a programme funded by the European Union/
un programme financé par l'union européenne/
برنامج ممول من الإتحاد الأوروبي

Med-Mem Project
Euromed Heritage IV/MEDMEM/ ENPI 150-924

Guide
of good legal practice

**Written by SNRT (Morocco) with the help of INA (France)
as part of the Med-Mem project**

VERSION 2 – September 20th 2012

CONTENTS

INTRODUCTION 5

Chapter 1: LEGAL GUIDE 7

Section 1: Elements of literary and artistic property in audiovisual works within the Mediterranean area 8

0. Pre-requisites and protection by copyright. 8
0.1. The work must be formatted. 8
0.2. The work must be original 9
0.3. What is not important when considering copyright protection 9
0.4. Works are protected by the mere fact of their having been created 9
0.5. Filing the work as proof of authoroship 9
0.6. Usefulness of the confidentiality agreement 10
0.7 Obtaining protection abroad 10

1. The object protected and the rights holders 10
1.1. The object protected 10
1.2. Rights holders for audiovisual works 11
1.2.1. The authors of the audiovisual work 12
1.2.2. The other rights holders 12
1.2.2.1. Performers 13
1.2.2.2. The producer of films or audiovisual works 13
1.3. The term or duration of protection 13
1.3.1. Term of copyright 13
1.3.2. The term of protection for neighbouring rights 14

2. Rights on works and services 14
2.1. General principles 14
2.2. Economic rights 15
2.3. Moral rights 15
2.3.1. The right of paternity 15
2.3.2. The right of disclosure 16
2.3.3. The right to reconsider or withdrawal 16
2.3.4. The right to respect the integrity of the work 16
2.4. Exceptions to copyright and neighbouring rights 16
2.4.1. Legal use without permission 17
2.4.1.1. The private copying exception 17
2.4.1.2. The short quotation exception 17
2.4.1.3. The education exception 18
2.4.2. Legal uses under a free licence 18

2.4.2.1. Possibilities offered by a free licence 18
2.4.2.2. Obligations of the free licence 19

3. What is an imitation or pirated version? 19
3.1. Infringement of the right of reproduction 19
3.1.1. The material element 19
3.1.2. The moral element 19
3.1.3. Other offences under the violation of the right reproduction 19
3.2. Violation of the right of showing or exhibiting the work 19

Section 2: The definition of broadcaster's rights vis-à-vis the selected audiovisual archive. 20

0. General principles 21

1. Principles applicable to all contracts 21
1.1. The notion of contract 21
1.2. The purpose of the contract 21
1.3. Making contracts 21
1.3.1. Principles 21
1.3.2. How to sign a contract without committing oneself 22
1.3.2.1. Enter into a conditional contract 22
1.3.2.2. The option contract 22
1.3.3. Presumption to transfer 22
1.4. Revenue collection and rights management 23
1.5. The choice of applicable law 23
1.6. The processing of dispute arising during fulfilment of the contract 23

2. Provisions specific to audiovisual contracts 23
2.1. The preamble 23
2.2. The characteristics of the transfer of rights 24
2.3. Rights transferred or licensed 24
2.4. Payment 25
2.4.1. Form of payment 25
2.4.2. The basis of calculating 25
2.4.3. The amount of the guaranteed minimum 26
2.5. Rewriting the script 26
2.6. Production time 26
2.7. Accountability 27
2.8. Credits 27
2.9. Guarantees 27
2.10. The penalty for breach of contract 28
2.11. Applicable law and ways of resolving disputes 28
2.12. The option clause 28

CHAPTER II : A PRACTICAL GUIDE 29

Section 1: The search for the rights holders and the use of author's administration societies. 30

0. How to manage the use of works? 30
0.1. Individual management of rights 30
0.2. Collective management of works 31

1. How to identify those who have rights on broadcast material? 32
1.1. His name is mentioned on the work 32
1.2. Copyright notice 32
1.3. DRM on digital works 32

2. Collecting societies and the distribution of rights 32
2.1. Role and responsibilities 33
2.2. The impact of collective management on contractual practice 34
2.2.1. Collective management and contracts with authors 34
2.2.2. Collective management and contracts with broadcasters 35
2.3. List of rights management companies in the Mediterranean 35
2.4. Diagram showing the process of exploitation/remuneration 35

Section 2: Typical procedure for the release of rights that benefit MedMem 36

0. The main categories of contracts concerning audiovisual works? 36
0.1. Contracts for the production of an audiovisual work 36
0.2. Contracts for making the audiovisual work 36
0.2.1. Contracts for the artistic aspects 37
0.2.2. Contracts for the technical aspects 37
0.3. Contracts for the exploitation of the audiovisual work 37

1. What authority to ask for? 38
1.1. Moral rights 38
1.2. Economic rights 38
2. How to formalize the authorisation?
39
2.1 The object of the contract 39
2.2. The geographical area covered 39
2.3. Warranties 40
2.4. The appropriate law 40
3. Special cases of commissioned works or works created by an employee or agent 40

APPENDICES 41

A. SUMMARY of how rights can be released 42

B. THE PRINCIPAL QUESTIONS 43
Question 1 / Do you have all or part of the rights to the programme? 43
Question 2 / Is the programme an audiovisual work? 45
Question 3 / Does the programme use actors or performers? 45
Question 4 / Does the programme contain elements whose rights do not belong to the producer? 46
Question 5 / Does the programme contain elements whose come from a right other than copyright? 46

C. LEGAL REFERENCES 47
Euromed Audiovisual Programme 47
International legal references 47

D. PRACTICAL EXAMPLES
Example 1: Letter of agreement with co-producer for ways of showing a work which have either expired or were not anticipated 48
Example 2: Co-production agreement 49
Example 3: Clause in a co-production agreement 49
Example 4: Request for permission concerning moral rights 50
Example 4 bis: Request for permission concerning moral rights 51
Example 5: Clause covering copyright transfer to new media 52
Example 6: Request for permission from an actor/performer 53
Example 7: Letter releasing rights for an insert 54
Example 8: Letter of agreement concerning personality right 55

INTRODUCTION

Since the second half of the twentieth century, and especially since the arrival of the Internet, broadcasting in all is forms has become increasingly important in our lives: as a source of news, culture, entertainment and education. It has also brought new practices, for example new ways of buying which have overturned traditional geographic or cultural boundaries. It is a new component in the shared understanding and dialogue among peoples. Indeed, for several years, many broadcasting conferences and seminars have helped us gauge the importance of the audiovisual heritage in first constituting, then transmitting a shared collective memory.

However, at the moment over 200 million hours of television and radio are doomed to disappear from the world, either because they have been ruined by being used too often or because they have been forgotten about: we can only save what is loved, and we only love what we know.

Thus, the Mediterranean audiovisual heritage is a resource of exceptional value even though it is not often seen nor easily accessible – and precisely because of that risks deteriorating rapidly and being lost forever.

Safeguarding most of the content of these archives is still possible but is becoming very urgent: institutional and cultural leaders, among them the major broadcasters in the Mediterranean countries, are now fully aware of this and are mobilized to fight for the preservation and online visibility of their historical and cultural heritage. But it is not a question of safeguarding the material simply by preserving it on more modern and less vulnerable media: the major issue is the transmission of this heritage to future generations, and therefore it has to be visible now on platforms and communication channels used by the young.

It is by making this heritage available to the greatest number of people that we can offer it the best chance of entering the “virtuous circle” of preservation, digitising and distribution. The new converging technologies allow us to take another step because, by making access available to as many people as possible via the new digital networks, they renew the conditions of communicating information, exchanging knowledge and sharing other peoples' cultures: the Mediterranean broadcasting heritage must be accessible online and so help express the shared history of the Mediterranean peoples.

It was from this starting point that the *Mémoire Audiovisuelle de la Méditerranée* – MEDMEM (Mediterranean Broadcasting Memory) – germinated in June 2007, during a seminar in Alexandria about preserving archives which was part of COPEAM's Archives Commission: the aim was to give the widest possible exposure to audiovisual archives, not only to preserve them, but also to put them at the service of inter-cultural dialogue, at the same time ensuring they would be passed on to future generations.

Retained in the European Commission's programme “Euromed Heritage IV” for inter-cultural dialogue and for preserving the tangible and intangible heritage of the Mediterranean for the benefit of young audiences, with the specific aim of helping Mediterranean populations appreciate and look after their national and regional cultural heritage, the Med-Mem project was conceived from the outset as a trilingual site (English, French, Arabic), its vocation was cultural, educational

and scientific, offering a selection of more than 4,000 videos about and from Mediterranean countries, available online to the general public from 2011.

As part of a series of actions taken by the European Commission, and more specifically as a logical follow-up to the CAPMED project, which had helped to save and catalogue over 4,000 audiovisual works, the aim of the Med-Mem project is to preserve the Mediterranean's broadcasting heritage. By doing that, by making available a shared visual history of the region, it will be creating greater understanding and inter-cultural dialogue.

With the support of COPEAM, in partnership with the Union for the Mediterranean and managed by INA (France), with leading partners who include SNRT (Morocco), RAI (Italy), EPTV (Algeria) and JRTV (Jordan), the concrete results of the Med-Mem project are:

1. universal on-line access to the Mediterranean broadcasting archives for researchers, students, the general public, broadcasters and cultural operators – with a vocation at once cultural, educational, scientific and professional;
2. good practice procedures for broadcasting archivists and processes to ensure a lasting safeguard have been set up.

It was in this context that the SNRT was asked to write this methodological Guide to the Best Legal Practice. Its principal objective is to identify the legal issues that arise and outline the procedural steps to take – hoping this will help broadcasters with archives put their works on-line in compliance with national and international rules on literary and artistic property.

It should be noted that during the preparatory process and in particular during INA's internal steering committee meeting on April 1st 2009, the Guide's aims were identified as being to present:

1. The legal principles and rules applicable to copyright on the use of audiovisual works;
2. The scope of expertise in collective management of the rights, the agencies that are responsible for them and the contacts which are useful for them;
3. The steps and procedures which must be followed – for the attention of the partner broadcasters but more generally for any organisation that owns audiovisual material.

Prepared by a Moroccan *ad hoc* technical committee co-ordinated by SNRT and composed of members of the Ministry of Communications, the Moroccan Copyright Office and the High Authority for Audiovisual Communication, this Guide comes in the form of a tutorial offering practical answers to the use and distribution of broadcasting archives on the Internet. It cannot however be comprehensive nor address every existing scenario. This tutorial, which consists of a Legal Guide followed by a Practical Guide, looks at common examples which can be used to answer key questions. There is also a list of web-sites to access official legislative texts and Appendices giving legal or practical source material to help you when asking rights owners for permission to upload broadcast material.

CHAPTER ONE: LEGAL GUIDE[1]

The aim of this chapter is to answer questions that may arise for radio and television broadcasters involved in the Med-Mem project and more generally for any owner of an audiovisual archive who wants to upload their material to the internet in compliance with national and international rules on literary property. Of course it addresses a certain type of questions, those connected with the legality of exploiting or exhibiting works which are said to be under copyright, in other words broadcast productions which have already been the subject of a complex legal arrangement for compensating the various copyright holders.

Some sequences of images (films, TV films, cartoons, documentaries, TV shows, commercials, clips ...) are indeed protected by the law of literary and artistic property, commonly known as copyright. The copyright owners of these films or audiovisual works have to give their permission before their work can be shown.

Audiovisual works are defined in law as **collaborative works**, that is to say they are works in the creation of which several individuals (director, writer, etc..) have all had input. This leads to a legal system based on common property, which in legal terminology is called joint ownership.

Although cases can vary significantly depending on the relevant legislation, the main co-authors who contribute to an audiovisual work are:
- the writer of the script;
- the person who adapted a pre-existing work and possibly the original author;
- the dialogue author;
- the composer of any music composed especially for the film;
- the director.

Actors , performers and producers have related or neighbouring rights in the audiovisual work. Actors and performers have a neighbouring right to the interpretation of a work. Producers have a neighbouring right in a work or a non-work.

Co-authors must exercise their rights together, for example, if they have to take legal action to defend their rights, co-authors of a joint work must, on pain of inadmissibility, act together. Which consequently also means that a request for permission to use a film in a way not provided for in the original production contract must be made to each of the authors, who must authorize together the exceptional use requested. The co-authors must agree unanimously both for the exploitation of the work and to take legal action.

