthy creative ecosystem:

> "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need (…) protection (…) to be able to fully benefit from the rights harmonised under Union law (…)" (Recital 72).

Chapter III of Title IV of the Copyright Directive ("Measures to achieve a well-functioning marketplace for copyright") addresses in six articles the question of fair remuneration in the exploitation contracts of authors and performers (referred to here jointly as "creators").[49]

First, Article 18(1) sets out a principle of "appropriate and proportionate" remuneration for creators that license their works/subject matter. As to what should be understood as "appropriate and proportionate," Recital 73 provides some further guidance, as follows:

> "[…] appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."[50]

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[47] Other solutions proposed to facilitate the licensing of audiovisual works and other subject matters on online-content sharing platforms are not addressed in this publication.
[48] It is also worth noting that some member states provide for mandatory retention of rights.
[49] With the exception of authors of computer programs.
[50] Beyond the question of the interpretation of what a "proportionate remuneration" should be, there are, in some cases, also issues related to the translation of the term "proportionate" in the different language

The reference to the actual exploitation of the work or the revenue generated by the exploitation (also found in Article 19(3), Article 20(1), and Recital 78 to define "disproportionate") suggests that creators could claim a remuneration which is not fixed but which increases over time in proportion with actual exploitation.[51] In addition, Recital 73 clarifies that a lump sum payment can constitute a proportionate remuneration "but it should not be the rule." It also mentions that member states are free to define specific cases for the application of lump sums, taking into account the specificities of each sector. The provision leaves the choice of mechanisms to the discretion of the member states when implementing the principle, subject to conformity with EU law. In previous versions of this provision, the existing or newly introduced mechanisms were referring to collective bargaining agreements, statutory remuneration rights and voluntary collective management practices.

It remains to be seen in practice how member states will implement this provision in such a way that lump sum payments, which are established before the exploitation phase on the basis of a given value, can take into account and be proportionate to the (unknown) revenues that will be generated by the exploitation of a work. It also remains to be seen to what extent Article 18 may ensure a fair remuneration to authors and performers in a context where market practices still prevail in industry negotiations. At the very least, it is to be hoped that Article 18 will provide an incentive for parties to negotiate.[52]

2.2.3.3. Transparency obligation

In order to make informed financial decisions, authors and performers must ensure that the royalties they receive under their contracts or the payments concerning their statutory remuneration rights are an accurate reflection of the revenue generated by the exploitation of their works or performances.

In practice, however, it may be difficult for creators to monitor the agreements reached by their contractual counterparts and the likely amounts negotiated. Given that online distribution is expected to become an increasingly common form of exploitation in the audiovisual sector (as well as in the music sector), the lack of transparency due to the growing complexity of new online distribution channels, the variety of intermediaries and

versions of the Directive. Thus, in the French version of the Directive, "proportionate" has been translated as "proportionnelle", whereas, according to some stakeholders, the term "proportionnée" would have been more appropriate. According to the various definitions found in dictionaries, "proportionnel" would be more determined in relation to a precise notion of magnitude, while "proportionné" woud refer more to an idea of general harmony. These differences may seem subtle but can end up being of significant importance in the negotiations between rightsholders and producers.

[51] At least that is how the coalition "Fair Internet for Performers Campaign" has interpreted this term in its press release on the occasion of the adoption of the Directive, "[…] the Directive establishes that the remuneration of performers must be proportionate to the revenues generated by the exploitation of their work and that lump sum payments are to be the exception rather than the rule. […]", press release, 26 March 2019, https://www.fair-internet.eu/eu-parliament-adopts-copyright-directive-final-text/.

[52] See also, Aguilar, A., *The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part 1, Articles 18 and 19*, Kluwer Copyright Blog, 15 July 2019, http://copyrightblog.kluweriplaw.com/2019/07/15/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-1-articles-18-and-19/.

changing consumption patterns (for example, from ownership to access/streaming) is a potentially growing problem for many creators.

Recital 74 of the Copyright Directive underlines the need for creators to have the necessary information in order "to assess the economic value of rights of theirs that are harmonised under Union law. This is especially the case where natural persons grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. (…)."[53] Based on this ground, Article 19(1) requires that creators receive:

> "on a regular basis, at least once a year, and taking into account the specificities of each sector, up-to-date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."

The subsequent paragraphs of Article 19 give more details about the practical implementation of this obligation and envisage the different types of licences that may be granted. Article 19(2) (and Recital 76) foresees the case whereby the rights have been sub-licensed to other parties who exploit them. In this case, creators do not have an automatic right to transparency but are entitled to request additional relevant information on the exploitation of the rights, "in the event that their first contractual counterpart does not hold all the information that would be necessary […]." In addition, member states may decide whether creators can contact the sub-licensee directly or whether they would need to go through their contractual counterparts (the licensee).

However, this obligation of transparency is attenuated for the sake of proportionality and efficiency. Thus, Article 19(3) provides that member states may limit it "to the types and level of information that can reasonably be expected," where "the administrative burden resulting from the obligation would become disproportionate in relation to the revenue generated by the exploitation of the work or performance."

Furthermore, according to Article 19(4), member states may provide that contractual counterparts will no longer be obliged to provide greater transparency to creators in relation to their pay where the contribution of the latter is not "significant" in relation to the overall work or performance, unless creators justify that they need more information within the context of the contract adjustment mechanism (Article 20). In practice, the question arises as to who will be responsible for assessing the weight of a particular artistic contribution in a work or performance, and how this will be determined.

According to Article 19(5), member states may provide that the transparency rules may be negotiated collectively. As highlighted in Recital 77 of the Directive, "[c]ollective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive." Such a collectively agreed solution would contribute to increasing the bargaining power of the majority of creators. It

[53] See also Commission Staff Working Document - Impact Assessment, op. cit., Part 1, p 174 and following, https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules.

is also worth mentioning that Article 19(6) exempts collective management organisations from Article 19 on the basis that the CRM Directive regulating them already had such provisions. Although the transparency obligation has been substantially attenuated, Article 19 legitimises in itself the need for greater transparency towards rightsholders in the creative sector. According to the Final Provisions of the Directive, agreements for the licence or the transfer of rights of authors and performers shall be subject to the transparency obligation set out in Article 19 as from 7 June 2022 (Article 27).

2.2.3.4. Contract adjustment mechanisms

Article 20 entitles creators to a contract adjustment mechanism. They can claim "additional, appropriate and fair remuneration" from their counterpart (or its successors in title) if their initially agreed remuneration turns out to be disproportionately low as compared to the revenues generated by the subsequent exploitation of the works or performances by the contractual counterpart (Recital 78 provides some guidance on how to assess this). Importantly, the mechanism does not apply to agreements concluded by CMOs or "independent management entities", as these are subject to national rules implementing the CRM Directive.

2.2.3.5. Alternative dispute resolution procedure

According to Article 21, disputes concerning the transparency obligation and the contract adjustment mechanism may be submitted to a voluntary, alternative dispute resolution procedure, which may be initiated by a representative organisation of authors and performers such as a CMO at the request of the creator it represents.

2.2.3.6. Right of revocation

In addition, creators have a right of revocation under Article 22. They may revoke in whole or in part an exclusive licence or transfer on the grounds of lack of exploitation of their work or subject matter, unless such lack is due to circumstances that the creator "can reasonably be expected to remedy." The right of revocation can only be exercised after a "reasonable time" after following the conclusion of the relevant contract, and the creator may opt for termination of exclusivity instead of revocation. The article identifies a number of factors that national laws should consider if they set out specific provisions for the revocation mechanisms, including sector specificities, the relative importance of individual contributions in collective or joint works, as well as the legitimate interests of other affected creators. In this context, member states may even decide to completely exclude the application of the revocation mechanism to works or subject matter that usually contain contributions from a plurality of creators.

2.2.3.7. Common provisions

Finally, any contractual provision that prevents compliance with Articles 19 to 21 – transparency obligation, contractual adjustment mechanism, alternative dispute resolution – is unenforceable vis-à-vis creators (Article 23). That is to say, these are mandatory provisions that cannot be derogated by contract, whether between creators and contractual counterparts, or those counterparts and third parties (for example, in non-disclosure agreements, as noted in Recital 81). Conversely, it appears that contractual derogation from the right of revocation is possible. Still, member states may choose to allow such a derogation to be enforceable only if it is based on a collective bargaining agreement (Article 22(5)).

3. National rules

3.1. Aggregation of rights

The way audiovisual works are produced and marketed is quite different from other copyrightable works such as musical or literary works. Firstly, while the development, financing and production of film and TV works is the responsibility of a producer, they may involve the contributions of a potentially large number of original rightsholders, including, in particular, the authors who are designated on the basis of applicable national law, for example, the screenwriter, the film director and the composer of the original music soundtrack. Secondly, audiovisual works are much more expensive to produce than other creative content, hence the value of sharing creative and investment risks between producers, distribution partners and financiers as well as the prominence of the direct exercise of exclusive rights in the audiovisual sector. Those two facts mostly explain what is specific to the audiovisual sector in terms of creative process, financial risk and investment requirements, preferred mode of licensing, etc; the producer aggregates all necessary rights through law or contract to secure legal certainty and the streamlined exploitation of the work. Thirdly, audiovisual work may encounter some cultural barriers to circulation (in particular language).[54]

The producer could be defined as the company that takes the initiative to develop a work and assumes the financial, technical and artistic responsibility for that work, with "garantie de bonne fin". This role should not be mistaken with the role of executive producer, who is a service provider and owns no copyright. In theory and in practice, the producer of an audiovisual work is able to give multi-territorial licences. However, for different reasons that are not of a legal nature, this is not always the case in Europe. As mentioned in Chapter 1 of this publication, in Europe, sharing financial risks between the producer and his/her co-production and distribution partners is a key instrument in raising the significant investments needed for producing a film or TV work. Financing methods therefore often include the pre-sales of theatrical, home entertainment, broadcasting and online rights on a country-by-country basis; consequently, very often, the exploitation rights for a given country have already been licensed by the producer. Furthermore, in the case of co-productions, it is common for each co-producer to retain the exploitation rights for their respective country.[55]

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[54] Subtitles/dubbing are not to everybody's liking. Furthermore, cultural barriers go beyond language (for example, a successful series in Spain might not necessarily be interesting for a Finnish or Polish audience).

[55] As noted in the European Commission's Communication on European film in the digital era, "The average production budget varies considerably from Member State to Member State. In the UK it stands at EUR 10.9 million, in Germany and France around EUR 5 million and in Sweden EUR 2.6 million." In practice, production budgets can be considerably higher. In France last year, 73 local film productions had budgets over EUR 5 million, including ten with budgets over EUR 15 million. (See Enrich E.,"Legal Aspects of International Film Co-Production", European Audiovisual Observatory, Strasbourg, 2005). Meanwhile, budgets for some television series can reach EUR 10 million per episode, and in some instances more.

3.1.1. Authorship and initial ownership

Copyright ownership vests in the person who created the work. This is a basic rule of copyright law. But who created the audiovisual work? The answer to this question is not the same in all countries. There are two main legal solutions in the world:

- Co-authorship status of individual contributors combined with presumptions of transfer of exclusive rights to the producer (civil law countries)
- Concentration of all rights in the hands of the producer as author or initial owner (common law countries);

In the United States, for example, the producer of an audiovisual work is the author of and initial owner of the copyright in the work. Creative participants such as screenwriters, directors and performers do not retain copyright ownership, except for composers of musical works that are not made for hire, who do retain copyright in their composition.[56] Creative participants are employees who collectively bargain for remuneration, including initial payments and ongoing percentage compensation generated by the gross revenues earned through the worldwide exploitation of the work in every medium as well as a range of other financial (health, pension) and creative modalities. The US Copyright Act includes in its definition of a work made for hire, among other things, "a work specially ordered or commissioned for use […] as a part of a motion picture or other audiovisual work […] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[57] If the members of the creative crew are deemed to be employees, they shall not be considered the author of the work for copyright purposes. If members of the crew are hired as independent contractors, then they may be considered as authors for copyright purposes depending on their creative contribution (although this is not normally the case).[58]

At EU level, the only aspect relating to the determination of the authorship of an AV work that has been harmonised is the legal position of the principal director of an AV work. According to Article 2(1) of the EU Term Directive,[59] "(t)he principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors." As a result, member states are free to designate other co-authors, even including producers. However, it is rare for producers to be considered as co-authors, as most EU countries are civil law countries. Most EU member states qualify audiovisual works as joint works or works of collaboration, so that any individual who makes a sufficient creative contribution to the work is deemed to be one its co-authors. Moreover, some member states' copyright law provides for a presumptive list of co-authors which includes, at a minimum, the screenwriter(s), the director and the composer of the original music. Very importantly, in

[56] 17 U.S.C. sec 101, https://www.copyright.gov/title17/92chap1.html#101.
[57] 17 U.S.C. sec 101, https://www.copyright.gov/title17/92chap1.html#101.
[58] See e.g. O'Brien D., "How do I get the rights to use a song/music in my film?", http://www.filmmaking.net/FAQ/answers/faq96.asp.
[59] 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, amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02006L0116-20111031

line with the specificities of the audiovisual sector and in order to secure legal certainty and efficient exploitation, most EU countries provide for a statutory rebuttable presumption of transfer of exploitation rights to the producer or for some other mechanism that operates to unify the rights in the producer.[60]

The United Kingdom and Ireland are specific cases since they are common law countries and have a sort of "work made for hire" doctrine like the United States. However, as members of the European Union,[61] they must abide by the rules of the EU Term Directive concerning the status of authorship for the principal director. As a result of this, in both countries, the producer and director are co-authors of the audiovisual work.

