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STUDY ON AUDIOVISUAL PERFORMERS' CONTRACTS AND REMUNERATION
PRACTICES IN FRANCE AND GERMANY

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INTRODUCTION¹

This study was commissioned by the World Intellectual Property Organization (WIPO). Its purpose is to give a general picture of the contractual and remuneration practices of performers in the audiovisual sector in France and Germany. The study will first describe the general statutory protection of audiovisual performers under applicable statutes. Thereafter it will describe the collective bargaining practices or lack thereof for audiovisual performers. Finally it will present the collective administration of rights by collecting societies with respect to the rights of audiovisual performers. The study will examine both countries separately and conclude by a comparative analysis of the two systems.

Regrettably the study has been constricted by the difficulties with regard to access to relevant information. This is particularly relevant with regard to certain collecting societies and information regarding collective bargaining practices in Germany. However, in spite of the insufficient information in respect of certain areas of the study, the study will nevertheless give a comprehensive and reliable picture of the contractual and remuneration practices of performers in the audiovisual sector. For France the picture is more complete than for Germany, but this is not a major shortcoming since contractual practices are likely to change in the near future with the new German law on copyright contracts. The new German law is described in detail.

For the preparation of this study I have received invaluable assistance from representatives of performers' organizations. I would in particular like to express my gratitude to Ms. Catherine Alméras, Director of *Le Syndicat français des acteurs* (SFA); Mr. Laurent Tardif, in charge of legal affairs of *Syndicat national des artistes musiciens de France et d'outre-mer* (S.N.A.M.); Mr. Jean Vincent, Director of *Société civile pour l'administration des droits des artistes et musiciens interprètes* (ADAMI); Mr. Carl Mertens, Director of *Deutscher Orchestervereinigung* (DOV); and Mr. Tilo Gerlach, Director of *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH* (GVL) were helpful in answering my questions relating to administration of rights in Germany. Mr. Dominick Luquer, General Secretary, International Federation of Actors (FIA), has also put in a great effort to provide me contact information for different parties. I also want to thank Dr. Anette Kur, Senior Researcher at the Max Planck Institute (MPI), for her comments on the German law. In addition I would like to thank all other people with whom I have had the opportunity to discuss this study.

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

I. FRANCE

INTRODUCTION

The current French regulation relating to performers' rights in audiovisual productions dates back to the entry into force of the French authors' rights law of 1985. In that law performers were granted extensive rights to authorize the use of their performances in connection with audiovisual works, and the law included the principle according to which performers were entitled to remuneration for all exploitation of their performances. This right was put into effect through a combination of labor law and authors' rights law, which made it possible that remunerations for performers has been, in the first place, included in collective bargaining agreements having extended application in the whole sector.

In the following we shall first explain the French statutory framework for performers' rights in audiovisual productions. Then we shall describe the existing collective bargaining situation relative to performers' rights in the audiovisual sector, and, finally, we shall describe how performers' rights are administered by collecting societies in France.

A. PERFORMERS' RIGHTS UNDER AUTHOR'S RIGHTS LAW

Performers' exclusive rights and their assignment under the French law

In order to understand the protection of performers' rights under the French law, we first have to comprehend that *under the French law* performers are *a priori* considered as *employees (salariés)*. According Article L762 -1 of the Labor Code:

“Tout contrat par lequel une personne physique ou morale s'assure, moyennant rémunération, le concours d'un artiste du spectacle en vue de sa production, est présumé être un contrat de travail dès lors que cet artiste n'exerce pas l'activité, objet de ce contrat, dans des conditions simplifiant son inscription au registre du commerce (emphasis added). Cette présomption subsiste quels que soient le mode et le montant de la rémunération, ainsi que la qualification donnée au contrat par les parties. Elle n'est pas non plus détruite par la preuve que l'artiste conserve la liberté d'expression de son art, qu'il est propriétaire de tout ou partie du matériel utilisé ou qu'il n'emploie lui-même une ou plusieurs personnes pour le seconder, dès lors qu'il participe personnellement au spectacle.

[...]

“Conserve la qualité des salariés l'artiste contractant dans les conditions précitées”.

The law also leaves open the possibility for performer to work as independent contractors, but in practice such cases are rare if non-existent.³

The fact that performers are considered as employees is also the underlying principle with regard to protection of performers' rights under French authors' rights law. The related rights

² Article L.762 -1 of the *Code du Travail*.

³ Memorandum of the *Syndicat français des artistes-interprètes*. February 2003.

protection given for performers in the authors' rights law is intertwined with and complementary to the labor law based regulation, in particular collective bargaining agreements.

In the following we shall first address the main points of the French authors' rights law with regard to related rights protection of performers focusing, in particular, upon the regulation of contractual relationships. After that we shall see how the labor law affects the contractual relationship between performers and producers.

The relationship between authors' rights on the one hand, and related rights, including performers rights, on the other hand, is regulated in the general part of the French author's rights code (Code de la propriété intellectuelle, 3rd July 1985). The law lays down the principle of independence and intangibility of the protection of author's rights on the one hand, and related rights on the other hand. According to the French law, *related rights shall not prejudice authors' rights*.⁴ Consequently, no provision in the law shall be interpreted in such a way as to limit the exercise of an authorial right by its owner. This principle applies to all related right holders, that is, to performers, phonogram producers and videogram producers (which is the term used in the French law for producers of audiovisual fixations). One of the main intentions of this article was to avoid possible conflicts between the rights of authors and performers with regard to, for example, the exercise of their moral rights. This provision of the law has been interpreted by the courts to mean that the exercise of related rights may not limit the exercise of exclusive rights of authors.⁵

The protection of performers' rights with respect to their contributions to audiovisual works may be problematic in practice due to the multitude of performers employed in an audiovisual production, whose roles may often be of very different sizes, extending from that of a lead actor to that of an extra or background performer, whomay pronounce only a few sentences at most. The French law has tried to confront this problem by making *a distinction between interpreting and performing artists on the one hand and the artists considered as complementary in the professional practices, on the other hand*.⁶

According to the French copyright law only the actual interpreting and performing artists are protected by related rights. They are defined in the law as *persons who act, sing, deliver, declaim, play or otherwise perform literary or artistic works, variety, circus or puppet acts*.⁷

This distinction is also included in the French labor law. According to Article L.762 -1 of the Labor Code:

⁴ "Neighboring rights shall not prejudice authors' rights. Consequently, no provision in this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners." (Art. L. 211-1).

⁵ See case *Rostropovich* (Tribunal de grande instance, Paris 10.1.1990) and the case *Catela C. Ralloc. la S.A. Carrère Music* (Cour de Versailles, 13.2.1992). See also *Edelman, Bernard*, *Droit d'auteur, droits voisins, droit d'auteur et marché*, éd. Dalloz, Paris 1993, pp. 151f.

⁶ "Save for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play or otherwise perform literary or artistic works, variety, circus or puppet acts." (Art. L.212 -1.) See also *Droit de l'audiovisuel*, ed. Lamy, 2^e édition, Paris 1989, (hereinafter referred to as "*Droit de l'audiovisuel*") at 480.

⁷ Article L.212 -1.

“Sont considérés comme artistes du spectacle, notamment l’artiste lyrique, l’artiste dramatique, l’artiste chorégraphique, l’artiste de variétés, le musicien, le chansonnier, l’artiste de complément, le chef d’orchestre, l’arrangeur-orchestrateur et, pour l’exécution matérielle de sa conception artistique, le metteur en scène”.

The main principle of the French law is that every artist performing in a central capacity enjoys protection under the law. Artists who perform in ancillary functions from the artistic point of view are excluded from author’s rights protection. Drawing the line between complementary artists and actual performers is not easy. The preparatory documents give guidance with respect to dramatic performances by saying that if more than 13 lines are performed by the artist, the artist may be considered as a performing artist in terms of the law.⁸ If artists who would, according to the prevailing professional practices, be considered as complementary artists, want to claim their rights under the authors’ rights law, they have to prove that their artistic contributions satisfy the requirements of the law.⁹ The pragmatic approach adopted by the French law in this respect tries to avoid situations in which every person appearing on the scene, even if for only a few seconds, must be taken into account in terms of authors’ rights law.

In principle, the French law has granted the performer the whole scope of rights. The exclusiveness of these rights is not, however, identical to that of author’s rights but has been tempered by making their exercise partly conditional on labor legislation. In the French law the rights of performers are intertwined with the (collective) labor agreements. According to the law,

“[t]he performer’s written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and images have been fixed.

“Such authorization and the remuneration resulting therefrom shall be governed by Articles L.762 -1 and L.762 -2 of the Labor Code, subject to Article L.216 -6 of this Code.”¹⁰

In other words, under French law, performers are granted exclusive rights to authorize:

- (1) the fixation of their performance;
- (2) the reproduction of their fixed performance;
- (3) the communication to the public of the fixed performance; and
- (4) the separate use of the sounds or images of their performances where both the sounds and images have been fixed.

⁸ *Rapport Jolibois*, no.212, Tome II, pp.85.

⁹ *Edelman* (1993), pp.160.

¹⁰ Article L.212 -3.

The French law thus provides performers a wider range of related rights, but the protection is made subject to labor law, which means that these rights may be assigned in individual employment agreements or in collective labor agreements.

With regard to the protection of the rights of performers it is very important to note that the law requires *a written authorization* from the performers for the fixation of the performances, for reproduction and communication to the public as well as for any further separate use of the sounds and images of audiovisual fixations.

This provision is complemented by the provision in Article L.762 -1 of the labor law according to which *an employment contract must be individual*. The contract may, however, be made for several performers in cases where several artists are reemployed for the same performance or musicians belonging to the same orchestra. Also in this case the contract must mention the name, and specify the individual salaries, of each performer. One of the artists may sign this contract on behalf of other artists presupposing that she has a mandate from them to do so.

In order to ensure that the producer holds all rights relative to the audiovisual work in her hands the French authors' rights law provides for the assignment of performers' rights to the producer of the audiovisual fixation by the signing of the production contract. According to the law *the signature of a contract between the performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer*. The law further provides that this contract *shall lay down separate remuneration for each mode of exploitation of the work*.¹¹

In other words, the French law provides for a sort of legal assignment of rights, a *cessio legis*, to the producer of the work after the performer has signed the employment contract. By virtue of the fact that the performer has accepted to sign an employment contract for an audiovisual production with the producer, performer's rights are assigned automatically, by operation of law, to the producer. It should be emphasized that *if no written contract exists, there is no assignment of rights and the presumption rule is not effective*.¹²

However, this assignment of rights is compensated for in the law itself, which contains a complex regulatory framework to ensure that a performer receives fair compensation for all further uses of her fixed performance. Accordingly, *the contract between the performer and the producer must specify separate remuneration for each mode of exploitation of the work*. The remuneration may be determined either in the individual contract or in a collective agreement.

If neither the individual contract nor a collective agreement mention the remuneration for one or more modes of exploitation, *the law refers to the common tariff established in each*

¹¹ Article L. 212 -4.

