



# Educational Material on Collective Management of Copyright and Related Rights

## **Module 3:** Management of copyright and related rights in the audiovisual field

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## PURPOSE OF THE MATERIAL

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The management of copyright and related rights is an increasingly important element in a properly-functioning copyright infrastructure, alongside legislation and enforcement. Relevant information is needed both among governmental representatives working in copyright offices, for instance, and among people working in the private sector, for instance in collective management organizations.

WIPO has therefore commissioned experts to write educational material to be used for reference in conjunction with various training activities. Working closely with many non-governmental organizations (NGOs), the experts have drafted a comprehensive set of materials that covers all areas where collective management is customarily applied. The contribution of NGOs has been invaluable and the experts wish to thank all representatives for their assistance and guidance.

The way rights are exercised and managed varies greatly with the different creative sectors. This program focuses on collective management. It is organized in a modular structure and covers the following sectors:

1. Module 1: General aspects of collective management
2. Module 2: Management of copyright and related rights in the field of music
3. Module 3: Management of copyright and related rights in the audiovisual field
4. Module 4: Management of rights in print and publishing
5. Module 5: Management of rights for visual arts and photography
6. Module 6: Management of rights in dramatic works

Each module is written as independent reading, together with Module 1. For instance, a reader who is interested in the audiovisual field can study Modules 1 and 3.

The experts are Ms. Tarja Koskinen-Olsson (Finland/Sweden and Mr. Nicholas Lowe (the United Kingdom)). Their short bios are annexed.

## How to use the material

In all modules, the material is written on different levels to serve the purpose of different readers:

- The text under each main heading offers an overview and can be read separately for quick comprehension of the issues at stake.
- The next level is operational and offers a description of collective management of copyright and related rights in each sector.
- The third level offers detailed information, examples and experiences from various regions.

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The needs and interest of the reader will determine how to use the program. Cross-references are used throughout the text, as many issues touch more than one sector.

### **Terminology**

A glossary of terms is included. This glossary also offers some explanations and alternative terms as used in various countries.



## GLOSSARY OF TERMS USED IN THE TRAINING MATERIAL

(EXPLANATION OR ALTERNATIVE TERM IN PARENTHESIS)

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**Blanket license** (general license covering the repertoire of a CMO)

**Cable-originated programs** (initiated by cable operators; program content from many sources)

**Collective management** (also called collective administration)

**Collective management organization (CMO)** (also called collective rights management organization (CRM); previously known as collecting society)

**Composer, lyricist and music publisher** (rights holders of musical works)

**Copyright** (in common law countries; in civil law countries, also called authors' rights)

**Grand rights** (dramatic and dramatico-musical works)

**Individual exercise of rights and collective management of rights**

**Management based on legislative support** (generic term for extended collective license, legal presumption and obligatory collective management)

**Mechanical rights** (right of reproduction in relation to musical works)

**Non-voluntary collective management** (management of rights under a non-voluntary license)

**Non-voluntary license** (generic term for compulsory license and statutory license)

**Owner of rights** (author or subsequent owner of rights)

**Performing right** (right of public performance, broadcasting, communication to the public)

**Private copying remuneration** (also called levy on recording equipment and media)

**Reciprocal representation agreement** (specific form of representation agreement)

**Related rights** (rights of performers, phonogram producers and broadcasting organizations; also called neighboring rights)

**Remuneration right** (right to equitable remuneration, fair compensation)

**Reproduction rights organization (RRO)** (specialized CMO in the text and image-based sector)

**Reprography** (also called reprographic reproduction)

**Retransmission of broadcast programs** (simultaneous and unchanged retransmission by wire or by rebroadcasting)

**Rights holder** (generic name for authors, performers, producers, publishers and broadcasters)

**Small rights** (non-dramatic musical works)

**Transactional license** (work-by-work license)

**Voluntary collective management** (management of exclusive rights)

## **PUBLICATIONS ON MANAGEMENT OF RIGHTS IN THE AUDIOVISUAL FIELD**

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- WIPO Review of Contractual Considerations in the Audiovisual Sector, Katherine Sand, 2012
- Audiovisual Authors' Rights and Remuneration in Europe, SAA White Paper, Society of Audiovisual Authors (SAA), 2011
- Performers' Rights in European Legislation: Situation and Elements for Improvement, Updated Version, AEPO-ARTIS, 2009
- Rights, Camera, Action! IP Rights and the Film-Making Process, WIPO, Creative Industries, Booklet No. 2, 2008
- From Script to Screen – The Importance of Copyright in the Distribution of Films, WIPO, Creative Industries, Booklet No. 6, 2011

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## MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE AUDIOVISUAL FIELD (MODULE 3)

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August 31, 2012

### CHAPTER 1

#### EXERCISE AND MANAGEMENT OF RIGHTS IN THE AUDIOVISUAL FIELD

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**Audiovisual works<sup>1</sup> can be enjoyed in cinemas, on television, via satellite and cable, at home by way of rental or delivery of files through the internet. The industry – known variously as the film, movie or audiovisual industry – plays a major economic and cultural role in society.**

The beginning of the audiovisual industry dates back to the end of the 19th century, when the mixing of sound and images on film began. In the early decades of the industry, multitalented individuals like Charlie Chaplin and Buster Keaton wrote the stories, directed the films, and played the leading roles.<sup>2</sup>

The industry has changed dramatically. Creators and performers are drawn from a large number of professions, including screenwriters, directors, and directors of photography, narrators and actors. Their work can be enjoyed over a range of different channels: cinema, television, satellite and cable, rental and delivery through the Internet.

Television turned 75 in late 2011. The world's first regular television service was offered by the United Kingdom's flagship broadcaster, the British Broadcasting Corporation (BBC) in 1936. The first broadcast lasted two hours and covered the formal launch of the service, a Movietone newsreel, a variety show and a 15-minute documentary entitled "Television comes to London".<sup>3</sup> Today, television plays a major role in disseminating audiovisual works to a large audience.

Broadcasters produce a great number of television programs themselves. They also acquire rights for showing films and other independent productions on their channels. This involves an enormous amount of individual rights. A single television channel may broadcast more than 100 000 programs a year, including films, documentaries and animated cartoons produced both in-house and independently. For national broadcasters, the domestic market is the primary market and broadcasters frequently buy rights to broadcast foreign works in their own countries.

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<sup>1</sup> The term "audiovisual work" is used in this paper as a generic term including, among others, films, television shows, animations and documentaries.

<sup>2</sup> *From Artist to Audience*, WIPO-CISAC-IFRRO Publication, 2004.

<sup>3</sup> *Television turns 75*, WIPO Magazine, December 2011.



Because of the large number of participants in audiovisual productions and the heavy investment involved in film making and distribution, legislation in many countries contains specific rules governing the ownership of copyright in audiovisual works. In general, the necessary exploitation rights tend to be in the hands of producers. This consolidation takes place by law and/or contracts. While rights are generally centralized with the producer, music in audiovisual works can be cleared in a number of ways, varying from country to country.

Whereas rights in audiovisual works are governed by law and/or contracts between authors, performers and producers, licensing of rights is in most cases covered by direct contracts between producers and distributors, broadcasters and increasingly content aggregators for digital platforms.

Depending on the country, there are also instances where collective management is applicable. In particular, cable retransmission of whole television channels outside the home market is most often a matter of collective licensing, and in some cases subject to obligatory collective management. Other instances include private copying of audiovisual works, rental of DVDs and some public performances.

## 1.1 Market and economic contribution

**Creative industries are among the major contributors to the economic growth of a nation and the creation of jobs. These industries represent in average 5.4 percent of the gross domestic product (GDP) of a country. In studies,<sup>4</sup> the audiovisual sector is included in the figures for motion picture and video, but it is also part of radio and television.**

Motion picture and video are one of the core copyright industries and their average contribution to GDP is 4.07 percent. The contribution of radio and television, including cable and satellite television, is on the average 12.18 percent of the total. These figures are averages and the relative share of the audiovisual industries varies greatly in individual countries, being highest in countries like Canada, Jamaica and Malaysia among the 30 countries where measurements of economic contribution have been completed so far.

The contribution of copyright industries to national employment stands at an average of 5.9 percent. Measured from the perspective of employment, the share of motion picture and video represents on average 5.57 percent of total employment figures and that of radio and television 6.77 percent.

The audiovisual industry makes a vital economic and cultural contribution. The following figures highlight a few examples of the magnitude of productions in different parts of the world.

<sup>4</sup> WIPO *Studies on the Economic Contribution of the Copyright Industries*, 2012.

The following figures describe the film and television industry in the United States:

- a national community of 2.2 million workers depend on the film and television industry, ranging from costume designers to make-up artists, stuntmen to set builders, writers to actors and accountants to dry cleaners;<sup>5</sup> and
- the industry contributes more than 175 billion USD (135 billion EUR) annually to the U.S economy, in wages, vendor payments and public revenue.

The following figures describe the European industry in 2009:<sup>6</sup>

- the gross revenue was more than 108 billion EUR (140 billion USD);
- 1,192 feature films were produced;
- approximately 1 million people were working directly in the industry; and
- 7,528 television channels and more than 700 on-demand platforms offered access to audiovisual content.

Some Asian countries are major producers of films. For instance, almost 1,300 feature films were produced in India in 2009. Asia has witnessed a huge development of digital exploitation of audiovisual works, especially in the Republic of Korea, India and China.

In the Arab region, Egypt is a major film producing country. Its roots date back to 1896 with a limited number of silent films. Cairo's film industry became a regional force with the coming of sound.

In Africa, the major film producing countries are Burkina Faso, Kenya, Nigeria and South Africa. In Nigeria, for instance, more than 1,000 titles are produced yearly, mostly for the home video market. In recent years, the number of titles for cinema release has been increasing.

Large productions of television shows in Brazil have traditionally been produced in-house. Now the Brazilian independent production market is growing fast, boosted by a series of regulations and government incentives.

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<sup>5</sup> *The Economic Contribution of the Motion Picture and Television Industry to the United States*, Motion Picture Association of America, [www.mpa.org](http://www.mpa.org).

<sup>6</sup> *Audiovisual Authors' Rights and Remuneration in Europe*, SAA White Paper, 2011.

## 1.2 Players in the market

**Most audiovisual works are collaborative efforts, involving the contribution of several creators and performers and large financial investments by producers and production companies. The role of distributors and sales agents is pivotal in marketing films nationally and internationally.**

Moviemaking is a collective endeavor organized by the producer and involving many brilliant creative talents: writers, directors and actors, cameramen, designers, editors, makeup artists, hair stylists and illustrators, and so on. It is a costly and risky undertaking. Economic success depends on “matching ideas with talent, obtaining relevant intellectual property (IP) rights and using them to attract finance from commercial film distributors”<sup>7</sup> and of course, capturing the imagination of the audience.

“Audiovisual work” as used in this paper means, in principle, any series of related images, which shown together create an impression of movement. Whereas the work must have a visual element, the audio element is optional.

The author of an audiovisual work has never been specifically defined in international copyright conventions. Authorship is therefore determined by national and regional legislation, which in turn depends on a number of cultural and economic factors.

The term “rights holders” in audiovisual works customarily includes creators, performers and film producers. Creators can include authors of pre-existing works, such as the writer of a book on the basis of which the script is written and a composer of a pre-existing song. Directors, screenwriters and composers of music composed especially for the film can be authors or co-authors of the audiovisual work, subject to national legislation. Producers play a pivotal role in filmmaking and some countries’ laws include special provisions governing authorship and/or the transfer of rights to film producers.

Filmmakers, particularly the producer, need to be acquainted with the whole value chain in film-making and the fundamental functions of the people and companies that will market their films to the public. On the one hand, the role of film distributors is important and customarily a territorial distributor is responsible for the marketing and circulation of films to the end users, including cinemas, television, DVD and new media distribution technologies, such as video on demand (VOD). A sales agent, on the other hand, is responsible for the licensing of distribution rights to a territorial distributor in a particular country.<sup>8</sup>

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<sup>7</sup> *Rights, Camera, Action! IP Rights and the Film-Making Process*, WIPO, Creative Industries, Booklet No. 2, 2008.

<sup>8</sup> *From Script to Screen – The Importance of Copyright in the Distribution of Films*, WIPO, Creative Industries, Booklet No. 6, 2011.

### 1.3 How is copyright exercised and managed in the audiovisual field?

**Even though legislation in many countries recognizes creators as original authors, they often sign contracts in which they transfer a significant portion of their economic rights to film producers. In some countries, rights are originally vested in the producer and in other countries, there are various provisions governing transfer of rights.**

A contract between a creator/performer and a film producer is of fundamental importance as it specifies working conditions, the transfer of rights to the producer and payments due to creators/performers participating in an audiovisual work.

In general, creators receive different kinds of payments for their works. Many creators receive an upfront payment from the producer for their contribution to a project, whether it is a script, a score, or the work involved in directing. They can also receive payments for subsequent uses of their works, depending on the terms of their contract with the producer. These contracts can be individual or collectively bargained by authors' and performers' unions.

In common law countries,<sup>9</sup> a system where the producer holds all rights to the audiovisual production prevails. This is the case in the United States pursuant to the work-made-for-hire doctrine. In the United Kingdom and Ireland, the producer and the principal director are "authors". In most countries in the Asia-Pacific region and also in parts of Latin America, such as Chile and Ecuador, the situation is the same. The rationale of this system is the substantial financial investment that the production companies make and the consequent need to have flexibility in marketing the work. Producers maintain all copyright-based rights and are entitled to the profits of the production, subject to their contractual obligations. For example, under US law, the producer is deemed to be the sole "author". Individual contracts and collective bargaining agreements between creators and performers on the one hand and producers on the other determine what remuneration and in which form is paid to the creative personnel. It can be up-front payments and subsequent percentage shares. These additional payments are called "residuals" in the United States.

In other countries, the actual creators are the authors or co-authors of an audiovisual work, meaning that they have separate copyright rights. This system is prevalent in civil law countries, that is, much of continental Europe and parts of Latin America, such as Argentina, Brazil, Mexico and Peru. The actual creators are determined by national legislation and usually include a combination of director, screenwriter and music composer, but can include other contributors such as directors of photography, editors and costume designers. In these countries, some rights are managed by

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<sup>9</sup> *A Guide to Audiovisual Rights*, CISAC News, 2008, International Confederation of Societies of Authors and Composers (CISAC).



collective management organizations (CMOs) which are mandated to administer certain exclusive rights and certain remuneration rights. In some respects, this system of remuneration rights could be considered analogous to the remuneration allocation (residuals) system in the United States.