3.1.2. Scope of transfer of rights

As already explained, in order to be able to exploit an audiovisual work, a producer needs to acquire all rights from authors and performers and pay them accordingly. Production contracts usually provide for a fee (work on the project, set, location, etc.) and remuneration for the transfer of rights, for example, royalty provisions or lump sums, or both, depending on the industry practice in the country, the individual contract and the type of creative contribution. Often, it is the case that producers licensing to broadcasters or other platforms also receive only lump sum compensation. The consolidation of rights in the hands of the producer is the only means by which producers can control the exploitation rights in the audiovisual work necessary to organise the optimal distribution to reach the widest audience, to enforce the contracts with creative and business contributors in terms of royalties and to recoup investments with a view to being able to finance new projects. It is also the most important 'currency' when raising financing; the fact that the producer represents all relevant rights makes a persuasive case for financiers and ensures legal and business certainty both for financing and future distribution. On top of the remuneration provided in their production contracts, in nearly all EU member states, audiovisual authors can claim additional royalties from CMOs in respect of private copying and retransmission.

There are specific copyright regimes for film production in Europe, with two groups of countries dealing with this matter in different ways:[62]

- Countries with general rules on copyright contracts and a few specific rules on film production agreements
    - UK and IE have a presumption of assignment of the rental right to the producer

[60] For more information see Xalabarder R., "CISAC International legal study on implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works", https://www.cisac.org/CISAC-University/Library/Studies-Guides/AV-Remuneration-Study, page 13-14 and IViR, "Remuneration of authors and performers for the use of their works and the fixations of their performances, https://www.ivir.nl/publicaties/download/1593.pdf, page 33-34, and Silke Von Lewinsky, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP*, page 535.

[61] At the time of writing, the future relationship between the United Kingdom and the European Union after Brexit was still unclear.

[62] See Kamina P., *Film Copyright in the European Union*, Second Edition, Cambridge University Press, 2016, page 453 (e-book version).

    - Other countries have a presumption of assignment of a broader scope of rights to the film producer and more specific provisions on copyright licences and assignments (AT, ES, BE, EE, DE, GR, HU, LU, NL, PL, SK).
- Countries with a more detailed regime for the main types of copyright contracts, sometimes including film production contracts (BG, HR, CZ, DK, FI, FR, IT, LT, PT, RO, SI, SE).

Generally speaking, the scope of the transfer of rights is determined by the parties, but in some countries, copyright law requires that the contract sets out explicitly, for each mode of exploitation, the author's remuneration, the geographical scope and the duration of the assignment. Furthermore, the courts in most EU member states give a restrictive interpretation to contractual clauses concerning the transfer of rights from an author/performer to an exploiter. Concerning the rights on future forms of exploitation, many EU countries have not legislated on this matter. The EU countries that have chosen to regulate such a transfer of rights do so by either strictly prohibiting them or by allowing them, but leaving room for renegotiation. In the case of rights on future works or performances, they can normally be transferred under general contract law if the contract defines them properly.

3.2. Remuneration issues

As explained above, in order to be able to exploit an audiovisual work, a producer needs to acquire all rights from authors and performers and pay them accordingly. Production contracts may contain buy-out or lump-sum remuneration clauses depending on the creative contribution concerned, and in some cases include follow-up payment clauses. This allows the producer to own all exploitation rights in the audiovisual work and receive all revenues from the exploitation chain, which then enter into the recoupment of development and production costs.

The form of remuneration (a lump sum, remuneration whose modalities relate to the performance of the work (royalty), or a combination of both) is normally negotiated by the contracting parties. The following EU countries[63] have opted for some form of remuneration based on exploitation revenues:

- Belgium: Article XI.183 of the Belgian Economic Code[64] states that audiovisual authors are entitled to a separate remuneration for each mode of exploitation and that the amount of remuneration shall be in proportion to the revenues of the exploitation of the work, unless otherwise agreed.

[63] See FERA-FSE-SAA, *Implementation of the EU Directive on Copyright in the Digital Single Market: how to make the most of Article 18 on the right to proportionate remuneration for audiovisual authors* (unavailable online)
[64] Code de droit économique, http://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel.

- Spain: Article 46 of the Intellectural Property Law[65] provides that the author will receive a "proportional share of the proceeds of exploitation" agreed upon by the parties, although the payment of a lump sum is justified in certain circumstances.
- France: Article L 131-4 of the Intellectual Property Code[66] also includes a proportional remuneration rule with an exception for cases where such proportional remuneration is impossible to calculate or not justifiable in view of the nature of the contribution. For audiovisual contracts, there is a specific provision in Article L. 132-25 of the Intellectual Property Code.
- Hungary: Article 16.4 of the Copyright Law[67] provides that the remuneration due to the author against the licence he has given for the use of his work shall be proportionate to the revenue earned by the use of the work, unless otherwise agreed.
- The Netherlands: Article 45d.2 of the Copyright Contract Act[68] stipulates that anyone who broadcasts the film work owes the principal director and the screenplay writer of the film work, who have assigned these rights to the producer, proportionate fair compensation.
- Romania: Article 72.1 of the Copyright Law[69] stipulates that the remuneration for each mode of exploitation of the audiovisual work shall be proportional to the gross earnings deriving from that exploitation.

In a number of countries, authors and performers rely on collective management organisations (CMOs) to receive royalties for the exploitation of their works, in addition to the one-off payment they received from the producer for their work on the film or audiovisual work. Thanks to the 1993 Satellite and Cable Directive, the collective management of the retransmission right was made mandatory for audiovisual authors throughout the European Union. Many CMOs have been established since. However, beyond retransmission, the scope of the rights collectively managed varies per country. Unlike music authors, audiovisual authors do not receive royalties on all media and from all European countries; it depends on the country in which their work is exploited.

[65] 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, https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930.
[66] Code de la propriété intellectuelle, https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414.
[67] 1999. évi LXXVI. törvény a szerzői jogról, http://njt.hu/cgi_bin/njt_doc.cgi?docid=41066. An English version is available at: https://www.hipo.gov.hu/sites/default/files/szjt_lxxvi_1999_en_rev_1.pdf.
[68] Wet van 30 juni 2015 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de versterking van de positie van de auteur en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht (Wet auteurscontractenrecht), https://zoek.officielebekendmakingen.nl/stb-2015-257.html.
[69] Legea Nr. 8/1996 privind dreptul de autor si drepturile conexe, actualizata, cu modificarile si completarile ulterioare, https://ucmr-ada.ro/wp-content/uploads/2019/07/legea_8_1996_actualizata_2019_PDF.pdf.

Table 1. Description of rights administered by audiovisual authors' CMOs in Europe (voluntarily or on a mandatory basis)

Right	Description
Retransmission right	Collectively administered all over Europe in application of the 1993 Cable and Satellite Directive and the new 2019 Online Broadcasting and Retransmissions Directive.
Private copying	Private copying schemes are in place in most EU member states.
Broadcasting rights	Whether by law or agreement, broadcasting rights are collectively managed by a majority of CMOs representing audiovisual authors in the EU. These rights generate a very important source of income for audiovisual authors.
Rental right	Subject to an unwaivable right to equitable remuneration according to the 1992 Rental and Lending Rights Directive, it is administered on a voluntary basis by some CMOs in the European Union.
On-demand rights	Royalties for the on-demand exploitation of audiovisual works have been paid to authors through CMOs in six member states and in Switzerland since 1 April 2020.
Other secondary uses	For example, public performance rights (broadcasting in hotels, bars, etc.), lending rights, educational uses and archive uses are collectively managed by a number of audiovisual CMOs in the European Union.
Theatrical exhibition	Theatrical exhibition is only collectively administered in Spain and Poland for audiovisual authors.

Source: SAA

Otherwise, the copyright legislation of some EU countries has contract adjustment mechanisms on the basis of a perceived disproportion between the agreed remuneration and the generated revenues. This mechanism for unforeseen revenues is usually called a "best-seller clause", but in theory, the clause applies when there is a significant disproportion between the agreed remuneration and the actual revenues (that is, the commercial value), which can happen with any kind of work, even of low/medium success, provided that this success (revenue) had been unforeseen and is not in proportion to the agreed remuneration. Therefore, the term "better-seller clause" would be a more appropriate name for a contract adjustment mechanism that applies when a work sells better than expected.[70]

[70] Such a clause exists, among others, in the legislation of DE, FR, HU, PL, ES and SL. For more details, see European Commission, Impact Assessment on the modernisation of EU copyright rules, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17213, Annex 14D.

According to the European Commission's Impact Assessment on the modernisation of EU copyright rules,[71] authors and performers face a lack of transparency in their contractual relationships with regard to the exploitation of their works and performances and the remuneration owed as a result of that exploitation. The Authors' Group, for example, complains about "the lack of accurate reporting of financial revenue streams generated by the exploitation of the authors' works: without transparency, authors cannot identify the proper economic value of their rights."[72]

This lack of transparency in the creators' contractual relationships would concern:

- Possible exploitation, that is, how the work may be used;
- Actual exploitation, that is, how the work is used and what the commercial result is; and
- The remuneration that is owed for the exploitation of the work.

Transparency is particularly affected by the increasing complexity of new modes of online distribution, the variety of intermediaries and the difficulties for the individual creator to measure the actual online exploitation of his or her work, notably due to the evolution of consumption patterns in some sectors, such as the shift from ownership to access/streaming modes of consumption. Without effective ways to monitor the use, measure the commercial success and assess the economic value of their works, creators might be unable to negotiate an appropriate remuneration in exchange for their rights, to verify that they are receiving the agreed amounts or to enforce their claims for remuneration effectively. It should be noted that producers also suffer from a lack of transparency from distributors, platforms and other rightsholders. Transparency is a challenge which in fact affects the whole value chain, from the final customer to the author.

As explained in Chapter 2 of this publication, the new Copyright Directive introduced into EU legislation the principle of appropriate and proportionate remuneration and a transparency obligation on the creators' contractual counterparts (notably producers and publishers), supported by a contract adjustment and dispute resolution mechanism.

[71] European Commission, *op.cit.*

[72] Authors' Group (ECSA, EFJ, EWC, FERA and FSE), "Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators", http://composeralliance.org/wp-content/uploads/2015/07/CC_declaration.pdf.

4. Territoriality of copyright

The principle of territoriality in copyright law means essentially that, within the framework of international treaties and relevant EU directives, each country can regulate copyright in its own way. Therefore, copyright rules may vary from one member state to another. More importantly for the purposes of this publication, according to this principle, rightsholders have the right (but are not obliged) to grant territorial licences to different licensees in different countries.[73]

The principle of territoriality in copyright law has been challenged by some as an exception to the freedom to provide services as provided for in the EU treaties. According to its opponents, this principle would raise transaction and enforcement costs for authors, rightsholders and users alike, since territorial fragmentation requires those wanting to offer content-related services across the European Union to secure multiple licences. Moreover, they consider that differences between national laws, particularly as regards limitations and exceptions, may lead to additional legal costs and legal uncertainty. Finally, the use in concrete cases of copyright may raise competition issues. However, for many stakeholders in the audiovisual industry, the possibility of granting territorial licences is considered fundamental to the financing of European audiovisual works. For example, the Audiovisual Sector Coalition,[74] an umbrella for organisations working across the audiovisual sector in Europe, considers that Europe's audiovisual sector relies heavily on the freedom to agree licences and contracts on a territorial basis in order to raise funding from production and distribution partners in several countries for the creation, production and distribution of new content. As far as the Coalition is concerned, territorial exclusivity not only allows for greater investment in the development and creation of new works, but also for the offer of films and audiovisual content to be tailored to the many different audiences across Europe, creating local markets for non-national content and promoting cultural and linguistic diversity, the result of which is more choice for European audiences.[75]

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[73] For more information on the topic of territoriality of copyright and its impact on the financing of audiovisual works in Europe, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S., "Territoriality and financing of audiovisual works: latest developments", IRIS Plus, European Audiovisual Observatory, Strasbourg, November 2019, https://rm.coe.int/iris-plus-2019-3-territoriality-and-financing-of-audiovisual-works-lat/16809a417c and Kanzler M., "Fiction film financing in Europe", European Audiovisual Observatory (Council of Europe), Strasbourg, 2019, https://rm.coe.int/fiction-film-financing-in-europe-big-picture-book/168094f6aa.

