

prepared by Ms. Katherine Sand, Consultant

UNDER THE TERMS OF REFERENCE AND GUIDELINES
PREPARED BY THE WORLD INTELLECTUAL PROPERTY
ORGANIZATION (WIPO) AND IN CONSULTATION WITH
STAKEHOLDERS IN THE AUDIOVISUAL SECTOR

WIPO Review of Contractual Considerations in the **Audiovisual Sector**



Preamble by the Director General of WIPO

There are a number of areas where the value of a contract can be assessed beyond the specific interests of the parties. The societal value of a contract can be identified in regard to legal certainty, for instance. By providing clarity on the terms of transactions, well-drafted contracts have a clear impact on economic and social stability. Contracts strengthen societal ties, providing mutual recognition to groups with different and sometimes opposing interests, thereby stimulating and preserving social dialogue.

In regard to Intellectual Property, contracts contain the final expression of the rights granted under international treaties and implemented in national legislation. By compensating right holders and facilitating the exploitation of rights, contracts represent the ultimate way in which Copyright impacts on creators and the creative industries. Well-drafted contracts are a key factor for an effective and balanced exercise of rights, ensuring both their efficient exploitation and the equitable remuneration of creators. The need for promoting solid contractual relations appears as especially acute in developing countries lacking effective

Intellectual Property institutions, a tradition in social dialogue, and solid trade unions representing the different stakeholders concerned.

In the past, WIPO has played a very limited role in the field of Copyright contracts. The absence of international initiatives in the field of contractual practices reflects the effect of two main constraining factors. First, contract law is territorial by nature and therefore subject to numerous national peculiarities. As opposed to rights, contracts have not been subject to any significant process of international harmonization in the field of Copyright. Since contractual law is dependent on national legislation and jurisprudence, an international assessment of current contractual practices has seldom been made. Second, contracts are by nature a contentious space, an area where different positions are confronted in an effort to agree but also to overcome the position of the other party. In this context, it is very important for WIPO not to endorse the position of any contractual party, be it the original right holder (author, performer) or the creative industry (publisher, producer) that undertakes the exploitation

of the creation and its transmission to the public. The *WIPO Review of Contractual Considerations in the Audiovisual Sector* (“the Review”) demonstrates that WIPO can play a relevant role in the field of contracts while taking into consideration the two constraining factors listed above.

In developing the Review, the following parameters have been followed:

- a) *A positive approach to contractual relations.* In themselves, contracts benefit copyright. They represent the *dynamic* dimension of the Copyright system, which is put in motion and tested in a plurality of ways by the unlimited array of contractual possibilities. The benefits of the *exercise* of rights as represented by contracts are felt by both parties to the contract and Society at large in areas such as legal certainty, mutual recognition of stakeholders and strengthening of national legislation.
- b) *A developmental perspective.* The Review of contractual considerations can provide a valuable tool for co-operation in the promotion of rights in audiovisual performances in developing countries. The Review offers a valuable capacity-building tool for performers and producers and a means for their joint intervention in awareness raising and training.

- c) *A neutral and universal approach.* The Review addresses the different aspects of the contractual relation in a high level, generic and neutral way. Different options are displayed in the Review but no specific position in substance is taken in regard to the different alternatives that are visited or considered. Given its high-level, agnostic character, the Review is universal, as opposed to model contracts and even guidelines, which by necessity are linked to national legislation or adopt a prescriptive character.

WIPO has commissioned the preparation of the Review of Contractual Considerations to an independent consultant, Ms. Katherine Sand, who has a deep knowledge of audiovisual contracts and extensive international experience in this area. The WIPO Review also benefits from comments from the International Federation of Film Producers (FIAPF) and the International Federation of Actors (FIA). In presenting this Review, I would like to thank Ms. Katherine Sand for her excellent work and both FIA and FIAPF for their insightful comments.



Preamble by the Presidents of FIA and FIAPF



Film and audiovisual production is - in its very essence - a collaborative form. A film set bustles with the creative and technical energies of many talented and committed individuals whose combined efforts transform mere words on a page into a memorable immersive experience on the screen. As the pervasive presence in front of the camera and in the public's consciousness, the actor, or audiovisual performer, plays a key part in that collaborative effort.

FIA and FIAPF jointly welcome WIPO's initiative of commissioning the present Review of Contractual Considerations in the Audiovisual Sector. With this timely publication, its author, Ms. Katherine Sands, has succeeded admirably in providing a condensed, yet comprehensive, panorama of all the key aspects of performers' contracts in the audiovisual industry and the various ways in which these may serve the interests of both performers and producers. The authoritative

clarity of her writing reflects her many years as an internationally respected expert.