Where national legislation provides exclusive rights to authors and performers, these exploitation rights are almost always transferred to the producer. National legislation may include a presumption of transfer of rights if a film contract is concluded. In some cases, national legislation provides a right to equitable remuneration where the right itself has been transferred to the producer. Remuneration rights may be managed by CMOs. Presumptions of transfer tend not to apply to remuneration rights and moral rights, which are usually inalienable and unwaivable.

#### **1.4 Where collective management is a solution**

**Irrespective of the copyright system, there are certain exploitation areas where collective management is a feasible solution and, in some cases is the only option because of the concept of obligatory collective management.**

In a few countries, CMOs manage primary exploitations on behalf of their members independent of direct licensing by the producer. For example, CMOs can be entitled to collect remuneration for television broadcasting. In some countries such as Spain, Italy and Poland, the broadcaster as the final distributor is considered by law to be responsible for payments to the authors and performers. These payments are made through CMOs.

Collectively managed rights, however, refer in most cases to revenue paid to rights holders for subsequent uses after the primary exploitation. These can include private copying remuneration, rental or retransmission of broadcasts via cable. These rights can be subject to collective management, and in some countries they are subject to obligatory collective management.

In the audiovisual field, CMOs have been established to help rights holders to manage their rights collectively. The role of CMOs varies greatly in different jurisdictions and countries. Their scope in terms of representation of rights and rights holders is diverse. There are, for example:

- CMOs for creators, mainly directors and screenwriters;
- CMOs for performers, such as actors and dancers;
- CMOs for film producers; and
- CMOs representing all rights holders or a mix of them.

Whereas audiovisual CMOs are relatively old phenomena in some developed countries, many developing countries are currently considering how collective management could contribute to the economic development of their audiovisual industries. Local infrastructure, social, economic, cultural and legal parameters are decisive when a country discusses the most appropriate solution. There is a wealth of experiences to draw on. In all cases, it is important to ensure that the producer is in a position to finance, produce and distribute the audiovisual work. There are various ways of organizing additional or subsequent payments to key contributors.



## CHAPTER 2

### RIGHTS HOLDERS AND RIGHTS IN THE AUDIOVISUAL FIELD

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**Audiovisual works were added to international copyright conventions as independent artistic works only in 1948.<sup>10</sup> The determination of who is a rights holder in an audiovisual work is a matter for national legislation. International protection of audiovisual performers dates back to 1961.<sup>11</sup> The Beijing Treaty on Audiovisual Performances<sup>12</sup> updated the international protection of performers in 2012.**

The main groups of rights holders in filmmaking are creators, performers and film producers. In international copyright conventions, the term “cinematographic work” is used instead of audiovisual work. In this paper, however, the term audiovisual works is used throughout.

#### Authors

Audiovisual works may include pre-existing works. For instance, it has become popular to base a film script on an existing novel. Music can be especially composed for the film; alternatively, the film can include a number of existing musical works that support the storyline. Permission to use pre-existing works is a prerequisite for filmmaking. The clearance of music rights in films can take many different forms, subject to the country. This issue is discussed in more detail in Section 2.1.3.

*“Authors who have brought contributions to the making of the work”* is the guidance given in the Berne Convention for countries to determine the concept of an author of an audiovisual work. In some regions, such as in the European Union, directives<sup>13</sup> have established that at least the following shall be regarded as audiovisual authors or co-authors:

- the principal director;
- the author of the screenplay;
- the author of the dialogue; and
- the composer of music specifically created for use in the cinematographic or audiovisual work.

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<sup>10</sup> Article 14*bis* of the Berne Convention for the Protection of Literary and Artistic Works (1971).

<sup>11</sup> The Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

<sup>12</sup> The Beijing Treaty (BTAP) was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances on June 24, 2012 in Beijing.

<sup>13</sup> Article 2.2 of Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC).

## Performers

Performing artists in audiovisual works include actors, dancers, singers and musicians. The main international convention in the field of related rights, generally called the Rome Convention,<sup>14</sup> establishes an international protection for performers, phonogram producers and broadcasters. However, the protection in the audiovisual field was considered by some to be insufficient. Consequently, discussions at WIPO led to the adoption of a new international treaty, the Beijing Treaty for the Protection of Audiovisual Performances (Beijing Treaty) in 2012.

## Film producers

The position of film producers is twofold. In some jurisdictions film producers are considered “authors” of audiovisual works, for example in the United States, where the producer holds the copyright in the work and is deemed therefore “the sole author”. In other jurisdictions, film producers base their rights on transferred rights from creators and performers. National law may include presumptions concerning the transfer of rights when a film contract is concluded or provisions on the transfer of rights for employed authors. Moreover, producers hold related rights in many jurisdictions.

## Exploitation of rights

In all instances, producers having a central position in the audiovisual sector, contracts between them and creators and performers play an important role. Main exploitation rights are customarily transferred by law and/or contracts to producers, who in turn can market the works effectively to various users and markets throughout the world. In these contracts, it is important to make a distinction between the transfer of exploitation rights and remuneration that will be paid to creators and performers.

Rights are customarily exploited by the producer who signs contracts with distributors and others who market films, domestically and abroad. It has been considered important that film producers have major exploitation rights in order to attract financing for the film from distributors, broadcasters, other major users, as well as from other possible financiers. The producer will often pre-sell such rights even before the film is shot.

In Common Law countries, producers pay remuneration to the creative personnel, based on contracts, which may be either individual or collectively bargained agreements. Remuneration for various subsequent uses is called “residuals” in the United States. The role of guilds representing scriptwriters, directors and performers

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<sup>14</sup> The Rome Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).



is important in this system, as the guilds negotiate the terms of employment and remuneration. In many Civil Law countries, such rights are managed by CMOs for all or some of the uses. Unions exist also in Civil Law countries, and in some countries there is a combination of collective bargaining agreements, including residuals, and remuneration rights managed by CMOs.

In some cases, the concept of an unwaivable right to remuneration is introduced to guarantee equitable remuneration to audiovisual creators and performers where their relevant exploitation rights are transferred to film producers. This is the case, for instance, with rental right in the European Union.<sup>15</sup> The right is constructed as “unwaivable” to ensure that creators/performers actually receive payments, whether through direct contracts or collective management.

## 2.1 Authors and management of their rights

**The lack of international harmonization of authorship of an audiovisual work has led to different approaches in national jurisdictions. Limited harmonization exists at the regional level, for instance in the European Union.**

It is important to establish in national law who is considered to be an author of an audiovisual work. There is little guidance offered in international conventions. Regional legislation has led to partial harmonization in the European Union.

There are two main approaches to ensuring appropriate remuneration of authors (as well as performers). This can take place through contracts that are either individually negotiated between the creator and the producer or collectively bargained between unions and producer groups, often called the guild system. Alternatively, this can take place via collective management organizations representing authors and performers.

In any system, it is important to ensure that audiovisual creators are remunerated adequately for their work in any environment. Of course, a number of questions may arise when works are being exploited in countries where the systems are different, be it from a country with a contract-based system to a country with a CMO system, or *vice versa*.

There are still many countries where the legal framework does not adequately protect creators and producers through strong copyright protection. Capacity-building and development activities of WIPO and non-governmental organizations like CISAC<sup>16</sup> aim to improve the situation.

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<sup>15</sup> Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC).

<sup>16</sup> The International Confederation of Societies of Authors and Composers (CISAC), [www.cisac.org](http://www.cisac.org).

### 2.1.1 Legislative framework

An audiovisual work is the product of the collaboration, investment and creative input of a number of individuals and enterprises. Based on the originality of their work, some individuals can be recognized as being authors under national legislation, with intellectual property rights in either the completed work or their contribution to it.

In all 27 countries of the European Union, the director must be included in a list of authors or co-authors for an audiovisual work, based on what is known as the Rental and Lending Directive of 1992.<sup>17</sup> The Directive created a unique situation in countries like the United Kingdom, where the director had not been recognized as an author.

Screenwriters are sometimes considered authors of a pre-existing work, as in Germany, or co-authors of the completed audiovisual work, as in France and Italy. A similar arrangement is also applied to composers of music used in the film. In yet other countries, like Mexico and Austria, other creative personnel, such as directors of cinematography, are included in the list of co-authors.<sup>18</sup>

#### Regional example from Latin America and the Caribbean: Mexico

Article 97<sup>19</sup> of the Mexican copyright law specifies who is considered to be an author of an audiovisual work. The term “photographer” means director of photography, also called cameraman or main photographer in some instances. Article 97 states:

*“The following are the authors of an audiovisual work:*

- I. The director or maker;*
- II. The authors of the plot, adaptation, screenplay or dialogue;*
- III. The authors of the musical compositions;*
- IV. The photographer, the authors of cartoons and animated pictures.*

*“Unless otherwise agreed, the producers shall be considered the owners of the economic rights in the whole work.”*

#### Regional example from Europe: harmonization principles

Two directives in the European Union have harmonized the concept of authorship in an audiovisual work to a certain extent.

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<sup>17</sup> Council Directive of 19 November 1992, 92/100/EEC.

<sup>18</sup> *A Guide to Audiovisual Rights*, CISAC News, 2008.

<sup>19</sup> Federal Law on Copyright, 24 March 1997, Chapter III, Cinematographic and Audiovisual Works.



As stated above, the principal director was recognized as being an author in the 1992 Directive on Rental and lending rights. Article 2.2 of the said directive states:

*“For the purposes of this Directive the principal director of a cinematographic or audiovisual works shall be considered as its author or one of its authors. Members States may provide for others to be considered as its co-authors.”*

A further directive of 1993 harmonizing the term of protection establishes the minimum list of persons to be considered as authors or co-authors. Article 2.2 of the said directive<sup>20</sup> states:

*“The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last surviving of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the authors of the screenplay, the authors of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.”*

Some national laws identify the individuals who should be considered authors while others do not provide for a fixed definition, but remain open to any collaborator in an audiovisual work who can demonstrate an original, creative contribution. This can be quite challenging as legal certainty is needed for film financing, production and distribution.

### **2.1.2 Different approaches to managing audiovisual rights: individual contracts, guilds and CMOs**

The main approaches are a system based on contracts and a system based on collective management. Contracts can be individually negotiated or collectively bargained between representatives or creators/performers and producers; this is also called the guild system.

#### **Individual contracts**

Contracts between an individual creator and a producer govern, among others, payments, working conditions, transfer of rights and any subsequent remuneration that the producer pays to the creator. It is customary for the creator to receive an upfront payment for his work and rights specified in the contract. The contract can further specify what kind of subsequent payments are due and on what basis.

It is up to each individual producer to follow all uses as well as to report and pay subsequent remuneration that may arise from specified areas where extra

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<sup>20</sup> Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC).

remuneration is due. In some countries, unions representing creators have negotiated model agreements to be used as a guideline in individual negotiations.

### **Collective bargaining via guilds**

In countries such as the United States, where the producers are deemed to be the authors of audiovisual works, the payment and working conditions of creative collaborators are determined by collective agreements negotiated between professional guilds and producers' associations. Guilds act on behalf of creators in a similar way as labor unions: they negotiate, enforce and administer collective contracts that establish the minimum terms and conditions for all works being created by their members. Based on the size of its entertainment industry, the guilds are powerful in the United States.

Union requirements establish the salaries and general employment terms for creative collaborators and the transfer of usage rights and royalty payments that are due to creators following the initial release of a work: "residuals". The guilds handle any disputes and use their collective negotiation power, including strikes, if they are not in agreement with a proposal put forward by the producer's organizations. The Writers Guild of America (WGA),<sup>21</sup> the Director's Guild of America (DGA)<sup>22</sup> and the Screen Actors Guild (SAG)<sup>23</sup> are examples of guilds negotiating with producers' associations.

### **CMOs**

In countries where the copyright law provides certain exclusive and remuneration rights, audiovisual creators can transfer the management of their rights to a CMO that collects and distributes royalties on their behalf for mandated uses of their works. The CMOs negotiate licensing contracts for such uses and also establish tariff rates with users, such as broadcasters and cable companies. The range of rights managed collectively varies from country to country and it is subject to the country's financing, production and distribution infrastructure.

Even in countries that provide a collective management framework for authors' rights, working conditions, including any upfront payments and transfer of rights, are set out in a contract signed with the producer. Not all creators have equal negotiating power and this is addressed through statutory protection, CMOs and/or unions. CMOs usually offer legal support to their members to ensure that the terms of their contracts are in line with minimum standards set by the CMO for its members.

Even in countries where CMOs are more prevalent, there are also audiovisual unions active on behalf of their members. For example in the Nordic countries, unions

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<sup>21</sup> [www.wga.org](http://www.wga.org).

<sup>22</sup> [www.dga.org](http://www.dga.org).

<sup>23</sup> [www.sagaftra.org](http://www.sagaftra.org).



negotiate collective agreements which also include stipulations on collectively managed rights and remuneration.

### **2.1.3 Musical works in audiovisual works**

Most audiovisual works include music, be it pre-existing songs or music specifically written for the film. A prerequisite for the inclusion of music is permission from the composer and other rights holders in the musical work. The inclusion of music into an audiovisual work is a category of the right of reproduction, commonly called as synchronization right.

In countries where rights holders to musical works are members of a CMO, the CMO can also manage synchronization rights for its members. Alternatively, a music publisher may grant synchronization rights based on a contract with the composer. If the music is specifically written for the audiovisual work, the film producer and the composer may agree on the terms and conditions in a direct contract. For instance, in the United States, music composed especially for the film will be acquired directly, based on the work-made-for-hire doctrine. Pre-existing music will be cleared at source.

In both cases – existing and specifically composed music – CMOs in many countries manage performing rights relating to music in audiovisual works. Audiovisual works are shown in cinemas, on television and in other public places. A common tariff basis for film music in cinema theatres is a percentage of the ticket price.

When audiovisual works are distributed as videos or DVDs, the making of multiple copies entails mechanical rights, also a subset of the right of reproduction. Where mechanical rights are managed by a CMO, the film producers obtain permission for the making of copies and their distribution from the CMO. In some jurisdictions, such rights are cleared at source, that is, they are acquired directly from the authors of music.

Delivery through the internet customarily entails both rights of reproduction and communication to the public, including making available to the public. The CMOs in some countries negotiate a deal directly with a content provider who is responsible for putting together the service and delivery to consumers; be it by streaming or downloading. In some other countries, these rights are cleared at source. The CMO may in such cases need to differentiate between local and foreign productions, as rights have been cleared differently.

Musical works and their licensing are described in more detail in Module 2.

### 2.1.4 Collectively managed rights

The ranges of rights that are managed collectively on behalf of audiovisual authors, as well as for other rights holders, vary greatly from country to country. Rights can be grouped into the following categories, based on their nature:

- rights that are managed individually;
- rights that can be managed collectively; and
- rights that are most practicably managed collectively or are subject to obligatory collective management.