Any use which is not within the exceptions provided by law (see 2.4) requires the permission of those involved in making the work. Many different situations can arise. Here are some examples where it is necessary to get the authorization of those who hold copyright and neighbouring rights

1 Translator's note: the French equivalent of "his" or "her" (*son* or *sa*) does not refer to the gender of the person, but instead agrees with the gender of the noun to which it is attached: thus a man will have *sa maison* (his house), a woman *son chien* (her dog). The French word for author is *auteur*, masculine, regardless of the gender of the creative person concerned. In English we have developed the rather clumsy habit of writing "his / her", which given the repetitive nature of this text, would become very heavy. For the sake of simplicity I have taken the decision to make all persons (authors, producers, actors) male, knowing of course that this is far from the reality, and apologise in advance for any offence this may cause.

in an audiovisual work:
- to play a video on your website or blog.
- to take an extract of a broadcast work and distribute it or make a new work out of it regardless of how that new work is distributed;
- streaming a video clip on a website.

The request for permission to use the work must be **in writing** and must specify:
- The broadcast work in question;
- The recording / extract references;
- The intended use;
- The length;
- The support;
- The territory covered by the re-transmission;
- The fee and form of payment if there is one.

The broadcast work can only be shown or used once permission has been obtained from the rights holders. Any use **not authorized** by the rights holders must be the subject of a new application.

Agents or authors' administration societies allow co-authors to manage their rights collectively. Their mission is **to manage the author's rights particularly by collecting royalties and transferring them directly to the authors or their heirs**.

In fact questions about the legality of the actions taken by broadcasting archivists in connection with their collections, particularly making them available for the Med-Mem project, cannot be addressed without first making an essential detour to take an overview of authors' and related rights in the broadcasting field right across the Mediterranean. This may seem unnecessary but is nevertheless vital.

This presentation will be brief, despite the complexity of the subject which, on the one hand comes up against a variety of legislations[2] and, on the other is in an area where the law is not fixed, since copyright is subject to many cultural, economic and technical developments. Some of these lead to new practices about which the law and jurisprudence have yet to rule.

Section 1: Elements of literary and artistic property in audiovisual works within the Mediterranean area.

0. Pre-requisites and protection by copyright.

0.1The work must be formatted.

To be protected, a work must be in a material form, that is without necessarily being completed, it

2 On this point it should be pointed out that a fairly exhaustive documentary research has already been carried out as part of the legal section of the technical assistance offered by the Euromed Audiovisel II programme, which includes the setting up of a legal database about copyright available on-line. This database shows the Mediterranean laws and instruments about cinematographic and broadcasting works: http://www.euromedaudiovisuel.net/legaldb.aspx?treeID=7906&lang=fr

must have reached a certain stage of “realisation”. Thus, copyright does not protect the ideas themselves (concept, method, system, knowledge ...), but the original form in which they are expressed.

But if the principle is clear, its implementation is often difficult. Thus on television projects the basic format of some programmes can be protected because the shape and nature of the programme are sufficiently concrete and detailed. A work which is not yet in its final form can also be protected by copyright.

0.2. The work must be original.

To be protected, a work must be original: a work is generally considered original when it is the expression of the intellectual effort of the author who has produced it and / or when it bears the personal stamp of that person. However, originality does not mean being the first. Being the first, a criterion used for example in patent law, is by definition objective: an invention is the first appearance of a particular thing.

Originality on the other hand is a subjective concept: regardless of the date of creation, what counts is the mark of the author's personality. The work must therefore bear **the stamp of the author's personality, that is to say, express his or her creative input (arbitrary and capricious choice)**. Applying the originality condition can sometimes be tricky for certain categories of works. Thus, in software, it is more a question of intellectual contribution, a more objective concept. A work is protected whether it is absolutely original – that is, it owes nothing to a pre-existing work – or relatively original – it borrows elements from a work, particularly the format, but adds a personal treatment, as is the case of an audiovisual adaptation of a novel for example.

0.3. What is not important when considering copyright protection.

Copyright protects all original works in the same way, making no distinction between:

- **genre** (literary, musical, artistic ...).
- **form of expression**: oral (speeches, sermons ...), visual (pictures, posters, sculptures ...), writing (novels, brochures ...) or virtual (computer graphics).
- **merit**: protection by copyright is not subject to any aesthetic or moral appreciation of the work. Example: an opera, a piece of contemporary art and a tourist brochure will all be protected in the same way.
- **destination**: the work will be protected in the same way regardless of its purpose, whether aesthetic or utilitarian. Example: a lamp base can be protected by copyright as much as a collection of poems

0.4. Works are protected by the mere fact of their having been created.

Protection requires no filing or other formality. Protection is automatic from the moment the work is born, without it being necessary to take any administrative steps or file anything.
The only formality necessary in some countries is the obligation to file the work in a particular institution. These institutions vary according to the type of work, their aim is to preserve and archive works. If the moral person (a literary editor, producer of an audiovisual work) does not fulfil this requirement, he may be liable to prosecution for a fine. The original work itself, however,

remains protected.

0.5. Filing the work as proof of authorship

In the event of litigation, although proof of authorship and originality may be proved by any means (advertising, attestation, testimony ...), the author should in practice always file his work with a solicitor, bailiff, authors' society or a specialist agency.

Firstly filing a work in that way will fix the date the work was created, and secondly, prove the author's ownership of rights over it.

It makes little difference whether copies of the work have the copyright symbol © followed by the name of the owner of the copyright and year of creation or of first publication / broadcast on them. The work is protected whether or not it is there. But using them makes it easier for a third party to find the owner of copyright and may discourage potential imitators by reminding them that this is a work protected by copyright.
However in some countries © has no legal status.

0.6. Usefulness of the confidentiality agreement

An idea, a concept can not be protected, but to get development finance the creator may have to present his idea to potential future business partners. In which case it is strongly advised to establish confidentiality agreements. People with knowledge of the project will thus be bound to secrecy and will be partly liable for any disclosure or improper exploitation.

0.7 Obtaining protection abroad

The Berne Convention establishes a number of guiding principles which form the basis of a uniform copyright legislation in all the signatory states. Under this particular text, works by authors from those Mediterranean countries which have signed the Convention are protected in the same way as foreign authors in their own country. This protection is not subject to any administrative formality.

The Copyright Treaty of of December 20th 1996 drawn up by the World Intellectual Property Organisation (WIPO), recognizes the legal validity of systems such as Digital Rights Management (DRM) – that is technology which protects a work from being used in ways not intended by the original provider. Thus all signatories to the Treaty have to protect in their legal system any technical measure like DRM which protects rights and information. The WIPO treaties have also adopted the principle of assimilation established by the Berne Convention.

The Berne Convention and all relevant texts are available on the WIPO website: www.wipo.int

1. The object protected and the rights holders

1.1. The object protected

Overall, legislation on copyright and neighbouring rights protect intellectual works and certain

services associated with these works, for example, an actor's performance, the investment of a record or video producer and the investment of a broadcasting company.
By intellectual works is meant mainly works which are literary, musical, graphic, visual, photographic, cinematographic, architectural, choreographic etc..

The performer performs a work: whether it be the pianist who plays (and interprets) a piece of music, the actor who recites a text or the dancer who performs a choreography, etc..

The producer transfers and fixes the performance of a work on to a support media (vinyl, film, tape...). He arranges the financing and is responsible for the transfer of the performance on to the new support.

The broadcasting company transmits the carrier signal of a radio or television programme (which will consist of musical or literary works in the case of radio, audiovisual works if it is television).

Although in every country the act of creation, performance, fixing or transmission have the same technical meaning, they do not have the same legal classification.

In the Roman tradition, which uses the phrase "**author's rights**", only an intellectual creation is called a work and may be protected by copyright. The services provided by a performer, producer or broadcasting organization are not called a work, but a performance or service and are protected by rights known as "related" or "neighbouring rights".

However, in the Anglo-Saxon tradition, where author's rights are called "**copyright**", the notion of "neighbouring rights" does not exist and the concept of a work is extended to include certain services (a radio broadcast is a "work") while other services (those of performers and producers) are protected by a law called "right of enforcement" (of a work) or "**Performance rights**".

This text will favour the Roman tradition, using the term "work" to denote only creative works, while the word "service" will be used for objects to be protected other than creative works. The concept of "performance right" will be dropped in favour of "neighbouring rights", used in the TRIPS agreement to designate the rights to services regardless of the legal system to which one is referring.

If no legislation defines the intellectual work, a number of laws offer lists, like Article 2 of the Berne Convention. These texts specify protection for literary, musical, visual, film, photographic works, without defining a "literary work", a "musical work" or "cinematographic work".

1.2. Rights holders for audiovisual works

Many people will be involved in the making of an audiovisual work and thus have rights in it. Rights holders are generally:
- the authors;
- the actor/performers (they have a right in the interpretation of a work)
- the producers.

Remember that the nature of the rights which different categories of rights-holders can enjoy may

vary depending on the legal system: in Roman-based systems, film-makers have “author's rights”, while performers and producers have “neighbouring rights”; in the Anglo-Saxon world however, all these rights will be called “copyright”, “artists' rights” or “producers' rights” …

1.2.1. The authors of the audiovisual work

The concept of author is a legal concept. Although all legal systems consider the author to be the person who created a work, there may be differences depending on whether the law limits authorship to the person responsible for the intellectual creation of the work or whether the definition extends to the work's financial creation or development.

There are four different legislative approaches to the notion of authorship of an audiovisual work:

- Some legal systems give the authorship to all those who bring a significant creative contribution to the work;
- Some recognise a limited list of people considered to be authors of a film or audiovisual work;
- Some systems combine the principle of contributing to the intellectual creation of the work with a list of persons presumed to have authorship of the work;
- Finally, some systems ignore the creative criterion in favour of the financial , acknowledging the film's producer as one of the authors.

It follows from the foregoing that the definition of an audiovisual work's author may vary from country to country. So in each particular country we have to refer to the national legislation to determine which person or persons qualify.

If in a particular legislation there is no specific provision for audiovisual works, you have to refer to the provisions governing collaborative works, that is to say, works created by several authors whose individual contribution is identifiable.

Although cases can vary significantly depending on the relevant legislation, the main co-authors who contribute to the making of an audiovisual work are:
• the author of the screenplay;
• the author of the adaptation and if applicable the author of the pre-existing literary work;
• the author of the dialogue;
• the author of any musical compositions specially composed for the work;
• the director.

Performers, producers and audiovisual broadcasting companies hold neighbouring rights in the audiovisual work.

1.2.2. The other rights holders

Besides the people who qualify as co-authors of an audiovisual work, there are rights holders who, although not an author of the work, have similar rights for their services.

1.2.2.1. Performers

The actors in the film are not its authors. However, for their performance they enjoy rights similar to an author's rights.

Because of this, their rights must be assigned or transferred to the producer so that he can properly exploit the work in question.

1.2.2.2. The producer of films or audiovisual works

The producer is usually defined as the person who takes the initiative and responsibility for fixing an image sequence on film or tape with or without sound.

As well as the rights transferred to him by the work's author(s) and performer(s), in those countries which recognise the existence of neighbouring rights, the producer also has his own right as a producer. In countries of Anglo-Saxon tradition where he is considered one of the film's authors, the producer is entitled to copyright.

1.3. The term or duration of protection

1.3.1. Term of copyright

Under Article 7 of the Berne Convention, countries must protect films and audiovisual works for at least 50 years. This period begins on the date of the author's death (in reality this means the date of death of the last surviving co-author, because a film is a collaborative work).

However, under this article, a country may provide in its legislation that the period of 50 years runs from the date when the work was lawfully made available to the public or when it was completed – if within 50 years of its completion the work has not been made available to the public.

The term or duration of protection of an audiovisual work may vary by country. This can have important consequences since it is the law of the country where protection is claimed which applies. It can happen that a work protected in its country of origin is no longer protected in another country.

The opposite situation (a work is no longer protected in its country of origin but is still protected in other countries), pre-supposes the existence of specific laws in a country which provides copyright protection for a longer period than the country of origin, insofar as the Berne Convention established the principle that the duration of protection in a foreign country cannot exceed the duration of protection in the country of origin.

