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STUDY ON AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION PRACTICES  
IN MEXICO, THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA

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## INTRODUCTION<sup>1</sup>

In introducing this large and complex subject, it is essential to acknowledge that an important aspect of the administration of performers' rights, and a key difference from that of authors' rights, lies in the importance not only of copyright legislation but also additionally in different kinds of national labor law which set the conditions by which performers can bargain collectively on the basis of their rights. In a number of countries there is an intimate connection between performers' intellectual property rights and a range of different collective management solutions permissible under and reinforced by, the terms of national labor law and practice.

Unlike authors who have a more isolated creative existence, performers are necessarily collaborators and have always strived to develop collective solutions to improve their conditions of work. Collective organization by performers within professional bodies (which may have different legal character depending on the jurisdiction but may be called trade unions, guilds or associations) is therefore a very well established practice in many countries. Some of these professional entities are over 100 years old and all of them were established precisely in order that performers might pool their individual bargaining power to improve their working conditions. For this system to work it is essential that producers too are prepared to work collectively to establish and enforce industry standards. In almost every case, the absence of statutorily created intellectual property rights for many decades, led performers to bargain in this way.

Bargaining between the two sides may take place in relation to a huge range of conditions - in the earliest days performers' organizations would have focused on minimum payment for work in the theatre and other kinds of live performance. Other important concerns include such elements as the length of the working day, payment for rehearsal etc. With the evolution of the film and television industries, additional kinds of negotiating goals became necessary and performers' intellectual property rights in their performances, and the ability of the producer to make secondary uses of those performances would evolve to become part of the currency of bargaining in a number of countries.

This collective approach is obviously the individual performer's best hope of achieving an equitable outcome, since alone he is often replaceable, and will normally have little or no bargaining power. Only a very small minority of performers will have enough "star" power to negotiate successfully alone. The way performers' unions operate - by establishing minimum rates while allowing their members to pursue individual arrangements - is unlike that of other labor organizations. However, the approach also gives an important advantage to producers who work together, by facilitating and giving certainty to negotiations - without the baseline conditions contained in collective bargaining agreements they would have to start every deal with a large number of performers on an individual basis from scratch. The creative tension between the two has resulted in some very successful systems of rights management although it is worth noting that almost every major advance from the point of view of performers - in particular the institution of secondary payments systems of residuals and royalties - have often only been achieved via the use or threat of strike action by performers.

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<sup>1</sup> Any views expressed in this Study are those of the author and not views of WIPO.

However, as will be evident even from this brief study, performers' rights are managed by a combination of methods. As performers in a number of countries have acquired more rights through copyright legislation (in almost every case musicians have more developed rights in their audioperformances), so have the different systems of organization become intertwined. Performers and producers alike have come to accept and operate "hybrid" systems of rights management that depend upon both contractual practices and statutorily created intellectual property rights for their operation. This is particularly true in the field of audiovisual performances. The nature and scale of the audiovisual industry varies from country to country so that no single system is identical to any other. Views as to their effectiveness and fairness will differ even at national level (and are not cited in this study). However it is to be hoped that readers will appreciate the reasons for the differences in national practice between countries.

Finally, the contracts, agreements and even collective administration organizations that will be referred to in the course of this study all came into being through performers' collective efforts. The manner in which these were achieved, the legal basis for such activity in many and varied national labor laws, and the detailed interaction of those laws with legislation relating to intellectual property should not be ignored, but lies somewhat beyond the remit of this present study. They will therefore be referred to only briefly or tangentially where the context so demands it but not analyzed in depth.

## I. AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION IN THE UNITED KINGDOM (UK)

### Summary of the system

The British system of performers' protection is based on a broad range of exclusive rights which are, for the most part, managed through a strong tradition of union collective bargaining agreements that define minimum terms within performers' individual contracts. Performers' rights in the UK have never, with only one exception, been subject to any kind of presumption of transfer—performers give their consent to rights to use and reuse of their performances through individual contracts that are based on the conditions set out in their union collective bargaining agreements, and this is perhaps the key element necessary to understand the working of the system.

### A. STATUTORY RIGHTS

- (a) Coverage of the Rights of Performers under National Law: The Copyright, Designs and Patents Act, 1988

British performers derive legal recognition and protection of their intellectual property rights from the Copyright, Designs and Patents Act 1988, Part II, which is titled Rights in Performances.

The UK law and subsequent Statutory Instruments amending the original Act<sup>2</sup> are in turn based on a framework of international treaties and laws including the Rome Convention,<sup>3</sup> the WIPO Performances and Phonograms Treaty<sup>4</sup> and a number of European Community Directives including perhaps most importantly the European Directive on Rental and Lending and Certain Related Rights<sup>5</sup> and most recently the European Directive on the Harmonization of Copyright and Certain Related Rights in the Information Society.<sup>6</sup> The European Directives provide a harmonized standard of protection applying in all Member States of the Community.

(b) Beneficiaries of Protection

Under UK law, no differentiation is made between performers in audio or audiovisual, except in the area of communication to the public of recorded performances (as indicated in (d) below). There is no definition of what a performer is but a “performance” and a “recording” of a performance are defined as follows:

- A performance is described as meaning a dramatic performance (including dance and mime), a musical performance, a reading or recitation of a literary work or a performance of a variety act or similar presentation.
- A recording in relation to a performance is a film or sound recording made directly from the live performance, made from a broadcast of, or cable program including the live performance or made directly or indirectly, from another recording of the performance.

Under the Copyright, Designs and Patents Act, protection is given to “qualifying individuals” (i.e., performers), and to performances taking place in “qualifying countries” (section 181 of the Act). A “qualifying individual” is a national, subject or resident of a “qualifying country” (see section 206). Apart from the UK, a “qualifying country” is (a) all other EC states and (b) any country designated by an Order (SI) made under section 208. The effect of the reference in s.206 to the other EC states is that all of the performers’ rights granted in the UK automatically extend to them.

Section 208 is drafted in terms of giving “reciprocal” protection to such foreign countries as are designated by Order. The current Order under s.208 dates from 1999.<sup>7</sup> (These Orders have to be updated from time to time, e.g., as new countries join treaties.) The Order divides those countries into two kinds, as set out in Parts 1 and 2 respectively of the Schedule to the Order.

The Part 1 countries are all Rome Convention members and they receive all of the rights accorded to performers by the Act. The reciprocity is therefore broadly interpreted as, for

<sup>2</sup> The Duration of Copyrights and Rights in Performances Regulations (1995) and Copyright and Related Rights Regulations (1996).

<sup>3</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961).

<sup>4</sup> WPPT (1996).

<sup>5</sup> Directive No. 92/100/EEC (1992).

<sup>6</sup> Directive No. 2001/29/EC (2001).

<sup>7</sup> Statutory Instrument (1999), No. 1752.



example, this would accord rental rights to Rome Convention countries even though Rome itself does not require these and they may not be provided in other countries.

The Part 2 countries are TRIPS members which do not belong to either Rome or the EC. Here, the protection given is reciprocal, and limited to only the rights set out in paragraph 3 of the Order, which equates to those that TRIPS Article 14 requires – i.e., the rights in respect of fixation, reproduction, and broadcasting and communication to the public of live performances.

Protection is also extended on the same basis to performances given in foreign countries (which can be relevant in cases where the performer is not a national of the country concerned).

Reciprocity of term (duration of protection) is applied in the UK (except to Economic European Area (EEA) countries). Section 191 of the Act was amended to this effect by SI 1995 No. 3297, as this was required by the EC Duration Directive (93/98). This means that the term given in the UK to non-EEA performers is limited to that in their own country.

#### (c) The Requirement to Obtain a Performer's Consent

The operation of the British system, and one that has an important bearing on the way that performers organize the management of their rights, is crucially hinged upon the requirement to obtain the performer's consent to the exploitation of his performances. In the UK, performers' rights in recorded performances are property rights which, following the Anglo-Saxon legal tradition, may be freely assigned and are binding on every successor in title. (This may differ somewhat from the European civil law tradition of *droit d'auteur*). The need to obtain the consent of the intellectual property owner (in this case, the performer) is considered the lynchpin of the British rights system.

In practice, and in the absence of any provision to that effect, this means that there is no presumption of transfer, or full or partial compulsory license with respect to the performers' rights that exist (with the limited exception of the Right of Rental which will be explained separately).

#### (d) The Scope of the Rights

The exclusive rights conferred upon performers within the Act and subsequent secondary regulations, are stated as being independent of any copyright in, or moral rights relating to, the work being performed or recorded. The rights apply to the whole, or any substantial part of a performance and the rights themselves are structured as follows:

– The consent of the performer is required in order (a) to make a recording of the whole or any substantial part of a qualifying performance directly from the live performance, or (b) to broadcast live, or to include live in a cable program service, the whole or any substantial part of a qualifying performance, or (c) to make a recording of the whole or any substantial part of a

qualifying performance directly from a broadcast of, or cable program including, the live performance (other than for personal or domestic use);<sup>8</sup>

– The performer has the right to authorize or prohibit the making of a copy (either directly or indirectly) of a recording of a performance, other than for private and domestic use (the “reproduction right”);<sup>9</sup>

– The performer has the right to authorize or prohibit the issue of copies to the public (the distribution right);<sup>10</sup>

– The performer has the right to authorize or prohibit the lending of copies to the public (lending is defined as making a copy of a recording available for use, on terms that it will or may be returned, other than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public (i.e., a library));<sup>11</sup>

In addition two rights are formulated differently:

– Performers have a right to equitable remuneration for exploitation of a sound recording, where a commercially published sound recording of the whole or any substantial part of a qualifying performance is either played in public, or is included in a broadcast or cable program service, in which case the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording. That right to equitable remuneration may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf.<sup>12</sup> (However, no rights are granted in relation to the showing in public, broadcasting or other communication to the public of audiovisual recordings made with the consent of the performer.)

And importantly for the purposes of this study which deals with rights of performers in audiovisual productions, only one limited presumption of transfer was introduced, and this, for one right only – the exclusive right of rental in the case where a film production agreement has been concluded – a formulation which derives directly from the European Directive on Rental and Lending and indeed was *required* by that Directive.<sup>13</sup> (Otherwise there are no presumptions of transfer of performers’ rights in UK law, and none are contemplated.)

– The performer has the right to authorize or prohibit the rental of copies of the performance (whether in the form of sound recordings or films) to the public. However, in the case of films, where a film production agreement has been concluded, there is a presumption of transfer of the exclusive right to the producer of the film. It should however be noted that the presumption of transfer is rebuttable by the performer (i.e., the performer may make an agreement to the contrary). Furthermore, even if a performer has transferred this rental right concerning a sound recording or a film to the producer of the sound recording or film, he retains

<sup>8</sup> The Copyright, Designs and Patent Act (1988), S182.

<sup>9</sup> C.D.P.A.S.182A.

<sup>10</sup> C.D.P.A.S.182B.

<sup>11</sup> C.D.P.A.S.182C.

<sup>12</sup> C.D.P.A.S182D.

<sup>13</sup> Directive No.92/100/EEC(19 92).

the right to equitable remuneration for the rental and cannot assign that right to remuneration except to a collecting society for the purpose of enabling it to enforce the right on his behalf. A performer may apply to the Copyright Tribunal to determine the amount payable but the “remunerations shall not be considered equitable merely because it was paid by way of a single payment or at the time of the transfer of the rental right.”<sup>14</sup>

(e) Duration of Performers’ Rights

The duration of rights in performance is as set out in the Duration of Copyright and Rights in Performances Regulations 1995 which amended Section 191 of the Copyright, Designs and Patents Act 1988 to provide that:

“The rights conferred expire at the end of the period of 50 years from the end of the calendar year in which the performance takes place or, if during that period a recording of the performance is released, 50 years from the end of the calendar year in which it is released.”

(f) Exceptions and Limitations

Similar exceptions and limitations to the exclusive rights held by copyright holders in the Copyright, Designs and Patents Act also exist for performers. These will not be dealt with in any detail here but include such aspects as;

- Fair dealing with regard to a performance or a recording for the purposes of criticism, review or news reporting;
- Incidental inclusion of a performance or recording in a sound recording, film, broadcast or cable program;
- Copying of a recording of a performance in the course of education;
- Playing or showing of a sound recording, film, broadcast or cable program for educational purposes;
- Recording for archival purposes;
- Lending of copies of a recording of a performance by an educational establishment;

(g) New Rights

Finally, the 2001 European Directive on Harmonization of Copyright and Certain Related Rights in the Information Society<sup>15</sup> is due to be transposed into British law by Statutory Instrument in 2003, bringing further changes to performers’ rights, in particular introducing the exclusive right of making available, allowing performers (in audio and audiovisual) the right to authorize or prohibit the making available of recordings to the public, by wire or wireless means, in such a way that members of the public may access them from a place and time individually chosen by them.

<sup>14</sup> C.D.P.A.S191F -191H.

<sup>15</sup> Directive No.2001/29/EC due to be transposed into British law in 2003.

## B. MANAGEMENT OF THE RIGHTS OF PERFORMERS IN CONTRACTS AND COLLECTIVE BARGAINING AGREEMENTS

### (a) The Legal Status of Performers' Collective Bargaining

Under the UK system whereby performers' rights are transferable "property rights," labor law plays an important part in the management of those rights via contract and collective bargaining agreement. In the UK, performers will mainly be treated as "self-employed" for the purposes of taxation. This means that they are in effect independent contractors who are free to negotiate individual contracts with producers and, in those contracts, make dispositions for their various rights. Since the Copyright, Designs and Patents Act determines that the individual performer's consent is required for a range of uses, it is incumbent upon the producer to negotiate the performer's consent to make use of his rights to the extent, and under the conditions necessary, to exploit the performance.

### (b) How British Performers and Producers Work Together to Manage Rights Through Collective Bargaining

Key to the operation of the UK system which combines individual performers' rights with union bargaining agreements is the right under British labor law for a performer to be a member of a trade union which can then negotiate collectively with producers on behalf of all those performers for whom it has a mandate. Put simply, by agreeing to join the union, the individual performer gives that union the authority to establish sets of terms and conditions with producers covering a range of minimum terms—including the way in which the performers' rights are to be dealt with. In the UK there is no obligation upon any individual to become a member of any union (this is sometimes referred to as the "closed shop") and no possibility for a union to require any individual to join it. However the union depends upon its members to be disciplined about not accepting "non-union" work that would undercut collective agreements.