¹² There have been several court cases regarding interpretation of requirement for a written agreement as a pre-condition for the presumption rule to enter into effect. These court cases have dealt with the rights of musicians to the soundtrack of the film, and the outcome of different cases has been somewhat different. The final say with regard to these issues lies with the French *Cour de Cassation*.

sector underspecific agreements between the employees' and employers' organizations representing the profession.¹³

Moreover, the author's rights law (Art. L212 -6) provides that Article L762 -2 of the Labor Code shall only apply to that part of the remuneration paid in accordance with the contract that exceeds the base set out in the collective agreement or specific agreement. According to the Labor Code:

“N'est pas considérée comme salaire la rémunération due à l'artiste à l'occasion de la vente ou de l'exploitation de l'enregistrement de son interprétation, exécution ou présentation par l'employeur ou tout autre utilisateur dès que la présence physique de l'artiste n'est plus requise pour exploiter ledit enregistrement et que cette rémunération n'est en rien fonction du salaire reçu pour la production de son interprétation, exécution ou présentation, mais au contraire fonction du produit de la vente ou de l'exploitation de l'enregistrement”. (Article L -762-2 of the Code du Travail).

This means that part of the remuneration received by performing artists for the sale or other exploitation of the recording of their performance after their physical presence is no longer required is not considered part of their initial salary for the performance, but as a remuneration from the sale or exploitation of the recording. Whether this remuneration is considered as complementary to salary, that is, as a salary or as copyright remuneration, is to be determined in the following manner.

First of all, three conditions laid out in the law must be satisfied: there must be recording of a performer's performance; the remuneration must be paid relative to the sale or exploitation of the recording (*“à l'occasion de la vente[...]"*),¹⁴ and the physical presence of the performer is not required for the exploitation of the recording.

Depending on the fulfillment of these three conditions, the remuneration paid for the performer may or may not be considered as a salary. According to Article L.762 -2 of the Labor Code the remuneration is *not* regarded as a salary if it is in no way determined as a function of the initial salary paid for the production of the performance and its recording, but only relates to the monies received from the exploitation of the recording. Thus, the determination of the remuneration may not in any way, even indirectly, relate to the initial salary and it must also be derived directly from the sale or exploitation of the recording. In all other cases the remuneration forms part of the performer's salary.¹⁵ We shall see later, that in practice the remuneration is almost invariably considered to be a supplementary part of the performer's salary.

The law also regulates the status of contracts concluded prior to entry into force of the law. According to Article L.212 -7 contracts concluded prior to January 1, 1986, between a performer and a producer of audiovisual works or their assignees, shall be subject to the preceding provisions [of the law] in respect of those modes of exploitation which the parties have excluded. It is further provided that the corresponding remunerations shall not constitute a salary. This right of remuneration shall lapse at the death of the performer.

¹³ Article L.212 -5.

¹⁴ *Droit de l'audiovisuel* at 519 .

¹⁵ *Ibid.*

In practice this means that if the old contract had excluded certain modes of exploitation, the remuneration for performers shall be calculated according to the new law for these modes of exploitation. After the death of the performer the right of remuneration for these modes of exploitation ceases to exist.

The law further provides that *the provisions of the agreements referred to in the preceding Articles may be made compulsory within each sector of activity for all the parties concerned by order of the responsible Minister*.¹⁶ In practice this is also the case with the exception of collective bargaining agreements for musicians. The collective bargaining agreement relative to performers' rights in film production has been made mandatory by the Minister of Culture. The collective bargaining agreement for television has also been extended by the Minister of Labor to cover also non-represented parties. We shall come back to these agreements in more detail in the next section of this study.

Should the parties not be able to reach an agreement with regard to assigning performers' rights to the producer and with regard to remuneration for each mode of exploitation as required by the law, the law provides for a judicial process of establishing the level of remuneration. According to Article L.212-9 of the law:

“[f]ailing an agreement concluded in accordance with Articles L.212-4 to L.212-7, either prior to January 4, 1986, or at the date of expiry of the preceding agreement, the types and bases of remuneration for the performers shall be determined, for each sector of activity, by a committee chaired by a magistrate of the judiciary designated by the First President of the Cour de cassation and composed, in addition, of one member of the Conseil d'Etat designated by the Vice President of the Conseil d'Etat, one qualified person designated by the Minister responsible for culture and an equal number of representatives of the employees' organizations and representatives of the employers' organizations.

“The Committee shall take its decisions on a majority of the members present. In the event of equally divided voting, the Chairman shall have a casting vote. The Committee shall decide within three months of the expiry of the time limit laid down in the first paragraph of this Article.

“Its decisions shall have effect for a duration of three years, unless the parties concerned reach an agreement prior to that date.”

If a performance of performers is accessory to an event that constitutes the main subject of a sequence within a work or an audiovisual document, the performers may not prohibit the reproduction and public communication of their performance (Article L.212-10).

Videoclips are considered as audiovisual works in France.

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¹⁶ Article L.212-8

¹⁷ By comparison, for example in Germany, videoclips are considered as musical works.

Rights to equitable remuneration for audiovisual performers under French authors' rights law

1. Private copying

Under French author's rights law remuneration from private copying is instituted as a legal license by virtue of which remuneration is collected from makers and importers of blank audio and video recording media. The remuneration is a compensation for authors, performers and producers for the loss of income caused by private copying in the music and audiovisual sectors.

The remuneration for private copying of videograms is between 0,43 € and 8,80 € per blank commercial recording medium.

The remuneration amounts are fixed by a commission composed of high-ranking judges, representatives of rightsholders and users. The remuneration is collected for rightsholders by two agencies:

- SORECOP: *Société de perception et de répartition de la rémunération pour la copie privée sonore* .
- COPIE FRANCE: *Société de perception et de répartition de la rémunération pour la copie privée audiovisuelle* .

These agencies represent the three different groups of rightsholders: authors, performing artists and producers.

In the audiovisual sector performers are represented by ADAMI and SPEDIDAM.

According to Article L.311 -7 of the French authors' rights law remuneration from private copying in the audio sector is to be divided in the following manner: 50% to authors, 25% to performers and 25% to phonogram producers.

According to the law the remuneration from private copying in the audiovisual sector is to be divided in the following manner: 1/3 authors, 1/3 performers and 1/3 producers. The remuneration is inalienable, which means that rightsholders may not assign it contractually to another party.

Remuneration due to performers represented by ADAMI and SPEDIDAM is divided in the following manner:

- Audio sector: 50% SPEDIDAM, 50% ADAMI.
- Audiovisual sector: 20% SPEDIDAM, 80% ADAMI.

2. Cable retransmission

With regard to cable transmission of existing television programs and simultaneous and unbridged retransmission on cable, there is a collective agreement between the television channels (TF1, France 2 and France 3), ANGOA (representing film producers' associations) and performers' trade unions (SFA). ADAMI has been appointed by the parties to represent performers. The agreement is administered by ADAMI. The level of remuneration is

determined as a percentage of the turnover of the television channel from cabled distribution, and is distributed individually to performers.

Performers are compensated for cable retransmission of their performances under collective bargaining agreements as a percentage of the revenues from exploitation. Remuneration is regarded as a supplement to their salary. Performers do not receive additional remuneration for cable retransmission under author's rights law.

B. INDIVIDUAL STANDARD AGREEMENTS

Television

There exists no standard agreements for performers in film production in France. With regard to television there exists a model standard agreement, "*Contrat d'engagement d'artiste-interprète*," which is drafted in conformity with the collective bargaining agreement for television and forms an addendum to the collective bargaining agreement.

Advertising

For advertising there exists a standard agreement, "*contrat artiste -interprète pour l'utilisation d'enregistrements publicitaires audiovisuels*". This contract has been drafted with the participation of representatives of the *Syndicat français des artistes -interprètes*, ADAMI, *l'Union des annonceurs* and *L'Association des agences de conseils en communication*. The purpose of the contract is to serve as a model agreement for contracting parties in the advertising sector.

The contract is concluded between the performing artist and the production company of the advertisement. In the contract the performer authorizes the advertiser and/or agency to exploit the audiovisual work according to the terms of the contract. The exploitation license of the audiovisual recording covers exploitation in the following media:

- (1) television both in France and abroad;
- (2) cinema theatre distribution;
- (3) cabled distribution;
- (4) satellite distribution;
- (5) broadcasting in a local television network;
- (6) broadcasting in a closed television network;
- (7) video, CD-ROM; CD-I, Internet exploitation; and
- (8) use of images or recorded sounds constituting a part of an audiovisual work.

According to the model contract remuneration for performers should be paid according to the terms of a protocol signed by the contracting parties on 28 April 1986. In practice this has

often not been the case. The recommended types of payments in the model agreement are all based on the types and frequency of use (annual lump-sum payments, payments per transmission etc.). No buy-out payments are mentioned in the model contract.

C. COLLECTIVE ADMINISTRATION OF RIGHTS

Collective administration of performers' rights in the audiovisual sector under French law is divided between collective bargaining agreements negotiated by performers' and producers' trade unions on the one hand, and collective administration of certain rights and remunerations by performers' collecting societies, on the other hand. In the following we shall describe the collective bargaining conventions and agreements in force at the moment, after which we shall explain how performers' rights are administered by collecting societies.

1. Collective Bargaining Agreements

As stated earlier performers are almost always working as employees in audiovisual productions and their rights and obligations are thus determined in the first place by collective bargaining agreements and individual employment contracts. Collective bargaining in the audiovisual sector in France has a long history. Currently there exist three collective bargaining agreements in the audiovisual sector for actors, of which the oldest, *Convention collective de travail de la production cinématographique* (actors), dates from September 1967. In addition there exist three specific collective agreements for musicians. In the following we shall describe the stipulations of the collective bargaining agreements relevant to performers' rights under copyright. Collective bargaining agreements for interpreting artists, in particular actors and dancers, are described first and thereafter the collective bargaining agreements for musicians.

Actors, dancers and other interpreting artists

1. *Convention collective de travail de la production cinématographique (acteurs)*

The collective convention for actors in film production dates from September 1967 and has been extended annually thereafter. It has been concluded between *La Chambresyndicale de la production cinématographique française* on the one hand, and *Le Syndicat français des acteurs* and *Le Syndicat national libre des acteurs* on the other hand.

The Convention regulates the rights of producers and actors for productions of which the producer has its headquarters in France. It applies to all production taking place in France and its territories, and to French production taking place abroad provided this is not contrary to the law or professional practices of the place where the film is being shot. It also applies to all foreign films or parts of films being shot in France by a foreign producer, regardless of the language of the film.

According to the Convention all engagements of actors must be made through written agreements before work has begun (Art. 9). All individual contracts must refer to the Convention or incorporate it in its totality or in a condensed form. No clause in the individual employment contract may be in contradiction to the Convention (Art. 10).

The Convention stipulates in detail the minimum remuneration to be paid for daily work (cachet minimal) in employment relations of different lengths, or for other kinds of engagements. It also contains specific clauses with regard to remuneration for post-synchronization work.