As noted in the Introduction, this publication has been designed as a review of things to consider when designing contracts, rather than as a guideline. This distinction is an important one: as the publication makes clear, there are great variations in legal philosophies, industrial relations structures and contractual traditions across the globe; in order to serve a fully practical purpose in a WIPO context, it was important that this publication provide a neutral check list of possible features in the morphology of the audiovisual performers contracts, and avoid any form of ideological emphasis. In this way, the Review may be used in a multiplicity of national contexts to practical effect.

Whilst we may not always converge on the detail, FIA and FIAPF are united in our efforts to bring about a stable business environment for screen actors and producers throughout the world. Sound, fair and enforceable audiovisual contracts are one of the means to this desirable end. The absence of reliable contracts serves no one and impairs all the contributors in this most collaborative of creative industries: screen actors do not receive the treatment they expect and deserve and producers find it more difficult to secure production financing and exploit the resulting film in all relevant consumer markets.

Our organizations hope that the present Review may prove a valuable background in supporting the efforts of all relevant national film industries in making full use of contractual templates, for the benefit of long term economic growth, social cohesion and cultural diversity.

Agnete Haaland, FIA




Luis Alberto Scalella, FIAPF




Introduction

This document has been prepared for WIPO in order to assist dialogue and cooperation at different levels with respect to the operation of contracts in the audiovisual sector.

For the framework to be optimally useful to WIPO, to Member States and to accredited non-governmental organizations across the wide array of legal and cultural settings, and to fulfill the concomitant requirement of neutrality, this framework will present a nonjudgmental *review of considerations*, rather than *guidelines* or even *examples* since the latter imply a prescriptive tone that, in many situations, could be irrelevant while also being potentially alienating and divisive.

In preparing this review, elements of the collective agreements and related laws of a number of countries were considered, not to judge their merits but to provide a context for the framework. These countries include Australia, Brazil, Canada, Denmark, France, Germany, India, Japan, Mexico, Spain, the United Kingdom and the United States of America.

Throughout the document, it should be recognized that while audiovisual contracts necessarily contain matters not relating to performers' rights or the work of WIPO, this fact should not negate or de-

tract from their importance as vehicles for the implementation of performers' rights.

The organization of this framework focuses first on the *role of performers' contracts in the audiovisual industries*. The opening section considers the role of contracts for both performers and producers. That role encompasses a process and protection for both sides of the agreement. The process ensures that both sides agree upon issues ranging from ownership of rights to compensation before production commences; protection ensures that the expectations of both sides can be satisfactorily met. This section examines why performers need contracts, the question of who is a performer and whether all productions are created equal, the relationship between neighboring rights and contracts, the difference between contracts and collective agreements, and the international nature of audiovisual production.

The framework then turns to an overview of the *limitations of contracts*. It would be a mistake to view the contracting process as a magic solution that can resolve all problems encountered by performers and producers, and this section provides an overview of the range of issues that limit or prevent the effectiveness of contracts as a method for implementing performers'

rights in practice. Those impediments include the issue of individual versus collective bargaining power, traditions of verbal agreements, the implications of employment status derived from labor law and competition (antitrust) law, the ability to enforce contractual provisions, and the inability to enforce contractual terms against third parties. This portion of the framework also refers to the territorial nature of contract law and the problems that arise in an international audiovisual industry. Finally, this portion concludes with an overview of the contractual issues that arise where the performer is a minor and not yet of the age at which he or she is permitted by local law to enter into a binding agreement.

The framework next provides an overview of the *issues that should be addressed in performers' contracts*. This section reviews the issues that can be addressed on a contractual basis, such as upfront compensation, residual compensation, credits, reuse rights and duration of the engagement. These issues are set forth as a nonprescriptive list, framed to allow discussion of local and regional differences in the way rights are treated in contracts and agreements. The scope of this framework does not envisage a comprehensive analysis of custom and practice in contractual terms around the world, and interested parties are encouraged to provide more detailed information on practices in specific countries and regions during WIPO-led discussions.

The section specifically focuses on typical contractual provisions, compensation and remuneration, contracts as a mechanism for the efficient transfer of rights, secondary compensation, credits and other contractual issues.

The final portion of this framework provides a brief overview of those performers' dealings with producers that raise *issues that do not rely on contracts*. These are rights or obligations that arise through domestic law or treaty obligations, regardless of any contractual relationship between the performer and the producer. These issues cover such topics as moral rights and statutory rights of remuneration.

The framework *concludes* with some thoughts on the role and importance that contracts play in the working relationships between performers and producers.

This framework is intended to provide a first step for a multi-stakeholder discussion of the ways in which this initial effort can be expanded to provide useful guidance for both performers and producers in developing approaches to contracting that enhance and clarify the rights and expectations of performers and producers. Any such effort must, of course, be undertaken in a manner appropriate to the myriad legal systems in which performers and producers work together.

