# Audiovisual Performances in the Digital Era

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## Introduction

Intellectual property is the outcome of a revolutionary notion that appeared in sixteenth century during the Renaissance in Europe: the "homo universalis", i.e. the person who excels in multiple areas, including arts and science. This revolutionary principle greatly induced aesthetic creation and invention, which have since driven mankind morally and financially. Intellectual Property Law was established in order to keep this Renaissance principle of the "homo universalis" alive. But now, modern technologies have reversed what used to be well standing ideas and practices.

Our era is dominated by digital technologies, which assist the dissemination of works and information in seconds through the gentle press of a button or a mouse. The result of the expansion of the usage of modern technologies at an unprecedented level is the conception of a universal right of on-line communication and on-line free movement of knowledge and innovation. In fact some advocate that a new right has been born in flesh and blood and thus people

have (or should have) the right to demand free access to information by minimizing the scope and importance of Copyright. A strong drive seems to demand the creation of a new "homo universalis" in this modern high tech era during which every user of works of knowledge, technology and art need not be just a passive viewer but may also become a potential creator and active peer.

Indeed, international and national legislators acknowledge this social request for a freer more relax access to technical and educational materials and to this effect they have proposed or are in process of proposing measures capable of facilitating the access to copyright material online with reasonable terms, having regard to the benefits derived by granting to the public access to knowledge and the need of providing adequate remuneration to the creators of copyright material and their investors.

Although contractual practices internationally in the field of copyright are far from being consistent, new legislative tools have been adopted, taking into consideration the introduction of new technologies, while older statutes (such as the Berne Convention, Rome Convention and TRIPS) still offer the necessary guidelines to those concerned for the correct implementation of the relevant legal notions. Future can learn from the past, therefore, older models may still inspire new measures, both legal and in the practice of Copyright, and may assist to find the golden mean between the

need on the one hand to protect creators and investors and on the other the right of the public to have access to information.

Departing from the idea that digital technology is here to stay and supporting the general idea that technology is by no means devastating, but, to the contrary, beneficiary to mankind, we will examine statutory and practical issues and will attempt to find the balance between technology and copyright in the new economy of intangible goods in relation to audiovisual performances.

**Performance in audiovisual (cinematographic) works**

A film or in general an audiovisual work, is a recording on any medium, from which a moving image can be produced. A film is born, created and performed at the same time of its making, of it's shooting, so, acting, that is, actors' performance, takes place at exactly the same time the work is generated, and so the creation of the work and the performance co-incide. Performers acting in a film, participate actively and continuously in it's creative process, together and in close cooperation with all its creators. It is because of this specific nature of film making, that the performer's acting has so many features in common with the authors' creativity, making it possible, under certain legislations, to support the view that the artist is involved in such a manner and to such an extent in

the creation of the audiovisual work, that he might be considered a co-author himself!

During the last decades of the 20th century film making obtained an irreversible status as an art form and is statutory recognized as a copyright work by the grand majority of legislations worldwide. Its realization, producing and marketing has established a well-standing and strong industry as well as a strong-rooted exploitation mechanism.

However, the last years, new technologies significantly changed the production and distribution methods concerning audiovisual works. Video and audio compression methods, server technology and digital networking have had an impact on audiovisual works productions, post-production and distribution. Such technological improvements have reduced costs, improved marketability and at the same time expanded the devices, applications, modes and forms of dissemination of films. Films are now receptive to multiple modes of exploitation, with new ones being added to traditional ones. A film is projected in cinemas, fixed in a dvd or blue ray disc and distributed by selling, renting or lending of such DVD discs, broadcasted through pay-tv, or through encrypted cable TV, satellite TV on a subscription basis, through IPTV (Internet protocol

TV), pay TV, free on air TV, exhibited on a pay-per view basis, through video on demand etc.

These technological changes have permitted new means of distribution of audiovisual copyright material to emerge and new entrants in the business to appear. So, not only traditional entrepreneurs are making money out of a film, like the producers, distributors, exhibitors and the broadcasters, but also new entrants as **internet service providers** and **telecommunications providers**.