The Convention does not contain any clauses with regard to assignment of rights to the producer. However, it does provide that if the individual employment contract does not stipulate otherwise, the producer has the right to assign (retroceder) part or all of its rights. In this case the assignee of rights is liable to the performer for fulfilling the terms of the agreement. The producer or other assignor of rights remains in any case jointly liable to the actors for fulfillment of the contract (Art. 17).

2. *Accord spécifique concernant les artistes interprètes engagés pour la réalisation d'une oeuvre cinématographique*

This special agreement relative to performing artists employed in film production was concluded in June 1990, in implementation of the French authors' rights law of 1985, particularly sections 19 (Art. L212 -4) and 20 (Art. L212 -5). It was concluded between *La Chambre syndicale des producteurs et exportateurs de films français*, *L'Association française des producteurs de films*, *L'Union des producteurs de films*, on the one hand, and the *Syndicat français des artistes interprètes* (SFA -C.G.T.) and *Syndicat des artistes du spectacle* (SY.D.A.S.-C.F.D.T.), on the other hand.

The agreement fixes the minimum remuneration to be paid by the producer to the performer. According to the 1990 agreement the fee (cachet) must be a minimum of 1,637 FRF or

900 FRF for cinema theatre distribution in public cinemas
560 FRF for broadcasting
177 FRF for video distribution for private use.

This salary is subject to revision according to the applicable professional agreements.

As a supplement to this salary the producer must pay to a collecting society an amount of two percent of the net returns from exploitation after the film production has broken even. The monies received by the collecting society are distributed to performing artists on a prorata basis with regard to their initial salaries. The fees surpassing seven times the current minimum fees, or a daily fee over 11,459 FRF are not, however, taken into account.

The film production costs to be taken into account in determining the break-even point of the production are set by a separate ministerial decision. The costs of the film and producer's net receipts from exploitation are defined in an annex to the agreement.

The producer must deliver to the collecting society the following information after six months have passed from the first exploitation of the film:

- the costs of the film;
- list of the interpreting artists engaged in the production of the film;

- the number and the amount of fees (cachets) paid to each performing artist, taking into account the eventual maximum amount of fees as defined in Article 1 of the agreement;
- the amount of net revenues collected by the producer in France for each exploitation mode, and the amount of net revenues collected from foreign exploitation.

The amount of net income and eventual payments will thereafter be paid annually to the collecting society.

The contracting parties agree to establish an arbitration commission as required by Article L.212-9 of the authors' rights law. The contracting parties agree to submit to this commission all disagreements with regard to interpretation and application of the agreement.

This commission shall convene within a period of 30 days after the other union has submitted a case to arbitration. In case the commission has not convened by this time, each party may bring the case to the competent jurisdiction.

This agreement has been made mandatory by decision of the Ministry of Culture.

3. *Convention collective nationale 1992 -12-30 des artistes-interprètes engagés pour des émissions de télévision.*¹⁸

The rights of performer employed in television broadcasts (émissions de télévision) are regulated by a collective bargaining agreement concluded between the unions representing performing artists¹⁹ on the one hand, and French television channels,²⁰ *L'Institut national de la communication audiovisuelle (INA), L'Union syndicale des producteurs de programmes audiovisuels* and *La Société Pathé -télévision* on the other hand (hereinafter the Convention).

The Convention regulates the relationship between the employing organizations having signed the contract and performing artists employed for production of television broadcasts (émission de télévision). The categories of programs which are considered as television programs in terms of the Convention are the following:

- (1) dramatic programs;
- (2) programs consisting of reading aloud;
- (3) programs other than dramatic, lyric or choreographic;
- (4) lyric programs;

¹⁸ Extended by the decision of 24th January 1994, published in the Journal Officiel of February 4, 1994.

¹⁹ *Le Syndicat français des artistes-interprètes, Le Syndicat des artistes du spectacle, Le Syndicat national libre des acteurs* and *Le Syndicat Indépendant des Artistes-Interprètes.*

²⁰ TF1, France 2, France 3, CANAL+ and La SEPT.

(5) choreographic programs ²¹

The Convention is applicable in France and abroad in respect of programs financed and produced entirely by one or more of the employers or at their request (Art. 1.2.1).

The Convention stipulates in detail the conditions of employment, which must be included in the individual employment contract.

The general terms of employment and remuneration are set out in Article 5 of the Convention.

According to the Convention the remuneration covers first transmission in France made by an employer having signed the Convention, by every mode of transmission covered by the Convention (broadcasting, cable retransmission...), or once on the French territory, or several times in certain regional or local areas as defined by the Convention. In exceptional circumstances and after having consulted the Union the Convention may also cover first simultaneous transmission by all means of transmission (broadcasting, cable, collective antennas etc.). ²²

²¹ “1) Émissions dramatiques (la réalisation télévisuelle de tout ou partie d’une œuvre dramatique ou d’extraits d’œuvres dramatiques). Les dispositions du présent titre ne sont pas applicables à l’artiste -interprète qui, dans une émission dramatique, n’interprète qu’un texte chanté, qu’un numéro de variété ou de danse.

“2) Prestations de lecture (lorsque le plan de travail d’une émission dramatique ou d’un épisode d’une série prévoit une prestation de lecture d’une durée inférieure ou égale à quatre heures, celle-ci est rémunérée sur la base de la moitié du prix de journée prévu par le contrat de l’artiste-interprète).

“3) Émissions de variétés (une émission faisant appel à des prestations d’artistes -interprètes dans des conditions autres que celles prévues pour les émissions dramatiques, lyriques ou chorégraphiques). [applie to all other performing artists with the exception of choreographers to which a special regime is applied under 5.14.4.]

“4) Émissions lyriques (réalisation télévisuelle de tout ou partie d’une œuvre lyrique ou d’une émission comportant seulement des extraits d’œuvres lyriques).

“5) Émissions chorégraphiques (la réalisation télévisuelle totale ou partielle d’une œuvre chorégraphique constituée par une suite de pas et d’enchaînements corporels réglés à l’avance et exécutés par des artistes -interprètes spécialisés)”.

²² “– une première rediffusion destinée au territoire français effectuée par l’une des entreprises de communication audiovisuelle signataires ou adhérentes sur l’ensemble des moyens de télédiffusion dont elle bénéficie (radiodiffusion, distribution par câbles simultanée et intégrale de cette radiodiffusion, etc.), soit en une fois sur l’ensemble du territoire national, soit en plusieurs fois par zone régionale ou locale, (à raison d’une seule diffusion par zone régionale ou locale), sous réserve d’accords spécifiques concernant la diffusion assurée par des entreprises de communication audiovisuelle dont les programmes ne sont reçus que par une partie du public, notamment du fait de l’étendue de la zone géographique de réception, ou des systèmes sélectifs d’accès aux programmes;

“– à titre exceptionnel, après avis des syndicats signataires et adhérents, une première diffusion simultanée par l’ensemble des moyens de télédiffusion (émetteurs, câbles, antennes collectives, etc.), mis à la disposition des entreprises de communication audiovisuelle visées ci-dessus et destinées au même territoire français. (Article 5.2)

“5.2.2. Si l’émission n’est pas destinée à une première diffusion par les moyens de télédiffusion dont bénéficie l’une des entreprises de communication audiovisuelle signataires ou adhérentes, le contrat de l’artiste -interprète précise les utilisations prévues en télévision”.

If the program is not meant for first transmission by any means of transmission for which the contracting employers are entitled, the contract of the performing artists shall define the means of permitted television exploitation.²³

Non-commercial uses²⁴ of television programs are covered by the contractually agreed remuneration under the following circumstances:

(a) use of programs in connection with professional markets, exhibits and events, in which either of the contracting organizations is represented or television as such is featured (*être mise en valeur*);

(b) use of television programs for technical experimentation purposes without communicating them to the public by normal means;

(c) exceptional use of programs by public interest organizations other than *maisons de la culture*, museums and educational establishments – in connection with specific events for the purposes of raising the knowledge in specific cultural or social sectors under certain strictly defined circumstances;²⁵

(d) Use of programs in exceptional circumstances by French governmental representatives in connection with the events promoting French culture and organized on their own initiative. This use may not consist of transmission by television channels or exhibition in commercial cinemas.

According to the Convention the restrictions relative to uses mentioned above must be communicated to the users, whom must agree not to use the recordings for other than the permitted uses and not to reproduce or re-assign them to a third party with or without payment.

The Convention includes special provisions with regard to retransmission of recordings of events, which means broadcasting an event either directly or by delayed television broadcast. Performers are remunerated for these retransmissions under the conditions specified in the Convention.²⁶

²³ Article 5.2.2.

²⁴ According to Article 5.3 of the Convention non-commercial uses are defined as “ *autre de laquelle l'organisme cédant ne perçoit que le remboursement des frais supposés par lui pour cette opération à l'exclusion des commissions d'intermédiaire* ”.

²⁵ “ *Utilisation des émissions à titre exceptionnel par des organismes d'intérêt général autres que maisons de la culture, musées et établissements d'enseignement, à l'occasion de manifestations ponctuelles ayant pour objet le développement des connaissances ou l'information dans un secteur culturel ou social déterminé, à condition que le sujet de l'émission soit en relation avec l'objet de la manifestation et que la couverture des frais afférents à l'organisation de cette manifestation soit assurée selon des modalités exclusives de toute participation du public sous quelque forme que ce soit: système de billetterie, abonnement, etc.* ”

²⁶ Article 6.1.1.: “ *Définitions – Dispositions générales:* ”

“ *On entend par retransmission l'enregistrement, aux fins de diffusion en direct ou en différé par le moyen de la télévision, d'un spectacle organisé par un organisateur de spectacle pendant la durée de son exploitation ou dans les quinze jours qui suivent la fin de celle-ci, que ce spectacle aitsubit ou non des modifications en fonction des exigences de la télévision, qu'il ait lieu ou non en présence d'un public.* ”

[Footnote continued from previous page]

“La retransmission dite “retransmission événement” ne comporte pour les artistes -interprètes aucun travail spécifique pour la télévision, aucune modification du texte ni de la mise en scène pour les besoins de la télévision. Elles s’effectuent par l’enregistrement en continuité de deux représentations au maximum. Une répétition pour la technique peut avoir lieu au cours des représentations précédentes. Seuls les spectacles comportant au maximum sept représentations sont susceptibles de faire l’objet de retransmissions événement.”

“Pour les spectacles dramatiques, lyriques et chorégraphiques, le nombre de retransmissions événement est limité par un à douze pour chaque entreprise de communication audiovisuelle.”

“Encas de retransmission en télévision d’un spectacle organisé par un tiers, celui -ci demeure l’employeur des artistes -interprètes appartenant aux catégories régies par la présente convention collective et traite avec eux des conditions de cette retransmission.”