The following is a non-exclusive list of rights<sup>24</sup> that are managed collectively in some countries of the European Union. Management can be based on law or be a voluntary matter. It is emphasized that the list describes the situation in some European countries.

In other countries, the same rights can be licensed individually. For instance, in the United States, general licensing solutions (also called blanket licenses) are available from commercial operators, such as the Motion Picture Licensing Corporation.<sup>25</sup>

### Theatrical exhibition and performances in other public places

Theatrical exhibition is managed collectively only in a few countries, for example in Spain and Poland. Other instances of public performances include hotels, bars, buses and the like. In many countries, audiovisual works are shown also by hairdressers, beauty salons, etc.

### TV broadcasting

TV broadcasting rights are collectively managed by a majority of members of the Society of Audiovisual Authors (SAA).<sup>26</sup> As a primary exploitation form, TV broadcasting royalties are generally an important source of income for audiovisual authors.

### Online/on-demand uses

Uses cover both online transmission of broadcasts and new on-demand services. CMOs can adapt their agreements with broadcasters to also cover online uses of the programs, such as catch-up services, where programs are available a certain period after primary sending.

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<sup>24</sup> *Audiovisual Rights and Remuneration in Europe*, SSA White Paper, 2011.

<sup>25</sup> [www.mplc.org/index/worldwide](http://www.mplc.org/index/worldwide).

<sup>26</sup> [www.saa-authors.eu](http://www.saa-authors.eu), Belgium.



## **Rental**

In Europe, the rental right is subject to an unwaivable right to equitable remuneration. Member States may stipulate in national law that this remuneration right is subject to obligatory collective management. The management of rental right is described in more detail in Chapter 4.

## **Cable retransmission**

Cable retransmission rights and remuneration thereof are customarily managed collectively in Europe, due to requirements of obligatory collective management included in the Satellite and Cable Directive.<sup>27</sup> This does not apply to the rights of broadcasters or rights acquired by broadcasters. The management of cable retransmission right is described in more detail in Chapter 5.

## **Educational copying**

Broadcast programs are also used in educational establishments and clearance of rights for all rights holders, including the broadcasters, can take place through the services of CMOs. The management of educational copying is described in more detail in Chapter 6.

## **Private copying**

Exceptions to the right of reproduction in case of private copying are recognized in the majority of countries of the European Union and in a number of countries on other continents. Private copying remuneration is often paid in form of fees or levies on recording equipment and blank carriers. Remuneration covers music, audiovisual and also literary and visual works in a number of countries. The management of private copying remuneration is described in more detail in Chapter 7.

## **Other secondary uses**

Other secondary rights can be managed collectively and examples range from public lending to the use of programs from TV archives. Digitization projects customarily entail a large number of works. The preservation of cultural heritage and copyright questions included therein are described in Module 4, Chapter 6.

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<sup>27</sup> Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and related rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC).

## 2.2 Performers and management of their rights

**International protection concerning related rights dates back to 1961 when the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations was negotiated. The adoption of the Beijing Treaty in 2012 updated and improved the international protection of audiovisual performers.**

Under international, European and national legislation, performers are granted a protection for their performances in the field of music, audiovisual, dance or any other category of performing arts. Those rights are generally called “performers’ rights”. Like authors’ rights, performers’ rights can be divided into two categories: moral rights and economic rights. Performers’ rights have mainly been justified on economic and cultural grounds. As to economic rights, performers can enjoy exclusive rights and rights to equitable remuneration for certain uses of their performances. Moral rights pertain to the right to be identified as the performer and the right to object to distortion, mutilation or other modification, taking due account of the nature of audiovisual fixations.

Performers customarily enter into contracts with film producers, covering working conditions, transfer of rights and payments. The minimum terms of these contracts, including collective bargaining agreements, can be negotiated by unions representing performers, such as an actor’s union.

In practice, the rights of performers are to a large extent transferred to producers on the basis of contracts and/or legislation. Many countries’ laws include presumptions on transfer of rights when a film contract is concluded.

For some uses, performers may be entitled to receive equitable remuneration. Equitable remuneration rights do not allow performers to authorize or prohibit the exploitation of their performances, but do ensure them an income. CMOs customarily manage such remuneration rights when they are based on copyright legislation. Private copying remuneration and rental right are examples of such remuneration. The other alternative is performer residuals based on collective bargaining agreements.

### 2.2.1 Legislative framework

The Rome Convention<sup>28</sup> establishes minimum protection for performers, producers of phonograms and broadcasting organizations. Each country joining the Rome Convention must have incorporated this minimum protection in domestic law.<sup>29</sup>

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<sup>28</sup> The number of countries that have adhered to the Rome Convention is 91 (August 2012).

<sup>29</sup> Article 26 of the Rome Convention.



Article 3 defines what is included in the expression of “performer” thus:

*“For the purposes of this Convention:*

- a) *“Performers” means actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.”*

The minimum protection for performers is construed in the form of “possibility of preventing” the doing of certain acts without the consent of the performer. The reason for the wording is to allow complete freedom of choice of the means used to implement the Convention and make it possible for member countries to choose those which they consider most appropriate. They may be based on one or more legal theories: law of employment, of personality, of unfair competition or unjust enrichment, etc. and of course an exclusive right, based on copyright and related rights legislation. The important thing is that those means achieve the purpose of Article 7, namely that the performer has the possibility of preventing the acts enumerated.<sup>30</sup>

These acts are:

- a) *The broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public performance is itself already a broadcast performance or is made from a fixation;*
- b) *The fixation, without their consent, of their unfixed performances;*
- c) *The reproduction, without their consent, of a fixation of their performance:*
- i. *If the original fixation itself was made without their consent;*
  - ii. *If the reproduction is made for purposes different from those for which the performer gave their consent;*
  - iii. *If the original fixation was made in accordance with the provisions of Article 15<sup>31</sup> and the reproduction is made for purposes different from those referred to in those provisions.*

However, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 ceases to apply.<sup>32</sup> From the moment the performer consents to the inclusion of his performance in a film, he cannot prevent any use which is made of his fixed performance whether the fixation was intended for the cinema or for television. For example, an actor plays a role in a film or television

<sup>30</sup> Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981.

<sup>31</sup> Article 15: Permitted Exceptions.

<sup>32</sup> Article 19 of the Rome Convention.

studio; his mere presence before the cameras means that he agrees to being filmed for showing in cinemas or on television screen as the case may be.<sup>33</sup>

The TRIPS Agreement<sup>34</sup> does not provide performers with formal exclusive rights, as it reproduces the wording of the Rome Convention.

The WIPO Performances and Phonograms Treaty (WPPT) of 1996 offers performers exclusive rights for the first time. However, the exclusion of the audiovisual sector did not remedy the problem of international protection for audiovisual performers.

A new international treaty for the protection audiovisual performers was adopted on June 24, 2012 in Beijing. The Beijing Treaty (BTAP) strengthens the position of performers in the audiovisual industry by providing a clearer legal basis for the international use of audiovisual products, both in traditional media and in digital networks. The instrument also contributes to safeguarding the rights of performers against the unauthorized use of their performances in audiovisual media, such as television, film and video.

BTAP deals with a set of exclusive rights; however, a party to the treaty may make reservations.

The economic rights in the treaty are as follows:

- economic rights of performers in their unfixed performances (Article 5);
- right of reproduction (Article 7);
- right of distribution (Article 8);
- right of rental (Article 9);
- right of making available to the public (Article 10); and
- right of broadcasting and communication to the public (Article 11).

Article 12 of BTAP deals with the transfer of rights, one of the central questions, and reads as follows:

1. *A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Article 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such 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.*

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<sup>33</sup> Guide to the Rome Convention and to the Phonograms Convention, WIPO, 1981.

<sup>34</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994).



2. A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their authorized representative.
3. Independent of the transfer of exclusive rights described above, national law or individual, collective or other agreements may provide the performer with the rights to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

The wording of Article 12(3) thus incorporates different ways of remunerating performers for subsequent uses of their performances, such as individual contracts, collectively bargained agreements and management through CMOs.

### European legal framework

Within the European Union, the Information Society Directive<sup>35</sup> introduces an exclusive making available right for performers, including audiovisual fixations. Thus, the protection is not limited to phonograms, as is the case with the WPPT.

Article 3 of the directive states:

*“Member States shall provide for the exclusive right [for performers] to authorize or prohibit the making available to the public, by wire or wireless means [of fixations of their performances], in such a way that members of the public may access them from a place and at a time individually chosen by them.”*

In both the audio and audiovisual sectors, the performer almost always transfers his exclusive rights, including the making available right, to the producer. When implementing the Information Society Directive, Spain introduced a presumption of transfer of the performers' making available right to the producer, if a contract is concluded with a film producer concerning the production of a film, unless the contract stipulates otherwise.<sup>36</sup> The law further states that where the performer has transferred his exclusive right, he retains an unwaivable right to equitable remuneration as a counterpart to the transfer. The equitable remuneration is payable by the persons making the fixation available.<sup>37</sup> The right must be exercised through collective management organizations.

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<sup>35</sup> Directive of the European Parliament and of the Council of 22 May 2011 on the harmonization of certain aspects of copyright and related rights in the information society (2011/29/EC).

<sup>36</sup> Article 108.2 of the Spanish law; also concerns phonograms and phonogram producers.

<sup>37</sup> Article 108.3 of the Spanish law.

## 2.2.2 Management of performers' rights<sup>38</sup>

Performers, in much the same way as authors, exercise their rights both through contracts and/or through collective management. Practices vary from country to country, but remuneration or compensation for private copying and cable retransmission remuneration are in place in many countries; remuneration for rental and communication to the public is paid in some countries.

Instances of collective management are described in the following section. However, it should be borne in mind that in the United States, the system of residuals guaranteed through collective bargaining agreements prevails.

### Exclusive exploitation rights

In most cases, performers' exclusive exploitation rights are transferred to film producers. Legislation in many countries includes presumptions of transfer of rights. Such presumption can be an outright transfer, or apply where parties have not agreed otherwise. The other alternative is that the rights are initially vested in the producer.

In some countries remuneration for the exploitation of films is paid on a contractual basis, via residuals or other profit-sharing mechanisms – under collective labor agreements concluded between trade unions, such as an actors' union, and producers' associations.

### Rights to equitable remuneration

National laws can include instances where performers are entitled to receive equitable remuneration if their rights have been transferred to producers. This is considered to strike a balance that enables producers to market their films without restrictions, but at the same time guarantees performers' remuneration.

## 2.2.3 Collectively managed rights

### Equitable remuneration for broadcasting and communication to the public

BTAP provides for the possibility for national laws or individual, collective or other agreements to provide the performer with the right to receive royalties or equitable remuneration for broadcasting and communication to the public.<sup>39</sup>

In most European countries, remuneration is only collected for the use of phonograms. However, in certain countries such as Belgium, Croatia, Germany and Spain, remuneration can also be collected for audiovisual performances. In Spain, a

<sup>38</sup> *Performers' Rights in European Legislation: Situation and Elements for Improvement*, AEPO-ARTIS, 2009.

<sup>39</sup> Article 12 (3) of BTAP.



significant amount is collected every year for audiovisual fixations by the performers' CMO, AISGE.<sup>40</sup> In Germany, GVL<sup>41</sup> collects remuneration for broadcasting and public performance of music videos.

### **Remuneration or compensation for private copying**

Remuneration for private copying represents revenue in countries where the law provides for remuneration or fair compensation as a condition for a private use exception to the exclusive reproduction right. The management of private copying remuneration is described in more detail in Chapter 7.

### **Equitable remuneration for rental**

Some countries subject the collection of remuneration for rental to obligatory collective management. This is the case, for instance, in Germany, Switzerland and Spain. The economic importance of this remuneration right is nowadays limited in European countries, partly because on-line uses replace the rental of physical copies. Also, piracy has ravaged many national home markets. The management of remuneration for rental is described in more detail in Chapter 4.

### **Equitable remuneration for the retransmission of broadcasts**

The Rome Convention does not provide a cable retransmission right for broadcast programs. However, national laws in many countries grant some rights, at least a right to remuneration, to the beneficiaries of related rights for such retransmissions.<sup>42</sup>

The EU's Satellite and Cable Directive<sup>43</sup> contains detailed stipulations for cable retransmission, including specific provisions governing the collective management of rights. The directive takes as the starting point that retransmission takes place on the basis of individual or collective arrangements between copyright owners, owners of related rights and cable operators. Cable retransmission rights may only be exercised through a CMO for all other rights holders, except for the original broadcaster in respect of its own transmission. For all other rights holders, collective management is obligatory, unless they choose to convey their rights to the broadcaster. CMOs representing audiovisual performers participate in the management of cable retransmission remuneration in many European countries. The management of cable retransmission is described in more detail in Chapter 5.

<sup>40</sup> *Artistas Interpretes Sociedad de Gestión (AISGE)*, Spain, [www.aisge.es](http://www.aisge.es).

<sup>41</sup> *Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL)*, Germany, [www.gvl.de](http://www.gvl.de).

<sup>42</sup> *Collective Management of Copyright and Related Rights*, *op. cit.*

<sup>43</sup> Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and related rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC).

## 2.3 Producers and management of their rights

**Producers of audiovisual works qualify as original authors or rights holders in a number of countries. In other countries, producers have been transferred rights from creators and performers and they exercise those rights on the basis of contracts and/or law.**

Producers customarily obtain all necessary exploitation rights either on the basis of legislation and/or through contracts and can license their films for various uses. The audiovisual market is highly segmented and different uses have traditionally been marketed on the basis of sequential release patterns (also known as windows). Cinema exhibition is still seen in most film industries as the launch market, while film viewing at home is a growing practice. Television broadcasting, both free-to-air and pay-tv, is a major form of dissemination to a large audience. However, digital and offline piracy is a threat leading to lower pre-financing and revenue from the value chain, including for distributors, video publishers and broadcasters.

In order to address piracy and consumer demand, some films are beginning to go “day-and-date”, that is, being released simultaneously in various media,<sup>44</sup> and windows between different forms of exploitations are shrinking.

Contracts between creators and performers and producers stipulate what remuneration will be paid to original rights holders or creative collaborators and on what basis. Remuneration can also be based on individual or collective agreements negotiated by designated representatives, such as guilds, or by collective management organizations (see point 2.1.2).

### 2.3.1 Legislative framework

No international convention directly covers the rights of film producers. Their copyright is in some countries based on their status as owners of copyright or “author”. In other countries, they have been transferred rights from creators and performers.

Irrespective of the copyright status, contracts play a major role and producers customarily have all major exploitation rights to license their films both nationally and abroad. In many cases, film producers license IP rights to film distributors, receiving in exchange their investment in the film budget. As film financing is a major endeavor, financing is often needed from many different sources, and financiers customarily demand IP rights as guarantees for their investment.