In addition to that, changes in the film-release structures are introduced. At first movies were exploited only through their projection in cinema theatres. When the TV was invented, a new route opened, giving producers extra possibilities and at the same time generating new services, such as dubbing or subtitling. The market grew even more after the roll-out of videocassetes (VHS). The market expanded, but at the same time, markets were clearly distincted, since local versions were needed due to linguistic differences and at the same time it was easier from an economical and organizational point of view for distributors to work on a territory per territory basis. This long-lasting chain of exploitation with the several release windows involves fragmentation of time

and of the multiple ways of exhibition and distribution in order to maximize profits.

The traditional distribution channels, like theatrical exhibition, selling and rental of DVDs and of course broadcasting, remain still the key ones. But now, the multitude of new distribution methods that have become possible through digital and electronic media technology, as VOD, pay-per-view and mobile TV may request international licensing. It is true though that VOD and such on-demand uses have a small place in the relevant market and are not yet very profitable, the major reason for this being, the interest of traditional players to protect, as much as possible, the value of the long-established release windows, as aforesaid. Nevertheless, while in the music field online uses have already "desecrated" traditional ones, in the audiovisual sector they seem to be gaining ground day–by-day.

**EUROPE 's creativity policy**

At the same time, it seems to be a top European Union priority to promote a competitive and diverse single market for audiovisual works, with an augmenting capacity of "conquering" other markets

as well. For this, an international licensing mechanism is said to be indispensable.

Now let's see which rights are involved in an audiovisual work.

**Copyright generated by a film**

The matter of the authorship of the film meets divergent regulation among the Member States. In those copyright systems which are classified under the droit d' auteur category (continental European legal systems) authorship is granted to the film directors, being the principle creative stakeholder. The Anglo-saxon jurisdictions, where the system is based on the copyright tradition, vest the copyright in the film to the producer (following the US legal system, under which the producer is granted authorship through the "work-made-for-hire" doctrine). We should note however, that in the UK, since the Copyright and Related Rights Regulations of 1996 which harmonized the British law with Rental and Lending Directive (92/100 art. 2 par. 2), the film producer shares its copyright in the film with the principal director, considered as co-author. Performers enjoy the exclusive right of authorizing or prohibiting their fixations (art. 6), of distributing the original and copies with their fixed performances (art. 9), and lastly of renting and lending of such fixations (art.2).

With respect to the rental right, the Directive imposes a presumption according to which "when the performer concludes a contract with a film producer, it is presumed, subject to contractual clauses to the contrary, to have transferred his rental right", (art. 2 par. 5) but retains the right of obtaining an unwaivable equitable remuneration for such use. (art. 4) The administration of the right to equitable remuneration may be entrusted to collecting societies" (art. 4 par. 3).

At this point, permit me to focus more on audiovisual performers' rights in general as well on their specific right of making available. It is useful to quote the present legal framework both international and European.

## European and International Legal framework

According to the EU Directives there is no acquis communautaire for **broadcasting** and **communication to the public right** related to audiovisual performances. Although musicians enjoy a right to equitable remuneration, in case a phonogram with their performance fixed thereon is broadcasted, or otherwise communicated to the public (according to art. 8 of the Rental and Lending right Directive 92/100), actors do not enjoy such a right.

The same discrimination is repeated by the InfoSoc Directive 29/1001, which does not attribute to audiovisual performers a right of communication to the public, but only provides them (in art 3 par. 2) with the exclusive right to authorize or prohibit the making available to the public [by wire or wireless means of fixations of their performances].

In the international legal framework, WPPT attributes rights only to audio performances. According to art. 10 *"Performers enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them"* .

It thus follows the Rome Convention of 1961, which in art. 12 grants a right of equitable remuneration to performers only for phonograms broadcasted or communicated to the public.