“Toutefois, les conventions conclues avec l’organisateur du spectacle comporteront pour lui les obligations suivantes:

- encas de retransmission événement: versement par journée d’enregistrement d’au moins deux fois le salaire minimum de journée “enregistrement” pour la catégorie d’artiste-interprète concernée.
- dans le cas de retransmission: versement d’une rémunération au moins égale au produit du salaire minimum de journée prévu par la présente convention collective pour la catégorie d’artistes -interprètes concernée, par le nombre de journées de travail supplémentaire convenues pour la retransmission, sans que la rémunération puisse être calculée pour moins de trois jours (cinq jours pour les dramatiques).

“Pour garantir que les salaires dus aux artistes -interprètes ayant participé à la retransmission leur soient payés en tout état de cause, la convention passée avec l’organisateur du spectacle prévoit deux échéances de règlement: la première, correspondant aux salaires dus aux artistes-interprètes du fait de l’enregistrement, immédiatement après l’enregistrement, le solde n’étant versé qu’après que l’organisateur du spectacle ait justifié du paiement des salaires dus aux artistes -interprètes.”

“La société signataire de la convention collective et partie prenante à la convention d’enregistrement se portera garante de l’application de ces dispositions.”

“Les dispositions qui précèdent ne sont pas applicables aux retransmissions des spectacles de variétés ainsi qu’aux retransmissions des spectacles dramatiques, lyriques ou chorégraphiques effectués avec le concours de troupes de théâtre nationaux ou de sensibles étrangers officiels entourées en France ou de troupes de théâtre de la région ou de théâtre lyriques municipaux de France. Encas de nouvelle utilisation de l’enregistrement, les artistes -interprètes percevront les suppléments de rémunération prévus par l’accord annexé à la présente convention collective. Ces suppléments seront déterminés sur la base des rémunérations perçues par les artistes-interprètes pour la retransmission en fonction des éléments communiqués par l’organisateur du spectacle et annexés à la convention de retransmission, les entreprises de communication audiovisuelle veillant à la bonne application de ces dispositions notamment en faisant remettre copie des contrats signés par les artistes -interprètes avant le premier jour de travail”.

“6.1.2. -Enregistrement hors du lieu habituel des représentations.

Lorsqu’une retransmission est assurée hors du lieu habituel des représentations hors de la période d’exploitation –y compris les quinze jours suivant la fin de celle -ci –les artistes-interprètes seront engagés et payés directement par les employeurs selon les dispositions de la présente convention collective.

“6.1.3. -Retransmissions partielles.

“Sous réserve des dispositions de l’article 6.2, les retransmissions partielles sont régies par les mêmes dispositions que les retransmissions totales. Toutefois, les retransmissions partielles ne sont pas prises en compte dans le nombre maximum de douze “retransmissions événement” visé à l’article 6.1.1”.

The Convention also includes specific provisions with regard to remuneration to be paid to performers for reporting about their performances either in direct or later at the place of the event.²⁷ Terms for remunerating performers for artistic performances not covered by the previous section and for which the performer has displaced herself to another place than that of the original performance, are set out in Article 6.3.3 of the Convention.

According to the Convention satellite transmission of programs is subject to special agreements, forming addenda to the present Convention, between the concerned audiovisual communication organizations and the contracting unions.

For *all other secondary uses* performing artists are entitled to supplementary remuneration as agreed in an annex to the Convention (Art. 5.4.). An agreement (Accord "Salaires") was concluded on 20th July 2002 between the employers' and employees' (performers') organizations fixing remuneration for secondary uses, national and regional broadcasting of television programs and for cable and satellite transmission of television programs.

The remuneration is a complementary salary for performers and is calculated as a percentage of the net income of the producer. For all the performers this percentage is ten percent of the producer's net income up to 10,000 Euros and eight percent of the producer's net income in excess of 10,000 Euros. Producer's net income is defined as gross revenues reduced by a lump-sum of 20% of the total covering the costs of assignment of rights.

Even though pay-per-view and video on-demand are not specifically mentioned in the Convention they may be regarded as included under other secondary uses, as a commercial assignment of rights to the producer, and performers are thus remunerated for these uses as a percentage of the producer's profit as indicated above.²⁸

According to this agreement performers' initial salary always covers the first analogue broadcasting on national territory and the simultaneous re-transmission of this broadcast by one of the means of transmission covered by the agreement.

In addition to this agreement, which replaces in part the addendum I of the Convention, the Convention includes seven other addenda fixing remuneration for different kinds of uses of performances by one or more of the employing audiovisual organizations. All this remuneration is supplementary to salaries. In addition there is a particular agreement with Channel M6 and another one for La Cinquième.

The provisions with regard to remunerating authors have been extended by the Minister of Labor to cover parties in the audiovisual sector not represented by the contracting parties.

²⁷ Article 6.2.2.

²⁸ Memorandum of SFA.

*Musicians**1. Convention collective nationale des artistes musiciens de la production cinématographique (Convention collective nationale 1964 -07-02)*

This collective convention from 1964 regulates the rights of musicians in respect of recording their aural performances or instrumental performances of musical works in connection with cinematographic works intended for worldwide distribution. It is concluded between the *Chambre syndicale des producteurs et exportateurs de films français* and the *Chambre syndicale des éditeurs de musique* *légère* on the one hand, and the *Syndicat national des artistes musiciens de France* et *d'outre-mer (S.N.A.M.)* and *Syndicat des artistes musiciens professionnels français de Paris* et *d'Ile-de-France*, on the other hand.

It regulates the general conditions of work and remuneration to be paid therefor. Remuneration is based on the type, length and time of day of the recording session. The remuneration schedules depend on the type of instruments played.

The agreement does not apply to any other type of use of the recorded performance than that defined in the agreement, which means that every other use of the recorded performance is subject to a separate agreement (Article 1).

This Convention has not been extended in its sphere of application to non--parties and it is unclear to what extent it is still being used.

2. Protocole d'accord concernant l'utilisation secondaire des enregistrements de la musique de films (Protocole d'accord 1960 -07-29)

There is a specific memorandum of understanding relating to the secondary use of film music. This memorandum of understanding is concluded between the same parties as the collective convention for musicians' rights in film production.

This agreement regulates the use of film music for the making of commercial phonograms. If the use of film music for a commercial phonogram exceeds 20 minutes, a separate remuneration is due to the musicians having participated in that recording. The remuneration is paid by the phonogram producer, and is defined as a lump -sum depending upon the number of musicians participating in the recording.

This agreement is administered by the collecting society *SPEDIDAM* on behalf of musicians.

This agreement has also not been extended to non--parties, and it is not clear to what extent it is still being applied in practice.

3. "Protocole d'accord du 16 mai 1977 modifié par l'avenant du 5 mars 1987 relatif aux conditions d'emploi et de rémunération des artistes musiciens employés dans des émissions de télévision".

The rights of musicians employed to perform in television programs are dealt with in a collective bargaining agreement concluded between, on the one hand, the *Syndicat national des*

artistes musiciens (SNAM) and *Syndicat des artistes musiciens de Paris et de la région parisienne* (SAMUP), and on the other hand, the former public sector broadcasting societies, “*Télévision française 1* (currently TF1)”, “*Antenne 2* (currently FRANCE2)”, “*France régions 3* (currently FRANCE3)” and *l’Institut national de l’audiovisuel* (INA). INA is not a broadcaster but is in charge of, among other things, management of the public sector TV broadcaster programs archives.

The agreement sets the terms of the basic remuneration (cachet initial), and all complementary remuneration is subsequently calculated in relation to this basic remuneration. The structure of remunerating musicians in the agreement is based upon the same principles as the corresponding collective bargaining agreement with actors (see above). Remuneration is paid separately for services relating to recording of sound and television services.

For recording of sound the basic recording sessions shall not exceed 20 minutes, after which a complement of five percent of the basic remuneration for each minute surpassing 20 minutes must be paid to musicians.²⁹

With regard to television services the basic remuneration covers the first broadcast on French territory and over -sea territories and simultaneous cable transmission for the same territory.³⁰ For the 50 years following the first broadcast, musicians are entitled to a complementary remuneration for further uses of their fixed performances according to the terms of the Agreement. For a complete retransmission of the program musicians are entitled to 25% of their initial payment.³¹ For licensing the program among Eurovision countries, the musicians are entitled to a supplementary remuneration as agreed between the European Broadcasting Union and the International Federation of Musicians and Actors.

For commercial uses of musicians’ fixed performances, musicians are entitled to 37,5% of the net income of the assignment. The remuneration is paid pro rata in relation to the initial remuneration for each musician.³²

According to the agreement musicians are entitled to a *supplementary remuneration* to be negotiated between musicians’ unions and the commercial exploiters of their programs, for the following modes of exploitation:

- commercial cinema theatre exhibition or video transmission in a cinema;
- exploitation in the form of derived rights, such as producing a commercial phonogram; and
- commercial video exploitation for entertainment programs (émissions de variétés).

²⁹ Article 4 of the Agreement.

³⁰ See more in detail Article 17 of the Agreement.

³¹ For further details see Article 18.

³² For further details see Articles 20 (exchange of programs) and 21 (other commercial uses).

Non-commercial uses of programs are covered by the initial remuneration

Non-commercial uses are defined in the same manner as in the corresponding collective bargaining agreement for actors (see above).

Musicians are paid a certain percentage for the pre-sales of programs to commercial television channels (Canal Plus, Cultural programs (La Sept), cable networks, local stations and to TV5). The percentage is based upon the number of spectators or satellite connections, and the number of emissions determined separately for each television channel.³³

Unlike the corresponding collective bargaining agreement for actors, the collective bargaining agreement for musicians is not extended, which means that, according to French labor law, it is binding with respect to the parties of the agreement only. The agreement is still in force today. It is applied by FRANCE2 and probably by FRANCE3. According to *Laurent Tardif*, in charge of legal affairs at SNAM, TF1 does not seem to apply it as such, but pays higher levels of remuneration to musicians than those stipulated in the agreement.³⁴

By way of conclusion it is important to highlight that *musicians are paid for the use of their performances in television programs separately for each use, all additional payments being supplementary to their salaries and thus including the corresponding social security benefits*. Even if this agreement is not extended to non-parties, it seems to be in use by the majority of television channels and thus it acts as an example for remuneration practices for television channels not bound by the agreement.

Summary of the collective bargaining agreements

To sum up the remuneration practices of performers under the collective bargaining agreements in the audiovisual sector, the following features may be distinguished:

First of all it should be emphasized that under French law, both under labor and author's rights legislation, a elaborate structure of protection of performers' rights in audiovisual production has been established. The law ensures that *each performing artist concludes a written contract with the producer, in which remuneration for each mode of exploitation is stipulated*. This can also be done by reference to applicable collective bargaining agreements. *Both free-lancers and permanent personnel are equally covered by collective bargaining agreements*, which are made obligatory and have extended effect in both film production and television, meaning that they also apply to performers who are not parties to the agreements. Only the musicians' collective agreements do not have such extended effect.

³³ See more in detail Articles 24-1 and 24-2.

³⁴ A response by Laurent Tardif to the questions regarding musicians' collective bargaining situation in the audiovisual sector in France, 13.3.2003.