In Europe, film producers enjoy an exclusive reproduction right on the basis of Article 7 of the Rental and Lending Directive,<sup>45</sup> which defines it as “*the exclusive right*

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<sup>44</sup> *Rights, Camera, Action! IP Rights and the Film-Making Process*, WIPO, 2008, op cit.

<sup>45</sup> Council Directive of 19 November 1992, 92/100/EEC.



to authorize or prohibit the direct or indirect reproduction for producers of the first fixations of films, in respect of the original and copies of their films". Other exclusive rights based on the Information Society Directive<sup>46</sup> include a right of communication to the public, which encompasses making available to the public.

### 2.3.2 Collectively managed rights

While individual exercise of rights is the most frequent form in which film producers exercise their rights, there are some instances where collective management may be applicable.

Certain rights are not normally under the direct control of the producer. These are specific rights whose exercise, for practical reasons, requires collective consent and licensing rather than individual transactions. Collectively managed rights that are specific to the audiovisual medium consist mainly of cable retransmission rights and remuneration for private copying, also called levies. Producers use collective management in these cases alongside authors and performers.<sup>47</sup>

#### Retransmission of broadcasts

A cable company transmitting several broadcasts in their package would have difficulties in clearing rights individually for all audiovisual programs contained in each channel. In copyright terms, cable retransmission of broadcasts is a new form of exploitation *if the user is another body than the original broadcaster*.<sup>48</sup>

The legislation of some countries presupposes that rights pertaining to the retransmission of broadcasts must be cleared collectively; in some others, they are subject to a compulsory or statutory license.

The Satellite and Cable Directive<sup>49</sup> of the European Union introduced the concept of obligatory collective management for this form of exploitation, which also includes the rights of film producers. Film producers have established their own centralized organization, called AGICOA,<sup>50</sup> to manage rights and remuneration from retransmission. It is an international collective management organization for audiovisual producers. Alternatively, producers license their retransmission rights directly to the original broadcaster. The management of retransmission right is described in more detail in Chapter 5.

<sup>46</sup> Directive 2001/29/EC.

<sup>47</sup> *Rights, Camera, Action! IP Rights and the Film-Making Process, op. cit.*

<sup>48</sup> Article 11*bis* of the Berne Convention.

<sup>49</sup> Council Directive of 27 September 1993, 93/83/EEC.

<sup>50</sup> Association for the International Collective Management of Audiovisual Works (AGICOA), Switzerland, [www.agicoa.org](http://www.agicoa.org).

## CHAPTER 3

### OPERATIONAL ASPECTS IN COLLECTIVE MANAGEMENT OF AUDIOVISUAL WORKS

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**There are wide variations in the representation of rights holders and repertoires in the audiovisual field. For all audiovisual CMOs, accountability, transparency and good governance are important when they collect and distribute royalties to rights holders.**

In some countries, screenwriters and directors have joint CMOs; in some others, there are two separate organizations for the two constituencies. Authors from all repertoires are grouped together in some multi-purpose CMOs, including music and audiovisual rights holders.

Authors and performers are grouped together in some countries, audiovisual authors and producers in some others. There are also some new CMOs in the audiovisual field where all rights holders are grouped together. Ghana offers an example for this type of CMO with the Audio-Visual Rights Owners Society of Ghana (ARSOG),<sup>51</sup> established in 2011.

The acquisition of rights is one of the first tasks of any collective management organization. In the audiovisual field, the type of rights administered plays a role. Whereas direct mandates are needed from owners of exclusive rights, the CMOs often manage remuneration rights for all rights holders, members and non-members alike. If this is the case, the CMO must acquire all the necessary information from all rights holders to effectively distribute royalties to them.

The governance of collective management is an important issue and accountability, transparency and good governance rules are needed in the audiovisual field as much as in other repertoires. The money collected by CMOs is not the money of the organization, but remuneration that they hold in trust for rights holders.

In order to be capable of distributing remuneration to rights holders, audiovisual works need to be properly reported by users and identified by CMOs. Different industry standards have been developed to facilitate identification and royalty distribution. One international body, the International Organization for Standardization (ISO),<sup>52</sup> reviews and approves various standards and has so far approved one standard in the audiovisual field, the International Standard Audiovisual Number (ISAN)<sup>53</sup> as a reference for identifying audiovisual works throughout the industry. Other identifier tools in the audiovisual sector include the EIDR (Entertainment Identifier Registry).<sup>54</sup>

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<sup>51</sup> [www.arsog.org](http://www.arsog.org).

<sup>52</sup> [www.iso.org](http://www.iso.org).

<sup>53</sup> [www.isan.org](http://www.isan.org).

<sup>54</sup> [www.eidr.org](http://www.eidr.org).



Piracy and infringement are obstacles to the proper functioning of the audiovisual market. They include physical piracy like bootlegging and illegal copying or Internet piracy. As broadband penetration has reached saturation in developed markets, Internet piracy of films and television programs has drastically increased. Apart from passing more stringent legislation, providing legal alternatives is one of the key remedies for this situation.

### 3.1 Different types of CMOs

**The main types of CMOs in the audiovisual field are authors', performers' and film producers' organizations. As there are great variations in the mix of rights that are managed collectively, rights holders have grouped together in a large number of constellations.**

Audiovisual authors, performers and producers have organized their collective licensing and collection of remuneration in a number of different ways, reflecting historical, operational and economic realities in their countries. The number of variations is almost limitless and a great deal of cooperation is needed among different CMOs representing audiovisual rights holders, as revenue in many instances needs to be shared among different CMOs.

#### 3.1.1 Audiovisual authors' organizations

There is no single model for collective management societies administering audiovisual authors' rights. However, there is a common factor in that all societies emerged as a result of the desire of audiovisual authors to form groups so their rights and remuneration could be collectively managed.

A few types of CMOs existing in Europe<sup>55</sup> and on other continents are listed below.

#### Screenwriters and directors together

Screenwriters and directors are grouped together in the following countries, among others: SACD<sup>56</sup> and SCAM<sup>57</sup> in France, DAMA<sup>58</sup> in Spain and SSA<sup>59</sup> in Switzerland. The underlying idea is to group together two main groups of authors of audiovisual works.

<sup>55</sup> *Audiovisual Authors' Rights and Remuneration in Europe, op. cit.*

<sup>56</sup> *Société des Auteurs et Compositeurs Dramatiques (SACD)*, France, [www.sacd.fr](http://www.sacd.fr).

<sup>57</sup> *Société Civile des Auteurs Multimedia (SCAM)*, France, [www.scam.fr](http://www.scam.fr).

<sup>58</sup> *Derechos de Autor de Medios Audiovisuales (DAMA)*, Spain, [www.damautor.es](http://www.damautor.es).

<sup>59</sup> *Société Suisse des Auteurs (SSA)*, Switzerland, [www.ssa.ch](http://www.ssa.ch).

### Screenwriters and directors separately

There are separate CMOs for screenwriters and directors. In the United Kingdom, for instance ALCS<sup>60</sup> represents writers and Directors UK<sup>61</sup> represents directors; in the Netherlands, LIRA<sup>62</sup> represents writers and VEVAM<sup>63</sup> represents directors. Where all kinds of literary authors have their own CMOs in a given country, such as in the United Kingdom and the Netherlands, directors have established their own CMOs.

In Argentina, ARGENTORES<sup>64</sup> represents writers, including screenwriters and DAC<sup>65</sup> represents directors of films and audiovisual productions.

In Japan, WGJ<sup>66</sup> represents some 1,500 screenwriters and grants the license to any secondary uses of their screenplays.

### Multi-purpose CMOs for authors' rights

Some CMOs are called multi-purpose organization as they represent different repertoires, including both audiovisual and music. This is the case, for instance, with SIAE<sup>67</sup> in Italy and SPA<sup>68</sup> in Portugal. The management of all authors' rights jointly has economies of scale and can be more accessible in countries where collective management is applied.

In Senegal, BSDA<sup>69</sup> is a multi-purpose CMO that also manages audiovisual rights. The same applies to ONDA<sup>70</sup> in Algeria.

### Umbrella organizations:

Umbrella organizations for several rights holders' organizations and repertoires exist in the Nordic countries, for example, KOPIOSTO<sup>71</sup> in Finland and COPYSWEDE<sup>72</sup> in Sweden. The underlying rationale is to group together all CMOs and associations of rights holders where licensing involves different repertoires and genres of works and performances. For instance, KOPIOSTO in Finland manages reprography and digital

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<sup>60</sup> The Authors Licensing and Collecting Society (ALCS), the United Kingdom, [www.alcs.co.uk](http://www.alcs.co.uk).

<sup>61</sup> Directors UK (formerly DPRS), the United Kingdom, [www.directors.uk.com](http://www.directors.uk.com).

<sup>62</sup> *Stichting LIRA*, the Netherlands, [www.lira.nl](http://www.lira.nl).

<sup>63</sup> *Stichting VEVAM*, the Netherlands, [www.vevam.org](http://www.vevam.org).

<sup>64</sup> *Sociedad General de Autores de la Argentina* (ARGENTORES), Argentina, [www.argentores.org.ar](http://www.argentores.org.ar).

<sup>65</sup> *Asociación General de Directores Argentinos Cinematográficos y Audiovisuales* (DAC), Argentina, [www.dacdirectoresdecine.org.ar](http://www.dacdirectoresdecine.org.ar).

<sup>66</sup> Writers Guild of Japan, (WGJ), Japan, [www.writersguild.or.jp](http://www.writersguild.or.jp).

<sup>67</sup> *Società Italiana degli Autori ed Editori*, (SIAE), Italy, [www.siae.it](http://www.siae.it).

<sup>68</sup> *Sociedade Portuguesa de Autores*, (SPA), Portugal, [www.spautores.pt](http://www.spautores.pt).

<sup>69</sup> *Bureau Senegalais du Droit d'Auteur* (BSDA), Senegal, [www.bsda.sn](http://www.bsda.sn).

<sup>70</sup> *Office National des Droits d'Auteur et des Droits Voisins* (ONDA), Algeria, [www.onda.dz](http://www.onda.dz).

<sup>71</sup> KOPIOSTO, Copyright Society, Finland, [www.kopiosto.fi](http://www.kopiosto.fi).

<sup>72</sup> COPYSWEDE, Sweden, [www.copyswede.se](http://www.copyswede.se).



copying, cable retransmission and other forms of secondary uses of audiovisual works.

### 3.1.2 Audiovisual performers' organizations<sup>73</sup>

AS with authors' CMOs, there is no single model for the management of performers' rights. In general, performers' organizations have been established later than those for authors, due to legislative developments. In many countries, related rights protection was added much later than authors' rights.

Below are some examples of audiovisual performers' CMOs in different countries.

#### Related rights holders together

All related rights holder in the field of music and audiovisual works are grouped together in a number of countries. An example is INTERGRAM<sup>74</sup> in the Czech Republic. In the field of music, the rights holders are performing artists and producers of phonogram and in the audiovisual field, actors and dancers.

#### Separate CMOs for related rights' holders in audio and audiovisual fields

Related rights holders are grouped in separate organizations in the field of music and audiovisual works. For instance, in Denmark, GRAMEX<sup>75</sup> represents performing artists and producers of phonograms and FILMEX<sup>76</sup> represents performers in the audiovisual area. FILMEX was established in 1995 by the Actors' Union for the management of audiovisual performers' rights. The underlying rationale is specialization, as there are differences in both rights and types of uses in the two fields.

In Chile, *ChileActores*<sup>77</sup> represents actors and collects remuneration for communication to the public in all its forms, such as television, cable, cinema, transportation vehicles, hotels, etc.

<sup>73</sup> *Performers' Rights in European Legislation*, AEPO-ARTIS, 2009.

<sup>74</sup> Independent Association of Executive Artists and Producers (INTERGRAM), the Czech Republic, [www.intergram.cz/en/](http://www.intergram.cz/en/).

<sup>75</sup> GRAMEX, Denmark, [www.gramex.dk](http://www.gramex.dk).

<sup>76</sup> FILMEX, Denmark, [www.filmex.dk](http://www.filmex.dk).

<sup>77</sup> *La Corporación de Actores de Chile* (ChileActores), Chile, [www.chileactores.cl](http://www.chileactores.cl).

### Joint CMOs for audio and audiovisual performers

In some countries performing artists in the audio and audiovisual field have grouped together and work in partnership with phonogram and audiovisual producers. This is the case, for instance, with SWISSPERFORM<sup>78</sup> in Switzerland. This type of CMO has a strong performer representation and can partner with producers and share revenue collected for related rights.

### Film directors and actors together

Another variation is a joint audiovisual CMO for directors and actors, such as VDFS<sup>79</sup> in Austria. As literary authors have their own CMO, *Literar-Mechana*,<sup>80</sup> the other main rights holders have founded their own CMO.

### 3.1.3 Audiovisual producers' organizations

Producers have a joint international management body for cable retransmission rights. An example is AGICOA in Switzerland. It is an international organization that collects retransmission royalties in 38 countries.<sup>81</sup> It has close to 10,000 members, both individual and institutional, customarily the producers' association or CMO of a country.

### Producers' organizations

Audiovisual producers have established their own CMOs in a number of countries. They customarily cooperate with AGICOA for retransmission rights. This is the case, for instance, with TUOTOS<sup>82</sup> in Finland. There are also other uses apart from retransmission of broadcasts for which audiovisual producers can collect their share. One such example is educational recording of television programs.

In Spain, EGEDA<sup>83</sup> represents and defends the interest of audiovisual producers. EGEDA has the authority of the Ministry of Culture for its activity. It also cooperates with AGICOA for retransmission of broadcasts.

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<sup>78</sup> Gesellschaft für Leistungsschutzrechte, (SWISSPERFORM), Switzerland, [www.swissperform.ch](http://www.swissperform.ch).

<sup>79</sup> Verwertungsgesellschaft der Filmschaffenden, (VDFS), Austria, [www.vdfs.at](http://www.vdfs.at).

<sup>80</sup> Literar-Mechana, Austria, [www.literar.at](http://www.literar.at).

<sup>81</sup> [www.agicoa.org](http://www.agicoa.org) – countries as at May 31, 2012.

<sup>82</sup> Copyright Association for Audiovisual Producers in Finland (TUOTOS), Finland, [www.tuotos.fi](http://www.tuotos.fi).

<sup>83</sup> *Entidad de Gestión de Derechos de los Productores Audiovisuales* (EGEDA), Spain, [www.egeda.es](http://www.egeda.es).



## **Audiovisual authors and producers together**

Some audiovisual CMOs represent both authors and producers. This is the case for SUISSIMAGE<sup>84</sup> in Switzerland and ZAPA<sup>85</sup> in Poland. In many countries, audiovisual rights are transferred to producers to a large extent, but certain remuneration rights are shared among authors and producers.