The terms and conditions negotiated by the union are contained within mutually agreed collective bargaining agreements containing minimum terms of employment. These are binding upon all members of the union. The performer must still make an individual contract of employment with the producer, the contents of which in turn are based on the terms of the collective bargaining agreement. All agreements require the use of a standard contract (or "form of engagement" as it is sometimes described). The agreement prohibits any alteration to that standard contract except by agreement with the union (sometimes special stipulations may be made due to exceptional requirements of a situation—the form of engagement cannot however derogate from the terms of the standard contract).

It should be noted that no rights are transferred by the performer through any kind of mandate to the union but only the authority to negotiate and bargain—this is a critical difference between the way that performers' unions and collecting societies operate. Although the performer's contract will have its basis in the collective bargaining agreement, it is entirely possible for the performer to make a contract with the producer containing more favorable terms (for example, higher level of remuneration) than those within the agreement since those agreements only establish a minimum standard. However in the collective agreements of Equity,

the trade union of actors, the transfer of rights, including any future new rights and uses is crucially tied to the existence of a collective agreement and a standard individual contract – under these agreements future uses cannot be assigned.

The strength of the system from the point of view of the union depends on the discipline and loyalty of its members and their collective desire to support that organization. A key rule of any performers' union is that its members must not accept an engagement less than the union's minimum rates.

The producers in turn derive security from the collective agreements since it simplifies their negotiation process and guarantees them the consents and rights they are obliged to obtain in order to exploit their product.

### (c) The Parties Involved in Collective Bargaining

#### *The Producers' Associations*

The organization of producers, as much as that of the performers is, of course an essential prerequisite for the management of performers' rights through collective bargaining. Without the good faith participation of the producer bodies in the process of performer rights management the performers have a diminished ability to require their members to make standard contracts. The way the process of employer organization emerges will inevitably reflect the national situation with its own peculiarities. In the UK the employers' associations that exist have come about as the industry – in particular Britain's very significant television industry – have developed. For this reason, as an example, there are three entirely separate, though similar television agreements, covering firstly the BBC, secondly the Independent Television Companies (the UK's commercial television network) and thirdly, an increasingly large and active group of Independent producers, producing for a large number of channels known as PACT – the Producers' Alliance for Cinema and Television. PACT is also the bargaining party for feature film production.

#### *The British Performers' trade unions*

There are two, very well established performers' unions in the UK – British Actors' Equity Association (“Equity”) and the British Musicians' Union. Between them they represent the vast majority of professional performers working in the UK

#### *Equity*

Equity<sup>16</sup> was formed in 1930 by actors working on the London stage and over the decades has grown to include actors, singers, dancers, variety and circus artists, stunt performers and walk-on and supporting artists (also known as “extras”) as well as a number of non-performer categories including choreographers, stage managers, theatre directors and designer and stunt and

<sup>16</sup> Information about Equity may be found at [www.equity.org.uk](http://www.equity.org.uk).

theatre fight directors. The membership of the union is 35,000 and is open to anyone working professionally within any of its various categories including foreign performers working in the UK. Equity describes its function as being to negotiate minimum terms and conditions of employment throughout the entire world of entertainment and to ensure these take account of social and economic changes. The unions strive to negotiate agreements to embrace the new and emerging technologies which affect performers, and covers satellite, digital television, and new media in addition to live performance.

### *The Musicians' Union*

The Musicians' Union <sup>17</sup> was established in 1893 and membership is open to anyone who is following the profession of music in any of its branches – whether performing, teaching or writing music. The union negotiates fees with all the major employers of musicians in the UK, including broadcasting companies, film and video companies and the recording industry as well as setting minimum rates for live performance. The Musicians' Union has over 30,000 members.

#### (d) The Role of Agents in Negotiating Individual Contracts

In the UK the majority of professional performers in audio visual, and in particular actors (less often musicians) will choose to use the services of an agent for negotiating their individual contracts. The role of the agent can therefore be an important one, translating the terms of the collective agreement into an individual contract including its minimum terms and provisions. In Britain many performers' agents are themselves organized within a professional grouping – the Personal Managers' Association – which works closely with Equity in developing and enforcing the terms of the collective agreement.

#### (e) Beneficiaries of the Collective Agreements

Legally it is not necessary to be a member of the union to enjoy the benefits of working under a collective agreement. However the vast majority if not all professional performers are indeed union members. Extra or “background” performers are covered in most of the film and television agreements, or have their own agreements negotiated by the unions. They are not however eligible for payments for secondary uses. Foreign performers are not restricted from working under the unions' agreements as long as they have the appropriate work permits and authorizations. In many cases they become members of Equity through special Visiting Artists' membership in which case they are given precisely the same help, advice and insurance as full members.

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<sup>17</sup> Information about the Musicians' Union, UK may be found at <

[www.musiciansunion.org.uk](http://www.musiciansunion.org.uk)>.

(f) Payments for Various Uses and the Interaction Between Collective Agreements, Individual Contracts and Performers' Statutory Rights

The UK system works in a highly pragmatic way, linking the exclusive rights given to performers by law, to a collectively bargained set of minimum terms and conditions, including dispositions for those rights. The exclusive rights in the CDPA provide the basis for performers' contracts in audiovisual works as issued by film and television producers.

When looking at any union agreement it is necessary to acknowledge that it is, by definition, a product of a bargaining history between parties and not a "static" document. Agreements are subject to quite frequent revision and adjustment and are lengthy and often complex documents which, unlike statutes, may be changed to take account of industrial, technological and other changes. For the illustrative purpose of this systematic study and the sake of brevity, highly simplified versions of a number of collective agreements are described, including only the basic framework and performer information (there may be a number of categories of performer covered in different ways) and omitting information not relevant to this study.

In areas where no agreement exists with a producers' organization – in which no bargaining counterpart may yet have formed, or be in a position to negotiate or in fact the industry in question may not yet be very developed – the union may recommend rates and conditions to its members and their agents, and these are included in this section where relevant. Alternatively the union may choose to make case-by-case single production deals with producers who present themselves or to whom members draw the union's attention.

(g) Examples of Collective Agreements in Audiovisual Production

There are a whole range of collective agreements covering audiovisual production in the UK with varying structures and compensation systems. Some specific examples are quoted here for the purposes of illustration rather than a comprehensive analysis of every agreement.

Agreements and standard terms (i.e., recommended rates) exist in the following areas. The absence of an agreement with a body of producers does not preclude the union from making agreements on a case-by-case basis using standard terms and guidelines and indeed this happens frequently.

<i>COLLECTIVE AGREEMENTS/GUIDELINES</i>	<i>EQUITY</i>	<i>M.U.</i>
Cinema films	X	X
Low budget film provisions	X	X
Television (BBC/ITV/PACT)	X	X
Commercials	S.T.	X
Production for the Internet	X	
Corporate/non-broadcast video	S.T.	X
Music Video	X	

#### (h) Consent and Copyright Clauses

Some of the UK collective agreements contain standard consent clauses which go on to form part of the standard individual contracts signed by performers. These clauses acknowledge the need for the performer to give individual consent to the producer for the use of his rights and make a further link between the consent being given and the terms of an agreement with the union concerned.

Two examples follow:

#### Equity/ITV agreement – Copyright consent clause

The Agreement requires that the artist consent to the use of his rights as follows:

“I agree to and give every consent necessary under the Copyright, Designs and Patents Act 1988 or any amendment to or replacement thereof for the use worldwide of my performance but only as provided for in the Main Agreement and in any other agreement current at the time of such use between the Companies and Equity in relation to any means of distribution now known or hereafter developed.”

This clause clearly restricts the use of the performers' rights to a situation in which there is an agreement between Equity and an ITV company. It also means that in practice this means that if new rights or uses come into being, the producer must refer back to the union in order to negotiate the necessary new consents.

#### The PACT/Equity Television Production Agreement – copyright consent clause

The standard consent clause in this agreement reads:

“The Artist grants all consents under the Copyright Designs and Patents Act 1988 or any statutory modification or re-enactment thereof for the time being in force which the Producer may require for the making and use of the production subject to the restrictions on use of the production contained in the Agreements.



Uses of the productions shall be paid for in accordance with the fee arrangements set out in the Agreements.”

(i) Payment Structures and Systems in Audiovisual Collective Bargaining Agreements

Cinema Feature Films: Agreement between Equity and PACT

Equity only recently completed negotiations on an agreement for performers working in cinema feature films with PACT – the Producers’ Alliance for Cinema and Television (which represents over 1000 independent producers). Final wording is still undergoing a process of drafting so only the framework terms and conditions are recurrently available.

The Agreement includes a modified set of provisions for low – budget films which have a budget of less than £3 million, and “very low budget” films which have budgets of £1 million. These terms give producers different payment options and recognise the very different conditions inherent in producing low budget features from larger studio productions. As part of this agreement Equity has agreed to distribute secondary payments to the actors concerned under the terms of the agreement.

These fees are calculated on the basis of a basic daily rate – which is a minimum payment – and are calculated as percentages of that rate. Other payments and fees which form part of the collective agreement may or may not be included in this calculation.

In addition to payments, the agreement specifies a very wide range of other terms and conditions such as the length of the working day, overtime pay, fees for additional days worked etc, which will only be referred to if relevant.

The following table lists payment structures and use fees for actors in cinema film under the terms of this agreement :

<i>RATE</i>	<i>BASIC £</i>
Daily Rate	£95
Weekly Rate	£380
<i>Minimum Variation Rate</i> Where the performer’s salary exceeds this amount per week, a contract which varies certain standard terms and conditions of the Agreement is permissible	£1,040
<i>Use fees</i> In addition to the daily fee, the producer must pay for a range of uses in order to be able to exploit the artist’s performance. There are several different options by which the producer can do this – options which afford flexibility to the producer in terms of how the respective rights are paid for. The fact that the producer must pay for the performer’s consent to use the rights does not vary – only the payment mechanism	

<p><i>Payments for secondary uses</i></p> <p>In addition to the basic payments for the work, the producers must then pay the performer a percentage of the profit from the film according to a formula currently being worked out, but similar in concept to the Screen Actors Guild agreement in the USA. In essence the formula will determine that receipts from the film from such as sales to television and sales of video and DVD are to be shared among the performers according to a points system, thereby ensuring that performers share both the risk – and the success – in the film being made.</p> <p>In respect of the Equity/PACT Cinema Films Agreement different options will be available. For larger budget films, performers will receive a residual payment – i.e., a subsequent and ongoing payment as the film proceeds through, and profits through various markets which is based on a percentage of the performer’s original salary. Performers will then receive payments based on the extent of their participation in the film. This is an important new feature of the agreement and discussions are ongoing as to the precise nature of the formula to be used – how income and recoupment of investment from the film are to be defined, etc.</p>	
<p><i>Payments for secondary uses for low and very low budget films</i></p> <p>Equity’s agreement recognizes the fact that producers of low and very low budget films may not have the logistical ability to pay performer on an ongoing basis once the film is released and therefore they can pre-purchase the rights they need to be able to guarantee finance for the film “up-front. The performer then receives additional payments that are percentages of the basic salary (up to a maximum of 280%). These percentages recognize the difference in value of various uses and markets around the world and are included here in illustration of those values.</p> <p>The pre-purchase percentages up to the 280% maximum are as follows, and reflect the differing values placed upon the markets:</p>	
<p><i>For Theatrical use (i.e., playing in cinemas)</i></p> <p>USA/Canada 37.5%</p> <p>Rest of World (including the UK) 37.5%</p> <p><i>UK Television Rights (excluding Theatrical &amp; Videogram)</i></p> <p>UK Network Terrestrial television 20% UK Secondary television 5%</p> <p><i>USA Rights (excluding Theatrical &amp; Videogram)</i> U.S. Major Network 25%</p> <p>U.S. Other than a Major Network 10% U.S. Pay television 20%</p> <p><i>Rest of the World Television Rights including pay, cable and satellite (excluding world theatrical, world videogram and all UK and USA rights)</i></p> <p>Rest of World 10%</p> <p><i>Videogram 90%</i></p>	

Television Production and Broadcasting Agreements:

The performers' unions have each negotiated their separate television production agreements over many years and these have secured an enormous amount of employment for audiovisual performers because of the size and output of the British television industry. The reason that there are three agreements is largely historical – one is held with the BBC, the UK's important public service broadcaster, another with ITV (Independent Television) which is both commercial and quite heavily regionalized. The final and newest agreement is with PACT (Producers' Alliance for Cinema and Television) and was an important step forward in the 1980's when independent production (including that which is commissioned for the BBC and other public service channels like Channel 4) grew enormously. The PACT agreement is also used by non-UK production companies and broadcasters.

Under the television agreements, British performers receive their fees and secondary payments (residuals and royalties) from the broadcasters/producers and not through the union. Each of the agreements differs slightly in structure and terms and the Equity/BBC agreement and Musicians' Union/PACT agreements are summarized here for the purposes of illustration.

Television production and broadcasting: Agreement between Equity and the BBC

The BBC agreement deals with artists by category under separate sections, for example, variety acts, solo light entertainers, singers, chorus singers, stunt performers, etc. For the purpose of this study only one category is discussed, that of "artist exercising dramatic skills" (i.e., actors). The BBC endeavours to ensure that only professional performers are cast in their productions.