[74] The Audiovisual Sector Coalition is an umbrella for organisations working across the audiovisual sector in Europe and representing film and TV directors, commercial broadcasters, sports rightsholders, publishers, distributors, film and TV producers and cinema exhibitors.

[75] Letter from the Audiovisual Sector Coalition on the European Commission's Proposal for a Regulation on Geo-Blocking, 29 November 2019, https://99ff6266-dd25-42d5-a566-c2ad860fe46d.filesusr.com/ugd/7bf01a_fb8851dfc1734feaa8f2b9ee64e525a2.pdf.

4.1. The Single Market and the freedom to provide services

The principle of freedom to provide services in the European Union, as established in Article 56 of the Treaty on the Functioning of the European Union (TFEU)[76] –– as well as the freedom of establishment –– is mainly implemented in the EU through the Services Directive (SD),[77] which aims at removing legal and administrative barriers to trade in the Internal Market. However, the Services Directive does not apply to "audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting" (Article 2(2)(g) SD). In addition, with regard to copyright in general, the rules on the freedom to provide the services included in Article 16 SD[78] do not apply, among other things, to copyright and neighbouring rights (Article 17 (11) SD), confirming thereby the principle of territoriality in copyright law. Moreover, member states are allowed to impose requirements with regard to the provision of a service activity for reasons of public policy,[79] such as the protection of intellectual property, cultural policy objectives, the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language, as well as the preservation of national historical and artistic heritage.[80]

4.2. Territoriality of copyright in the European Union

EU law limits the principle of territoriality in copyright law only in respect of two aspects. Firstly, as mentioned earlier, the SatCab Directive introduces the "country of origin" principle for communications to the public by satellite. Yet, the application of this principle can be (and usually is) overruled via contractual licensing practices and signal encryption techniques.[81] Secondly, the InfoSoc Directive introduces the "exhaustion" principle for the distribution right.[82] This principle applies only to the distribution of the work incorporated in a tangible article, that is, it does not apply, for example, to the right of communication to the public of works and the right of making available.[83]

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[76] Article 56 TFEU contains a general prohibition to restrict the freedom to provide services within the Union in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended. In addition, Article 49 TFEU contains a general prohibition to restrict the freedom of establishment of nationals of a member state in the territory of another member state.
[77] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0123.
[78] Article 16 SD lists the principles to be respected by member states when providing access to or exercising a service activity in their territory (non-discrimination, necessity and proportionality). It also includes a list of prohibited requirements for providers established in another member state.
[79] Article 16(3) Recital 40 SD.
[80]. For further details on the Services Directive, see "Territoriality and financing of audiovisual works: latest developments", op. cit.
[81] See 2.1.2.2., ibid.
[82] This principle, known as the "first sale doctrine" in US law, means that the right of distribution is exhausted by the first sale or other transfer of ownership of a copy of the work made by the rightsholder or with his or her consent (Article 4(2) InfoSoc Directive).
[83] See Article 3(3) and Recitals 28 and 29 of the InfoSoc Directive.

As a result, the territoriality principle mostly prevails, and any service provider offering, for example, copyrighted works online in more than one member state will have to clear licences covering all of the countries concerned. This is not a problem if all rightsholders involved in the creation of the work retain the required rights for all countries in question. Nothing in national or EU law precludes, for example, a film or a music producer from giving a multi-territorial licence for more than one country, as long as s/he holds these rights. However, in practice, rights in audiovisual works are usually pre-sold by producers to national distributors in order to finance the production of the work in question and, in the case of musical works, rights are exercised by national collective management organisations (CMOs), which play a fundamental role.[84]

4.3. Latest legislative developments

In recent times, some legislative developments to improve the circulation of works within the European Union have raised concerns among rightsholders about a dismantling of the principle of territoriality in EU copyright law.

The Regulation on cross-border portability of online content services in the internal market (the "Portability Regulation")[85] was adopted on 14 June 2017 and came into force on 1 April 2018. It aims at ensuring that EU citizens who buy or subscribe to online content services in their home country are able to access this content when they travel or stay temporarily in another EU country.[86] According to Article 3 of the Portability Regulation, the provider of an online content service provided against payment of money must enable a subscriber who is temporarily present in a member state to access and use the online content service in the same manner as they would have done had they been in their member state of residence, including by providing access to the same content, via the same range and number of devices, for the same number of users and with the same range of functionalities. In order to conciliate this aim with the principle of territoriality, on which EU copyright law is based, Article 4 of the Portability Regulation contains a legal fiction whereby the provision of the service to a subscriber who is temporarily present in a member state, as well as the access to and the use of that service by the subscriber, will be considered as happening in the subscriber's member state of residence. Moreover, Article 7 foresees that any contractual provisions that are contrary to the Portability Regulation, be it between the service provider and rightsholders or the service provider and subscribers, shall be unenforceable.

On the other hand, in April 2019, the European Union adopted a Directive laying down new rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio

[84] For further details, see "Territoriality and financing of audiovisual works: latest developments," op. cit., p. 15 and following.
[85] See chapter 2 of this publication.
[86] Digital Single Market – Portability of online content services, https://europa.eu/rapid/press-release_MEMO-18-2601_en.htm.

programmes.[87] The directive introduces the principle of the country of origin (COO) for certain types of online transmissions of TV and radio programmes, such as simulcasting and catch-up services, with the goal of facilitating the licensing of content online by broadcasters and, ultimately, increasing cross-border access to broadcasters' online services in the Digital Single Market. It also introduces a mandatory collective management system for the clearance of rights for retransmissions of TV and radio programmes provided by means other than cable, on equivalent closed networks, with the objective of facilitating the use of programmes by third-party platforms.

Under the new rules, for the purpose of clearing rights for some online transmissions by broadcasters (see details below), the rights of communication to the public, making available and reproduction would be deemed to take place solely in the member state in which the broadcasting organisation is established. In this way, the broadcasting organisation would only have to clear the rights necessary for the member state in which it has its principal establishment. However, the licences granted under the COO principle would have to take into account all aspects of such online services, including the audience and the language versions of the programmes.

The adopted rules on the COO principle (Article 3) apply to all radio programmes, but only to television programmes that are: (i) news and current affairs programmes, or (ii) fully financed own productions of the broadcasting organisation. It expressly excludes from its scope the "broadcasts of sports events and works and other protected subject matter included in them." Moreover, Article 3(3) provides that the COO principle shall be without prejudice to the contractual freedom of the rightsholders and broadcasting organisations to agree, in compliance with Union law, to limit the exploitation of such rights.[88]

4.4. Territoriality and competition law

Under EU competition rules, horizontal and vertical agreements between undertakings which restrict competition are prohibited (Articles 101 TFEU), with limited exceptions. In addition, the abuse of a dominant position is prohibited (Article 102 TFEU). Both articles are implemented in the European Union through the Antitrust Regulation (AR).[89] This Regulation replaced the centralised notification and authorisation system with an enforcement system based on the direct application of Articles 101 and 102 TFEU in their entirety. According to Article 11(6) AR, the initiation of proceedings by the European

[87] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2019.130.01.0082.01.ENG.

[88] For further details, see Territoriality and financing of audiovisual works: latest developments", op. cit., p. 19 and following

[89] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R0001. See also Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0773.

Commission relieves the competition authorities of the member states of their competence to also apply EU competition rules to the practices concerned. Article 16(1) AR provides that national courts must avoid giving decisions which would conflict with a decision contemplated by the European Commission in proceedings it has initiated.

The European Commission has traditionally defined the geographic scope of broadcasting markets for the licensing/acquisition of audiovisual TV content (film and other content) as national or relating to linguistically homogeneous areas.[90] The market investigation in the NewsCorp/BskyB case[91] confirmed that these rights are only rarely negotiated simultaneously for different territories, particularly as regards broadcasting rights to premium films. According to stakeholders, broadcasting rights are generally negotiated and concluded on a country-by-country basis, with the only exceptions appearing to be licensing in relation to a linguistic area (for example, rights for Germany, Austria and the German-speaking parts of Switzerland and Luxembourg) or in relation to areas with a particular common socio-cultural background (for example Scandinavia). Further factors mentioned by stakeholders which prevent cross-border negotiation/licensing include the availability of materials in each language; differences in the availability dates for content in different territories; and the fact that each country and region reflects local preferences in programming.

The fact that licensing agreements are generally concluded on a country-by-country basis does not mean that they cannot have anti-competitive effects and be considered as an obstacle to the completion of the Single Market. The most outstanding example of this was the judgment delivered by the CJEU in the so-called Premier League cases concerning the issuing of licensing restrictions granting broadcasters an exclusive live broadcasting right for Premier League matches on a territorial basis, generally corresponding to the territory of a member state.[92] Following this judgment, in 2012, the Commission conducted a fact-finding investigation to examine whether licensing agreements for premium pay-TV content contained absolute territorial protection clauses which could restrict competition, hinder the completion of the Single Market and prevent consumers' cross-border access to premium sports and film content.[93] In January 2014, the European Commission opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBCUniversal, Paramount Pictures) and the largest European pay-TV broadcasters, such as BSkyB of the United Kingdom, Canal Plus of France, Sky Italia of Italy, Sky Deutschland of Germany and DTS of Spain.[94] The Commission's aim was to investigate whether these provisions prevented broadcasters from providing their services across borders, for example, by turning away potential subscribers from other member states or blocking cross-

[90] See "Territoriality and financing of audiovisual works: latest developments," op. cit., p. 19 and following.
[91] European Commission, Decision D/C(2010) 9684, Case COMP/M.5932 - NewsCorp/BSkyB, 21 December 2010, http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf.
[92] This judgment is described in detail in Chapter 5 of this publication.
[93] See Report from the Commission on Competition Policy 2012 (COM(2013) 257 final), Commission Staff Working document, 7 May 2013, SWD(2013) 159 final, http://ec.europa.eu/competition/publications/annual_report/2012/part2_en.pdf.
[94] See press release of the European Commission, "Antitrust: Commission investigates restrictions affecting cross-border provision of pay TV services", 13 January 2014, http://europa.eu/rapid/press-release_IP-14-15_en.htm.

border access to their services. As a result of these antitrust proceedings, on 23 July 2015, the European Commission sent a Statement of Objections to Sky UK and six major US film studios: Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox and Warner Bros.[95]

After the Commission's Statement of Objections, events unfolded. In April 2016, Paramount offered commitments to address the Commission's competition concerns. The commitments were accepted and made legally binding in July 2016. In December 2018, the General Court of the European Union fully upheld the Commission's decision to accept commitments from Paramount (Case T-873/16 Groupe Canal+), confirming thereby that the Broadcaster and Studio Obligations contained in Paramount's film licensing contract with Sky infringed Article 101 TFEU by eliminating cross-border competition between pay-TV broadcasters. Finally, towards the end of 2018, Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky offered commitments aimed at addressing the Commission's concerns, which were made legally binding under EU antitrust rules in March 2019.[96]

[95] See press release of the European Commission, "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland", http://europa.eu/rapid/press-release_IP-15-5432_en.htm.
[96] For further details on another recent Commission antitrust enquiry concerning the e-commerce sector, see "Territoriality and financing of audiovisual works: latest developments," op. cit., p. 21 and following.

5. Case law

There is a variety of case law on the different aspects involved in the various stages of the licensing process, from the transfer of rights from creators to producers to the licensing of the copyright-protected work to users. This chapter intends to offer a selection of examples drawn from European or national case law concerning some key notions which intervene in this process, such as the notion of ownership of rights in a given audiovisual work, the presumption of transfer of those rights to the producer, the remuneration of authors and performers and the scope of the licence. This list is not exhaustive and merely purports to offer some examples of the interpretation of the law by the courts.