In countries which have transposed the principles of the European Directive on the term of copyright (Directive 93/98/EEC), the length of protection is 70 years and that is calculated from January 1st of the year after the death of the last of the following collaborators: the principal director, the scriptwriter, the dialogue writer and the composer of any music specifically created for the cinematographic or audiovisual work.

Therefore in each particular case it is necessary to refer to the laws of each country to determine whether an audiovisual work is entitled to copyright protection there or not.

When the term of protection has expired, the work falls “into the public domain”. This means that the operating monopoly to which the work was subject no longer exists. This principle applies to every type of work, including those which can be used in the making of a film: the literary work adapted to make the script, the music used in the film, etc. Therefore when using a work in the public domain you must always check that the version used is the original version, and is also in the public domain, and not an adaptation which might still be protected.

1.3.2. The term of protection for neighbouring rights

The term of protection of performers' and producers' rights is generally shorter than the term of protection of authors' rights. It should be noted however, that any country can grant a longer term of protection than that provided by international agreements, and some countries have done this by making the duration of performers' rights the same as an author's rights.

Under the TRIPS Agreement, the minimum duration of a performer's rights is 50 years from the completion or the fixation of the performance.

Although in most countries performers and producers benefit from a shorter term of protection than authors (it is often 50 years) the starting point for calculating the term of protection is not, as for authors, the death of the author or co-author but the date of fixation, publication or public disclosure.

2. Rights on works and services

2.1. General principles

The law recognizes that for authors and performers there are economic rights and moral rights. Producers enjoy only economic rights. Economic rights are those which establish a monopoly for the rights holder on the exploitation of a work or performance.

Moral rights are largely confined to authors who, alone, benefit fully from what is known as “the moral right”.

Moral right is made up of various rights all connected to the fact that the work is regarded as the product of its author's personality. Moral rights are personal rights, inalienable and non-transferable, unlike economic rights.

Performers are the only holders of neighbouring rights who enjoy certain moral rights.

Although economic rights have a certain consistency internationally, this is not the same for moral rights whose scope and intensity varies considerably across countries .

2.2. Economic rights

Economic rights were based originally on an author's two fundamental rights: the right to allow his work to be performed and the right to authorize its reproduction. Granted to authors in the late eighteenth century, these two fundamental rights (reproduction and public performance) still exist but have become the foundation on which a complex structure has been built.

The **right of representation** (public performance) covers all communication of a work to an audience and now includes:

- The right to broadcast a work in a place accessible to the public. This right covers both a live performance and the communication to an audience of a work by means of a reproduction of it (disk, DVD, etc.).
- The right to broadcast on radio, which includes:
  - The right to authorize transmission by radio
  - The right to authorize satellite broadcast
  - The right to authorize cable retransmission
  - The right to broadcast a work in a public place (that is the radio or television is audible or visible in a public place)
  - The right to make the work available to the public online (internet).

The **right of reproduction**, which is the right to make or authorize the making of copies of the work (books, music, DVD, etc..). This also includes:

- The right of translation: translate the work, or cause it to be translated into another language;
- The right to adapt the work to another medium;
- The right of distribution: the right enjoyed by the author to control the distribution of copies of his works (by sale, lease, loan). In some countries, this right expires when a copy is sold or the ownership is otherwise transferred.

2.3. Moral rights

Although the author's economic rights were created at the end of the eighteenth century by the law, moral rights were created by jurisprudence.

Throughout the nineteenth century the courts developed a theory of moral rights, recognizing that authors had different rights because their work is the product of the author's personality.

These rights, which were then established by law, have the particularity of being non-transferable. In Roman countries, they are also perpetual. In most other countries, they have the same duration as economic rights.

These rights generally include:

2.3.1. The right of paternity

The right of paternity is the right of the author to be recognized as such.

He therefore has the right to have his name appear on copies of his work or, conversely, to refuse to let his name be mentioned or to use a pseudonym. The right of paternity also enables the author to refuse to let another person put his name on the work.

2.3.2. The right of disclosure

The right of disclosure is the author's right to decide when his work is completed and when it can be made available to the public for the first time. Although no one can compel an author to release a work he does not consider complete, the use of this right does not shelter an author from an order to pay for damages if, invoking this right, he does not respect a contractual obligation to deliver a work by a specified date.

2.3.3. The right to reconsider or withdrawal

The right to reconsider is the author's right to modify his work. The right of withdrawal is his right to withdraw it from circulation.

This right applies mainly in publishing, an author may sometimes regret what he wrote at a particular point in his life. Although in the audiovisual field few laws expressly exclude the right to withdraw or reconsider, the author's obligation to indemnify the person who holds the work's exploitation rights against any prejudice makes it impractical in this area.

2.3.4. The right to respect the integrity of the work

This right, allowing the author to stop his work being changed without his consent, is the moral right which creates the greatest number of disputes. There are many infringements to the integrity of an audiovisual or cinematographic work when it is shown on television: the interruption of the work by commercial breaks, deletion of certain sequences of the work, changes to the framing or editing, superimposition of acronyms or various messages on to the image, colourizing black and white films, time compression, removal of the end credits, or accelerated scrolling of the credits with sound suppression and Split Screen ...

2.4. Exceptions to copyright and neighbouring rights

Most national laws on copyright provide a number of exceptions to the monopolies of use on works and services, that is to say cases where either the protected work and / or the service can be used without the need to seek the agreement of the rights holders.
The existence of a legal exception to the author's exclusive rights and to the neighbouring rights does not give the user the right to benefit from this exception.

Under the Berne Convention, the exceptions provided under national law must meet three conditions:

- They must be applied to specific cases;
- They cannot affect the normal exploitation of the work;
- They cannot cause right holders unreasonable prejudice.

The number and scope of exceptions to the author's economic rights and his collaborators' neighbouring rights varies from country to country. Although the Berne Convention and the Rome

Convention only provide for limited exceptions (Articles 10 and 10bis of the Berne Convention, Article 15 of the Rome Convention), a general framework of all exceptions that may be applied in Europe has been drawn up as part of the Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (Directive 2001/29/EC of the European Parliament and the Council of May 22nd 2001).

The fact that there are exceptions to the rights' holders monopoly of use does not mean that using the work, performance or service without the permission of the rights holders is free. In some countries and for certain forms of exploitation, the exclusive right will be replaced by a right of remuneration (e.g. private copying, public loan ...). This means that the copyright owner cannot oppose the use of his work or his performance by a third party but that third party must pay a fee, as compensation for the authorization given to it by law.

An exception to the author's rights or the neighbouring rights therefore is not synonymous with the free use of the work, performance or service. The main exceptions likely to affect the film and audiovisual industry are:

2.4.1. Legal use without permission

2.4.1.1. The private copying exception

Some countries allow private copying of audiovisual works. This copy may either be temporary (for a deferred viewing) or permanent. In the latter case, some countries have a private copying levy on recording media and / or the equipment used for recording, which fee is intended to compensate the shortfall for the beneficiaries. The important point about the private copy is that it is "private": it must remain within the definition of "private" as laid down by statute (for example, the family circle). A copy cannot be sold, rented out, exchanged or even lent.

Finally, a private copy is legal only if it is made from an original made lawfully available to the copyist. Thus it is legal, in countries which permit private copying, to copy a film shown on TV. However, without the permission of the rights holders it is illegal to copy a work from the web, for example exchanging files between internet users (peer to peer). The private copying exception means only that the user who accesses a work legally does not have to ask the permission of the rights holders: if it is technically possible for him to make a copy and if he does it for private purposes only.

2.4.1.2. The short quotation exception

In the broadcasting and multimedia field, the concept of a quotation is often misinterpreted: some people use it to reproduce extracts from works to which they have no rights. It is important to be clear that the use of quotations follows strict rules and that failure to respect these rules may result in the quotation being reclassified as an illegal imitation. A quotation is allowed without the permission of the text's author only on the following conditions:

- the quote must be taken from a legally published work;
- the quote must be made for purposes of criticism, debate, review, education or in a scientific work;
- the quote must be made in accordance with fair practice and to the extent justified by

the purpose, without infringing copyright;
- the quote must be part of a work and mention the source and the author's name;
- The quote must be short.

Apart from these conditions, the quotation must appear as such, that is to say, it is must be clear it comes from a third party and not from the person quoting it. Besides the fact that the quotation is not a substitute for consulting the original work, in case of conflict over whether the legal conditions have been met, in general a quote will be assessed according to the renown of the work quoted but also of the work which is using the quote.

2.4.1.3. The education exception

The Berne Convention and various national laws provide exceptions to exclusive copyright and related rights where education is concerned. Works can be used to illustrate teaching on the following conditions:

- They can be used only to the extent justified by the declared purpose: that is only to illustrate a point in teaching or research,
- Reproduction and use / communication is for pupils, students, teachers and researchers.
- There may be no commercial exploitation of these works
- Their use for educational purposes must be paid for by a global, lump sum.

This exception does not apply to works specifically conceived for educational purposes.

2.4.2. Legal uses under a free licence

In some cases, a work may be subject to a free licence, which can also mean it is not necessary to seek permission to use it.

The author allows the dissemination and sharing of his work. However, he remains the owner. The work does not belong to the public, it remains the property of the author. When a free licence applies to a work, it means the author allows the public to modify, re-transmit and re-use the work. There are different kinds of free licences (GNU Licence, IBM Public licence...), the most common one being “Creative commons”, letting the rights holder choose which uses he will allow. We should distinguish between actions permitted by the free licence and the obligations which it imposes.

2.4.2.1. Possibilities offered by a free licence

The ability to modify the work: if the licence authorizes it, you can modify the existing content. Note however that such a modification may be an infringement of the author's moral rights. Thus, even if the licence authorizes modification of the work, the author still has the right to forbid a particular modification on the basis of his moral rights.

The ability to use the work commercially: the phrase “possibility of using the work commercially” allows protected content to be used for profit.

2.4.2.2. Obligations of the free licence

The author of the existing content retains in every case all the attributes of moral rights, like the fact of mentioning his name and the title of the work used.

In certain circumstances described in the free licence, the author may demand that the changed product be also subject to a free licence. It has to be accepted therefore that the new work is used in compliance with the provisions stated in the licence governing the original work.

3. What is an imitation or pirated version?

Forgery or pirating happens when the author's sole right is infringed. Any reproduction or representation of a creation, made without the consent of the author constitutes a forgery. But of course this is a use which does not come within the exceptions to copyright.

3.1. Infringement of the right of reproduction

The act of forgery assumes the presence of both a material and a moral element.

3.1.1. The material element

This is the complete, partial or derivative (adaptation or translation) reproduction of the work without the express consent of the author. Courts judge forgeries by their similarities to the original and not by the differences.

Even a change of support or medium from the original constitutes a forgery. A forgery is also when the holder of the reproduction rights operates beyond the terms of his contract with the author. On the other hand it does not matter that only a single copy has been made or that the illegal copier has derived no pecuniary benefit from his copy.

3.1.2. The moral element

Where the infringement is subject to a civil action, the liability of the copier is engaged whether or not he was aware he was infringing copyright. He must repair the damage caused to the owner of copyright. In the case of criminal proceedings, the court assumes the accused acted in bad faith. It is therefore up to the copier to prove his good faith in order to avoid punishment.

3.1.3. Other offences under the violation of the right of reproduction

These are the sale of counterfeit works by traders, and the export / import of pirated works.

3.2. Violation of the right of showing or exhibiting the work

The material element: any showing of the work made without the agreement of the author or his representatives. All methods of communicating the work to the general public are covered by this. Example: distribution of a film on the Internet, broadcasting a documentary infringing copyright.

The moral element of dishonesty is assumed.

Section 2: The definition of broadcaster's rights vis-à-vis the selected audiovisual archive.

0. General principles

Audiovisual works are artistic creations whose making and exhibition require the use of industrial resources. Whereas one legal system, the Roman tradition, emphasizes the artistic aspect of the work while another, the Anglo-Saxon tradition, emphasizes the economic aspect, both systems face the problem of the transmission of authors' and performers' rights as part of the making and subsequent exploitation of the works.

Usually the authors, actors, producers, distributors and broadcasters of the work are different people. Everyone concerned with making money from the work must have the permissions necessary for his intervention in the chain of production and exhibition of the work, whose starting point is the author for the creative input and the actor for the performance.

As a first step authors and actors must give the producer permission to produce the work and show it. The producer (production company) will then authorise the distributors and broadcasters to exploit it.