### **3.1.4 Joint audiovisual organizations**

Discussions are underway in some developing countries to establish a joint CMO representing all rights holders in the audiovisual field. Ghana and Nigeria are examples of such initiatives.

ARSOG<sup>86</sup> in Ghana secured its approval to function as a joint audiovisual CMO in 2011. It represents producers, writers, actors and music in audiovisual productions. ARSOG started as an initiative of film producers, but grouping together all rights holders in the audiovisual field was felt to be the most appropriate solution for the local infrastructure. In Ghana, private copying remuneration has been collected for a number of years.

## **3.2 Rights acquisition**

**The collective management of exclusive rights takes place on the basis of a mandate from rights holders, unless prescribed by law. In case of remuneration rights, it is important to identify all rights holders for the distribution of royalties.**

National mandates are acquired either directly from rights holders or through their associations. Foreign mandates are acquired through representation agreements with CMOs in other countries.

Rights holders generally give to the CMO a proxy or authority to manage their rights for a given period of time on an exclusive or non-exclusive basis. In certain cases of collective management where the law does not provide for exclusive rights, but only a right to equitable remuneration, users customarily pay remuneration for all protected material. In those cases, the CMO may not need a mandate from rights holders, but rather all necessary data to pay out remuneration to rights holders who have been identified.

As many audiovisual CMOs deal both with exclusive rights and rights to equitable remuneration, a mandate structure forms the basis for operation in most cases.

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<sup>84</sup> Swiss Authors' Rights Cooperative for Audiovisual Works, (SUISSIMAGE), Switzerland, [www.suissimage.ch](http://www.suissimage.ch).

<sup>85</sup> ZAPA, Poland, [www.zapa.org.pl](http://www.zapa.org.pl).

<sup>86</sup> The Audio-Visual Rights Owners Association of Ghana (ARSOG), Ghana, [www.arsog.org](http://www.arsog.org).

The representation of foreign rights holders or payments to them is achieved through agreements with CMOs in other countries. As the representation of audiovisual CMOs is different in various countries, the collecting and paying CMO may sometimes need to enter into agreements with several CMOs in the receiving country. The CMO also needs to take into account different ways of paying secondary royalties, for instance through the guild system if one exists.

### 3.3 Governance issues

**CMOs must be run in a professional manner, fulfilling the requirements of accountability, transparency and good governance. Some NGOs have defined standards of service that rights holders and users can expect.**

The good governance principles of CISAC<sup>87</sup> are used here as an example to describe standards that NGOs have established. Some standards are mandatory for members; others are voluntary.

The Professional Rules of CISAC are a set of principles laid down by CISAC to ensure that all members operate according to the best governance, administrative, financial and technical practices. Compliance with the rules is mandatory for members of CISAC. The Professional Rules for Dramatic, Literary and Audiovisual Arts (DLV) Societies set out the rules applicable to audiovisual authors' societies.

The Professional Rules cover the following principles that all members of CISAC must apply and respect:<sup>88</sup>

- Governance and membership: establishes who can be members of a CMO, members' rights, composition of the Board of Directors and the organization's inherent compliance with law and regulations.
- Transparency and confidentiality: deals with the information that authors' societies are required to share with their members, sister societies and CISAC (annual report, licensing income, distribution rules, etc.) and policy concerning disclosure of confidential information to third parties.
- Licensing and collection: details the different criteria for authors' societies as concerns to the granting of licenses, the collection of royalties and the monitoring of uses of their repertoires.

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<sup>87</sup> International Confederation of Societies of Authors and Composers (CISAC), [www.cisac.org](http://www.cisac.org).

<sup>88</sup> CISAC News, June 2008.



- Documentation and distribution: states that authors' societies must document works in their repertoire and distribute royalties in accordance with the Binding Resolutions.<sup>89</sup>
- Compliance and conflicts: describes the various principles related to compliance with the rules and the various procedures for dealing with litigation and dispute settlement.

In 2012, the European Commission published a proposal for a directive on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.<sup>90</sup> It proposed standards for governance and transparency for all types of CMOs.

### **3.4 Documentation of works and performances; standards and technical tools**

**Audiovisual works and performances must be identified for royalty distribution purposes. CMOs need tools which meet international standards and are interoperable.**

Major players in the audiovisual industry have developed a set of international standards for the proper identification of audiovisual works. The International Standard Audiovisual Number (ISAN)<sup>91</sup> is a key numbering system and metadata schema enabling the unique and persistent identification of any audiovisual work. ISAN is recommended or required as the identification and metadata system of choice for studios, producers, broadcasters, authors, rights holders, film archives and service providers who need to encode, track and distribute any kind of audiovisual content on all possible platforms in a variety of formats and embodiments, such as film prints, optical discs, digital files, digital streams, etc. The ISAN number has been integrated into several watermarking and fingerprinting technologies.

#### **Author identification tools**

The International Documentation on Audiovisual Works Database (IDA)<sup>92</sup> is a worldwide audiovisual author management system that serves as a common information database for CISAC members. They can consult it online to obtain accurate information on audiovisual works. IDA is fully compatible with the ISAN number and with the International Party Identifier (IPI).<sup>93</sup>

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<sup>89</sup> The Binding Resolutions are a separate set of technical criteria applying to documentation and distribution practices.

<sup>90</sup> COM(2012) 372 final, July 11, 2012.

<sup>91</sup> [www.isan.org](http://www.isan.org).

<sup>92</sup> [www.ida-net.org](http://www.ida-net.org).

<sup>93</sup> [www.ipisystem.org](http://www.ipisystem.org).

The purpose of the IPI system is the global unique identification of an author or other rights holder acting across multiple creation classes (musical work, literary work, work of art, etc.), assuming different roles (musical creator, film director, author of fine art, etc.) and owning different rights (performing right, reproduction right, broadcasting right, etc.). Around 2.2 million rights holders (IPs) are today included in the IPI system. The IPI system is the backbone administration tool for all CMOs dealing with authors' rights.

CISAC's Common Information System (CIS) consists of two series of tools that provide the building blocks for global digital rights management.<sup>94</sup>

- The first component features the integration of unique, ISO-certified, standardized international identifiers of works and parties (IPs) relevant to the creative process.
- The second pertains to a network of global databases, or sub-systems relying on various centralized and increasingly decentralized technologies, that will serve as the repository of authoritative information on the creative process for all participating CISAC societies.

These tools make it possible for CMOs to carry out their functions efficiently and transparently, in particular in the digital world. They are keys to automating the data exchange processes across the distribution chain and help CMOs in their royalty payments across the world.

In the audiovisual industry, a unique identifier for movie and television assets called EIDR is also an important mechanism and the Registry provides unique identifiers for a range of audiovisual objects.

### **Performer identification tools**

Performing artists enjoy rights in their performances in the same way as authors enjoy rights in their works. Apart from exclusive rights, they have some remuneration rights that are collectively managed. CMOs in this field have the task of identifying the performing artists whose recorded performances have been used in order to be able to distribute the remuneration collected by them for the entitled performers in their own countries and abroad.

In 1997, 18 CMOs representing performers' rights established the International Performers Database Association (IPDA),<sup>95</sup> with the goal of setting up an International Performers Database (IPD). Figures show that in 2011, 37 performers' rights

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<sup>94</sup> [www.cisac.org](http://www.cisac.org) – Our activities – Information networks.

<sup>95</sup> [www.ipddb.org](http://www.ipddb.org).



CMOs were members of the IPDA and more than 500,000 performing artists were registered in the IPD.

The main objective of the IPD is to identify individual performers in audio recordings and audiovisual works and the legal mandates they have assigned their CMOs in a unique way. Artists are assigned an International Performer Number (IPN). This number can be later used in the data exchange between CMOs, simplifying and improving the matching algorithms and the proper identification of rights holders, as well as in other databases and information systems linked to IPD.

### **Joint identifiers**

People often both create and perform, and do so possibly under different names, including pseudonyms. Not only CMOs need identification systems; intermediaries and archives invest big efforts in disambiguating creators and performers and sorting their works also need them. In this light, there was a real need to create a new identifier that connects the right person with the right credentials.

The International Standard Name Identifier (ISNI) Agency,<sup>96</sup> founded by a worldwide group of organizations, has created an ISO<sup>97</sup> standard that connects appropriate information with the appropriate public entity, be it Albert Einstein, John Lennon or Kermit the Frog. Drawing on the International Standard Book Number (ISBN), ISNIs create a unique 16-digit code for individuals or characters that are shared across all the information related to the cultural and scholarly contents associated with them. The ISNI is not intended to provide direct access to comprehensive information, but it provides links to other systems where such information is held. The ISNI system was launched in 2011 with an initial database of more than one million names, consolidated from various sources. CISAC and IPDA were among the founding members that together represent more than 26,000 world major libraries and 300 rights management organizations.

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<sup>96</sup> Press Release, December 2011, [www.isni.org](http://www.isni.org).

<sup>97</sup> International Organization for Standardization (ISO), [www.iso.org](http://www.iso.org).

## CHAPTER 4

### COLLECTIVE MANAGEMENT OF RENTAL RIGHTS

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**The rental of audiovisual works became popular with the advent of video and VHS cassettes in the 1970s. A further boost came with DVD optical discs, launched in 1995. Video-on-demand is today replacing video rentals.**

Rental rights were added to international copyright conventions at a relatively late stage. The TRIPS Agreement<sup>98</sup> of 1994 introduced rental rights in respect of computer programs and cinematographic works at least. The Beijing Treaty of 2012 introduced rental rights for performers.

Rentals refer to physical copies and thus places video-on-demand (VOD) outside the scope of rental rights. In copyright terms, VOD is covered by the communication to the public, including making available rights.

Rentals have been a major form of exploitation, but they are already clearly diminishing in developed countries. They still play a major role in developing countries and many of the vast numbers of titles produced in Nigeria yearly are delivered directly to the home video market. The economic importance of rentals may still be significant, but many markets have been badly hurt by the illegal copying of films.

Rental rights are customarily dealt with in direct contracts between creators/performers and producers and rights are transferred to producers. Many countries' legislations include presumptions on the basis of which rental rights are transferred to producers in the event of a film contract, unless otherwise agreed between parties. Sometimes these presumptions are "rebuttable", meaning that there is a possibility of agreeing otherwise.

To counterbalance such provisions and to ensure rights holders a possibility to enjoy some revenue from rentals, national legislation may include a provision on an equitable right to remuneration. In Europe, rights holders, authors and performers alike, have an unwaivable right to equitable remuneration for rentals. Member States may stipulate in national law that this remuneration right is subject to collective management, but this is left to each country's discretion.

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<sup>98</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994).



## 4.1 Rental rights

**Exclusive rental rights are in most cases transferred to producers, either by way of law or by contracts. In the European Union, rights holders have a right to equitable remuneration for rentals even after the transfer of the right itself.**

### International legal framework

Rental rights are stipulated in the following manner in Article 11 of The TRIPS Agreement (1994):

*“In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the rights to authorize or prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive rights of reproduction conferred in that Member on authors and their successors in title.”*

The Rome Convention does not grant the performer a rental right. The WPPT grants an exclusive right of authorizing commercial rental to the public to the performer.<sup>99</sup> However, this only concerns performances fixed on phonograms. The Beijing Treaty includes a right of rental for audiovisual performers.

### European harmonization

In the European Union, the Rental and Lending Directive<sup>100</sup> defines rental as follows (Article 2):

*Rental means making available for use, for a limited period of time and for direct or indirect commercial advantage.*

The directive introduced the concept of “unwaivable right to equitable remuneration”, meaning that it is an unalienable right which cannot be waived, in the following way (Article 4: paragraphs 1 and 2):

*“Where an author or performer has transferred or assigned his rental rights concerning a phonogram or an original copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for rental.*

*“The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.”*

<sup>99</sup> WIPO Performances and Phonograms Treaty (WPPT) (1996).

<sup>100</sup> Council Directive of 19 November 1992, 92/100/EEC.

Concerning the management of rental rights, the directive leaves the decision to the Member States by stipulating the following (Article 4, paragraphs 3 and 4):

*“The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors and performers.*

*“Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.”*

In some countries, collective management is prescribed by law, making it obligatory.

## 4.2 Users, tariffs and other conditions

**For the collective management of rental right to be efficient, it is important to specify in national legislation which entity is liable for payment of remuneration.**

Where the liable entity is defined as “those who operate the rental” or “the user”, CMOs can exercise collective management and conclude agreements with the rental shops. In countries where the liable party is defined as “the producer”, collective management is not applied. In countries where there is a system of collective bargaining agreements, as in the United States, residuals are paid for home entertainment.

In some European countries, it is obligatory for the remuneration right to be managed by CMOs; this is the case in Germany and Spain for both authors’ and performers’ rights. As the rental market is declining, remuneration in these countries has been decreasing in the last few years.

In countries where remuneration for rentals is collected by CMOs, this remuneration is determined by mutual agreement between the CMO and the users. As with any collective licensing, the importance of finding a representative negotiating partner is crucial. The tariff can be a percentage of rental income or be based on some other criteria.

For instance, in Spain, the performers’ CMO AISGE<sup>101</sup> concluded an agreement with the video shops association in 2005 and collection was greatly enhanced as a result. The tariff structure of AISGE is based on the area (square meters) of the video shop, as it is considered that this correlates with the amount of available audiovisual works. Special conditions apply to video clubs. In both cases, there is a minimum payment which stood at 1.5 percent of the rental revenue in 2012.

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<sup>101</sup> *Artistas Interprètes, Sociedad de Gestión, (AISGE), Spain, [www.aisge.es](http://www.aisge.es).*

## CHAPTER 5

### COLLECTIVE MANAGEMENT OF RETRANSMISSION RIGHTS

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**The content provided by television channels is sent to satellites (up-link), relayed to other countries (down-link) and distributed to households through cable networks. In copyright terms, this raises a new use, a separate communication to the public right, and therefore clearance of copyright is required.**

When national broadcasters clear rights, they normally acquire licenses for the domestic market, which is their primary area. This applies in particular to public service broadcasters. They conclude agreements with national rights holders and buy broadcasting rights of foreign material for showing in their countries. One broadcast channel can include 10,000 individual programs a year.

The very same broadcasts are often sent up to satellites (the up-link phase), from where they can be relayed to other countries (the downlink phase) and the signals are picked up by cable operators. When cable operators choose to include a particular channel in their channel selection (package), the operator must clear rights for all programs on the channel. The cable operator cannot choose which programs to send or in which order. It is impossible to manage rights individually, program by program.

CMOs can facilitate the clearing of multiple copyright licenses of thousands of individual programs transmitted via satellite and cable. The rights cover those of original creators, performers, film producers and broadcasters, all of whom benefit from cable revenues.