Outline of this Framework

Preamble by the Director General of WIPO

Preamble by the Presidents of FIA and FIAPF

Introduction

PAGE 10

The role of performers' contracts in the audiovisual industries

- 12 Why do performers need contracts?
- 13 What is a performer?
- 13 Are all productions created equal?
- 14 The relationship between neighboring rights and contracts
- 15 The difference between contracts and collective agreements
- 16 An international industry

PAGE 17

The limitations of contracts

- 17 Collective versus individual bargaining power
- 17 Verbal contracts
- 18 Employment status
- 18 Geographical jurisdiction
- 18 Enforcement of performers' contracts
- 19 Minors and contracts

PAGE 20

Issues that should be addressed in performers' contracts

20 Typical contractual provisions

20 Compensation/remuneration

21 Contracts as a mechanism for the efficient transfer of rights

22 Secondary compensation

24 Credits

24 Other contractual issues

PAGE 25

Issues that do not rely on contracts

25 Exclusion of rights of remuneration

25 Moral rights

PAGE 26

Conclusion

The role of performers' contracts in the audiovisual industries

This section considers the role of contracts for both performers and producers. That role encompasses a process and protection for both sides of the agreement. The process ensures that both sides agree on issues ranging from ownership of rights to compensation before production commences; protection ensures that the expectations of both sides can be satisfactorily met. Before commencing with an overview of specific aspects of performers' contracts, it may be worthwhile to briefly examine why performers need contracts; the question of who is a performer and whether all productions are created equal; the relationship between neighboring rights and contracts; the difference between contracts and collective agreements; and the international nature of audiovisual production.

This framework is neither a detailed study nor a comprehensive analysis of performers' contracts and collective agreements around the world. While such a detailed study or comprehensive

analysis could have its interesting aspects, the difference across various regions – in the nature of audiovisual production, the evolution of statutory versus contractual rights and the collective bargaining clout of performers – means there is little opportunity to export contractual provisions from one country or situation to another.

The concept of a comparative analysis of performers' contractual rights – even on a framework level such as this – is a potentially fraught, and certainly subjective, area of discussion. In their working lives, performers in all countries are exposed to all kinds of contracts, including those based on collective agreements negotiated by guilds and labor unions, and some of which are, additionally, part of a statutory framework of labor law regulation. Even differences in competition (antitrust) law can play an important role in these issues.

The need for a framework for further discussion of these issues can easily be seen from a simple Internet search which yields examples of sample contracts routinely used in audiovisual production.

Many – perhaps even most – of those sample contracts require the performer to yield or waive all rights (including, but not only, neighboring rights) for a single, one-time fee. Sometimes known as “buy-outs”, contracts like these can be onerous for performers; yet in many countries where laws and collective bargaining are less developed – and even in countries with effective guilds and producer organizations – they are routinely offered and used.

In reviewing the kinds of provisions found in audiovisual contracts, it has been assumed that WIPO Member States, and producers and performers alike, will want to promote the use of contracts in a free but fair negotiating environment with the goal of stimulating audiovisual production around the world. In addition to stimulating production, the goal extends to effective and transparent management and administration of rights while encouraging an understanding of the clear and equitable disposition of rights and a delineation of relative obligations that is possible through the use of standard, collectively negotiated or legally authorized contracts and agreements.

Throughout many decades of norm-setting discussions, representatives at WIPO have worked towards a common understanding of the needs of audiovisual performers in relation to authors, musicians and other contributors to audiovisual works. Their task is complicated by the multiplicity of arrangements and laws in

this field and the fact that performers are treated differently in law depending on the legal and cultural tradition of each country.

In some systems, performers’ contributions to an audiovisual production are viewed as a “work made for hire”, and in such cases, the producer is deemed to be the author of the audiovisual work in whom copyright vests. In other regimes, performers themselves are seen in much the same way as authors and given exclusive rights in their performances. There are a considerable number of other countries that might fairly be described as having elements of both systems. The achievement of some kind of “marriage” of these differing systems, and in particular the mechanisms they provide for the transfer of performers’ rights to the producer of the audiovisual work, is a question that remained before WIPO for many years and has only recently been satisfactorily addressed by the conclusion of the Beijing Treaty on Audiovisual Performances.

In addition to these complexities are additional layers that influence the different content of performers’ contracts, including legal, cultural and linguistic differences; differences in the relative state of development of audiovisual production industries; different definitions of what constitutes a performance and, more recently, a multitude of new modes of exploitation of audiovisual production.

This review highlights the one element common to most, if not all, of these different legal systems, namely the audiovisual performer's contract. It is here that the performer's status, remuneration, rights and obligations with respect to the performance can be delineated. A connection between rights issues and employment issues has been established in international norm-setting since the advent of the Rome Convention half a century ago.