The authorizations granted by authors and actors to the producer to produce and exploit the audiovisual work, and the authorisations then given by the producer to third parties are another way of saying they have yielded or assigned their rights. Yielding means transferring the ownership of the rights: the transferee or assignee (the producer) becomes, for the duration of contract, the owner of the right which previously belonged to the transferor (author or actor).

In fact, putting an original work on-line needs the holder of work's rights (author or assignee) to specifically authorize the operator of the online service to use the work on the Internet.

Jurisprudence tends to require the signature of a specific clause, which has the advantage of also clarifying the parties' rights. This contract shall include transferring the right of representation, that means the right to communicate the work to the public by any means direct or indirect, including on the Internet. The concession (usually called a licence) is an authorization given by the copyright owner for a third party to exploit his work. In practice, the authors of and actors in an audiovisual work assign their rights to the producer in a contract and allow the producer to re-exploit their work or performance.

The latter will generally agree operating licences limited in time and space and with exhibition methods specified in writing.

The producer may choose to grant a national or foreign distributor a licence for all methods of exploitation or only for some of them.

Thus he can, for example, assign theatrical distribution to a cinema distributor, television use to a

broadcaster with whom he deals directly and distribution on DVD to another distributor.

In Roman countries, the initial transfer of rights between the author and the producer is done by contract, because both parties decide to do that. In the Anglo-Saxon tradition, where the author may be engaged under an employment contract, the author's rights may belong from their inception to the production company which employs him. Works created in this way are called “works made for hire”. Finally there is, in some countries, a legal transfer system by which copyright is transferred to the producer by operation of law. In these three systems, however, subsequent transfers of rights (by the producer to those granted use of the work) are through assignment or licensing contracts.

Unlike the system “works made for hire” in which the rights belong from their inception to the production company, the contract system is subject to the principle of restrictive interpretation of copyright transfer, which means that any rights not expressly transferred by the author are retained by him.

From the above it is clear transfer contracts and the granting of rights must be written with the utmost care to avoid potential bottle-necks in exhibition because some rights have not been transferred. However, laws which apply the system of contractual assignment often provide for a presumption of transfer of rights whose scope may vary from one legislation to another.

1. Principles applicable to all contracts

1.1. The notion of contract

The contract is a voluntary agreement which seeks to create obligations. However, breach of contract is not sanctioned in the same way in all countries: in some countries moral prejudice is generously compensated while in other countries it is compensated only symbolically. As regards material damage, in some countries compensation will be paid only for damage actually sustained and proved, while in other countries compensation will include punitive damages and interest or the income the victim would have made if the contract had not been broken.

1.2. The purpose of the contract

No one can transfer more rights than he owns himself. The rights assigned or licensed, whether it be by the author to the producer, the producer to a distributor or the distributor to a broadcaster, can only be the rights which the transferor himself holds.

1.3. Making contracts

1.3.1. Principles

Except for contracts for which the law requires compliance with formalities, contracts are made by the agreement of willing parties, that is to say a contract is an exchange of consent. However, regardless of the conditions surrounding the making the contract, the content must always be able to be proved if challenged. It is therefore generally preferable to have a written contract.

In the audiovisual field, where contracts are often multiple and complex, a written contract is indispensable. Writing it down will be essential in the relationship between the signatories, enabling them to establish throughout their relationship the exact content of their agreements but also in the relationship third parties may have with the work, sometimes long after the original signatories have died.

1.3.2. How to sign a contract without committing oneself

Once signed, a contract binds the parties definitively. This means the parties should only commit themselves when they are fully informed, and only contract themselves to an obligation when they are sure they can carry it out.

However, the rigour of this principle is difficult to reconcile with the reality of economic activity in general and of television production in particular.

1.3.2.1. Enter into a conditional contract

A condition may be suspensive or resolutive. Entering into a contract with a suspensive condition means that the due date of the obligations created by the contract depends on a future event whose happening is independent of the will of person signing the contract. There is a second form of condition, known as “resolutive” which does not suspend the due date of the obligations but retroactively annuls the contract when payment has been achieved. This condition is thus extremely valuable, enabling one party to free himself from a contract without damage when he is not sure whether it can be fulfilled when he signs it. The fulfilment of the condition can never depend solely on the will of the person who commits himself conditionally.

1.3.2.2. The option contract

Unlike the condition, the option depends on the will of the person in whose favour it is made. If a producer wants to buy the rights to adapt a novel, the publisher will give the producer, against payment, an option for six months or a year to acquire the rights of the novel at a specified price. Signing the option contract means the publisher cannot, during the term of the option, sell the rights to anyone else. Within the time-limit, the producer only has to inform the publisher that he is taking up the option for the contract of assignment of rights to be final. The advantage of such a contract is that if the producer takes up the option, there is nothing more to be negotiated. The disadvantage is that, by its precision and development, the contract is more expensive than a more simple version which would involve the negotiation of certain points if the option were taken up.

After the option period, if the producer has not exercised the option, the contract ends and the publisher is free to sell the rights to anyone else.

1.3.3. Presumption of transfer

In some countries of English Common Law, the author's rights belong from their inception to the production company which employs him, while some countries have a system of legal assignment.

In countries that do not have these systems, the need to strengthen legal security has led a number of them to provide in law for a “presumption of assignment” whereby authors and performers or others who collaborate in the creation of an audiovisual work being bound to the producer by a contract are, unless proved otherwise, presumed to assign to the producer the exclusive rights of exploitation of the work.

The scale of this presumption may vary from country to country so it does not necessarily apply to the same people and will not have the same scope everywhere.

The presumption will be applicable to authors and performers subject to the existence of a signed contract with the producer.

1.4. Revenue collection and rights management

The management and sharing of an audiovisual work's income is complex because of the wide variety of revenue sources and the number of persons among whom it is shared.

1.5. The choice of applicable law

The contractual relationship of all the parties will necessarily be governed by one law and this law may be chosen whenever the question of choice arises.

The question will not arise when both parties are nationals of the same country and the contract is made in that country: in the absence of choice, their national law will apply. However, when there is a foreign element, the issue of deciding which law to apply to the contract does arise.

1.6. The processing of disputes arising during fulfilment of the contract

When things are going well it is easier to predict what must be done if something goes wrong. In the film or audiovisual world signing a contract is often the start of an exciting adventure for the parties concerned. And enthusiasm can lead people to forget that in any joint project, tension or conflicts of interests can arise. The quality of a contract will depend largely on the provisions that the parties have taken regarding compliance with their obligations, possible causes of termination of contract and handling disputes.

2. Provisions specific to audiovisual contracts

Before he can produce the audiovisual work and then exploit it, the producer must acquire by contract the rights of the work's authors as well as the performers. These contracts will also be essential for finding finance for the project.

2.1. The preamble

The preamble is used to define the contract. The project and the role of each party are described there.

2.2. The characteristics of the transfer of rights

This section of the contract will define the nature and scope of the rights transfer, specifying the length of time the rights are assigned or granted, the territorial extent of the assignment and licenses and the methods of exploitation.

The forms of authorized exploitation will also be defined. Given the often very detailed arrangements about assigned rights and how much was paid for them, there are often specific clauses about them.

2.3. Rights transferred or licensed

This clause is of fundamental importance. If it is incomplete or inaccurately drawn-up, exploitation of the audiovisual work may be impeded because of a break in the chain of rights (since the producer cannot sell what does not belong to him) .

- The adaptation of a work is based on the right of reproduction, one of the author's exclusive rights. He must therefore have given his permission;
- Giving permission to reproduce the work in the form of moving images does not imply permission to take still photographs on the set (still images usually taken by a photographer during rehearsals or filming). Permission for these must be given independently;
- Any act which may constitute a violation of the author's moral right (which is non-transferable) must be authorized by the author in every country where moral rights are recognised and where the law provides that the author cannot assign them; the moral right can be arranged in the contract
- In countries where certain forms of the work's exploitation – other than the forms of exploitation necessarily administered collectively – are managed by authors' administration societies, it is necessary to specify in the contract:
  - That the author will provide the producer with a list of countries where his rights are managed by the author's administration society to which he belongs;
  - That it is for the producer to remind broadcasters with whom he deals that the price of the licence he is granting them does not include remunerating those authors whose rights are managed by an author's administration society;
  - That permission to reproduce and exploit the work does not necessarily include permission to use excerpts of the work; this authorization must be given separately; this will be the case for instance for multimedia works or trailers for a film in cinemas, VOD, TV...
  - The right to produce the film does not imply the right to make an adaptation or synthesis in book form. The literary adaptation will be part of the supplementary methods of exploitation, while, independent of this type of use, the producer must anticipate the possibility of reproducing synopses of the work for advertising or other promotion;
  - That the work can be shown in festivals and competitions and so provision should be made here about who will receive any prizes the film might win.

2.4. Payment

Payment is given in return for the transfer of rights discussed in the preceding section. This is often the section about which there is longest negotiation.

Various issues should be addressed:

2.4.1. Form of payment

Payment may be fixed, or proportional or a combination of both. It is rare for authors' rights to be assigned to the producer for a lump sum. However, the right to exploit the work will be granted by the producer for a lump price in a certain number of cases, for example for a television showing or exploitation by any means in a distant land where it is difficult or impossible to keep control. In a contract transferring the rights of a scenario, payment generally includes a fixed sum and a proportional share of the film's income.

The fixed portion of the payment usually consists of a “guaranteed minimum”. This is an amount which remunerates the author independently of the film's income but is usually attributable to income. This means that having paid the fixed part, the producer will not pay the author the proportional part until the producer has recovered the “guaranteed minimum” from the author's percentage of the film's takings. The term “guaranteed minimum” means that the producer cannot recover the sum paid to the author if the film's takings are not enough for the percentage due to the author to equal to the amount already paid.

Proportionate share: a percentage of the revenue collected by the producer. This percentage may vary depending on various criteria such as the author's reputation, the forms of exploitation, the film's performance. Different percentages may be allowed for depending on levels of income defined in advance.

2.4.2. The basis for calculating

For each form of exhibition, the producer receives only a fraction of the revenue generated by the film. Thus, when the film is released in cinemas, each cinema owner has to pay the distributor the rental fee, the distributor will deduct his expenses and his commission before handing on the balance to the producer. It is out of that sum that the producer will pay the proportionate payments.

In this context, the question arises of the responsibility for costs of the producer (the amount paid by the distributor is the gross receipts, out of which the producer will deduct his costs, leaving the net revenue, known as the “the producer's share of net receipts”).

The amount of net receipts will obviously depend on how many expenses can be deducted, so the definition of “net receipts” as the basis for calculating the percentage of the proportional payments is of great importance when negotiating contracts. All contracts which provide for

proportionate remuneration have generally an annex giving a definition of “net receipts” and the content of this can vary significantly from contract to contract.
Some countries' legislation may impose a calculation. An example is France where the law states that if the public pay an entry fee to see a film, the film's authors must be compensated in proportion to the price paid by the public. Managing this type of compensation can be complex.

2.4.3. The amount of the guaranteed minimum

The guaranteed minimum may take the form of a credit (recoverable on proportional revenue) or not. It will be necessary to determine:

- The amount of the guaranteed minimum;
- The ways the guaranteed minimum will be paid (usually one expects different stages related to the development of the script, from the signing of the contract to the acceptance by the producer of the completed version of the script;
- What happens to the sums already paid if the producer refuses the work done by the author;
- What happens to the remuneration if the producer has to use a co-author or have the script rewritten.

Reminder: the remuneration due to the authors and holders of related rights for simultaneous retransmission by cable, private copying and public lending is necessarily collected by an author's administration society.

2.5. Rewriting the script

The practice of rewriting the script by a third party is common in Anglo-Saxon countries where the moral right of the author does not exist or is not protected. In countries where the author's moral right is protected, it implies the author's agreement to have his work modified by a third party. This clause is not always necessary.

It will, however, be difficult to mount a major international co-production with Anglo-Saxon partners if the contract signed with the script's author does not provide the right to rewrite the script. Such a clause is usually very difficult to negotiate with authors used to strong protection of their moral rights and negotiation often ends with the phrase "take it or leave it".

Besides the cases where the producer finds it necessary to rewrite the script or part of it by a third party, there may be cases in which creative collaborators are not able to complete their contribution or, more rarely, refuse to complete it.