The rights relating to retransmission of broadcasts can be organized through the network of CMOs in various countries. For example, if a Swedish broadcast program is transmitted in a cable network in Denmark, the cable operators in Denmark need permission from a Danish CMO. The Danish CMO collects the revenue and sends the part due to Swedish rights holders to its Swedish counterpart for distribution to entitled holders of copyright and related rights in Sweden.

## 5.1 Retransmission rights

**The Berne Convention lays down a basis for cable retransmission of broadcast programs. These programs must be transmitted simultaneously and unchanged.**

There are two basic categories of cable programs.<sup>102</sup>

- Cable-originated programs: these programs are initiated by the cable operators themselves and they include program content from many different sources. Normal copyright and licensing rules apply to this category.
- Simultaneous and unchanged transmission of broadcast programs: these programs are originated by broadcasters and used by cable operators in their totality and without changes.

The Berne Convention contains special provisions for the second category.

### Authors' rights

Article 11*bis* (1) (ii) of the Berne Convention states:<sup>103</sup>

*“Authors [...] enjoy the exclusive right of authorizing:*

*any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication made by an organization other than the original one”.*

The starting point is an exclusive right. Cable distribution is one form of “communication to the public by wire”, cable being one category of wire.

The notion of “public” follows the interpretation of what constitutes a big enough network; the number of households connected to the network varies in different countries. For instance, in Sweden, networks having more than 25 households are considered to constitute a “public” in the copyright sense. The legislation of some countries places a limit on the purpose.

A prerequisite is that the communication to the public is made by another organization than the original one. The original one in this case is the broadcaster and the cable operator is thus another organization utilizing the same program in new context. Another prerequisite is that the broadcast program is transmitted simultaneously with the original broadcast and without change.

Under Article 11*bis* (2), non-voluntary licenses can replace the exclusive right, meaning that the consent of the rights holders is not needed but they have a right to

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<sup>102</sup> *Collective Management of Copyright and Related Rights, op cit.*

<sup>103</sup> Also included by reference in the TRIPS Agreement and the WCT.

remuneration. This remuneration right can be collected by CMOs in the country of cable transmission. Thus, some countries such as the United States of America and Canada have introduced compulsory licenses for cable retransmission.

### **Performers' rights**

The Rome Convention provides rights to related rights holders only in respect of cable-originated programs and not in respect of cable retransmissions of broadcast programs. The Beijing Treaty (BTAP) introduces a right of communication to the public (Article 11).

### **European harmonization**

The Satellite and Cable Directive<sup>104</sup> contains detailed regulations governing cable retransmission in addition to provisions governing collective management. Retransmission must take place on the basis of individual or collective contractual agreements between rights holders (copyright and related rights) and cable operators. This means that non-voluntary licenses are not allowed in Europe.

Member States must ensure that authorizations to cable operators for cable retransmission can only be exercised through a CMO.<sup>105</sup> This constitutes obligatory collective management. Another way to achieve the intended result is to introduce an extended collective license<sup>106</sup> for cable retransmission.

The right of a broadcasting organization may be exercised on an individual basis, as they are not subject to obligatory collective management (Article 10). The rationale is that cable operators are generally in a position to deal individually with each broadcaster and they have to acquire a license directly from broadcasters. As a consequence, film producers can choose to license their retransmission rights upfront to the initial broadcaster.

The outcome is that cable operators can obtain permission from all rights holders, with the exception of the original broadcaster, by way of collective licensing.

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<sup>104</sup> Council Directive of 29 October 1993, 93/83/EEC.

<sup>105</sup> Article 9 (1) of Directive 93/83/EEC.

<sup>106</sup> Details of an extended collective license are included in Module 1, Chapter 7, Section 4.

## 5.2 Negotiating history<sup>107</sup>

### **Organizations representing authors, film producers and broadcasting organizations on one hand and those representing cable operators on the other devised model contracts for cable retransmission as far back as 1981.**

During the 1970s interested international non-governmental organizations representing rights holders negotiated a joint declaration concerning rules and procedures pertaining to the collective licensing of cable retransmission. In 1979 CISAC, the International Federation of Film Producers Associations (FIAPF)<sup>108</sup> and the European Broadcasting Union (EBU)<sup>109</sup> adopted a joint declaration on the basic principles of a future joint management system. Thereafter, they devised a model contract with the International Alliance for Distribution by Cable (AID) in 1981.

The establishment of the Association for the International Collective Management of Audiovisual works (AGICOA)<sup>110</sup> in 1981 was an important step towards a workable solution in collective licensing. Members of AGICOA are national associations representing producers of audiovisual works. AGICOA has two tasks:

- negotiations concerning cable distribution of audiovisual works, in cooperation with its national members; and
- distribution to rights holders of the sums collected.

The first contract concerning the authorization of cable retransmission covering all rights involved was concluded in Belgium between the authors' CMO, SABAM,<sup>111</sup> and AGICOA with its Belgian member organization and the individual broadcasting organizations concerned on the one hand and the Professional Union of Radio and Teledistribution (RTD) on the other. It provided that cable operators would pay remuneration for the use of the repertoire represented by the rights holders' organizations and these organizations would undertake guarantees against possible third party claims. The agreement is no longer in force in its original form.

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<sup>107</sup> Collective Management of Copyright and Related Rights, op cit.

<sup>108</sup> The International Federation of Film Producers Associations (FIAPF), [www.fiapf.org](http://www.fiapf.org).

<sup>109</sup> The European Broadcasting Union, (EBU), [www.ebu.ch](http://www.ebu.ch).

<sup>110</sup> The Association for the International Collective Management of Audiovisual Works, (AGICOA), [www.agicoa.org](http://www.agicoa.org).

<sup>111</sup> *Société Belge des Auteurs, Compositeurs et Editeurs*, (SABAM), Belgium, [www.sabam.be](http://www.sabam.be).

### 5.3 Users, tariffs and other conditions

**The negotiating partners are authors, performers, producers of phonograms and audiovisual works and broadcasting organizations on the one hand and cable operators on the other.**

These rights holders can either negotiate jointly with the users or their representatives, or act separately. In Europe, a prerequisite is management through a CMO for all rights holders, except for the original broadcaster.

#### Package licenses/global agreements

For instance, in the Nordic countries, all rights holders have chosen to act together and issue joint licenses to cable operators. The Swedish umbrella CMO, COPYSWEDE,<sup>112</sup> represents 14 Swedish associations and CMOs of authors and performers. It has concluded cooperation agreements with organizations representing phonogram producers<sup>113</sup> and film producers,<sup>114</sup> as well as broadcasting organizations. Partners negotiate jointly and conclude agreements with cable operators covering all rights holders, including broadcasters who have established their own representative, the Union of Broadcasting Organizations in Sweden (UBOS). UBOS has a coordinating role for broadcasters.

The package license concerns approximately 100 different broadcast programs, both radio and television, which cable operators can include in their package. It also includes programs outside Europe, such as Arab News Network (ANN), Eri TV (Eritrea), Channel One TV (Iran), TV Montenegro RTCG (Monte Negro), Universal (Somalia), *Télévision Tunisienne* (Tunisia), just to mention a few. This reflects the great number of different nationalities living in Sweden and wanting to watch television channels in their national languages. There are more than 2.5 million cable households in Sweden.

The license covers distribution by cable, but also through the Internet, IP-TV. The prerequisite is that it must be a broadcast program which is retransmitted simultaneously and unchanged.

The tariff is based on the number of households and the broadcast channels that are distributed in each network. Thus, the more channels are distributed, the higher the payment. The tariff structure is a fee per channel per household. The price in 2012 was approximately 11 USD per household/year up to two foreign channels, thereafter approximately 2.60 USD per household/year for subsequent channels. The tariff basis for hotels that transmit broadcasts is a fee per room/year.

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<sup>112</sup> COPYSWEDE, [www.copyswede.se](http://www.copyswede.se).

<sup>113</sup> The International Federation of the Phonographic Industry, Swedish Group (IFPI), [www.ifpi.se](http://www.ifpi.se).

<sup>114</sup> The Swedish Film Producers' Rights Federation (FRF), [www.frf.se](http://www.frf.se), a member of AGICOA.

### **Separate licenses/individual contracts with each CMO**

CMOs representing different repertoires can act individually, or the cable operators may choose to negotiate separately with each CMO and individually with the broadcasters whose broadcasts are included in the service.

This is the case, among others, in Belgium,<sup>115</sup> where global agreements prevailed until 1988 (see Chapter 5, Section 2). Since then, an individual contract has been signed with each CMO for the rights of their constituency. In this model, the price per channel may be different, reflecting the importance of the channel to the cable operator. There are more than 4 million cable households in Belgium.

## **5.4 Distribution principles**

### **Money collected from cable retransmission is due to the main groups of rights holders: authors and performers, producers of audiovisual works and broadcasters.**

In case of package licenses, licensing entails several groups of rights holders, and they need to negotiate among themselves how much is due to each main group. This customarily reflects the rights situation in the country. In countries where rights of the original contributors have been transferred to film producers to a large extent, their respective share is bigger. In countries where this is not the case, as in Sweden, the share of film producers is lower, as authors and performers reserve their collectively managed rights in contracts with film producers. The share of broadcasters includes their right to the broadcasting signal and all acquired/transferred rights.

The above is reflected in the distribution shares of cable revenue in Sweden:

- share of COPYSWEDE (authors, performers, and phonograms producers)<sup>116</sup> 35.5 percent
- share of film producers: 29 percent
- share of broadcasters: 35.5 percent.

Every country being different in relation to the shares, the Swedish distribution serves only as one example. The principle, however, is the same in all cases of global licensing: the shares are first distributed to the main groups and then distributed within each group to different rights holders.

Where rights holders license their repertoire independently, there is no need for distribution among the main groups.

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<sup>115</sup> *Cable Retransmission of Broadcasts: A study on the effectiveness of the management and clearance of cable retransmission rights*, the European Broadcasting Union (EBU), 2007.

<sup>116</sup> Including authors and performers of musical works and phonogram producers.



## CHAPTER 6

### COLLECTIVE MANAGEMENT OF EDUCATIONAL COPYING

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**Educational establishments use audiovisual material in their activities, including broadcast programs. Rights clearance for the recording of radio and television broadcasts for non-commercial educational purposes is an area where collective management can offer a viable solution.**

Educational establishments use audio and audiovisual recordings for educational purposes. Recordings are often made from broadcast programs, that is, off-air recordings. In today's media landscape, previously broadcast programs are also available online as on-demand services. Broadcasts and on-demand services provide an opportunity for selection and access to valuable teaching and learning resources. Examples of studies where they provide an important added value are drama, the arts and current affairs.

As with retransmission of broadcasts, copyright clearance entails many different groups of rights holders and a large number of individual rights holders. Some countries have therefore included special stipulations to facilitate the permissions process.

In copyright terms, off-air recording is an act of reproduction for which permission from rights holders is required. Rights holders may include creators, performers, procurers and also the broadcaster. Without the services of collective management, the number of rights holders that would need to be considered and approached would be complex to administer for rights holders and users alike.

#### 6.1 Legislative framework

**There are no special provisions governing educational recording of broadcast programs in the international treaties. National solutions exist in a number of countries.**

The purpose of special provisions is to ensure that swift licensing procedures exist that balance the rights of rights holders and the interest of educational uses. For example in the Nordic countries, the legislators added an extended collective license (ECL) stipulation to off-air recording of broadcasts for educational purposes in the 1980s. The purpose of an extended collective license is to extend the effects of a collectively negotiated agreement to cover such rights holders that the CMO does not represent, provided that the CMO itself is representative.<sup>117</sup>

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<sup>117</sup> Extended collective licenses are explained in more detail in Module 1, Chapter 7, Section 4.

Two examples are used below to illustrate case studies: firstly the United Kingdom and secondly Australasia.

### 6.1.1 Regional example from Europe: the United Kingdom

The Copyright, Designs and Patents Act of 1988 of the United Kingdom enables educational establishments to record for non-commercial educational purposes any radio or television broadcast output of members of the Educational Recording Agency (ERA).<sup>118</sup> The ERA operates a license scheme certified for the purpose of the special stipulation. ERA licenses support educational establishments building and retaining libraries of audio and audiovisual recordings for educational use.

Recordings must be made by educational establishments or produced for them from

- a) Radio or television broadcasts (off-air recordings); or
- b) Online services making available programs which have previously been broadcast when the terms and conditions of use expressly permit access under the terms of an ERA license.

ERA members are many sector-specific CMOs representing UK authors and owners of related rights, trade unions representing rights holders and a number of broadcasters. Section 35 of the Act encourages rights holders to come together to offer a convenient and cost-effective license for educational users. This is considered to be a balancing act between protecting the interest of rights holders and the needs of users.

### 6.1.2 Regional example from Australasia: Australia and New Zealand

The Australian Copyright Act<sup>119</sup> allows educational institutions to copy from television and radio, provided payment is made for copyright owners. Screenrights<sup>120</sup> was established in 1990 to administer this provision.

Screenrights licenses educational institutions in Australia and New Zealand, enabling them to copy broadcast material and put these copies on internal networks or e-mail them to staff and students. Screenrights is also involved in a number of other non-voluntary licensing schemes, including retransmission of broadcasts.

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<sup>118</sup> Section 35 and paragraph 6 Schedule 2 Copyright, Designs and Patents Act 1988, [www.era.org.uk](http://www.era.org.uk).

<sup>119</sup> Part VA, Copyright Act 1968.

<sup>120</sup> Screenrights, Australia, [www.screenrights.org](http://www.screenrights.org).



## 6.2 Licensing, collection and distribution of remuneration

### **Countries where joint CMOs for several groups of rights holders exist provide a single point of contact for educational establishments to secure licenses.**

Licensees choose the programs they wish to record. These recordings must be labeled or marked with appropriate copyright notices informing teachers and students of the scope of the licenses.

For instance, in the United Kingdom, the recording must bear the following:

- date when the recording was made;
- name of the broadcaster;
- program title;
- the following message: “This recording is to be used only for educational and non-commercial purpose under the term of the ERA License”.

The copying of commercially produced, pre-recorded videos, audio tapes, CDs and DVDs or programs provided in any on-demand services is not authorized under the ERA license. In many countries, there are commercial operators which can license audiovisual works for educational establishments.

The selected programs can be stored and shared through an intranet, that is, closed networks. Access by students and teachers must be controlled by passwords or equivalent.

Remuneration is collected jointly for all rights holders. Consequently, the collected remuneration will be distributed to all copied titles, and within each title to the relevant rights holders. The scheme of allocation indicates the shares of various shareholders in an audiovisual work.