1. *Film production*

The rights of performers in film productions are covered by the special agreement concluded between the associations representing performers and producers. According to this agreement performers are remunerated with an initial salary for which the minimum is fixed in the agreement. As a complement to this salary the producer pays two per cent of the producer's net income from exploitation of the film. These monies are paid to a collecting society, ADAMI, which represents performers and producers for the purposes of administering the agreement. This remuneration is regarded as a supplement to salary and thus gives rise to social security benefits for performers.

The agreement has extended application and covers thus the whole sector, regardless of whether the individual performers or producers are represented by the contracting parties.

For musicians there exists a collective convention relative to their participation in film production, and a special memorandum of understanding with respect to use of film music for commercial phonograms. These agreements do not have extended application. Both of these agreements are from the 1960's and it is unclear to what extent they are still applied today.

2. *Television production*

The collective bargaining convention for television (*Convention collective nationale 1992-12-30 des artistes -interprètes engagés pour des émissions de télévision*) fixes the minimum (daily) remuneration to be paid to performers for participating in a television production. Depending on the production and the television channel, the tariffs and manner of calculating them differ, but in principle it can be said that the initial salary covers a certain use (normally first diffusion on French territory) after which performers are entitled to a percentage of the producer's income from any other further use of a television program. This remuneration is regarded as complementary to the salary and gives thus rise to social security benefits for performers.

This Convention has also been extended to cover rights of those right holders not being represented by the contracting parties.

The remuneration structure set up in the corresponding collective bargaining agreement for musicians (*Protocole d'accord du 16 mai 1977 modifié par l'avenant du 5 mars 1987 relatif aux conditions d'emploi et de rémunération des artistes musiciens employés dans des émissions de télévision*) is for the most parts similar to that of actors. The major difference is that this agreement does not have extended effect but is only binding with regard to the contracting parties.

3. *Collective agreements in the advertising sector*

In the advertising sector there is no collective bargaining agreement in force. For the model agreement for performers working in audiovisual productions in the advertising sector, see Section B, above.

4. *Agreements concluded between producers and third parties*

Performing artists are not usually aware of the contracts concluded between producers and third parties. It is the producer of the audiovisual work who is responsible for fulfilling the contract towards performers. The initial producer remains liable even in cases where he has transferred his rights totally or in part to a third party. Because this principle has not always worked in a satisfactory manner, performers would wish that their rights be transferred to a collecting society for administration on behalf of the producer.³⁵

2. Collective Administration of Rights by Collecting Societies

Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI)

The central collecting society administering performers' rights in the audiovisual field is ADAMI. In general terms it can be said that ADAMI represents actors who are entitled to a credit in audiovisual productions. This includes both actors and musicians having central roles in audiovisual productions. The other collecting society representing performers in the audiovisual field, *Société de perception et de distribution des droits des artistes -interprètes de la musique et de la danse* (SPEDIDAM), represents backstage performers and other performers not entitled to credits in the productions. In this connection we should also remember that the French author's rights law also makes a distinction between key actors and supporting actors. This distinction is, however, not the same as the one between the two collecting societies.³⁶

Rights administered by ADAMI

In total, ADAMI administers over 200 000 individual accounts of rightholders. Its main administration areas are:

Contractual administration of rights

(1) *Remuneration from those secondary rights which are specifically assigned to ADAMI to administer.*

ADAMI has been given mandates from private producers for administering rights in television programs.

In the field of cinema ADAMI collects and distributes remuneration for all uses of films in application of the collective bargaining agreement relative to cinematographic production (l'accord conventionnel cinéma). This Convention has been extended to cover all rightholders in film production, including those not represented by the contracting parties.

In this connection it is important to note that under the collective bargaining agreement residuals are paid as salaries, which means that they include all social security benefits. Thus residuals paid out as part of salary are more advantageous to performers than copyright

³⁵ Letter from Ms. Catherine Almeras, Director of SFA.

³⁶ E-mail of Laurent Tardif, in charge of legal affairs at SNAM.

royalties. This also means that the international framework of copyright protection does not apply to any of these residuals; they are only subject to French labor law and social security statutes.

(2) *Reciprocal agreements concluded with foreign sister societies.*

(3) *Obligatory collective administration of rights under French author's rights law*

ADAMI administers the part of the remuneration from private copying payable to those performers that it represents in the audiovisual sector.

Payments for foreign right holders

With regard to rights and remunerations administered by ADAMI under collective labor agreements, all payments of remuneration are subject to the terms of the collective agreement. In other words, the scope of application of the agreement is determined in the agreement and any person, regardless of nationality, working under a French collective agreement receives payments pursuant to such agreement.

With regard to remuneration for private copying, audiovisual performers receive remuneration for their performances fixed onto an audiovisual fixation in the European Union.

Rights not administered by ADAMI

ADAMI does not administer those secondary user rights which have been contractually assigned to the producer. For these rights the producer pays the remuneration directly to the performer as agreed in an individual contract and applicable collective bargaining agreement. Such rights relate to the commercialization of the audiovisual work, publishing of video and DVD recordings, rebroadcasting and other similar rights.

Administration fee

ADAMI deducts 20% as an administration fee for the monies it distributes.

Social funds

With the exception of monies going for artistic and social purposes as provided in the French authors' rights law (25%), ADAMI does not make any deduction of remunerations for social funds.

Société de perception et de distribution des droits des artistes - interprètes de la musique et de la danse (SPEDIDAM)

SPEDIDAM is the other French collecting society representing performing artists. As indicated above, SPEDIDAM represents artists which are not entitled for a credit listing in the credits of an audiovisual production.

SPEDIDAM collects and distributes remunerations on behalf of its affiliates. For audiovisual performers this is for the most part for private copying and for use of film music for commercial phonograms.³⁷

D. CONCLUDING REMARKS WITH REGARD TO FRENCH REGULATION AND CONTRACTUAL PRACTICE RELATIVE TO AUDIOVISUAL PERFORMERS' RIGHTS

The French regulation of rights of performers in audiovisual productions is an elaborate and well-designed statutory system based on both author's rights and labor law regulations. The specific circumstances in respect of performers' role and work in audiovisual productions has been taken into account in this statutory protection. Under French law performers are treated as employees and their remuneration for their participation in audiovisual productions, and the remuneration coming from the exploitation of their performances in connection with audiovisual works, is regarded as salaries and supplements to the initial salary giving rise to all social security benefits connected to the employment relation.

The French author's rights law grants performers the full scope of exclusive rights. Performers have a right to authorize the fixation of their performance, the reproduction of the fixed performance, the communication to the public of the fixed performance, and the separate use of the sounds or images of their performances where both the sounds and images have been fixed.

Moreover, the law requires the performer's written authorization for the fixation of the performance. This is done by an individual employment contract. Provided that a written contract exists between the producer and the performer, the law provides for the assignment of performer's rights to the producer. According to the law *the signature of a contract between the performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer.*

The law further provides that this contract *shall establish separate remuneration for each mode of exploitation of the work.* This remuneration may also be determined by a collective agreement. If neither the individual contract nor a collective agreement mentions the remuneration for one or more modes of exploitation, *the law makes reference to the common tariffs established in each sector under specific agreements between the employees' and employers' organizations representing the profession.*

The provisions of the collective agreements relating to remunerating performers may be made compulsory within each sector of activity for all the parties concerned by order of the responsible Minister. In practice this has also been the case with the exception of musicians' collective bargaining agreements.

If the parties are not able to reach an agreement with regard to assigning performers' rights to the producer and with regard to remuneration for each mode of exploitation as required by the law, the law provides for a judicial process to determine the remuneration.

³⁷ No further information was available regarding activities of SPEDIDAM.

As a result of the combined statutory regulation and contractual practice with regard to the rights of performers in the audiovisual sector, there exists a comprehensive collective bargaining practice dating from the 1960s and updated to a certain extent after the entering into force of the current authors' rights law in 1985. The fact that most agreements have extended application has harmonized the terms and minimum remuneration standards in the whole sector. The fact that the remuneration is determined at the collective level by labor agreements has also ensured that performers receive their remuneration for the most part as a salary or a complement to their salary, which means that this remuneration gives rise to the full range of social security benefits for the performers.

The combined effect of the law and contractual practice has also been to rule out buy-out agreements which could prove detrimental to the rights of audiovisual performers.

Two collecting societies administer the rights of performers: ADAMI and SPEDIDAM. An interesting feature of these collecting societies is that in addition to administering performers' remuneration for private copying, they also administer certain collective agreements. In particular ADAMI administers the collective bargaining agreement for film production and the cable retransmission agreement.

In general French performers are quite satisfied with the current statutory framework protecting their rights. The major weaknesses seem to be related to their lack of bargaining power which has meant that it has been difficult to increase the level of remuneration provided in the agreements. Another problem is the lack of control of performers' organizations with regard to foreign productions in which their members are engaged.³⁸

II. GERMANY

INTRODUCTION

Regulation of rights relating to the contractual position of authors and performers in Germany underwent a major change in 2002 when the new law strengthening their contractual position entered into force. The purpose of the new law was to strengthen the bargaining position of authors and performers when negotiating with producers and other exploiters of their works and performances. Moreover, the law also attempts to ensure that authors and performers receive an equitable remuneration for all modes of exploitation of their works and performances. This law will most probably have a profound impact on collective bargaining practices with regard to the rights of audiovisual performers. This is why it is important to comprehend the motives and content of the new law when describing current contractual practices of audiovisual performers in Germany. However, changing of existing contractual practices in the audiovisual industry takes time and thus the real impact of the new law will only be known after a few years have elapsed.

In the following we shall first see how audiovisual performers' rights are regulated in the German Copyright law and thereafter give a description of the new copyright contracts law as it applies to audiovisual performers. Finally we shall give an overview of the collective bargaining situation and administration of performers' rights as they exist today.

³⁸

Memorandum of SFA of February 2003 and Memorandum of ADAMI of February 11, 2003.

A. PERFORMERS RIGHTS UNDER COPYRIGHT LAW

The rights of performers in respect of audiovisual works are regulated in Section 75 of the German copyright law. According to the law *the recording of a performance on a video or audio medium shall require the consent of the performer*.³⁹ Moreover, performers have been granted an exclusive right to authorize the reproduction and distribution of the video or audio medium.⁴⁰ In other words, with regard to audiovisual works, performers have an exclusive right:

- (1) to authorize the fixation of their performance on an audiovisual recording;
- (2) to authorize further reproduction of copies of the fixed performance in the audiovisual recording; and
- (3) to authorize the distribution to the public of the audiovisual recording on which their performance has been fixed.

The distribution right includes an *exhaustible* right to authorize the rental and lending to the public⁴¹ of their fixations in connection with audiovisual works. They also have an *unwaivable right to remuneration for rental and lending*.⁴²

According to the law performers' consent is required for *broadcasting* of a performance.⁴³ However, with regard to broadcasting of published video recordings the German law provides for a legal license of performers' rights. According to the law a performance, which has been lawfully fixed on a video (or audio) recording, may *be broadcast* without the consent of the performer. The performer is nevertheless *entitled to equitable remuneration for the broadcasting*.⁴⁴

With respect *to communication to the public of video or audio recordings (e.g., by airlines) or for making the performance perceivable by means of a broadcast (e.g., at television set in a hotel room), the performers are entitled to remuneration*.⁴⁵

To sum up the current German law with regard to performers' rights, they have an exclusive right to authorize the recording of their performances on a video recording, and an exclusive right to authorize the reproduction and distribution of the video recording on which their performances have been fixed.