It is therefore necessary to provide for the producer being able to complete the task by a third party.

2.6. Production time

One of the obligations of the producer who has the author's rights is to produce the film. The operation is complex, several years may elapse between the first contracts being signed and the film being released.

In the assignment agreement it is therefore necessary to specify a time within which the film production must be undertaken. Otherwise, the author's rights could be blocked for a very long time. You should be aware that this clause does not generally prevent the producer from selling the rights he has acquired to another producer (who will be held by the same time obligation) if the agreement does not prohibit it.

Experience shows that some authors tend to overlook contracts they have signed but which have not been acted upon. Sometimes an author, who in good faith guarantees that he is the sole holder to the rights of his script, forgets he has already signed a contract with another producer because the film has never gone into production.

It is very important for both the author transferor and the producer transferee, to clarify this issue and ensure that no prior assignment has taken place. The author may believe that the previous contract is “void” because the film has never been made.

Now, if the contract does not state the time within which production must be started or the law applicable to the contract does not specify a time or if the period specified in the agreement or by law has not passed, the first producer may suddenly appear in the course of project development (for example following a presentation of the project to obtain public finance) to obtain payment for the rights of which he is still the legal owner. You should also check that this delay has not been suspended by some outside factor.

2.7. Accountability

Every party with a financial interest in the film's takings has a right to see the accounts. They must therefore be regularly informed of the film's takings, the amounts due to them must be calculated and paid out within the agreed deadline. This right also gives the beneficiary the right to check the accounts of the film's takings.

It should be noted in this regard that it is necessary to keep separate accounts for each film or audiovisual work currently earning income.

2.8. Credits

Every creative collaborator and performer working on the film has the right to see his name on it. Font size and the order in which names appear can also result in intense negotiations.

2.9. Guarantees

In any contract about transferring rights, the transferor is required to give the transferee guarantees about the originality of the work and his ownership of the rights to the creative contribution which are being transferred. He must also give guarantees about the absence of any element which could bind the transferee (e.g. invasion of privacy of a third party), about the absence of litigation concerning ownership of rights, about the fact that completion of the contract will be not be hindered by any outside impediment, etc. This is not a mere formality. In case of dispute, the person who has made the guarantees to the assignee will be required to compensate him if he sustains any loss as a result of an event covered by the guarantee.

2.10. The penalty for breach of contract

This clause will list the acts which the parties consider serious enough to cause the contract to be terminated.

It will include provisions about giving notice to the other party (which is always necessary) and the penalties that attach to the breach of contract by either party.

It should be noted that the provisions about penalties may vary according to the stages of the film's production. In general, there are four stages in the production of a film:

- Development: this stage starts the day the producer begins working on the project and ends when the film goes into pre-production. This is the period of preparation which will enable the film to be made. The essential stages are the search for funding, buying the rights, writing the script, signing contracts with the director and actors, looking for distributors, possibly the signature of co-production agreements etc..;
- Pre-production: this stage usually lasts between 8 and 12 weeks immediately before filming, for which it is the preparation;
- Production in the strict sense, that is to say the filming which usually lasts five to eight weeks for an average production;
- Post-production which includes editing, recording music, editing music, special effects, etc. How long this period lasts varies according to the time spent on these different elements.

It will be immediately clear that, if any party fails in its obligations, the impact of this, and so the impact of the penalty, can be very different depending on which stage the production is at.

Sanctions for any breach must, like all other contractual provisions, be based on a balance which takes into account not only the personal interest of all parties concerned, but also all the interests of those who have worked to make the film. For that reason financial sanctions are the most common.

2.11. Applicable law and ways of resolving disputes

This clause, very important, makes provision for how disputes will be settled and to which law the contract is subject.

2.12. The option clause

If the producer does not want to commit himself completely but only take out an option on a scenario, the contract can be made into an option contract by adding a specific clause at the head of the contract.

Then if the option is lifted, the following text of the agreement becomes definitive without further negotiations.

CHAPTER II: A PRACTICAL GUIDE

In the field of intellectual property law, there are specific constraints on sound recordings and moving images. Apart from authors' intellectual property rights, there are also those of producers and artists specifically related to audiovisual media.

The issues of user license are very important in this area. Because of restrictions due to licensing, the use of a register to list the legal status of each item in the collection is recommended and should be updated regularly.

Each organisation should try to persuade the rights holders to accept a standard model of user licence to avoid difficult and protracted negotiations with a wide range of different types of beneficiaries.

It may sometimes seem appropriate to create a separate, parallel collection of the works for which a licence has been obtained so as allow the works more widespread use, for example to have a separate collection of recordings of shows available for lending.

However, the concept of a “work” does not always mean a text, a musical score, a painting or a film reel.

In many cases there will be no room for hesitation: the published work which we want to make into a script, recorded music that you want to use as background music, the ballet that you are planning to make into a film will be almost always under copyright, if their authors are living (or dead) and their rights have not expired. The necessary authorisation must therefore be obtained, without forgetting the rights of performers and producers as appropriate.

In doubtful cases, the most important things to do are:

- Find out if there is a name on the object that could be a protected work. The presence of a name is usually a claim of authorship and if there is a name it is likely that the object is considered a copyrightable work by its creator. In this case you should contact him or the assignee of his rights;
- If a work has been protected, check the term of protection is still running;
- Ask the national collecting societies whether the work is one whose rights they manage;
- Request authorization from the competent Court in countries where this institution exists and is able to deliver it.

This Guide attempts to identify the legal issues that arise and procedural steps to be carried out to help broadcasters who are MedMem project partners and more generally audiovisual archivists who want to offer their archives on-line in compliance with applicable national and international rules on literary property.

Without claiming to deal with all existing scenarios, this Guide examines the practical issues surrounding how copyright management should be organised as well as what broadcasting archivists should do in order for their archives to be available for the MedMem project.

Section 1: The search for the rights holders and the use of authors' administration societies.

Copyright being intangible, it is necessary to make it meaningful in legal texts which make it binding for everyone. Being neither a tangible object nor a service performed by a visible person, it is difficult to classify this right in relation to other legal standards.

Copyright has some features in common with other intellectual property rights, such as those pertaining to trademarks, patents and inventions, but nevertheless it still retains distinct characteristics, the main one being that there is no formal procedure marking its implementation.

The conditions to which the author will give his consent will provide him a certain income. This income has similarities with wages. So copyright could be classified as a social law. But one of the essential rights under social law, the right to strike, is not available for the self-employed worker-author! The only weapon he has at his disposal will be an absolute right, the choice of agreeing to or prohibiting the use of his work. This prerogative is comparable to owner's rights. Moral right and economic rights are the two pillars which protect the author. The author-creator does not want to cut the umbilical cord that binds him to his creation. He is the father of it and he wants everyone to know and respect that. Under his moral right he will want to monitor the use made of his work and guard against anyone appropriating it or altering it contrary to his original intentions.

Besides this moral aspect of protection, legislation provides the author the right to enjoy the fruits of his intellectual effort. Any use of the work, either by reproduction, or representation, can only be conceived with their consent. That is the general rule, which allows exceptions only if expressly and restrictively provided for by law.

The rights granted to the author, enshrined in legislation, may be exercised by the author personally, by an agent, or his management company.

0. How to manage the use of works?

Although he is legally able to do so, in practice the author rarely exercises the rights available to him. However he will always do so when his moral rights are involved, and on the first showing, performance, publication or broadcast of his work. Thus he uses his moral right of disclosure.

0.1. Individual management of rights

The author will be personally closely concerned that the first showing to an audience, critical to his and the work's reputation, happens in the best possible circumstances. The relationship with the first user of his work is and must be a trusting relationship. The contract setting out the conditions of exploitation is drawn up by and signed by the person who the author has before him. He will sign with that person and not just anyone. This is an *intuitu personae* or personal services contract.

Once a first publication has taken place, the author may sometime entrust the management of any subsequent use to an intermediary, an agent who will negotiate in his place and on his behalf, though consulting him if serious decisions are to be taken.

This intermediary is sometimes the first user of the work. He has possibly invested his own money in it and will, like the author, have an interest in the work being given the widest possible distribution. Each time new technology creates the possibility of using an existing work in a different form, the author must be remunerated for the intellectual effort he has provided, and the intermediary remunerated for the money he has invested. In recent decades, these intermediaries have acquired national and international recognition for their related rights.

That is why it would be ambiguous and risky for the author to be asked to entrust the management of his rights to an agent who is also a rights holder. The agent would then hold all the rights, his own and those which the author has transferred to him. That may create some confusion in people's minds, and open the door to abuses caused by the ever-growing appetites of the dominant industries .

Everyone knows the unenviable situation that afflicts a large number of creators in countries where the system of “a buy out” is current, and where only best-selling authors are able to secure good remuneration.

The best solution is undoubtedly that the agent's role be limited to the promotion of the work, with of course a fee, and nothing more. The author should entrust the management of his rights to an authors' administration society.

0.2. Collective management of works

Collective management means management for the benefit of several writers. The sums thus collected cannot be diverted from their final destination, the individual author. To each his own! The rights must not be used for collective purposes. This is not a tax, but the author's wages. So: collective collection, but individual distribution.

When the author has a very many and different users to deal with, collective management is the only way that ensures respect for his legitimate interests.

How could the composer know what use is being made of his music by people in countless bars, cafés, shops, in short in all public places throughout the world? And how could he prosecute violations of his rights?

Collective management is the most effective way to facilitate public broadcast of works when the end-user uses a wide variety of works.

Already the broadcast work brings together of all kinds of creative people. The list of people working on a film is always impressive. The phenomenon has become even more complicated with the growth of multimedia work. Only collective management can solve the problems if we want these forms of exploitation to operate legally.

Certainly, collective management may not be the exclusive privilege of the Societies of Authors. It can easily be imagined that intermediate users, acting as authors' agents, organize themselves in turn into management companies, since they do that already to collect their related rights. The collecting societies, created at the initiative of the authors or with the support of the state in

emerging countries, are serving authors, those who exploit them and the general public.

1. How to identify those who have rights on broadcast material?

The copyright holder is the person who created the work. If the work was created by several people, in principle, the copyright belongs to all the creators of the work. It may be that the author of a work is no longer the owner of the economic rights because he has assigned or granted a licence to a third party. This other person then becomes the derivative owner of the copyright. In general, it is possible to say that:

- For a film, the rights on the copy belong to the producer, production company or original transferee (the distributor has income from the copy only for the duration of the distribution contract);
- For the distribution of a video (video, DVD ...) to an audience, including extracts, the rights belong to the video publisher mentioned on the recording;

The use of a work protected by copyright involves obtaining a written authorization from the author or his assigns.

There are two scenarios for obtaining authorization:

- If an author is part of a company specializing in the collection and distribution of rights, it is to the latter that the request must be addressed. Some of these companies can be contacted through their websites.
- If an author is not part of a company specializing in the collection and distribution of rights, the request to use his work must be made directly to him or sent to his beneficiaries.

In practice, it is possible to find the author when

1.1. His name is mentioned on the work: simply contact the publisher of the work and ask for the name of the owner of the economic rights.

1.2. Copyright notice: the person named is presumed to be the owner of the rights to the work and requests should be addressed to him.

1.3. DRM on digital works: the identification of the owner is possible through the “electronic watermarking” integrated into the work.

But these mentions may be wrong or insufficient.

In the case of orphan works, for which it is impossible to find or identify the rights holders, the owner of the audiovisual archive may, at his own risk, allow MedMem to use the work, but with the clearly visible mention that despite every effort he has not been able to identify the author, but he or she is invited to come forward in order to regularize the situation.

2. Collecting societies and the distribution of rights

The effectiveness of the economic rights that the law gives authors forces them to manage their rights individually. But in practical terms individual management is often tedious.
Sometimes unaware of his rights, the author is not always able to manage his rights individually. Indeed, he does not necessarily have the means, material, human or financial, to control the uses to which his works are put; and confronted with the users, he is not always in a strong position to fix and impose his conditions on how his work is used. So then in practice, thanks to a lack of effective individual management, the rights are likely to remain ineffective.

Which is why the author may have a vested interest in resorting to collective management – it overcomes the drawbacks of individual management.

Collective management means management for the benefit of several writers. The sums thus collected cannot be diverted from their final destination, the individual author.
To each his own! The rights must not be used for collective purposes. This is not a tax, but the author's wages. So: collective collection, but individual distribution.