For instance, the allocations for Australian educational copying according to rules of Screenrights are as follows:

- copyright in the film: 68.5 percent;
- copyright in literary and dramatic work: 22.1 percent;
- copyright in the sound recording of musical works: 2.0 percent; and
- copyright in the musical works: 7.4 percent.

The CMO must identify all persons entitled to remuneration using its databases and various other sources. This may seem a laborious undertaking, but it is one way of making copyright function in practice.

As Screenrights puts it, bringing filmmakers and educators together is their task.

## CHAPTER 7

### PRIVATE COPYING REMUNERATION

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**In many countries defined forms of private copying can take place without the consent of rights holders, based on private copying exception. The amount of private copying of music and audiovisual works is huge, however, and without any compensation, it can have a negative effect on the livelihood of creators and artists and more generally on cultural diversity.**

Many countries have introduced special remuneration mechanisms to compensate rights holders for large amounts of private copying.

Customarily a small payment, also called a levy, is added to the price of recordable equipment and/or media that are used for private copying. Importers and local manufacturers of media and equipment are liable for the levy.

Even though the liability for the levy rests on importers and local manufacturers, the levy is in many cases transferred to the price of media and equipment. Thus the consumer, who is the beneficiary of the private copying exception, ends up paying the levy, albeit indirectly.

A CMO is customarily in charge of collecting the levy; in countries with several CMOs, one of them is nominated to function as the collecting body. In some countries, a governmental authority may be charged with the collection. In both cases, the revenue is distributed through relevant CMOs in both the audio and audiovisual fields.

This system has functioned since 1965, when a remuneration right was introduced in Germany – a levy on recording equipment. In 1985, it was broadened to cover recording media. New recording equipment and media are introduced to the market continuously. For that reason legislation does not customarily include a definite list, but rather the principle that remuneration is to be paid for all equipment and media that enable the making of copies for private purposes.

In 2011, the European Commission launched a mediation process on private copying and reprography levies and appointed a high-level mediator to identify the best manner to achieve coherence, effectiveness and legitimacy in the implementation and application of the principles and legal framework underpinning private copying and reprography levies. The mediator is expected to publish a report before the end of 2012.



## 7.1 Legislative framework

**In the Berne Convention, the reproduction right is an exclusive right and the criteria for exceptions and limitations are listed in the convention, the “three-step-test”.<sup>121</sup> Where the volume of private copying would be harmful to the interests of rights holders, many national laws provide for private copying remuneration or fair compensation.**

Private copying remuneration is applied in many countries, for example:

- Canada and the United States (digital audio media);<sup>122</sup>
- Japan and the Republic of Korea;
- Burkina Faso, Ghana, Nigeria and Botswana;
- Paraguay, Peru and Ecuador.

### 7.1.1 Regional example from Africa: Burkina Faso

In Burkina Faso, Law No. 032-99 on the protection of literary and artistic works includes a Chapter V, “Remuneration for private copying”.

According to Article 81:

*The authors and performers of works fixed on phonograms or videograms, as well as the producers of such phonograms or videograms, shall be entitled to remuneration for the reproduction of the said works intended strictly for personal and private use and not intended for collective use.*

*Remuneration for private copying shall be collected on behalf of the successors in title by the collective management organization which must, once the management fees have been deducted, allocate 50 per cent of the sums collected to a fund for the promotion of culture.*

BBDA (*Bureau Burkinabé du Droit d’Auteur*)<sup>123</sup> is the multipurpose CMO in the country. It has concluded its first distribution of private copying remuneration for audiovisual rights holders.

### 7.1.2 Regional example from Europe: harmonization principles

In Europe, the Information Society Directive<sup>124</sup> deals with reproduction right and possible exceptions and limitations. A new concept of fair compensation was

<sup>121</sup> Article 9.2 of the Berne Convention.

<sup>122</sup> Audio Home Recording Act of 1992 (AHRA).

<sup>123</sup> Bureau Burkinabè du Droit d’Auteur (BBDA), [www.bbda.bf](http://www.bbda.bf).

<sup>124</sup> Directive of the European Parliament and of the Council of 22 May 2001, 2001/29/EC.

introduced in the directive. Such compensation is a prerequisite for an exception or limitation for reproduction for private use. If a Member State wishes to include an exception for private use, it must also ensure some form of compensation.

The form, detailed arrangements and level of compensation are left to the Member States<sup>125</sup>.

### 7.1.3 Operational principles in the audiovisual field

Remuneration for private copying is customarily collected by a CMO that concludes an agreement with importers and local manufacturers or their representatives. One CMO collects the remuneration, but it can be distributed to rights holders through their sector-specific CMOs.

#### Collection

The collecting CMO may be one of the existing organizations or a new body established for collection purposes. In a few countries, two bodies have been established to collect remuneration, one for audio equipment/carriers and another for audiovisual equipment/carriers. In today's media landscape, this kind of distinction is largely outdated, as most carriers and equipment are used for multiple purposes, to record audio, video, text, photographs, etc.

In most cases, the collecting body does not distribute the money to all rights holders. To take the example of Hungary, the CMO representing musical works, ARTISJUS,<sup>126</sup> collects the levy. It is distributed among others by FILMJUS representing directors, directors of photography, writers of audiovisual works and film producers.<sup>127</sup>

In some countries, the remuneration is collected by a government body. This is the case, among others, in Botswana, where the "levy on technical devices" is collected by the Department of Customs and Excise.

#### Liability to pay

The liability to pay the levy customarily rests with the importer or local manufacturer. The legislation of some countries includes a secondary liability for retailers in order to ensure that they trade with carriers and equipment for which the levy is paid.

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<sup>125</sup> A more detailed explanation is given in Module 1, Chapter 7, Section 5.1.

<sup>126</sup> Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), Hungary, [www.artisjus.hu](http://www.artisjus.hu).

<sup>127</sup> Hungarian Society for the Protection of Audio-Visual Authors and Producers' Rights (FILMJUS), Hungary, [www.filmjus.hu](http://www.filmjus.hu).



There are three ways to set the tariff:

- national law or regulation;
- negotiation between parties; and
- arbitration or court action where negotiations fail.

## Tariffs

The tariff structure is either a flat fee per recording capacity or a percentage of the price of the equipment/carrier. In earlier days, the flat fee used to be a tariff per minute of recording time, reflecting that the more consumers could record on a blank VHS-cassette, the higher the remuneration should be. In the digital world with recordable CDs and DVDs (CD-Rs and DVD-Rs), the flat fee is customarily per gigabyte.

The other alternative, a percentage-based remuneration, is calculated on the basis of the import price or retail price, subject to the provisions of the law. Percentage-based remuneration varies in most countries between 2 and 8 percent. It is lower where carriers and equipment are also used for purposes other than recording copyright-protected material for private use. Such is the case, for instance, with personal computers.

Private copying levies are applied to devices such as blank CDs or DVDs, external hard discs, set-top-boxes, MP3/MP4 players or memory cards and mobile phones with MP3 functionality.

## 7.2 Distribution of remuneration<sup>128</sup>

**Private copying remuneration in the audiovisual field is paid to the main groups of rights holders: authors, performers and producers of audiovisual works.**

Decision on the respective shares of each main group can be included in legislation or regulations, or the decision can be left to rights holders to negotiate among themselves.

Legislation defines the main shares in Denmark and Poland, among others, with the following results in the audiovisual field:

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<sup>128</sup> Figures in this chapter are based on the International Survey of 2010 conducted by *Stichting de ThuisKopie*, the Netherlands, [www.thuisKopie.nl](http://www.thuisKopie.nl).

**Denmark – Video scheme:**

- authors 33.33 percent;
- performers 33.33 percent; and
- producers of audiovisual works 33.33 percent

**Poland – Video scheme:**

- authors 35 percent;
- performers 25 percent; and
- producers of audiovisual works 40 percent.

Distribution is negotiated between rights holders' organizations, for example, in Japan, where remuneration for audiovisual works is as follows:

- copyright holders of visual works (7 visual works producers' organizations) 36 percent;
- copyright holders of musical works (JASRAC)<sup>129</sup> 16 percent;
- copyright holders of literary works (3 writers' organizations) 16 percent;
- performers (GEIDANKYO)<sup>130</sup> 29 percent; and
- producers of phonograms (RIAJ)<sup>131</sup> 3 percent.

Internal distribution in each group is decided by the relevant CMO. Many CMOs use a distribution method called "objective availability". In this method, remuneration in the audiovisual field can be allocated to television programs and video/DVD titles on the market, as people have a possibility to copy these materials. CMOs can find out through surveys which types of materials are copied frequently and thus allocate a heavier weighting to those materials in their distribution rules. The rationale for this method is that existing material in the market can be copied by private persons. Surveys also indicate the share of foreign material.

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<sup>129</sup> Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), Japan, [www.jasrac.or.jp](http://www.jasrac.or.jp).

<sup>130</sup> GEIDANKYO/CPRA (Center for Performers' Rights Administration), Japan, [www.cpra.jp](http://www.cpra.jp).

<sup>131</sup> Recording Industry Association of Japan (RIAJ), Japan, [www.riaj.or.jp](http://www.riaj.or.jp).



Legislation in some countries provides that part of the collected revenue is used for cultural and/or social purposes within the activities of CMOs. The share varies in different countries, but it is generally about 20-30 percent, as the following examples show:

- Japan and Spain 20 percent;
- France 25 percent; and
- Croatia 30 percent.

Some countries have lower shares and in many countries there are no provisions governing the use of funds for cultural and/or social purposes. Cultural purposes can include promotion of production and dissemination of audiovisual works and training of professionals in the field.

### **7.3 Market control**

**Cooperation with customs authorities is an important element in the collection of private copying remuneration, based on legislative provisions.**

As most equipment and media are imported goods, it is important that the legislation includes clear provisions governing the CMO's ability to obtain information from customs authorities. As this kind of information is not customarily provided to private parties, there may be a need to specify the mechanisms for delivering information in customs legislation, irrespective of general secrecy provisions.

Another market control mechanism is to introduce a secondary liability for retailers of blank media and recording equipment. This ensures that retailers have an interest in verifying the payment of the levies when purchasing goods, because they would be liable in case of non-payment.

Many CMOs have controllers who visit retailers during their field activities.

## CHAPTER 8

### MANAGEMENT OF AUDIOVISUAL RIGHTS IN THE DIGITAL ENVIRONMENT

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**Digital technologies are overturning established ways of producing creative content and of delivering it to audiences around the world. While this means that consumers have greater choice in terms of when, where and how they view creative works, it also presents risks and opportunities for those who work within the audiovisual industry.**

An Indian film producer and director Bobby Bedi presented the scenario in the following way at event organized by WIPO in July 2011:<sup>132</sup> “The only ways that actors, technicians or workers, producers, directors, all of us can get paid, is through the money that people pay for a ticket, a CD, a DVD or a download. While digital technology makes things easier for us and makes us so much more creative, it does easily permit theft of our property at a very high quality and in a very easy way. Now, if our revenues come down then obviously actors will suffer, producers, directors, everyone suffers. Finally, creativity suffers.”

The traditional distribution chain for films (theatrical release, DVD sales/rental and exploitation by television) is facing a radical revision. The worldwide DVD market is in decline, both in terms of volume and profits, and is replaced by developing and as yet less profitable video-on-demand platforms.

Television has traditionally been an important medium both economically and culturally. Today, it is developing innovative ways of engaging audiences. New delivery systems mean that content can be shared in ways unimaginable only a few years ago. The age when programs were made for viewing by a mass audience in a single country on a particular night at a specified time has long gone. Catch-up services and on-demand services have, for many, become the default method of viewing. Although this shift appears to offer unheard-of benefits to an audience, it brings with it new challenges for traditional broadcast funding models.<sup>133</sup>

In legislative terms, what are the challenges of the new media landscape and what are the ways to address them?

The first question is whether the rights of authors and performers are in line with online and mobile markets. The second question is how enforcement functions in the online environment.

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<sup>132</sup> *WIPO Magazine*, September 2011.

<sup>133</sup> Audiovisual Authors' Rights and Remuneration in Europe, *op cit*.



Online and on-demand uses cover both online transmissions of broadcasts and new on-demand services. The WIPO Copyright Treaty (WCT) of 1996 established an exclusive right of communication to the public, including making available to the public, and in so doing clarified that authors enjoy an for online transmission of their programs by way of an exclusive right to authorize any communication to the public by wire or wireless means. Webcasting is the term used for online broadcasting and simulcasting means simultaneous and unchanged transmission of broadcasts over the net.

On-demand services are covered by the right of making available to the public “from a place and at a time individually chosen by them”. It is important that countries update their legislation to include these rights which are indispensable in the digital environment. For instance, video-on-demand (VOD) is one important on-demand service, and as it is rapidly replacing rental of physical copies, the legislative framework need to be clear on national bases.

The WPPT of 1996 grants a new exclusive right of making available to the public in an interactive manner to audio performers. The Beijing Treaty of 2012 does the same for audiovisual performers.

For effective enforcement in the network environment, new provisions are needed in copyright or separate legislation to clarify the liability of Internet Service Providers (ISPs) for illegal content that they carry through their services. This is one of the key issues, as it is virtually impossible for legitimate businesses to compete with free, unauthorized services.

If the legislative prerequisites for rights and enforcement are in place, it is up to the industry to develop new business models that are appealing to the audience in both online and mobile markets. Different regions have developed differently as to their favorite way of consuming new media. While the Internet is strong in the United States, the Asian market has turned mobile and people are using mobile phones to watch television, films and new audiovisual content created for mobile phones.

## 8.1 Legislative framework

**The adequacy of legislation is a prerequisite for flourishing audiovisual content for new media. Modern legislation and effective enforcement measures help national creative industries to develop.**

### Authors' rights

The ratification of the WCT is important to bring legislation to the level needed for new delivery models in the digital landscape, either online or mobile. The right of communication to the public, including making available to the public, is the key concept and is enshrined in Article 8 of the WCT.

In the European Union, the Information Society Directive<sup>134</sup> gives audiovisual authors a “making available right” that covers on-demand-services.

Article 3 of the directive reads:

*“Right of communication to the public of works and rights of making available to the public of other subject matter*

- 1. Member States shall provide authors with the exclusive rights to authorize or prohibit any communication to the public of their works, 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 them, from a place and at a time individually chosen by them”*

The implementation of this exclusive right in private contracts between authors and producers is under consideration. There are different ways to ensure subsequent payments to creators and performers, such as individual and collective agreement (the guild system) and through collective management organizations. The solutions are likely to reflect these differences; the main aspect being that some form of remuneration is paid.

### Performers' rights

At the international level, the Beijing Treaty includes a right of making available of fixed performances (Article 10).