It should be noted that at the time of the writing of this Study, *the EU Directive on Copyright and Information Society* had not been implemented in Germany.

In order to secure producers' negotiating position vis-à-vis distributors, the law provides for a presumption of assignment of performers' reproduction, distribution and broadcasting

³⁹ Section 75(1), Law of 22 March, 2002. Bundesgesetzblatt 2002, Teil I Nr. 21 of March 28, 2002.

⁴⁰ Section 75(2).

⁴¹ Article 75(2).

⁴² Article 75(3) and Article 27.

⁴³ Article 76(1).

⁴⁴ Article 76(2).

⁴⁵ Article 77.

rights to the producer. ⁴⁶The presumption enters into effect only after a performer has concluded a contract with the producer for her participation in the film production, and when there is doubt with respect to the interpretation of that contract as it applies to the exploitation of the cinematographic work.

According to Section 92(1) of German Copyright Act:

“[i]f a performer concludes a contract with the film producer for his participation in the production of a cinematographic work, in cases of doubt concerning exploitation of the cinematographic work, such contracts shall constitute assignment of the rights pursuant to Section 75(1) and (2) and Section 76(1).”

Thus, the presumption rule enters into effect after the performer has concluded a contract with the film producer for participation in the production. If there is no contract, the presumption rule does not apply. It is unclear whether this contract has to be in writing or if an oral agreement or action to that effect suffices in terms of the law. For example, the collective bargaining agreement for film authors, performers and other employees in the audiovisual sector does require a written contract as a prerequisite for an employment relation.

Even if performers' rights have beforehand been assigned to another party, such as a collecting society, a performer still has the right to assign these rights to the producer. ⁴⁷In this way, the law has taken care of the double assignment situation, which may otherwise occur in the audiovisual sector, if performers' rights are collectively managed.

In this connection it should also be emphasized that *performers' unwaivable right to equitable remuneration as provided by the law does not fall within the scope of the presumption rule*.

The law also provides for a special rule with regard to performers working in employment relations. According to Section 79 of the law:

“[i]f a performer has given a performance in execution of his duties under a contract of employment or of service, the extent and conditions under which his employer may use it or authorize others to use it shall be determined, if not otherwise agreed, by reference to the nature of the contract of employment or service.”

This provision of the law provides for a *non-interpretation rule* with regard to employed performers or those working under a service contract. This rule merely states that if there is no other agreement between the employed performer and employer, be it at individual or collective level, the employer is entitled to use the performance in accordance with the purpose of the employment or service contract. The new provisions of the German copyright law with regard to performers' right to equitable remuneration for the exploitation of their performances (see more in detail below) also apply to employment relations. ces

⁴⁶ Article 92(1).

⁴⁷ According to Section 92(2) of the German Copyright Act [i]f the performer has assigned in advance a right mentioned in paragraph (1) to a third party, he shall nevertheless retain the entitlement to assign this right in respect of exploitation of the cinematographic work to the film producer.

The exercise of performers' *moral rights* is also *restricted* with respect to cinematographic productions. According to the law performers (and authors) may prohibit only gross distortion or other gross mutilations of their contributions, with respect to the production and exploitation of the cinematographic work. Moreover, each author and right holders shall take the others and the film producer into due account when exercising their right.

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Remuneration for private copying

In addition to performers' right to authorize certain uses of their performances, and the entitlement to an equitable remuneration for certain uses of their performances, performers are also entitled to receive a share of the remuneration collected from sale of recording appliances and recording media as remuneration for private copying.⁴⁹ This right may only be exercised on behalf of performers and other right holders by a collecting society. The remuneration is collected by a collecting agency ZPÜ (*die Zentralstelle für private Überspielungsrechte*), which is housed by the collecting society GEMA administering authors' performing rights (small rights) in the field of music. Performers are represented in that agency through their own collecting society GVL (*Gesellschaft zur Verwertung von Leistungsschutzrechten mbH*) .

⁴⁸ Section 93.

⁴⁹ Section 54 of the German Copyright Law.

The new copyright contract law

A new law amending the German copyright law – *the German Law on Strengthening the Contractual Position of Authors and Performers*, March 22, 2002) entered into force on July 1, 2002. True to its name, the main goal of the law is to strengthen the contractual position of authors and performers in Germany. In the following we shall give an overview and analysis of the new law to the extent it affects the rights of performers in audiovisual works.

The purpose of the new copyright contract law was to strengthen the bargaining position of authors and performers in cultural and media industries. The legal status of freelance authors and performers had been particularly weak since hardly any collective agreements existed for freelance authors and performers in cultural and media industries.⁵⁰

Prior to the summer of 2002 the collective bargaining position of freelance authors and performers was somewhat uncertain. Section 12a of the Collective Labor Agreements Law (Tarifvertragsgesetz) had expressly allowed certain groups of freelancers “who are economically dependent and socially in need of protection similar to employees” to conclude, under certain conditions, collective labor agreements with employers or organizations in media and cultural industries. Such agreements were, however, scarce, and they were non-existent in the private sector. Thus, the new copyright contract law finally makes clear that negotiations and agreements on common remuneration standards for whole branches and sub-branches of the culture and media industries are legally permitted and even encouraged.⁵¹

In the following we shall briefly describe how the new law attempts to strengthen the bargaining position of authors and performers and how this affects performers’ contractual position in the audiovisual sector.

First of all, the Section of the law defining the scope of copyright was amended to specify that in addition to protecting the author with respect to personal and intellectual relationship with her work and with respect to utilization of her work, *copyright also serves to secure an equitable remuneration for utilization of the author’s work*.⁵²

The basic principle of final alienability of copyright under German Law has been preserved in the new law. According to Section 29, copyright as such is not transferable but granting of exploitation rights (Section 31), purely contractual authorizations and agreements on exploitation rights as well as contracts on moral rights of authors as regulated in Section 39 are permitted.⁵³

The core sections of the new law are those guaranteeing authors and performers *a right to equitable remuneration for all modes of exploitation of their works and performance* (Sections 32, 32a and 32b) and those which *provide for establishment of common remuneration rules through mediation in the event that the parties fail to achieve common remuneration standards through collective bargaining agreements* (Sections 36 and 36a). These sections also apply to the rights of performers in audiovisual works.

⁵⁰ See *Dietz, Adolf*, Amendment of German Copyright Law, IIC Vol. 33, 7/2002 at 829ff.

⁵¹ See *ibid.* at 830f.

⁵² Section 11.

⁵³ Translation as published in IIC Vol. 33, 7/2002, made by *A. Dietz and William Cornish*.

According to Section 32(1):

“[f]or the grant of exploitation rights and permission to use a work, the author is entitled to a remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration.”

In other words, *performers are entitled to an equitable remuneration for the granting of exploitation rights relative to their performances*. This remuneration is, in the first instance, determined *contractually*. If, however, the remuneration cannot be agreed, *the performer is entitled to an equitable remuneration*. The performer may ask her contracting party, in audio-visual production the producer, *to negotiate the contract in order to receive an equitable remuneration*. This is *not*, however, *possible, if the remuneration for use of her work is settled through a collective (labor) agreement*.⁵⁴

So, if there is a collective agreement in force with regard to the use of the performance by means referred to in the contract, whether it is a collective labor agreement or others similar collective agreement concluded between representative parties, this agreement is to be used as a reference in order to determine whether certain remuneration is equitable. This is the case also when remuneration in a collective labor agreement is determined on the basis of a scale, and the contractually agreed remuneration falls within that scale.⁵⁵ *Thus performers may not ask for negotiating the contract for determining an equitable remuneration if there is a valid collective agreement for this exploitation sector, and the agreed remuneration is in line with the collectively agreed remuneration*. Remuneration determined in such a collective agreement is always regarded as equitable.

If there is no collectively agreed remuneration in force, *the remuneration is equitable if it is determined by a common remuneration standard in conformity with Section 36 of the law*.⁵⁶ According to the law *associations of authors (and performers) may establish common remuneration standards with associations of users of works or individual users of works, as a means of establishing the “equity” of remunerations. The common remuneration standards should take account of the circumstance in the current field to be regulated, in particular the structure and size of the user organization. Collective (labor) agreements shall prevail over common remuneration standards*.⁵⁷

Associations eligible for negotiating common remuneration standards must, according to the law, be representative, independent and authorized to establish common remuneration standards.⁵⁸

The law also provides for a mediation procedure for the determination of common remuneration standards in case parties fail otherwise to reach an agreement with regard to the

⁵⁴ Section 32(4).

⁵⁵ See *Beschlussempfehlung und Bericht des Rechtsausschusses*, 23.1.2002, *Deutscher Bundestag, Drucksache 14/8058* at pp. 18.

⁵⁶ Section 32(2).

⁵⁷ Section 36(1).

⁵⁸ Section 36(2).

remuneration standard. Parties may settle their differences through mediation by common agreement or upon the written request of one of the parties in following instances:

- (1) the other party has not commenced negotiations over common remuneration standards within three months after this first party has requested the negotiations in writing.
- (2) the negotiations over common remuneration standards remain without result one year after their commencement has been requested in writing; or
- (3) a party declares that the negotiations have wholly failed.

The mediation panel must make a reasoned settlement proposal for an agreement containing the general remuneration standards to the parties. The proposal will be taken to be accepted if, within three months of its receipt, it is not rejected in writing.⁵⁹ Further stipulations with regard to the use, composition and voting procedures of the mediation panel are provided in Section 36(a) of the law.

Otherwise, remuneration is deemed *equitable if it conforms at the time of contracting to what is regarded as customary and fair in business having regard to the type and scope of the permitted uses, and in particular their length and timing, as well as to other circumstances*⁶⁰

So, in case there is no collective agreement through which the particular remuneration has been determined and no collectively agreed remuneration standard in force, the reasonability of the remuneration is to be determined with regard to what would have been paid, at the time of the conclusion of the contract, in good faith in the course of business taking into consideration the type and scope of the license granted, the duration of the use and all other relevant circumstances at that time.

It is to be noted that it is not sufficient that certain types of remunerations have customarily been paid in a certain sector, but the paid remunerations should also be fair. In this connection the legislator has clearly sent a message that what is customary may not always be fair.⁶¹ However, for an author or a performer it is in many cases difficult to show that what is a customary way of remunerating a certain sector, is not fair. Thus, in practice, having collective labor agreements or common remuneration standards is of primary importance for authors and performers.

The law does, however, provide for a possibility to revisit the remuneration also with regard to changed circumstances after the conclusion of the contract. According to Section 32(a), paragraph 1:

“[i]f an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be conspicuously disproportionate to the returns and advantages from the use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances. It is not relevant

⁵⁹ Sections 36(3) and (4).