When the author is faced with many different users, collective management is the only way that ensures respect for his legitimate interests,.

Collective management is the most effective way to facilitate public broadcast of works when the end-user uses a wide variety of works.

Already the broadcast work brings together all kinds of creative people. The list of people involved in the making of a film is always impressive. The phenomenon has become even more complicated with the growth of multimedia work. Only collective management can solve problems if we want these forms of exploitation to operate legally.

The collecting societies, created at the initiative of the authors or with the support of the state in developing countries, are at the service of authors, distributors and the general public.

2.1. Role and Responsibilities

The primary role of the societies which collect and distribute rights is that of intermediary between authors and the users of intellectual works. Indeed, they are responsible for issuing licences to use the works, to collect from the users the due remuneration, and to distribute that remuneration among their authors. Collective management is therefore based on a tripartite relationship. As part of its core mission, the society which collects and distributes rights also determines the conditions for which those works may be used, including the amount of remuneration according to the company's established rates.

The company which collects and distributes the rights uses various methods to control the uses to which the works for which it is responsible can be put. It may claim fees from users who otherwise would not have paid them. In addition, it is entitled to take legal action in defence of the economic rights of which it has statutory charge.

In addition to their social and cultural actions, companies collecting and distributing rights lead a collective action to defend the interests of creative artists. For example, they can take legal action,

similar to a trades union, to defend their profession's collective interests, and may also play a role with the public authorities.
To maintain their ability to refer matters to court if necessary, the companies must assist their members in their individual management. This is the legal role they have to perform. The company is its members' principal advisor. It must however be alert to the costs generated by this.
Companies must offer template contracts and draft typical clauses guaranteeing the maintenance of law in favour of the author. They must negotiate with publishers and producers to ensure these principles are adopted.

These services are paid for by their fee when the works are used. The company can do more, by helping the author individually during contract negotiation. This management of contracts must be offered on a voluntary basis and be paid for separately for each contract.

The economic role is of course the main service offered by the society of authors. The collection and distribution of the rights are the reason management companies exist. They also guarantee the correct income to reward the creative effort. The society of authors ensures legal safeguards for the different people concerned with the economic exploitation of the works and also creates the basic condition that encourages their economic development. Depending on their specificity, the societies will focus on some or all of these different aspects of their role.

2.2 The impact of collective management on contractual practice

In broadcasting, many authors have assigned their rights to a collective management company. Collective management occupies an important place and therefore influences how contracts are drawn up.

2.2.1 Collective management and contracts with authors

Transferring rights to a collective management company bears:

- on one or more categories of economic rights,
- on works already created, unless they have been previously assigned, and to future works.

In principle, once the rights have been transferred, the author no longer has the power to authorize the exploitation of his works, except in special cases, nor to be paid directly by users. In the system of collective management, the collective management company is the one which authorises use and which then collects the remuneration which is distributed to the authors.

In practice, broadcasters pay royalties to the collective management companies in return for broadcasting the works.

This explains why the contracts provide that the remuneration is not paid by the producer, but is made up of fees collected by the collective management companies from broadcasters. However, for countries where a collective management company is not involved, the producer has to pay the author directly a remuneration in return for broadcasting his work. On the Pay Per View, Video On Demand (VOD), it is generally expected that remuneration will be made up of fees collected by the collective management company from the audiovisual communication services and online.

2.2.2 Collective management and contracts with broadcasters

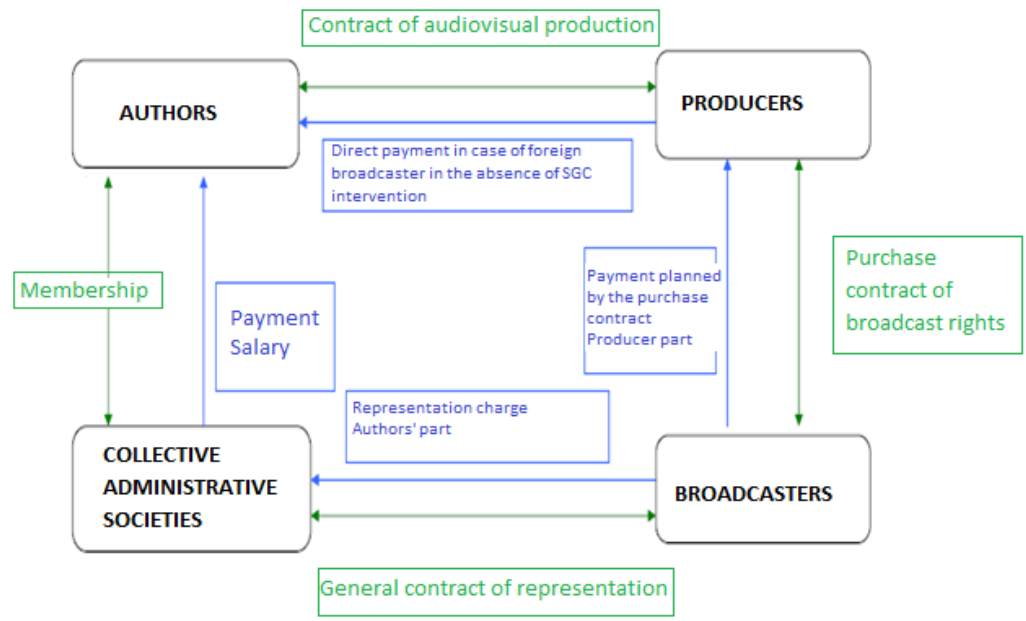
In practice, the broadcast of audiovisual works leads to the drawing up of two contracts:

- First, an individual contract between the broadcaster and the producer in which the latter authorises the transmission and receives the “producer's share”
- and secondly, a general performance contract drawn up between the television channel and the collective management company, in which the channel agrees to pay the company “the author's share” in return for the right to transmit his work.

2.3. List of rights management companies in the Mediterranean

Significant work has been done by the INA on this subject, on which we can capitalize. (*Maxime Sanson - Ina Mediterranean: Med-Mem June 2009 / Dossier on Intellectual Property*)

2.4 Diagram showing the process of exploitation/remuneration



Section 2: Typical procedure for the release of rights that benefit MedMem

The production, making and exploitation of any audiovisual work lead to a number of contracts being drawn up and we shall briefly explain the different types, so as to inform broadcasters who are part of the MedMem project and more generally those who have broadcasting archives and who want to offer their collections on-line in compliance with national and international rules regarding literary property.

0. The main categories of contracts concerning audiovisual works

0.1 Contracts for the production of an audiovisual work

A production contract can be defined as a contract in which one or several companies draw up the terms under which they will jointly participate in the making of and/or financing of an audiovisual work.

In principle, the signing of a co-production contract makes each person signing a co-producer. Co-owners of the audiovisual work, they will usually be co-holders of the intellectual property rights and will share the proceeds from the exploitation of the audiovisual work.

There are a variety of co-production contracts, and they can be classified into two main categories.

The first category includes contracts between two or more companies which, by initiating and directing the project, jointly exercise the role of producer in all its different aspects (artistic, administrative, technical, financial...). In this category we find:

- the development contract: contract for a planned co-production for an audiovisual work;
- the partnership agreement: co-production contract for an audiovisual work.

The second category groups together contracts between a producer and a company which is only an investor, providing a financial contribution. In this category we find:

- the inclusive co-production contract;
- the contract for financial participation.

In a contract for executive production the producer entrusts a third party with the executive production of the audiovisual work. Meaning a service which has a direct bearing on the making of the work. But this contract does not give the co-contractors the status of producer within the meaning of copyright.

0.2 The contracts for making the audiovisual work

The making of an audiovisual work needs the participation of many different people who each perform an artistic or a technical service.

Because of the way it is marketed and exhibited, making an audiovisual work involves drawing up many different contracts.

0.2.1 Contracts for the artistic aspects

To make an audiovisual work, the producer who takes the initiative and responsibility, may have to draw up three main types of contracts.

- Contracts referring to an existing work. This generally relates to the audiovisual adaptation of an existing work (books, comics ...);
- Contracts with the co-authors of the audiovisual work (scriptwriter, director, composer), which can be of two types: the option contract and the contract transferring copyright;
- Contracts with the artist-performers (when the audiovisual work requires artist-performers). Generally these focus on two things: firstly the performer is considered to be on a salary and secondly he has related rights.

0.2.2 Contracts for the technical aspects

Contracts will also be drawn up between the producer and various technicians.

- A fixed length work contract subject to the provisions of the Labour Code is generally drafted and signed. This contract sets the nature of the service to be provided and how it will be carried out (place, duration, ...) and the wages paid in return;
- There may be other contracts signed with service providers such as equipment rental.

0.3 Contracts for the exploitation of the audiovisual work

As holder of the economic rights, the producer will enter into a number of contracts for the exploitation of the finished work.

In principle formal rules of transfer do not apply since these contracts are drawn up between a third party and the sub-assignee of the economic rights.

There are several types of contracts for the exploitation and exhibition of an audiovisual work.

- Distribution agreements: these are contracts between the producer and the distributor who is mandated to show the audiovisual work in cinemas. To do this, the distributor enters into a contract with the cinema owners or operators.
- Contracts of cinematic representation: these are contracts about how the film is rented, their purpose is to have the film shown in cinemas. The parties are on the one hand the distributor and on the other cinema owner.
- Contracts for the transfer of publishing rights for video release: these are contracts under which the producer sells the work's publishing rights to a publisher so it can be marketed in video form (DVD). This may be not a transfer but an authorisation.
- Broadcasting contracts: these are contract between the producer and broadcasters (TV channel, VOD operator) which, by virtue of this contract, acquire the right to broadcast the audiovisual work . There are also pre-purchase contracts for television rights.

1. What authority to ask for?

The author of a work has moral and heritage prerogatives on it.

Since the work is considered a reflection of its author's personality, his moral right allows him to keep some intellectual control over it.

Because of the synthetic approach of Roman law on the subject and his right to control his work's "destination", all other forms of exploitation which can be derived from these rights are included in the author's monopoly, such as the translation, the adaptation, distribution, rental, lending. To use a work protected by copyright, it is essential to obtain the economic rights (rights transfer) or permission from the author or his heirs (concession or licence).

But however the work is going to be used, respect for the moral prerogatives is imperative.

1.1. Moral rights

Moral rights are perpetual, inalienable, irrevocable, intangible and absolute, but their abuse is punishable if it is done to harm others.

For that reason, for any question about moral rights one must always go to the author. However the work is going to be used, the prerogatives of moral rights to be respected are:

- the right of paternity means one must include the author's name on a work being shown or reproduced. It also means one must take care not to put his name on another person's work;
- the right to respect the integrity of the work implies that we must not deform it "either in form or in spirit" by adding, distorting, modifying or deletion. Respecting this right is especially important in contracts for adapting or translating a work, where the authors of each work must give their permission;
- the right to disclosure implies we must not communicate the work to the public before its author has done so;
- the right to reconsider or withdraw allows the author to stop the exploitation of his work and to modify the contract.

On the death of the author, only the rights of paternity and respect for the integrity of his work can be invoked by his heirs.

1.2. Economic rights

The economic rights make it possible for them "to ensure the author's remuneration". They consist of transferable monopolies of exploitation, assignable together, separately or in sections, on the representation and reproduction of the work.

The right of performance makes it possible for the author to communicate his work directly to the public by any method, including the making his work available in such a way that every member of the public can have access to it individually and when and where he chooses – which covers posting the work on the Web.