The weekly fee that is negotiated for each artist for each engagement takes into account factors such as:

- The nature and weight of the artist's contribution
- The number of programs to be recorded
- The length of the engagement
- The artist's status and earning power in television and elsewhere

The following table lists payment structures and use fees for actors in television under the terms of this agreement:

<i>FEE BASIS</i>	<i>RATE</i>
<p>Minimum total <i>engagement fee</i>            The engagement fee entitles the BBC to transmit or permit the transmission of the artist's performance in the relevant program, whether live or recorded, once only in both analogue and digital forms on all platforms (terrestrial, satellite and cable) on the relevant BBC channel, either simultaneously or at different times in different BBC regions.</p>	£462
<p>Thereafter there is a sliding scale of fees depending on the duration of the program and number of weeks.</p>	£462–£1201
<p>For series, a different scale of minimum fees applies, depending on the length of the program and the duration of the engagement.</p>	
<p>Arrangements for other activities and eventualities, including overtime, location fees for additional workdays, including voice-over, dubbing, post synchronization, trailer set) may also be added.</p>	
<i>SECONDARY USE PAYMENTS</i>	
<p>The Residual Basic Fee is the basis from which the repeat fee is calculated. It is not less than 80% and not more than 100% of the total engagement fee (with some items excluded).</p>	
<p>The Repeat Fee is then 80% of the agreed Residual Basic Fee for each transmission. This gives the BBC the right to give two repeat transmissions of each artist's performance in its programs within a period of three years from the date of the original transmission. Special arrangements exist for out-of-time repeats and a range of other circumstances.</p>	
<i>THEATRICAL RIGHTS</i>	
<p>In return for a payment of 50% of the Residual Basic Fee payable upon first release against a 20% royalty of the BBC's gross income received from theatric distribution, a production may be shown theatrically (a) outside the UK (including the U.S.) and within the UK (with some restrictions.)</p>	

*OVERSEAS SALES AND DISTRIBUTION AND SALE TO THE U.K. SECONDARY MARKET*

The BBC deals with its sales and distribution through a separate company called BBC Worldwide. An agreement (known as the Multi-Media Royalty Agreement) exists between Equity and the BBC for their production, the terms of which cover:

“...exploitation in all media which shall be defined as covering any means of distribution now known or hereafter developed including but not limited to cable television, satellite broadcasting and terrestrial broadcasting whether in the UK or overseas, but in respect of the following forms of exploitation existing agreements shall continue to apply while in force unless otherwise agreed; videograms, simultaneous retransmission in Europe.”

Equity performers, other than walk-ons and supporting artists share a royalty of 17% of the BBC's gross income accruing from the sale of the program, shared among the artists in proportion to their aggregate fees for the program concerned. The distribution of royalty payments and all other fees is undertaken by the BBC.

In the case of certain co-productions exploitation rights may be purchased at the point of original contracting according to a scale of percentages. Internet rights are not included in these arrangements.

*OTHER RIGHTS PAYMENTS*

The agreement does not prevent the artist from laying claim to equitable remuneration or other forms of income to which he is legally entitled from domestic or foreign collecting societies. Such income might include cable retransmission, blank tape levies etc. Equally the artist is not entitled to any similar remuneration or income to which the BBC might receive whether as a producer and/or broadcaster.

Television production and broadcasting: Agreement between the Musicians' Union and PACT

It is important not to forget that many of the performers who contribute their performances to different audiovisual productions are musicians. The following agreement illustrates the kinds of minimum terms negotiated by the British musicians for when their members work in film, television programs and series.

Actual rates for different session fees which are very detailed in nature, have not been included.

***FEEBASIS******Basic fee***

This entitles the producer to incorporate the Musician's performance into the film or television program to which the engagement to use, or license other to use, the film or program in the following ways:

- World wide non -Theatrical and:
- Where the basic recording fee has been paid, one of the following:
- One network terrestrial transmission within the U.K (i.e., BBC, IV, Channel 4, Channel 5).
- UK, all other television
- World wide theatrical exhibition
- World wide television excluding the U.K.
- World wide videogram

***Secondary Uses: Repeat Fees, Further use fees and Royalty***

The producer may acquire additional rights to use the performance according to different structures:

***Repeat fees***

Where the primary use is for UK television, fees are due to the musician for repeats on different combinations of UK television channel, at peak times – these fees are paid as a percentage of aggregate session fees.

There is a special provision for educational programming whereby the producer is entitled to non - theatrical rights throughout the world and two UK Network television transmissions in consideration of the musician's session fee.

Producers may also purchase rights for world wide theatrical exhibition, world wide television and videogram – it has been agreed by the parties that the payment for video uses encompass their present assessment of equitable remuneration in respect of the Rental and Lending Right.

***Royalty payments***

As an alternative to the fixed payments, the producer may use or permit the use of a recording of the musician's performance in the production in all or any media on payment of a royalty, on the basis of 4% of gross receipts from program sales divided between the musicians in proportion to their original session fees. Higher royalty percentages are due if the program is predominantly or exclusively based on music or musicians rather than actors. Royalty payments are paid by the producer.

***Combined use fee***

As an alternative to these structures the producer may opt at the time of engagement to pay the musician a combined use fee, in consideration of which the producer shall be entitled to incorporate the musician's performance into the film or program and shall acquire the right to use or to license other to use, the film or program in all media, throughout the world in perpetuity, and to release the musician on commercial audio recordings.

Commercials: Standard terms recommended by Equity for actors working in commercials

An agreement between Equity and the British advertisers and advertising producers' organizations is currently in abeyance, however performers continue to work under the terms of the previous agreement.

*Fees and use payments*

A standard form of engagement is used which provides for a *basic studio fee*. The form specifies the number of days for which the performer will be required.

After the first transmission of the commercial the Advertiser pays the performer a single transmission fee, equivalent to 100% of the basic studio fee. Payment of this fee grants the Advertiser the right to unrestricted access to and showing of the commercial on any or all television channels irrespective of signal delivery system (i.e., terrestrial, satellite, cable or any other means.)

Use fees for subsequent uses of the commercial are calculated by reference to the number of UK individuals reported to have viewed the commercial transmission. This data is taken from an official audience measurement service. This figure is accumulated to arrive at a total number of viewing occasions and expressed as a percentage known as a TVR (Television Rating). These fees are then calculated by formula according to a sliding scale, depending on the size of the audience for that commercial.

Payments for overseas use of the commercial must be negotiated with the performer concerned and must be paid for at not less than the UK rates. Payments for use in Canada and the USA must be paid for according to not less than the locally prevailing rate.

Internet-only production: Standard terms recommended by Equity for actors working in Internet only production

Equity and the Personal Managers' Association have issued guidelines to performers working on projects specifically for the Internet – as yet, a very new area of production. The recommendations use a time-limited formula and include artist's fees, which allow producers to show the work on the Internet for up to six months on one UK website, as follows:

Daily Rate: £100 for working days of up to ten hours (including 1 hour meal break).

Weekly Rate: £500 for five working days.

If the producer wishes to extend the six months, or show the work on more than one website there are additional fees. There are also other payments for other uses.

In the present climate few of the Internet productions that have been made (whether by broadcasters or independent producers) have any income stream attached. In these circumstances

the unions will tend to seek an additional fee and a restriction on the time the material is available.

(j) Miscellaneous other Rights – How Are They Treated?

*Cable Retransmission*

There is currently no right for cable retransmission for audiovisual performers in the UK. The provisions of the European Directive on Cable and Satellite<sup>18</sup> removed obstacles for cross border transmission of cable services. Article 8 of that Directive provides that applicable copyright and related rights must be observed when programs are retransmitted from one EU state to another. However, in the field of cable transmission, UK law only grants performers rights in respect of commercially published sound recordings.

UK performers have developed a partial solution to this situation through a labour agreement between the BBC and the two performers' trade unions. Since 1984 the BBC has paid the unions a percentage of the money received for simultaneous cable retransmission into Eire, Belgium and the Netherlands. This is a voluntary agreement and therefore not binding on other broadcasters. BBC Worldwide also passes on part of the income it derives from Sky Television for the direct-to-home delivery of BBC 1 and 2 to Sky TV subscribers in Ireland.

*Moral Rights*

UK legislation contains no moral rights provision for performers. In the absence of, though not as a substitute for, these rights, the performers' trade unions have built in certain minimum protection through collective bargaining agreements which relate to elements of moral rights legislation. Of these, one of the most important is the right to credit and performers' agreements do include such elements as follows;

The right to credit as in the BBC/Equity agreement which states: "The BBC continues to recognize the importance of credits for all Main Artists and will adhere to its existing practice etc provide credit to Main Artists in normal circumstances."

*Rental Remuneration*

The introduction of the rental right for performers in British law was a result of Directive 92/100/EEC in 1992 which has so far not led to a change in practice with respect to revenue from the rental of videos and DVDs.

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<sup>18</sup> Council Directive 93/83/EEC (1993).



### *Private copying remuneration*

There is no legislation in the UK providing remuneration for private copying, and none is envisaged. However, while the recording of a performance for private or domestic use is currently a permitted act, not requiring the consent of performers, it is proposed to remove this exception and replace it by two much more limited exceptions, relating only to the home recording of broadcasts for “time-shifting” purposes and the taking of still photographs of audiovisual broadcasts for private purposes. European Directive 2001/29/EC on Copyright and Related Rights in the Information Society contains a recital which states that “Digital private copying is likely to be more widespread and have a greater economic impact than analogue.” However it is up to the governments of member states to decide if and how to implement private copying exceptions withing general limits set by the Directive in this area.

### C. THE COLLECTIVE EXERCISE AND MANAGEMENT OF AUDIOVISUAL PERFORMERS’ RIGHTS IN THE UK

It has to be reiterated that the information in this section applies only to collective administration of performers’ rights in their *audiovisual* performances. Other rights in audio performances are managed by other societies (in the UK two collecting societies called the Performing Artists’ Media Association (PAMRA) and the Association of Uniting Recording Artists (AURAUK) manage the rights of performers in their audio recorded performances).

#### (a) Which Rights does BECS Represent?

Under UK legislation no rights of remuneration exist that would require collective administration by a collecting society. However in 1998 Equity took the step of establishing a collecting society called BECS<sup>19</sup> (British Equity Collecting Society) in order to manage sums paid to the union for the “collective” use of performances (deriving in some cases from labor agreements) and to represent the rights of its members towards collecting societies in other countries. This new mechanism is an interesting bridge between collective administration via collective agreement, and the management of rights by a collecting societies.

BECS obtains a direct mandate from its members, appointing the society as their exclusive agent to collect performers remuneration on the terms set out in the Memorandum and Articles of Associate of the Society.

The Memorandum and Articles define performers’ remuneration as any income or remuneration arising or payable to Performers:

(i) In respect of the rental of a sound recording or a film either by way of (a) the exercise of the rental right or (b) the right to equitable remuneration for the rental in the United Kingdom under:

<sup>19</sup> For information see <http://www.equity.org.uk/becs.htm>

- S191 and 182 of the 1988 Act
- S191 of the 1988 Act

(ii) In other countries pursuant to:

any legislation in respect of the rental right and/or such equitable remuneration and/or their implementation of Articles 2 and 4 of the Rental Directive or

(iii) From any blank tape levy or other levies on private copying media or devices or

(iv) In respect of the cable retransmission of programs incorporating performances or

(v) Which is of a similar collective character which the Board of Management resolves should fall to be collected by the society.

Unlike a number of societies BECS does not at the present time take an assignment of rights from its members allowing performers to retain the individual or collective right to bargain for the transfer of certain rights, additionally performers can withdraw their mandate by giving three months notice of their intention to do so.

In addition, BECS makes agreements with other societies. There are two basic types of agreements BECS reaches with other societies:

- Where societies do not have the ability to identify performances individually BECS will reach an agreement with a society for the entirety of the British repertoire and then distribute the revenue collected to all performers involved whether members or not, without penalizing non-members or non-British performers who appear in British fixations. Societies are expected to make every effort to identify and pay those performers who are not members of the society but for whom a society holds revenue.

- Where performers can identify performers individually BECS collects revenue that is due to its mandated members.

BECS also facilitates the identification of performers by exchanging data.

## II. AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION IN THE UNITED STATES OF AMERICA (USA)

### Summary of the system

The US system of performers' protection is based on a strong tradition of collective bargaining between producers and performers rather than on audiovisual performers' statutorily created rights. Over many decades as the audiovisual industry has developed, American performers have negotiated minimum terms for the use and re-use of their performances which have become enshrined in extensive collective bargaining agreements. The minimum terms in those agreements form the basis for performers' individual contracts with producers.

## A. STATUTORY RIGHTS

### (a) Coverage of the Rights of Performers under the US Copyright Act

Copyright in the United States is enshrined in chapters 1 through 8 and 10 through 12 of title 17 of the *United States Code*. The framework is contained in The Copyright Act of 1976 and subsequent amendments. Transitional and supplementary provisions are also contained in the Digital Millennium Copyright Act (DMCA) of December 1998.

The Act does not confer rights upon performers in audiovisual works and therefore only the section of the Act cited below is relevant in this respect.

In the US tradition, intellectual property rights vest initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.<sup>20</sup> In the case of works-made-for-hire the employer or other person for whom the work was prepared is considered the author, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.<sup>21</sup>

Audiovisual productions are among those classified as works-made-for-hire in the Act's definitions as follows;

“A ‘work made for hire’ is -

- (i) a work prepared by an employee within the scope of his or her employment; or
- (ii) a work specially ordered or commissioned for use as a contribution to a collective work, *as a part of a motion picture or other audiovisual work*, as a translation, a supplementary work, a compilation, an instructional text, a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities” (emphasis added).

Under (i) above, the creator must be a regular employee as determined by standards of labor and tax laws at the time the work was created, and merely attempting to superimpose upon an independent contractor the category of employee for the purposes of this doctrine runs the risk of invalidating the transfer of rights. Furthermore, the work must have been created “within the scope” of the employment, meaning that it was part of the job duties of the creator to create the work. Merely because an actual employee creates a work that is then acquired by the employer is not sufficient.

<sup>20</sup> Section 201(a).

<sup>21</sup> Section 201(b).

Under (i), a person who is not an employee but an independent contractor can still fall within the work made for hire concept but only within the express examples above and then only if the parties have executed a written agreement declaring a work for hire contract prior to the creation of the work.<sup>22</sup>

## B. THE COLLECTIVE BARGAINING SYSTEM

### (a) A Brief Background to the Development of Performers' Protection Through Collective Bargaining in the US

Performers in the United States first began to organize themselves in unions at the very beginning of the twentieth century in the theatre and live performance. In the mid-1930s, with the growth of Hollywood, the Screen Actors' Guild was formed by some of the biggest stars in the business, including James Cagney and Boris Karloff and in 1937, after a threatened strike, the Guild forced the Studio to recognize the union as a bargaining agent, and soon afterward the first-ever SAG contract was signed.