5.1. Ownership of rights in an audiovisual work

5.1.1. Proof of ownership of author's rights to a script

In the case of *C. Valdenaire v. M. Hazanavicius, La classe américaine et a.*,[97] the regional court (Tribunal de Grande Instance, TGI) of Paris had to decide on the ownership of the rights to a scenario, examining in particular the proof of anteriority of the rights. In the case at hand, a French scriptwriter who claimed to hold copyright on the script for an intended black and white silent feature film entitled *Timidity, la symphonie du petit homme*, alleged that the film *The Artist*, released at the end of 2011, which won several Oscar, Cesar, and Cannes Film Festival awards, had used key sequences from his script included in a previous version. He therefore brought legal action against the writer, director and producers of the film for copyright infringement. The main point at issue in this case concerned the proof of the anteriority of the rights of the applicant (scriptwriter).

In a judgment of February 2016, the Tribunal de Grande Instance acknowledged that, by definition, infringement of copyright presupposes the existence of an original creation prior to the work in question, and that it is up to the plaintiff to demonstrate such anteriority by identifying the work and determining the exact date of its creation. The court considered that, in the present case, the applicant had not proved the anteriority of the rights he claimed to hold and dismissed his application. The court was also called to rule on the originality of the scenario, and noted in this regard that the concept of producing a silent film in black and white, even at the end of the twentieth century, could not be protected by copyright, and that the works in question differed in terms of plot, construction, style, atmosphere, the nature of the homage they intended to pay to cinema,

[97] TGI de Paris (3e ch. 1re sect.), 25 février 2016 - C. Valdenaire c/ M. Hazanavicius, La classe américaine et a. Regional court in Paris (3rd chamber, 1st section), 25 February 2016 - C. Valdenaire v. M. Hazanavicius ('La Classe Américaine') and others.

characters and treatment of situations. Their only similarity lay in the ideas that could not be protected by copyright.

The applicant appealed against this judgment before the Paris Court of Appeal and, contrary to the initial proceedings, provided the court with proof of the anteriority, existence and content of the script in the form of a certificate from the Alsace regional authority, to which the writer had submitted his script in 2006 as part of an application for funding. The Court of Appeal found that the characteristics described by the applicant in his most recent writings, which he considered to indicate the originality of his script (namely, chronology, the futuristic universe described therein, the character traits of the main character in the film and his relationship with other people, the events and twists in the plot, etc.), were not present in *The Artist*, and dismissed the copyright infringement claim.[98]

5.1.2. Criteria for joint authorship of a screenplay

On 22 November 2017, the Intellectual Property Enterprise Court (IPEC) in London, which is part of the Business and Property Court of the UK High Court of Justice, considered in the case of *Martin & Anor v Kogan & Ors*[99] the nature and extent of the defendant's contribution to the writing of a screenplay, and whether that contribution was sufficient to give rise to joint authorship in a copyright work within the meaning of Section 10(1) of the Copyright, Designs and Patents Act 1988. The judgment provides a useful overview of the principles of when joint authorship arises in England and Wales.

The dispute arose between Nicholas Martin, a professional writer of film and television scripts, and Julia Kogan, a professional operatic singer, over the screenplay of the critically acclaimed film Florence Foster Jenkins, a comedy drama starring Meryl Streep. Mr Martin and Ms Kogan were living together as partners when the idea for the film was born and when the first drafts of the screenplay were written, but, by the time Mr Martin produced the final draft used to shoot the film, their relationship was over. The film premiered in April 2016, crediting Mr Martin as the screenplay's sole author. The claimants, Mr Martin and his company, sought a declaration that the first claimant was the sole author of the screenplay for the film. The defendant counterclaimed for a declaration that she was a joint author of the screenplay and that both claimants had infringed her copyright in it. Ms Kogan claimed, in particular, that her creative work, originally contained within the first three drafts of the script, had been included in the fourth and final version, of which it constituted a substantial part. She was thus entitled to claim joint authorship of the final screenplay and a share of Mr Martin's income from the film.

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[98] For further details, Blocman, A., "Judgment against screenwriter claiming infringement of copyright upheld on appeal", IRIS newsletter 2018-1:1/20, European Audiovisual Observatory, Strasbourg, http://merlin.obs.coe.int/article/8106.

[99] *Martin & Anor v Kogan & Ors* [2017] EWHC 2927 (IPEC), 22 November 2017, http://www.bailii.org/ew/cases/EWHC/IPEC/2017/2927.html. See also Antoniou, A., "Claim of joint authorship rejected by the IPEC in the Florence Foster Jenkins case," IRIS newsletter 2018-2/1:20, European Audiovisual Observatory, Strasbourg, http://merlin.obs.coe.int/article/8149.

The High Court judge rejected Ms Kogan's contention, holding that she had failed to satisfy two of the three conditions for joint authorship under the 1988 Act, namely, the condition of "collaboration" between two or more authors and that of "sufficient contribution", both needed to qualify her as a joint author of the work. Based on documentary evidence, the judge found that the shooting script was written after Mr Martin and Ms Kogan had parted ways. Unlike previous drafts, the parties had not discussed the final version and there had been no collaboration between them in creating it. Ms Kogan's consent to the use of the material she had generated for the first to third drafts in the final screenplay was "no doubt necessary for collaboration, but not sufficient." There must have been a "common design", that is, "co-operative acts by the authors at the time the copyright work in issue was created." Moreover, Ms Kogan's textual and non-textual contributions to the first three drafts "never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions." As such, these were insufficient to qualify her as a joint author of the final screenplay, "even had those contributions all been made in the course of a collaboration" to create it. Mr Martin was therefore entitled to a declaration that he was the sole author of the screenplay and that the claimants had not infringed the copyright in it.

5.1.3. Ownership of the production rights

In the late 1990s, Terry Gilliam wanted to embark on the production of a film he referred to as *The Man who Killed Don Quixote*, inspired by Cervantes' novel. He could have had no idea that more than twenty years later, the film's release for screening in cinemas and its status as the closing film of the Cannes Film Festival would be dependent on a court decision. In addition to the many incidents that occurred during filming, a dispute arose between the author/director and the company Alfama Films Production and its manager Paulo Branco. This reached breaking point in August 2016 when Gilliam felt that the conditions imposed by the producer would not allow him to make the film he had had in mind for all that time. The film was therefore produced by other companies, but the initial producer felt that his contract with Terry Gilliam - and all the associated rights - was still valid.

The regional court (Tribunal de Grande Instance - TGI) in Paris was called on to deliberate on the dispute over ownership of the production rights; on 19 May 2017, it rejected the author/director's application for the courts to terminate the contract binding him to the original producer.[100] Among the aspects taken into consideration by the court in assessing the relationship between the author/director and the initial producer were the producer's obligation to inform the author/director about the film's budget and financing, the level of freedom granted to the author/director to form his technical and artistic team, while taking decisions that remained compatible with the film's final budget, etc.

The case went to appeal and was scheduled for deliberation by the Paris Court of Appeal on 15 June 2018. As a result, the film company and its manager (upon learning that

[100] Tribunal de Grande Instance de Paris, 3ème Chambre, 3ème Section, jugement du 19 mai 2017, https://www.doctrine.fr/d/TGI/Paris/2017/FRB4BF48D540A54EDBD1D6.

the film was to be screened on 19 May 2018 to close the Cannes Film Festival) had the Festival's organiser, AFFIF, summoned by the court to ban the screening of the film. In its decision delivered on 9 May 2018,[101] the court, sitting under the "urgent procedure", noted initially that it was apparent from the contracts and court decisions already delivered that Alfama Films Production was justified in claiming benefit from the rights arising from the contract it had concluded with Terry Gilliam and that they had an option to acquire a licence to use the film's scenario. These elements thus confirmed that the contracts with the applicant company and its manager (in respect of producing the film) had not been terminated, even though in the end, the film had been made by Terry Gilliam and produced with companies other than the applicant parties. The latter also produced evidence that they were indeed the holders of rights that had been disregarded by the continuation without their agreement of the project to produce and screen the film. The judge therefore felt that the violation of those rights was characteristic of a "manifestly unlawful disturbance", within the meaning of the French Code of Civil Proceedings, and that steps should be taken to put a stop to that disturbance. However, the court found that banning the screening of the film at the international film festival's closing session was manifestly disproportionate to the rights that they were entitled to claim on the basis of the contracts. The judge noted, amongst other things, that they had devoted themselves to the project for a short period of time and had invested approximately EUR 300 000, whereas the director, Terry Gilliam, had been working on the film for more than 25 years and the other producers had contributed more than EUR 16 million towards its financing. In the light of these elements, the court found that the requested ban would manifestly exceed what was fair and necessary in order to put a stop to the disturbance invoked, and so the film was screened on 19 May 2018 to close the Cannes Film Festival, and in cinema theatres.

5.1.4. Presumption of transfer of rights to the producer

On 9 February 2012, the Court of Justice of the European Union (CJEU) provided further clarifications in the case of *Martin Luksan v. Petrus van der Let* (Case C-277/10)[102] concerning the rights relating to the exploitation of cinematographic works and the right to fair compensation as provided for under the "private copying" exception, which are originally and directly vested by law in the principal director: the Court ruled that "[…] European Union law must be interpreted as not allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the right to fair compensation vesting in the principal director of that work, whether that presumption is couched in irrebuttable terms or may be departed from."[103] The decision

[101] TGI de Paris (ord. réf.), 9 mai 2018, Alfama Films Production et Paulo Branco c/ Association française du festival international du film et a. (Regional court of Paris (urgent procedure), 9 May 2018, Alfama Films Production and Paulo Branco v. Association Française du Festival International du Film and others). For further information, see Blocman, A, "Courts authorise showing of "The Man who Killed Don Quixote" to close Cannes Film Festival," IRIS newsletter 2018-7:1/16, European Audiovisual Observatory, Strasbourg, http://merlin.obs.coe.int/article/8314.

[102] Judgment of the Court (Third Chamber), *Martin Luksan v. Petrus van der Let,* CJEU, 9 February 2012, http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0277&lang1=en&type=TXT&ancre=.

[103] Ibid, paragraph 109.

hints at the necessity of achieving a fair balance between the needs of commercial production and the protection of intellectual creators.

This case, which was brought by the Handelgericht Wien (Commercial Court of Vienna) opposed Martin Luksan, as the scriptwriter and principal director, and Petrus van der Let, as the commercial producer of a documentary film entitled *Fotos von der Front*. The two parties had concluded a "directing and authorship agreement", according to which copyright and exploitation rights were assigned to the producer, while the director retained rights concerning the distribution of the documentary on digital networks, closed circuit and pay TV. However, after the film's completion, the producer made it available on the Internet and assigned pay TV rights to a TV network. Mr Luksan sued the producer, alleging breach of contract and claiming that the defendant had exercised the exploitation rights specifically excluded from the agreement. Mr van der Let maintained in response that, according to Austrian Law on Copyright (Urheberrechtsgesetz, BGBl. 111/1936), all exploitation rights were vested in him as the producer of the film and that the contract's provisions on the issue were void. He also claimed to be entitled to the entire amount of the remuneration rights. The Handelgericht Wien referred several questions to the CJEU for a preliminary ruling concerning the allocation of exploitation rights to the film producer and the possibility of transferring remuneration rights.

In particular, the first question sought to determine whether a national law that directly (originally) and exclusively allocated the exploitation rights in a cinematographic work to the film producer would be compatible with EU law. To answer this question, the Court first assessed the status and position of the film director, who should be regarded as "having fully acquired under European Union law, the right to own the intellectual property in [a cinematographic] work." Denying him the exploitation rights at issue "would be tantamount to depriving him of his lawfully acquired intellectual property right." As a consequence, the EU provisions should be interpreted as "precluding national legislations which allocates (…) exploitation rights by operation of law exclusively to the producer of the work".[104]

The second question related to the transfer of the rental right to the film producer. The CJEU ruled that EU law allows member states to establish a presumption of transfer of exploitation rights in favour of the film producer, under the condition that the presumption is not irrebuttable and the film director can agree otherwise (opt-out).

The third and fourth questions concerned the right of fair compensation. The CJEU had to determine whether a film director in his capacity as author or co-author would be entitled to fair compensation (under private copying) and whether the right of fair compensation could be subject to an automatic presumption of transfer. The Court ruled that under EU law, such a right could not be "waivable", as the goal of fair compensation is "to compensate rightholders for the prejudice sustained", which is "conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation". A film director should therefore be directly and originally entitled to fair compensation. However, this right of fair compensation cannot be the subject of an automatic presumption of

[104] It should also be noted that the Court rejected the application of Article 14bis (2)(b) and (3) of the Berne Convention (which provides for a presumption of assignment of rights in favour of the film producer) invoked by the Austrian Government to justify its national law.

transfer in favour of the film producer, whether the presumption is rebuttable, transferable or not.