⁶⁰ Section 32(2).

⁶¹ See *Dietz* at p. 837ff.

whether the contracting parties foresaw or could have foreseen the level of such returns or advantages.”

However, once again the overriding status of collective labor agreements or common remuneration standards is emphasized in the law *by precluding any claims under Section 32(a) paragraph 1 if such agreements or common remuneration standards exist and further participation is expressly provided therein in cases covered by the law*.⁶²

The provision of the law is based on the former so-called “best-seller” paragraph in Section 36 of the old law. The new provision lowers the threshold for using this paragraph in two respects. First of all, under new law it is enough to show “a conspicuous” disproportion (*auffälligen Missverhältnis*) between the existing remuneration and one which would be fair. The prior law required a showing of “gross” (*groben Missverhältnis*) disproportion. According to *Nordemann*, who was one of the drafters of the original draft of the Law (the “Professoren Entwurf”), the conspicuous disproportion would be approximately 2/3 of what has been previously determined as a gross discrepancy by the courts. The second difference between the new and old law is that it is no longer necessary that the difference was “unforeseen.”⁶³

In determining whether there is a conspicuous disproportion between the agreed remuneration and the revenues derived from the successful exploitation of the work, also revenues coming from sources not directly connected with the exploitation of the work, such as advertising, must be taken into account. The additional remuneration would typically be a percentage of the revenues derived from successful exploitation of the work. The preparatory documents of the new law do, however, indicate that, depending on the type of exploitation, a lump-sum remuneration may also be possible.⁶⁴

With regard to audiovisual performers’ rights it is important to note that, according to the preparatory documents of the new law, *only the main performers in the work may have a claim under this provision of the law*. According to those documents a distinction should be made in this respect between principal performers, supporting actors and statisticians. Interestingly enough, it is made clear that this is not to be interpreted along the same lines as the distinction made in the French author’s rights law where protection is granted only for main performers and so-called ancillary performers are excluded from the protection.⁶⁵

The “best-seller” provision of the law contains a new rule by virtue of which *a further remuneration may be claimed against a third party in case the party to the contract has assigned exploitation rights to a third party, and the conspicuous disproportion of consideration and performance results from returns and advantages gained by the third party*.

⁶² Section 32(a)(4).

⁶³ *Nordemann, Wilhelm*, A Revolution of Copyright in Germany, *Journal of the Copyright Society of the USA*, VOL. 49, No. 4 at p. 1045.

⁶⁴ See *Beschlussempfehlung und Bericht des Rechtsausschusses*, 23.1.2002, *Deutscher Bundestag, Drucksache 14/8058* at pp. 19-20.

⁶⁵ *Formulierungshilfe (Antrag) zu dem Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, 14 January 2002, p. 19, and *Beschlussempfehlung und Bericht des Rechtsausschusses* at p. 19.

In this case the third party is directly liable to the author, and the liability of the other contracting party ceases.⁶⁶

*The claims for additional participation in revenue from exploitation of the work may not be waived in advance and any disposition with regard to the entitlement to which they may give rise is ineffective.*⁶⁷

Like other provisions relating to authors' and performers' right for equitable remuneration also this provision is made mandatory. Thus the usually weaker bargaining position of authors and performers may not be taken advantage of by forcing them to assign or waive these rights or waive the use of them beforehand contractually.

Moreover, the law also provides a choice-of-law clause according to which Sections 32 and 32a have mandatory application in the following cases:

- (1) if, but for a choice of law, the use agreement would be governed by German law; or
- (2) insofar as the contract concerns substantial use in the territory governed by German law.⁶⁸

According to Nordemann one of the real effects of Section 32 of the law will be with regard to contracts with international relevance, such as U.S. film series produced in Germany. *The provisions of the new law relative to authors' right to equitable remuneration and profit sharing may not be circumvented by a choice of foreign law in the contract for any production taking place in Germany.*⁶⁹ Also with regard to significant exploitation acts of the work taking place on the German territory, the provisions of Sections 32 and 32a are imperatively applicable.

Interestingly enough, from the point of view of this study, it should be noted that the provision in Section 32b with regard to mandatory application of German law does not apply to the rights of performers.⁷⁰

Specific provisions regarding audiovisual performer's rights

With regard to rights of performers in audiovisual production the basic principle underlying the new law is that provisions regarding authors' rights also apply to performers rights, in particular Sections 31(5),⁷¹ 32, 32a, 36, 36a and 39. As stated above, the choice of

⁶⁶ According to Section 32a(2), where the other party has transferred the exploitation right or granted further exploitation rights and the conspicuous disproportion results from returns or advantages to a third party, the latter is directly liable to the author under sub-section (1), having regard to the contractual relations in the license chain. The liability of the other contracting party then ceases.

⁶⁷ Section 32a(2).

⁶⁸ Section 32b.

⁶⁹ Nordemann at 1044.

⁷⁰ Section 75.4.

⁷¹ This is the so-called "Zweckübertragungsprinzip" – principle "according to which" [i]f the types of use to which the exploitation right extends have not been specifically designated when the right was

law provisions in Section 32b do not apply to performers' rights. Moreover, taking into consideration the fact that in many productions the number of performers may be considerable, the law provides that:

“[w]here several performers give a performance together, and their respective contributions cannot be separately exploited, they may decide before the performance to authorize one person to pursue their claims under Sections 32 and 32a.” (Section 75(5)).

Thus performers as a group may appoint one of them as their representative in negotiations regarding the remuneration and possible demands for adjustment of the level of remuneration under the “best-seller” paragraph. The only prerequisites for this are that their respective contributions may not be separately exploited and the person must be appointed before the performance has taken place.

Under the old law there already existed a special provision providing that in respect of choral, orchestral and stage performances the group may elect a representative to act on behalf of all of them for the purposes of giving consent to the use of their performances and for asserting their rights as provided in Sections 74 to 77 of the law.⁷² With regard to giving consent to the use of a performance this may be done either individually or through a representative. However, only the representative of the group may assert the rights as afforded in Sections 74 to 77 of the law, for example the remuneration rights.

Under Section 31(4) of the Copyright Act authors may not validly assign exploitation rights for unknown types of uses. This provision *does not, however, apply to performers who may assign future exploitation rights with regard to their fixed performances.* Nevertheless, the provisions relative to fixing an equitable remuneration and sharing in profits from use of the work do apply with regard to these exploitation methods, even if they are not specified in the contract.

B. COLLECTIVE MANAGEMENT OF PERFORMERS' RIGHTS

Current situation

Musicians

With regard to orchestral musicians there currently exist separate collective agreements with each public broadcasting company regarding the *Orchesterhaus* orchestras.

For individual orchestras (state and municipal orchestras and operas) there exists a general collective bargaining agreement⁷³ according to which all rights for television broadcasting belong to the employer. For broadcasting rights musicians are entitled to an equitable remuneration in addition to their initial salary. According to the German Finance

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granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant.”

⁷² Section 80 of the German Copyright Act.

⁷³ Tarifvertrag für die Musiker in Kulturorchestern, latest extension May 15, 2000.

Court this remuneration does not include social security payments but is to be regarded as a separate copyright remuneration for performers.⁷⁴

Other uses of musicians' performances are not covered by collective bargaining agreements and are subject to special agreements with performers. Some orchestras, such as the *Berliner Philharmoniker*, have concluded special agreements with regard to other uses of their performances.

Actors, Singers and Dancers

The general collective bargaining agreement in the area of film production is the *Tarifvertrag für Film- und Fernsehschaffende* of May 1996. This agreement has been concluded between three unions representing film producers (the *Bundesverband Deutscher Fernsehproduzenten e. V.*; the *Arbeitsgemeinschaft Neuer Deutscher Spielfilmproduzenten e. V.*; the *Verband Deutscher Spielfilmproduzenten e. V.*) on the one hand, and two unions representing authors, performers, film technicians and other employers in film production (the *IG Medien - Druck und Papier, Publizistik und Kunst*, the *DAG Deutschen Angestellten - Gewerkschaft - Berufsgruppe Kunst und Medien*) on the other hand. The agreement covers film production outside public broadcasting companies.

Until the beginning of 1995, the collective bargaining agreement included an extensive section relating to exclusive assignment to the producer of all exploitation rights in authors' and performers' contributions with no restriction in respect of content, time or territoriality of the assignment. The new agreement still contains the previous text of the assignment in italics, accompanied by the statement that it is no longer valid and that the parties obligate themselves to negotiate a new agreement in this respect.⁷⁵ However, no such agreement has so far been achieved. The old clause has still affect with respect to contracts concluded before 1995.⁷⁶

⁷⁴ Telephone interview with Mr. *Gerald Mertens*, General Director of the *Deutscher Orchestervereinigung*.

⁷⁵ According to the collective bargaining agreement the prior (no longer valid) text was the following:

“*Der Filmschaffenderäumt mit Abschluß des Vertrages alle ihm und durch das vertragliche Beschäftigungsverhältnis erwachsenden Nutzungs- und Verwertungsrechte an Urheber- und verwandten Schutzrechten dem Filmhersteller für die Herstellung und Verwertung des Films ausschließlich und ohne inhaltliche, zeitliche oder räumliche Beschränkungen ein. Die Einräumung umfaßt:*

(a) *den Film als Ganzes, seine einzelnen Teile (mit und ohne Ton), auch wenn sie nicht miteinander verbunden sind, die zum Film gehörigen Fotos sowie die für den Film benutzten und abgenommenen Zeichnungen, Entwürfe, Skizzen, Bauten und dgl.;*

(b) *die Nutzung und Verwertung des Films durch den Filmhersteller in unveränderter oder geänderter Gestalt, gleichviel mit welchen technischen Mitteln sie erfolgt, einschließlich Wieder- oder Neuverfilmungen, der Verwertung durch Rundfunk oder Fernsehen und der öffentlichen Wiedergabe von Funksendungen, sowie der Verwertung durch andere zur Zeit bekannte Verfahren, einschließlich AV-Verfahren und -Träger, gleichgültig, ob sie bereits in Benutzung sind oder in Zukunft genutzt werden.*

“*Der Filmhersteller erwirbt das Eigentum an den in Ziffer 3.1 genannten zum Film gehörenden Materialien, soweit es ihm nicht ohne hinzusteht.*

“*Protokollnotiz:*

“*Die Tarifvertragspartei erklärt ihre Bereitschaft, im Zuge der Aufnahme der Gespräche zwischen RFFU/IG Medien und den öffentlich-Rechtlichen Rundfunkanstalten*

The collective agreement does not cover freelancers, which means that currently there is no collective labor agreement (*Tarifvertrag*) in force for freelancers in film production in Germany.⁷⁷

There exist also collective labor agreements for public broadcasting companies with detailed copyright clauses. These agreements are applicable in principle only for employed personnel but may, in case, be extended to persons working in employment-like relationships (*arbeitnehmerähnliche Personen*). However, for example, in *Südwestrundfunk's Tarifvertrag*, the copyright clause applies only to employed personnel.⁷⁸ These agreements seem to apply only for film authors. It is somewhat unclear to what extent they are applied to performers.