At the European level, the Information Society Directive provides for an exclusive making available right for all performers (Article 3 of the directive). However, as with authors, the performer almost always transfers this right to the producer. In general, the making available rights are considered to be part of the package of

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<sup>134</sup> Directive of the European Parliament and of the Council of 22 May 2001, 2001/29/EC.



rights transferred by the performer to the producer. In Spain, the law<sup>135</sup> provides an express and broad presumption of transfer: the making available right is considered to be transferred to the film and phonogram producer if a film or phonogram contract is concluded. As a counterpart to this transfer, the law ensures that where the performer has transferred his exclusive right, he retains an unwaivable right to equitable remuneration. This right to remuneration is exercised by a CMO.

### 8.1.1 Regional example from Africa: Ghana

The Copyright Act of 2005 (Act 690) of the Republic of Ghana affords performers, both audiovisual and audio, a number of exclusive rights and a right to remuneration. Article 28 (2) reads as follows:

*“(2) A performer has the exclusive right to authorize or prohibit:*

*(d) The communication to the public of the performance except where the performance has been lawfully fixed on audio visual or audio recording media which may be broadcast without the consent of the performer, if the recordings have been published, subject to the payment of equitable remuneration.”*

This guarantees remuneration to audiovisual performers for new ways of delivering broadcasts through the internet.

## 8.2 New business models

**Video-on-demand (VOD) is a generic term for interactive on-demand services. The emergence of VOD, as well as the severe impact of online copyright infringements, put pressure on other market segments, such as pay-tv and DVD.**

Digital distribution and VOD in particular are important dissemination methods for the future. Market demand is challenging stakeholders to adapt their business strategies, also taking into account the impact of social media.

New players, such as telecommunication providers and Internet service providers set up new distribution platforms and they stress the need to make rights licensing more efficient by establishing more “one-stop-shops” in order to acquire rights for a larger catalogue of films than just those offered individually by each independent producer. Large catalogues may include older works and rare titles for niche-markets. New users argue that clearing rights can be a laborious task.

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<sup>135</sup> Article 108.2 of the Spanish IP Law.

### 8.3 Enforcement of rights in the network environment

**It is important that countries bring their legislation up to date with the digital environment and decide what kind of enforcement mechanism is appropriate for each country.**

The question is when and under what conditions Internet service providers (ISP) can be held liable for copyright violations committed by users of their services. Even where ISPs may benefit from certain liability privileges,<sup>136</sup> they still should be subject to injunction to prevent and put an end to ongoing infringement on their networks and sites. For instance, stipulations in Article 8.2 of the Information Society Directive<sup>137</sup> of the EU are important in this respect, urging Member States to take the necessary measures to ensure that rights holders whose interest are affected by an infringing activity can effectively enforce their rights.

There are a number of national solutions and these solutions can be regarded as options and examples when a country is considering the most appropriate measure. The issue of enforcement and ISP liability is discussed in Module 1, Chapter 8, Section 2.

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<sup>136</sup> For example, the EU E-Commerce Directive of 2000 (Articles 12-15).

<sup>137</sup> Directive 2001/29/EC.



## CHAPTER 9

### INTERNATIONAL ORGANIZATIONS AND THEIR TASKS

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**The role of non-governmental organizations is crucial in all areas of collective management. In the audiovisual field, there are NGOs representing different groups of rights holders and NGOs representing their collective management organizations.**

The main groups of rights holders are audiovisual authors, performers and producers. Each of these groups has one or more international and/or regional organizations that speak on behalf of their constituencies.

Authors' CMOs are internationally represented by the International Confederation of Societies of Authors and Composers (CISAC), alongside with authors from all disciplines. CISAC has a special body to deal with dramatic and audiovisual authors. At the European level, the Society of Audiovisual Authors (SAA) represents CMOs of screenwriters and directors.

Audiovisual performers are organized in the International Federation of Actors (FIA) whose many tasks include a focus on the IP rights of its constituency. The international representative of performers' rights CMOs is SCAPR (the Societies Council for the Management of Performers' Rights). AEPO-ARTIS works at the European level with performers' CMOs. The two organizations work closely together. In Latin America, LATIN-ARTIS (*Federación Iberoamericana de Artistas Intérpretes*) speaks on behalf of performers from the continent.

Film producers are represented by the International Federation of Film Producer Associations (FIAPF) which membership includes a large spectrum of national film producers' communities, including the Motion Picture Association (MPA). When collective licensing of cable retransmission rights became a challenge in Europe, AGICOA as the international licensor of producers' retransmission rights was established.

The following list is not exhaustive.

## 9.1 CISAC

**Within CISAC, the International Council of Dramatic, Literary and Audiovisual Creators (CIADLV)<sup>138</sup> brings together creators from the world of theatre, literature and audiovisual creation.**

The members of relevant CMOs range from playwrights and choreographers to writers, film directors and film adaptors. The mission of CIADLV is to study all questions that are directly linked to the interests and to the status of authors and their societies.

The CIADLV has discussed, among others, the important supportive role that CMOs should play vis-à-vis young authors in connection with model contracts for the production of audiovisual works and the conditions of employed authors.

The CIADVL also recognizes the importance and implications of various standards and digital tools for audiovisual content, such as the International Standard Audiovisual Number (ISAN) and closely follows developments relating to these tools.

CISAC has approved Professional Rules as good governance standards for audiovisual societies and these standards are obligatory for the CMOs concerned. The standards are described in more detail in Chapter 3, Section 3.140

## 9.2 SAA

**The Society of Audiovisual Authors (SAA)<sup>139</sup> was established in 2010 by European collective management societies to represent the interest of their member authors, in particular screenwriters and directors.**

The establishment of SAA was prompted by a perceived need to enforce the legal position of writers and directors and to achieve a fair, transparent and harmonized system to remunerate European audiovisual authors for the digital use of their works. Such a system would ensure that all authors are fairly remunerated in line with the success of their films and programs and, at the same time, allow for easy distribution and access of works. This system can, according to SAA, only be achieved through the collective management of audiovisual authors' rights and remuneration.

SAA works with other stakeholders to establish an effective system for collective licensing and pan-European management of audiovisual authors' rights and remuneration. SAA has published a White Paper, "Audiovisual Authors' Rights and Remuneration in Europe" (2011).

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<sup>138</sup> [www.cisac.org/CisacPortal/page.do?id=30](http://www.cisac.org/CisacPortal/page.do?id=30).

<sup>139</sup> [www.saa-authors.eu](http://www.saa-authors.eu).



The total amount of audiovisual collections in SAA member societies in 2009 was 423 million euros (550 million USD).

### 9.3 FERA

**The Federation of European Film Directors (FERA)<sup>140</sup> has been representing European film directors since 1980.**

The members of FERA are national associations representing film directors and it is the voice of more than 20,000 screen directors in Europe.

FERA has published, among others, Directors' Contracts Guidelines.<sup>141</sup> It highlights director's creative and economic rights and the problem of "buyout" contracts that oblige many European directors to give away their secondary (re-use) rights to financiers without any royalty payments.

### 9.4 FIA

**The International Federation of Actors<sup>142</sup> is an international non-governmental organization representing performers' trade unions, guilds and associations around the world.**

FIA was set up in 1952 by British and French representatives of actors and has grown to a global organization with more than 100 members in over 70 countries around the world.

The members of FIA are the trade unions, guilds and associations that work to ensure that performers can work safely, earn a decent living from their profession and the commercial exploitation of their talent and train to adjust to a rapidly changing environment, enjoy an adequate social protection as well as equal opportunities and be granted intellectual property rights on their performances.

In relation to IP rights, FIA works on two fronts: performers' intellectual property rights and performers' CMOs.

Building high, harmonized standards for the protection of performers' intellectual property, both nationally and internationally, and in particular in audiovisual media, is a key activity for FIA, and, as digital methods of exploiting performances increase, this work is even more critical.

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<sup>140</sup> [www.filmdirectors.eu](http://www.filmdirectors.eu).

<sup>141</sup> [www.filmdirectors.eu/?cat=28](http://www.filmdirectors.eu/?cat=28).

<sup>142</sup> [www.fia-actors.com](http://www.fia-actors.com).

## 9.5 SCAPR

**SCAPR (the Societies' Council for the Management of Performers' Rights)<sup>143</sup> initially sought to develop bilateral agreements between performers' rights organizations.**

SCAPR wishes to ensure that performers receive remuneration for those economic rights that are due to performers both internationally and nationally.

SCAPR was founded in 2001 to ensure that performers' rights are managed in a transparent, efficient and cost-effective way. It also seeks to ensure that performers feel that their interests are being correctly protected when their performances are being exploited in the extensive environment of technology and media.

Ordinary members of SCAPR must fulfill the following requirements:

- they are national representatives for the performers' statutory rights they administer;
- they directly or indirectly license performers' rights and/or collect remuneration for performers;
- they distribute payments individually to rights holders, both national and foreign; and
- they have established a database with relevant recording data and information on the remuneration they administer as well as the relationship with national and foreign rights holders by use of a recognized unique international performers' identification number.

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<sup>143</sup> [www.scapr.org](http://www.scapr.org).



## 9.6 AEPO-ARTIS

**AEPO-ARTIS (Association of European Performers' Organisations)<sup>144</sup> represents 33 performers' collective management societies from 25 European countries. The societies vary in size and duration of existence, with some 350,000 performers as members.**

In most countries, performers' rights are collectively managed both for members and non-members of the organizations.

The objectives of AEPO-ARTIS are:

- to develop and secure wider recognition of the collective administration of performers' rights;
- to further develop collaboration between performers' organizations at a European level in the field of performers' rights and in the collective administration of these rights;
- to contribute to highlighting the importance of the protection of performers and of the collective administration of their rights; and
- to further develop cooperation on European and international agreements, with special interest in clauses relating to collecting practices.

AEPO-ARTIS works on items of national legislation as well as on the content of European directives and international instruments in the field of intellectual property rights.

## 9.7 LATIN-ARTIS

**LATIN-ARTIS (*La Federación Iberoamericana de Artistas Intérpretes*)<sup>145</sup> represents audiovisual performers' collective management organizations in Spanish- and Portuguese-speaking countries.**

LATIN-ARTIS is a platform for collaboration between audiovisual performers' CMOs in Brazil, Chile, Colombia, Mexico, Paraguay, Peru, Portugal, Spain and Uruguay. It contributes to legislative development both nationally and internationally and facilitates the trans-border exchange of remuneration. It has developed administrative and technical procedures and standards for identification of performances in different territories to ensure that collected remuneration is distributed to legitimate rights holders. It has a number of principles pertaining to efficiency and good governance of CMO operations.

<sup>144</sup> [www.aepo-artis.org](http://www.aepo-artis.org).

<sup>145</sup> [www.filaie.com](http://www.filaie.com).

## 9.8 FIAPF

**Created in 1993, the International Federation of Film Producers' Association (FIAPF)<sup>146</sup> represents film and television producers globally. It has members in 27 countries on five continents.**

FIAPF's mandate is to represent the economic, legal and regulatory interests which film and TV production industries have in common. As an advocate for producers, FIAPF helps formulate policies and coordinate political action in the following key areas:

- copyright and related intellectual property rights legislation;
- enforcement of IPR legislation and anti-piracy action;
- deployment of digital technologies and their impact on the audiovisual value chain;
- technology standardization process;
- media regulation;
- private- and public-sector film financing mechanisms; and
- trade-related issues.

FIAPF has published a declaration called "Basic Principles for Film Producers Worldwide".<sup>147</sup>

## 9.9 MPA

**The Motion Picture Association (MPA) represents the interests of major motion-picture producers and distributors of films and other audiovisual works in the global marketplace.**

On behalf of its member companies that provide audiovisual entertainment for global audiences, the MPA advocates for strong copyright and content protection for copyright works, particularly in the audiovisual sectors. MPA conducts investigations around the world, assists with the criminal and civil litigation generated by such cases and conducts education and outreach programs to teach movie fans around the world about the importance of strong copyright and content protection.

The MPA directs its worldwide content protection operations from its headquarters<sup>148</sup> in California, with regional offices on different continents.

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<sup>146</sup> [www.fiapf.org](http://www.fiapf.org).

<sup>147</sup> [www.fiapf.org/advocacy\\_basic\\_principles.asp](http://www.fiapf.org/advocacy_basic_principles.asp).

<sup>148</sup> [www.mpaa.org](http://www.mpaa.org).



## 9.10 AGICOA

**The International Audiovisual Producers' Collective Rights Management Organization (AGICOA)<sup>149</sup> was established in 1981 to track and distribute royalties for the retransmission of broadcasts in respect of the products of independent producers.**

AGICOA represents clients worldwide. It operates under the terms of copyright law established by the Berne Convention and the provisions of the Satellite and Cable Directive.<sup>150</sup>

Since 2000, AGICOA has collected and distributed over half a billion euros of royalty payments on a portfolio of more than one million audiovisual products.<sup>151</sup>

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<sup>149</sup> [www.agicoa.org](http://www.agicoa.org).

<sup>150</sup> Council Directive of 27 September 1993, 93/83/EEC.

<sup>151</sup> AGICOA Press Release, December 19, 2011, [www.agicoa.org](http://www.agicoa.org).

## ANNEX

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### About the authors

#### **Tarja Koskinen-Olsson (Mrs)**

International Adviser, Olsson & Koskinen Consulting, Finland/Sweden

#### Current position

International Adviser at Olsson & Koskinen Consulting, 2003 –

#### Board positions

- NORCODE (Norwegian Copyright Development Association, Vice-Chair, 2010 –
- Copyright Clearance Center, Board of Directors, 2009 –

#### Previous positions

- Chief Executive Officer at KOPIOSTO (Joint Copyright Organization in Finland), 1987 – 2003
- Assistant Director at TEOSTO (Finnish Composers' Copyright Bureau), up to 1986

#### Elected positions

- Chair of IFRRO (International Federation of Reproduction Rights Organisations), 1993 – 1999
- Honorary President of IFRRO, 2001 – 2009

#### Expert positions

- Member of the High Level Expert Group on the Digital Libraries Initiative of the European Commission, 2006 – 2009
- Member of WIPO Stakeholders' Platform facilitating access to copyright works for visually impaired persons, 2008 - 2010



## **Nicholas Lowe**

Copyright and Collective Administration Consultant

### **Previously**

Director of Legal and International Affairs and Director of Broadcasting Licensing at the Performing Right Society (PRS) in London.

Solicitor (admitted in 1977 in England and Wales and in 1993 in Ireland) in private practice specialising in intellectual property law.

### **Experience**

Over 35 years' experience of copyright, contracts and litigation, the last 28 years having been in the field of music, related rights and collective management.

Advising collective management organisations, NGOs and music publishers in Europe, North America and the Caribbean on contractual matters, copyright and neighbouring rights.