The right of reproduction in the widest sense is the author's prerogative to forbid or authorise his work to be reproduced and to define the terms of how this is done. Specifically, this includes:

- the right of reproduction in the strict sense, which allows the author to determine how, technically, his work will be reproduced, on what type of media, where;
- the right to authorize changes of any kind, including the adaptation or translation of the work which aim to change the latter into a different genre;
- the right to lease or loan, which allows the author to make the original or a reproduction of the work available to a third party, for a fixed period;
- the right of destination or distribution, which makes it possible for the author to control the way his work is distributed and also the uses to which it may be put;

2. How to formalize the authorization?

To obtain the right to exploit a work he wants to make available to MedMem, the audiovisual archivist must obtain a transfer of rights from the author or his beneficiary. A transfer involves granting the exclusive right to use. A concession or licence involves granting the non-exclusive right to use, following a simple authorization. For example this is the case of licences for commercial software. These contracts may only cover the economic rights (representation and reproduction), which excludes from the object of the contract the moral right as well as the *droit de suite*.[3]

Besides the four common law conditions specific to all contracts (offer, acceptance, intention to create legal relations and consideration), for a contract to be valid it must be written down, in principle in return for fee, with sufficient precision to identify the work and determine the nature and scope of the rights. There must at least include:

2.1. The object of the contract.

The parties may conclude a transfer contract or licence agreement. In addition to any *ad hoc* clauses (the audiovisual work in question, the recording or extract's references, intended use, the medium: the Internet in this case), the parties must specify which rights are assigned or licensed for transmission on a website, namely:

- the right to digitize the work;
- the right to reproduce the work in any digital medium including a network;
- the right to make any changes to the work necessary for this purpose;
- the right to communicate the work as part of a network whether open or closed;
- the development of certain moral rights defined on pain of being nullified (right of integrity, for example), so as to make the work exploitable in a digital environment such as the Internet;

2.2 The geographical area covered: the assignment or licence shall be granted for world use (the international nature of the Internet).

2.3. Remuneration

The laws regarding copyright require that the author's remuneration is specified for each method

3 The right granted to artists or their heirs to receive a fee on the resale of their works, contrasting with the American First-sale doctrine where artists do not benefit from subsequent sales.

of exploitation. It is accepted that an author can grant his rights without compensation, but this must be explicitly specified for each method of exploitation, so as to respect the law.

2.4. Warranties

It is essential to put a clause in the contract whereby the co-contractor of the broadcaster who holds the audiovisual archive guarantees that he is the holder of the assigned copyright, and that the contract has not been drawn up in contravention of the rights of third parties.

2.5. The appropriate law

It is also useful to specify the appropriate law, namely the one that will favour the MedMem partner.

3. Special cases of commissioned works or works created by an employee / agent

The creator of a work, a natural person, enjoys the protection of copyright as long as he has not assigned his rights. If there is more than one author, the work must be specified as a collaborative work, a collective work or a composite work. Apart from legal exceptions, only a natural person can claim authorship. However, certain contractual links can affect ownership of copyright.

For example who owns the rights for a work that is commissioned – that is, when the author has agreed to create a work and deliver it to a third party, with conditions established in a contract and in return for payment determined by mutual agreement. The Sponsor or Commissioning Editor does not hold the copyright: in the absence of specific provisions, the creation of a work in such a context transfers to the Sponsor only the physical ownership of the work, not the right to exploit it.

If a work was created under a contract of employment it must be determined whether the employer receives an automatic assignment of the rights. Under French law an author who is employed, salaried, remains the author, since the Intellectual Property Code specifies that the existence of an employment contract in no way takes away from his enjoyment of copyright. The very common clause transferring the rights to the employer may only relate to financial entitlements. The moral right is not transferable.
In the case of works made by a public employee[4], two hypotheses are generally possible:

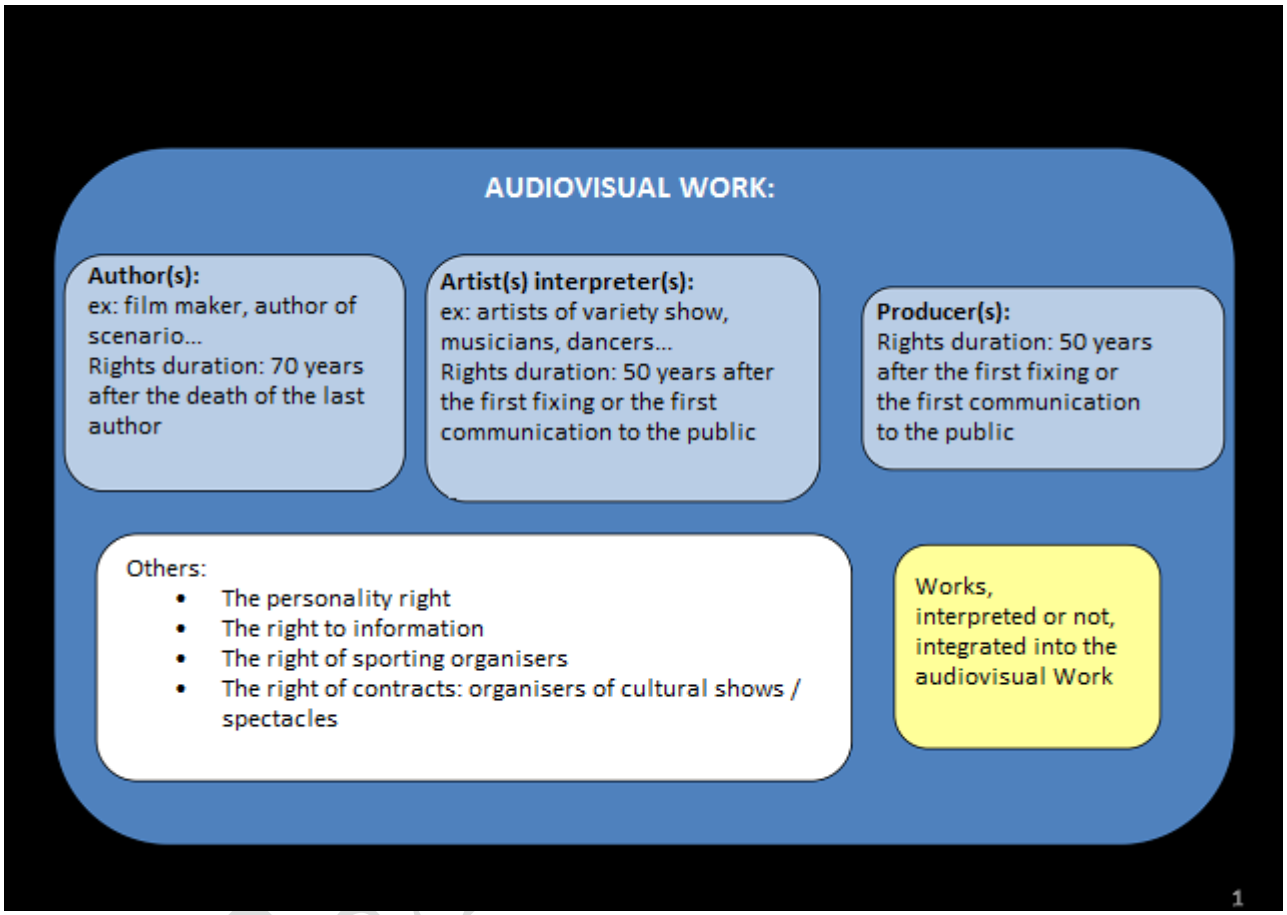
- commercial use is not planned (if the public employee has made the work in the course his normal duties or following instructions and the work is part of a public service);
- commercial use is planned: the administration must agree with the public employee the conditions of remuneration, since the creator retains copyright.

4 Under the French system, public employees are under a different regime

APPENDICES

A. SUMMARY of how rights can be released:

LEGAL ELEMENTS IN AN AUDIOVISUAL WORK



B. THE PRINCIPAL QUESTIONS:

4 questions prior to the release of rights:

1 / Are you the owner of the programme's rights, either entirely or in part?
2 / If the programme is an audiovisual work, have the authors transferred their rights to you?
3 / Have the salaried rights owners authorized the re-use of their contributions?
4 / Does the programme have "third party" elements whose rights do not belong to the producer?

Question 1/ Do you have all or part of the rights to the programme ?

Is it:

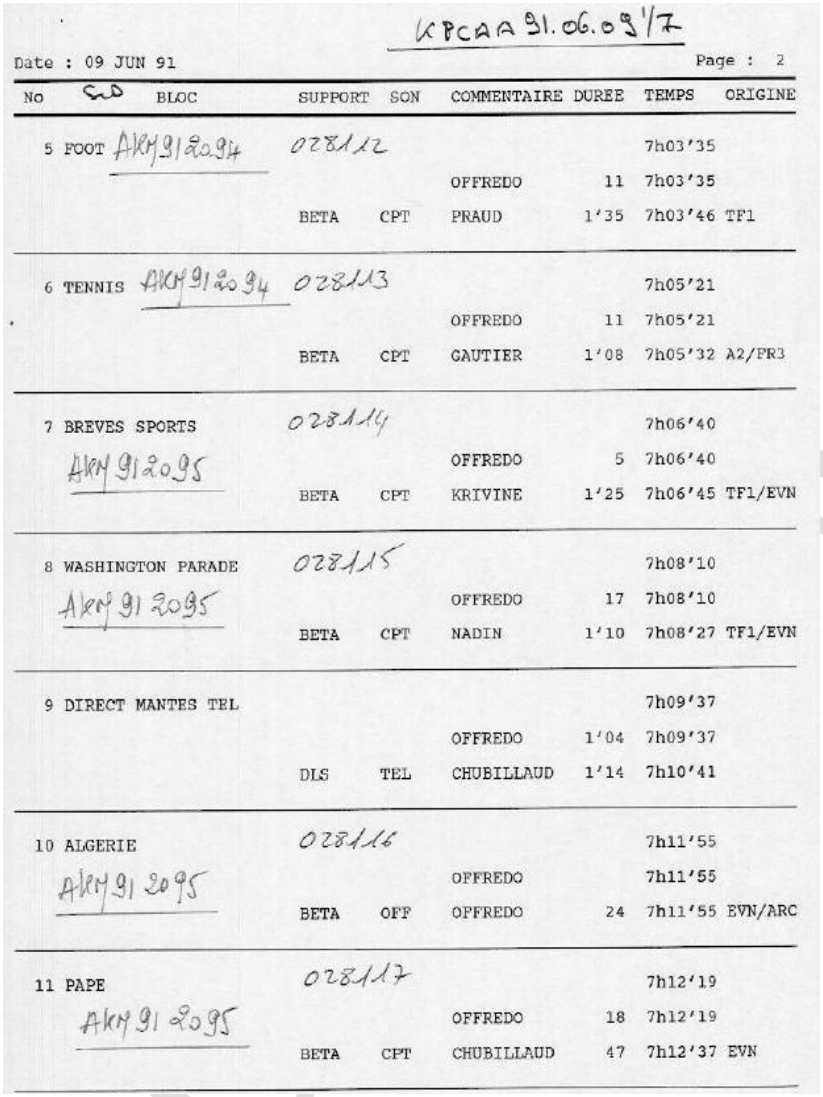
- a stand-alone production
- a re-broadcast (organiser's rights)
- a co-production

Check if there is a co-owner of the exhibition rights: go through the programme's production file if it exists, view the front and end credits, or the post-production running order for television news ... Make sure the co-production agreement allows the intended use.

Two possibilities:

(i) the particular use is not specified in the agreement or needs a separate agreement to be signed;
(ii) the particular use was for a limited period. If that period has passed, the co-producers must define the terms and conditions for this new use (make it clear who looks after the exhibition, in which territories, for how long, how is the income to be shared out)

See D. PRACTICAL EXAMPLES - Example 1 : renegotiating rights with the producer for one or more uses which have either expired or were not originally envisaged.



KPCAA 91.06.09 1/7

Date : 09 JUN 91 Page : 2

No	BLOC	SUPPORT	SON	COMMENTAIRE	DUREE	TEMPS	ORIGINE
5	FOOT AKM 912094	028112				7h03'35	
				OFFREDO	11	7h03'35	
		BETA	CPT	PRAUD	1'35	7h03'46	TF1
6	TENNIS AKM 912094	028113				7h05'21	
				OFFREDO	11	7h05'21	
		BETA	CPT	GAUTIER	1'08	7h05'32	A2/FR3
7	BREVES SPORTS AKM 912095	028114				7h06'40	
				OFFREDO	5	7h06'40	
		BETA	CPT	KRIVINE	1'25	7h06'45	TF1/EVN
8	WASHINGTON PARADE AKM 91 2095	028115				7h08'10	
				OFFREDO	17	7h08'10	
		BETA	CPT	NADIN	1'10	7h08'27	TF1/EVN
9	DIRECT MANTES TEL					7h09'37	
				OFFREDO	1'04	7h09'37	
		DLS	TEL	CHUBILLAUD	1'14	7h10'41	
10	ALGERIE AKM 91 2095	028116				7h11'55	
				OFFREDO		7h11'55	
		BETA	OFF	OFFREDO	24	7h11'55	EVN/ARC
11	PAPE AKM 91 2095	028117				7h12'19	
				OFFREDO	18	7h12'19	
		BETA	CPT	CHUBILLAUD	47	7h12'37	EVN

See D. PRACTICAL EXAMPLES - Example 2 : co-production agreement.