In conclusion, according to the CJEU, EU law requires that member states grant to a film director exploitation rights in a cinematographic work together with the right to fair compensation. National laws can establish a presumption of transfer of the exploitation rights to the film producer, provided that the film director can agree otherwise. However, in relation to private copying, fair compensation cannot be the subject of a presumption of transfer.[105]

5.2. Equitable and appropriate remuneration

The CJEU has long established that copyright and related rights are also of an economic nature insofar as they confer the right to commercially exploit the marketing of the protected work, in particular in the form of licences granted in return for payment of remuneration.[106] Although the concept of "equitable" remuneration was used for the first time in the Rental and Lending Directive with regard to the exclusive broadcasting and communication to the public rights of performers,[107] it is up to the member states to define what an "equitable remuneration" should mean.

In the case of *SENA v. NOS* (2000),[108] the CJEU gave some further directives in this regard by ruling that there has to be a "proper balance" between the interests of artists and producers and the interests of third parties (in the present case, broadcasters of phonograms).[109] Whether the remuneration is equitable is to be assessed, in particular, "in the light of the value of that use in trade" (paragraph 37). The CJEU has left it to the discretion of the member states to determine the criteria to be used for fixing the amount of such equitable remuneration.[110] In addition, the Court considered that "It is for the parties to achieve a balance between those criteria by taking account, in particular, of the methods used in the other Member States and, in the event that negotiations between them fail, by agreeing that the national court may receive technical assistance from an expert to determine the amount of equitable remuneration." (paragraph 44).

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[105] See also, Jasserand C., Court of Justice of the European Union: Exploitation rights of film directors, IRIS 2012-3:1/4, European Audiovisual Observatory, Strasbourg, http://merlin.obs.coe.int/article/6055.

[106] See CJEU, *Musik-Vertrieb membran and K-tel Internationa v. GEMA*, 20 January 1981 (paragraph 12); Joined Cases C-92/92 and C-326/92 Phil Collins and Others, 20 October 1993 (paragraph 20); Joined Cases C-403 and C429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (paragraph 107-108).

[107] "Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user […]". Article 8(2) (Rental and Lending Directive).

[108] CJEU, Judgment of the Court (Sixth Chamber) of 6 February 2003, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, paragraphs 36 to 37, http://curia.europa.eu/juris/liste.jsf?num=C-245/00.

[109] There has to be "a proper balance between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable." (paragraph 36, op. cit.)

[110] "[…] it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring (…) adherence to that Community concept." (paragraph 38, op. cit.)

Different types of criteria are listed by the Court for calculating the equitable remuneration, such as the duration of the performance ("number of hours of phonogram broadcast"); the "density" of the use ("viewing and listening densities achieved"); the tariffs fixed by agreement in the same field; the tariffs set by the public broadcast organisation in the neighbouring member state; or the amount paid by commercial broadcasters.[111]

As mentioned in Chapter 2 of this publication, the new Copyright Directive refers to an "appropriate and proportionate" remuneration for authors and performers against the licensing or transfer of their exclusive rights in a contract (Article 18(1)).[112] Recital 10 of the InfoSoc Directive already referred to an "appropriate" remuneration,[113] and the CJEU further clarified what "appropriate" should mean in this context. In particular, in the *Premier League v. Murphy* case,[114] the Court ruled that rightsholders cannot demand "the highest possible remuneration." Consistently with its specific subject matter, they are ensured – as Recital 10 of the InfoSoc Directive and Recital 5 in the Preamble of the Rental and Lending Directive envisage – only "appropriate" remuneration for each use of the protected subject matter (paragraph 108). The Court further details that "[I]n order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service (…)" (paragraph 109).

5.3. Exclusive territorial licensing of rights

The CJEU confirmed on numerous occasions, even before the harmonisation process of copyright in the European Union started,[115] the principle of territoriality of copyright and

[111] "Article 8(2) of Directive 92/100 does not preclude a model for calculating what constitutes equitable remuneration for performing artists and phonogram producers that operates by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcast organisation, the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State concerned, and the amounts paid by commercial stations, provided that that model is such as to enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable, and that it does not contravene any principle of Community law." (paragraph 46), ibid.

[112] Recital 73 of the Copyright Directive refers appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.

[113] Recital 10 of the InfoSoc Directive: "If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work."

[114] Joined Cases C-403 and C429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (paragraph 107-108).

[115] Judgment of the Court of 18 March 1980, Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and Others v. Ciné Vog Films and Others* (Coditel I), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61979CJ0062; and Judgment of the Court of 6 October 1982, Case C-262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and Others v. Ciné-Vog Films SA and Others* (Coditel II), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-262/81.

the compatibility with the EU Treaty of the exclusive territorial licensing of rights.[116] This principle was later confirmed by various judgments concerning the application of different copyright-related directives.[117]

However, the limits of the principle of territoriality in copyright law have been challenged in recent years by EU courts and competition services through the re-assessment of exclusive territorial licences for the distribution of copyright-protected content from an internal market and competition perspective. Thus, in 2011, the CJEU opened a first breach in the principle of territoriality concerning the satellite transmission of Premier League football matches in the Murphy judgment (also referred to as the "Premier League" judgment).[118] In this case, the Court held that a system of licences for the broadcasting of football matches, which granted broadcasters territorial exclusivity on a member state basis and which prohibited television viewers from watching the broadcasts with a decoder card in other member states, was contrary to EU law. In its ruling, the Court held, in relation to the system of territorial exclusive licence agreements put in place by the Football Association Premier League (FAPL), that clauses that forbid the broadcaster from supplying decoding devices that would enable access to the rightsholder's subject matter (protected against use outside the territory under the licence agreement) constitute a restriction on competition as prohibited by Article 101 TFEU.

The Court recognised the right of the copyright owner to receive remuneration as part of the essential function of copyright, and pointed out that, in negotiating "appropriate remuneration", the rightsholder was not prevented from asking "for an amount which takes into account both the actual audience and the potential audience in the Member State in which the broadcasts are also received."[119] However, the Court held that the rightsholder in this case sought to receive remuneration that went beyond what was necessary to achieve the objective of protecting the copyright in question. The premium payment the Premier League received in exchange for the guarantee of an absolute territorial exclusivity resulted, according to the Court, in artificial price differences which tended to restore the

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[116] "A contract whereby the owner of the copyright for a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85 of the Treaty, "It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market.", Coditel II

[117] In particular, in the Lagardère case (C-192/04), the Court confirmed the territorial nature of certain remuneration rights harmonised under the Rental and Lending Directive. In the Donner case (C-5/11), the CJEU defined the scope of the concept of "distribution to the public", under Article 4(1) of the InfoSoc Directive, from a territorial point of view. For further details on this case law, please see: Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, pag. 55 and following, https://rm.coe.int/168078347f.

[118] Judgment of the Court (Grand Chamber) of 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), http://curia.europa.eu/juris/document/document.jsf?docid=110361&doclang=en. For further details on the Premier League judgment, please refer to Cabrera Blázquez F., Cappello M., Grece C., Valais, S., Territoriality and its impact on the financing of audiovisual works, *op. cit.*

[119] Ibid., paragraph 112.

divisions between national markets.[120] However, partitioning markets with the sole aim of creating artificial price differences between member states and thereby maximising profits (price discrimination) is irreconcilable with the Treaty.[121]

Although the consequences of this judgment were initially limited to changes in contractual conditions introduced by the Premier League with regard to customers,[122] it seems to have marked a turning point in the application of the principle of territoriality, which would be reflected a few years later in other audiovisual fields. Thus, three years after the Murphy case, the European Commission extended its review of the exclusive territorial licensing of copyright-protect content through the opening, in January 2014, of an investigation into possible restrictions affecting the provision of pay-TV services in the context of film licensing agreements. [123]

[120] Ibid., paragraph 139.
[121] Ibid., paragraph 115.
[122] Licensees were no longer allowed to offer an optional English language feed to their consumers. They could only transmit Premier League matches with the commentary in the language of that country. The English language feed is now limited to UK and Irish licensees. Non-UK licensees were no longer allowed to transmit more than one live Premier League match on Saturday afternoons.
[123] For further details on this caselaw and on territoriality, please refer to chapter 4 of this publication and to the IRIS *Plus* "Territoriality and financing of audiovisual works: latest developments" op. cit.

6. State of play

The audiovisual sector is going through a profound transformation, which is reflected in a wider variety of licensing practices facilitated by the specificity of the audiovisual sector, where the aggregation of rights lies with the producer. As the sector is reshuffling its cards, with new major players entering the market and new content walled gardens appearing, contractual arrangements are being adapted to these new circumstances. The main trend that has emerged in rights licensing over the last five years is that of variety, to adapt to the growing demand for local content: a variety of licensing models to adapt to the variety of new business models. This increased diversity of licensing models is also accompanied by greater complexity and an increased need for flexibility.

Licensing arrangements are also shaped by legislative measures and court decisions; of these, the different developments concerning the principle of territoriality in EU copyright law are probably the ones with a more transformative effect. As explained in Chapter 4 of this publication, while the Portability Regulation did not meet with substantial opposition from the audiovisual industry, the Proposal of the Commission for a Regulation on the exercise of copyright applicable to online transmissions of broadcasting organisations and retransmissions of television and radio programmes caused a backlash throughout the audiovisual industry, as the core business model when financing, producing, distributing and marketing was at stake.

One of the Commission's objectives in the 'pay TV' case, according to the European Commissioner for Competition, Ms. Vestager, was to offer European consumers an increased choice of cross-border pay-TV services to give them the opportunity to watch films and TV programmes that reflect their own cultural interest without this choice being constrained by geographical blocking provisions in licensing agreements between the main film studios and pay-TV channels.[124] Accordingly, the commitments made in this case mean that an Italian customer could now theoretically buy access to the main Hollywood films from Sky UK. It is also expected that such a scenario would increase competition between broadcasters, who can now give customers residing in other member states access to their services. However, it also presupposes that broadcasters are able to adapt their business models to offer their services to potential customers on a pan-EU level and that they can acquire the corresponding exploitation rights from rightsholders.

It remains to be seen to what extent this will be the case in practice, in particular in view of the results of the last e-commerce sector inquiry carried out by the Commission in 2017. Indeed, according to the Final Report published in May 2017,[125] the key determinant for competition in the digital content market is the availability of the relevant (online) rights. Such availability is largely determined, under the principle of contractual freedom, by the rightsholders' decision on whether to license them and, if relevant, on their

[124] Celebrating European culture, Speech by Ms. Vestager, 24 January 2017, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/celebrating-european-culture_en.

[125] European Commission, Final Report on the e-Commerce Sector Inquiry, 10 May 2017, https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

scope, as defined in the licensing agreements. On the other hand, it is worth mentioning that exclusivity is widely used in relation to licensed rights, since access to exclusive content increases the attractiveness of the offer from digital content providers. The Commission itself has repeatedly reiterated that the use of exclusivity is not a problem in itself.[126] Furthermore, the Murphy and 'pay TV' cases have clearly confirmed the possibility for rightsholders, when negotiating their rights, to take into account the actual and potential audience, not only in the country for which the exclusive licence has been granted (active sales), but also in those where content is received (passive sales). This possibility naturally has an impact on the cost of purchasing these rights; this is also cited by the digital content providers who participated in the e-commerce sector inquiry as the first factor (along with insufficient consumer demand for foreign content) for not making their services accessible in member states other than those in which they currently operate.[127]

It is interesting to highlight the role that competition law has played in recent years in shaping the scope of the territoriality principle in the audiovisual sector.[128] As seen in Chapter 4 of this publication, the announced re-evaluation in 2020 of the geo-blocking Regulation 2018/302, to determine whether to include audiovisual services in its scope, should give more insight into the question of geo-blocking practices in the audiovisual field under current market developments.

Beyond the territoriality issue, the adoption of the Directive on Copyright in the Digital Single Market has, for the moment, closed an intense discussion about some of the regulatory challenges raised by the digital age in the copyright field. Now the time has come for legislators and regulators to roll up their sleeves and get to work on transposing it into national law. And as usual, the European Audiovisual Observatory will continue to follow and report on the implementing measures at national level via our different publications.

[126] Ibid., paragraph 59, p. 14.
[127] European Commission, Commission Staff Working Document, Final Report on the e-Commerce Sector Inquiry, 10 May 2017, Table C. 7, page 234, https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf
[128] See Vezzoso, S., *Geo-blocking of Audio-visual Services in the EU: Gone with the Wind?*, 13 January 2019, https://www.competitionpolicyinternational.com/geo-blocking-of-audio-visual-services-in-the-eu-gone-with-the-wind/#_edn11.

7. Appendix - Case studies of licensing on VOD services

The recent emergence of new on-demand players and services from within and outside of Europe, the challenges to the traditional windowing model as well as the increased demand for local content have all led to an important diversification of the different types of content deals. Film and TV series continue to generate their own specific type of licensing schemes (similar to what happens in the linear world).