Therefore, while not stepping into social dialogue, WIPO representatives working in the field of performers' intellectual property (IP) rights should be aware of the landscape in which performers and producers collaborate to make films, television programs and other audiovisual content.

Why do performers need contracts?

Simply and obviously, the audiovisual performer's contract regulates the relationship between the producer and the performer or other contributor to the making of a film, television program or other audiovisual work. Contracts provide an essential tool in the effective management of certain exclusive rights, both by individuals and through collectively negotiated standards and mechanisms.

The mere act of discussing and agreeing to a contract can, at times, be as

important as the contract itself, because it provides an opportunity for the performer and the producer to agree in advance, in writing, on all of the relevant terms and conditions applicable to the performer's contributions to the audiovisual work. The written contract can also serve as a tool for enforcement should a dispute later arise over compliance by either party with the terms of the employment relationship.

It is inherent in the life of any right holder to aspire to have some influence over his or her artistic work. In the case of the performer, whose performance is inevitably part of a collaborative effort, this notion of control is very limited and almost invariably restricted to the simple negotiation of remunerative terms for the exploitation of that performance.

Written contracts provide an important function to the advantage of the producer, which is to convey significant legal and commercial certainty and security with respect to the performer and his or her rights and obligations. In an industry that involves complex and varied arrangements for the financing, production and future distribution of the work being produced, this is essential for every producing and distributing entity.

Some aspects of performers' contracts may seem to some to be remote from performers' neighboring rights. However, these questions are a normal part of producers' and performers' day-

to-day business, and it is not possible to consider neighboring rights in isolation from the work being done, since it is from precisely those performances that the rights are derived. There is an intimate connection between the neighboring rights of the performer and the working conditions and employment rights of the performer. In this respect, performers differ greatly from authors, and it is for this reason that the employment status of the performer is an essential factor for consideration at national level, in conjunction with any consideration of neighboring rights issues. Constructive relationships between performers and producers are of critical importance to fair and equitable business dealings, and are the norm in many countries where there is a well-structured industry.

What is a performer?

This review does not engage with the question of the definition of an audiovisual performer. This is a question dealt with at national level, influenced by local custom and practice and, often, by union or guild rules. A number of performers' organizations do not represent *background* or "extra" performers who may have few words to say, or no dialogue, and literally do appear in the background. More often than not, background performers do sign contractual terms.

In some countries, a further distinction is made between *professionals* and *amateur* performers, with amateurs not covered by collective agreements, though neighboring rights laws would not make such distinctions.

It should be noted that, in addition to actors, there are many other kinds of audiovisual performers, including musicians, dancers, singers, stunt performers, motion-capture performers, body doubles, etc. Dubbing performers work in a great many countries. Theirs are complex and important functions, and they are often necessarily engaged in countries other than the original country of production.

Are all productions created equal?

The negotiation process and the content of audiovisual performers' contracts tend to differ depending on what kind of production is taking place. Where there is an established local television industry with primarily local production – which may be limited linguistically – there is more standardization of contractual terms.

Film production varies widely too. Many countries do not have a sustained film industry and producers may come and go, making any kind of collective negotiation difficult or impossible. Some audiovisual performers, for example dubbing artists and musicians, may not even be engaged by the audiovisual producer,

but by a third party entity hired to provide these services for the production. In such situations, performers may not be awarded contracts of the same standard as those negotiated collectively. Similar situations arise in the commercials industry, a major source of work for performers around the world.

In some countries there are differences in standards for contracts in low-budget film production. Some guilds and unions have created slightly different terms and conditions for such companies to facilitate small producers and to stimulate this particular art form.

Increasingly, performers provide their services for a whole range of “new media” productions, including for video games, Internet-only productions, etc. Interactive agreements exist in some countries but are far from the norm.

The relationship between neighboring rights and contracts

Audiovisual production is a rapidly expanding, international industry, transformed by technology within the last 20 years and changing with unprecedented speed because of the Internet and online media. The industry is characterized by complex ownership models and financial relationships because of the global convergence of media ownership, complicated distribution chains and deals involving

audiovisual products. It is an industry that faces enormous threats from the rapid growth of online piracy, which threatens traditional business models and the business of production itself.

In this environment, the growth of neighboring rights in many countries has sent an important signal that performers and producers need to be able to protect themselves, their works and their performances with clarity and fairness. The contract is one such mechanism for achieving this.

Performers’ continuing relationship with the production after the day of work itself (other than in connection with possible publicity and promotion for the work) is most often limited to rights of continuing remuneration or rights regarding any reuse of the performance. But the extent of these rights varies widely in different countries and often depends on the fame (and thus bargaining power) of the performer. Contracts are necessary to delineate the boundaries of the performers’ involvement, whether based on exclusive rights, remuneration rights or a combination of those rights.