An important legal development took place in 1935 which made it possible for performers, and indeed other workers, to organize themselves. The National Labor Relations Act of 1935, known popularly as the Wagner Act, was New Deal legislation designed to protect workers' rights to unionization. It created the National Labor Relations Board (NLRB), which still functions to enforce the National Labor Relations Act.

Further statutory developments affected the way unions operated in some aspects of their activity. Most significant among these was the Labor-Management Relations Act of 1947 amending the National Labor Relations Act. This legislation, named for its instigators as the Taft-Hartley amendments,<sup>23</sup> restricted the ability of the unions to confine jobs to their own members.

Until the end of the 1940's and Hollywood's so-called "Golden Age," audiovisual production was concentrated in a few major studios. Performers, and in particular actors enjoyed secure, continuous long-term employment contracts with the studios—which is what is meant when the "Studio System" is referred to. However in the 1940's technological change (the advent of television) and anti-trust legislation forced the studios to relinquish control over both production and distribution, and the system was forced to become much more flexible, with studios contracting with independent production companies to make films. As a result, producers came to contract with the actor on a picture by picture basis, and the role of the unions and of agents in negotiating individual contracts became much more important.

The impact of technology and of secondary uses on the collective bargaining system cannot be under-estimated. The advent of television allowed broadcaster to screen repeats of programs

<sup>22</sup> Section 101 Definitions.

<sup>23</sup> The Taft-Hartley Act (1947) passed by the US Congress, officially known as the Labor-Management Relations Act. Sponsored by Senator Robert Alphonso Taft and Representative Fred Allan Hartley, the act qualified or amended much of the National Labor Relations (Wagner) Act of 1935.

and old movies as a way of generating extra revenue. This encourages unions like the American Federation of Musicians and the Screen Actors Guild to seek residual (secondary) payments for these additional uses to compensate performers for lost work, thereby creating an important role for performers' unions that continues to this day.

This pattern continued in later decades with other technological developments like home video and cable television, enabling the performers, using their collective strength even without statutorily granted rights, to negotiate secondary payments for these uses in order to mitigate the financial effects of technological change. Technological change has been the major source of conflict in labor relations throughout the decades, and all the major strikes of the talent unions have been driven by the need for compensation and secondary payments for new uses. The emphasis has however changed, with performers focusing less on the need for compensation for lost work as on the right of performer to share in the new revenue streams being created.

Residuals also represent a form of profit sharing that enables the producer to defer payments until costs have been recovered, thereby reducing their risk and allowing the performer to benefit from the proliferation of media outlets for entertainment.

#### (b) The Collective Bargaining System and How it Relates to Individual Contracts

Today the audiovisual industry in the US remains heavily unionized, meaning that the majority of production takes place under union collective agreements, and the vast majority of professional performers are members of one or more of the performers' unions or guilds.

Each union negotiates its own basic agreement with the producers' association. This agreement, which covers all workers under its jurisdiction, will typically cover such issues as minimum rates of pay, periods of work, retirement and health benefits, grievance procedures etc. Re-negotiations of the often very extensive contracts take place periodically and the agreements are subject to constant and in some cases joint, monitoring by the unions and the producers with respect to their implementation.

The key element of the system depends on the framework set by the collective agreements for *individual bargaining*. Union collective bargaining agreements are not contracts between individual performers and producers. They provide minimum terms for the actual bargaining over performers' individual contracts. The basic agreements allow individuals who have more marketing power than others – the stars – to negotiate additional compensation above the minimum through personal services contracts. These contracts are discussed in Section C.

#### (c) Beneficiaries of Protection under Collective Agreements – Do Performers Have to be Union Members?

The American system whereby performers are compensated via collective bargaining agreements depends on two factors: the first of these is the ability of the union to control the number of performers working under their contracts entering the profession, and secondly that of the discipline exercised by the performer themselves.

Following the 1947 Taft-Hartley Act it became more difficult for the union to restrict hiring of union members. The law dictates that a producer who is signatory to the union's collective bargaining agreement may hire a non-union member under a union contract for thirty days. After that time the performer is required to tender the requisite initiation fee and dues to the appropriate union in order to accept any additional union work. In practice producers can hire non-union members without any significant difficulty, though naturally this is heavily discouraged by the unions.

There are a number of routes into union membership although these differ from union to union. A performer may join the Screen Actors Guild in one of three ways: either by obtaining work as a principal for a SAG signatory producer, or by virtue of membership in an affiliated union or by being hired for at least three days' work as an extra under a union contract. A performer may join SAG's sister union AFTRA on payment of an initiation fee.

Once a performer becomes a member of the Screen Actors Guild, he/she is bound by the rules of the union. In terms of obligations, Rule One is the most important of these, stating as follows:

*“No SAG members shall work as an actor or make an agreement to work as an actor for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect.”*

This means in effect that SAG members will not accept any non-union work – indeed there is a system of fines and other measures for those who contravene it – and is a key element in ensuring the signing of collective bargaining agreements by producers.

(d) Are “Extras” Considered to be Performers?

The Screen Actors Guild and AFTRA do have jurisdiction over “background actors” and collective agreements covering their work. However it should be noted that under the Screen Actors Guild basic codified agreement, background actors are not considered “performers.”

However, the American Federation of Musicians' agreements for theatrical features and television films do provide for musicians providing what are known as “sideline” services, i.e., being seen on camera, for which they receive secondary payments. Sometimes these musicians also provide recording services on the piece that they are sent to be performing on screen.

Definition of extras in the AFTRA Network Code:

“Walk ons and extras are those performers who do not speak any lines whatsoever as individuals but whom may be heard, singly or in concert, as part of a group or crowd.”

In a union collective bargaining agreement does an extra or background actor, categorized as such under the terms of the agreement, receive secondary use payments.

## (e) Can Foreign Performers Benefit from US Union Agreements?

The US Immigration and Naturalization Service (INS) sets the visa requirements for foreign performers who want to work in the United States. The INS allows performers who are not US citizens or permanent residents to audition based on any visa, but they must then obtain a very specific visa to actually work on a film, television, or electronic media project, whether the producer is a union signatory or not, in the United States. Production companies, and sometimes talent agents and managers, will often apply for these visas on behalf of the performer concerned. Due to the INS criteria and cost of transportation, living expenses, and legal fees, these visas are typically granted only to major -role principal players.

However once granted permission to work in the US, foreign performers are treated exactly the same as national performers in terms of union requirements and benefits.

## (f) The Jurisdiction of US Union Agreements

Most of the performers' collective agreements in the US are currently restricted in scope geographically (one exception being the AFM's sound recording agreement). This means that the terms of the agreements apply to performers' contracts made in the US and to situations in which a producer based in the US hires a performer whom they may then be filmed on location in another part of the world.

This is an area of concern to the performers' unions in light of the increasing amount of production that takes place in foreign countries by US companies operating from subsidiaries established in those countries. In such a situation the terms of the collective agreement do not legally have to be applied to the performer concerned and can potentially undermine observance of the collective agreement. This issue is likely to remain an important point in collective bargaining for the future. In the meantime the unions are engaged in a major effort to enforce the terms of their collective agreements by requiring discipline on the part of their members in not accepting contracts other than those based on such agreements.

## (g) The Parties Involved in Collective Bargaining

*The film and television producers*

The key producers' association in audiovisual production is the Alliance of Motion Picture and Television Producers<sup>24</sup> (AMPTP) which is a multi -employer bargaining association in film and television. Since 1982, the Alliance of Motion Picture & Television Producers (AMPTP) has been the primary trade association with respect to labor issues in the motion picture and television industry. The AMPTP negotiates 80 industry -wide collective bargaining agreements that cover actors, crafts -persons, directors, musicians, technicians and writers -virtually all of the people who work on theatrical motion pictures and television programs. In these negotiations, the AMPTP represents over 350 production companies and studios, including all the major

<sup>24</sup> For more information see <http://www.amptp.org>

studios. Producers who sign a contractor letter of agreement with the union in their jurisdiction are called signatories.

### *Commercials producers*

Producers of commercials organize themselves for the purposes of collective bargaining as a joint policy committee of advertisers and advertising agencies – the American Association of Advertising Agencies<sup>25</sup> (AAAA) and the Association of National Advertisers<sup>26</sup> (ANA), representing over 300 companies which have over 8000 brands.

### *The performers' organizations*

There are several performers' unions with specific and separate (i.e., non-competing) agreements – and sometimes joint agreements – in the audiovisual field. Most people who attempt to pursue a performing career full-time are usually members of more than one union, depending on the medium and venue.

### *Screen Actors' Guild (SAG)*

The Screen Actors' Guild<sup>27</sup> (SAG) represents 98,000 performers in all categories working in film, television, commercials (jointly with AFTRA), industrial/educational films, as well as interactive media, low-budget productions and audiovisual productions made for the internet. SAG is currently in discussions with AFTRA with regard to uniting and consolidating the two unions.

### *American Federation of Television and Radio Artists (AFTRA)*

AFTRA<sup>28</sup> represents actors, other professional performers and presenters in four major areas: 1) **news and broadcasting**; 2) **entertainment programming**; 3) **the recording business**; and 4) **commercials** and non-broadcast, **industrial**, educational media. AFTRA's 70,000 members include actors, announcers, news presenters, singers (including royalty artists and background singers), dancers, sports casters, disc jockeys, talk show hosts and others.

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<sup>25</sup> For more information <http://www.aaaa.org/>

<sup>26</sup> For more information <http://www.ana.net>

<sup>27</sup> For more information <http://www.sag.org>

<sup>28</sup> For more information <http://www.aftra.com>



*American Federation of Musicians*

The AFM<sup>29</sup> represents 100,000 musicians in the US and also Canada, including those whose performances are used in film, television and other audiovisual productions, and those who perform live music in every genre and every kind of venue. The AFM has audiovisual and audio agreements in sound recordings, television (public, network, cable etc), motion pictures, interactive media, video cassette etc.

(h) Talent Agents

Talent agents in the US play an important part in negotiating performers' individual contracts. Traditionally the unions have worked very closely with this group, including by a system known as "franchising" – a system of control by the union whereby agents are authorized and aspects of their relationships with the client (e.g., the percentage of commission agents may charge etc) are controlled directly by the union, in addition to any licensing that may be required by law.

(i) Other Performers' Unions

Theatre performers, as well as stage managers, are represented by Actors Equity Association (AEA). Live music and variety performers find their representation in the American Guild of Musical Artists (AGMA), and the American Guild of Variety Artists (AGVA). All these unions, under the umbrella of the Associated Actors and Artistes of America (sometimes referred to as the Four A's), are all affiliated with the trade unions' central organization in the US, the AFL-CIO.

(j) Areas in which Collective Bargaining Agreements and Standard Rates for Performers in Audiovisual Exist

There are a whole range of very lengthy and detailed collective agreements covering audiovisual production in the US, with varying structures and compensation systems. Some specific and simplified examples are quoted in this paper for the purposes of illustration – this does not however represent a comprehensive analysis of every agreement.

<i>COLLECTIVE AGREEMENTS</i>	<i>SAG</i>	<i>AFTRA</i>	<i>AFM</i>
Motion pictures (film – theatrical) and television (including on cable)	X		X
Low budget (a range of different levels), experimental, student film	X		X
Television animation	X		X
Public television	X	X	X

<sup>29</sup> For more information <http://www.afm.org>

Network & syndicated TV, daytime sitcoms, serials, variety show setc (including digitally produced -including cable)		X	X
Commercials	X	X	X
Non-broadcast, education & training films	X	X	X
Interactive media (CDROM & internet games and entertainment programs) or computer generated animation	X	X	X
Independent, experimental and low -budget programming, material for the Internet, or computer generated animation (CGA).		X	
Compilation and clips			X
Music video	X	X	X

(k) Rights Conveyed by Performer to Producers

Collective agreements in the US are silent on any questions relating to statutory rights or their transfer *per se*. These aspects are left to the performer's individual contract. The agreements do, however, address in considerable detail the performers' conditions of work, and the range of minimum compensation mechanisms for primary and secondary exploitation of the performer's audiovisual performance.

(l) Performers' Compensation – Payments for Secondary Uses via the Residuals System

Perhaps the most important feature of the US system of performers' compensation and control over secondary uses of performances, is represented by residuals, which are also referred to as "reuse fees" or "supplemental contributions." These payments may be calculated as a percentage of either the minimum initial payment or the revenue of the producers or distributor for a new market. Payments are ongoing, as long as the audiovisual production continues to be sold to secondary markets.

It can be argued that the requirement for the producer to pay for secondary uses imposed by the collective bargaining agreements, creates a situation whereby the performers have control over their "rights" in a way that is analogous to that of other countries where performers may negotiate compensation on the basis of the transfer of their statutory -created exclusive rights.

Residual payments date back to the 1950's when the American Federation of Musicians became the first union to negotiate secondary use payments for theatrical film exhibited on television. After a decade of acrimonious negotiation, the payment of residuals became accepted practice throughout the industry in the 1960's although further industrial strife took place in the early 1970's when the new markets of home video, cable and pay -per-view television came into being. As secondary markets have grown and as new markets continue to evolve, the importance of residual payments to actors' total compensation has become increasingly significant.

For the majority of performers in audiovisual production the system operates via the collective bargaining agreements, which obligate producer to send performers individual checks

directly to the union or, in some cases, to remit funds directly to the performer. Under the SAG contract the lump sum is divided between the performers concerned using a point system based on the number of days worked on the particular production. A key feature of the residuals system is that it aims not to disadvantage lower paid actors in relation to their “star” counterparts – a cap is built into the system so that in effect the highest paid performers’ secondary use payments help in part to subsidize those whose initial compensation and bargaining power is less.

The unions’ involvement in the administration of residual payments has given them extensive responsibilities and experience not dissimilar to that of collective administration organizations established by rights holders both in the US and in other parts of the world. They manage a large amount of data, they disburse very large amounts of money to the precise individuals who have worked on each project, and, as importantly, they monitor and audit the sums received from producers on many thousands of productions each year. It is also worth noting that the unions do not make any deductions from the lump sum received for the process of administration – all the money goes to the performers.

As the entertainment industry has become more complex, with ownership of productions passing from company to company, the unions have had to negotiate complex security arrangements to ensure that ongoing residuals obligations continue to be met (including onerous fines imposed on producers for late payments), and to track the accuracy of the sums received from the producers by auditing and other procedures.