Beyond original content developed by online streaming services,[129] one of the main differences between licensing deals is the level of rights exclusivity. Licensing agreements that are not exclusive to a single online streaming service are less expensive to obtain, whereas exclusive licensing agreements are far more expensive, but they have the potential to bring in a greater number of subscribers over time. However, in the last five years, licensing deals have become increasingly complex and more detailed. There is no one-size-fits-all model, and the differences also include windowing rights, the type of content, ownership of rights and the duration of the deals.

According to Filmtake, the next battleground in the streaming space will take place over content exclusivity. Content licensing will become increasingly complex as major studios, broadcasters (public service and commercial) and online entertainment services launch stand-alone and hybrid streaming services, which have as a consequence that producers will have more opportunities and leverage in licensing negotiations.[130]

7.1. Licensing models

There are three main licensing models on the market which, to a certain extent, reflect models that already existed in the cinema and broadcasting sectors.

7.1.1. Licence in exchange for a fee for a territory or region

This model is used by broadcasters and VOD services, and it applies both to films and series.

A licence is granted for a specific right for a specific time, with some of the following characteristics:

- The fee depends on the level of exclusivity, duration and estimated performance
- The licence term is for a few years (this can vary greatly) and can be longer for films.

[129] See, for example, the case of Netflix originals *infra*.
[130] https://www.filmtake.com/streaming/netflix-needs-content/

- The producer receives his share of the fee for this licence, as well as for the other licences.
- After the licence term expires, the producer can resell the series.
- The producer owns the copyright of the licenced work.

7.1.2. Production costs + fee

This model is more common with series than with films. The on-demand services commission a producer with a series and the producer will retain a certain number of rights depending on the deal. This model was already being used with broadcasters.

- The on-demand service gets all or some of the rights from the producer as well as some creative control over the work.
- The producer receives an amount of between 10% and 15% of the production costs as remuneration. The producer does not receive any other remuneration from this work.
- The copyright is held by the platform as well as potentially any exploitation of the work, the format or the products derived from the franchise.

7.1.3. Revenue Share

This model allows producers to obtain some benefit directly from the consumer. The disadvantage of this model is that the platform decides the conditions of the agreement, which are changed whenever the platform decides to do so without the producer being in a position to do anything about it. Examples of services with a revenue share scheme include Amazon Video Direct, Samsung TV Plus (AVOD model) and Pluto (Viacom's AVOD).

7.2. Case studies

7.2.1. Netflix

Netflix[131] is a SVOD service available in over 190 countries that provides a global content library featuring feature films, documentaries, series, and other content.[132] At the end of 2019, Netflix controlled over 53% of the SVOD market in Europe, followed by Amazon with 22%. Sky, HBO and Viaplay each have around 3% to 4%, whereas local services account for 14%. Although the cards are being reshuffled in the SVOD market, with the arrival of new US actors and with European media companies joining forces in the SVOD arena, Netflix is

[131] https://www.netflix.com/.
[132] https://help.netflix.com/en/node/412.

still an important player in this arena, both in Europe and worldwide. In order to keep its market leader position, Netflix seems to be increasing the amount it pays to licence film and series content[133] and moving towards a self-sufficiency model by putting the accent on its own production.[134]

Netflix acquires streaming rights in a multitude of ways:[135]

- It commissions TV shows and films on an exclusive, global basis. In some cases, Netflix owns the rights to these productions and can stream them anywhere in the world.
- It acquires streaming rights for a variety of TV shows and films via licences – pre-buys and library acquisitions, for example.
- It participates in co-productions with public and commercial broadcasters.

The "originals" model was made popular by Netflix, but the rest of the majors also use the "originals" model in various ways.[136] For Netflix, an "original" is an audiovisual work that is available exclusively on Netflix in a given territory, but not necessarily developed by the company itself. For example, the series *Bazar de la Charité*, which is a co-production between TF1 and Netflix, was broadcast by TF1 as a first run in France, with Netflix having a first window elsewhere and a second window in France.

In general, the term "original" is used as a branding tool to delineate between films and series which are exclusive to Netflix in a given territory and those which are not. Content that is commissioned will be branded as "original" in the vast majority of cases. If content is licensed or co-produced and made available first on Netflix, it will also be branded "original". Sometimes, the same licensed or co-produced title can be considered an "original" in some parts of the world, while not necessarily in other countries, as it may be made available via other linear or non-linear services first in those markets.

After a number of years (which can change depending on the agreement), the producer can sell the series again (this varies a lot in the case of cinema) with certain constraints:

- The copyright belongs to the producer.
- The producer grants the on-demand service the first option on remakes, or even freezes the format rights for a certain period of time.

Despite its stated intention of providing a global content library, Netflix content varies by region, and may change over time. According to Netflix, there are different reasons why a TV show or film may be available to audiences in one country or region but not to another, including:

- Regional tastes;
- Multiple rightsowners with different exclusive rights per territory;

[133] https://www.filmtake.com/streaming/netflix-takes-europe/
[134] https://www.broadbandtvnews.com/2019/03/21/ampere-analysis-netflix-moves-to-self-sufficiency/
[135] https://help.netflix.com/en/node/4976.
[136] For more information on the "originals" model, see: https://redef.com/original/how-the-paradox-of-the-phrase-original-series-explains-the-video-industry-netflix-misunderstandings-pt-4

- No rights available for a given region.

Even in the case of Netflix originals, not all of them are available globally for the following reasons:[137]

- When some Netflix originals were created, Netflix was only available in a small number of countries, so Netflix did not secure the licensing rights for all global regions.
- Despite a TV show or film being a Netflix original, other companies may have the rights to stream it in a particular region due to content deals made before Netflix was available in that region.
- Depending on the region, Netflix may not be able to obtain the licensing rights for an original series for many years.

A particular licensing agreement concerns the so-called First Run Series. These are television series that Netflix makes available for streaming on an exclusive basis soon after its initial broadcast, normally one week after their initial broadcast. Some agreements allow all episodes of a season to become available at once, after the full season has aired in the original region through the original broadcaster. In regions where Netflix makes individual episodes of a First Run Series available weekly, the series may be titled a Netflix original.[138]

Netflix uses consumer data mining to determine viewers' preferences and can use this information as one of the elements to determine the total cost of each licensing agreement. On the basis of this information, Netflix estimates a project's potential share of viewing versus its share of Netflix's total content spend, and it bases its final pricing on exclusivity as well as on the timeframe of the contract.[139]

7.2.2. Filmin

Filmin[140] is a TVOD/SVOD platform that has been operating in Spain since 2008 and in Portugal since 2016. Filmin is currently also available in Mexico through FilminLatino, a platform created with the collaboration of IMCINE.

In Spain, the consumption of TVOD is concentrated in the first window after theatres, which lasts approximately 4 months. This window is not regulated by law, but rather by an agreement between distributors and the main exhibitors.

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[137] For further details on Netflix Originals see https://help.netflix.com/en/node/4976, third question of the FAQ section.
[138] For example, *Better Call Saul* is a Netflix original series in all regions it is currently available, excluding the United States and Canada. For further details on First Run Series, see https://help.netflix.com/en/node/4976, sixth question of the FAQ section
[139] https://www.investopedia.com/articles/investing/062515/how-netflix-pays-movie-and-tv-show-licensing.asp
[140] https://www.filmin.es/faq.

Usually, TVOD agreements are based on revenue sharing, although some companies, especially majors, require minimum guarantees for packages with a minimum number of titles and multi-year agreements.

As for SVOD, it is common practice to negotiate based on flat fees, although there is a great difference between negotiating with majors and negociating with independent companies. In the first case, it usually means linking the agreement with an obligation to acquire a package of a certain volume; in the second case, it is usually much more flexible.

In some cases, other formulas are contemplated, such as a minimum guarantee, which is completed with a share of the incomes generated by the titles (despite the difficulty in evaluating consumption in SVOD). That usually fluctuates between 50% and 60% of the incomes generated. On some occasions, especially with the older catalogues of independent producers, simple revenue sharing formulas can be agreed.

7.3. Examples of licensing contracts[141]

7.3.1. Example of non-exclusive licensing of VOD rights

Entre Les Soussignées

La Société _____, SARL au capital de _____ Euros, immatriculée au Registre du Commerce et des Sociétés sous le numéro _____, et dont le siège social est au _____, représentée par son président _____,

Ci-après dénommée " le Contractant "

ET

La Société _____, SARL au capital de _____ Euros, immatriculée au Registre du Commerce et des Sociétés sous le numéro _____, et dont le siège social est au _____, représentée par son président _____,

Ci-après dénommée

_____

Ensemble dénommées les « Parties » ou séparément « la Partie ».

[141] The following section contains a sample of real-life contract models that we have chosen to present in their original language.

ETANT PREALABLEMENT EXPOSE QUE

Le Contractant détient les droits d'exploitation sous forme de vidéo à la demande des œuvres figurant à l'Annexe I des présentes.

_____ édite un service de vidéo à la demande (VOD) locative, définitive et par abonnement, qui propose aux consommateurs un catalogue d'œuvres (et bonus) audiovisuelles et cinématographiques de patrimoine.

IL EST CONVENU CE QUI SUIT

1. Objet

Par les présentes, le Contractant confie à _____ une licence d'exploitation non exclusive en Vidéo-à-la-demande définitive (EST) et temporaire (VOD locative), pour l'usage privé du public, des titres / du titre figurant à l'Annexe I des présentes (ci-après les « Films » / le « Film »), en totalité ou par extraits.

La Vidéo-à-la-demande (VOD) s'entend de la mise à disposition d'un programme, en contrepartie du paiement d'un prix déterminé, permettant au consommateur de visionner ledit programme au moment de son choix :

(i) par tout réseau de communication électronique (Internet, câble, satellite, réseau hertziens ou téléphoniques etc…) ;
(ii) par tout intermédiaire (site Internet, applications et tous services de TV/VOD/IPTV, box multimédia, set top box etc…) ;
(iii) pour une réception sur tout terminal, fixe ou mobile (TV connectées, ordinateur, smartphone, tablettes, consoles multimédia etc…) ;
(iv) par tout procédé technique (téléchargement ou streaming) ;
(v) dans tous les formats possibles (plein écran, quart d'écran etc…) ;
(vi) dans le cadre du cercle de famille ainsi que dans les circuits fermés (c'est-à-dire des lieux temporairement accessibles au public tel que les hôtels, les prisons, les restaurants, les trains, les avions etc…) et/ou les circuits dits "institutionnels" (musées, bibliothèques, médiathèques, établissements d'enseignement ou de formation etc…).

2. Territoires

Par les présentes, le Contractant cède à _____ une licence d'exploitation non-exclusive, telle que définie ci-dessus, sur les territoires de _____ (ci-après le « Territoire »), en version originale sous-titrée en _____ et/ou en version doublée _____.

3. Durée

La durée du présent accord sera de 3 (trois) ans à compter de la date des présentes, renouvelable tacitement par périodes d'un an, sauf dénonciation signifiée par lettre recommandée un mois avant le terme.

Les périodes de disponibilités des Films / du Film sont précisées en Annexe I des présentes.

Il est précisé que les Parties s'engagent à respecter les termes de l'arrêté du 25 janvier 2019, publié au JO le 10 février 2019 portant extension de l'accord pour le réaménagement de la chronologie des médias du 6 septembre 2018 et son avenant du 21 décembre 2018 et/ou tout accord interprofessionnel qui lui serait substitué.

Il est entendu que, dans l'hypothèse d'une cession de droit exclusive à une chaîne de télévision, portant sur l'une des œuvres incluses dans les Films / le Film, _____ s'engage à geler l'exploitation dudit Film dans les conditions et pour la durée nécessaire à l'exploitation par ladite chaîne, à condition que le Contractant en informe _____ au moins deux mois (2 mois) avant la date butoir.

4. Commercialisation

_____ commercialisera le titre / les titres figurant en Annexe I des présentes sous la marque provisoire et/ou définitive _____

La commercialisation s'effectuera :

- sous forme d'exploitation directe, soit toute exploitation pour laquelle _____ _____ facture directement le client final (sur son site internet à l'adresse provisoire ou définitive et sur ses applications) ;

- sous forme d'exploitation indirecte, soit toute exploitation pour laquelle le client final est facturé par les partenaires avec qui _____ a passé des accords d'exploitation (plateformes Internet, services IPTV etc…).

Dans tous les cas, _____ garantit qu'elle sera en mesure de tenir un compte exact des actes de visionnages effectués pour chaque Film.