Contractual rights are necessarily limited, whereas the advantage of IP rights is that they may be exercised against anyone regardless of whether or not they are in a contractual relationship with the performer. Thus, in addition to overcoming problems of jurisdiction, and privity,

they can also protect performers against insolvency and can be enforced against third-party right holders and assignees.

The existence of performers' neighboring rights can also assist in contractual development and the good practices that are seen in countries with developed audiovisual industries, helping to provide performers with the ability to work towards adequate compensation mechanisms and producers with a more regulated business environment.

The difference between contracts and collective agreements

In some countries, mainly those with well-developed industries, audiovisual performers and producers have found it both possible and convenient to organize their relationships through the mechanism of trade associations and performers' guilds. The ability to do so varies from country to country, depending on a range of legal, cultural and historic factors, including: the nature of performers' employment status, the existence of organized and representative performers' and employers' associations, an audiovisual industry of sufficient size and structural solidity (in situations with *ad hoc*, independent production this is much more difficult). In some countries, collective agreements have an added layer in terms of force of law, having been given official recognition by Ministries of Labor.

One of the complications in certain territories is that performers may be viewed as independent contractors who are prohibited by competition (antitrust) laws from engaging in collective bargaining. Where such laws apply, it is far more difficult for performers to protect their rights through negotiated agreements.

Where these collective bargaining organizations exist, it has frequently been possible for performers to promulgate standard contractual terms. At the most basic level, these terms provide a framework for negotiation and give guidance to performers, and/or their agents or other representatives, in terms of what their individual contractual agreement with a producer should contain. The more developed version of these standard terms is expressed in collective agreements, establishing minimum contractual terms for the engagement of performers in a given audiovisual work. The performer is, generally speaking, free, based on his or her individual bargaining power, to negotiate "better" or slightly varying terms as long as the collective agreement is observed. Indeed, unions often include specific provisions to this exact effect.

It is advantageous to both performers and producers to have an organized counterpart with which to deal. However, getting to a point of organization is often a major hurdle in countries where there is no such tradition. In an *ad hoc* producing situation there is likely to be no incentive

or perceived need for producers to join a collective group. However, the advantages are manifest for all parties. Performers who have made commitments to organize themselves in order to negotiate collective agreements and minimum contractual terms with producers have created a wide range of benefits for their members, although this remains an ongoing challenge.

Producers have often benefitted too from performers' collective organization and negotiation by being able to engage with a single organization rather than a multiplicity of performers, and through a range of dispute and arbitration mechanisms that can be used to iron out problems.

The terms of a collective agreement do not always provide protection for and against those entities that are not party to the negotiated collective agreement. In film production, an internationalized industry, this can present a problem. Performers in films may well be hired by an entity established solely for the purpose of that production that disbands after filming has been completed, or by a foreign company. For collective agreements to exist and be effective, there must be a relatively stable landscape of employers and performers. National broadcasters with a permanent presence often have collective agreements for that very reason. In countries where the production industry is fragmented and opportunities for production scarce, a coherent representative body of producers is not likely to exist, and the same is true for performers.

Where collective agreements do not exist, or where collective bargaining is prohibited or – for various reasons – impossible, unions/guilds have issued guidelines and rules on best practices for their members. These are not binding upon any party but can assist the actor in negotiating the correct terms for his or her individual contract.

An international industry

An additional layer of complexity to consider is the international nature of the audiovisual production industry.

A great deal of work for performers in film production around the world takes place in foreign productions or international co-productions. In these situations, the local guild/union may not be involved in providing standard contractual terms. In such cases, performers may be hired by a third party – or a locally-constituted producing entity – creating a level of detachment from the original producer.

Foreign producers are often beyond the jurisdiction of local guilds and unions, creating problems for policing and enforcement of terms. Reciprocity between unions can go some way towards regulating these arrangements and contracts.

The limitations of contracts

This section provides some discussion about a range of issues that limit or prevent the effectiveness of contracts as a method for implementing performers' rights in practice. These include the issue of collective versus individual bargaining power, traditions of verbal agreements, the implications of employment status derived from labor law, the ability to enforce contractual provisions, the inability to enforce contractual terms against third parties, etc. This section refers to the territorial nature of contract law and the problems that arise in an international audiovisual industry.

Collective versus individual bargaining power

Collective mechanisms for negotiating with producers give better assurance to performers that their contracts will contain provisions of a reasonable standard. The existence of exclusive rights might, theoretically, go some way to improve the bargaining position of a performer; but it is really the case that unless performers themselves commit to becoming organized and approaching producers and broadcasters to establish acceptable standard

contractual terms, performers are unlikely to improve their situation in any aspect.