**Greek law**

Greece is an "oasis" exception to the above status, granting performers exclusive and remuneration rights, irrespective of their performance being an audio or an audiovisual one. Plus, the actor, who performs a role in a cinematographic/audiovisual work is not

presumed to have assigned his rental or other economic rights to the producer. There is no statutory presumption at all. An actor only licenses the rights specifically mentioned in an explicit written agreement. If the rights that an actor intends to license are not explicitly mentioned in the written agreement, then only those rights that are absolutely linked to the relevant contract and fall within the contract's scope and purpose, fully corresponding to the intention of the contracting parties, will be regarded as licensed, pursuant to the principle of the "scope of the contract".

Greek Law (in par. 3 of art. 46 of Copyright Law 2121/1993) clearly stipulates that: *"The performer shall at all times retain the right to remuneration for each of the acts of fixation, reproduction, distribution, rental and lending, broadcasting, communication to the public and making available, regardless of the form of exploitation of his performance. In particular, the performer shall retain an unwaivable right to equitable remuneration for rental, if he has authorized a producer of sound or visual, or audiovisual recordings, to rent out recordings carrying fixations of his performance".*

In this extremely heterogeneous legal environment, we have been told by "official mouth" that on-line digital dissemination of works is considered a key project of the European Union, interconnected with cultural and sociological policies, making indispensable the

need for a flexible, fast and secure pan-european licensing system. Closely associated with this issue is the current system of collectively managed rights, that has been criticized, implicitly or sometimes directly, of presenting barriers to the on-line dissemination of audiovisual works.

As an answer to this criticism, we must point to the fact that, notwhithstanding the legal framework, the film producer has indisputably the negotiating power to concentrate in his hands all economic rights of all rights holders relying on either statutory or contractual clauses.

This de facto/in practice concentration of power makes the film producer the one-stop-shop licensing solution so many have recommended both in theory and in business!

Allegedly, current copyright regulations and collective management structures are the major factor of fragmentation of the audiovisual market. But this is not true. As was analyzed above, the strong-rooted marketing and distribution policies of audiovisual works are the ones fragmenting the market in order to obtain maximization of income by the limitations per mode, time and country introduced. Producers, distributors and broadcasters, who are still the main

exploiters of the audiovisual work, are strongly attached to the fruitful practice of several release windows and seem very reluctant to give their authorization to on-demand uses in multiple territories simultaneously. Performers' collecting societies are by fate and by the nature of the rights they manage, second in rank, as performers' exclusive right to making available, even if available and even when it is not presumed as assigned or is not contractually assigned to the producer, may not be exercised if the producer and the principal rights holders (co-authors) have not licensed such right first.

**The substance of the making available right**

Much has been advocated about the substance of the making available right. Leaving aside the theoretical question if this right is an enlargement or a reaffirmation of the Berne Convention rights of communication to the public or not, and focusing more on the legal and practical issues, we must note that the making available (right) is comprised by the act of "publishing" and distributing (by uploading) to a world-wide audience, consisted of an unknown number of people, the action of reproducing and of electronic storage on a hard drive for reasons of enjoyment of the work by the end-user, which again is a reproduction act.

So the making available, by its nature, contains notions of the exclusive rights of distributing and reproduction as well acts equivalent to "broadcasting" and wireless diffusion of works.

Our view in accordance with the consistent legal theory and practice in Greece and in Spain (the later having been statutory regulated as well), the only legally consistent, logical and practical solution is to combine the licensing of the making available right with the statutory remuneration rights of copyright and related rights rightholders with mandatory collective management.

## European Institutions' priorities linked to the dissemination of works of art.

Audiovisual works have a particular prominence, because of their cultural importance as such and play an important role in the European creative industry.

Thus, in addition to the legal and practical framework aforementioned, special attention has to be attributed to several normative texts that re-confirm the European Institutions' high priority to stimulate and encourage creativity in order to enhance

social and economic renewal and even more specifically their priority given to guarantee the protection of Audiovisual Heritage.