For freelancers there exist standard contracts (*Musterverträge*) with remuneration clauses (*Honorarbedingungen*) which vary according to the media branch.⁷⁹ In the private television and advertising sector these contracts often implicate the assignment of all rights to the producer.⁸⁰

C. COLLECTIVE ADMINISTRATION OF RIGHTS BY COLLECTING SOCIETIES

In Germany, all secondary uses as granted by the law with regard to the rights of audiovisual performers are administered by *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*. In practice this means that GVL collects and distributes remuneration for secondary uses of fixed audiovisual performances in the areas where audiovisual performers are granted a right to an equitable remuneration in the law. Currently remuneration is collected in the following areas:

- (1) rental and lending of audiovisual works;
- (2) on-the-spot communication to the public of published videograms (such as hotels, fairs etc.);
- (3) cable retransmission;
- (4) where a broadcast is communicated to the public (e.g. at television set in a hotel).

GVL also administers reproduction rights on behalf of performers for broadcasting of video clips with regard to audiovisual works.

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hinsichtlich einer Zahlung von Wiederholungs- und Übernahmevergütungen sowie Erlösbeteiligung nach Maßgabe der Tarifverträge Bestimmungen über Urheber- und Leistungsschutzrechte in den Tarifverträgen für auf Produktionsdauer Beschäftigte des WDR oder anderer Rundfunkanstalten hierzu entspreche Tarifverhandlungen aufzunehmen."

⁷⁶ V. Olenhausen, Albrecht Götz, *Der Urheber- und Leistungsrechtsschutz der arbeitnehmerähnlichen Personen*, GRUR 2002, Heft 1, p. 16.

⁷⁷ V. Olenhausen, *op. cit.* p. 17.

⁷⁸ V. Olenhausen, *op. cit.* p. 16.

⁷⁹ See, e.g., Henning-Bodewig, Frauke, *Urhebervertragsrecht auf dem Gebiet der Filmherstellung und Verwertung, in Urhebervertragsrecht, Festgabe für Gerhard Schricker zum 60. Geburtstag*, München, 1995, p. 413ff.

⁸⁰ *Ibid.*

In the practice of GVL video clips are assimilated to phonograms and GVL administers broadcasting of video clips as an exclusive right.

The remuneration for rental and lending of videos and DVDs is collected directly from the rental or lending establishment. A permission for rental is also required from the film producer.

In the public sector the remuneration is collected from the municipality for lending videos and DVDs in public libraries.

Cable rights and rental and lending of audiovisual works are administered by GVL together with other collecting societies representing authors (GEMA, VGBILD - KUNST, VG WORT) and producers (VFF, GWF - F, VGF).

GVL administers rights only with regard to secondary use in Germany (broadcasting, rental, cable re-transmission, communication to the public). Remuneration for foreign films may be administered if the film has been broadcast for the first time on German speaking television during the distribution year.

For those affiliates which have assigned both their German and foreign rights to GVL and which obtain their main income from Germany, GVL administers their rights through reciprocal agreements in the following countries: Belgium, Denmark, Finland, France, Great Britain, Ireland, Iceland, Japan, Norway, Austria, Poland, Rumania, Sweden, Switzerland, Slovenia, Spain and the Czech Republic.

Private copying

GVL administers remuneration for private copying jointly with the other collecting societies in ZPÜ (die Zentralstelle für private Überspielungsrechte), located at GEMA.

Distribution of remunerations

Remuneration is distributed to performing artists and phonogram producers according to distribution principles fixed in the Statutes of the Association. Distribution rules are decided annually by the GVL Council.

The administration fee of GVL is approximately eight percent.

Up to five percent of the remunerations may be used for the support of culture or for social purposes.

Payments to foreign rightholders

GVL collects remunerations for its members and members of other sister organisations by virtue of reciprocal representation agreements. It does not collect remuneration for non-members. Any EU citizen or resident can become a member of GVL.

With regard to audiovisual performers not citizens or residents of a member country of the European Union, GVL can only act on their behalf under a reciprocal representation agreement. If a foreign audiovisual performer lacks similar rights in their own country, GVL is not able to collect remuneration for them and thus there is also no distribution of remuneration to such rightholders.⁸¹

D. CONCLUDING REMARKS WITH REGARD TO GERMAN REGULATION AND CONTRACTUAL PRACTICE RELATIVE TO AUDIOVISUAL PERFORMERS' RIGHTS

Under German copyright law performers in audiovisual works are granted an exclusive right to authorize the recording of their performances on a video recording and an exclusive right to authorize the reproduction and distribution of the video recording in which their performances have been fixed. They also have a right to an equitable remuneration for public communication of the video recording for example by airlines, and for making their performance perceivable by means of a broadcast, for example through a television set in a hotel room. Performers also have an unwaivable right to rental and lending of video recordings to the public. They also receive an equitable remuneration for broadcasting of the video recording.

All secondary user rights and rights for equitable remuneration including remuneration from private copying, are administered on behalf of performers by the collecting society GVL.

The German copyright law also contains a presumption rule with regard to transfer of performers' rights to the producer. According to the law, after a performer has concluded a contract with the film producer on her participation in the production, such contract shall constitute assignment of performer's rights to the producer in case of doubt. The presumption rule does not affect performers' right to equitable remuneration as provided by the law.

German copyright law also contains an interpretation rule with regard to the rights of employed performers. If a performer has given a performance in execution of her duties under a contract of employment or of service, the extent and conditions under which her employer may use it or authorize others to use it shall be determined, if not otherwise agreed, by reference to the nature of the contract of employment or service. However, it should be noted that the new provisions of the German copyright law with regard to performers' rights to equitable remuneration for the exploitation of their performances also apply to employment relationships.

In July 2002, a new law amending the German copyright law – *the German Law on Strengthening the Contractual Position of Authors and Performers* – entered into force. The purpose of this law was to strengthen the bargaining position of authors and performers in

⁸¹ Communication from Mr. Tilo Gerlach, Director of GVL, May 2003.

cultural and media industries . The collective bargaining practices in this sector had not been well developed, and were practically non-existent for freelance performers.

The core logic running through the new law is that *performers are entitled to equitable remuneration for all modes of exploitation of their performances*. This remuneration is, in the first instance, determined *contractually*. If the remuneration cannot be agreed, *the performer is entitled to an equitable remuneration*. The performer may ask her contracting party, in audiovisual production the producer, *to negotiate the contract in order to receive an equitable remuneration*. This is *not*, however, *possible, if the remuneration for use of her work is settled through a collective agreement*.

So, a collective bargaining agreement or common remuneration standards agreed between associations of performers and users supersede an individual contract . Collective labor agreements prevail over common remuneration standards.

If no collective labor agreement or common remuneration standard exist, a performer is entitled to equitable remuneration . The remuneration is deemed equitable if it conforms at the time of contracting to what is regarded as customary and fair in business, having regard to the type and scope of the permitted uses and taking into consideration all relevant circumstances.

The law also provides for establishment of common remuneration rules through a mediation procedure in the event that parties fail to achieve common remuneration standards through collective agreements.

The law also contains a so-called “best-seller” provision which makes it possible for the performer to revisit the remuneration if there is a conspicuous disproportion between the agreed remuneration and the revenues derived from successful exploitation of the work . If such a disproportion exists, the performer has a right to a further equitable participation in the revenues having regard to all circumstances. However, no such claim is possible if collective bargaining agreements or common remuneration standards exist and further participation is expressly provided therein in cases intended by the law . Thus the overriding status of collective bargaining or collectively agreed remuneration standards is once again emphasized in the law . With regard to audiovisual performers it should be noted that only the main performers may assert a claim under this provision of the law.

The provisions of the new law regarding performers’ right to equitable remuneration and the claim for additional participation in profits are mandatory, and may not be waived in advance.

To sum up, the new German copyright contract law will undoubtedly contribute to strengthening collective bargaining structures in the audiovisual sector in Germany and ensuring authors and performers an equitable remuneration for the exploitation of their protected contributions . It is still too early to predict what these new contractual practices will look like in reality.

III. CONCLUDING REMARKS WITH REGARD TO THE CONTRACTUAL PRACTICES AND RELATED REGULATION OF AUDIOVISUAL PERFORMERS IN FRANCE AND GERMANY

By way of conclusion we can state that the new German law on copyright contracts is modeled very much along the lines of the French authors' rights law of 1985. Both laws grant performers a right to authorize the fixation, reproduction and public communication of their fixed performances in connection with audiovisual works and contain a presumption of assignment of all exploitation rights to the producer under certain conditions.

With regard to remunerating performers the basic structure in the two laws is also similar. Both laws encourage determining the remuneration for performers in collective bargaining agreements, which set the minimum level of remuneration and are given priority over other agreements. Failing the establishment of common level of remunerations by collective bargaining, both laws provide for a mediation procedure through which common tariffs may be established.

The French regulation is firmly anchored in labor law, and the protection of performers' rights under authors' rights law refers back to general labor law. This has been advantageous for performers because the remuneration structure for the use of their performances has been constructed based on labor law. In collective bargaining agreements performers are being remunerated by a so-called residual system, according to which the remuneration is determined in function of their salary and is thus regarded as a salary. Social security benefits are included in salary-based payments which make this system more beneficial for performers than copyright royalties would be. It is also very important that the French collective bargaining agreements for performers, with the exception of musicians' agreements, have been extended to apply also with regard to persons who are not represented by the contracting parties. Thus a common set of minimum remuneration standards and a general remuneration structure has been set to cover the whole field.

The major setback of the French system relates to the fact that performers' unions are often in a weaker bargaining position in collective bargaining negotiations than their employer counterparts, which has meant that the remuneration levels they have been able to attain for use of their performances could have been higher. For example, calculating the remunerations as two percent of producer's net revenues from exploitation of the film is done under the special agreement relative to performing artists employed in film productions (*Accord spécifique concernant les artistes interprètes engagés pour la réalisation d'une oeuvre cinématographique*) may leave performers with nothing, because it is only in rare cases that even successful films show any profits according to the accounts.

The new German law has attempted to correct the unfair bargaining position of performers by giving them the right to revisit the contractual remuneration in the event that exploitation of the film proves to be more successful than initially anticipated. This is not, however, possible in cases where the remuneration has been determined at a collective level, either in a collective bargaining agreement or by common remuneration standards. So, it would not give any solace in cases such as that described above relating to remuneration of audiovisual performers in the French collective bargaining agreement for film production.

It is still far too early to predict whether the new German law will succeed in reinforcing the bargaining position of authors and performers and establishing common remuneration standards at a collective level for the use of protected works and performances. The French

law has already been in force for close to 20 years and the collective bargaining practices have had time to develop, but performers are still complaining that it is difficult to include new modes of exploitation in these agreements and to achieve fair remuneration for all forms of exploitation of their performances.

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