Verbal contracts

It is not always essential that contracts of engagement be in writing in order to be binding on the respective parties; however, a number of governments have recognized the value of conveying performers' rights to producers by providing written contracts.

This, like so many issues, is a question of national culture. Certainly, one hurdle in the process of promoting relationships between producers and performers is that, in a significant number of countries, including some major producers of audiovisual products (and not just countries where there is a low development of production and employment for audiovisual performers), extremely rudimentary or verbal contracts are the norm for performers.

The problems with verbal contracting are obvious. Without a written contract, disputes frequently arise about a range of issues – for example, fees – and it is hard to envisage a satisfactory development of performers' rights where there is no clear mechanism for their disposition.

In addition, the lack of a written agreement impedes the successful distribution of a film, because it makes it impossible for the producer or distributor to document that they have all the necessary rights.

A number of countries have adopted specific legislation to deal with the problem of actors working without written agreements, by prescribing that there must be a written agreement between performer and employer which must be registered and approved by the relevant labor authority. Other provisions require that the written contract be provided to the performer before work on the audiovisual production begins. Performers generally welcome the principle enshrined in a number of international laws that any assignment of copyright or neighboring rights must be made in writing, and also that of mandatory contractual negotiation for the licensing of performers' rights.

Employment status

It is extremely difficult to make generalizations about the legal status of performers under labor law. Although perhaps not useful in terms of this study, in some cases the employment status of a performer inhibits the process of forming collective contracts and agreements.

As noted above, in countries where performers are classified as self-employed independent contractors, performers who

attempt to make collective agreements will fall foul of monopoly laws unless an appropriate exemption is created (as is also sometimes the case).

Geographical jurisdiction

Of interest to this review is the fact that collectively agreed terms are limited in their geographical scope. A great deal of production takes place in countries other than the one in which a collective agreement is made, and performers may be contracted by subsidiary local companies. This makes it difficult or impossible for guilds and unions, as well as individual performers, to enforce minimum contractual terms of the same standard as those promulgated in their home country.

Enforcement of performers' contracts

Performers in audiovisual productions are often unable, for a range of reasons, to enforce the terms of contracts made with producers. These may include such issues as difficulties in tracking and keeping contact with the producing entity because it is disbanded after the production has taken place, or simply that the producer in whom the performers' rights are vested is unable to pursue a default on the part of a third party.

All too often, it is prohibitively expensive and difficult for an individual performer to pursue legal recourse for contractual default. Here, the collective organization of performers can provide more effective, less expensive solutions of arbitration and mediation, in concert with producers.

money earned by the minor remains available to the minor and is not squandered by irresponsible parents or guardians.

Performers' unions and guilds have, in some instances, taken steps to secure payment by producers by requiring a security deposit or bond to guarantee the performers' remuneration in case of default.

The issue of privity is germane to this discussion. Because only the parties to a contract can be bound by the terms of that contract, audiovisual performers will be limited from pursuing a third-party distributor that defaults on a contractual obligation.

Minors and contracts

One limitation of performers' contracts is that, in a large number of countries, children who have not attained majority (which is variously defined) cannot legally enter into a contract. In some common law countries a contract purporting to bind a minor is voidable at the election of the minor.

Some countries, such as the United States of America, also place very detailed obligations on minors' contracts to make certain that a substantial portion of the

Issues that should be addressed in performers' contracts

This section reviews some of the key issues that may be addressed in audiovisual contracts and the ways in which rights established in law are expressed in contractual terms, such as upfront compensation, residual compensation, credit, reuse rights, duration of the engagement, etc. This is a nonprescriptive list, framed to allow discussion of local and regional differences in the way rights are treated in contracts and agreements.

However, the proposed document does not envisage a comprehensive analysis of custom and practice in contractual terms around the world, and interested parties are encouraged to provide this more detailed information during WIPO-led discussions.

Typical contractual provisions

Compensation/remuneration

The basis of payment for the engagement of a performer's services is, of course, the central issue in any per-

former's contract. In almost every case, the performer will be paid a fee, which can be linked to any number of factors, including the nature of the role, the number of days to be worked, etc.

This initial fee is almost always a matter for individual negotiation by the performer or his or her representative, although in cases where a union or guild collective agreement exists, that organization negotiates a minimum fee. Performers are always able, depending on their bargaining power, to negotiate for themselves above that fee.

More complex collective agreements, built up over years of negotiation between parties, are likely to specify a range of additional fees payable by producers for additional services and requirements, such as for work in excess of specified hours, travel time to locations and appearances, costume fittings, etc. In almost every case, the producer is restricted from incorporating the performance into a production other than the one specified in the contract.