- The most important is of course an International normative tool, i.e. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20/10/2005, to which the EU is signatory.

- Stimulating innovation and encouraging creativity are European Institutions' priorities according to the Lisbon strategy (especially mentioned in art. 1a, 2 and 151 of the EU Treaty).

- This same pillar is recognized as of top priority by the very first European Cultural Convention of the Council of Europe (ETS no 18, 19.12.1954, recital 5) which gives general but strong references to Europe's intention "to foster the study of the languages, history, and civilization of the others, and of the civilization which is common to all nationals of the member states".

- The Framework Convention on the Value of Cultural Heritage for Society (CETS no 199, 27.10.2005) and the European Convention for the Protection of the Audiovisual Heritage (ETS no 183, 8.11.2001,) again of the Council of Europe wish to ensure the protection of European culture and, especially of European audiovisual heritage (the second one), in order to

endeavour diversity of languages and cultures and to enhance the access of members of society to this heritage and knowledge.

- Art. 22 of the Charter of Fundamental Rights of the European Union (Nice, 7 December 29000, OJ C 364/118.12.2000 revised and published in OJ C 303/01 14.12.2007) reads "The Union shall respect cultural, religious and linguistic diversity".
- Lastly, the Audiovisual Media Services Directive (AVMS) 2007/65 deals more specifically with the goal of promoting cultural diversity by means of on-demand services. It states that because "on demand audiovisual media services have the potential to partially replace television broadcasting [...] they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity" (recital 48).

Following this non-exhaustive list, it seems that happily, during the last years, the promotion of culture stopped being a wish-list, but has also received substantive recognition in many normative texts and has found practical application in the "Europeana" project.

Coupled with the protection of cultural diversity, creativity and enhanced access of the public to cultural content, is the acknowledgement of the need to guarantee a financial stimulus to creators and artists, as an indispensable incentive to permit them to contribute and to support the cultural development.

European legal instruments highlight the need for legislative measures in order to ensure adequate income to authors and performers. Recital 7 in the 92/100 EU Dir. comes first in our minds: *"Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned"*.

Same reasoning exists in 9 and 10 recitals of the 2001/29 InfoSocDir stating:

" (9). Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public

at large, Intellectual property has therefore been recognized as an integral part of property.

(10). If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. …..

(11). A rigorous effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12). Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action."

We give special importance to this last Dir(ective), since it is said to be the European Union's response to the challenge of structuring copyright protection in the new environment of the digital services (by "vox" of Mr Reinbothe in 2002).

So, it is obvious, that European legislation and the way this is interpreted by the Commission and by the European Court of

Justice, expresses full support in the need of protecting the creativity as well as of guarantying financial initiatives to all contributors to the creation procedure. In this same context, European legislation must explicitely grant effective rights to the audiovisual performers for on-line uses.

Besides the aforementioned legal and culture-wise arguments, there can be no doubt, that the advent of new technologies, have enlarged the duration of the exploitation life of audiovisual works. On the one hand, re-utilization of existing works and performances is easier, permitting new profitable uses of works and performances. And on the other hand, new works are subject to additional exploitation models. This also shows the enormous interest of the human community for spiritual nourishment and therefore the great economic power of the entrepreneurs of copyright material. We should not forget that tv stations, internet tv operators and in general broadcasters and telecommunications providers, show audiovisual copyright works to attract viewers and therefore to attract income through selling advertising time or space.

It is an indisputable principle in the Copyright Community Law and has been continuously held by the European Court of Justice that one needs to find the right balance in terms of compensating the

rights holders for the loss of remuneration opportunities resulted from the development of technology. So, it is more important than ever that performers receive a share on the newly produced profit.

Such a right, unwaivable and collectively managed, would ensure that artists are justly paid, while others get rich from their creative property.

As a conclusion we repeat these words stated by the world-famous Greek professor of Copyright, George Koumantos: The only feasible and admissible way **of financing intellectual creativity is intellectual property.**

**THANK YOU FOR YOUR ATTENTION**

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