Dans le cadre de cette commercialisation, _____:

- choisira et élaborera un environnement promotionnel spécifique, établi en collaboration avec le Contractant, cet environnement étant ensuite adapté au cas par cas suivant les divers modes de commercialisation ;

- établira le cas échéant à ses frais et sous sa responsabilité le matériel promotionnel nécessaire pour les commercialisations ci-dessus définies ;

_____ est autorisée à faire des captures d'écran des Films / du Film et d'utiliser des extraits dans la limite de 3 (trois) minutes à des fins promotionnelles et éditoriales, sans demander validation à l'ayant-droit.

_____ prendra à sa charge ou fera supporter par ses délégataires tous les frais d'encodage, de stockage, de transfert, d'interface, de promotion et de marketing nécessaires, et de manière générale tous les frais nécessités par la bonne exécution de la présente licence.

5. Rémunération du Contractant

Au titre de l'exploitation du Film / des Films, _____ versera au Contractant une redevance de 50% (cinquante pourcent) du Net éditeur.

Par Net éditeur, on entend la somme du prix public de chaque transaction, diminué :

- de la TVA et de la taxe sur la vidéo
- des redevances pour droits d'auteurs (SACD, SACEM, SDRM, etc…)
- de l'éventuelle commission de distribution des opérateurs tiers (notamment les FAI)

6. Matériel

Le Contractant mettra à la disposition de _____ pour les titres / le titre figurant à l'Annexe I un ou plusieurs masters aux normes traditionnellement requises par les services de VOD (en accès ou en prêt pendant un mois) ainsi que le choix le plus large possible de matériels d'exploitation dont il dispose (affiches, photos, bande annonce, e.p.k, etc.) libres de droit et permettant à _____ une exploitation paisible dans le cadre de la présente licence.

Le Contractant autorise aux fins de la présente licence _____ à encoder le Film / les Films, le matériel d'exploitation conjoints, ainsi que les éléments promotionnels établis à partir de ce dernier matériel, sous forme de fichiers numériques, à stocker ces fichiers sur des serveurs ad hoc, et à les transporter sur les réseaux numériques permettant la mise à disposition aux internautes habilités, dans les formats d'encodage et de compression nécessaires.

7. Garanties

Le Contractant affirme qu'il dispose sans restriction ni réserve des droits ci-dessus mentionnés, en ce qui concerne les auteurs, réalisateurs, éditeurs, artistes interprètes ou exécutants, techniciens et, d'une manière générale, toute personne ayant participé à la réalisation ou pouvant prétendre à un droit quelconque à l'égard des titres / du titre figurant à l'Annexe I.

Le Contractant garantit également _____ contre tout recours ou action que pourraient former les personnes physiques ou morales n'ayant pas participé à la production ou à la réalisation, qui estimeraient avoir des droits quelconques à faire valoir sur tout ou partie des Films / du Film ou de leur commercialisation par _____. Ces garanties concernent tant l'œuvre elle-même que l'ensemble des éléments matériels ou immatériels livrés à_____ par le Contractant dans le cadre du présent contrat.

De son côté, _____ garantit que les conditions techniques et éditoriales de l'exploitation en vidéo à la demande dont il est concessionnaire permet à tout internaute du Territoire sur lequel s'exerce la présente licence l'accès dans des conditions usuelles des titres / du titre figurant à l'Annexe I.

8. Décomptes

_____ tiendra le Contractant régulièrement informé des conditions de l'exploitation des droits confiés. Il communiquera les comptes d'exploitation détaillés dans les quarante-cinq (45) jours suivant la fin de chaque trimestre.

Ces comptes d'exploitation stipuleront, ventilés Film par Film, le nombre d'actes de visionnage, le montant des recettes brutes afférentes encaissées par _____, et le

détail des seules déductions opposables (TVA, taxes sur la vidéo, redevances pour droits d'auteur, ainsi que les commissions des opérateurs tiers dans le cas d'une exploitation indirecte, ces dernières déductions étant ventilées par opérateur).

_____ réglera au Contractant, sur réception de factures, les sommes lui revenant.

9. Divers

Les Parties s'accordent d'ores et déjà pour négocier de bonne foi et en conformité avec les pratiques en vigueur dans le secteur, toute clause complémentaire qui se révélerait nécessaire à la bonne exécution du contrat.

La présente licence et tout différend en résultant sont soumis à la loi _____ et aux tribunaux de _____.

Fait à _____, le _____, en deux exemplaires originaux

LE CONTRACTANT .....

Annexe 1

Liste des œuvres correspondant à la licence non-exclusive d'exploitation de droits VOD en date du _____

			PERIODE DE DISPONIBILITE		
TITRE	REALISATEUR	N° RCA	DEBUT	FIN	COMMENTAIRES

LE CONTRACTANT .....

7.3.2. Example of the purchase of SVOD rights

ENTRE LES SOUSSIGNEES

La Société _____, SARL au capital de _____Euros, immatriculée au Registre du Commerce et des Sociétés sous le numéro _____et dont le siège social est au _____, représentée par son président _____,

Ci-après dénommée " le Contractant "

ET

La Société _____, SARL au capital de _____Euros, immatriculée au Registre du Commerce et des Sociétés sous le numéro _____et dont le siège social est au _____, représentée par son président _____,

Ci-après dénommée _____

Ensemble dénommées les « Parties » ou séparément « la Partie ».

ETANT PREALABLEMENT EXPOSE QUE

Le Contractant détient les droits d'exploitation sous forme de vidéo à la demande des œuvres figurant à l'Annexe I des présentes.

_____ édite un service de vidéo à la demande à l'acte (TVOD) et par abonnement (SVOD), qui propose aux consommateurs un catalogue d'œuvres (et bonus) audiovisuelles et cinématographiques de patrimoine.

IL EST CONVENU CE QUI SUIT

1. Objet

Par les présentes, le Contractant confie à _____ une licence d'exploitation non-exclusive en Vidéo-à-la-demande par abonnement, pour l'usage privé du public, du titre / des titres figurant à l'Annexe I des présentes (ci-après le « Film » / les « Films »), en totalité ou par extraits et dans tout format possible.

La Vidéo-à-la-demande par abonnement (SVOD) s'entend de la mise à disposition d'un ensemble de programmes, en contrepartie du paiement d'un prix périodique, permettant au consommateur de visionner lesdits programmes au moment de son choix :

(i) par tout réseau de communication électronique (Internet, câble, satellite, réseau hertziens ou téléphoniques etc…) ;

(ii) par tout intermédiaire (site Internet, applications et tous services de TV/VOD/IPTV, box multimédia, set top box etc…) ;

(iii) pour une réception sur tout terminal, fixe ou mobile (TV connectées, ordinateur, smartphone, tablettes, consoles multimédia etc…) ;

(iv) par tout procédé technique (téléchargement ou streaming) ;

(v) dans le cadre du cercle de famille ainsi que dans les circuits fermés (c'est-à-dire des lieux temporairement accessibles au public tel que les hôtels, les prisons, les restaurants, les trains, les avions etc…) et/ou les circuits dits "institutionnels" (musées, bibliothèques, médiathèques, établissements d'enseignement ou de formation, alliance françaises…).

2. Territoires

Par les présentes, le Contractant cède à _____ une licence d'exploitation non-exclusive, telle que définie ci-dessus, sur les territoires de _____ (ci-après le « Territoire »), en version originale sous-titrée en _____ et/ou en version doublée _____.

3. Durée

La période de diffusion de chaque titre est d'un mois (1 mois), tel que précisé en Annexe I des présentes. A l'issu de cette période, _____ s'engage à retirer le Film en question de la plateforme.

Le présent accord prend effet à compter de sa signature, et ce jusqu'à la fin de la dernière période de diffusion, sauf accord écrit entre les Parties pour sa prorogation.

4. Commercialisation

_____ commercialisera le titre / les titres figurant en Annexe I des présentes sous la marque provisoire et/ou définitive _____.

La commercialisation s'effectuera :

- sous forme d'exploitation directe, soit toute commercialisation pour laquelle _____ _____ facture directement le client final (sur son site internet à l'adresse provisoire ou définitive et sur ses applications) ;

- sous forme d'exploitation indirecte, soit toute commercialisation pour laquelle le client final est facturé par les partenaires avec qui _____ a passé des accords d'exploitation (prestataires techniques, plateformes Internet, services IPTV etc…).

Dans tous les cas, _____ garantit qu'elle sera en mesure de tenir un compte exact des actes de visionnages effectués pour chaque Film.

Dans le cadre de cette commercialisation, _____:

- choisira et élaborera un environnement promotionnel spécifique, établi en collaboration avec le Contractant, cet environnement étant ensuite adapté au cas par cas suivant les divers modes de commercialisation ;

- établira le cas échéant à ses frais et sous sa responsabilité le matériel promotionnel nécessaire pour les commercialisations ci-dessus définies ;

_____ est autorisée à faire des captures d'écran des Films / du Film et à utiliser des extraits dans la limite de 3 (trois) minutes à des fins éditoriales et promotionnelles, sans demander la validation du Contractant.

_____ prendra à sa charge ou fera supporter par ses délégataires tous les frais d'encodage, de stockage, de transfert, d'interface, de promotion et de marketing nécessaires, et de manière générale tous les frais nécessités par la bonne exécution de la présente licence.

5. Rémunération

En contrepartie de la cession des droits SVOD des titres cités / du titre cité en Annexe I des présentes, _____ versera au Contractant une somme forfaitaire et définitive de XXX EUR HT (XXX euros hors taxes) par Film. Il est précisé que cette rémunération ne constitue pas un minimum garanti.

Le paiement de ladite somme / desdites sommes s'effectuera à la signature des présentes, sous réserve de la réception de la facture correspondante.

OU

Le paiement de ladite somme s'effectuera le mois précédent le début de la période diffusion du Film en question, sous réserve de la réception de la facture correspondante.

6. Matériel

Les Parties reconnaissent que _____ détient d'ores et déjà le matériel nécessaire à une exploitation paisible du titre / des titres cités en Annexe I des présentes.

OU

Le Contractant mettra à la disposition de _____ pour les titres figurant à l'Annexe I un ou plusieurs masters aux normes traditionnellement requises par les services de VOD (en accès ou en prêt pendant un mois) ainsi que le choix le plus large possible de matériels d'exploitation dont il dispose (affiches, photos, bande annonce, e.p.k, etc.) libres de droit et permettant à _____ une exploitation paisible dans le cadre du présent contrat.

Aux fins du présent contrat, le Contractant autorise _____ à encoder le Film / les Films, les matériels d'exploitation conjoints, ainsi que les matériels de promotion établis à partir de ces matériels d'exploitation, sous forme de fichiers numériques, à stocker ces fichiers sur des serveurs ad hoc, et à les transporter sur les réseaux numériques permettant la mise à disposition aux internautes habilités, dans les formats d'encodage et de compression nécessaires.

7. Garanties

Le Contractant affirme qu'il dispose sans restriction ni réserve des droits ci-dessus mentionnés, en ce qui concerne les auteurs, réalisateurs, éditeurs, artistes interprètes ou exécutants, techniciens et, d'une manière générale, toute personne ayant participé à la réalisation ou pouvant prétendre à un droit quelconque à l'égard de l'œuvre cinématographique figurant à l'Annexe I. Le Contractant garantit également _____ contre tout recours ou action que pourraient former les personnes physiques ou morales n'ayant pas participé à la production ou à la réalisation, qui estimeraient avoir des droits quelconques à faire valoir sur tout ou partie de l'œuvre audiovisuelle ou de leur commercialisation par _____. Ces garanties concernent tant l'œuvre audiovisuelle elle-même que l'ensemble des éléments matériels ou immatériels livrés à _____ par le Contractant dans le cadre du présent contrat.

De son côté, _____ garantit que les conditions techniques et éditoriales de l'exploitation en vidéo à la demande sur internet dont il est concessionnaire permet à tout internaute du Territoire sur lequel s'exerce le présent contrat l'accès dans des conditions usuelles à l'œuvre cinématographique figurant à l'Annexe I.

8. Divers

Il est précisé que les Parties s'engagent à respecter les termes de l'arrêté du 25 janvier 2019, publié au JO le 10 février 2019 portant extension de l'accord pour le réaménagement de la chronologie des médias du 6 septembre 2018 et son avenant du 21 décembre 2018 et/ou tout accord interprofessionnel qui lui serait substitué.

Les Parties s'accordent d'ores et déjà pour négocier de bonne foi et en conformité avec les pratiques en vigueur dans le secteur, toute clause complémentaire qui se révélerait nécessaire à la bonne exécution du contrat.

Le présent contrat et tout différend en résultant éventuellement sont soumis à la loi _____ et aux tribunaux de _____.