It is essential to note that as well as payments for uses, the US performers’ unions have negotiated very significant payments by producers for pension and health insurance schemes that are jointly administered by the unions and producers. This huge “social” element of the collective bargaining system is clearly of immense importance to the individual performer but it lies beyond the remit of this Study and is not included in this discussion.

(m) How Residuals are Distributed – An Example of Residuals Distribution Formula (Screen Actors’ Guild Basic Agreement)

The following formula demonstrates how residuals are distributed among performers under one collective bargaining agreement.

*Time units*

Each performer is credited with units for the time worked on a production as follows:

- Each day = 1/5 unit
- Each week = 1 unit
- Maximum = 5 units per performer

*Salary units*

The salary of each performer is converted to units as follows:

Day performer	each multiple of daily scale compensation = 1/5 unit
All other Performers	each multiple of weekly scale compensation = 1 unit
Maximum	= 10 units per performer

*Computation*

The aggregate of each performer's time and salary units is applied against total cast units and each performer is paid in the percentage their units represent.

(n) Assumption and Security Agreements – How the Unions Protect Ongoing Payments through Collective Bargaining

Since performers' rights in the US are contractual in nature, it is important for the unions to be able to protect performers' payments in an ongoing way, even if the original producer of the audiovisual work transfers or sells the exhibition or distribution rights in that production to another entity.

Union agreements in the US deal with the very frequent eventuality of changes in ownership of audiovisual productions, by requiring distributor to be bound by what are known as "assumption agreements" acknowledging the ongoing requirement to meet the performers' compensation payments on the terms dictated by the original collective bargaining agreement. These sophisticated agreements include a range of obligations that must be transferred to the new owner, including the union's right to be furnished with statements of gross receipts, the possibility of audit etc. In addition, the unions have negotiated the possibility to demand that the original producer obtains a security interest in the production on behalf of the unions. This security interest is needed in order to protect future ongoing payments in case of default. The unions can choose to vary some of the security requirements to take account of distributors or other entities with which the union has a history of dealing with respect to residual payments.

(o) The Duration of Collective Bargaining Agreements

A collective bargaining agreement applies to all productions made while that version of the agreement is in effect. Therefore, if the agreement is later changed, it will not apply retroactively to earlier productions, unless the parties so agree and specify to that effect in any revised agreement.

(p) New Forms of Exploitation

The way that new forms of exploitation are dealt with will differ between collective bargaining agreements. If there is no agreement as to whether a new use falls within an existing

definition within the agreement, the issue is certain to form a topic for the next round of bargaining between the parties.

(q) Non-Economic Rights

The US performers' collective agreements contain negotiated provisions for a range of "non-economic" rights that are of considerable value to performers. These are often related to the personality and reputation of the performer, including those governing credits, and provisions relating to nudity. Very extensive provisions protecting performers who are minors are separately included. These are basic minimum provisions above which the individual performer cannot negotiate individually.

Typical credit provisions include:

Extract from AFTRA network code for television programming :

"All persons classified as performers who speak more than five lines... shall receive cast credit, individual and unit respectively..." although there are situations in which the unions accept that despite best efforts, credits may not always be possible."

Extract from SAG codified basic agreement

"Producer agrees that a cast of character on at least one card will be placed at the end of each theatrical feature motion picture, naming the performer and the role portrayed. All credits on this card shall be in the same size and style of type, with the arrangement, number and selection of performers listed to be at the sole discretion of the Producer. All such credits shall be in readily readable color, size and speed..."

(r) Examples of Collective Agreements in Audiovisual Production

Motion Pictures: Agreement between SAG and the AMPTP

Any performer (with the exception of instrumental musicians) who works on motion picture or television film that is shot on film will work under the Screen Actors Basic Agreement. Television material that is shot on videotape or digital falls under the jurisdiction of both SAG and AFTRA and in certain cases is produced under a separate AFTRA agreement.

The performers covered by the agreement are performers (actors), singers and dancers (both solo and in groups) stunt performers and background actors (extras) in specific zones around New York and Los Angeles.

The following table contains a very brief summary of the SAG basic agreement to illustrate some of the minimum compensation and secondary use payment requirements. Only rates for performers (i.e., actors) are included and while some of the rates concerned apply to television as

well as film and are listed for interest, a number of specific provisions relating to television have been omitted.

A very wide range of other conditions and payments (including for make up/hairdress/wardrobe fitting calls, overnight location, overtime, travel time) are included in the agreement but not listed here.

A condition of the agreement is that the performers should have his/her individual contract available for signature no later than the first day of employment and cannot be required to sign a contract when starting work on the set. Damages (as for late payments) are due for default of this rule.

All the payment formulae below may be the subject of individual bargaining and are illustrative (some have been omitted).

<i>BASIC MINIMUM RATES</i>	<i>RATE</i>
<i>Minimum fee for Day performer</i>	\$678
<i>Minimum fee for Weekly performer</i>	\$2,352
<i>Theatrical exhibition of television pictures</i>	100% of minimum for US and Canada, 100% for exhibition in a foreign country.
<i>Television exhibition and supplemental market use of theatrical motion pictures</i> For the distribution of feature films to free or pay television.	3.6% of gross receipts paid to SAG for distribution
<i>Theatrical motion pictures released to VHS/DVD</i> For theatrical motion pictures released in videocassette format	4.5% of gross receipts of first \$1 million then 5.4% of excess over \$1 million paid to SAG for distribution
<i>Pay Television</i> Performers' initial compensation entitled the producer to 10 exhibitions or one year's use on each pay TV system. Thereafter:	6% of total worldwide gross paid to SAG for distribution

<p><i>Basic Cable</i></p> <p>For release to basic cable of product initially made for free television a range of per centages are due to be paid to the union.</p>	
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Television: AFTRA Network Television Code

The compensation rates and supplementary payments quoted below are for the performer category—a number of other performer categories are covered by the agreement (theatre-day performers, stunt performers, singers, dancers, specialty acts and groups and extras) but are not included in this very abbreviated summary. Rates for broadcaster stations that are not networks, such as the Fox Broadcasting Corporation (Fox Network) have also not been included.

<i>BASIC MINIMUM RATES</i>	<i>RATE</i>
<p><i>Network Prime Time dramatic programs for the performer category</i></p> <p>One day Three days (1/2 or 1 hour show) Weekly</p>	<p>\$655 \$1,656 \$2,272</p>
<p><i>Major role performer</i></p> <p>1/2 hour program 1 hour program</p>	<p>\$3,521 \$5,633</p>
<p><i>Remote broadcasts</i></p> <p>There can be no telecast pickups from many theatres, nightclubs, movie locations, hotels, studios etc where performances may take place without the consent of the individual performers involved. Performers may be entitled to additional amounts for such telecasts per their individual contracts of employment.</p>	
<p><i>Re-play (repeats) of recorded programs</i></p> <p>The producer has the right, within 60 days of the original broadcast, to show the recording in any area where the program has not been previously broadcast without additional payment to the performers. Additional broadcasts in the same area are considered replays. For the first and second network replay performers are paid:</p> <p>For subsequent replays performers are paid percentages of the basic minimum program fee which decrease as the program is replayed more times.</p>	<p>75% of the applicable program fee plus an extra percentage of additional rehearsal and doubling fees.</p>

<p><i>Domestic replays in a foreign language</i> Producers may have the option of doing domestic broadcast of a television program in another language for an additional payment</p>	<p>2% of distributor's gross receipts</p>
<p><i>Excerpts</i> A range of provisions relating to program excerpts exist, some (for programs where more than 75% of the program consists of excerpts) requiring the consent of, and negotiation with, performers.</p>	
<p><i>International Television</i> Producers have the right to license, authorize or cause a network program to be broadcast by stations in specified foreign areas subject to authorization in writing from. The provisions define the nature of a foreign broadcast and specify a range of fees – percentages of the basic minimum program fee.</p>	
<p><i>Supplemental markets</i> The producers have the right (subject to any restrictions in their individual employment contracts) to distribute release programs made under the agreement in Supplemental markets. These are defined as by cassettes (defined as audiovisual devices for exhibition on a home tv screen by sale or rental), pay television, basic cable and "in-flight" uses. It does not include distribution on closed circuits. For these uses the producer will pay the performer on the program a percentage of the Distributor's gross receipts in perpetuity, starting at 2% for older programs rising as the amount of revenue increases and varying depending on the supplemental market concerned. Distributor's gross receipts are defined in detail in the agreement. Separate provisions exist for programming made specifically for pay (subscription) television and program material made specifically for videodisc/cassette markets.</p>	

Commercials: Screen Actors Guild Commercials Contract

The Screen Actors Guild contract defines commercials as "short advertising or commercial messages made as motion pictures, 3 minutes or less in length and intended for showing over television." The definition in the current agreement also includes "short advertising messages intended for showing on the Internet which would be treated as commercials if broadcast on television and which are capable of being used on television in the same form as on the Internet." Still photographs of the kind that appear in magazines or billboards are specifically excluded.

The agreement covers Principal Performers whose roles, compared with those of extra performers are described.



The “rights” and use fees in the commercial contract are based on a principle of exclusivity. When a performer agrees to accept employment in a commercial, he/she would be expected to agree not to accept employment advertising a competitive product or service. However, if the producers want a greater degree of exclusivity – i.e., that the performers should not accept employment in commercials advertising *non-competitive* products – this must be compensated. It is for this reason that the use of commercials is time-limited in the agreement.

<i>BASIC MINIMUM RATES</i>	<i>RATE</i>
<p><i>Network Prime Time dramatic programs for the performer category</i></p> <p>Oneday \$655                      Threedays (1/2 or 1 hour show) \$1,656                      Weekly \$2,272</p>	
<p><i>Major role performer</i></p> <p>1/2 hour program \$3,521                      1 hour program \$5,633</p>	
<p><i>Remote broadcasts</i></p> <p>There can be no telecast pickups from many theatres, nightclubs, movie locations, hotels, studios etc where performances may take place without the consent of the individual performers involved. Performers may be entitled to additional amounts for such telecasts per their individual contracts of employment.</p>	
<p><i>Re-play (repeats) of recorded programs</i></p> <p>The producer has the right, within 60 days of the original broadcast, to show the recording in any area where the program has not been previously broadcast without additional payment to the performers.</p> <p>Additional broadcasts in the same area are considered replays. For the first and second network replay performers are paid:</p> <p>For subsequent replays performers are paid percentages of the basic minimum program fee which decrease as the program is replayed more times.</p>	<p>75% of the applicable program fee plus an extra percentage of additional rehearsal and doubling fees.</p>
<p><i>Domestic replays in a foreign language</i></p> <p>Producers may have the option of a domestic broadcast of a television program in another language for an additional payment.</p>	<p>2% of distributor’s gross receipts</p>

<p><i>International Television</i>                  Producers have the right to license, authorize or cause network programsto be broadcast by stations in specified foreign areas subject to authorization in writing from. The provisions define the nature of a foreign broadcast and specifies a range of fees – percentages of the basic minimum program fee.</p>	
<p><i>Supplemental markets</i>                  The producers have the right (subject to any restrictions in their individual employment contracts) to distribute release programs made under the agreement in Supplemental markets. These are defined as by cassettes (defined as audiovisual devices for exhibition on a home tv screen by sale or rental), pay television, basic cable and “in-flight” uses. It does not include distribution on closed circuits.                  For these uses the producer will pay the performer on the program a percentage of the Distributor’s gross receipts in perpetuity, starting at 2% for older programs rising as the amount of revenue increases and varying depending on the supplemental market concerned.                  Distributor’s gross receipts are defined in detail in the agreement.                  Separate provisions exist for programming made specifically for pay (subscription) television and program material made specifically for videodisc/cassette markets.</p>	

Interactive multimedia: AFM Guideline Experimental Rates for Interactive Multimedia Projects

Collective bargaining in the area of interactive multimedia production is as yet very new, although several unions have promulgated agreements for use on a case by case basis with producers seeking to hire union (i.e., “professional” talent). As this industry grows the use of such agreements is certain to develop. Two examples are included hereto to illustrate the approaches taken by unions with respect to a new industry with new rights.

<i>FEESTRUCTURE</i>	
<p><i>Basic Session Payment</i> Musicians to receive double scale (minimum rate) with additional percentages for doubling. The AFM's Motion picture/TV Film premium pay provisions apply throughout.</p>	
<p><i>CDROM AND DVD FOR EDUCATIONAL/PROMOTIONAL PURPOSES</i></p> <ul style="list-style-type: none"> <li>• Producers may either pay an hourly session fee plus a "plateau payment" whereby upon the sale of 25,000 units an additional fee will be paid;</li> <li>Or</li> <li>• A one-time payment in which case the initial session fee is higher.</li> </ul> <p>In each case the option must be exercised prior to the session call, and the musician informed.</p>	
<p><i>Dedicated Console Platforms</i> Negotiated on a case-by-case basis by the union.</p>	
<p><i>Music for Websites, online services and providers, interactive cable stations, virtual reality rides, etc.</i> Hourly session fees are specified, with use for one year only, after which re-use fees based on the original session fee will be pro-rated.</p>	
<p><i>Live performances on the Internet and other uses</i> These performances require advance notice to the AFM and the signing of a special agreement. No distinction is made in rates between the use of audio/video, audio only or video only. Hourly session fees are specified with a limit of 6 months' use after which additional payments will apply. Other rates exist when Internet exhibition is made in conjunction with other broadcast performance. The AFM also makes agreements for or commercials on the Internet, re-use of existing recorded and filmed or taped performance and use of clips and music on enhanced CD's and CD-plus.</p>	

Interactive multimedia: Screen Actors Guild Interactive Media Agreement

<i>FEESTRUCTURE AND RATES</i>	<i>RATE</i>
<p><i>Definitions of key aspects of the agreement</i></p> <p><i>Interactive:</i> describes the attribute of products which enable the viewer to manipulate, affect or alter the presentation of the creative content of such products simultaneous with its use by the viewer.</p>	

<p><i>Interactive Media:</i> any media on which Interactive product operates and through which the user may interact with such product including but not limited to personal computers, games, machines, arcade games, CD interactive machines and any and all analogous, similar or dissimilar microprocessor-based units and the digitized, electronic or any other formats now known or hereinafter invented which may be utilized in connection therewith.</p> <p><i>Remote Delivery:</i> any system by or through which Interactive product may be accessed for use from a location that is remote from the central processing unit on which the product is principally used or stored, such as an online service, a delivery service over cable television lines, telephone lines, microwave signals, radiowaves, satellite, wireless cable or any other service or method now known or hereinafter invented for the delivery of transmission of such Interactive product.</p> <p><i>Program:</i> The final version of a fully -edited product for presentation to the viewer or user. It does not refer to the computer software code utilized in the digitization process, any type of electronic technology, patents, trademarks or any of the intellectual property rights of the producer.</p> <p><i>Exclusions:</i> these definitions specifically exclude the linear transmission of interactive programs by traditional television or by radio. These are programs made by videotape or film photography through which photographic images or other visual representations are used alone, or in conjunction with audio effects, and which are exhibited by television, videocassette and similar devices or film projection in theaters.</p>	
<p><i>Minimum scales rates</i></p> <p>Day performers \$556</p> <p>Three day performers \$1,408</p> <p>5-day performers \$1932</p> <p>6-day performers \$2126</p> <p>Performers to be paid 100% of minimum rate for Remote Delivery and also for Integration if acquired not later than 1 year after initial release of the program in interactive media.</p>	
<p><i>Rights</i></p> <p>For the initial compensation the performer may exploit the results of the performer's services in the interactive programs, in all interactive media, including the right to adapt the interactive program for any and all platforms. The producer's rights shall include remote delivery and integration.</p> <p>The producer also has the right to exploit the program at trade events and for customary industry promotional events.</p>	

*Re-use of material*

The producer may not re-use any part of the photograph or soundtrack of an interactive program without separately bargaining and coming to an agreement with the individual performer. The minimum fee is the minimum for purposes of such bargaining. Producers that fail to bargain separately with the performer are liable for damages equivalent to three times the amount originally paid the performer for the number of days worked as well as other applicable fees.