See D. PRACTICAL EXAMPLES - Example 3 : contractual clauses to be included in the new co-production agreements of audiovisual programmes, authorising them to be put on-line electronically, including by video on demand

Question 2 / Is the programme an audiovisual work? Have the authors assigned or transferred their rights?

Is the programme an audiovisual work ?
Who are the authors of an audiovisual work ?
Which are the author's rights?

a- moral right

See D. PRACTICAL EXAMPLES - Example 4 and 4bis : request for permission from the point of view of moral rights.

b- the economic rights: how can the authors assign or transfer their rights?

- Individual management of author's rights
- Collective management of author's rights

See D. PRACTICAL EXAMPLES - Example 5 : clauses of assigning or transferring the author's rights for use in the new media, with remuneration:

- in a collective management situation
- in an individual management situation

Question 3/ Does the programme use actors or performers?

Definition of a performer:

- *The performer is defined by the ICC as "a person who acts, sings, recites, declaims, plays or in any other way interprets a literary or artistic work, a variety number, circus act or puppet show."*

- Performer's rights,

- Duration of performer's rights.

It is imperative that the contract between the performer and the producer provides authorization and remuneration for every method of exhibition or use.

The agreement and the remuneration can be provided for either in the employment contract or in an applicable collective agreement.

Otherwise, the producer (the person who has engaged the performer) must obtain the performer's permission and fix the remuneration for the proposed use.

See D. PRACTICAL EXAMPLES - Example 6 : a use not anticipated in the employment contract or collective agreement.

Question 4/ Does the programme contain elements whose rights do not belong to the producer?

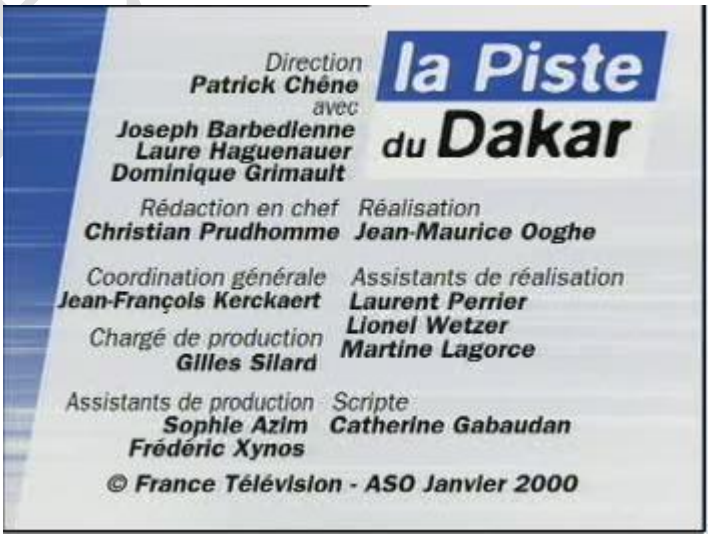
- Commercial sound recordings
- photographs
- works of art
- drawings
- sound
- extracts of TV programmes
- extracts of cinema films

See D. PRACTICAL EXAMPLES - Example 7 : letter for the release of rights for an insert.

Question 5/ Does the programme contain elements whose rights come from a right other than copyright?

- The personality right
- The right to information
- The right of sporting organisers
- The right of contracts: organisers of cultural shows / spectacles

See D. PRACTICAL EXAMPLES - Example 8: letter of agreement concerning the personality right.



C. LEGAL REFERENCES

Euromed Audiovisual Programme

Country-by-country guide to copyright and related or neighbouring rights
http://euromedaudiovisuel.net/p.aspx?t=general&mid=53&l=fr

http://euromedaudiovisuel.net/p.aspx?t=general&mid=53&l=en

http://euromedaudiovisuel.net/p.aspx?t=general&mid=53&l=ar

International legal references

International treaties :
http://www.wipo.int/copyright/fr/treaties.htm

http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=130302

Studies on the limitations and exceptions to copyright for teaching use
http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=130302

http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=130393

European Directive on the duration of related or neighbouring rights
http://ec.europa.eu/internal_market/copyright/term-protection/index_fr.htm

D. PRACTICAL EXAMPLES

Example 1 : Letter of agreement with co-producer for ways of marketing and showing a work which have either expired or were not anticipated

Name of person
Name of production company

Object : Project to market and exhibit the audiovisual programme "_____" / Host project

Dear Sir or Madam,

We are pleased to inform you that _____ wishes to show or exhibit the audiovisual programme " _____ " as part of the project (description of the project) / in the following ways (description of the methods of communication or dissemination).

This audiovisual programme was co-produced by your company and our company the (date)

__/__ / __

Desired methods of use:

- **Exhibition rights (internet, DVD/video cassette, television broadcast)**
- **Territories**
- **Term or duration**
- **Financial conditions**

The co-production agreement of the __/__/____ (date) shows that for these uses the rights:

- ☐ must be settled in a separate agreement between the parties
- ☐ have expired since the _
- ☐ Were not anticipated or foreseeable

We suggest you let us take care of disseminating the work described above, and that we pay you, as appropriate, XX% of the net takings (as defined in the co-production agreement).

Paragraph to be inserted if the co-producer has himself engaged the copyright holders and / or purchased the various rights of third parties:

We would be grateful if you would confirm there are no legal restrictions as far as the authors, salaried rights holders or others are concerned, which might in any way prevent these uses.

If you accept these conditions, we would be grateful if you would send us a copy of the present document signed and preceded by the hand-written phrase "Read and approved".

Yours sincerely,

Example 2 : co-production agreement

Co-production agreement supplemer *(See document attached)*

Example 3 : clause in a co-production agreement

" … has the exclusive / non exclusive right to exploit and commercialise and/or to give any third party permission to commercialise the Work,

either in its entirety or in extracts / in its entirety only

(if necessary) in version / language…

in VOD free and/or paying, in the following territories ….., for a duration of … starting as from …

By "video on demand" or "VOD", the Parties agree they mean: to make available all or part of the Work to the end-user at his request and at a time chosen by him on any network and by all electronic communication technologies.

(this must be added if the use is by both parties)

Each Party must let the other Party know, by registered letter with recorded delivery, of any proposed commercialization of the work in VOD. After receiving the recorded delivery, the second Party will have a period of … days to make a better offer. Failing that or after this period, the Party which made the first proposal will be free to sell on behalf of the co-production the exploitation rights concerned according to the conditions of the proposal.

The Party which provides the exploitation of the Work under the conditions mentioned above will do the necessary with French societies of authors or with foreign societies of authors which represent French societies of authors, concerning the payments due to the authors of the Work who are members of these societies , and if necessary to authors who are under a single management.

The Party which passes the exploitation of the work to a third party operator or agent must ensure and specify in the contracts it signs with them, that they shall be responsible for such obligations.

Make provision for sharing the takings in case of exploitation in VOD and define net receipts

The net receipts coming from the exploitation of the Work as defined above will be split:

Company A : …%

Company B : …%

By net receipts the Parties mean as defined in the convention of coproduction

Example 4 : request for permission concerning moral rights

Name of the author or beneficiary

At _____ , the _____

Object : Request concerning the moral right /Request make cuts and re-edit/ Exploitation of the programme «.....»

Dear Sir or Madam,

We are pleased to inform you that we want to use /broadcast/edit "____", a programme of which you are the author director, broadcast the __/__/__ (date) on _____ (television channel) as part of _____.

We would like to use the programme under the following conditions:

Uses and method of exploitation :
Duration of the rights:
Territories :

Given the complexity associated with renegotiations, we would like to be able to cut those sequences which may pose legal problems.

With respect of your moral rights we therefore ask your permission to let us cut/ re-edit the following sequence:

- Description of the sequence(s) / length

We hope that you will agree to our request by returning a copy of this letter, duly signed and dated, with the words "agreed" added in your hand before the signature.

I look forward to hearing from you,

Yours sincerely

Example 4 bis: request for permission concerning moral rights

Name of the author or beneficiary

At _____ , the _____

Object : Request concerning moral rights / Separation of the sound and picture / Use of the programme " _____"

Dear Sir or Madam,

We wish to inform you that we would like to use the sound track of (or an extract of) the programme "_____" of which you are the author, broadcast on the (date) ___/__/__ on (television channel) as part of _____.

We would like to use the sound track in the following conditions:

Uses and method of exploitation :
Duration of rights:
Territories :

Under your moral rights as author, we ask your permission to let us uncouple the sound from the picture: transferring it from video (image and sound) to CD (sound only).

We hope that you will agree to our request by returning a copy of this letter, duly signed and dated, with the word "agreed" added in your hand before the signature.

I look forward to hearing from you,

Yours sincerely

Example 5: clause covering copyright transfer to new media

The author transfers to .... the exclusive right to market and disseminate the work by any means, with or without payment, in extracts or in its entirety by digital transmission on-line whenever selected by the end-user on his individual request, by all means and on all electronic communication networks, by any process (streaming, downloading permanently or temporarily), intended for all fixed and mobile receivers (including "video on demand")).

Make provision for a clause covering remuneration :

- As part of a collective management if the author is a member of a society of authors

Procedure of direct collection by the Society of Authors

For giving his permission for the use of his Work, the author will be paid through the Society of Authors in accordance with agreements concluded or to be concluded by the latter (or his representative) with ... and, if applicable, a third party with rights to the Work:

- In this respect, the author will receive directly from the Society of Authors the fees due to him, if applicable, by ..... in accordance with the conditions of the general agreements concluded or to be concluded between the Society of Authors and.. ...

- In addition, if ..... entrusts the exploitation of the Work to a third party (including broadcasters, video publishers or online), the author will also receive a fee under the general agreements concluded or to be concluded between the Company authors (or his representative) and the third operator's Work.

- If for a specific method of exploiting the Work or in a specific country there is no direct way for the Society of Authors (or its representative) or the producer or a third party to collect the takings:

..... will pay the author a fee of ..... () % of the public sale price before taxes of the Work or, if it proves impossible to agree a public price, a fee of ..... () % of the producer's share of net receipts.

By "Producer's Share of Net Receipts", the Parties mean ....

Example 6: request for permission from an actor-performer

Name of the performer or beneficiary

We inform you that ..... want to use / distribute / edit an excerpt from the programme ".....", under the following conditions:

- Define the method of use
- Duration of the showing

The sequence in question is.....

The performer's contract you signed with our company on the ..... does not cover this form of use.

I would be grateful if you could give us your consent for the use mentioned, in return for payment of the sum of ..... €.

We hope that you will agree to our offer by returning a copy of this letter signed and dated, with the words "read and approved" written by you at the end.

Yours sincerely,

Example 7: letter releasing rights for an insert

Name of contact
Name of rights management company

At _____, the

Object : Proposed use for commercial exhibition

Dear Sir or Madam,

We are pleased to inform you that _____wants to use the audiovisual programme "_____" in the project _____(project description).

This programme contains _____ (description of the legal element: a film excerpt / a photograph) to which you have the rights:

- Name of the work / author of the work / length of the insert

We therefore ask your permission to use the insert described above, in the following conditions of use in return for a single payment of_____ €:

- Use and methods of exhibition (internet, television, video editing ...)
- Territory(s)
- Duration of rights

We hope that you will agree to our request by returning a copy of this letter, duly signed and dated, with the words "agreed" added by yourself.

I look forward to hearing from you and thank you in advance,

Yours sincerely

Example 8: letter of agreement concerning personality right

Authorisation

I, the under-signed

……

Living at .....

authorise,

ex gratia,

…. , situated at … ,

- to record my image and my remarks (and to photograph me) during the …..., with…....., the … (date(s)) at.....…(place),

- to reproduce and show (these photographs and) these sound/audiovisual recordings, in their entirety or in part, in the film produced by …..… about …...… /entitled ...…

Permission will be taken as granted by the signature of the present people, for (define the expected methods of exploitation) of the Film by.....…, world-wide and for a duration of … years.

Signed at ...…, the ...…

in two copies

Signature*:

*Please precede the signature with the hand-written phrase: "Read and approved"