Fait à _____ en deux exemplaires, le _____

LE CONTRACTANT _____

Annexe 1

Titre de l'œuvre audiovisuelle correspondant au contrat d'achat de droits SVOD en date du _____

			PERIODE DE DIFFUSION		
TITRE	REALISATEUR	N° RCA	DEBUT	FIN	COMMENTAIRES

LE CONTRACTANT _____

7.3.3. Example of the licensing of VOD/TVOD rights

Place, date

PARTIES

On the one part, Mr/Ms _____, with NIF number _____, acting on behalf of _____, with address in _____street of _____, with Identification number _____, in his/her capacity as _____, hereinafter _____.

On the other part, Mr/Ms _____, with NIF number _____, acting on behalf of _____, with address in _____street of _____, with Identification number _____, in his/her capacity as _____, hereinafter THE GRANTOR.

Both parties agree to undertake this contract for the management, playback, public communication and commercialization of audiovisual works, henceforth THE CONTENTS, according to the following

TERMS

FIRST: DEFINITIONS

Both parties agree on the following definitions for the purpose of this contract:

COMMERCIAL MANAGEMENT FOR THE OPERATION: Commercial Management is meant as:

Performing the necessary promotion tasks and providing the CONTENTS in the best possible technical conditions to ensure the maximum number of viewings in Internet, specifically in _____ and its relevant applications.

This commercial management does not imply the transfer of author property rights, or total or partial intellectual property or ownership rights.

INTERNET FORMS: any and all forms of access and provision of Internet services, be it via computer or portable systems (cell phones, tablets, electronic calendars, videogame consoles, etc.), connection, broadband, satellite, wireless, cable or any other form of access, any and all Internet protocols in current and coming versions. This includes digital

download, streaming, electronic sell through/download to purchase, electronic rental and lending, in any and all digital platforms, IPTV (Internet Protocol Television), interactive, social networks and any and all commercial forms, including, without limitation:

TVOD (Transactional Video On Demand): exploiting contents by giving the user access to a certain content for a limited time, after payment by the user.

SVOD (Subscription Video On Demand): exploiting contents by giving the user authorization to have unlimited access to a certain number of contents for a specified time, after payment of a temporary subscription fee by the user.

ACCESSES to titles in SVOD: number of times one selects Play in order to watch a certain title. To avoid repetitions, only one access per title and subscriber is computed for each 24-hour period.

SECOND: PERIOD OF VALIDITY AND ENTRY INTO FORCE

The validity of this agreement lasts for 12 months, with an automatic extension for successive periods of one (1) year, unless notice is given by any of the parties a minimum of three months before the due date of the initial period of validity or any of its extensions.

The individual period of validity, or start and end dates of the exploitation for each of the CONTENTS, appears in Attachment I and successive attachments to the contract. It is automatically extended for a period of one year, unless notice is given by any of the parties a minimum of three months before the due date of the initial period of validity or any of its extensions.

Any other rights or forms of commercial operation not specifically mentioned in this contract must be agreed upon between the parties in writing, and included as an Attachment.

THIRD: SUBJECT

THE GRANTOR puts _____ in charge, non-exclusively, of the commercial management, playback, public communication and showing of the contents on the Internet through _____ and other applications and services operated by _____ .

FOURTH: DISTRIBUTION OF REVENUE AND COSTS

The net revenue (that is, the RRP after deducting the VAT) obtained with the commercialization of the CONTENTS in the broadcasting methods, terms and characteristics of the CONTENTS described in the ATTACHMENT I and other attachments to this contract– shall be distributed in the following manner:

- THE GRANTOR shall receive __% of the net revenue obtained for individual sales (TVOD).

- THE GRANTOR shall receive __% of the net revenue obtained for the subscription accesses (SVOD).

Out of the total revenue obtained during the liquidation period from the sales in the various subscription models, SVOD, in _____ and its applications, a proportional distribution shall be carried out taking into account the number of accesses made to each of the titles during the liquidation period, and the total number of accesses during the period for the total number of titles included in the subscription. That is to say, if the total number of accesses during the liquidation period for all the titles in _____ and its applications amounts to 200, and one of the titles of THE GRANTOR has obtained 20

accesses, such title gets 10% of the total revenue obtained, taking into account all forms of subscription. The distribution detailed in this clause shall be applied to this amount. For instance:

Total number of accesses in the form of SVOD during the liquidation period = 200.

Accesses obtained by THE GRANTOR's title = 4 accesses => 2% of the total number of accesses.

Total revenue in SVOD for all the subscription forms during the period = 1.000€.

Revenue that corresponds to THE GRANTOR's title = 1,000€ x 2 % = 20€.

Liquidation = 20€. The percentage explained in this clause shall be settled on this amount.

FIFTH: LIQUIDATIONS

At the end of every calendar quarter, _____ shall deliver THE GRANTOR an account summary of the revenues obtained for the sales in TVOD and the accesses in SVOD, as well as the balance for every party with regards to the access and generated amounts, in accordance with the previous clause.

The liquidation of such amounts shall be carried out through bank transfer, on the 25th of the month following the one where the corresponding invoice was submitted.

THE GRANTOR shall be able to verify and carry out the accounting checks of the liquidations, be it by themselves, by any of the employees or by a third party, through the inspection of the accounting books of _____ about THE CONTENTS, upon request to _____ and bearing the costs of such inspection. If the difference between the accounts submitted to THE GRANTOR and the inspection goes beyond five (5) per cent, _____ shall pay for the cost of the verification.

THE GRANTOR shall be able to request, together with any liquidation, a certificate from the client that carries out the broadcasting or download. Said certificate shall include the number of showings, downloads, viewings, etc.

The liquidations shall be subject to the existing legal provisions, specially the tax provisions valid in every case and time in the place where THE GRANTOR and _____ are based.

SIXTH: PUBLICITY AND MARKETING

The publicity and marketing campaigns necessary for the commercial operation of THE CONTENTS shall be conceptualized, designed and supported by _____ . _____ has the commitment of promoting in an equal way all the contents in their catalog.

Notwithstanding the foregoing, THE GRANTOR shall inform _____ about any and all legal requirements for the viewing of THE CONTENTS, in regards to third-party logos, spots, headlines and other requirements that THE GRANTOR might have committed to with third parties.

SEVENTH: OBLIGATIONS

THE GRANTOR guarantees and shall ensure that:

THE GRANTOR possesses every right for the distribution and commercial operation, in the form and amount laid down in this contract, through any and all broadcasting media.

THE GRANTOR guarantees the ownership or authorship and originality of THE CONTENTS, and possesses all the chain of contracts, licenses authorizations and permits, duly documented and completed.

THE GRANTOR shall provide any and all necessary documents to prove the ownership of THE CONTENTS in the required time and place.

THE GRANTOR possesses full powers to conclude and execute this contract and there shall not be any right of retention, right of preference, pledge or levy against any of the rights that could repeal or contradict the rights granted to _____ .

As a result, THE GRANTOR assumes the responsibility before _____ of any and all claims by third parties or management bodies in regards to a lack of authorization or permission that could be demanded or put forward (including, but not limited to, the ones derived from the rights of edition, playback, distribution, reproduction and public communication, including publicity promotion) of THE CONTENTS in any and all channels. This includes any claim made for the infringement of industrial or intellectual property rights or unfair trade.

In the event a claim is made or sanction proceedings are initiated against _____ , _____ shall immediately inform THE GRANTOR, who shall, where appropriate, bear the payment of any and all reparations that could eventually derive from such claims.

The materials to be delivered, in Prores or Bluray format, are in acceptable technical conditions according to the standards of the industry. Nevertheless, in the event any of the materials is below the established minimum, THE GRANTOR commits itself to replace it within seven (7) business days. Otherwise, _____ shall be empowered to replace the title for another one of similar characteristics or remove it from the contract, which would involve the refund of the payments made for said title.

THE GRANTOR shall deliver to _____ any and all necessary materials for the creation of the publicity and promotion elements.

_____ guarantees and shall ensure that:

Respect for the integrity of THE CONTENTS, including the credits. Nevertheless, in the case of Free-VOD, where cuts in THE CONTENTS can be made for the insertion of publicity, _____ shall possess the previous authorization of THE GRANTOR.

Use, for the mastering and the digital compression processes, of first-rate products and services and recognized companies, as well as requiring the best and most current safety and anti-piracy systems.

For the purpose of the last point, _____ shall inform THE GRANTOR, when required by them, about the safety and anti-piracy measures adopted by the clients of _____ , and shall make these clients responsible in case of failure to fulfill such measures or failure to prosecute any infringement to the rights of authorship and intellectual ownership of THE CONTENTS.

_____ guarantees the OWNER that the payment commitments regarding the rights of intellectual ownership

derived from the public communication of the viewings or downloads subject to this contract, and regarding the management bodies for these rights, shall be at _____ 's expense, given the fact that _____ effectively carries out the commercial operation described in this contract. These include the public communication or provision rights concerning the artists and performers, as well as any derived from these. Under no circumstances these payment commitments shall be the responsibility of, or shall be charged to, THE GRANTOR.

EIGTH: NON-DISCLOSURE

Except to the extent required by law or legal proceeding –and, in any case, with written notification to the other party–, both parties agree that this document and any attached to it, as well as any other information known by the parties in the execution of this contract, shall be treated as confidential, which implies that none of the parties shall reveal such terms to any third party.

NINTH: NOTIFICATIONS

Any and all notifications the parties must carry out in the execution of this contract shall be done in the addresses recorded at the beginning and in the email addresses expressly designated.

On the part of THE GRANTOR: _____

On the part of _____ : _____

TENTH: SINGLE DOCUMENT AND NEW TITLES

This contract and its attachments include all the pacts and agreements between the parties, and cannot be altered or changed in any manner, except in a document mutually agreed-upon and signed-off by both parties.

Both parties agree that all future CONTENTS that THE GRANTOR transfers to _____ shall be governed by the same terms and conditions established in this contract, and they shall be added to it by way of an Attachment.

The clients of _____ shall have access, from any location, to the contents for which they purchased access to in the Spanish territory.

ELEVENTH: TERMINATION

This contract can be terminated if THE GRANTOR wishes to do so, in case any of these circumstances happen:

_____ doesn't pay the due amounts in the! terms described in the Fourth clause.

_____ carries out any of the activities described in this contract in a non-authorized territory.

_____ fails to fulfill any of the obligations described in this contract, provided that such lack of fulfillment cannot be remedied or _____ fails to provide a remedy within FIFTEEN (15) days of the reception of the written notification from THE GRANTOR to communicate said lack of fulfillment.

If any circumstance provided in the insolvency legislation happens.

All these events are grounds for automatic termination, and it's enough to send notification by any legally binding means, without any further formalities. If such notification were rejected or returned, the automatic termination shall be in effect all the same, provided that the notification were sent to the address designated by the addressee. The termination shall be carried out by the reversion of all rights, after the settlement of any due amount.

This contract can be terminated if _____ wishes to do so, in case any of these circumstances happen:

THE GRANTOR is declared bankrupt or equivalent situation.

THE GRANTOR fails to fulfill any of the obligations described in this contract, provided that such lack of fulfillment cannot be remedied or THE GRANTOR fails to provide a remedy within FIFTEEN (15) days of the reception of the written notification from _____ to communicate said lack of fulfillment.

THE GRANTOR finds itself unable to carry out the commercialization defined in this contract pursuant to a final court judgment.

In any case, THE GRANTOR and _____ shall be empowered to claim for damages derived from such a situation, as well as withhold any due amounts as part of the reparation for damages.

TWELFTH: APPLICABLE LEGISLATION

This contract is governed by its own clauses or, failing these, the applicable Spanish legislation. In the event of a dispute regarding the fulfillment or interpretation of the contract, the parties waive their own jurisdiction that may correspond to them by virtue of their location. Any conflict or dispute shall be submitted to the Courts of the city of Barcelona.

In witness whereof and in recognition of the terms set forth in this contract and any attachments integrated in it, both parties hereby sign in duplicate this document, on the date first above written.

_____ _____

_____ _____

ATTACHMENT I

OF THE CONTRACT OF COMMERCIALIZATION THROUGH INTERNET SIGNED BETWEEN _____ AND _____

Date: _____ ___, 20__

DESCRIPTION OF THE CONTENTS, VALIDITY AND FORMS OF COMMERCIAL OPERATION TRANSFERED

TITLE	VALIDITY STARTS ON	VALIDITY ENDS ON	SVOD	TVOD

TERRITORY

[x] Territory SPAIN

In witness whereof, both parties hereby sign in duplicate this Attachment, which is included in the contract referenced above.

Place, date

_____ _____

_____ _____

A publication
of the European Audiovisual Observatory