## C. MANAGEMENT OF THE RIGHTS OF PERFORMERS THROUGH INDIVIDUAL CONTRACTS

### (a) Overview

The unions' basic agreements allow individual performers to negotiate additional compensation and other elements through personal services contracts. The unions have no involvement in such negotiations, these being left to the performer's own lawyers and agents. Such contracts would usually include a call for initial compensation higher than the required minimum, and other forms of control and remuneration such as a percentage of net profits, gross receipts, merchandise sales etc. Elements of creative control might include any number of additional specifications including a set of credits, publicity requirements, certain non-set personnel, etc.

Under most collective bargaining agreements, the unions have the right to copies of all employment contracts, for the purpose of monitoring implementation and compliance by producers, as well as tracking residual and other obligations.

### (b) How Rights are Dealt with in Individual Contracts

Whereas the unions' collective agreements include a range of payments and negotiated restrictions on the secondary uses made by producers of audiovisual product, it is in performers' individual contracts that provisions relating to statutory rights may be found. Under the terms of the US Copyright Act, as has been discussed, performers' contributions are generally considered to be works-made-for-hire. Work for hire, unlike transfers of rights that exist in the laws of a number of countries, has, however, to be activated or obtained by written agreement between the parties, since most performers working in audiovisual productions will not be "employees" in the strict sense. Therefore all performers' individual contracts will contain wordings similar to the following:

"All results and proceeds of Performer's services, including, without limitation, all literary and musical material, designs and inventions of Performer hereunder shall be deemed to be a work made for hire for Producer within the meaning of the copyright laws of the US or any similar or analogous law or statute of any other jurisdiction and accordingly, Producer shall be the sole and exclusive owner for all purposes including, without limitation, in connection with the distribution, advertising and exploitation of the Picture or any part thereof."

A performance cannot be deemed a work for hire retroactively so producers must obtain the performers' services in this way prior to the completion of the production. In addition producers may often obtain a more wide-ranging copyright assignment to protect themselves from other claims.

Finally, producers will customarily require a wide-ranging contractual waiver of other rights although for leading performers, these may be contractually negotiable. Rights and uses that producers might require could include the following:

“Performer hereby waives the “moral rights” of authors (i.e., *droit moral*) as said term is commonly understood throughout the world;

“Employer acknowledges and agrees that Producers shall be the sole and exclusive owner of all rights in the role or character portrayed by Performer, including name, likeness and distinctive characterization thereof, and the right to merchandise and exploit such role or character, and the right to use Performer's name, photograph, voice (or simulation thereof) and/or likeness in connection therewith; Performers shall have no right at any time to portray, exploit, merchandise or make any use of such role or character portrayed by Performer;

“Producers shall have the right to use and permit others to use Performer's name, photograph, likeness, voice (or simulation thereof), and/or biography in connection with advertising, publicizing and exploiting the Picture or any part thereof (except endorsements without Performer's prior consent, but sound track albums, commercial tie-ins, novelizations, printed or souvenir programs and other publications relating to the Picture and the exhibition of a “trailer” or promotional film for the Picture on a sponsored television program shall not be deemed to constitute an endorsement);

“Producers shall have the right to include excerpts of the Picture and so-called “behind the scenes” shots in promotional films of thirty (30) minutes or less without payment of additional compensation.”

D. PUBLISHED FIGURES

*The development of SAG residuals between 1954 - 1995*

<i>Total Residuals Payments</i>	<i>Number of Checks Sent to Members</i>	<i>Total Residuals Payments</i>	<i>Number of Checks Sent to Members</i>
<i>TV Programs: Domestic Runs</i>			
<i>In 1954</i>		<i>In 1995</i>	
\$170,299	3,934	\$78,084,565	335,180
<i>TV Programs: Foreign Runs</i>			
<i>In 1965</i>		<i>In 1995</i>	
\$618,666	15,744	\$24,035,670	133,146
<i>Feature Films to Television</i>			
<i>In 1963</i>		<i>In 1995</i>	
\$5,448	226	\$32,201,314	424,535
<i>Feature Films to Supplemental Markets</i>			
<i>In 1974</i>		<i>In 1995</i>	
\$229,672	3,020	\$90,569,824	659,929
<i>TV Programs to Supplemental Markets</i>			
<i>In 1973</i>		<i>In 1995</i>	
\$2,565	45	\$13,671,533	263,769

Residuals generated by Screen Actors Agreements - 2002

The following figures represent the major residuals categories generating payments to performers under selected SAG contracts in 2002

<i>AGREEMENT</i>	<i>\$RESIDUALS</i>	<i>Number of checks sent to individual performers</i>
Feature motion pictures	\$235,900,000	2,000,000
Broadcast television series	\$162,000,000	1,300,000
Television movies made for broadcast TV	\$12,200,000	111,000
Series made for basic cable	\$13,500,000	204,000
Animated features	\$11,600,000	24,000
<i>TOTALS</i>	<i>\$457,300,000</i>	<i>3.8 million checks</i>

### III. AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION IN MEXICO

#### Summary of the system

The Mexican system of remunerating and protecting performers for their audiovisual performances is based on a combination of legally codified union collective bargaining protections which provide for initial compensation and repeat fees, and a statutorily created economic remuneration rights administered by a performers' collecting society.

#### A. STATUTORY RIGHTS

##### (a) Coverage of the Rights of Authors and Performers under the Mexican Federal Copyright Act<sup>30</sup>

Before looking at the specific rights granted in Mexican law to performers it is worth assessing select aspects of the law, including some key definitions, the way that the rights of authors and producers are structured relative to each other, and a range of provisions relating to the contractual disposition of rights, since these subjects have a bearing on the treatment of neighboring rights holders.

##### (b) Definitions Relating to Bringing a Work to the Public

The Mexican Copyright Law, Article 16 designates the following means by which a work may be brought to the public.

(i) Disclosure: the act of making a literary or artistic work accessible to the public by any means for the first time, as a result of which it ceases to be unpublished;

(ii) publication: the act of reproducing the work in tangible form and making it available to the public in the form of copies, or of storing it permanently or temporarily in an electronic medium, in such a way that the public may read it or perceive it by sight, touch or hearing;

(iii) communication to the public: the act by which the work becomes generally accessible by any means or process of dissemination that does not consist of the distribution of copies;

(iv) public performance: the presentation of a work by any means to listeners or viewers without such act being restricted to a private group or family circle; a performance is not considered public where the work is performed within the confines of a school or public or private welfare institution, provided that there is no gainful intent;

<sup>30</sup> *Ley Federal del Derecho de Autor*, Entry into force: March 24, 1997.  
Source: *Diario Oficial* of December 24, 1996, pp. 39-66.



(v) distribution to the public: the act of making the original or copies of the work available to the public by sale or rental, or any other general form;

(vi) reproduction: the making of one or more copies of a work, phonogram or videogram in any tangible form, including permanent or temporary storage in an electronic medium, and also the making two-dimensional of a three-dimensional work or vice versa.”

(c) Authors' Rights Relative to Ownership of Audiovisual Works by Producers

The authors of an audiovisual work are defined in Article 97 as follows, with subsequent Articles 98 - 100 describing the ownership of an audiovisual work and the presumption of transfer of rights to the producer of the work that applies to authors, albeit with limitations. This aspect of the law provides a certain parallel with the rights of performers and other neighboring rights-holders, and also defines and establishes the role of the producer as the economic owner and coordinator of the audiovisual work – a noteworthy feature of the Mexican law.

“The following are the authors of an audiovisual work:

- the director or maker;
- the authors of the plot, adaptation, screen play or dialogue;
- the authors of the musical compositions;
- the photographer;
- the authors of cartoons and animated pictures.

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

“*Art. 98*. The producer of the audiovisual work is the person, whether a natural person or legal entity, who takes the initiative for the making of a work, coordinates it and assumes responsibility for it, or who sponsors it.

“*Art. 99*. Unless otherwise agreed, the contract concluded between the author or the owners of the economic rights, as the case may be, and the producers shall not imply unlimited, exclusive assignment to the latter of the economic rights in the audiovisual work.

“Once the authors or owners of economic rights have undertaken to make their contribution to the making of the audiovisual work, they may not be subject to the reproduction, distribution, public performance, cabled distribution, broadcasting, communication to the public or subtitling and dubbing of the text of the said work.

“Without prejudice to the rights of the authors, the producer may perform all such acts as are necessary for the exploitation of the audiovisual work.

“*Art. 100*. The provisions contained in this Chapter shall apply as appropriate to broadcast works.”

## (d) General Provisions: Contractual Provisions Relating to Audiovisual Works

In addition to the above-mentioned provision, the Mexican law contains a range of quite specific measures addressing the contractual transfer of rights between parties in the case of audiovisual works, designed to give security to the producer (as the owner of the collaborative work) and the authors and performers (as contributors). Perhaps the most important of these provisions are the unwaivable right to a proportional share of the remuneration that flows from the exploitation of the work (Article 31), and the protection of this right even following a transfer in ownership of the production. Selected provisions are set forth here.

*“Art.30 .The owner of the economic rights may freely, subject to the provision of this Law, transfer his economic rights or grant exclusive or non-exclusive licenses for use.*

*“Any transfer of economic rights shall be for consideration and temporary. In the absence of agreement on the amount of remuneration or the procedure for setting it, or on the time limits for the payment thereof, the competent courts shall decide. Acts, agreements and contracts by which economic rights are transferred and licenses granted shall invariably be concluded in writing, failing which they shall be null and void as of right.*

*“Art.31 .Any transfer of economic rights shall provide for the grant to the author or to the owner of the economic rights, as the case may be, of a proportional share in the proceeds from the exploitation concerned, or a predetermined, fixed amount of remuneration. That right shall be unrenounceable.*

*“Art.32 .The acts, agreements and contracts by which economic rights are transferred shall be entered in the Public Copyright Register in order to be binding on third parties.*

*“Art.33 .In the absence of any express provision, any transfer of economic rights shall be deemed to be for a term of five years. A term of more than 15 years may only be agreed upon in exceptional cases where dictated by the nature of the work or the scale of the required investment.*

*“Art.34 .Future reproduction may only be the subject of a contract in the case of a specific work the characteristics of which have to be laid down in the said contract. The global transfer of future works shall be null and void, as shall any provisions whereby the author undertakes not to create any other works.*

*“Art.35 .Any license affording exclusive rights shall be expressly granted and shall give the licensee, where not otherwise agreed, the right to exploit the work to the exclusion of any other person, and also the right to grant non-exclusive authorization to third parties.*

*“Art.36 .The license affording exclusive rights shall obligate the licensee to take whatever action is necessary for the license to be effective, depending on the nature of the work and the customs and practices prevailing in the professional, industrial or commercial activity concerned.*

“Art.39 .Authorization to broadcast a protected work by radio, television or any other similar medium shall not include the right to broadcast it to exploit it.

“Art.40. The owners of authors’ economic rights and neighboring rights may claim compensatory remuneration for any copying or reproduction done without their permission and not covered by any of the limitations provided for in Articles 148 and 151 of this Law. n

“Art.41 .Economic rights may not be either attached or pledged, but the benefits and products derived from the exercise thereof may be sused.”

(e) Specific Provisions Relating to Contracts for Different Kinds of Audiovisual Works

The law contains also chapters including contractual specifications for the following kinds of works:

- Publication of a literary work;
- Publication of musical works;
- Stage Performance;
- Broadcasting;
- Audiovisual Production;
- Advertising.

These specifications impose rights and duties on both parties to a contract – the rights holder on one hand, and the publisher/producer/subsequent owner of the rights on the other .

“Audiovisual Production Contracts

“Art.68. Under an audiovisual production contract, the authors or owners of the economic rights, as the case may be, grant the producer exclusive ownership of the economic rights of reproduction, distribution, communication to the public and subtitling of the audiovisual works, unless otherwise agreed. The foregoing shall not apply to musical works.

“Art.69 .Where an author’s contribution is not completed for reasons of *force majeure*, the producer may use the part already completed, subject to respect for the rights of the said author in that part, including the right of anonymity, and without prejudice to any indemnification that might be appropriate.

“Art.70 .The effects of the production contract shall lapse as of right if the making of the audiovisual work does not start within the period specified by the parties or for reasons of *force majeure*.