A number of guilds and unions have created provisions specific to the interests of small or independent producers, containing simpler provisions for such producers to implement, different kinds of fee structures, etc.

Concomitant to these terms are a range of obligations that fall to the performer in a production, such as rendering exclusive services, punctuality, professional conduct, etc.

The fees mentioned in this section do not, as a rule, have any relationship to rights referred to in the contract. They simply relate to the work done by the performer.

Contracts as a mechanism for the efficient transfer of rights

As has been discussed, a key purpose of the performer's contract is to effect a clear and unambiguous disposition of any exclusive IP rights that may be held or claimed by the performer. Performers and producers have a common interest in facilitating the exercise of rights in the audiovisual work in order that it may be successfully disseminated. Clarity in these terms is essential for enabling a mutual understanding of what the performer may, or may not, later claim from the producer, and for the producer in negotiating terms and conditions with third parties, such as broadcasters or distributors.

It is perhaps worth pointing out that most performers' contracts will generally emphasize the *uses* to be made of an audiovisual production in addition to invoking the specific rights being transferred to the producer. For the individual performer, a clear specification of the many secondary uses that are *encompassed* in his or her exclusive rights will be the major focus of interest. Secondary uses can include reuse of the performance and/or the performer's image in new works, such as subsequent productions or advertisements for products other than the audiovisual work itself.

Clearly, the nature and scope of such rights vary from country to country. It is in this aspect that the two complicated worlds of negotiated labor rights and IP rights come closest, creating very specific provisions about which it is difficult to generalize.

At the very least, it is possible to cite some possible formulations; however, this is by no means an exhaustive list:

- Contracts in which exclusive neighboring rights are transferred to the producer. In those countries where the legal system does not create a presumption of transfer of those rights, it is obviously essential that a contract be clear and unambiguous in this respect.

- Contracts in which, while there is a presumption of transfer of rights to the producer, the transfer can only be achieved by written authorization for the fixation of the original performance, i.e., by means of a written contract.
- Contracts that limit the consent to the use of a performer's rights by a producer to a situation in which there is an agreement between the performer's guild or union and the producer. In practice, this kind of formulation requires the producer to refer back to the union in a case where new rights are created.
- Contracts in countries where performers do not have neighboring rights but are employees or independent contractors.

Secondary compensation

Closely related to the question of the transfer of exclusive neighboring rights is that of secondary compensation for uses made of the audiovisual work.

As noted above, many performers' collective agreements and standard contracts include detailed provisions relating to such uses and reuses as exploitation on television (broadcasting and rebroadcasting by local and international television, via cable and satellite, etc.), sale via DVD, dissemination via the Internet, audio soundtracks, etc. Where rights are granted for such uses and reuses, it is

important that the contract address the additional compensation applicable to such new uses.

An elaborate patchwork of arrangements and formulations exists in many countries in order to allow performers to be compensated for the reuse of their performances and, arguably, share in the success of the audiovisual performance in question, above and beyond the payment of the initial work fee.

Even in certain countries where a presumption of transfer of rights exists, provisions require that performers' contracts actually specify separate remuneration for each mode of exploitation of the work. Measures like this may be seen as trying to assist a process of clarity in the negotiation between the parties.

Payments for individual uses may be made at the time the contract is formed (in other words, "upfront") or on an ongoing basis as the production is exploited by different means.

These secondary payments for ongoing and additional uses have come about in a range of ways and may be considered by some, in effect, to be analogous. Examples of the way in which they have been created include:

- Secondary payments derived directly from the transfer of exclusive rights. In this situation, the existence of

rights to be transferred allows the performers some leverage to negotiate a secondary fee.

- Those derived from labor negotiation (built up over years of bargaining).
- Those derived from a combination of the two systems.
- Those specified in labor law. With respect to this latter concept, one legal system examined actually contains an unusual provision that, under certain circumstances, permits performers to revisit contractual remuneration in the event that the exploitation is more successful than anticipated; however, remuneration determined by a collective administration is exempt from this provision.

Secondary fees are referred to in a range of ways, including as “residuals”, “royalties” or simply secondary fees; indeed these terms have different national implications and meanings from country to country, depending on how such fees are calculated. Formulations include calculations based on a percentage of the initial fee. It is, however, extremely important to differentiate these secondary use fees from payments collected from rights of remuneration or compulsory collective license.

In some cases, the fact that secondary payments are derived from statutory labor agreements, and therefore form part of a performer’s “salary”, has had important advantages for performers,

triggering rights to social security benefits for performers in a way that payments derived from neighboring rights would not.

Payments for secondary uses are distributed in different ways – sometimes via the producer (in particular where that producer is a broadcaster), via the union or guild and, in some cases, through a collecting society, according to the terms and percentages specified in the collective agreement and therefore reflected in the individual performer’s own contract.