“Art.71 .The audiovisual work shall be considered completed when the final version has been achieved in accordance with the agreement between the director or maker on the one hand and the producer on the other.

“*Art.72* .Theprovisionsonpublishingcontractsforliteraryworksshallapplyto audiovisualproductioncontractsinssofarastheyarenotatvariancewiththeprovisionsof thisChapter.

*“Advertising Contracts*

“*Art.73* .Advertisingcontractsarethosewhosepurposeistheexploitationofliterary orartisticworksforpromotionaloridentificationpurposesinadvertisingorcommercial announcementsinanymediumofcommunication.

“*Art.74*. Advertisingorcommercialannouncementsmaybedisseminatedfora periodnotexceedingsixmonthsfollowingthefirstcommunication.Afterthattimelimit communicationshallbeforpaymentforeachadditionalperiodofsixmonths,evenifitis effectedonlyforfractionsofsuchaperiod,withaminimumpaymentofatleastthat originallycontractedfor.Afterthreeyearshaveelapsedfollowingthefirstcommunication, useshallrequirethepreviouspermissionoftheauthorsoftheworkusedandtheownersofthe neighboringrights therein.

“*Art.75* .Inthecaseofadvertisinginprintedmedia,thecontractshallspecifythe physicalmediumormediainwhichtheworkistobereproducedand,inthecaseof pamphletsor mediaotherthanperiodicalpublications,thenumberofcopiesconstitutingthe print-run.Thereshallbeanexpressagreementforeveryadditionalprinrun.

“*Art.76* .Theprovisionsonpublishingcontractsforliteraryworksormusicalworks andthose onaudiovisualproductioncontractsshallapplytoadvertisingcontractsinssofar astheyarenotatvariancewiththeprovisionsofthisChapter.”

*“Broadcasting Contracts*

“*Art.66*. Underabroadcastingcontracttheauthororowneroftheeconomicrights, asthecasemaybe,authorizesabroadcastingorganizationtobroadcastawork. Theprovisionsapplicabletothebroadcastsofsuchorganizationsshallapplyasappropriate tothoseeffectedbycable,opticfiber,electromagneticwaves,satelliteor anyother comparablemediumthatservesfortheremotecomunicationtothepublicofprotected works.

“*Art.67* .Theprovisionsonpublishingcontractsforliteraryworksshallapplyto broadcastingcontractsinssofarastheyarenotatvariancewiththeprovisionsofthis Chapter.”

(f) Performers’ Rights

The rightsofperformersandotherneighboringrights holders(bookpublishers,producers ofphonograms,producersofvideogramsandbroadcastingorganizations)arefoundunderTitleV

of the Act. Protection is given irrespective of whether the performance is aural or audiovisual and whether the fixation is limited to sounds or is audiovisual.

(g) Definition of a Performer

Under Article 116 of the law, a performer is defined as follows, with the specific exclusion of extra performers – although exactly what constitutes an extra is not defined and is presumably left to be determined by custom and practice;

“Performer means the actor, narrator, speaker, singer, musician, dancer or any other person who performs a literary or artistic work or an expression of folklore or who engages in a similar activity, even though he may have no pre-existing text to guide his performance. Extras and understudies are not included in this definition.”

(h) Economic Rights Given to Performers and their Transfer

Under Article 118 of the law, performers are given the following rights, although there is also a transfer of rights that limits the actual exercise of those rights in practice by performers. This provision was introduced with the 1997 law and is strongly resisted by the Mexican performers' organizations;

“Performers have the right to object to:

- the communication of their performance to the public;
- the fixing of their performance in a physical medium;
- the reproduction of such a fixation of their performances.”

However, the following broad presumption of transfer pertains to all fixations in which the performance is used (both audio and audiovisual);

“The above rights shall be considered exhausted once the performer has authorized the incorporation of his performance in a visual, sound or audiovisual fixation.”

The law also specifies a modality for those cases in which performers participate in audiovisual works as a group:

“Performers who collectively participate in one and the same performance, like musical groups, choirs, orchestras or ballet or theater companies, shall designate a representative from among themselves for the exercise of the right of opposition referred to in the foregoing Article. In the absence of such designation, it shall be presumed that the leader of the group or company is acting as representative.”

(i) Limitations on the Transfer of Performers' Rights

In Articles 120 and 121 a requirement is placed upon the producer to give the performer specific information as to the future exploitation of the audiovisual work. This information is essential to the collective administration of the remuneration rights that flow from the law. Article 121 places a limitation on the producer with respect to separate use of the sounds and images fixed in the audiovisual work, and also appears to make possible the contractual limitation of the transfer of rights to the producer by the performer, leaving some room for individual negotiation, presumably for the "star" performers who have most bargaining power. At the very least, this provision makes it clear that each performer must have a written contract with a producer.

*“Art. 120. Performance contracts shall specify the times, periods, remuneration and other terms and procedures associated with the fixing, reproduction and communication to the public of the said performance.*

*“Art. 121. Unless otherwise agreed, the conclusion of a contract between a performer and a producer of audiovisual works with a view to the production of an audiovisual work shall include the right to fix and reproduce the performer's performances and communicate them to the public. The foregoing does not include the right to use the sounds and the images fixed in the audiovisual work separately, unless agreed otherwise.”*

(j) Registration of Performers' Contracts

The law establishes a Public Copyright Register in order to “ensure the legal security of authors, owners of neighboring rights, the holders of the economic rights concerned and their successors in title, and also to afford sufficient publicity to works, instruments and documents through registration.” Performers' contracts are among the documents that may be registered and protected in this way.

(k) Non-Economic Rights Given to Performers

The Mexican law grants performers moral rights in their performances. The General Provisions of the Law protect authors' moral rights such that they are inalienable and un-transferable and it is to be assumed that performers' moral rights are similarly protected.

Performers' moral rights are expressed as follows:

*“The performer has the right to have his name associated with his performances, and also to object to any distortion or mutilation of his performance or other adverse act in relation to it that might damage his prestige or reputation.”*

## (l) Duration of Performers' Rights

The law gives protection to performers' rights for a period of 50 years counted from:

- the first fixation of the performance in a phonogram ;
- the first performance of works not recorded on phonograms;
- the first transmission by radio, television or other medium.

## (m) Beneficiaries of Protection

The General Provisions of the law create the following beneficiaries of its protection.

*“Art. 7 .Foreign authors or owners of rights and their successors in title have the same rights as nationals by virtue of this Law and international treaties on copyright and neighboring rights signed and ratified by Mexico.*

*“Art. 8 .Performers, publishers and producers of phonograms and videograms and broadcasting organizations that have effected, respectively, the first fixing of their performances, their publications, the first fixing of the sounds of their performances or the images of their videograms or the communication of their broadcasts outside the national territory shall benefit from the protection accorded by this Law and the international treaties on copyright and neighboring rights signed and ratified by Mexico.”*

## B. REGULATION OF THE FEDERAL AUTHORS' RIGHTS LAW

The 1998 Federal Copyright Law is further interpreted and defined by a set of Regulations dating also from 1998. <sup>31</sup> These regulations provide more detail as to the actual exercise of the rights contained in the law, including how royalties generated by the exploitation of works, performances, etc. are defined and dealt with. It is important however to differentiate between the Law (established by the Legislature) and the Regulations (established by the Executive). The Regulations cannot create rights and the Law will always take precedence.

## (a) Definition of Royalties and the Entitlement of Right -Holder to Secondary Use Payments

In Chapter II of the Regulations, the meaning of royalties within the Federal Law is explained, as is the payment to authors and performers. The provisions make it clear that these groups of right -holders are entitled to receive royalties for the secondary use of their works and performances, according to the form of exploitation concerned.

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<sup>31</sup> *Reglamento de la Ley Federal del Derecho de Autor.*

“Article 8 .-For the effects of the Law and this Regulation, royalties are understood as the economic remuneration generated by the use or exploitation of the works, performances or executions, phonograms, videograms, books or broadcasts in any form or medium.

“Article 9 - Payment of royalties to the author, to the holders of related rights and to their assignees will be made independently to each one of those who have a right depending on the form of exploitation involved.

“Article 10 .-Royalties for public communication, exhibition or performance of literary and artistic works will be generated in favor of the authors and holders of related rights, as well as of their assignees, when performed directly or indirectly for profit.”

(b) Performers' Remuneration: Communication to the Public of Audiovisual Works

Under Article 133 of the Federal Law, a compulsory license is created for the direct communication to the public of phonograms –however the law stipulates that the user of the phonograms must pay the right-holders, including the performers. Article 12 of the *Regulations* underlines this provision but also seems to go further than the Law itself, by further defining the notion of communication to the public in respect of this provision, specifying that each category of right-holder must receive separate payment and extending the right to cinematographic and audiovisual works. In practice, however, this extension (which does not appear in the Law itself) is not operational.

“Article 12: For purposes of article 133 of the Law,<sup>32</sup> direct communication to the public of phonograms is considered:

- Public performance made in such a way that a plurality of people can have access to them, whether by analogue or digital reproduction, reception of transmission or broadcast, or any other manner;
- Public communication by broadcasting, or
- Transmission or retransmission by wire, cable, fiber optic or other analogous procedure.

“The payment mentioned in article 133 of the Law must be made independently to each one of the categories of holders of copyrights and related rights that have the ownership of the rights on the exploitation form involved.

“The provisions of this article will apply where relevant, to cinematographic and audiovisual works.”

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<sup>32</sup> Art. 133: Once the phonogram has been lawfully brought into any commercial circuit, neither the owner of the economic rights nor the performers nor the phonogram producers may object to its direct communication to the public, provided that the persons using it for profit-making purposes make the corresponding payment to them.



In addition, Chapter III entitled Cinematographic and Audiovisual Work, Articles 34 and 35 establish the right of authors and performers to receive a share of royalties due from the communication to the public of audiovisual works;

*“Article 34: Audiovisual production contracts must establish the proportional share or the fixed remuneration for the authors or title holders specified in article 97 of the Law, which will rule for each act of exploitation of the audiovisual work. When the contract does not consider any form of exploitation, such exploitation will be understood as reserved in favor of the authors of the audiovisual work.”*

What is established in this article applies where relevant, to the acting and performances included in the audiovisual work.

*“Article 35 .- The authors of the audiovisual work and the performing artists who participate in it will receive a share in the royalties generated by its public execution.”*

#### (c) New Amendments to the Federal Copyright Law

At the time of writing a number of draft amendments to the Federal Law are under consideration. These were approved by the Mexican Senate in 2002 and if approved by the Congress, would have the effect of strengthening the current law in favor of authors and performers by adding to, and amplifying existing provisions in the law. Whether passed in the current session of Congress or not, these amendments illustrate the kinds of changes to the current Federal Laws sought by authors and performers.

Amendments proposed included granting authors an unwaivable remuneration right, subject to mandatory collective management, in all public communication and making available of audiovisual works, and granting performers a similar unwaivable right to collect remunerations for all exploitations of their performances (though not subject to mandatory collective management). In the case in which a performer does not have a contract the collecting society would receive the remuneration.

The amendments would also introduce both analog and digital private copying levies, with a requirement that collecting societies assign no less than 20% of the amount collected to cultural activities in their area. They would further require payment to collecting societies for the commercial use of public domain works, and would extend the term of copyright protection to 100 years for authors and 75 years for performers.

### C. PERFORMERS' TRADE UNIONS IN MEXICO

#### (a) How the Unions Operate

In the Mexican system of performers' rights the performers' trade unions have a significant role in managing the contracts and agreements that determine pay and conditions for their members, but deal with rights through performers' collecting society.

There are two performers' unions in Mexico – *Asociación Nacional de Intérpretes* (ANDA) which represents actors working professionally in all kinds of performance – theatre, radio, variety, circus, cinema, television, dubbing, modeling etc., and the *Sindicato de Trabajadores de la Música de la República Mexicana* (STMRM). Of these two organizations, ANDA seem to play the more prominent role in terms of audiovisual production and has a very comprehensive membership among Mexico's actors and other audiovisual performers.

(b) Collective Agreements and Individual Contracts for Audiovisual Production

Performers in Mexico are hired under individual service contracts each time they work in audiovisual productions. The only exception to this system is that which exists for certain actors who are regularly employed by the largest Mexican television company, Televisa. These star performers have exclusive contracts of employment by which they are paid monthly whether they are working on a production or not. This allows Televisa to retain their exclusive services for *telenovelas* (soap operas) and prevents them from taking work in soap operas or other programs for competing national or foreign companies.

There is a strong tradition of collective bargaining and organization for performers in Mexico and, as in certain other civil law countries, the agreements made by trade unions are linked to the Federal Labor Law and indeed codified within that law, rather than being private arrangements between parties as is seen in the Anglo-Saxon legal tradition.

ANDA therefore negotiates separate, though similar, collective terms with every television production company and also has an agreement with film producers who work within Mexican territory. However these agreements are labor agreements and do not deal with issues relating to intellectual property rights. The agreements establish minimums and are widely observed by producers.

ANDA's negotiations with producers focus on performers' working conditions, including minimum fees, travel and per diems, overtime and also displacement fees for foreign workers which are fees charged to producers by the unions for each non-Mexican employed on a foreign film. Like other Mexican film unions, ANDA's agreements are applied even to foreign producers working in Mexico and the union also has certain jurisdiction over work permits for non-Mexican actors. Other benefits provided by the union include free medical treatment and a retirement fund which emanates in part from the collective agreements.

(c) Contracts, Collective Agreements and Television Repeat Fees

The payment of repeat fees for performers in television is negotiated as part of the performer's individual contract or collective agreement with the television producer. The producer pays a determined percentage of the artist's original salary. The percentages range from 10-100% of the fee depending on the bargaining power of the star at the time of entering into the original contract. These fees are administered via the collecting society *Asociación Nacional de Intérpretes* (ANDI).

## D. COLLECTIVE ADMINISTRATION OF PERFORMERS' RIGHTS

### (a) ANDI—a Performers' Collecting Society

In 1957 the members of the Mexican actors' union ANDA set up a new organization known as ANDI (*Asociación Nacional de Intérpretes*), arising from the copyright law then in force that had been enacted in 1956. Established as an association to defend moral and patrimonial rights and to pursue the rights of national and foreign performers arising from the commercial use of their works in Mexico, ANDI immediately embarked upon the key tasks of sensitizing performers to the importance of their intellectual property rights and also started negotiations to obtain payment for performers for the public performance of phonograms, against considerable resistance from users.

In subsequent decades, ANDI has grown in strength and activities establishing tariffs for the use of performances in different media, as technology developed, lobbying politicians to gain improvements in the legal situation of performers. The organization became completely separate from ANDA in the 1970's, although the two work closely together, and is a non-profit body established under the Federal Law. ANDI represents and manages the rights of its members in the whole range of different media and uses.

### (b) The Legal Basis for the Collective Administration of Rights in Mexico

Title IX of the Federal Law dictates rules for the establishment of collecting societies. The general definition of what constitutes such a society is contained in Article 192:

*“Art. 192 .A collecting society is a legal entity without gainful intent that is set up under this Law with a view to protecting both national and foreign authors and owners of neighboring rights, and also collecting and delivering to those persons the sums payable to them by virtue of their copyright or neighboring rights.*

*“The successors in title of authors and owners of neighboring rights, whether national or foreign but residing in Mexico, may belong to collecting societies.*

*“The societies referred to in the foregoing paragraph shall be set up with a view to the provision of mutual assistance for their members, and shall base their action on principles of collaboration, equality and equity, in addition to which they shall operate on the principles laid down by this Law, which make them into public interest bodies.”*

The law goes on to state that membership of a collecting society is voluntary and that right-holders may choose to exercise their rights individually in person or through an agent, although once having given a mandate to a society, this ceases to be an option.

In the case of royalties collected on behalf of right-holders from abroad, the law states that the principle of reciprocity shall apply.

## (c) Aims and Responsibilities of Collecting Societies

The following selected articles state some of the key aims and responsibilities of collecting societies under the law:

*“Art.202:* Collecting societies shall pursue the following aims:

1. to exercise the economic rights of their members;
2. to keep at the disposal of users, on their premises, the repertoire that they manage;
3. to negotiate with users, according to the terms of the relevant mandate, licenses for the use of the repertoire that they manage, and to conclude the appropriate contracts.
4. to monitor the use of authorized repertoires;
5. to collect, on behalf of their members, the royalties payable for the copyright or neighboring rights that belong to them, and to hand those royalties over after deduction of the society’s administrative costs, provided that express terms of reference exist;
6. to collect and distribute over royalties accruing to the owners of foreign copyright or neighboring rights, either themselves or through collecting societies that represent them, provided that an express mandate has been granted to the Mexican collecting society, and after deduction of administrative costs;
7. to promote or carry out assistance services for the benefit of their members, and to support promotional activities relating to their repertoires.

*“Art.203 .*Collecting societies shall be under the following obligations:

1. to intervene in the protection of the moral rights of their members;
2. to agree to manage the economic rights or neighboring rights that are entrusted to them in accordance with their objective or aims;
3. to have their articles of association and statutes entered in the Public Copyright Register once they have been licensed to operate, and also the rules of collection and distribution, the contracts concluded with users and the representation contracts that they have with counterpart societies, and the instruments and documents by which members of their governing and supervisory bodies, directors and agents are appointed, all within 30 days following approval, conclusion, election or appointment, as the case may be;
4. to give all members equal treatment;
5. to give all users equal treatment;
6. to negotiate the amount of the royalties payable by users of the repertoire that they manage and, where no agreement is reached, to propose the adoption of a general tariff to the Institute, and submit supporting evidence.”

Finally, the Law requires that a collecting society publish the rules to which systems for the distribution of amounts collected are subject; and that those rules shall be based on the principle whereby the owners of the economic or neighboring rights represented are granted a share in the

royalties collected that is strictly proportional to the current, actual and proven use of their works, performances, phonograms or broadcasts.

(d) ANDI's Administrative Structures and Requirements

ANDI is run by a Board of Directors and a Committee of Scrutiny (Comité de Vigilancia) that are both elected every 6 years by the more than 17,000 performers who are currently in the organization's membership.

The members of ANDI are defined as:

- Actors and actresses;
- Narrators;
- Speakers;
- Singers;
- Models;
- Dancers;
- Any person who undertakes a similar activity and whose performance (voice, and/or image) is fixed in any way that makes its repetition possible in any media.

Foreign performers are able to join ANDI as direct members.

ANDI charges an administration fee of 15% of the royalties collected to its Mexican members, and 20% for foreign performers.

(e) How Performers Join ANDI

To become a member of ANDI, performers must sign a general mandate, conferring upon the collecting society the right to represent and collect on the basis of his/her current and future work, money due from the exercise of his/her patrimonial rights. This mandate is required under the Federal Law. In order to join, performers must produce relevant ANDA union contracts as well as other documents, in order to prove that they have indeed worked on a production.

(f) The Social Role of ANDI

ANDI also has a very significant social role, established under the law, in assisting those of its members who, for reasons of age or infirmity no longer have the ability to make their living in the acting profession or who require other kinds of social assistance. The organization provides a range of social benefits for its members through a fund, under the following headings:

- Social security
- Solidarity assistance
- Assistance for total incapacity
- Extraordinary annual assistance

- Assistance for purchasing glasses
- Assistance for dental services

Funds available stem from the interest earned on income from performers' rights and a range of different eligibility requirements pertain in order to obtain these benefits.

(g) Rights and Fees Negotiated and Collected by ANDI

ANDI deals with all those areas of the industry that make a communication to the public of works in order to make a profit, principally Cinema, Radio and Television. Since 1997 and the introduction of a presumption of transfer of rights for audiovisual performances ANDI has predominantly collected remuneration due with respect to the commercial use of phonograms. The society is engaged in a vigorous legal and political lobbying campaign to change this situation.

*Television repeats*

While ANDA, the union negotiates the basic collective agreements for performers with television, ANDI distributes the subsequent repeat fees paid by producers for repeats of programs – payments in these cases vary between 100% for each repeat to 10% depending on the age of the production and the part of the world in which the program is being repeated.

*Communication to the public of phonograms*

In addition, since ANDI has been able to negotiate tariffs for a range of users that use those works in order to make a direct or indirect profit (as defined by the Federal Law), including; Hotels, bars, hospitals, nightclubs, motels, planes, buses, airports, restaurants, jukeboxes, boats, trains, bank etc.

(h) Commercials

Article 74 of the Federal Law regulates contracts made for commercials and specifies that artists will have the right to receive no less than the same amount of payment as was contracted for each six months of use. However, after each three years the artist's authorization must be sought if the commercial is still to be used. The advertising agencies are responsible for these payments directly to the performers, rather than the collecting society, since these payments are based on the original contractual agreement.

(i) Multimedia and Internet Use

At present there are no tariffs established for these uses, although the law makes this possible.

Figures

Table 1: Comparison of ANDI's income (period 1989-1994 with period 1995-2000)

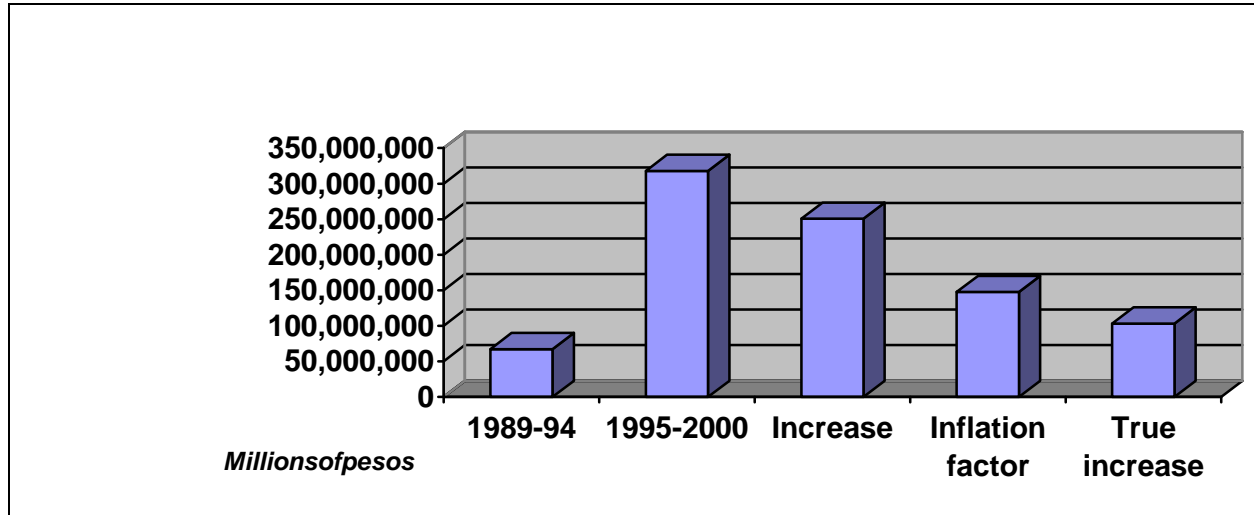


Table 2: Comparison of income from new areas (sound recordings), 1995-2000

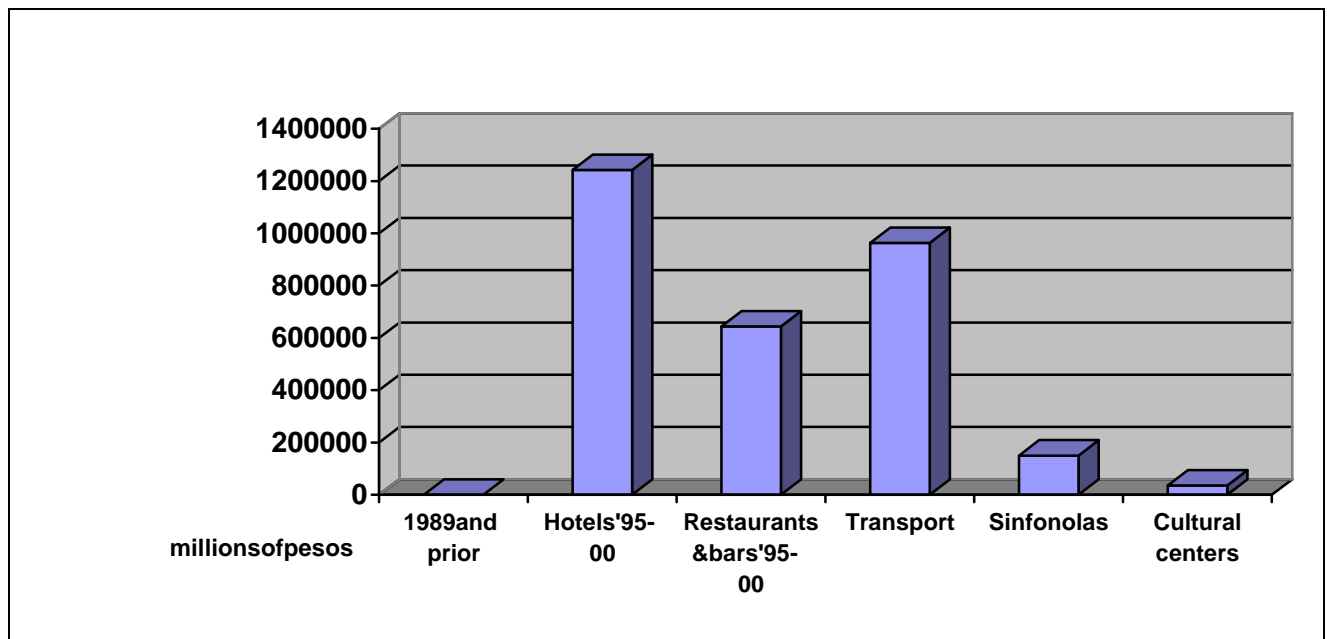
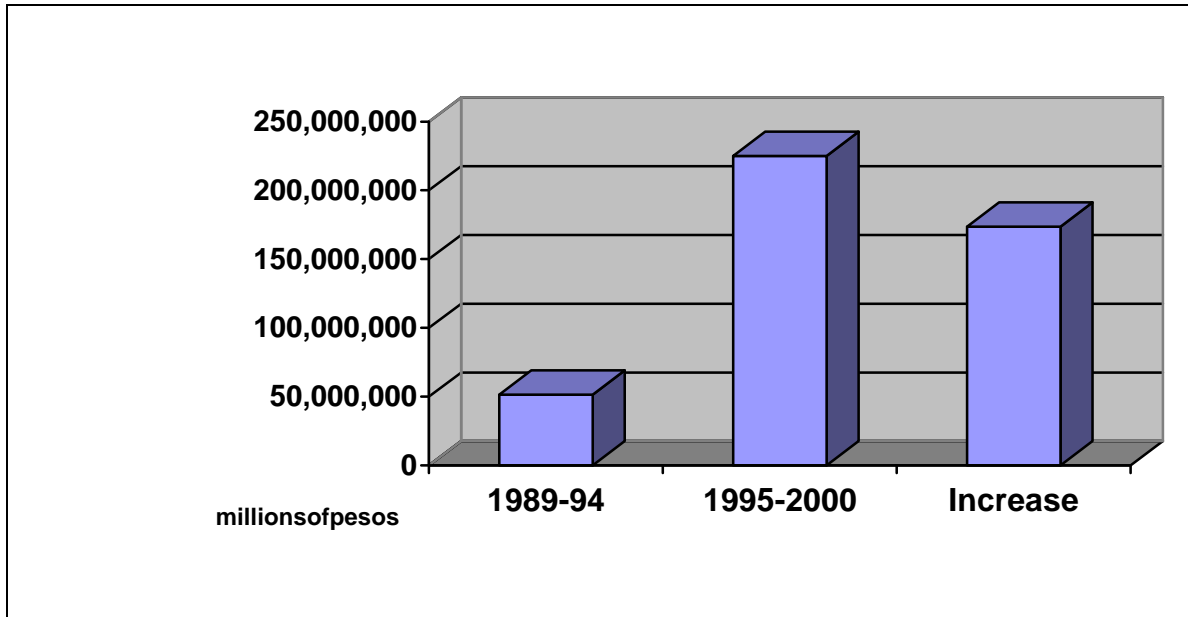


Table3:Compariso nofdistributionsmade,period1989 -1994withperiod1995 -2000



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