An important implication of the contractual requirement that performers receive payments for the secondary and subsequent uses of their performances is the need for scrutiny of those uses and payments, for arbitration mechanisms and for securing the means by which future payment obligations are to be met. A number of unions and guilds have established agreements with producers, distributors and subsequent owners for the assumption of ongoing responsibilities to meet contractual payment terms and for the scrutiny and auditing of payment and distribution processes. In a rapidly changing media landscape, such mechanisms are seen to be essential.

Credits

In a number of countries, performers and their organizations have negotiated contractual rights which, in their effect, may be considered analogous to statutory moral rights. The key provision in this respect is that of credit: recognition of one's name in connection with the role being portrayed is universally seen by performers as an essential element in developing and sustaining a professional career.

Credit provisions often go beyond guaranteeing credit to specify the placement of the credit (for example, at the start of the film or the end of the film, the order of names in credits, etc.) and even the size, font or on-screen duration of the credit.

Other provisions that may be seen as related to these questions concern the performer's integrity and include such elements as protection against elements of performances being used to promote or advertise products other than the original production; conditions upon which nudity is required for the performance; and distortion/reuse of the performance in a different audiovisual production.

It is important to note that contractual elements of this type do not, of course, have the same force of law as a statutory moral right and are not enforceable against third parties in a way that such rights would be.

Other contractual issues

Of less relevance to WIPO discussions of contractual provisions relating to performers, but no less important to performers and producers, are a number of issues, some of which are cited here but not discussed. These include:

- Working conditions – health and safety measures and protection.
- Insurance – to protect performers in the workplace.
- Pension and health insurance contributions – unions and guilds have, in many cases, created jointly-funded schemes with producers.
- Specific provisions relating to the working conditions and entitlement to secondary payments for specialist performer groups such as dubbing performers, child performers, dancers, stunt performers, body doubles, singers, extra/background performers.
- Provisions making it possible for the producer to market and advertise the audiovisual production.

Issues that do not rely on contracts

The final section of the framework provides a brief overview of those performers' dealings with producers that raise issues that do not rely on contracts. These are rights or obligations that arise through domestic law or treaty obligations regardless of any contractual relationship between the performer and the producer. These issues cover such topics as moral rights and statutory rights of remuneration.

Exclusion of rights of remuneration

Thanks to the global development of neighboring rights in the last few decades, a significant number of countries have created regimes by which performers are given rights of remuneration for certain uses of their work. The remuneration that flows from rights such as rental and lending, and copyright levies such as private copying, must be collectively administered by collective administration societies that exist in highly developed form in countries where these rights have been established.

Notwithstanding the fact that some collecting societies also distribute secondary payments derived from collective labor agreements, rights of remuneration cannot be assigned or relinquished in any way in a performer's contract with a producer.

In some countries, guilds and producers have agreed to contractual language that makes specific reference to the exclusion of remuneration rights and copyright levies from the ambit of negotiations between performers and producers.

Moral rights

The area of moral rights for audiovisual performers is a relatively new one and, as has been discussed, performers have in any case traditionally tried to negotiate analogous provisions through their contracts and agreements. The question of how the moral rights of audiovisual performers can be exercised in practice – for example, whether they can be limited, assigned or waived – is not something about which it is possible to make firm conclusions. However, it does

in general seem to be the case that where performers have been given moral rights in their performances, those rights tend to exist outside the framework of standard contractual negotiation, and therefore do not appear in collective agreements.

and equitable contractual practices in the context of dialogue between producers and performers, taking into account local conditions and practices.

As noted earlier it is hoped that this framework can provide a first step towards a multi-stakeholder discussion of the ways in which this initial effort can be expanded to provide useful guidance for both performers and producers, to assist them in developing approaches to contracting that enhance and clarify the rights and expectations of both performers and producers in a manner appropriate to the myriad legal systems in which they work together.

Conclusion

The world of performers' contracts is clearly an imperfect one, for reasons which often lie far outside the remit of WIPO and its Member States. However, there is a clear interest from all parties to see progress and a pragmatic evolution of performers' contracts, including through the creation of statutory rights that can be exercised in contractual terms or through collective administration, and often through both, in ways that are fair and not onerous for either performers or producers. Contracts are central to this development.

The challenge to performers to help themselves by working to negotiate collectively and effectively can only be achieved by representing the majority of performers in a country and by developing constructive relationships with producers.

In turn, governments can assist this process by promoting the twin notions of audiovisual performers' neighboring rights



For more information contact WIPO
at www.wipo.int

World Intellectual Property Organization
34, chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland

Telephone:
+4122 338 91 11

Fax:
+4122 733 54 28